

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 30, 1996

Answer Questions 5 and 6 in Answer Booklet D

5. In 1985, Dick Steele, a resident of Raven, Virginia, executed a valid will in which he devised specific parcels of real property to two of his three daughters. The will bequeathed to his third daughter a grandfather clock and the residue of his estate, subject to the condition that if the real property devised to the other daughters was not part of Dick's estate at the time of his death, those daughters were to each receive one-third (1/3) of the residue of Dick's estate.

In March 1996, he sent to the executor named in the 1985 will a letter, signed, dated and written entirely in Dick's handwriting, in which he discusses the status of his tax matters and life insurance policies and complains about his despair in coping with his physical condition and emotional problems. The letter concludes:

"As executor, you are doing much for me and the girls. God bless you. I know you will do your best. My will is out of date, but I think it will stand up. I want my daughters to share 1/3, 1/3, 1/3 in my estate".

Two weeks later Dick committed suicide. At the time of his death he still owned the specific parcels of real property referred to above.

The executor subsequently submitted the will for probate, but declined to offer the March 1996 letter for probate.

A hearing was held in Circuit Court pursuant to an inter-party probate order to determine whether the March 1996 letter was a valid codicil to the will. The proponent of the letter contends that:

- (a) Irrespective of whether it is effective to dispose of Dick's estate, the form of the letter qualifies it for admission to probate; and
- (b) The letter is substantively effective to alter Dick's 1985 will.

How should the court rule on each of the proponent's contentions and why? Explain fully.

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6. Mary Jones was indicted by the Grand Jury on a count of burglary and brought to trial before the Circuit Court of the City of Roanoke, Virginia.

Before the trial commenced, Mary's attorney moved to quash the indictments on the ground that Mary had not been given a preliminary hearing. The judge denied the motion to quash, and the trial proceeded.

The Commonwealth's Attorney for the City of Roanoke, John Fearless, who had been elected on a platform of protecting the property rights of citizens, took a personal interest in the case and represented the Commonwealth. The uncontested evidence presented by the Commonwealth was as follows:

The defendant, Mary Jones, was the estranged wife of Joe Jones. Joe and Mary had lived separate and apart for over a year, and Mary had filed an action for divorce from Joe in the Circuit Court of the City of Roanoke. One night at about 10:00 p.m., when Mary thought Joe was at home with his girlfriend, Mary, armed only with a camera, opened a closed but unlatched kitchen window at Joe's residence in the City of Roanoke and entered. Her sole purpose for entering was to take photographs to be used to establish adultery of Joe in the divorce action.

Joe had purchased the residence after his separation from Mary. Mary had never lived in the house nor had she been into it prior to the time she entered with her camera. She had been neither expressly invited nor forbidden to enter the residence, and there were no signs posted to warn against trespassing. She took photographs of a recently used, but unmade, double bed and women's clothes in the bedroom closet. After taking the photographs, Mary exited through the same kitchen window and left the area. She was later indicted and thereafter charged and taken into custody.

At the conclusion of the Commonwealth's evidence, Mary's attorney rested. The Commonwealth's Attorney then asked the court to instruct the jury both on the charge of burglary and on the lesser included crime of trespass. Mary's attorney moved to strike the Commonwealth's evidence as not supporting either the charge of burglary or the lesser included crime of trespass.

- (a) Did the Court rule correctly in denying the motion to quash the indictment? Explain fully.
- (b) Should the Court grant the defendant's motion to strike the Commonwealth's evidence as to the charge of burglary? Explain fully.
- (c) Should the Court grant the defendant's motion to strike the Commonwealth's evidence as to the lesser included crime of trespass? Explain fully.

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Answer Questions 7 and 8 in Answer Booklet E

7. Roland and Betty Fur, residents of Alexandria, Virginia, have been married eight years. Because of his last name and their own cleverness, Roland's friends called him "Fuzzy." Fuzzy and Betty have two children, Roland Jr. and Belinda, who are six and three, respectively. Three months ago, Fuzzy and Betty decided to separate from one another.

At that time, the parties contacted Larry Lawyer, a member of the Virginia State Bar, who agreed to meet with both of them to discuss the preparation of a separation agreement. Agreeing that this was a "friendly" separation, Fuzzy and Betty met with Larry, and with his help they reached a mutually satisfactory agreement. Based upon this meeting, Larry prepared a separation agreement which provided that Betty would continue to reside in the previous marital domicile, that Betty would have custody of the children, that Fuzzy would pay child support, and that Fuzzy would have the right of reasonable visitation. After signing the separation agreement, Betty and Fuzzy separated.

After two months alone, Fuzzy decided he was sick of hanging out at the bowling alley with his buddies and that he really loved Betty. Fuzzy expressed to Betty his willingness and desire to resume the marital relationship. Fuzzy asked for Betty's agreement for him to move back to the previous marital domicile where Betty and the children continued to reside. Betty, however, had begun to enjoy her life away from Fuzzy and, for that reason alone, refused to resume the marital relationship.

Fuzzy contacted Calvin Counselor, Larry's partner, and asked Counselor to file suit in the Circuit Court of the City of Alexandria seeking a divorce from Betty. Fuzzy also asked that he be awarded custody of Roland, Jr. and Belinda.

- (a) Can Fuzzy file a Bill of Complaint for divorce on the ground of mutual separation (i.e., no-fault divorce) and on the ground of desertion? Explain fully.
- (b) After having agreed to let Betty have custody of the two children, can Fuzzy be heard to seek custody of them at this point, and, if so, what must he prove in order to gain custody? Explain fully.
- (c) Can Calvin Counselor ethically represent Fuzzy in his divorce action? Explain fully.

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8. Dell Corporation ("Dell"), a Virginia corporation, was organized in 1960 to manufacture tennis rackets. The original shareholders were Bill Gattes and Tom Wolfebine. Dell was capitalized with \$5,000 (\$2,500 each from Gattes and Wolfebine). Gattes and Wolfebine each owned 50 shares of stock. Gattes was President and Wolfebine was Secretary. The board of directors consisted of Gattes, Wolfebine and Dell's lawyer, T.J. McSwift. Dell began to expand rapidly. In addition to tennis rackets, they also started

manufacturing tennis balls, shoes, clothing and other tennis accessories.

In 1970, Gattes convinced the other two board members to borrow \$10 million to buy more materials and expand the Dell's manufacturing facility. Dell's sales had been expanding at a rapid rate, but its cash receipts lagged several months behind its sales. It appeared on the corporation's books, prepared by reputable accountants, that the amount of its accounts receivable was extraordinarily high.

Dell continued to borrow to finance its expansion, and its sales continued to grow at a tremendous rate. By 1980, McSwift was convinced that Dell should go public. Gattes disagreed, but refused to explain his reasons for not wanting to go public. In late 1993, Gattes died of a sudden heart attack, leaving an estate of \$50 million. Dell went public at the end of 1994.

At the time it went public, Dell had sales in excess of \$100 million, but its debt was also \$100 million, and the accounts receivable balance was \$250 million. The excessive accounts receivable balance had been a long-standing problem, the cause of which neither McSwift nor Wolfebine had inquired into. All these figures were disclosed accurately in the documents that accompanied the initial public offering.

Jim Carey, a life-long resident of Williamsburg, Virginia and an avid tennis player, invested \$500,000 in the Dell Corporation stock from the initial public offering. Shortly after the initial public offering, McSwift and Wolfebine learned that Gattes had embezzled nearly \$200 million from the company and that he had concealed the embezzlement through phoney purchase orders, thus inflating the accounts receivable balance. In fact most of the value of Gattes' estate consisted of assets he had purchased with the embezzled funds. Upon learning of the embezzlement, McSwift told Wolfebine that they had to disclose this information to the shareholders immediately. Wolfebine disagreed. McSwift immediately resigned from the board.

Wolfebine, rather than disclose the embezzlement, determined that he would try gradually to reduce the accounts receivables on paper until he removed all of the bogus accounts. Wolfebine's scheme was thwarted when Dell's sales declined precipitously following the introduction of an ultra-light tennis racket by a competitor, Watson Sporting Goods.

Jim Carey's original investment of \$500,000 is now worth barely \$200,000. Rumors abound, and Carey through his local stockbroker has learned of the embezzlement by Gattes and the accounts receivable problem.

Carey has retained you to represent him and asks your advice on the following questions:

- (a) What, if any, duties did Gattes, Wolfebine and McSwift breach as directors and officers of Dell and what acts constituted breaches by those individuals?

- (b) Can Carey, as a shareholder, bring suit against McSwift, Wolfebine and Gattes' estate to remedy the loss to Dell caused by the embezzlement, and, if so:
- (i) What type of action can he bring?
 - (ii) What claims can he assert in such action?
 - (iii) What remedies and types of damages are available against the defendants?

Draft a letter to Carey addressing each of his questions and stating the facts and reasons upon which you base your conclusions. You need not address any legal ethics issues or issues arising under federal and state securities laws.

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Answer Questions 9 and 10 in Answer Booklet F

9. Bob and Betty Byer lived in a small condo and worked in the City of Norfolk, Virginia, but since their marriage they had dreamed of building a house outside the city where they could enjoy the stillness and beauty of a rural life. After several years of searching, they found a five-acre lot in the rural eastern end of Suffolk, Virginia, which met their desire for a rural homesite within commuting distance of their jobs. In January 1993, they signed a real estate purchase contract with the owner, Sid Sellers, whereby they agreed to purchase the unimproved lot for \$50,000. The contract contained the following provision: "This contract is contingent upon Byers obtaining building permit and percolation test approval for septic system prior to closing."

At the closing in March 1993, Sid conveyed the lot to the Byers with a general warranty deed. The deed contained no reference to the condition that the sale was contingent upon a building permit and percolation for septic system. At the closing, however, Sid gave the Byers a copy of a soil study made two years earlier which Sid received from the City of Suffolk. The study approved "two parcels of approximately 5 acres each" as sites for septic tanks. The parcels included the lot purchased by Bob and Betty. Sid had already built on the other site mentioned in the study, and the City of Suffolk had given him a building permit for that construction. He told Bob and Betty at closing that there would be no trouble obtaining the necessary permits for building the house and constructing the septic system. In fact, he told them that they "could begin building tomorrow" if they desired. Relying on Sid's representations, the Byers went forward with the closing even though they had not yet obtained a building permit.

At the time of the closing, Sid Seller knew that the city was considering a change in its rules regarding septic tank approvals and had been told by someone in the Health Department that the city had not issued any septic tank approvals for land on the eastern side of the city in several months. In fact, the city Health Department abandoned the percolation test for septic tank approval in July, 1993 and substituted seasonal water tables as the test for

approving septic tank permit applications. The Byers' lot could not satisfy the seasonal water table test, and, without a septic tank permit, the city would not issue a building permit.

The Byers engaged an architect to prepare the plans and specifications for their house and a contractor to build the house for them. In April, 1996, they applied to the City of Suffolk for a septic tank permit, and the application was denied by the city eight days later.

When they realized that they could not build a house on the property, the Byers tendered a deed reconveying the property to Sid and demanded that Sid return their purchase price because the sale had been expressly conditioned upon obtaining a septic permit and a building permit. Sid refused. Shortly after the closing of the sale, in order to minimize his tax liability, Sid had used the proceeds from the sale to the Byers to establish an irrevocable charitable trust to benefit disabled children in the community.

Bob and Betty Byer seek your advice on the following questions:

- (a) What type of equitable claim could Bob & Betty assert against Sid, and upon what grounds, if any, could they base their claim to cancel the transaction and obtain a refund of their money?
- (b) If Sid asserted the following defenses, on which of them, if any, would he be likely to succeed:
 - (i) Laches? Explain fully.
 - (ii) Extinguishment of the building permit contingency by merger into the deed? Explain fully.
 - (iii) Waiver by the Byers? Explain fully.
 - (iv) Mutual mistake? Explain fully.
 - (v) Intervening impossibility brought about by the Health Department's change in policy? Explain fully.
- (c) Would Betty and Bob be entitled to have this case tried to a jury? Advise Bob and Betty and state your reasons as to each question.

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10. The City of Fredericksburg, Virginia, is negotiating with Microhard Corporation ("Microhard"), a Delaware corporation with its principal place of business located in California, to locate a computer software and hardware manufacturing facility in Fredericksburg. Microhard is also negotiating with cities in and outside of the United States. Many of the foreign jurisdictions have put very aggressive proposals on the table. One foreign jurisdiction promised local taxes for the first twenty years of Microhard's operation in that particular city.

At least one U.S. city has also promised to transfer the land needed for the plant at no cost to Microhard. Additionally, one foreign city has promised to pay Microhard \$10,000,000 over a twenty year period to offset some of the expenses of building the facility.

Fredericksburg has a large tract of land in mind for Microhard, but the land belongs to James Hardapple, an elderly man who has no interest in selling. Fredericksburg has determined that Microhard could generate 5,000 new jobs and annual direct and indirect income to Fredericksburg in excess of \$10,000,000. Fredericksburg has lost jobs recently to other parts of the country, and is anxious to attract the new 5,000 jobs. In fact, Fredericksburg is so eager to attract Microhard that it is willing to propose all of the incentives offered by the other jurisdictions and more.

The incentives contemplated by Fredericksburg are as follows:

1. Construct at Fredericksburg's expense:
 - all of the required infrastructure, including a new road over which the general public will be able to travel, but which will effectively serve only the new Microhard facility;
 - a new free public (first -come, first serve) parking deck with 5,000 spaces which can be used by the Microhard employees and the public; and
 - a public park adjacent to the Microhard building.
2. Issue \$10,000,000 in general obligation bonds to finance an interest free loan to Microhard.
3. Condemn the real property owned by James Hardapple and convey it to Microhard at no cost except Microhard's promise to build its new manufacturing facility and employ at least 5,000 new employees at the site for not less than 20 years.
4. Abate all local taxes that arise from Microhard's operations at the new site.

As the new City Attorney for Fredericksburg, you are asked to give the City Manager a written legal opinion regarding Fredrickburg's power to confer these incentives and what restrictions, if any, there may be on that power. Draft a legal opinion and include the reasons that justify your conclusions.

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