

VIRGINIA BOARD OF BAR EXAMINERS
Norfolk, Virginia - February 24, 1998

Answer Questions 5 and 6 in Answer Booklet D

5. Ace Manufacturing Co. ("Ace"), located in New Castle, Virginia, needed money to finance its manufacturing operations. Kathy agreed to lend Ace \$100,000 if Ace would grant Kathy a security interest in Ace's primary production machine. At that time, the machine was unencumbered by any other security interests. After agreeing to Kathy's terms, Ace delivered to Kathy a properly executed \$100,000 negotiable note payable to the order of Kathy. Immediately upon disbursing the loan funds to Ace, Kathy properly filed a financing statement which was valid in all respects. She neglected, however, to obtain a written security agreement from Ace.

Two months later, through no fault of Kathy's, Molly stole the note from Kathy's safe, forged Kathy's signature on the back of the note, and sold the note to Dave, who took the instrument for value, in good faith, and without notice of theft. Kathy has learned that Dave now holds the note.

Kathy has also learned that, last week, Ace had borrowed \$50,000 from Craig County Bank and that Craig County Bank had taken a security interest in Ace's primary production machine.

After hearing about Craig County Bank's loan and security interest, Kathy realized that she had never obtained a signed security agreement from Ace granting her an interest in the machine. Upon discovering this oversight, Kathy got Ace to sign such an agreement. By then, however, Craig County Bank had already received Ace's signature on a security agreement and had properly filed a financing statement covering Ace's machine.

- (a) Does Kathy's security interest in Ace's machine take priority over Craig County Bank's interest? Explain fully.
- (b) As between Dave and Kathy, who has superior rights to the note? Explain fully.
- (c) If Kathy's rights are superior to Dave's, on what theories, if any, under the Virginia Uniform Commercial Code, may Dave recover against Molly? Explain fully.

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6. Bob, a licensed pharmacist working at a drugstore in Pulaski, Virginia, and Jerry, a local banker, were close friends. The two of them were casual cocaine users, and, on a number of occasions, used cocaine together. At times, Jerry would purchase cocaine from a dealer in Pulaski and, at other times, Bob would purchase it from a dealer he knew in Blacksburg, Virginia.

In late 1997, Jerry was charged with embezzlement and bank fraud in Pulaski County. Concerned that he would be convicted and sent to prison, Jerry approached Trooper, a Virginia state trooper, and offered to furnish information about a "major league" drug deal in return for leniency on the embezzlement and fraud charges. Trooper agreed that, if Jerry cooperated and furnished information that would support a conviction of the drug dealer, Trooper would recommend to the Commonwealth's Attorney that, if convicted, Jerry be sentenced to probation instead of imprisonment.

In December 1997, Bob told Jerry he was going on a business trip to Blacksburg and, while there, he would buy some cocaine for their personal use at their Christmas Eve party. Jerry asked Bob to buy for him a few extra ounces of cocaine from the Blacksburg dealer, using as a pretext that he, Jerry, needed cash to pay for the legal defense on the charges pending against him and that he could generate the cash by reselling the cocaine.

At first, Bob was very reluctant to buy the extra cocaine but, after repeated emotional entreaties and because Jerry was his close friend, Bob agreed. A few days before Christmas, Bob told Jerry that he had made the deal, that he was leaving for Blacksburg to pick up the cocaine, that he would keep the extra cocaine in his apartment, and that Jerry should come by to pick it up on the following day. He told Jerry that it would cost \$5,000 for the extra cocaine and that he would expect Jerry to reimburse him that same amount. Jerry immediately phoned Trooper, told him that Bob was en route to purchase the cocaine in Blacksburg and that he could find the cocaine in Bob's apartment on the following day.

Bob drove to Blacksburg and picked up the cocaine he and Jerry intended to use on Christmas Eve, as well as the cocaine he had purchased for Jerry to resell. On the return trip, and while Bob was driving carefully and within the speed limit, the brakes on Bob's car failed and he accidentally sideswiped another vehicle. The other vehicle was forced off the road into a ditch, and, as a result, the driver was killed. Fearful that the drugs he was carrying would be discovered, Bob did not stop at the scene of the accident. Information furnished by eyewitnesses led to Bob's identity relating to this incident.

Based on the information furnished by Jerry, Trooper obtained a search warrant, seized the cocaine in Bob's apartment, and arrested Bob.

Bob is charged with and tried in the Circuit Court of Pulaski County for felony possession of cocaine with intent to distribute and the murder of the driver who was killed when his vehicle was forced off the road.

- (a) Is Bob likely to prevail if he asserts the defense of entrapment as to the felony possession charge? Explain fully.

- (b) Assuming Bob is convicted on the felony possession charge, what arguments can Bob reasonably make that he is not guilty of murder under the Virginia "felony-murder" statute? Explain fully. (Do not discuss negligent homicide or manslaughter.)

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You MUST answer Questions 7 and 8 in Answer Booklet E

7. On the eve of their discharge from the United States Army in 1997, Chris decided that it was time to "square up" with his pal, JoJo. Chris and JoJo had enlisted in the Army right after their graduation from George Washington High School in Danville, Virginia and had been best friends for a long time. The two always played poker, along with others, at least once a week. Following a streak of bad luck, Chris found that his poker losses to JoJo amounted to \$925.

JoJo's fiancée, Stella, who worked at the First National Bank of Danville, thought the debt should be documented, and she prepared the following document, which Chris signed:

Danville, Virginia
May 1, 1997

For value received, I promise to pay on demand to JoJo Barnes the sum of \$925 with interest at the rate of 6% per annum from the date hereof until paid.

/s/ Chris Guthridge

Stella placed the signed document in a safe deposit box she had opened for herself and her future husband. Chris began making interest payments each month but not principal payments.

Looking for a way to earn some money, Chris asked JoJo if he would join him in starting up a lawn maintenance business in Danville. By his own calculations, Chris needed about \$1,500 to buy some used equipment with which to get the business started. JoJo was not interested in going into the lawn maintenance business because he knew Stella would not approve of it. Stella felt that Chris was honest but inept. Without telling Stella, however, JoJo decided to help out his old friend by loaning him the \$1,500, making it clear that he expected Chris to pay it back and that, in addition, Chris would have to pay JoJo half of one month's profits from Chris' business. JoJo figured that the loan wasn't too risky because he could keep an eye on Chris and help out if need be, since both lived in the same apartment complex in the City of Danville.

Not recalling the precise language of the earlier instrument Stella had drafted, Chris and JoJo decided that the following would be agreeable:

Danville, Virginia
May 25, 1997

I promise to pay you \$1,500 plus half of the August 1997 profits of my lawn business, payable in full on September 1, 1997, if you advance \$1,500 to me by June 1, 1997.

/s/ Chris Guthridge

Chris signed this instrument on May 25, 1997, and JoJo advanced the \$1,500 on the next day.

JoJo then took the May 25, 1997 instrument and pledged it to secure a debt owed to Ray's Auto Body & Repair Shop in Danville. JoJo wrote his name on the back of the instrument and delivered it to Ray Jones, the owner of Ray's Auto Body & Repair Shop.

On January 9, 1998, JoJo retrieved the May 1, 1997 note for \$925 from the safe deposit box, endorsed it and delivered it to Danville Jewelers in payment of his outstanding account balance, which had arisen from the purchase of an engagement ring for Stella. Dan Daniels, general manager of Danville Jewelers, knew that Chris had a profitable lawn business, and he gladly accepted the instrument from JoJo without discussion. The next business day, Danville Jewelers called Chris and demanded payment of the \$925 note.

In late January 1998, JoJo defaulted on his own obligation to Ray's Auto Body & Repair Shop. On February 1, 1998, Ray confronted Chris and demanded payment of the May 25, 1997, instrument.

Chris meets with you in your office and, after describing the above, seeks your legal advice. Advise Chris on the following questions:

- (a) Can Danville Jewelers enforce the May 1, 1997 note against Chris? Explain fully.
- (b) Can Ray's Auto Body & Repair Shop enforce the May 25, 1997 instrument against Chris? Explain fully.

Assume the following facts for purposes of subparts (c) and (d), below: The \$925 note evidences a promise by Chris to repay money loaned to him by JoJo to cover living expenses; JoJo is still the holder of the note; JoJo has presented the note to Chris and demanded payment, but Chris has refused to pay; JoJo is threatening to sue Chris on the note; and Chris has told JoJo that, if he sues, he (Chris) will file a counterclaim against JoJo for \$16,000 to recover the property damage to Chris' "dragster" automobile caused by JoJo's negligence in December 1995.

- (c) What are the names of the possible pleadings by which JoJo could bring his civil action against Chris and what would be the proper venue and court for the action?

- (d) Is there any viable ground on which JoJo could seek dismissal of the counterclaim if Chris were to file it as proposed? Explain fully.

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8. In 1985, Larry Lawyer prepared a will which, at the direction of Clem Client, contained the following provisions: Article I directed payment of debts, funeral expenses and taxes; Article II named Lawyer as the executor of Client's estate; Article III directed the following disposition of Client's estate:

- "1. I give, devise and bequeath my business known as Clem's Model Train Shop to my childhood friend, Dwight Johnson;
- "2. I give, devise and bequeath my residence to Sally Smithson, my late mother's best friend;
- "3. I give devise and bequeath the sum of \$40,000 to Willie Lowman, my long-time employee;
- "4. I give, devise and bequeath the sum of \$40,000 to Danny Dunston, my model train club buddy;
- "5. I give, devise and bequeath the rest, residue and remainder of my property, real and personal, tangible and intangible, wheresoever situate and howsoever held, to The Salvation Army."

The will was neatly typed and, except for the signatures, contained no handwriting. It was validly executed by Client and three witnesses, one of whom was Lawyer.

Lawyer knew that Client had a long-standing drinking problem and that Client would often disappear for days at a time, only to be found passed out on his living room sofa. During the several consultations between Lawyer and Client leading up to the drafting of the will and at the time the will was executed, there was never any evidence that Client had been drinking. Nevertheless, Lawyer questioned Client carefully and was assured by Client that he wanted Lawyer to serve as executor, that he really intended to leave his property to the beneficiaries named in the will, and that there was no one else whom he wished to benefit.

Client died on July 4, 1997, survived by his two only children, Sue, born in 1959, and Adam, born in 1961. Client had been estranged from Sue and Adam since about 1983.

The original of Client's will was found at his residence among his banking records and other papers he kept in his desk. Section 1 of Article III had been altered with a line drawn in black ink through the entire gift to Dwight Johnson and the word "delete," Client's signature and the date written in Client's handwriting adjacent to the alteration, as follows:

~~"1. I give, devise and bequeath my business known as Clem's Model Train Shop to my childhood friend, Dwight Johnson;~~ *Delete*
/s/ Clem Client
1-6-95"

Section 4 of Article III had been altered with a line drawn in black ink through

\$40,000, and the amount "\$80,000," the date, and Client's signature were written in Client's handwriting adjacent to the alteration, as follows:

"4. I give, devise and bequeath the sum of ~~\$40,000~~ ^{\$80,000} to Danny Dunston, my model train club buddy;
 1-6-95
 /s/ Clem Client"

Otherwise, the will was unchanged. At the time of his death, Client's estate consisted of a residence, personal belongings, cash and securities totalling \$250,000, and Clem's Model Train Shop.

As a result of the following assertions made by the parties regarding the will, Lawyer has filed a bill in chancery seeking the court's direction in interpreting the will and distributing the property:

1. Sue and Adam claim that they are entitled to take the entire estate by intestacy because the will failed to mention them.
2. Sue and Adam claim that the will is invalid because Client lacked testamentary capacity.
3. Sue and Adam claim that the will is invalid because Lawyer was a witness and was named as executor.
4. Dwight Johnson claims that the obliteration of Section 1 of Article III is of no effect because it was not done in compliance with the Statute of Wills.
5. Danny Dunston claims that the change made in Section 4 of Article III validly increased the gift to \$80,000 and that, if not, the original \$40,000 gift remains effective.

Addressing each of the foregoing claims, how and to whom should Client's estate be distributed? Explain fully.

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You MUST answer Question 9 in Answer Booklet F

9. Gizmo Manufacturing Company is a Roanoke, Virginia based manufacturer of novelty items for the retail market. On May 1, 1997, First Bank loaned Gizmo \$250,000 for operating capital, and Gizmo properly executed a security agreement granting First Bank a security interest in all of Gizmo's inventory and equipment and all after-acquired inventory and equipment. On May 3, 1997, First Bank perfected its security interest by properly filing a financing statement.

On June 2, 1997, Gizmo signed a written agreement whereby Gizmo agreed to purchase 100,000 cardboard shipping cartons from Bedford Box Company, located in

Bedford, Virginia, suitable for packing Gizmo's products and shipping them to its retail customers. Bedford Box had over one million of these cartons in its inventory. The contract price of the cartons, which were to be delivered on June 17, 1997, was \$5,000. Payment was due seven days after delivery.

Because of an industry-wide labor dispute that commenced on June 5, 1997, a general shortage of cardboard shipping cartons developed. On June 10, Bedford Box learned that the market value of 100,000 cartons of the kind ordered by Gizmo had risen to \$20,000. Bedford Box also knew that Gizmo would be unable to obtain a sufficient number of cartons elsewhere in time for its busy summer season. Bedford Box's manager telephoned the owner of Gizmo and told him that Bedford Box would not deliver the cartons on June 17 unless Gizmo agreed to pay \$20,000 for them. Gizmo protested and asked Bedford Box to "live up to its agreement." When Bedford Box reiterated that it would not deliver the cartons unless Gizmo agreed to the price increase, Gizmo reluctantly stated, "You don't leave me any choice. I don't like it, but I guess I'll have to pay." The next day, Gizmo signed a modification agreement identical to the original agreement except that the price of the cartons was \$20,000 instead of \$5,000.

On June 17, Bedford Box delivered the cartons to Gizmo from Bedford Box's inventory. On June 20, Bedford Box received a check from Gizmo for \$20,000, which the bank returned 5 days later marked "Insufficient Funds." On June 25, Bedford Box learned that Gizmo had, in fact, been insolvent on and since June 17.

On June 26, Bedford Box demanded that Gizmo return the cartons, but First Bank had already taken possession of them from Gizmo. Gizmo had failed to make a loan payment to First Bank on June 18, an event of default under Gizmo's security agreement with First Bank.

- (a) Was the modification agreement signed by Gizmo enforceable? Explain fully.
- (b) If First Bank had not already taken possession of the cartons, would Bedford Boxes have had any right to reclaim them from Gizmo? Explain fully.
- (c) What rights, if any, does Bedford Box have to reclaim the cartons as against First Bank? Explain fully.

(Do not discuss bankruptcy law.)

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