

FEBRUARY 2009

OUT OF STATE ATTORNEYS' EXAM

QUESTIONS AND BOARD ANALYSIS

FACTS APPLICABLE TO QUESTIONS 1, 2, AND 3

Alice has been married to Ben for five (5) years during which they have lived in Charles County, Maryland, and continue to do so. Alice works in St. Mary's County and Ben works in Calvert County, Maryland. Alice gave birth to a child, Carrie, one (1) year ago, the result of her secret affair with Deadbeat Drew, that has ended. Ben does not know he is not the father of Carrie.

Alice wants to end her marriage and comes to see you, a Maryland attorney. She advises you of the above facts which reflect no fault on the part of Ben. She asks you to file for a divorce on her behalf. She also wants custody of Carrie and child support from Ben.

QUESTION 1

(10 Points - 18 Minutes)

- a. **Can you file a Complaint for Divorce on Alice's behalf? Explain your Answer.**
- b. **Can you file a child custody and support action on Alice's behalf against Ben? Explain your Answer.**

BOARD'S ANALYSIS - QUESTION 1

a. She has no grounds for divorce; frivolous pleading violates Rules of Professional Conduct 3.1.

b. You cannot on client's behalf file a complaint against Ben alleging he is the father of the child and seeking child support as if he were the biological father. It would violate Rule 3.3 by filing a false statement and reflect a lack of candor to the tribunal (Rule 4.1) truthfulness in statement to others. If you had Drew as a named defendant, you can maintain an action for custody and support.

QUESTION 2

(15 Points - 27 Minutes)

- a. Assuming a divorce action can be filed between the parties, what court(s) can entertain the divorce complaint and why?
- b. What court(s) can entertain the child custody and support action?
- c. What are you required to file with the complaint for child support?

BOARD'S ANALYSIS - QUESTION 2

- a. Venue in divorce case C & JP 6-201 Circuit Court, Charles County where Defendant lives; Circuit Court, Calvert County where Ben works.
- b. Venue in child custody case C & JP 6-202 (5) Circuit Court, Charles County.
- c. Financial Statement per Maryland Rule 9-202 (f) in form reflected in Maryland Rule 9-203 (b) (Short form).

QUESTION 3

(10 Points - 18 Minutes)

- a. Assume a Master's hearing is held on January 2, 2009, and the Master makes written findings and recommendations that are served on Ben on January 2, 2009. The findings and recommendations are unfavorable and unacceptable to Ben who was unable to have a critical witness, Ernie, available to testify on his behalf. What must Ben do to attempt to change the outcome?
- b. How can Ben get the Court to hear Ernie's testimony?

BOARD'S ANALYSIS - QUESTION 3

- a. Maryland Rule 9-208 (f) Ben files within ten (10) days of January 2, 2009, exceptions in writing asserting the error with particularity.

Maryland Rule 9-208 (g) Ben needs to order a transcript and file a certificate of compliance.

b. Rule 9-208 (i) Ben needs to file a request for hearing with his exceptions and in his exceptions set forth with particularity the additional evidence to be offered by Ernie and why it was not offered at the master's hearing.

FACTS APPLICABLE TO QUESTIONS 4 AND 5

General Contractor and Owner entered into a written contract to build a hospital for Owner in Dorchester County, Maryland. An arbitration provision was included in the contract providing that all claims, disputes and other matters in question arising out of the contract shall be decided by arbitration. General Contractor subcontracted the earth removal work to Subcontractor. The contract with the Subcontractor contained the identical arbitration provision. Under the subcontract, Subcontractor agreed to remove earth from the hospital construction site and General Contractor agreed to pay Subcontractor \$95,000 for that work.

Subsequently, a dispute arose between them regarding the amount of earth removed by Subcontractor. Subcontractor contended that it was entitled to additional compensation for earth which it removed beyond the amount agreed upon in the contract. Subcontractor sued General Contractor in the Circuit Court for Dorchester County, Maryland on that dispute for \$55,000. General Contractor filed an answer and a third party claim against Owner pertaining to Subcontractor's claim. General Contractor filed a motion for summary judgment against Subcontractor. In support of that motion, General Contractor filed an affidavit made by the principal of General Contractor to the best of his knowledge, information and belief containing facts, parol evidence not set forth in the previous pleadings, and the statement that he was competent to testify to the matters stated in the affidavit.

QUESTION 4

(10 Points - 18 Minutes)

- a. Is the affidavit required? Explain fully.**
- b. Is the affidavit procedurally adequate? Explain fully.**

BOARD'S ANALYSIS - QUESTION 4

a. Maryland Rule 2-501 (a) (1) and (2). General Contractor had previously filed its answer to the merits. The affidavit was necessary because it contained parol evidence not set forth in the previous pleadings and, therefore, it was based on facts not contained in the record of the case.

b. Maryland Rule 2-501 (a). The rule requires the statement of material facts. It does not preclude parol evidence in the affidavit provided it is within the personal knowledge of the affiant.

 Maryland Rule 2-501 (c). The affidavit was made to the best of the affiant's knowledge, information and belief. It was defective and insufficient as it was not made on personal knowledge as required by this rule.

 Maryland Rule 1-304. The form of oath for an affidavit under personal

knowledge requires the statement that the contents of the affidavit are true.

ADDITIONAL FACTS APPLICABLE TO QUESTION 5

Prior to the Court's ruling on the motion for summary judgment, Subcontractor and General Contractor settled their dispute and entered into a consent judgment between them whereby General Contractor agreed to pay Subcontractor \$20,000. General Contractor dismissed Owner from the Circuit Court case.

Subsequently, General Contractor sought payment from the Owner for the balance due of \$450,000 for all the unpaid plumbing, electrical and carpentry work under the hospital construction agreement and filed suit against Owner in the Circuit Court for Dorchester County, Maryland for that money. The Owner filed its answer which denied owing any money to the General Contractor. Owner filed a motion/petition to compel arbitration and stay the litigation relying upon the arbitration provision of the construction contract. The General Contractor filed a motion to dismiss the motion/petition to compel arbitration and stay the arbitration.

QUESTION 5

(10 Points - 18 Minutes)

- a. Did Owner waive its election to arbitrate this case? Explain your answer.**

Assume that the Circuit Court granted the General Contractor's motion to dismiss the arbitration request and scheduled the case for trial.

- b. Does Owner have any appeal rights at this stage of the case? Explain your answer.**

BOARD'S ANALYSIS - QUESTION 5

a. Even if the Owner filed an answer, the Owner did not waive its right to arbitrate. The prior Circuit Court case by Subcontractor involved only the Subcontractor's claim regarding the earth removal. The subsequent suit by the General Contractor against the Owner involved plumbing, electrical and carpentry work that were not part of the Subcontractor's law suit.

b. Maryland Courts and Judicial Proceedings Article, section 12-101 (f) and section 12-301. As a general rule, an appeal is only from a final judgment. The Court order dismissing the motion/petition to compel arbitration and stay the litigation was not a final order, determination, decision or judgment.

Maryland Courts and Judicial Proceedings Article, section 12-303 (3) (ix). The Court order granting the motion to dismiss the Owner's petition to compel arbitration and stay the litigation had the effect of staying the arbitration. See section 12-303 (3) (ix). Owner could immediately appeal the

Court's interlocutory order because Owner was not permitted to arbitrate the matter; instead, Owner was required by the trial court's ruling to proceed to trial on the matter thereby being denied its right to arbitrate under the arbitration provision of the construction contract.

If the applicant relies on Md Rule 2-602, partial credit was given.

FACTS APPLICABLE TO QUESTIONS 6, 7, AND 8

On March 1, 2003, Adam & Bob acquired a tract of vacant land in Calvert County, Maryland, as tenants in common, for \$100,000. On the same date, at the settlement in Prince Frederick (the county seat of Calvert County) Adam loaned Bob \$45,000 to cover Bob's share of the purchase money, and Bob gave Adam an executed promissory note that required three annual payments, each in the amount of \$15,000 with all interest accrued to the date of payment, due on March 1 of 2004, 2005 and 2006. On April 15, 2003, Adam loaned Bob an additional \$5,000, without interest, to pay Bob's federal taxes for 2002 without any written agreement. Bob never made any payments to Adam.

On March 15, 2006, Adam confronted Bob at the property about the loans. Bob, angered by Adam's demands, stated "You'll never get that \$5,000 I owe you!" and swung his fist at Adam. Bob missed hitting Adam, but Adam fell while ducking the punch and incurred serious injuries, resulting in medical bills of \$10,000.

On February 1, 2009, Adam, a resident of Calvert County, comes to you, a licensed Maryland attorney, and retains you to file suit against Bob "for everything I can get" and to end co-ownership of the land.

Bob has resided in Pennsylvania since 2000.

QUESTION 6

(10 Points - 18 Minutes)

- a. Can Bob be sued in Calvert County, Maryland on any of these claims? Explain your answer.**

- b. What action(s) may Adam file, and in what court(s) may Adam's action(s) be filed and tried? Explain your answer.**

QUESTION 7

(5 Points - 9 Minutes)

What claims or actions, if any, may be consolidated? Explain your answer.

QUESTION 8

(10 Points - 18 Minutes)

**a. In what way(s) can you attempt to effect service of process on Bob?
Explain your answer.**

**b. Are any of Adam's claims barred by a statute of limitations?
Explain your answer.**

BOARD'S ANALYSIS - QUESTIONS 6, 7, AND 8

Bob, although a resident of Pennsylvania, may be sued in Maryland on claims arising out of his transaction of business in Maryland, his causing of tortious injury in Maryland, and his ownership of an interest in real property in the state of Maryland. *Md. Ann. Code*, Courts & Judicial Proceedings, sec. 6-103. As a non-resident individual Bob may be sued in any county. *Md. Ann. Code*, Courts & Judicial Proceedings, sec. 6-202(11). An action to partition real estate shall be brought in a county where that real property is located. *Md. Ann. Code*, Courts & Judicial Proceedings, 6-203(b)(1).

Adam may file a complaint in the Circuit Court for Calvert County for \$45,000 and interest due under the promissory note dated April 1, 2003. Adam may file a complaint in the District Court of Maryland for Calvert County for \$5,000 due on the loan made on April 15, 2003. Adam may file a complaint for damages caused by the assault on March 15, 2006. The action must be filed in the Circuit Court for Calvert County if the amount of the claim exceeds \$30,000. Otherwise, the action may be filed in either the Circuit Court for Calvert County or the District Court of Maryland for Calvert County. *Md. Ann. Code*, Courts & Judicial Proceedings, 4-401(1); 4-402(d). Adam may file an action for partition of the land (or sale in lieu of partition) in the Circuit Court for Calvert County. *Md. Ann. Code*, Courts & Judicial Proceedings, 4-402(a); Rule 12-401.

Actions in the Circuit Court involving a common question of law or fact or a common subject matter may be consolidated by the Court. *Rule 2-503*. Actions in the Circuit and District Courts may be consolidated in the Circuit Court when the actions involve at least one of the same parties, "with the same subject matter, issues and defenses arising out of the same circumstances," *Rule 6-104(b)*; This is not such a case, as each cause of action involves a different transaction or event at a different time.

Bob may be served with a copy of the summons, complaint, and all other papers filed with the complaint, in or outside of Maryland, by personal delivery, or by leaving the papers at his dwelling or usual place of abode with a person of suitable age and discretion, or by mailing a copy of the summons to Bob by certified mail, restricted delivery, with a return receipt requested, and receipt by Bob of the mailing. *Rule 2-121*. In addition, Bob may be served in the action for partition by publication in a newspaper with a general circulation in Calvert County, Maryland, of an order of court for the publication and a posting of the order of publication on the property. *Rule 2-122*. (Only if his whereabouts are unknown and reasonable efforts have been made in good faith to locate him.)

The action on the promissory note may or may not be barred in part. *Md. Ann. Code, Courts & Judicial Proceedings*, sec. 5-102. If the note is under seal, the action may be commenced within twelve years of the date on which the cause of action accrues. Otherwise, the action must be commenced within three years. *Md. Ann. Code, Courts & Judicial Proceedings*, sec. 5-101. A cause of action arises separately with respect to each installment of an installment obligation. *United States v. Myers*, 308 F.Supp., 859 (Md. 1970). If this note is not under seal, then limitations may bar an action on the first two installments, although not the third.

The loan based on the oral agreement is a demand obligation. A cause of action on a demand obligation accrues on the date of the obligation. Although more than three years have passed since the date of the \$5,000 loan, an unconditional acknowledgement of the obligation by Bob may extend the time in which to commence an action to three years from the date of the acknowledgement. *Hall v. Barlow*, 260 Md. 327, 272 A.2d 386 (1971). There may be a question of fact as to whether Bob's statement is an unconditional acknowledgement. Although he admits owing the \$5,000 to Adam, he also stated that Adam will "never get that \$5,000." If Bob is implying that he has a defense to the claim, then the acknowledgement may not be unconditional.

An action for assault must be commenced within one year from the date it accrues. *Md. Ann. Code, Courts & Judicial Proceedings*, sec. 5-105; *Ford v. Douglas*, 144 Md. App. 620, 799 A.2d 448 (2002).

FACTS APPLICABLE TO QUESTIONS 9 AND 10

Biff, in celebration of his 17th birthday, drank alcohol to excess, drove his parents' car without permission on a highway in Prince George's County, Maryland, and was stopped by a Police Officer who observed his vehicle weaving across the center line on several occasions within a short distance. After the stop, the Officer found a loaded handgun in the center console of the front seat of the vehicle when he searched the vehicle subsequent to arresting Biff.

Biff has been indicted by the Grand Jury and charged in the Circuit Court for Prince George's County with the misdemeanor charges of unauthorized use of a motor vehicle (four years and/or a \$500 fine); transporting a handgun in a vehicle in violation of Criminal Law § 4-203 (a) (ii) (three years and/or a \$3,000 fine); and driving under the influence of alcohol (one year and/or a \$1,000 fine.)

QUESTION 9

(10 Points - 18 Minutes)

Does the Circuit Court of Prince George's County have jurisdiction over any or all of the charges against Biff? Explain your answer.

BOARD'S ANALYSIS - QUESTION 9

Yes-Although Biff is 17, the handgun violation is an "excluding charge" over which the juvenile court does not have jurisdiction under MD Code § 3-8A-03 of Courts and Judicial Proceedings Article (CJA).

Also, even though the charges are all misdemeanors, the District Court and the Circuit Court have concurrent jurisdiction in a criminal case in which the penalty is at least three years in jail and/or a \$2,500 fine CJA 4-203(d)(1)(i). The handgun charge carries such a penalty.

QUESTION 10

(10 Points - 18 Minutes)

Based on the recited facts, what motion(s) should Biff's attorney file on his behalf and when must they be filed? Explain your answer.

BOARD'S ANALYSIS -QUESTION 10

1. Mandatory motion to suppress the search for and seizure for and of the handgun pursuant to MD Rule 4-252 (a)(3).

2. Motion to transfer jurisdiction to juvenile court pursuant to MD Rule 2-252 (c).

3. Motion for discovery and inspection pursuant to MD Rule 2-263(b).

Motions 1, 2 and 3 must be filed within thirty days of appearance of counsel or the first appearance of Biff before the Circuit Court pursuant to MD Rule 4-213 (c).