

**JULY 1998 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

Part A - Question I

Dear Mike:

Here is a brief answer addressing your three concerns:

At the present time, you do not have sufficient grounds for an absolute divorce, as you and Carol have been separated for only a month, and there is no basis for an immediate absolute divorce on the grounds of adultery. However, should you not return to the home or live with Carol as husband and wife for 12 months, you will have grounds for an absolute divorce based on a constructive desertion because Carol's drug abuse and violent behavior constitute cruel and violent acts which justifiably caused you to leave the home. Deck v. Deck, 12 Md. App. 313 (1971). Alternatively, if your unilateral separation continues for two years, without cohabitation, you may obtain an absolute divorce on the grounds of a two-year separation. Section 7-103(a)(5) of Family Law Article. Unless Carol changes her mind and agrees to a separation, you will not have grounds for a divorce based on a one-year voluntary separation because your separation was not mutual and voluntary. Misner v. Misner, 211 Md. 398 (1956).

As to your support obligation for Marsha, she is not your child as you never formally adopted her nor have you ever been appointed her guardian. Accordingly, you should have no legal obligation towards her support, even though you have provided for her needs in the past. Section 10-203(a) of Family Law Article.

Regarding Carol's judgment, the attachment by Creditor, as a matter of law, changes the title to the real property to tenants in common, as the joint tenancy has been broken. Eastern Shore Bldg. V. Bank of Somerset, 253 Md. 525 (1969). Therefore, you each own an undivided one half interest in the home. The judgment now constitutes a lien on Carol's one half interest. Section 11-402(b) of Courts Article. Her one half interest could be sold at a sheriff's sale if the Creditor pursues the attachment. Section 11-501 of Courts Article.

Part A- Question II

Regarding the monetary claims you can assert on Jane's behalf against Sam; the defenses, if any, Sam will raise to each of Jane's claims; and the likelihood of success of each claim, based on the facts in Question II, the following should be considered:

A. Alimony

The facts do not state that Jane waived alimony in the Prenuptial Agreement. Consequently, Jane can assert claims for both temporary and rehabilitative (permanent) alimony from Sam.

Sam has no effective defense to an award of alimony pendente lite. The award is based solely on need, without regard to fault. Guarino v. Guarino 112 Md. App. 1, 684 A.2d 231 (1996), and cases therein cited.

As to alimony, the fact that Jane committed adultery is not an automatic bar to alimony. Section 11-103 of Family Law Article. The court will consider all statutory factors in Section 11-106, giving due consideration that the principal function of alimony is rehabilitation. The likelihood is that Jane will be awarded alimony for a time and in an amount for her to gain sufficient training to become wholly or partially self-supporting. Holston v. Holston, 58 Md. App. 308, 473 A.2d 459, cert. denied, 300 Md. 484, 479 A.2d 372 (1984).

B. Monetary Award

Jane can assert claims for a monetary award as an adjustment of the equities concerning marital property. She will ask the court to determine which of Sam's assets is marital property. She will assert at least, that Sam's bonus, received during marriage, and the stocks purchased with those funds or traceable thereto are marital property.

Sam will defend on various grounds:

(a) Jane waived her rights to marital property by virtue of the Prenuptial Agreement and, therefore, all of his assets are excluded as "marital property" by valid agreement.

(b) The stocks he had at the time of the marriage and its appreciation due solely to economic factors are excluded as "marital property."

(c) Jane is not entitled to a monetary award because of the short duration of the marriage, her lack of contribution to the well-being of the family and her fault which contributed to the dissolution of the marriage.

Jane's initial hurdle will be to set aside the waiver of a monetary award contained in the Prenuptial Agreement. Jane can argue that the agreement should be set aside because Sam misrepresented the value of his stocks, and that she had insufficient opportunity to consult with her own counsel. She will also claim that the clause exculpating Sam from liability for misrepresentation is invalid. Sam will counter that Sam's attorney clearly explained the legal effect of the Agreement, that Jane was advised of her right to counsel and freely chose not to seek the advice of an attorney. Sam also will claim that Jane did not rely on the values he listed for stocks, and that she easily could have

verified the stock prices since all securities were publicly traded.

Applicants may receive full credit for concluding that Jane will or will not be successful in setting aside the Prenuptial Agreement, so long as they recognize the factors and arguments on both sides.

Jane also must show which of Sam's assets are marital property. Stocks acquired by Sam prior to marriage are clearly excluded from the definition of marital property as are assets directly traceable to these stocks. Any increase in value of specific non-marital stocks due solely to economic factors is excluded as non-marital property.

Sam's bonus money and the stocks purchased with that money are marital property, unless excluded by the Prenuptial Agreement.

C. Claim to \$500 per week

Jane can claim that Sam has a contractual obligation to pay her \$500 per week. She will argue that their marriage and/or Sam's natural love and affection was sufficient consideration to support his promise to give her \$500 per week.

Sam's defense is on the ground of lack of consideration, i.e. that his promise was unilateral, made after (and not part of) the Prenuptial Agreement. His love and affection for his wife is not sufficient consideration to support an executory contract. Sam will contend that he merely promised to make a gift (or series of gifts), which lacks consideration and is unenforceable.

Sam will also defend on the ground that even if marriage was the consideration for his promise, it is unenforceable because it was not in writing, as required by the Statute of Frauds §5-901 of the Courts Article.

Otherwise, the Statute of Frauds does not apply because Sam's death, upon which payments would terminate, could occur within one year. Section 5-901 of the Courts Article.

D. Claims Against Attorney Able

Jane does not have any claims which she can assert successfully against Attorney Able. He told her he was representing Sam and that she had a right to retain her own lawyer to review the Prenuptial Agreement and advise her about it. Based on the facts, attorney Able had no conflict of interest and made clear whom he was representing. He owes no duty to Jane and was not in privity with her.

Part B - Question I

NB: All section references are to the Maryland Uniform Commercial Code, Title 2, Commercial Law Article, Annotated Code of Maryland.

Jones could argue that no contract was formed, since he did not accept the WonderWasher. Acceptance occurs only after the buyer has had a reasonable opportunity to inspect the goods or does an act inconsistent with the seller's ownership. Section 2-606. He did not have a reasonable opportunity to inspect the goods when they were delivered at the height of the dinner rush. Section 2-513. Rather he inspected the goods later that evening, within a reasonable time after delivery, and notified Acme promptly the next morning that the goods were nonconforming. Section 2-602(1). Although Jones has already paid for the goods, payment does not impair the buyer's right to inspect or any of his remedies. Section 2-512. In the alternative, Jones could also argue that, if he is deemed to have accepted the goods on delivery, he revoked his acceptance pursuant to Section 2-608 after he discovered that the goods were nonconforming by using the WonderWasher for two loads of clothes.

Acme's response is that it made perfect tender by delivering the WonderWasher to Jones, and consequently, it is entitled to payment. Section 2-507. Acme should argue Jones accepted the WonderWasher when it was delivered. It was Jones who requested same day delivery of the WonderWasher. The delivery crew gave him the opportunity to inspect the goods and he refused. Section 2-513. In addition, he signed the contract acknowledging the delivery and acceptance of the WonderWasher, although the crew chief's note on the contract belies this argument. Acme can also argue that Jones accepted the WonderWasher upon using it for a second load of clothes, since he had already inspected it with the first load. The misuse of the WonderWasher was inconsistent with Acme's ownership and constituted acceptance. Section 2-606(1)(c). Acme can also argue that Jones' rejection of the WonderWasher is ineffective because he failed to state a particular defect. Section 2-605. Finally, Acme will argue that Jones refused Acme the opportunity to cure by refusing to allow the repair by Acme's technician. Section 2-508. However, Jones will respond that the time for performance had passed since the contract specified same day delivery. Section 2-508(1).

Part B - Question II

Jones could file counterclaims for breaches of express warranties under Section 2-313. The advertisement for the WonderWasher stated that it was suitable for super heavy duty washing jobs, and that "no household job is too tough for the WonderWasher." The clerk further stated in response to a specific question from Jones that "if you can fit it in the WonderWasher, this machine will clean it." These statements could be argued to be express warranties under Section 2-313(1), since express words of guarantee or warranty are not required under Section 2-313(2). Furthermore, neither the advertisement nor the clerk referred to any limitations on the use of the WonderWasher as described in the Owner's Manual.

In addition, Section 2-314 provides that a warranty of merchantability is implied in contracts for the sale of goods under the Code, including the warranty that the goods are fit for the ordinary purposes for which such goods are sold (Section 2-314(1)(c)). This warranty is applicable because Acme is a merchant of goods of the kind sold to Jones. Jones might also raise a claim under Section 2-315(1) for breach of the implied warranty of fitness for a particular use, but he will not likely prevail on such a claim, since he did not tell Acme of his intention to use the WonderWasher for commercial size loads of restaurant linens. Acme might be able to argue that any express warranties created by the advertisement and the clerk's statements were negated by Jones' unreasonable conduct in misleading Acme about its intended use, and in failing to follow the manufacturer's instructions in using the machine. Section 2-316.

If Jones is found to have effectively rejected the WonderWasher or revoked acceptance, he is entitled to remedies pursuant to Section 2-711. He can cancel the contract, recover as much of the price as has been paid - which he accomplished by the stop payment. He can cover by purchasing substitute goods and recover the difference between the contract price and the cost of the substitute goods. He is also entitled to incidental and consequential damages pursuant to Section 2-715.

If Jones is found to have accepted the goods, then his remedy for breach of warranty is pursuant to Section 2-714. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been warranted.

In either case, Jones is entitled to incidental and consequential damages resulting from the malfunction of the WonderWasher. The incidental damages would include the cost of the stop payment order, as well as the cost of the commercial laundry. For consequential damages, Jones would claim the damage to his apartment and the restaurant below, the losses incurred from closing the restaurant for one week and any loss to personal property in the apartment. Jones would also claim the value of the old but fully functional washer that was removed by the delivery crew. Acme would claim that the loss of income by the restaurant and the cost of laundering the restaurant linen are not allowable under Section 2-715, since Acme did not know and had no reason to know at the time of the making of the contract of Jones' intention to use the WonderWasher for his business.

Part C — Question I

This question calls for knowledge of basic principles of Maryland property law regarding joint tenancies and easements.

When Gus conveyed Parcel A to Mike and Etta in 1980, they held the property as joint tenants with rights of survivorship. In Maryland, joint tenancies are permitted and have the same characteristics as they did at common law:

Maryland by statute specifically permits joint tenancy. The characteristics of a joint tenancy are its four unities; that is to say, the unity of interest, unity of title, unity of time, and unity of possession. These must coincide -- if any is lacking, the estate cannot be one of joint tenancy. The destruction of one or more of the four unities severs and destroys the joint tenancy and this may be done by a conveyance, voluntary or involuntary, of the interest of one of the joint tenants. A joint tenant may convey his interest by deed, and the result is a severance of the joint tenancy and the creation of a tenancy in common between the grantee and the surviving joint tenant or tenants. *Alexander v. Boyd*, 253 Md. 511, 519, 520, 253 A.2d 359 (1969) (Citations omitted.)

When Mike conveyed his interest in the property to Bud, Mike severed the joint tenancy with Etta and Etta and Mike owned the property as tenants in common.

Etta's deed of conveyance recited that she was the sole owner of the property as a result of Mike's death and that she conveyed "all her right, title and interest" in the property to Polly. Mike's deed was recorded in the land records and Etta could not convey more than she owned. Thus, despite the recital in her deed and regardless of her and Polly's beliefs, Etta owns only an undivided one-half interest in the property.

The conveyance of Parcel A to Mike and Etta also included an easement across a portion of Gus' retained land. Maryland law provides that the conveyance of a property transfers the grantor's "whole interest and estate" in the property. Maryland Annotated Code Real Property Article § 2-101. The easement runs with the land; it is not necessary for a subsequent deed to explicitly reference it in order to convey it to a grantee. *Baugh v. Arnold*, 123 Md. 6, 9, 91 A. 151 (1914). Thus both Bud and Polly have a right to use the easement. The subsequent construction of South Road did not extinguish or limit the easement as there was nothing in the original grant of the easement indicating that it was conditional upon there being no other access to Parcel A.

The easement has not been abandoned. For an easement to be abandoned, there must be some action on the part of the dominant estate indicating an intention never to use the easement again. *D.C. Transit System, Inc. v. State Roads Comm.*, 265 Md. 622, 625, 290 A.2d 807 (1972). Mere

non-use will not suffice; there must be some affirmative act by the owner of the dominant estate indicating an intention to abandon the easement. *Shuggars v. Brake*, 248 Md. 38, 46, 234 A.2d 752 (1967). The facts do not give a basis for such an assertion.

Part C — Question II

(A) Bob has several claims against the Corporation. First, he can allege the employment contracts between the Corporation and Anne and Claire are void or voidable as being the result of a transaction between interested directors. Md. Anno. Code Corp. and Assoc. Article (hereafter “Code”) §2-419. He can also claim that the failure to pay dividends is a breach of Anne’s and Claire’s duties as directors to perform their duties in good faith, in a manner reasonably believed to be in the best interests of the Corporation and with the degree of care that a prudent person would use under similar circumstances. Code §2-405.1. Similarly, he can argue that the decisions not to pay dividends and the decision to turn down the purchase offer constituted breaches of the standard of care.

The first cause of action would be a derivative action as the entity harmed by the interested director transaction is the corporation itself. Bob must file on behalf of the Corporation after making demand on the Board to void the contracts or file suit unless, under the circumstance, such a demand would be futile. Since the Board consists of three directors and two of the three are directly involved in the transactions at issue, a demand would seem to be a futile gesture.

The second cause of action would be a direct action by Bob against both Anne and Claire for the alleged failure to pay dividends. Since Bob, not the Corporation, is the injured party, this action would not be derivative; there would be no need for a demand upon the Board.

Bob does not have a right to require the Corporation to acquire his stock at its fair market value. This shareholder’s remedy is governed in Maryland by Code §3-202(c). None of the circumstances triggering the right to receive fair value for the stock are triggered by these facts.

As a shareholder, Bob has the right to petition the court to dissolve the Corporation because of illegal, oppressive or fraudulent conduct on the part of the “directors or those in control of the corporation.” Code Section 3-413(b). An attempt by directors to make unreasonable or unfair payments to themselves constitutes such conduct. *Valerino v. Little*, 62 Md. App. 588; 602 - 603, 490 A.2d 756 (1985).

Several defenses can be asserted by the Corporation or Anne and Claire.

A personal defense which Anne and Claire can assert to any litigation is the business judgment rule, codified in part as Code §2-405.1. The business judgment rule protects directors from actions taken in good faith, in a manner reasonably believed to be in the best interests of the corporation and with the care that an ordinarily prudent person in a like position would take under similar circumstances.

This defense would be clearly applicable to the decision involving the offer to purchase the corporation.

Section 2-419 provides several bases for asserting the validity of interested director transactions, such as the employment contracts. One defense applicable under these facts may be that the contracts are “fair and reasonable to the corporation.” Code §2-419(b)(ii). The Corporation has prospered under Anne and Claire’s management; whether their salaries are reasonable can be determined by looking at the salary structure of comparable business organizations.

Probity & Virtue’s representation of the Corporation and two of its directors would be a violation of Rule 1.7 of the Maryland Rules of Professional Conduct. Anne and Claire obviously have interests which are potentially at variance from those of the Corporation. Probity & Virtue should advise them in writing that it will not represent Anne and Claire personally and that they should seek separate counsel. *Tydings v. Berk Enterprises*, 80 Md. App. 634, 639, 565 A.2d 390 (1989)

Part D - Single Question

(A) The facts reveal that Tom intentionally took possession of Sue's vehicle without her consent, transported an infant who lacked capacity to consent, and seriously injured said infant and his brother, Raymond. Additionally, a controlled dangerous substance was found in the Bronco. Accordingly, the prosecutor may charge Tom with the unlawful taking of a motor vehicle (theft) pursuant to Article 27, Section 343 of the Maryland Annotated Code; breaking and entering of a motor vehicle pursuant to Article 27, Section 35 ; second degree assault pursuant to Article 27, Section 12A (defined in a manner which includes common law battery); reckless endangerment of Bryan pursuant to Article 27, Section 12A-2; possession of a controlled dangerous substance pursuant to Article 27, Section 287; and kidnaping/child abduction pursuant to Article 27, Sections 2 and 338.

(B) The answer should address the following bases for Tom's Motion to Suppress:

- Tom may argue that his statement in the roll call room and the packets of cocaine should not be admissible since he was in custody at the time of his statement and the officer coerced him to make the statement in violation of his Fifth Amendment rights. However, under the facts, the State may successfully argue that he volunteered the information and it was not the result of police interrogation. See, Vines v. State, 40 Md. App. 658 (1978).

- Tom may argue that Raymond's statement at the scene should be suppressed since the officers must have considered him a suspect at that time but failed to advise him of his right to counsel. Accordingly, Tom may request that the Court rule that the illegal coercion which led to Raymond's statements could not have given the police probable cause to arrest Tom. The State will counter that Raymond was never a suspect and was never charged. Therefore, his on the scene statements were made at the time the officers were trying to ascertain whether a crime had occurred and there was no need to provide a *Miranda* warning. See, Whitfield v. State, 287 Md. 124 (1980). The State may also argue that Tom lacks standing to question the legality of statements made by Raymond.

- Tom may argue that Bystander's identification must be dismissed since he could not provide any identification when he originally spoke to the police. Moreover, Tom may assert that the line up was unduly suggestive since no other possible suspects were included. See, Chambers v. State, 81 Md. App. 210 (1989). Finally, Tom had requested the assistance of counsel and said counsel should

have been present at the identification. The State may counter that it was a show up, and, as such, was not illegally conducted.

- Tom may move to suppress Susan's recount of the telephone conversation and the officer's statement that the person who called was Tom, on the basis that neither can identify the voice over the phone as his. See, Mutyambizi v. State, 33 Md. App. 55 (1976). The State will not be able to counter this argument under the facts given, since there is no evidence that Susan and Tom knew each other.

C. Tom's attorney would probably object to the admissibility of a conviction more than 17 years old especially where Tom's credibility is not at issue (since he has not yet taken the stand as a witness on his own behalf). See, Whitehead v. State, 54 Md. App. 428 (1983); Maryland Rule 5-609. However, despite such objection, the State may introduce evidence of the former conviction in its case in chief if it is used to establish motive, intent, absence of mistake, a common scheme or plan between the crimes, or the identity of the person charged. See, Ross v. State, 276 Md. 664 (1976).

Part E - Question I

Faust has the right to order a non-party to be deposed under Maryland Rule 2-411. Under Maryland Rule 2-412(c) a non-party deponent may be required to produce documents at the taking of a deposition by subpoena. Under Maryland Rule 2-403 the bank is an entity from whom discovery can be sought. On motion and for good cause shown, the bank can be protected from incurring undue expenses in complying with the discovery, including the proviso that discovery be had only with an appropriate allocation of expense.

Under Rules of Professional Conduct 1.8(e) (1) a lawyer can advance expenses of litigation. This section eliminated the reference in former DR5-103(B) to the request that “The client remains ultimately liable for such expenses”.

If the protective order is sought and obtained, Camilla could be held responsible for the expense of compliance. The Court might well also award reasonable attorney’s fees incurred by the bank if Faust’s reaction to the bank’s request is deemed unreasonable.

Part E - Question II

(A) John did file his motion for judgment notwithstanding the verdict within 10 days of the initial entry of judgment on February 28, 1998, but he had not moved for judgment at the close of all the evidence and prior to submission of the case to the jury. The Circuit Court can not grant his post judgment motion because no issues on the insufficiency of the evidence were preserved by him. Maryland Rules 2-519(a); Maryland Rules 2-532(a) and 2-532(b).

(B) The judgment was final on April 20, 1998. Although the initial entry of judgment was on February 28, 1998, the filing of a post-judgment motion by John under Maryland Rule 2-532 extended the time to file a notice of appeal to within 30 days after entry of the order by the Circuit Court disposing of John’s motion. Maryland Rule 8-202(c).

(C) The judgment against Mary would have been final and appealable on February 28,

1998 had no motion for judgment notwithstanding the judgment been filed by John. The filing of that motion extended the time for appeal until the disposition of that motion by withdrawal or disposition by the Circuit Court. Maryland Rule 8-202(c). Maryland Rule 2-602(a) provides that an order or other form of decision that adjudicates the rights and liabilities of fewer than all the parties to the action is not a final judgment. Mary received the benefit of this extension as there can be no final adjudication of the entire action until John's post judgment motion is withdrawn or there is a Circuit Court disposition of that motion. Waters v. Whiting, 113 Md. App. 464, 470-474, 688 A.2d 459, cert. denied 345 Md. 237 (1997).

Part E - Question III

Service on Groucho is insufficient; the summons was not delivered to Groucho. Service on a defendant by certified mail is complete only upon delivery. I must file a motion to dismiss for insufficiency of service of process before an answer. A defendant served outside the state has 60 days in which to file a response. I can wait until Monday.

The motion to dismiss automatically extends the time for filing an answer.

Service on Harpo is sufficient; service may be made by an attorney for a party. I must file an answer. A defendant served within the state has 30 days in which to file an answer. The answer must be filed today.

Service on Chico is insufficient; service may not be made by a party. I must file a motion to dismiss for insufficiency of service of process. The last day for filing falls on a Saturday, which extends the time until the next business day. I can wait until Monday.

Part F - Question I

To state a cause of action in negligence, a plaintiff must allege that the defendant has a duty of care which he breached, and that the breach proximately caused legally cognizable injury.

An important factor used to determine the existence of a duty is foreseeability. One who knows that he or she has a highly infectious disease can readily foresee the danger that the disease may be communicated to others with whom he or she comes into contact. Therefore, Dr. Doctor had a legal duty to refrain from contact with his patients which might expose them to the virus, or to inform them of his condition.

Dr. Doctor's failure to inform James of his condition prior to performing surgery and exposing him to the HIV virus was a breach of this duty.

As a result of this breach, James has alleged that he was placed in fear of having contracted HIV and suffered the consequences of that fear which were manifested by emotional distress, headaches, sleeplessness, and, in addition, the pain and expense of repeated medical tests.

James' initial fear of acquiring HIV was not unreasonable. However, his continued fear became unreasonable after testing HIV-negative after learning of Doctor's illness. Recovery of such damages is limited to the situation where the plaintiff is actually exposed to the HIV virus and emotional distress along with the physical manifestations of such distress including anxiety, headaches, sleeplessness, etc. which result therefrom. Therefore, James may recover for these injuries to the extent that he can objectively demonstrate their existence.

In order to prove his claim for intentional infliction of emotional distress, James must show that Doctor's conduct was intentional or reckless; that it was extreme and outrageous; that there is a causal connection between Doctor's wrongful conduct and James' emotional distress; and James' emotional distress must be severe. Harris v. Jones, 281 Md.560, 380 A.2d 611 (1977). These are all issues for the jury.

Defendant's Motion should be denied.

Part F - Question II

In order to place a complaint in context, a court may take judicial notice of additional facts that are either matters of common knowledge or capable of certain verification. McCormick, *Evidence* 329-330 (4th ed. 1992); Murphy, *Maryland Evidence Handbook 1000(A)(1-2)*(1989). Included in the latter category are facts "capable of immediate and certain verification by resort to sources whose

accuracy is beyond dispute." Murphy, 1000(A)2).

In the medical context, courts have relied upon basic information about sexually transmitted diseases as found in medical journals and reports of the Centers for Disease Control. The Maryland Court of Special Appeals has relied upon similar sources to assess the need for precautions against AIDS transmission. See Wiggins v. State, 76 Md App. 188, 198, 544 A.2d 8 (1988).

Before examining the legal sufficiency of the complaint, therefore, it is permissible for the court to resort to learned treatises and publications to determine well established and scientifically understood facts about AIDS and its transmission.

James' objection should be overruled.

Part F - Question III

The attorney has violated Rule 1.2(c) of the Rules of Professional Conduct by failing to consult with his client before limiting the objectives of the litigation. The attorney has also violated Rule 1.4(b) of the Rules of Professional Conduct by failing to explain to his client his reasons for his action so that the client could make the decision.

EC 7-7 states that "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise, the authority to make decisions is exclusively that of the client..." EC 7-8 states that "In the final analysis, however, the... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client".

If the statute of limitation has run barring a claim against the hospital, James would be within his rights to file a malpractice suit against his attorney.