Summary of suggested answers & annotations to the essay part of the July 2014 Virginia Bar Exam. Prepared by Eric Chason, John Donaldson & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves & David Frisch of University of Richmond Law School, Thomas C. Folsom, Lynne Marie Kohm & Benjamin Madison, 3rd 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 applicants' answers on the exam. jrz

1. [07/14] [Local Government & Professional Responsibility] Wilma Smith, an 82-year-old, was injured on July 4, 2013 when she was hit by a fire truck while crossing Belvidere Street at its intersection with Main Street in the City of Richmond, Virginia. Though traffic studies made in 2005 and 2007 indicated that more vehicles passed through that intersection than any other in the City and that traffic signals should be installed to control traffic, none has ever been provided. Wilma had waited for more than 10 minutes before attempting to cross the street, and finally she thought she saw a break in the traffic sufficient to give her time to get across. Unfortunately, when she was about 3/4 of the way across the street, a City owned fire engine on the way to a fire rounded Main Street onto Belvidere Street at high speed, hit Wilma, and seriously injured her. The driver of the fire truck, a City employee, was not paying proper attention at the time of the accident.

While Wilma was in the hospital, Barry Young, a recent law school graduate who had been admitted to the Bar in April 2013, read about the accident in the newspaper. He went immediately to Wilma's room in the VCU Medical Center and told her that she had a claim against the City which she could not lose, that he was the best personal injury lawyer in the entire state, and that he would be glad to represent her if she would agree to pay him 1/3 of any recovery that he obtained for her. Still in her very early stages of recuperation, Wilma signed an agreement with Young, which authorized him to proceed on her behalf. By March of 2014, Wilma's doctors told Young that she had reached maximum improvement, but that she would remain bedridden the rest of her life and would be in need of constant care. In the meantime, Young had investigated the case thoroughly and had gathered evidence, which would substantiate the facts set forth above about the occurrence of the accident.

Without any communication with the City, he then filed and served a two-count personal injury Complaint on Wilma's behalf to recover $2,000,000 in damages for her injuries. Count I was against the City of Richmond and alleged that the City was liable for the accident and the injuries sustained by Wilma on the ground that the City had negligently failed to provide traffic signals to control traffic. Count II was against both the City and the driver of the fire truck and alleged that the fire truck had been negligently operated by the driver. Both counts alleged that the acts of negligence were the proximate cause of the accident.

The City Attorney is representing the City of Richmond in the lawsuit. Laura, a lawyer for the Firefighters' Union, is representing the fire truck driver.

(a) What defenses should the City Attorney raise to the allegations against the City in Counts I and II, and is each defense likely to succeed? Explain fully.

(b) What defense could be raised by Laura on behalf of the driver, and is the defense likely to succeed? Explain fully.

(c) Did Young violate any Virginia Rules of Professional Conduct in soliciting Wilma as a client? Explain fully.

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(a) (i) Under Va. Code §15.2-209 the holder of any negligence claim against a local government must give the local government notice, in writing of the nature of the claim, including the time and place at which the injury is alleged to have occurred, within six months after the cause of action accrued. This was not done and as to count one & two, the City has an absolute defense to the claim, but must affirmatively raise it. This statute protects only the local government, not any employee of the local government. If the City timely raises the defense, it will win on the issue.

(ii) The City should also raise the issue of Sovereign Immunity. Because the Virginia Tort Claims Act does not apply to the City, common law principles of immunity apply. If SI applies, the claim is barred as a matter of law. The

question is whether the City conduct complained of constitutes a governmental function, thereby enjoying immunity, or constitutes proprietary conduct, which is not covered by immunity.

Governmental functions which qualify for immunity include those actions taken for the general health, safety or welfare of the public, and those actions which result from the City's exercise of its legislative or political discretion or authority.

Proprietary functions are those which are performed for the benefit of the City, and which are ministerial in nature involving no exercise of discretion by the City actor.

While the maintenance of a city street has been found to be proprietary, City of Richmond v. Branch, 205 Va. 424 (1964), the planning of streets or regulation of traffic is a governmental function. City of Falls Church v. Transportation, Inc., 219 Va. 1004 (1979).

The conduct complained of is the City's failure to install traffic signals at a certain intersection. Because this is an action involving discretion and regarding the regulation of traffic, and is action taken for the general welfare, it constitutes a governmental function and the City has sovereign immunity.

(b) Va. Code §15.2-209 does not protect the driver. Breeding v. Hensley et als 258 Va. 207 [1999] Decided under prior §8.01-222.

Driver also should raise the issue of Sovereign Immunity, because if the employee works for an immune agency, then the employee may also have immunity.

In order to determine whether the employee of a governmental body is entitled to immunity, the court applies a 4 part test. The court examines: 1) The nature of the function the employee performs; 2) The extent of the governmental interest in that function; 3)The degree of control or discretion exercised by the government over the employee; and 4)Whether the wrongful act involved the exercise of judgment or discretion by the employee. Messina v. Burden, 228 Va. 301 (1987).

The employee was driving a fire truck to a fire, which is a governmental function in which the government has a strong interest to protect the safety and welfare of the public. Typically, the City will train its drivers in the proper and safe operation of fire trucks in responding to calls, and the employee was exercising a high degree of judgment and discretion in responding to the call. Therefore, employee should succeed in his defense of sovereign immunity as long as the employee's conduct was merely negligent, and not intentional or grossly negligent. National Railroad v. Catlett, 241 Va. 402 (1991).

The driver may also raise the defenses of assumption of the risk or contributory negligence as the facts do not indicate that pedestrian was in a crosswalk.

(c) Rule of Professional Conduct 7:1(a)"Communications Concerning a Lawyer's Services" prohibits any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading it if contains a material misrepresentation of fact or law. On the facts of the question Barry Young's assertions about being the best personal injury lawyer in town and that she could not lose violated the Rule.

Also, Rule of Professional Conduct 7:3(2) prohibits a solicitation that involves..... coercion, duress, compulsion, intimidation.. or unwarranted promises of benefits may have been violated, especially considering the age of the injured lady, and the applicant should recognize and discuss this.

2. [07/14] [Agency & Personal Property] Anxious to meet her college roommate for lunch at Ian's, Northern Virginia's newest restaurant, Maddie drove her late model sports car to the area near the restaurant's front door, where she was met by a uniformed parking attendant wearing a red jacket with the logo of AAA Valet Parking Co. sewn over the breast pocket. Maddie noticed the sign, stating that valet parking was $5 plus tip. Maddie exited her car, flipped the car keys to the attendant, and took the claim ticket in return. Without even glancing at the ticket, Maddie stuffed it in her purse and hurried into the restaurant.

As Maddie walked inside the dimly lit restaurant toward her reserved table, she slipped on an errant banana peel, fell to the floor, striking her head, and lost consciousness. Maddie was transported to Northern Virginia Hospital's

emergency room, where she regained consciousness. So that x-rays could be taken of her upper extremities, emergency room nurses removed Maddie's diamond earrings and necklace, which had a diamond pendant attached to it. Maddie was told to keep still and close her eyes.

After remaining in the emergency room for some 8 hours, Maddie was released without being admitted to the hospital. Maddie's son, Riley, accepted his mother's purse and jewelry, as delivered by the emergency room nurses and drove his mother home, faithfully placing her personal items on the kitchen table. The next morning, Maddie discovered that, while her earrings and necklace were present, the $20,000 diamond pendant for her necklace was not.

Later that morning, Maddie learned that the parking attendant, who caught her car keys at the restaurant, wrecked her car as he drove it on a joyride around the Capitol Beltway (instead of parking the car in the garage one block from the restaurant). She also learned for the first time that printed on the front side of the claim ticket was: "AAA Parking Valet (phone 555-212-5555)" and the claim number and that on the reverse side was printed: "In no event shall the monetary liability of AAA Parking Valet in connection with this ticket or your vehicle exceed $100.00; and you agree that the individual attendant(s) driving your vehicle is your agent for all purposes." The parking attendant is nowhere to be found.

Maddie files separate suits in the appropriate Circuit Courts against Northern Virginia Hospital and AAA Valet Parking on the theory that each of them breached a bailment.

(a) What defense would Northern Virginia Hospital assert, and how would the Circuit Court likely rule? Explain fully.

(b) What defenses would AAA assert, and how would the Circuit Court likely rule on each defense? Explain fully.

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✖✖ Facts for the question were taken from Pitchford v. Commonwealth 50 Va. Cir. 266 (1999) & Green's Ex'rs v. Smith 146 Va. 442 (1926)

(a) Northern Virginia Hospital would assert the defense that it met its standard of care for the bailment of Maddie's jewelry. Bailment is the transfer of personal property from the one party to another party. When the emergency room nurses, acting as agent of the hospital, removed Maddie's jewelry to take x-rays, a bailment was created.

The next issue is whether the hospital, as bailee of the jewelry, violated its standard of care. The nature of the bailment determines the applicable standard of care. In a bailment for the mutual benefit of the bailor and bailee, the bailee must use ordinary care as to the bailed property. A gratuitous bailment, on the other hand, is one where the possession is given the bailee solely for the benefit of the bailor. A gratuitous bailee owes only a duty of slight care. Thus, in order for a bailor to recover from a gratuitous bailee, he or she must prove the bailee was guilty of gross negligence.

Thus, the hospital will argue, first, that the bailment in this case was gratuitous and it accordingly owed only a duty of slight care and, second, that it was not grossly negligent and did not breach the duty of slight care. The Circuit Court would likely rule in the hospital's favor.

(b) AAA will assert the following three defenses: (1) it limited its liability for damage to the vehicle to $100; (2) the parking attendant was acting as Maddie's agent; and (3) even if the attendant was AAA's agent, he acted outside the scope of his employment and therefore AAA is not liable for his actions. The Circuit Court will likely rule against AAA on all three defenses.

First, the limitation of liability is not likely to be considered a contract binding against Maddie. To be an effective disclaimer or limitation of liability, the bailor must know of, or should have known of, and assent to the contractual limitation. Here, Maddie simply accepted the claim ticket in return for her keys without even glancing at it.

Similarly, the court will not likely find the recital about the parking attendants' status as an agent of the bailor to be binding. Again, Maddie did not assent to that provision. Additionally, disclaimers of an agency relationship are not binding under agency law.

Finally, the attendant's joyride was likely within the scope of his employment. Although he was supposed to park the cars in the nearby garage, and presumably was not permitted to otherwise drive the vehicles, his malfeasance was

sufficiently closely related to his employment as to be within scope of employment.

3. [07/14] [Criminal Law] While on routine traffic patrol in Abingdon, Virginia, Officer Wilson noticed a car plastered with bumper stickers depicting the emblems of several "jam bands." Wilson believed that fans of these bands were often drug users. Hoping for a reason to stop the car, he followed it for about five minutes through heavy traffic, when the car took a right turn off Main Street without signaling. Wilson activated the blue lights on his police cruiser and the car pulled to the side of the road.

As Wilson approached the car, he noticed that the driver, who was the sole occupant, was wearing a tie-dyed t-shirt and had a long beard. The driver identified himself as Jerry and handed Wilson his driver's license. When Wilson asked for the vehicle registration, Jerry shifted his position so as to block Wilson's view of the glove compartment, fumbled around, pulled out the registration card, handed it to Wilson, and locked the glove compartment with the key. While Wilson was verifying Jerry's identification and the vehicle registration through the police department's computer system, he noticed that Jerry appeared to be somewhat nervous, sweating profusely and glancing furtively in the direction of the car's glove compartment. Wilson returned and asked Jerry why the vehicle was registered to one Arnold Carter, a Richmond resident. Jerry said that he was driving the car across the country for his friend Arnold. Wilson then asked Jerry if he could search the vehicle, to which Jerry replied, "It's not my car, but, yeah, I guess it's OK."

Wilson asked Jerry to step out of the vehicle and proceeded to search the car. The car was cluttered with trash and dirty clothes, completely filling the area between the floorboard and the dash board on the passenger's side. Rummaging through the trash, Wilson found near the bottom of the pile a small clear plastic bag containing a white powder, which he believed from its appearance and his experience to be cocaine. Wilson then took the car key and unlocked the glove compartment, where he found a loaded pistol.

Wilson asked Jerry whether the pistol and plastic bag belonged to him. Jerry replied that he no longer wished to speak to him without the presence of an attorney. Wilson then arrested Jerry and confiscated the plastic bag and the pistol.

Subsequent analysis revealed Jerry's DNA and fingerprints on the pistol. A lab analysis confirmed that the material in the plastic bag was cocaine. The DNA and fingerprints of an unknown individual, not Jerry's, were found on the plastic bag. An investigation of Jerry's criminal history showed a prior conviction for forging a public record, a crime punishable by a term of imprisonment of at least two years and a possible additional fine not exceeding $100,000. The investigation also revealed that Jerry's friend Arnold had moved to California and had indeed asked Jerry to drive the car out there for him.

Jerry was charged with possession of cocaine and unlawful possession of a firearm by a convicted felon. Before the trial, Jerry filed motions to suppress the pistol and the cocaine, arguing that the initial stop and the search of the car were unlawful.

a) How should the court rule on Jerry's assertion that the initial stop was unlawful? Explain Fully.

b) How should the court rule on Jerry's motion to suppress the cocaine and the pistol on the basis that the search of the car was unlawful? Explain Fully.

c) At trial, is Jerry likely to be convicted on the charge of possession of cocaine? Explain Fully

d) At trial, is Jerry likely to be convicted on the charge of possession of a firearm by a convicted felon? Explain Fully

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(a) The police may stop an automobile to investigate possible illegal behavior, even though the police do not have sufficient probable cause to make an arrest. However, in order for police to make an investigatory stop, they must articulate specific facts underlying the suspicion of criminal conduct, and must have more than an "unparticularized hunch" that criminal activity is afoot. In deciding whether the police have a reasonable, articulable suspicion to stop a car, the court will consider the totality of the circumstances.

The presence of the bumper stickers would not rise above a "hunch" but if the law requires that a turn signal be made before turning, then the police had a legitimate reason to stop the vehicle, so the stop was lawful. McCain v.

Commonwealth, 275 Va. 546 (2008).

(b) During a lawful stop of a car, the police, for self-protection, may require occupants to exit the car, and the police may detain occupants until the stop is complete. Here, Jerry's nervous behavior, the locking of the glove box and the fact that he was driving a car that belonged to someone else, justified the officer extending the stop. The officer was free to ask for consent to search the car. It appears that consent was given voluntarily by Jerry, although the court considers voluntariness in light of all the circumstances. If Jerry wants to contest the search, he has the burden of showing that he had a reasonable expectation of privacy in either the glove box or the car which did not belong to him. In assessing his expectation of privacy, the court will consider whether Jerry had a possessory interest in the car, whether he had the right to exclude others from the car, and whether he took precautions to maintain privacy in the car.

Although Jerry consented to the search of the car, he could argue that he did not consent to the search of the glove compartment, and he locked it. Once the officer found cocaine in the car, he had probable cause to search the glove box. The motion to suppress on the basis of the unlawfulness of the search should be denied. Harris v. Commonwealth, 266 Va. 28 (2003); Abell v. Commonwealth, 221 Va. 607 (1980).

(c) In order to convict Jerry of possession of the cocaine found on the passenger side of the car on the floor buried under a lot of clutter and trash, the Commonwealth must prove that Jerry had knowing possession of the cocaine and exercised dominion and control over it. Mere proximity to the contraband is not enough to raise a presumption of possession, nor is possession of the premises upon which the contraband is found. The car did not belong to Jerry, and DNA and fingerprints, not belonging to Jerry, were found on the baggie. The Commonwealth has not carried its burden of proof beyond a reasonable doubt on this charge, so Jerry is likely to be acquitted.

(d) Jerry is likely to be convicted of possession of a firearm after having been convicted of a felony. Jerry possessed and exercised dominion and control over the gun by locking it in the glove box. Jerry's DNA and fingerprints were found on the gun, so his knowing possession of the gun was shown. Finally, we know that Jerry had been convicted previously of a felony because his sentence on that charge was 2 years in prison and a fine not exceeding $100,000. Had Jerry been previously convicted of a misdemeanor, his sentence could not have exceeded 12 months in jail and or a fine of $2500.

4. [07/14] [Business Organizations & Va. Civil Procedure] Joe Milner owned and operated a department store known as Milner and Rolls in Suffolk, Virginia, for many years. In 2008, Joe employed Sally, an expert seamstress who was a popular dressmaker for the fashion-conscious women of Suffolk, to establish and operate a custom made clothing department in Milner and Rolls. Sally only worked part-time, but she was in charge of advertising that venture, ordering all the materials and pricing the clothing, which she and several assistants personally designed and made. By 2010, the venture exceeded all expectations and the custom-made clothing department was one of the most profitable areas of Milner and Rolls.

In early January 2011, Sally advised Joe that she planned to leave and open her own dress shop. Joe begged Sally to stay on and they finally reached an agreement, which was reduced to writing and signed on February 3, 2011. The agreement contained the following terms:

1. Sally shall pay Joe the sum of $10,000 on or before March 1, 2011.

2. Beginning March 1, 2011, Sally shall share equally with Joe in all profits from the custom-made clothing department at Milner and Rolls.

3. Sally shall furnish her undivided professional time and attention to the custom-made clothing department.

4. In the event that Joe shall open or participate in any similar business during the term of the agreement, Sally shall be entitled to a fifty percent interest in the profit of such business.

5. The agreement shall be terminated by either of the parties with thirty days' notice to the other.

The department continued to flourish, but Sally grew increasingly frustrated by Joe's poor management of the rest of the department store as well as his involvement in a business in nearby Smithfield. Joe and his brother, Tom, had started a custom-made apparel section in Tom's antique store in Smithfield, which was less than twenty miles away from the Milner and Rolls in Suffolk. Tom and Joe had advertised that venture in community newsletters throughout the Suffolk area.

On August 1, 2012, Sally advised Joe that the agreement would be terminated effective September 1, 2012. She asked for an accounting from Joe of the assets and profits of the custom made clothing department in the Suffolk store. Joe refused to provide the accounting, so Sally retained Lawyer who filed a lawsuit against Joe on her behalf in the Suffolk Circuit Court. The Complaint alleged that her written agreement with Joe created a partnership and that the $10,000 she had paid was a capital contribution to the partnership. The complaint also asked for an accounting of the custom-made clothing business in Suffolk as well as Joe's business venture with Tom in Smithfield.

Shortly after the suit was filed, Joe learned that in July Sally had rented space near Milner and Rolls and had begun renovating it to house a dress shop, but he could find no evidence that Sally had taken any steps to find suppliers, advertisers, or to solicit customers for the shop.

In response to Sally's Complaint, Joe's lawyer filed a demurrer setting out the following grounds:

1. The written agreement with Sally was a mere employment agreement, not a partnership agreement because it contained no mention of a partnership.

2. The $10,000 Sally paid was to purchase a share in the profits of the department and nothing more. A partnership, he alleged, could not exist unless the partners explicitly agreed to share in both profits and losses.

3. Sally cannot maintain her action against Joe because (i) she violated the written agreement by failing to furnish her undivided professional time and attention to the department in the Suffolk store and (ii) if Sally were indeed Joe's partner, she violated her fiduciary duty to him by acquiring an interest that was adverse to the partnership*, i.e.*, renting and renovating space for a future dress shop.

4. The business venture with Tom was not covered by the agreement because Tom's store was an antique shop, not a department store.

How should the Court rule on each of the grounds raised in Joe's demurrer? Explain fully.

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The court should overrule the demurrer on all four grounds.

(1) In order to create a partnership, the parties simply must agree to operate as co-owners of a business for profit. The parties do not need to use the term "partnership."

(2) An agreement to share profits creates a presumption of partnership. Agreeing to share losses is another indicia of partnership; however, there is no requirement that the parties explicitly agree to share losses in order to create a partnership.

(3) First, Sally likely did not violate the agreement requiring her to "furnish her undivided professional time and attention to the custom-made clothing department" by renting a space and beginning to renovate it. Further, even if this action did violate the agreement, such a violation would not prevent her from seeking an accounting of her partnership with Joe or an accounting of Joe's business with Tom in Smithfield. As a partner, Sally has a legal right to an accounting of her partnership with Joe. Additionally, Sally did not violate her fiduciary duty of loyalty to Joe. Although partners may not compete during the life of the partnership, they may prepare to compete. Renting a space and renovating that space are merely preparations to compete, and alone, they do not constitute competition in violation of the duty of loyalty.

(4) The business venture with Tom would be covered by the agreement. The agreement to share profits applies to "similar business[es]." The business venture with Tom, like the partnership, sells custom-made apparel. Thus, the subject matter of the two businesses is exactly the same. Also, the businesses are geographically close enough to be in competition with each other. They are less than 20 miles apart, and Tom and Joe are advertising in Suffolk, which suggests that customers are traveling from Suffolk to patronize the store in Smithfield. The fact that the business is run out of an antique store, rather than a department store, does not prevent it from being a "similar business" under the agreement.

Alternative Analysis: [so long as the conclusion was reached that the demurrer should be overruled, if based on the following, the applicant should receive significant credit]

The demurrer should still be overruled When ruling on a demurrer, the trial judge is limited to reviewing the contents of the face of the pleading [in this case the complaint] that the demurrer is filed against.

Consequently as to:

Demurrer Count One: The facts do not reveal that the agreement was attached to or otherwise incorporated into to the complaint and thus became a part of the complaint. If it was not so made a part of the complaint, the trial judge, when ruling on the demurrer, could not consider any of the language of the agreement.

Demurrer Count Three: For these allegations to be established, the judge will have to hear evidence and the court can not hear evidence in ruling on a demurrer.

Demurrer Count Four: For these allegations to be established, the judge will have to hear evidence and the court can not hear evidence in ruling on a demurrer.

5. [07/14] [Wills & Estate Administration] In 2006, Steve Johnson, a 65-year-old resident of Roanoke, Virginia, who was a widower with no children, validly executed a will that had been prepared by his attorney, Don Davidson. This 2006 will provided:

I give and devise my estate as follows:

1. My house on Somerset Street in Roanoke to my friend, Bonnie;

2. $25,000 to my faithful employee, Ruby;

3. All the rest and residue of my estate to the Second Presbyterian Church.

I name Bonnie as the Executor of my estate.

In 2010, Johnson had Davidson prepare another will, which Johnson also validly executed. This 2010 will provided:

I hereby revoke all prior wills. I give and devise my estate as follows:

1. My house on Somerset Street in Roanoke to my friend, Bonnie;

2. $25,000 to my faithful employee, Ruby;

3. All the rest and residue of my estate to the Taubman Art Museum.

I name Bonnie as the Executor of my estate.

Davidson retained the executed originals of both wills in his office.

In 2012, Johnson learned that the Taubman Art Museum was planning to purchase an adjoining building for renovation and installation of an Imax theater. Johnson was infuriated at what appeared to him to be a senseless use of assets and decided that he preferred the provisions of his 2006 will over those of the 2010 will. He handwrote, dated, and signed the following letter to Davidson:

March 1, 2013
I wish to revoke my 2010 will and want you to take the necessary action to accomplish this. I wish my 2006 will to be effective as my last will and testament.
/s/Steve Johnson

Both Davidson and his secretary recognized Johnson's handwriting and signature. Upon receipt of this letter from

Johnson, Davidson wrote “Revoked” in large letters across each page of the 2010 will. He attached Johnson’s letter to the 2006 will and placed both wills in his file.

Later in 2013, Johnson sold the Somerset Street house that he owned at the times he had executed each of the wills and purchased a new house, also on Somerset Street in Roanoke.

Also in 2013, Ruby died, survived by six children.

Johnson died on June 15, 2014. He was survived by Bonnie, Ruby’s six children, and Robert, a nephew, who would be Johnson’s sole heir under Virginia laws of intestate succession.

Johnson’s estate consists of the new house on Somerset Street and stock, bonds, and checking accounts. Bonnie, Ruby’s six children, Robert, the Taubman Art Museum, and Second Presbyterian Church all claim the right to take from Johnson’s estate.

Under which will, if either, and to whom should Johnson’s estate be distributed? Explain fully.

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(1) Which will, if either, controls the distribution of Johnson’s estate

Analysis One:

Under this analysis, the 2010 will was properly executed and, as wills may be revoked by subsequent instrument, it effectively revoked the 2006 will under §64.2-410(B).

The 2010 will was not revoked by the attorney's actions. Although Virginia law does permit a will to be revoked by physical act by someone other than the testator, such revocation by proxy must be done at the testator's direction and in the testator's presence. §64.2-410 (A). The lawyer's actions were not taken in the testator's presence and therefore did not revoke the 2010 will.

However, the testator's letter of March 1, 2013 [arguably] revoked the 2010 will and revived the 2006 will. A will may be revoked by subsequent instrument and the March 1, 2013 writing, under §64.2-403(B), being entirely in the handwriting of the decedent, can qualify as a holographic will or codicil if it also purports on its face to be operative as such. Under Mumaw v. Mumaw 214 Va. 573, (1974), a letter can operate as a will or codicil only if the letter was intended to operate by its own force as a testamentary document modifying a former will or disposing of assets at death. Assuming the court finds the language of the letter to be adequate to establish such intent, the letter effectively revoked the 2010 will and revived the 2006 will by republication as provided in §64.2-411.

Even if the language of will is considered insufficient to show on its face the requisite intent under the Mumaw standard that the document itself be operative as a will, the proponent of the document is permitted by a curative statute, §64.2-404, to establish by “clear and convincing evidence” that the decedent intended the document or writing to constitute the decedents will or a complete revival of his formerly revoked will. Arguably, the facts presented in the exam question can satisfy this evidentiary requirement, thus permitting the letter to be probated as a will or codicil.

Under this analysis, the 2010 Will was revoked and he 2006 was revived. The 2006 Will controls distribution of Johnson’s estate.

OR

Analysis Two:

Under this analysis, neither the March 1, 2013 letter by Johnson, nor the action of the attorney operated to revoke the 2010 will and to revive the 2006 will & the 2010 will controls distribution of Johnson’s estate..

The attorney’s act of writing “revoked” on each page of the 2010 will is not an act of

"cancellation" performed in the presence and at the direction of the testator as required by 64.2-410 A. and does not of itself operate to revoke the 2010 will. Thus, the 2010 will appears to be unrevoked, and its clause revoking the 2006 will remains operative, unless the provisions of §64.2-404A [curative statute] are operative.

Johnson's March 1, 2013 letter stating the wish that "my 2006 will to be effective at death" is potentially a holographic will as it is handwritten and signed by Johnson. The issue, though, is whether Johnson had testamentary intent. The letter does indeed express Johnson's desires. Nevertheless, it does not purport to have any kind of legal effect. Under Virginia law, "A holographic will, like any will, must manifest the testator's intent of making a last and final disposition of her property. This testamentary intent need not be expressed in formal language in the will, provided that the face of the instrument establishes such intent." Mumaw v. Mumaw, 214 Va. 573 (1974; First Church of Christ, Scientist v. Hutchings, 209 Va. 158 (1968). Arguably the letter, seemingly giving instructions to the attorney and, in context, asking for legal assistance, fails to show such intent. Had Johnson written something like "I hereby revoke my 2010 will and direct that 2006 will be effective, the letter should considered to be a will. The curative statute, §64.2-404, is arguably inapplicable because the facts stated, while perhaps permitting speculation that the decedent may have come to believe the letter to be sufficient to be operative as will, do not satisfy the "clear and convincing" evidentiary standard of the statute.

Under this analysis, the 2010 Will was not revoked and the 2006 was not revived. The 2010 will controls distribution of Johnson's estate.

***Was* the decedent intestate?**

The decedent was not intestate. If the March 1, 2013 writing was not effective in revoking the 2010 Will, the 2010 will remains operative. If the March 1, 2013 writing revokes the 2010 Will, it also revives the 2006 Will by republication. Either the 2006 or the 2010 Will controls distribution of Johnson's estate, and because each has an effective clause disposing of the residue, there is no partial intestacy.

Note: It's our view that this is one of the essay questions where the VBBE are looking for an answer that not only shows the applicant's knowledge of the law but also, identifies the legal issues involved from the facts and how the applicable law should [could] be applied to the problem's facts. Also the applicants' writing skills are important. The actual conclusion reached is not as important as the other factors.

(2) To whom should Johnson's estate be distributed

(i) The House on Somerset Street

The house on Somerset Street would go to Bonnie on the basis of a will being an ambulatory document that speaks as of the death of the testator per Va. Code § 64.2-414. The will left the house on Somerset Street that was, at the time of his death, owned by Johnson to Bonnie.

(ii) The $25,000

The $25,000 bequest to Ruby will lapse and become part of the residue because she predeceased Johnson. The Virginia Anti-Lapse statute, §64.2-416, will save a gift to a beneficiary who predeceases the testator only if the beneficiary was a grandparent or the descent of a grandparent of the beneficiary. Ruby was not related to Johnson and therefore the bequest to her lapses.

(iii) The Residual Estate

If the exam taker adopts **Analysis One** as to which will governed the estate, then under the 2006 will, the Second Presbyterian Church will be the residuary beneficiary.

If the exam taker adopts **Analysis Two** as to which will governed the estate, then under the 2010 will, the Taubman Art Museum will be the residuary beneficiary.

6. [07/14] [Domestic Relations] Peggy and Dale, high school sweethearts who never went to college, married on February 14, 1990, in Hanover County, Virginia, where they have lived during their entire marriage. Dale, a third generation tomato farmer and a professional mixed martial arts fighter, makes a very nice living, and although they never had children, he insisted that Peggy, who never had a job, not work outside the home. Peggy and Dale had a tough marriage from the start. Dale occasionally drank heavily and often had multiple girlfriends on the side. Although Dale never physically abused Peggy, he criticized her constantly and often to the point where she became emotionally distraught.

Frequently, Dale left Peggy alone for days at a time while out on the MMA circuit or an excursion with one of his girlfriends. Peggy knew of Dale's involvement with other women, and she left Dale several times over the years, but she always returned. In spite of Dale's behavior, the two continued to live together and have sexual relations. However, Peggy began to experience anxiety attacks and eventually slipped into a deep depression. Her mother advised her to seek professional help and Peggy began to see a psychiatrist.

After several months, Dale began to feel remorse because of his poor treatment of his wife. He vowed to his best friend that he would immediately stop his wandering ways and excessive drinking, which he did. However, he never told Peggy of his vow to stop the womanizing behavior. Unfortunately, Dale never broke his habit of brutally criticizing his wife. On July 30, 2013, Dale and Peggy got into a heated argument, and Dale verbally abused her for over an hour. Peggy became sick and immediately packed her bags and left their home. Peggy moved in with a single friend who after a couple of weeks introduced her to a neighbor with whom Peggy slept on the first date. Peggy never went back to Dale, and they agreed in writing to remain separated. Her health has improved and, in June 2014, she retained a lawyer to commence divorce proceedings. She asks the lawyer the following questions:

(a) Are each of the following grounds for a divorce available to her: constructive desertion; cruelty; adultery; and no-fault?

(b) Will she be entitled to spousal support?

(c) How will the court determine her share of the marital property she and Dale accumulated during their marriage?

What advice should the lawyer give her on each question? Explain fully.

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(a) Peggy's lawyer will advise her that she can get a divorce based on Virginia's no-fault laws, and may have a chance at arguing a constructive desertion or cruelty cause of action, but will likely fail in her claim for adultery. Va. Code §20-91. All grounds of divorce must be corroborated. Va. Code 20-99. Although facts related to these causes of action will be factors to be considered in both spousal support and marital property division, she will likely prevail on a spousal support award, and get an equitable share of any marital property acquired during her marriage.

(i) A claim for constructive desertion would require that Peggy prove that Dale's conduct is so egregious as to warrant her leaving the marital home, which is in fact why she left Dale. Dale's verbal abuse has been both public and private. It has taken a measurable toll on Peggy's mental health and there is potential corroboration of that in Peggy's treatment by a psychiatrist. Dale has admitted to a third party that he has treated his wife poorly. Peggy's leaving the marital home is justifiable in light of Dale's verbal attack on July 30, 2013 which caused Peggy to become ill thereby supporting an allegation that she left the marital home because of conduct by Dale that caused her to be fearful for her health and safety, namely constructive desertion

(ii) Cruelty authorizing divorce requires acts that tend to cause bodily harm and render the spouses' living together unsafe. Mental or verbal cruelty alone is not a ground for divorce in Virginia. However, if the conduct is such that it affects and endangers the physical health of the divorce-seeking spouse, it may be sufficient to establish grounds for divorce. Normally, however, rude words alone will not suffice. Here, it can be argued that Dale's conduct of verbal and emotional abuse did amount to cruelty because it caused Peggy to become physically and emotionally ill, entitling her to leave the marital home.

(iii) Peggy likely will not prevail on a cause of action for adultery even though Dale's actions may constitute adultery because Peggy condoned the marital fault by cohabiting with Dale at times and later also committed adultery. This allows Dale to defend her claim against him for adultery with the defense of recrimination, as conduct of the same

general nature, as well as the defense of condonation when Peggy resumed marital relations with Dale after his adultery. Adultery would have to be proved by clear and convincing evidence. Painter v. Painter, 215 Va. 418 (1975.

(iv) Peggy's most certain ground for divorce against Dale is in Virginia's no-fault cause of action in living separate and apart. A no-fault divorce may be decreed if the parties have lived separate and apart for 6 months, without cohabitation or interruption, if there are no children and the parties have a separation agreement, or upon separation of the parties for a period of one year if they have children. Here, Peggy and Dale have no children and have been separated since July of 2013, at least eleven months, allowing Peggy to prevail in a no-fault divorce from Dale.

(b) The facts discussed in the fault grounds above may be considered when the Court determines spousal support in accordance with the factors set out in Va. Code 20-107.1: (1) the fact that she did not work outside the home during the marriage at her husband's insistence; (2) the standard of living to which she became accustomed during the marriage; (3) the duration of the marriage of 24 years; (4) Peggy's ongoing battle with mental health issues; and (4) Peggy's present earning ability and her capacity to acquire training to enhance her ability to enter the job market and earn a living. Adultery in Virginia, however, bars an award of spousal support to an offending spouse, unless the denial of that award will amount to a manifest injustice to that spouse, although an application of the manifest justice exception is in the discretion of the judge. Here, although Peggy committed adultery, she was completely dependent on Dale for 24 years at his behest. She also suffered abuse from him, which may be used as a factor in a spousal support determination. Because her health and circumstances would make a denial of support a manifest injustice Peggy will likely prevail on a spousal support claim.

(c) The facts discussed in the fault grounds above may also be considered in the determination of equitable distribution of the marital estate, in accord with the factors set out in Va. Code §20-107.3. The court will determine the value of all property, real and personal, tangible and intangible, acquired during the marriage. It will consider Peggy's contribution to the accumulation of that property. The value of the property shall be determined on the date of the equitable distribution hearing. The division of the marital property shall consider such factors as (1) the contributions of each party in the acquisition of the property; (2) the duration of the marriage; (3) the ages and mental and physical condition of the parties; (4) how and when specific items were acquired; (5) the debts and liabilities of each spouse; (6) the tax consequences to each party; (7) the liquid or non-liquid character of the property; (8) whether Dale used marital property for a non-marital purpose such as paying for his excursions with his girlfriend(s); and (9) such other factors as the court considers necessary and appropriate to reach a fair award. The amount awarded to Peggy as a result of equitable distribution will be considered in arriving at an amount for spousal support.

7. [07/14] [Local Government] The City of Radford, Virginia has experienced decades of economic decline. To address the problem, the City Council (the Council) approved a citywide development plan intended to create jobs, increase tax revenues, and revitalize the ailing economy. The plan has two basic components: one is to prevent the construction of shoddy and unsafe structures in the business areas of the City, and the other is to acquire real property through eminent domain for development of infrastructure by the municipality which will attract private entities that will bring jobs and economic growth to the City.

The part of the plan aimed at preventing shoddy construction is enforced through a Radford Ordinance 5-303, authorized under Virginia law, which provides:

> All newly built structures intended for use as commercial or industrial purposes shall pass a building inspection before the City will issue the owner a Certificate of Occupancy. Any structure that is found to be unsafe is hereby declared to be a public nuisance and shall be condemned and demolished. A structure is unsafe if it poses an imminent threat or risk to the safety and welfare of the general public.

Owner recently completed construction of a three-story office building in the City at a cost of $5 million and applied for a Certificate of Occupancy. The City Building Inspector, having been critical of Owner's construction methods on numerous occasions, determined that the foundation was incapable of supporting the building if and when it became fully occupied, denied the application for a Certificate of Occupancy, and ordered the building demolished. After all necessary hearings, a final order was entered, holding that the building was unsafe as defined in Ordinance 5-303. The City demolished the building, and Owner sued the City of Radford to recover the $5 million cost of construction, asserting that the demolition was an unlawful taking by the City.

The part of the plan aimed at acquiring property through eminent domain is implemented under a provision of the City's charter that allows the City, by action of the City Council, to acquire real property for a public use and incorporates the provisions of a state statute that gives the City the power to acquire the property by eminent domain.

The Council entered into negotiations with Develco, a private corporation that owned a large parcel within the City limits. Develco had obtained commitments from several big box stores to lease buildings to be constructed, but Develco agreed to proceed with the project only on condition that the City construct, maintain, and operate a City-owned multi-level parking facility adjacent to Develco's site. The City agreed.

The land upon which the City intended to build the parking structure is occupied by a grocery store owned and newly renovated by Grocer. Grocer's family had owned the store since1925. This store, which is now in excellent condition, would have to be demolished to make way for the parking facility. The City offered Grocer $250,000 for the land and store, but Grocer refused because he believes that, after the recent renovation, the store and land has a value of at least $1,000,000 and, in addition, a profit potential of at least $1,000,000 a year as an ongoing business projected over the next 10 years.

The Council passed and adopted a resolution condemning Grocer's property so it could go forward with constructing the parking lot and determined at a meeting that was open to the public that $250,000 was "just compensation" for the property. Grocer objected to the proceedings on the grounds that this was not an allowable exercise of the City's power of eminent domain and that, in any event, it was an improper determination of just compensation.

(a) Is Owner entitled to compensation from the City of Radford for the demolition of his building?

(b) Grocer seeks your advice on the following questions:

(1) Was the decision to condemn Grocer's property a lawful exercise of the power of eminent domain under Virginia law?

(2) Was the Council the proper body for the determination of the amount of just compensation?

(3) To what extent, if any, would Grocer be entitled to lost profits if the property were properly condemned?

Explain your answers fully.

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(a) The Owner is not entitled to compensation for the City's demolition of the building if it was demolished because it was a public nuisance. The abatement of a nuisance is an exercise of the police power of the City. Here, the Owner had proper notice and opportunities to be heard on the issue of whether the property constituted a nuisance. The abatement of a nuisance by a public body is not considered to be a compensable taking or an unlawful taking, so the Owner is not entitled to be compensated on this theory.

The Owner is not entitled to compensation for the property damage on a tort theory, because the City is protected by the doctrine of sovereign immunity. The abatement of a nuisance, an exercise of the City's police power for the common good, is a governmental function. The demolition entailed the exercise of the City's discretionary authority and was not a ministerial act. Accordingly, the City enjoys sovereign immunity for its actions. Lee v. City of Norfolk, 281 Va. 423 (2011).

(b) (1) The Constitution of Virginia guarantees that private property may be taken by the government only for a public use. Article 1, Section 11 provides that a taking is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance. Va. Code §1-219.1 mirrors the Constitutional prohibitions, but specifies that a governmental taking for the purpose of a transportation facility is permissible as a taking for public use.

The argument by the Grocer should be that the City's taking is improper because it is a taking primarily for the private advantage of the shopping center and its tenants, economic development , increasing jobs or increasing tax revenue to the City. A taking for any of these purposes is prohibited under the Constitution, and accordingly, the City's action is not a proper exercise of the power of eminent domain under Virginia law. Moreover, a parking facility is not among the transportation facilities enumerated as exempt from the operation of the Constitution and Va. Code §1-219.1. The City will argue that the taking is for the public purpose of providing transportation facilities, namely, a parking garage, and therefore comes within the statute's exceptions. Thus, the City will argue that the taking is a proper exercise of the power of eminent domain. On these facts, the Grocer should prevail because it appears that the primary purpose for the taking by the City is to stimulate economic development and to benefit private enterprise.

(b) (2) The City Council is not the proper body to determine just compensation. Va. Code §25.1-220 provides that whenever it is determined that a lawful taking by the government has occurred, condemnation jurors shall be appointed by the Court to determine the issue of just compensation, in accordance with procedures prescribed for the condemning authority. The condemnation commissioners so appointed are sworn, and determine the issue of just compensation in an ore tenus hearing.

(b) (3) In contrast to the general rule in Virginia that lost profits may not be recovered if they are speculative, remote, uncertain or contingent, lost profits of a business may be recovered as part of the taking in a condemnation case. Article 1, Section 11 of the Virginia Constitution provides that compensation in a taking case shall be no less than the value of the property taken, including lost profits and lost access, along with any damage to the residue caused by the taking. The Constitution further provides that the General Assembly shall define the term "lost profits." Va. Code §25.1-230.1 provides that compensation for lost profits is limited to net income for three years prior to the valuation date, provided that lost profits must result from an inability to relocate the business in a reasonable way, and may not be duplicated in the compensation otherwise awarded to the Grocer.

8. [07/14] [Agency] Roscoe's Electronic and Digital Superstores, Inc. ("Roscoe's") contracted with Safety Corporation, a Delaware corporation ("SafeCorp"), to furnish two armed guards per store, one to be present inside the store and one to handle traffic and customer safety in the store's parking lot. It also was understood that one of the guards would accompany the local Roscoe's employee who made the daily bank deposit for each store. Under the contract, if a guard proved unsatisfactory, Safe Corp would be notified by Roscoe's, and a new guard would be assigned. Also under the contract, at Roscoe's insistence, each guard was required to wear a white shirt and neck tie along with a jacket, furnished by Roscoe's, with the inscription "Roscoe's Security."

Roscoe's believed that the mere presence of armed security guards on its property during business hours would curtail shoplifting and promote customer safety. As a measure of quality control, the personnel manager at Roscoe's tried to provide each SafeCorp guard an orientation to the particular store and a primer on company policy and customer relations.

There were times when SafeCorp had more security assignments than it could fulfill with its own employees. Under a contractual arrangement with Zane's Assurance and Security Company, a Virginia corporation, ("Zane's"), on those occasions, SafeCorp would borrow guards from Zane's and temporarily assign them to work at Roscoe's. SafeCorp would pay Zane's a fee, and Zane's would pay the borrowed guards their wages. During such temporary assignments, the borrowed guards would be required to wear the "Roscoe's Security" jackets. Although Roscoe's was generally aware of the borrowing arrangement between SafeCorp and Zane's, Roscoe's did not interview or train the borrowed guards.

Last week at Roscoe's store in Fairfax City, Virginia two guards were on duty, Larry and Moe. Larry was on loan from Zane's, and Moe was a SafeCorp employee. Larry, who was working inside the store at the time, began to follow Victoria, a visitor, who had walked about the store for more than an hour, without making a purchase or responding to the offers of help from Roscoe's sales people. Larry, believing that Victoria was "casing the store" in an effort to shoplift merchandise, asked her to leave. When Victoria ignored Larry's request, Larry took her by the arm and a struggle ensued, during which Victoria fell and broke her arm.

The next day, while on duty in the Roscoe's store's parking lot, Moe observed that, across the street, a man was fleeing from a policeman. This incident had no apparent connection with anything happening at Roscoe's. Moe drew his revolver and yelled, "Stop!" When the man did not, Moe fired his revolver three times, striking Barry, an innocent bystander, in the leg.

Barry has sued SafeCorp to recover for his injury alleging that SafeCorp is liable to him for the tortious act of its employee, Moe.

Victoria has sued both Roscoe's and Zane's to recover for her injuries.

In her suit against Zane's, she alleges that Zane's is liable to her for the tortious act of its employee, Larry.

In her suit against Roscoe's, she alleges that Roscoe's is liable to her for Larry's tortious act based on the following theories: (1) *respondeat superior*; (2) apparent/ostensible agency; and (3)inherently dangerous activity created by the presence of armed guards in a retail store.

(a) Is SafeCorp likely to be held liable to Barry for Moe's act? Explain fully.

(b) Is Zane's likely to be held liable to Victoria for Larry's act? Explain fully.

(c) Is Roscoe's likely to be held liable to Victoria for Larry's act on each of the theories alleged by Victoria? Explain fully.

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(a) No, SafeCorp is not likely to be held liable to Barry for Moe's act. Under the doctrine of respondeat superior, an employer is liable for the torts of his employee that are committed within the scope of employment. It is given in the facts that Moe is an employee of SafeCorp; however, Moe was not acting within the scope of employment when he shot Barry. First, Moe was attempting to stop a man fleeing the police, which "had no apparent connection with anything happening at Roscoe's." It appears from the facts that Moe was not acting with a purpose to serve his employer's interests.

(b) No, Zane's is not likely to be held liable to Victoria for Larry's act. Under the doctrine of respondeat superior, an employer is liable for the torts of his employee that are committed within the scope of employment. The first issue is whether Larry was an employee of Zane's when the tort occurred. Under the borrowed servant doctrine, the borrowing employer may be liable for torts committed by the borrowed employee. Control over the employee is the most important factor in consideration of the borrowed servant status, although it alone may not be dispositive.

Other relevant factors include (1) who has control over the employee and the work he is performing; (2) whether the work performed is that of the borrowing employer; (3) was there an agreement between the original employer and the borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate its relationship with the employee; (6) who is responsible for furnishing the work place, work tools and working conditions; (7) the length of the employment and whether it implied acquiescence by the employee; (8) who had the right to discharge the employee; and (9) who was required to pay the employee. On balance, a review of these factors in this situation suggests that Moe was an employee of SafeCorp at the time of the tort, and therefore Zane's would not be liable for his tortious conduct. Presumably SafeCorp had the most control over the borrowed security guards. The facts specifically state that Roscoe's did not interview or train the borrowed guards, and thus, Roscoe's control appears to be minimal. Additionally, nothing in the facts suggests that Zane's was controlling Moe. Some of the factors point towards Moe being an employee of Zane's - specifically, Zane's continued to pay Moe's wages; Zane's did not terminate its relationship with Moe; and the length of employment seemed to be quite brief. On balance, however, the most likely conclusion is that, under the borrowed servant doctrine, Moe's was an employee of SafeCorp at the time of the tort and therefore Zane's cannot be liable.

(c) Roscoe's is not likely to be held liable to Victoria for Larry's act on any of the theories asserted by Victoria.

(1) Under the doctrine of respondeat superior, an employer is liable for the torts of his/her employee that are committed within the scope of employment. Generally, there is no liability for the torts of independent contractors. The distinction between employees and independent contractors turns on whether the principle controls the manner and means by which the job is performed. Although Roscoe's did provide SafeCorp guards with an orientation to the store and a primer on company policy and customer relations, this is not enough to constitute control over how the tasks were performed. Thus, SafeCorp was an independent contractor of Roscoe's, and respondeat superior does not apply.

(2) Roscoe's will not be liable on a theory of apparent or ostensible agency because such a theory is not a basis for tort liability in Virginia.

(3) Roscoe's will not be liable on a theory that hiring an armed guard in a retail store is an inherently dangerous activity. Although one is generally not liable for the torts of an independent contractor, there is an exception to this rule when the independent contractor is hired to perform an inherently dangerous activity. Under Virginia law, employing an armed security guard in a retail store is not inherently dangerous.

Thus, Roscoe's will not be liable to Victoria for Larry's conduct on any of her proffered theories.

9. [07/14] [UCC Negotiable Instruments] Johnny needed another tractor for the landscaping business he owned and operated in Suffolk, Virginia known as Johnny Appleseed's. Ned Naylor, his next door neighbor, was willing to sell an old

one to Johnny. Johnny had seen Ned using the tractor many times, but he inspected the tractor anyway and found it to his liking. Ned did not tell Johnny that the tractor had a history of malfunction.

Johnny offered to buy the tractor, and they negotiated a sale price of $30,000 on the following terms: Johnny would pay $10,000 in cash upon delivery of the tractor and give Ned a promissory note for the $20,000 balance. They agreed that the note would be payable in three years, and bear interest at the "going rate" from the date of delivery. Accordingly, Johnny gave Ned a certified check for $10,000, and anxious to avoid any legal fees, he had his teenage daughter type on her computer the following promissory note, which he printed, signed, and delivered to Ned:

July 1, 2010

FOR VALUE RECEIVED, I promise to pay Ned Naylor the sum of $18,000(Twenty Thousand Dollars and no/100), with interest thereon at the rate of_____ percent per annum, said sum to be paid in full in Suffolk, Virginia, together with all accrued interest on or before July 1, 2013.

Witness the following signature on this 1st day of July 2010 in Suffolk, Virginia.

/s/ _____Johnny_____

Ned was so happy to make the deal and get the cash, he simply folded up the note and put it in his pocket without reviewing it. Neither Ned nor Johnny noticed the discrepancy in the amount stated, and they neglected to insert an interest rate.

Over time, Johnny had to spend large sums to keep the tractor in repair. He tried but was unsuccessful in convincing Ned to take the tractor back and refund his money. Because he didn't want this to spoil their friendship, Johnny didn't press the issue with Ned.

In November 2011, Ned endorsed the note and delivered it to Merton, a merchant, in satisfaction of a $15,000 debt Ned owed him. In December 2011, Merton endorsed the note and gave it to his son, Sam, as a Christmas gift. Sam held the note until its maturity, at which time he presented it to Johnny, demanding payment of $20,000 plus interest.

Johnny refused to pay and gave the following reasons: (1) The note is enforceable, if at all, for only $18,000. (2) No interest is due because the note failed to state the rate. (3) In any event, the note is unenforceable due to a failure of consideration because the tractor never worked properly.

In a suit by Sam against Johnny to enforce the note, how would the court rule on each of these assertions by Johnny? Explain fully.

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The term *instrument* is defined in the UCC §8.3A-104(b) as meaning a negotiable instrument.

(1) Under §8.3A-114, if an instrument contains contradictory ..... "words prevail over numbers". So the note, if a negotiable instrument, is payable in the amount of Twenty Thousand Dollars.

(2) Under §8.3A-112(b), ..."If an instrument provides for interest, but the amount of the interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. The current rate of interest on a judgment is 6%. §6.2-302

(3) The issue of whether failure of consideration can be successfully asserted as a defense to the note turns on whether this was a negotiable instrument or not and if so, whether Sam was a holder in due course

a. To be a negotiable instrument, among other requirements, the instrument must be "payable to bearer or to order at the time it is issued or first comes into possession of a holder". §8.3A-104. This note was not payable to the *order of* Ned Naylor and is not a negotiable instrument.

i. If it was a negotiable instrument and was transferred to a holder in due course §8.3A-302, certain defenses, such as failure of consideration, would be cut off.

b. Since this was not a negotiable instrument, failure of consideration can be asserted by Johnny in Sam's claim against Johnny b/c the note's treated just like the assignment of a contract for purposes of defenses that can be raised.