

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 29, 1997

Answer Questions 5 and 6 in Answer Booklet D

5. Tony and Susan were married in 1990 but separated in 1996 when Tony started an affair with Matilda.

As soon as she learned of the affair, Susan moved out of their leased marital home in Bristol, Virginia, where they had lived since their marriage. She left so abruptly that she was unable to take most of her winter clothes, her books and her VCR. She made a couple of return trips to get her clothes, but several items of her property remained in the home.

After reflecting for thirty days on Tony's infidelity, Susan informed an investigator for the Bristol, Virginia Police Department that Tony used and kept large amounts of cocaine at the marital residence, where Tony and Matilda were then living.

The investigator whom Susan told about Tony's drug use then asked Susan if she would allow him to search the marital home without a warrant. Susan agreed and, using her key, opened the door and in Tony's absence accompanied the investigator while he searched the premises. The investigator found Tony's stash of cocaine in a dresser drawer, where Susan had told him it would be. Tony was indicted for felony cocaine possession.

At Tony's trial in the Circuit Court of the City of Bristol, and over the repeated objection of Tony, who asserted the marital privilege, Susan voluntarily testified against him. Tony also timely and properly objected to the search of the marital residence and moved to suppress evidence of the cocaine. The judge overruled all of Tony's objections. He was convicted and sentenced to a lengthy prison term.

Tony's attorney intends to appeal his case contending that allowing Tony's wife to testify against him over his objection was reversible error and that the search of the residence was improper.

- (a) To which court should Tony's attorney appeal this case?
- (b) Did the trial judge err in permitting Susan to testify against Tony? Discuss fully.
- (c) Did the trial judge's ruling on Tony's objection to the search of the marital residence and on his motion to suppress the cocaine violate Tony's rights under the United States Constitution? Discuss fully.

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6. Randy Warner, an employee of Slug Manufacturing Company, a Delaware corporation located in Gainsville, Virginia, stopped at Elmo's, a local pub, as was his custom for some refreshment on the afternoon after receiving his bi-weekly pay check from his employer. The check was made payable to the order of Warner in the amount of \$2,730.00 and was drawn on First Bank of Northern Virginia. There was a legend at the bottom left of the check which read:

Gross Salary:	\$3,200.00
Less Deductions:	<u>470.00</u>
	\$2,730.00

By mistake Warner left the check in a telephone booth at Elmo's where it was discovered by another patron, Sherry Jo Weaver. Sherry Jo wrote on the back of the check "Pay to the order of Sherry Jo Weaver" and signed Warner's name. Sherry Jo then immediately took the check to Tommy's Used Cars where she used the check to purchase a car for \$3,000.00, paying cash for the balance of the purchase price. Tommy's had no reason to know of Sherry Jo's forgery. Sherry Jo left for North Carolina and has not been seen since.

When Warner discovered his loss the next morning he promptly advised his employer which immediately placed an oral stop payment order with First Bank. Unfortunately, First Bank paid the check three days later in cash when Tommy's Used Cars indorsed and presented the check for payment.

- (a) Can Randy Warner recover the amount of his lost pay check, and if, so, from whom? Discuss fully.
- (b) Can First Bank recover the amount paid on the check and, if so, from whom? Discuss fully.

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Answer Questions 7 and 8 in Answer Booklet E

7. Storage, Inc. is a Virginia corporation that operates several small commercial storage warehouses in the City of Roanoke, Virginia. Bob is the President of Storage, Inc. and Sue is its corporate secretary. Both Bob and Sue regularly attend board meetings, although neither of them is a director or shareholder of Storage, Inc.

At a January 1997 meeting, the Storage, Inc. board of directors passed a resolution stating that the president of the corporation was not authorized to enter into any contract for over \$100,000 without the express prior approval of the board of directors.

On February 10, 1997, President Bob signed a contract on behalf of Storage, Inc. for the purchase of 10 forklifts for \$250,000 from Liftco, which was Storage, Inc.'s usual supplier of forklifts. The president of Liftco was unaware that the board of directors of Storage had never approved this transaction, but he did know that Storage had never owned

more than 5 forklifts at any one time. On February 12, the board learned of the contract with Liftco and immediately repudiated it, sending notice of the repudiation to Liftco.

On March 10, Bob proposed to the board of directors of Storage, Inc. that the corporation purchase additional storage racks for its largest warehouse from Rackco. Racks were essential to Storage, Inc.'s business in order to make more efficient use of the storage areas. The board determined that there was adequate unused storage in its warehouses and, believing that no additional racks were needed, it disapproved the proposed purchase. Following the meeting, and without the board's knowledge, on March 12, 1997, Bob signed a contract as president of Storage to purchase racks from Rackco for \$10,000. Rackco had no prior knowledge of the board's disapproval. On March 14, the board learned of the contract with Rackco and immediately repudiated it, sending notice of the repudiation to Rackco.

On April 7, 1997, Bob signed a contract as president of Storage, Inc. providing for the purchase of an airplane from Aircraft Sales for \$500,000. Sue, as secretary, signed and delivered a document certifying to Aircraft Sales that the Storage board of directors had earlier approved the execution of this contract by its president, Bob, in a resolution validly passed at a duly called meeting of the board. The certificate included the text of the corporate resolution. Sue frequently signed such certificates as part of her duties as corporate secretary.

In fact, the execution of this contract had not been approved at a Storage board meeting. Instead, without a board meeting, a consent resolution purporting to approve the contract had been circulated and signed by 4 of the 5 members of the Storage board of directors. Aircraft Sales was unaware that Sue's certificate was incorrect. On April 10, the board repudiated the contract with Aircraft Sales, sending notice of the repudiation to Aircraft Sales.

- (a) Can Liftco recover damages for breach of contract from either or both Storage, Inc. or Bob? Discuss fully.
- (b) Can Rackco recover damages for breach of contract from Storage, Inc., and, if so, does Storage Inc. have a cause of action against Bob? Discuss fully.
- (c) Can Aircraft Sales recover damages for breach of contract from Storage, Inc.? Discuss fully.

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8. Titanic Valve Company ("Titanic"), an Ohio corporation, manufactures valves at its only plant in Cleveland, Ohio and sells them all to Acme Radiant Heater Company ("Acme"), an Illinois corporation located in Chicago, Illinois. Acme's radiant heaters are manufactured for the construction trade and sold exclusively in Illinois and Michigan. Occasionally, one of Acme's heaters is shipped on special order to a customer in another state. The only record of an Acme heater having been shipped to Virginia was in mid-1986, when a Virginia resident, having seen the heaters during a visit to Acme's showroom in

Chicago, placed an order and had one shipped to his residence in Martinsville, Virginia.

In August 1996, Titanic purchased from Bytor Snowdog, an Ohio resident, a tract of land in Ohio as a location for its new manufacturing plant. Titanic paid \$30,000 down and signed a promissory note for the \$74,500 balance, plus interest, due at the end of 1996. In October 1996, Snowdog moved from Cleveland, Ohio to Henry County, Virginia, where he moved into a rented house and rented an office, both on short term leases.

When Titanic failed to pay the balance of the purchase price on time, Snowdog called Titanic's litigious general counsel to inquire about the payment and was told, "We can't pay you for another six months; take it or leave it. If that's not good enough, sue us."

Angered by this remark, Snowdog files a suit against Titanic in the United States District Court for the Western District of Virginia, Danville Division. The complaint, which, together with the summons, was personally served on Titanic, alleges that the promissory note is past due, that Titanic is an Ohio corporation with its principal place of business in Ohio, that Snowdog resides in Virginia, and that Titanic owes Snowdog \$74,500 plus interest.

Titanic files a motion under the Federal Rules of Civil Procedure, Rule 12(b)(6), to dismiss for failure to state a claim. The court denies the motion. Ten days later, Titanic files a motion to dismiss on the ground that the court lacks personal jurisdiction over Titanic. The court denies this motion as well.

Titanic answers the complaint and, during the deposition of Snowdog, discovers that Snowdog still maintains a home that he visits once a month in Cleveland, had voted in the Cleveland mayoral election in November 1996, still has an Ohio driver's license and has told some business associates that he intends to stay in Virginia for six to eight months while he wraps up some business affairs, after which he might move back to Cleveland, but more probably will move to California.

Based on this new information, Titanic files a motion to dismiss for lack of subject matter jurisdiction. The court denies the motion.

- (a) Before Titanic filed its motion to dismiss for failure to state a claim, did the court have personal jurisdiction over Titanic? Discuss fully.
- (b) Did the court err in denying Titanic's motion to dismiss for lack of personal jurisdiction? Discuss fully.
- (c) Did the court err in denying Titanic's motion to dismiss for lack of subject matter jurisdiction? Discuss fully.

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Answer Questions 9 and 10 in Answer Booklet F

9. In March 1997, Chuck purchased a cottage in the City of Virginia Beach,

Virginia, located on an ocean front lot. In April 1997, Ann bought the ocean front cottage on the property adjoining Chuck's property. In the course of closing her purchase, Ann obtained a survey which showed that the porch on Chuck's property encroached on her property by 5 feet. Since the cottage on the property being purchased by Ann was wholly within the boundaries of the property, she completed her purchase without contacting Chuck.

Ann has now determined that her dwelling and the cottage owned by Chuck were built by the same developer at the same time, approximately 25 years earlier. The encroachment existed at the time of original construction. Both properties have been continuously owned and occupied by different owners since that time without the existence of the encroachment having been raised.

Ann has contacted you and asked for assistance in resolving the encroachment.

- (a) What type of proceeding should you commence and what relief should you seek on behalf of Ann to remove the encroachment and in what court should it be filed? Discuss fully.
- (b) How should the court rule on the merits of the action brought by Ann to remove the encroachment? Discuss fully.
- (c) If the court finds that the encroachment should be removed, and so orders, but Chuck does not comply, what procedural steps should Ann take to obtain compliance, and what should be the result? Discuss fully.

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10. Wendy and Howard married just after they graduated from college in 1980, when they were both 22 years old. Wendy's degree is in education, and Howard's is in chemical engineering. Howard has worked as an engineer since 1980. From 1980 to 1983, Wendy was a special education teacher. In 1983, she gave birth to their only child, Dolly, and quit teaching on a full-time basis. Since Dolly started attending school, Wendy has worked occasionally as a substitute teacher but has never gone back to school to obtain the additional credits now required to teach full-time in their community of Lynchburg, Virginia, where they have lived continuously since 1980.

In 1997, Wendy and Howard agreed to divorce. They agree that Wendy will have custody of Dolly and that Howard will pay child support. They also agree that Wendy and Dolly will live in the marital home until Dolly turns 21, that Wendy and Howard will each pay half of the mortgage payments and that the home will be sold when Dolly turns 21, and the sale proceeds will be divided equally.

Wendy and Howard disagree over whether Wendy should receive spousal support and over the following items of property:

1. Howard's vested interest in a pension plan to which he contributed from his wages and his employer made matching contributions. Howard regards this as a product of his work, belonging solely to him.

2. A lakefront boat slip and docking facility which Wendy inherited from her father five years ago.

3. A houseboat which Howard, Wendy and Dolly have used on most spring and summer weekends and family vacations since purchasing it in 1981, using Howard's earnings. For convenience in estate planning purposes, the houseboat was titled in Wendy's name.

Howard, handy with his hands and things mechanical, has maintained the houseboat and the dock and rebuilt the engine. The houseboat has maintained its value and the boat slip, which carries with it a fee simple interest in the lakefront underlying the boat slip and dock, has appreciated in value.

Wendy wants to go back to school to renew her teaching certificate because she knows she cannot get a full-time teaching job unless she does. She can continue to work as a substitute teacher but she is worried that she will not be able to earn enough to support both herself and Dolly. She believes she is entitled to spousal support but Howard disagrees.

- (a) In a divorce action, what division of each of the following items of property is the court likely to make:
 - (i) Howard's pension plan? Discuss fully.
 - (ii) The lakefront boat slip? Discuss fully.
 - (iii) The houseboat? Discuss fully.
- (b) In the final decree, is the court likely to award Wendy permanent spousal support or any other kind of spousal support? Discuss fully.

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