MODEL ANSWER - QUESTION I - JULY 2006

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) will not be answered here.

MODEL ANSWER - QUESTION II - JULY 2006

PLEASE NOTE: QUESTION II was a "Multistate Performance Test" (MPT) will not be answered here.

MODEL ANSWER - QUESTION III - JULY 2006

The father's will creates a testamentary trust that creates life interests, and future life interests in the father's children and grand children as well as a remainder interest in the father's great-grand children. Because the trust creates future interests in real estate, i.e. the apartment building, it must be determined whether the trust violates the rule against perpetuities. The future interests created by the trust are not vested in any particular individuals, but in the those classes of beneficiaries. The interests were created at the time of the fathers death, and at that time, he had no grandchildren. Thus, because the trust creates successive life interests making it possible that the remainder interest could vest at a time in the future greater than lives in being (plus the period of gestation) plus 21 years, then the remainder interests created by the trust violate the rule against perpetuities. Under the common law, such a trust would be void ab initio, and the apartment building would devise to Aimee and Bonnie as tenants in common.

By virtue of 27 V.S.A. §501, however, Vermont has adopted the "wait-and-see" doctrine which rejects the strict enforcement of the rule and provides that the period of perpetuities be measured by actual rather than possible events. Under this doctrine, it is not possible to determine whether the trust will in fact violate the rule against perpetuities. Rather, it is possible that no further children, grandchildren or great-grandchildren will be born, and that the sole remaining beneficiaries under the father's will are Bonnie and Aimee's son. In that case, whoever of them is the sole remainderman would be entitled to receive the fee interest in the apartment building.

In addition, the terms of the father's trust could be enforceable because Vermont law prohibits a future beneficiary from collaterally attacking an unappealed probate decree. The trust was created by decree of the Probate Court upon the father's death. Any challenge to the trust as violating the rule against perpetuities was required to be made at that time, and since there is no evidence that the probate decree was challenged, and because the probate decree was not appealed on that or any other basis, the trust may be enforceable. Ransom v. Bebernitz, 172 Vt. 423 (2001).

1. The trust contains as its sole asset a six-unit apartment building, and requires that all income generated by the building to be paid to the beneficiaries with a present interest. At the time it is created, Aimee and Bonnie are the two beneficiaries of the trust. At that time, Aimee and Bonnie were each living in their own apartments in the building. To that extent, they each

benefitted equally from the trust. There is no indication that they received any additional income from operation of the apartment building.

From the time of her father's death, Bonnie is a beneficiary of the trust. She is entitled to a one-half share of the income from her father's trust. For the time she occupied an apartment in the building, she appeared to be receiving an equal share of the trust income, i.e. the use of an apartment. After Bonnie moved out of the apartment building on December 31, 1985, she no longer received a share of the trust income. Aimee as trustee did not send payments of any kind to her. She did not therefore receive trust income after leaving the apartment building. Aimee as trustee of her father's trust had a fiduciary obligation to the beneficiaries to ensure that they received their share of the trust income. A trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiaries. Since Aimee was not paying Bonnie an equal share of the trust income, Bonnie may have a claim for breach of trust against Aimee's estate. The death of a trustee does not bar inquiry into the trustee's management of a trust.

The elements of a claim for breach of fiduciary duty are (1) the existence of fiduciary relationship, (2) a breach of duty by the fiduciary, and (3) that the breach resulted in damage to the beneficiary or in a benefit to the fiduciary. In this instance, as trustee of their father's trust Aimee had a fiduciary duty to Bonnie. Second, since Aimee failed to pay any income to Bonnie for a period over 20 years, Aimee breached her fiduciary duty to Bonnie. Finally, since Aimee continued to benefit from the trust by living in the apartment she continued to receive income and benefit from the trust. Moreover, to the extent there was additional income generated by the trust that was not distributed to Bonnie, Bonnie has suffered damages. Bonnie therefore has a claim for breach of trust against Aimee.

Bonnie's claim against Aimee's estate may be limited in two ways. Bonnie has known that she was not receiving any income from her father's trust and that Aimee continued to receive income or benefit from the trust. Her claim against Aimee therefore accrued shortly after she moved out of the apartment building. There is a general six years statute of limitations which applies to all civil actions, and which applies to Bonnie's claim for breach of trust against Aimee. Since Aimee had an obligation to pay income from the trust to Bonnie periodically, a new cause of action accrued on each missed payment. Bonnie is therefore entitled to make a claim for breach of trust, but her damages will be limited to the past six years and not for the full twenty years since she moved out of the apartment.

Bonnie's claim for breach of trust may be limited in a second way. Since Aimee has passed away, Bonnie's her claim must be made against Aimee's estate. Since Aimee has a child under the age of seven 14 V.S.A. §405 requires that an allowance be made for the necessary maintenance of the child until the child reaches the age of seven. This allowance must be made before any distribution to heirs, devisees, legatees or any payments made to creditors.

2. When Aimee was married, her husband, Carl, gained a vested remainder interest subject to complete defeasement in the trust. The remainder interest is created when Carl, upon his marriage to Aimee, becomes a legal heir to Aimee and any of their children. The remainder

interest is vested because the only thing that must occur for the interest to become a present possessory interest is the death of the preceding interests.

Upon Aimee's death in 2006, Carl's interest in the trust remains unchanged. Aimee is survived by her sister, her son and her husband. Aimee's beneficial interest in the trust terminates upon her death and Bonnie is then the sole income beneficiary of the trust. To that extent, Carl and his son's right to occupy an apartment as a share of the trust income terminates on Aimee's death. Carl has no responsibilities to Bonnie or the trust.
Upon Aimee's death, Carl was the sole beneficiary of Aimee's will. Any property belonging to Aimee passes to Carl by virtue of her will.

3. Dan claims to be Aimee and Bonnie's sister. After discovering the trust, he has written to Aimee and Bonnie and requested that he share in the trust income. The will creating the trust identifies the beneficiaries as "his children." It is clear, however, that Dan was an illegitmate child of Aimee's and Bonnie's father as he was not married to Dan's mother at the time he was born. It is not known, however, whether Dan was known to the father. Under the common law, even if Dan were able to establish his paternity, Dan would not have been entitled to inherit from the father unless he was specifically named in the will.

In Vermont, 14 V.S.A. §553 establishes the right to inheritance of an illegitimate child. Under §553, an illegitimate child principally inherits through his mother. An illegitimate child may, however, inherit through his father under two circumstances: 1. If the child's parentage is established by order of the family court in accordance with 15 V.S.A. §306, or 2. if the father open and notoriously claims the child to be his own. In this instance, there is no information or evidence that Dan's parentage was either established by the court, or was claimed by the father as his son. Dan is, therefore, not entitled to a share of the income of the father trust.

4. Assuming that Carl had pre-deceased Aimee and their daughter, the Son is a legatee and/or devisee along with his sister since she survived her mother by more than 30 days. Since the daughter was only sixteen years old, we can assume that she died intestate, i.e. without a will. Under Vermont's general rules of descent, 14 V.S.A. §551, the assets that were bequeathed and/or devised to the Daughter through her mother's will pass upon her death to the Son.

Under the trust, the Son has no right to receive any income, but has a vested remainder interest subject to complete defeasement that will become a present interest upon Bonnie's death. At that time, he will be entitled to receive his share of the income of the apartment building together with any of Bonnie's children. If Bonnie has no children, then the Son will be the sole income beneficiary of the trust.

MODEL ANSWER - QUESTION IV - JULY 2006

(1) Harry may have a claim of negligent inspection against Ian for failure to discover the potential defect in the curtain drain around the outside of Harry's home. In order to make out a prima facie case against Ian, Harry would need to prove by a preponderance of the evidence that Ian owed a duty of care to Harry; the degree of care required of a certified home inspector; that

Ian failed to exercise the requisite degree of care in inspecting the house, and that this failure was the actual and proximate cause of an injury to Harry.

To Whom Duty Owed. Even though the Bank required that the home be inspected prior to lending Harry the money, and even though the report was delivered to the Bank, Ian owed a duty of care to Harry (perhpas as well to the Bank). Harry retained Ian, and paid Ian, and so there is plainly a basis upon which to conclude that Ian owed Harry a duty. In any event, it was reasonably forseeable to Ian that Harry would rely upon his work as a certified inspector, so it should be found that Ian owed Harry a duty.

Standard of Care. As Ian was hired as a nationally certified expert, he will be held to a higher standard of care then a "reasonable person"might otherwise be required to possess in these circumstances. Harry will need expert testimony to establish the appropriate level of care that was required of Ian in inspecting the house. This expert would need to establish the appropriate professional standard to be applied to certified home inspectors and whether Ian satisfied this standard of care.

Breach of Duty. Harry would need to prove that Ian's inspection did not satisfy the standard of care when he failed to identify the lack of a curtain drain. This, too, would likely implicate expert testimony to establish that a certified home inspector should test for the presence of a working curtain drain, and should report his findings on the subject in his report.

Proximate Cause. Next, Harry would need to show that Ian's negligence was the direct and proximate cause of Harry's injury. In other words, Harry need prove by a preponderance of the evidence that the basement would not have flooded but for the failure to install a proper curtain drain.. Indeed, Harry would need to prove that the curtain drain was not actually installed. Harry will also need to prove that a proper inspection would have uncovered this defect. This will likely require expert testimony.

Damages. Finally, Harry would need to prove by a preponderance of the evidence that he suffered actual damages as a result of the negligent inspection. These damages are detailed below.

(2) Defenses to this claim would include comparative negligence as Harry accompanied Ian on the inspection tour. Pursuant to Vermont's modified comparative negligence law, Ian would need to show that Harry was at least 51% negligent in order to avoid any liability on this claim. If Harry is less than 51% negligent in causing the problem, then his ultimate recovery is reduced by his percentage of comparative negligence. However, it is unlikely that Ian would prevail in this situation as he is the expert, not Harry and a flooded basement is unlikely to be an open and obvious defect so as to allow for a successful comparative negligence defense.

A similar analysis would apply to a claim of assumption of the risk. How was Harry to voluntarily assume a risk of which he has no knowledge? Other obvious defenses as raised above are that he did meet the professional requirements as an expert home inspector and rely upon the standards set forth in these industry standards.

(3) Harry can recover damages for the damage to his property and the diminution in value of his home due to the basement flooding due to the insufficient curtain drain. These damages would be the replacement cost of the items damaged in the basement during the flooding. It is unlikely that he will be awarded lost business opportunities as it is a new business with no track record for earnings.

(4) In order to appeal the lister's increase of Harry's assessment, Harry needs to file an appeal with the Board of Assessors. He may then appeal their decision to the Board of Civil Authority in South Bumpkin within 15 days. Following this decision, Harry has the right to appeal to the Superior Court and ultimately to the Vermont Supreme Court relative to his assessment. There are two grounds upon which an appeal may be based: (1) that the property was appraised at more than fair market value; or (2) that it was appraised more than comparable properties. Harry should argue that his assessment must be based upon the fair market value of his house as of April 1. The best evidence of that fair market value is the recent sale price of his home when he bought it. Harry may also argue that, as of April 1, his house had sustained flood damage that detracts from the value of the home and, therefore, his property tax bill should go down. Harry should also argue that his houses similar to Sid's and therefore his property tax bill should be similar to Sid's assessment not twice as much. This constitutes a comparative analysis.

(5) The reviewing bodies will give deference to the lister's assessment if it is based upon a fair market value analysis. Errors in the lister's assessment might include the failure to consider the recent sale price and the failure to consider the condition of the premises on the appraisal date. Harry has the burden of proof and the burden of production to show that a comparative analysis should result in a lower assessment.

MODEL ANSWER - QUESTION V - JULY 2006

1) Charly's options are to file for relief under Chapter 7 or Chapter 13 of the Bankruptcy Code. Chapter 7 would provide a process for a court-appointed trustee to liquidate Charly's non-exempt assets. Charly could obtain a discharge for the debts that could not be paid. Unless he can negotiate a reaffirmation agreement with ABC Bank or cure his default under the mortgage, however, the Bank could proceed with a foreclosure of Charly's house. Vermont provides an exemption for homesteads of $75,000.00 under 27 VSA § 101. This exemption applies only to the debtor's equity. *Mercier v. Partlow*, 149 Vt. 523 (1988). The state exemption, however, does not prevent the foreclosure of purchase money mortgages.

If Charly wants to save his house he may need to file a Chapter 13 reorganization plan to avoid foreclosure. Under Chapter 13, Charly could propose a plan to pay the past due mortgage amounts provided that he kept current future payments due to the Bank. As part of any Chapter 13 plan, however, Charly would have to make payments to his creditors in an amount approved by the Court under the plan. He could not simply discharge his other debts. Charly could qualify for Chapter 13 if his new job would provide him with enough regular income to make the payments required under the plan. The Court would require that Charly provide his unsecured creditors with payments that would be at least equal to the distribution they would receive in a Chapter 7. Charly would have to commit to paying left over disposable income to his creditors for the life of the plan in order to receive a discharge of any portion of his other debts not paid under the plan. Charly's plan would require payments for three years if his income is less than the median income in the State of Vermont, and five years if it is more. Because Charly's income is calculated on the basis of his salary for the six months preceding his bankruptcy filing, Charly likely would qualify for a three-year plan.

2) Under the Bankruptcy Act of 2005, Charly must obtain credit counseling from an approved agency sometime during the 180 days before filing. See Section 109(h). Charly would not qualify for the exception, which allows an immediate filing (to be followed by the counseling) to deal with emergencies, such as the final completion of the foreclosure process. Charly would also have to pay a filing fee and provide his most recent income tax returns.

3) Section 547 of the Bankruptcy Code regulates preferential transfers. Charly's sister is considered an "insider" under the Code. The Code allows the bankruptcy trustee in Chapter 7 to avoid a transfer to an insider for a debt that is made while the debtor is insolvent in the year preceding the filing, if the effect of the transfer was to allow that insider to recover more than would be paid in a bankruptcy. In addition, under Chapter 13, the Court will confirm a plan only if the payments to unsecured creditors are at least the amount that would be paid them in a Chapter 7 liquidation. Section 1325(4). Because a Chapter 7 Trustee could avoid this payment and redistribute the money to Charly's unsecured creditors, Charly's Chapter 13 plan would have to provide payments to unsecured creditors in at least this amount. If Charly made a filing under Chapter 7, the trustee would likely demand repayment of the money by Charly's sister or commence a preference action against her.

4) Hometown Hospital has filed its financing statement in the correct place. UCC filings for collateral other than fixtures or timbers should be with the Vermont Secretary of State. 9A V.S.A. §9-501. Nevertheless, Consumer Finance Company has a perfected security interest in the television set that takes priority over any claim of the hospital. Under the UCC, Consumer Finance Company's secured interest in the television was created when it financed the purchase because the television qualifies as a consumer good. Section 9-309. Filing is not required to perfect a purchase money security interest in consumer goods. Assuming that the value of the television is less than the amount owed to Consumer Finance Company, Hometown Hospital could not obtain any recovery as a second secured party in the television.

Hometown Hospital could not successfully claim a security interest in the money Charly transferred to his sister. Under Section 9-313 of the UCC, a party must take possession of money to acquire a security interest in the money.

The financing statement does not give Hometown Hospital an interest in Charly's home. Hometown Hospital has a valid financing statement, but the statement has not encumbered any collateral to secure its position. Hometown Hospital will be an unsecured creditor.

National Credit Card has no security interest, and will be an unsecured creditor. ABC Bank has a first mortgage security interest in Charly's home.

MODEL ANSWER - QUESTION VI - JULY 2006

1) Several different forms of business organization exist in Vermont, including:

a) Sole proprietorship;

b) Partnership: general partnership, limited partnership, and limited liability partnership;

c) Limited Liability Company

d) Corporation

When selecting the form of business organization, the decision requires consideration and analysis of several factors, with special emphasis upon the goals and objectives of the investors; the factors to be considered include (1) control and management of the new business enterprise, (2) the cost and complexity of establishing the business enterprise and continuing its operation, (3) transferability (or not) of ownership, (4) owner/investor liability for acts and actions of the business enterprise and of the other partners or members, and (5) income tax considerations. Also, it is important to remember who/whose interest you represent, and to recognize that the form of organization chosen may benefit or be more advantageous to one party than the other party.

The factors which have been identified by Peter and Cliff as being of particular importance to them include the following:

(1) Limited liability for the acts of the business; Peter wants no liability for the acts of the business. Not specifically mentioned, but important to Cliff, will be consideration of the opportunity to limit Cliff's liability.

(2) Control of operation and management of the business enterprise; Peter does not want to be involved in the operation of the business;

(3) In exchange for Peter's investment, he will receive a share of the profits.

Other considerations not mentioned by Cliff or Peter which may also be important to consider include tax considerations, continuation of the business following death of one of the investors, and the probability or likelihood of expansion or growth.

There are several forms of business organization which exist in Vermont which address the goals and objectives identified by Cliff and Peter. These include a limited partnership, a limited liability partnership, a limited liability company and Corporation. Each of these forms of business organization will be discussed below.

The form(s) of business organization which should be rejected because they do not address in a meaningful way the requirements of Peter and Cliff include: Sole proprietorship (as Peter would not be involved in the business or share in the profits), General Partnership (the liability of the general partners is unlimited, each partner could be involved in the management & operation & control of the business) and a regular (C) corporation.

Peter and Cliff have the following options to consider: A limited liability company, a Limited Liability Partnership, a limited partnership and Sub-chapter S or close Corporation.

The Limited Liability Company is a relatively new form of business organization in Vermont, and it is one of the preferred forms of business organization for Peter and Cliff, in my opinion. Peter's objectives would be addressed, in that he would not incur liability for acts of the business beyond his investment & the assets of the business; in the event of loss or liability he would not lose more than his investment in the business. The Operating Agreement to be prepared among the members would provide that Cliff is the manager of the business, so Peter would not be involved in the operation of the business, and Peter would receive a share of the profits. For tax purposes, the income/profits would be pass through, taxed to the individuals, in the manner similar to a partnership. Unlike a Limited Partnership, as a member of the Limited Liability Company, Cliff would also benefit by being afforded limited liability, except for his own personal actions, whereby under most circumstances his liability would be limited to his investment in the company & the company assets.

A second option would be a Limited Liability Partnership. A Limited Liability Partnership combines the benefits of a limited liability company with those of a limited partnership. Cliff would be the general partner responsible for management and operation of the company, But unlike a limited partnership whereby Cliff as general partner would have full personal liability for all debts and obligations of the business, a Limited Liability Partnership would afford to Cliff limited liability; this is a benefit to Cliff. A potential disadvantage for Cliff may exist, however, when compared to a limited partnership with respect to the issue of control and participation in management, to wit: In a limited partnership, Peter cannot as a Limited Partner participate in management, and if Peter does participate in management, he would become a general partner, lose limited liability and be personally liable as a partner. It may be easier for Cliff to keep Peter "in line" with respect to management (i.e. Out of management), in a limited partnership than in a Limited Liability Partnership. In the limited liability partnership, Peter will share in the profits; taxation would be pass through. Cliff would handle the management. Peter's liability would be limited to his investment in the Limited Partnership, & to the Limited Partnership assets.

A third option would be a Limited Partnership, whereby Cliff would be the general partner personally liable for the debts and liabilities of the partnership, Peter would be a limited partner whose liability is limited to his investment. Cliff would handle the management and operation of the business; Peter could have no part in the management; otherwise, he would lose or risk losing the benefit of limited liability. To establish a limited partnership it would be necessary to file with the Secretary of State a Certificate of Limited Partnership, and to comply with all other statutory requirements. They would both benefit from pass through taxation.

A fourth option would be a Sub-chapter S Corporation or close corporation.. However, even though a close corporation could address the stated goals and objectives of the business investors, and even though a sub chapter s corporation could provide pass through taxation similar to a partnership and a limited liability company, a corporation is a more complex and expensive form of business organization. A corporation is more expensive and complex to organize, operate and manage, and is not the best choice for Cliff and Peter based on the information provided.

2) Debbie should not be allowed to testify about Cliff's offer to help her pay the claim. The Vermont Rules of Evidence provide that evidence of furnishing, offering or promising to furnish a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for the claim or the amount of the claim. V.R.E. 408. Debbie will only be able to testify about Cliff's offer if she can establish that the testimony is for some purpose other than to prove the validity or amount of the claim. As Cliff made the offer prior to Debbie filing suit against him it is possible the court will find that V.R.E. 408 does not apply.

Debbie should also not be allowed to testify about the changes Cliff made to his investigation procedures after he heard about Debbie's problem with her employee. The Vermont Rules of Evidence provide that subsequent remedial measures are not admissible to prove negligence or culpable conduct. V.R.E. 407. Debbie will only be allowed to put this information into evidence if she can show she is offering it for a purpose other than to show negligence or culpable conduct, such as to prove ownership, control or feasibility of precautionary measures, if controverted, or impeachment.

Hearsay is defined in the Vermont Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." V.R.E. 801(c). V.R.E. 802 provides that "hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute." Debbie plans to testify to statements allegedly made by Cliff to the employee and repeated by the employee to Debbie. This constitutes hearsay within hearsay and must be analyzed under V.R.E. 805.

Rule 805 provides that "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Cliff's statement to the employee is not hearsay as Cliff is a party and his statement is an admission by a party-opponent. V.R.E. 801 provides that a statement is not hearsay if it is offered against a party and the statement is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Cliff's statement also may be non-hearsay on the grounds that it is not being offered for its truth.

The second part of the combined statement is the employee's statement to Debbie. The employee is not a party so Rule 801 doesn't apply. If the employee is available as a witness, her statement to Debbie cannot come in as no exceptions under Rule 803 apply. However, if the employee is "unavailable" as defined by Rule 804(a), the statement might come in. For example, if the employee has died or is unable to be present because of physical or mental illness or infirmity, her statement may come in under one of the hearsay exceptions of Rule 804. Some of the exceptions that could apply include if she made the statement in a deposition (Rule 804(b)(1) or if the statement is considered to be against the employee's interest (Rule 804(b)(3).

The fact that Cliff was convicted of petit larceny twenty-five years ago should not come out at the trial. The Vermont Rules of Evidence at V.R.E. 609 provide that evidence of conviction of a crime may be admissible under certain circumstances. The statutory elements of the crime must involve untruthfulness or falsification or the crime must be a felony in Vermont or punishable by death or imprisonment in excess of one year under the law of the jurisdiction where the conviction took place. In either case the court must determine that the probative value of the evidence substantially outweighs its prejudicial effect. Rule 609(a). The rule further provides that evidence of conviction is not admissible if a period of more than 15 years has elapsed since the date of the conviction. Rule 609(b). The crime in this case, petit larceny, does not involve untruthfulness as contemplated by the Rule (see Reporter's notes) and is not a felony. It would therefore not be admissible even if it were more recent. In this case, as the conviction happened twenty-five years ago it will also be inadmissible for that reason.

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