VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 27, 1999

Write your answer to Questions 5 and 6 in Answer Booklet D - (the BLUE booklet)

5. In his will, Fred devised his 100 acre tract of unimproved farm land in the Shenandoah Valley of Virginia to his three children as co-owners. He left them concurrent fee interests in the land in the following proportions: Allen - 55%; Betty - 35%; and Carl - 10%.

The siblings were unable to agree on what to do with the land. Carl, who wanted to build his family home on part of the land, filed a suit for partition naming Allen and Betty as defendants.

The controlling statute provides in pertinent part that:

> When partition cannot be conveniently made, the entire subject may be allotted to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or in any case in which the partition cannot be conveniently made, if the interest of those who are entitled to the subject. . . will be promoted by a sale of the entire subject, the court. . . may order such sale. . . and make distribution of the proceeds of sale, according to the respective rights of those entitled . . . .

In the suit, Carl alleged that the 100 acre parcel could conveniently be divided into three parcels each corresponding in value to the percentage interests of the co-owners and sought an order of partition in kind.

Allen cross-complained asserting that the highest price could be obtained if the 100 acres were sold as a single parcel and that it could not be conveniently divided into three appropriate parcels. He sought a court order requiring a judicial sale as a single parcel and division of the proceeds in accordance with the percentage interests of the co-owners.

Betty cross-complained asserting that partition in accordance with the interests of the co-owners would diminish the value to each of the co-owners, that she stood ready to pay Allen and Carl each their percentage share of the fair market value, and sought an order allotting the 100 acres to her in exchange for the payment by her.

After an evidentiary hearing, the judge found the following facts, which the parties agree are undisputed:

- That physical division of the 100 acres into three parcels, allotting to each co-owner acreage in accordance with his or her percentage interest, could be conveniently and equitably done; and

- That the fair market value of the land as a 100 acre parcel is at least $500,000, but might bring more at a public auction;

- That the highest and best use of the land is as a 100 acre farm;

- That partition into three parcels would undoubtedly reduce the overall dollar value of the 100 acres, but the precise amount of the reduction could not be ascertained.

Based on these findings, the judge made the following rulings and entered judgment accordingly:

- Because the 100 acres might bring more than $500,000 at public auction, it should not be allotted to Betty, even though she is willing to pay Allen and Carl their percentage interests of $500,000; and

- Because Allen and Betty, together, owned 90% of the interest in the land, the interests of the majority owners is best served by selling the 100 acres at public auction and distributing the proceeds in accordance with the percentage interests of the parties.

- Because partition as sought by Carl would reduce the overall dollar value of the 100 acres, the interests of the co-owners would best be served by selling the 100 acres at public auction and distributing the proceeds in accordance with the percentage interests of the parties.

Carl appeals from the judgment of the trial court.

(a) What was Carl required to prove to establish a *prima facie* case for partition in kind of the 100 acre parcel? Explain fully.

(b) In what respects, if any, did the trial court err; what arguments should Carl advance on appeal; and how should the appellate court rule? Explain fully.

Reminder: Write your answer to the above question #5 in Booklet D - the BLUE Booklet.

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6. Home Away From Home, Inc. ("Home"), is a nonprofit corporation licensed by the State of Virginia to assist with the rehabilitation of former convicts. It owns a five-bedroom house in an older residential neighborhood in Roanoke, Virginia.
Except for two lots, the neighborhood is zoned for single-family residences. The two exceptions, which are zoned for multiple family dwellings, are the lot where Home's house is located and the lot diagonally across the intersection, where a four-unit apartment house is located.

For the past three months, Home has been using its building as a halfway house for

parolees from state prison, most of whom are former drug and sex offenders. Such offenders have high recidivism rates. At any given time, six to eight parolees live in the house while they look for employment and adjust to life in society. There is strict supervision by at least one resident director on the premises at all times.

Residents in the neighborhood have formed a neighborhood association (NIMBY) that wants to prevent Home from continuing to operate the halfway house. NIMBY members are concerned about their safety, the safety of their children, and their property values.

Home has a ten-year record of having successfully operated several similar halfway houses in residential areas in Norfolk, Richmond, and Fairfax.

NIMBY, on behalf of it members, has sued Home in the Circuit Court of the City of Roanoke. In its complaint, NIMBY prays for an injunction against operation of the halfway house on the grounds that it is (a) a public nuisance and (b) a private nuisance.

What evidence must NIMBY produce to make a *prima facie* case on each of its asserted grounds, and, under the given facts, what arguments should Home Away From Home, Inc. make in support of its position that no injunction should issue against operation of the halfway house in NIMBY's neighborhood? Discuss fully.

Reminder: Write your answer to the above question #6 in Booklet D - the BLUE Booklet.

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Write your answer to Questions 7 and 8 in Answer Booklet E - (the PURPLE booklet).

7. John Smith, a Roanoke, Virginia businessman, died in 1985 survived by a daughter, Melody, who suffered from severe physical and mental disabilities. John's wife predeceased him, and they had no other children. John is also survived by a brother and a sister.

John's estate consisted of a small business he had successfully operated for a number of years, a home, and a few modest investments. John's will named Big Lick Trust Company as executor and trustee and gave the executor and trustee full power to sell assets and invest in its sole discretion. The will established a trust that the trustee was to administer as follows:

> My Trustee shall hold the Trust Estate in trust for the benefit of my daughter. My Trustee shall pay to or for the benefit of my daughter so much of the net income as is necessary for her support and so much of the principal as Trustee deems advisable in its sole and absolute discretion to provide for her health, maintenance, support and comfort. Upon my daughter's death the trust principal shall be distributed to my brother and sister per stirpes.

Big Lick Trust Company sold the house, the business and all the other assets in the estate

and invested the funds solely in United States government bonds. Melody was placed in a long-term care facility, Clearview Acres, which cares for all her needs.

For the last 14 years, Big Lick Trust has paid Clearview Acres an annual fee that has gradually increased to $30,000. In the early years of the trust, the income was more than adequate to provide for Melody's care. However, in recent years, trust income has declined to $40,000 per year. Clearview Acres has advised Big Lick Trust that its annual charges for the current year will increase to $45,000.

Big Lick Trust has advised Clearview Acres and Earl Rogers, an attorney appointed by an appropriate court as Melody's guardian, that it will not pay more than $35,000 from the trust income toward Clearview Acres' annual charge. Big Lick Trust gives the following reasons for its decision. First, Melody has a life expectancy of approximately 20 years, and Big Lick Trust is concerned that the trust property will be exhausted by invasions of principal before Melody dies. Second, Big Lick Trust is concerned that Clearview Acres' charges exceed those of similar facilities for comparable care. Third, Big Lick Trust is concerned about its potential liability to the remaindermen of the trust.

Rogers, the guardian, believes that Big Lick Trust must pay the Clearview Acres bill from income and principal of the trust, and he has told Big Lick Trust that, if it does not pay the entire annual charges of Clearview Acres, he will commence a judicial proceeding to require such payments or to terminate the trust.

(a) Is a court likely to compel Big Lick Trust to distribute all the trust income in payment of Clearview Acres' annual charge? Discuss fully.

(b) Is a court likely to compel Big Lick Trust to distribute any of the principal in payment of Clearview Acres' annual charge? Discuss fully.

(c) Is a court likely to terminate the trust upon the unilateral application of the guardian, Earl Rogers? Discuss fully.

Reminder: Write your answer to the above question #7 in Booklet E - the PURPLE booklet.

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8. Ted and Shirley never formally married. However, Washington D.C., where they resided when they met, recognizes common law marriages if the man and woman cohabit in a marriage-like relationship continuously for six months.

They began living together in Washington, D.C. in 1988 while they were students at Georgetown University. Following their graduations in 1989, Ted took a job with the U.S. Department of Housing and Urban Development, and Shirley took a job with the U.S. State Department. From all outward appearances, they lived as husband and wife.

In 1990, Ted quit his job and enrolled at Georgetown Law School. Pursuant to an

agreement between Shirley and Ted, Shirley continued to work and, with her earnings, which was their only income, paid all living expenses and helped Ted with his law school tuition.

In 1991, Ted and Shirley had a son. Shirley returned to work after her maternity leave and continued to be the only wage earner.

In 1993, Ted graduated from law school and took a job with a large law firm in Washington, D.C. and began earning a substantial salary. In 1994, Ted and Shirley had a second son. At Ted's insistence, Shirley quit her job so she could devote more time to the children and housekeeping. In 1995, they moved from Washington, D.C to Fairfax, Virginia and bought a house. The down payment came from Ted's earnings, and the balance was financed on the strength of Ted's income.

Thereafter, they lived on Ted's income. Aside from the house in Fairfax, they had two cars, a small savings account, and household furnishings, all acquired from Ted's income.

In 1996, they enrolled their eldest son in a very exclusive, expensive private school. In 1997, Ted's firm opened a new office in New York, and Ted was asked to spend two or three days a week there. He reluctantly agreed to do so, and by the end of 1998 he was spending from five to seven days a week in New York.

In early 1999, Ted began dating and having an affair with Veronica, an investment banker working in New York. The relationship between Ted and Shirley became strained, and, in mid-1999, Ted told Shirley he was leaving her and the children and moving to New York to live with Veronica.

(a) Can Shirley (i) Sue for divorce in Virginia and, in such a divorce action, (ii) require Ted to pay spousal support, and (iii) obtain a share of the property accumulated during the period of their cohabitation? Explain fully.

(b) Can Shirley require Ted to pay child support? Explain fully.

(c) Can Shirley require Ted to pay for the private school educations of both of their sons and to provide for their college educations? Explain fully.

Reminder: Write your answer to the above question #8 in Booklet E - the PURPLE booklet.

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Write your answer to Question 9 in Answer Booklet F - (the Gray booklet)

9. On January 15, 1997, Peter Pane was struck by an automobile while walking in a crosswalk in the City of Alexandria, Virginia. The automobile was driven by Ian Hanover and owned by Oliver Church. Ian was an employee of Oliver and was going to the post office to purchase stamps for Oliver's business when he ran a red traffic light and struck Peter. Oliver fired Ian two days after the accident.

On January 16, 1999, Peter filed a motion for judgment for personal injuries in the Circuit Court of the City of Alexandria. He named both Ian and Oliver as defendants and asked for a judgment against both defendants jointly and severally. Service of process was had on Ian in person on January 30, 1999. Ian, through his attorney, filed a grounds of defense in which he admitted the allegation that he was acting within the scope of his employment at the time of the accident. Ian denied any negligence and any liability to Peter and alleged as his only affirmative defense that Peter was guilty of contributory negligence.

On February 1, 1999, a deputy sheriff attempting to serve Oliver and not finding him at home, tacked a copy of the notice and motion for judgment on the front door of the condominium where Oliver resided. The return of service filed by the deputy sheriff read, "Not finding the defendant at home, I posted the notice and motion for judgment on the front door on February 1, 1999." Nothing further was done to perfect service on Oliver.

At the time of service, Oliver was in Brazil on a business trip. He returned on March 5 and dropped the suit papers at his lawyer's office. A temporary secretary placed the papers in a file, where they remained unnoticed.

On April 1, 1999, Peter served Oliver with a motion for default judgment. Oliver made no response to this motion, and, on April 15, the court found that Oliver was in default and entered a default judgment against him.

The trial went forward on June 30 against Ian alone. Oliver did not participate in the trial. On July 1, 1999, the jury rendered a verdict in Peter's favor against Ian for $125,000. On that same date, the trial court entered a judgment order against both Ian and Oliver for $125,000 plus costs.

On July 15, 1999, Ian and Oliver each filed a motion with the trial court to set aside the judgment and requested the court to suspend its judgment order pending reconsideration. In Ian's motion to set aside, he pleaded that the court was without jurisdiction, asserting for the first time that Peter's claim was barred by the statute of limitations.

In Oliver's motion to set aside, he pleaded that the court lacked jurisdiction to enter judgment against him because he had never been properly served with the initial motion for judgment.

Peter responded to both motions by stating that they were not timely filed and that the judgment of the trial court was final.

Having anticipated that Oliver would move to set aside the judgment in the first suit, Peter had filed a second, identical motion for judgment against Oliver. This time, service of process was made in person. Oliver moved to dismiss this second suit on the ground that it was barred by the statute of limitations.

(a) Was Peter's initial motion for judgment filed within the applicable period of limitations? Explain fully.

(b) Were the motions of Ian and Oliver to set aside the judgment timely filed? Explain fully.

(c) Assuming Ian's motion to set aside was timely, how should the court rule on Ian's assertion that Peter's claim was barred by the statute of limitations? Explain fully.

(d) Assuming Oliver's motion to set aside was timely, how should the court rule on Oliver's assertion that the court lacked jurisdiction to enter judgment against him? Explain fully.

(e) How should the court rule on Oliver's motion to dismiss Peter's second motion for judgment? Explain fully.

Reminder: Write your answer to the above question #9 in Booklet F - the GRAY booklet.

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