

## **MODEL ANSWER - QUESTION I - JULY 2008**

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

## **MODEL ANSWER - QUESTION II - JULY 2008**

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## **MODEL ANSWER - QUESTION III - JULY 2008**

The jurisdictional issue in this case is governed by Vermont's version of the Uniform Child Custody Jurisdiction Act ("UCCJA"). 15 VSA §1031 et seq. (Vermont has not adopted the more modern Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which is in effect in most, but not all, other states.) Under the UCCJA, physical presence of the child in Vermont, while desirable, is not a prerequisite for jurisdiction to determine the child's custody. 15 VSA §1032 (c). The court should consider each of several potential bases for its jurisdiction.

- a. First, the Vermont Family Court would have jurisdiction if Vermont was considered Kate's home state at the time Hal filed his motion, or if it had been Kate's home state within six months of that time if she was removed from the state. *Id.* §1032(a)(1). The "home state" is generally the state in which the child lived in the period immediately preceding the time in question for at least six consecutive months. Vermont is not Kate's home state since she hasn't lived here for nearly a year and a half, so this section does not support the Vermont Family Court's asserting jurisdiction.
- b. Second, the Vermont Family Court may have jurisdiction if it is in the best interests of the child that a Vermont court assume jurisdiction because the child and her parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships. *Id.* 1032(a)(2). This section might support the Vermont court's assertion of jurisdiction. In addition to Kate's father, her grandfather, who was a significant care provider for her, her brother, and many of her cousins and playmates live in Vermont. In addition, Kate has continued to spend considerable chunks of time in Vermont. By contrast, there may not be much evidence in New York at this point.
- c. Third, the Vermont court could assert jurisdiction if Kate were physically in Vermont and had been abandoned or otherwise needed emergency protection. *Id.* 1032(a)(3). Nothing in the fact pattern suggests that this provision applies here.
- d. Finally, the Vermont court would have jurisdiction if it appears that no other state would have jurisdiction considering factors substantially in accord with the above three, or another state has declined to exercise jurisdiction in deference to Vermont. *Id.* 1032(a)(4). Kate has not lived in any other state for six consecutive months, so no other state qualifies as her "home state." Nor

is she in need of emergency protection in some other state. If the court concludes that there is no other state with which Kate and at least one parent have a substantial connection, and in which there is available substantial evidence concerning her present or future care, protection, training and personal relationships, then Vermont could assume jurisdiction pursuant to this subsection. In order to decide whether this section applies, we would need to know more about what substantial evidence Winona believes is available in New York in connection with Kate's present or future care, protection, training, and personal relationships.

Even if the Vermont Court *can* assert jurisdiction pursuant to section 1032, it may decline to exercise that jurisdiction if it finds that Vermont is an inconvenient forum and the court of another state would be more appropriate. In determining whether Vermont is an inconvenient forum, the court should take into account the following factors, among others: if another state is or recently was the child's home state; if another state has a closer connection with the child and his family or with the child and one or more of the contestants; if substantial evidence concerning the child's present or future care is more readily available in another state; if the parties have agreed to another forum that is no less appropriate; and if the exercise of jurisdiction by a court of this state would contravene the purposes of the UCCJA.

## Question 2

Assuming the court decides to assert jurisdiction, it must consider first whether there has been a real, substantial and unanticipated change of circumstances, 15 V.S.A. § 668, and, if so, whether a modification would be in Kate's best interests. 15 V.S.A. §665.

### *a. Real, Substantial, and Unanticipated Change of Circumstances*

*Before* the court can actually analyze the best interests of the child, it must determine whether there has been a real, substantial and unanticipated change of circumstances. The fact that the initial order was based on a stipulation of the parties doesn't change this fact. The question is whether circumstances have changed in a substantial way that was not anticipated at the time of divorce.

Winona's move doesn't by itself automatically trigger a finding of changed circumstances; on the other hand, the fact that Winona is the custodial parent of Kate doesn't *preclude* the court from finding changed circumstances. Hawkes v. Spence, 2005 VT 57. In this case, the Court may conclude that when it issued its final order assigning physical rights and responsibilities for Kate to Winona, everyone understood that they would be living in New Hampshire, near Winona's parents, and close to a premiere school for the deaf. That fact was part of the rationale for assigning physical rights and responsibilities to Winona. Winona's subsequent decisions to move from there, and to a location that was not near any specialized school, could be considered a real, substantial, and unanticipated change of circumstances.

On the other hand, Newtown is actually *closer* to Middleburg than the New Hampshire home, and Winona's move has not made it harder for Kate to see Hal pursuant to the parent-child contact schedule. That fact may point against a finding of real, substantial, and unanticipated change of circumstances. Id.

*b. Best Interests*

If the Court concludes that a real, substantial and unanticipated change of circumstances has occurred, it must re-evaluate Kate's best interests pursuant to a set of factors outlined in Vermont statutes. 15 VSA §665.

Absent Winona's agreement, the Court cannot order shared physical rights and responsibilities. 15 VSA §665(a) and Cabot v. Cabot, 166 Vt. 485 (1997). Accordingly, in evaluating Hal's motion, the Court will have to decide whether to award physical rights and responsibilities to Hal or to Winona.

Despite Winona's belief that a young girl should be with her mother, the Court cannot and will not apply any preference for Winona on the basis that she is female, or that Kate is female. 15 VSA § 665(c); Hubbell v. Hubbell, 167 Vt. 153 (1997).

Each of the relevant factors for consideration is analyzed below:

- Kate's relationship with each parent and ability and disposition of each parent to provide child with love, affection and guidance (15 VSA §665(b)(1)):

The Court will have to evaluate this factor based on the evidence introduced at the hearing. Based on the facts provided, we don't have a basis for concluding that this factor supports one parent over the other.

- Each parent's ability and disposition to assure that Kate receives adequate food, clothing, medical care, other material needs and safe environment (15 VSA §665(b)(2)):

The Court will have to evaluate this factor based on the evidence introduced at the hearing. Based on the facts provided, we don't have a basis for concluding that this factor supports one parent over the other.

- Each parent's ability to meet Kate's present and future developmental needs (15 VSA §665(b)(3)):

In evaluating this factor, the Court should take particular care to determine whether placement with either parent would be advantageous with respect to the particular schooling needs Kate has, and whether either parent is better equipped to ensure that Kate is fully integrated into a broader community. Based on the facts presented, we don't have a basis for concluding that this factor supports one parent over the other.

- The quality of Kate's adjustment to her present housing, school and community and potential effect of any change (15 VSA §665(b)(4)):

Given that Kate just moved to New York, this factor is not likely to have a significant impact. She's not likely so well-entrenched in her community in New York that moving from that community would be unduly stressful or difficult for her.

- The ability and disposition of each parent to foster a positive relationship and frequent and continuing contact between Kate and the other parent (15 VSA §665(b)(5)):

The Court will have to evaluate this factor based on the evidence introduced at the hearing. Based on the facts provided, we don't have a basis for concluding that this factor supports one parent over the other.

- The quality of Kate's relationship with her primary care provider: (21 VSA §665(b)(6)):

Winona is clearly Kate's primary care provider. This factor is entitled to great weight, although it is not determinative of the issue. The weight to be given to maintaining Kate's relationship with Winona, her primary care provider, will depend on the quality of Kate's relationship with Winona, as well as Kate's age and development. The question is whether loosening the bond between Kate and her mother would be detrimental to Kate's physical and mental well-being, or to Kate's need for a stable and secure environment. Harris v. Harris, 162 Vt. 174 (1994).

- Kate's relationships with any other person who may significantly affect her 15 VSA §665(b)(7)):

This factor may favor Hal since he can argue that Gary, Chip, and lots of cousins, are all important people in Kate's life. Living with him will enable her to be closer to these people. On the other hand, the parent-child contact schedule may be generous enough to protect these other relationships

- Evidence of abuse (21 VSA 665(b)(9)):

There is no evidence of any abuse in this case.

The Court will weigh the above factors in determining whether Kate's best interests would be served by awarding Hal, rather than Winona, physical rights and responsibilities for Kate.

#### **MODEL ANSWER - QUESTION IV - JULY 2008**

1. Patricia should be successful in reversing the recent amendment to the articles of incorporation of XYZ Corporation. The Board of Directors lacked the ability to give Aaron 500 shares of preferred stock as the articles of incorporation only allowed for 100 shares of preferred stock which have already been issued to Patricia and other shareholders. See 11A V.S.A. § 2.02(b)(2(D)); §601. Therefore, the subsequent vote in favor of the amendment is null and void as the preferred stock voting was illegally issued to Aaron. Peter should be able to successfully challenge this action by the Board. 11A V.S.A. §3.04(b)(1).

2. Patricia will be successful in preventing XYZ Corporation from being held liable for the contract with Refusnik Inc as the corporation was founded for a more limited purpose. 11A V.S.A. §3.01(a) ("Every corporation incorporated under this title has the purpose of

engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation." See also 11A V.S.A. § 2.02(b)(2)(A) The contract with Refusnik Inc is too far removed from any business purposes as specifically set forth in the articles of incorporation so as to make this an "ultra vires" act subject to a shareholder suit to enjoin the illegal action of the corporation. 11A V.S.A. §3.04(b)(1).

3. One of the primary purposes of a limited liability partnership is to protect the personal assets of the limited partners. In a Limited Liability partnership, the limited partners have limited liability for losses for the business up to the amount of their capital investment. There are certain situations in which such limited liability would not apply. In the instant case, Patricia may be held personally liable for Cathy's contract even though she is a limited partner in the limited partnership. As Patricia's surname (Paine) is used in the name of the limited partnership, he will be treated as a general partner of the limited partnership with full legal liability for the contracts of the limited partnership involving third parties who do not know that Patricia is a limited partner. 11 V.S.A. §1395. As Aaron is acting in furtherance of the partnership's business interests at the time of the contract, both Aaron and Patricia are personally liable as general partners of the Limited Partnership for this contract even though Patricia objects to it at the time it is made.

4. While the corporation has the power to dissolve voluntarily, 11A V.S.A. §14.02, it must be approved by both the board of directors and the shareholders of the corporation. 11A V.S.A. §14.02(b)(1)). Given Aaron's position it may be difficult for Patricia to get the board of directors to agree to this dissolution. Board of Directors approval is required, unless there is a conflict of interest which does not readily appear in the instant facts. 11A V.S.A. §12.02(b)(1). If the amendment to the articles of incorporation are reversed, then Patricia would have a majority voting power and could require dissolution of the corporation, by electing supportive directors at the next board of directors meeting in which such elections are to be held. If the amendments to the articles of incorporation are not reversed, then Patricia would have dissenters rights and be able to demand fair market value for his shares. 11A V.S.A. §13.02(a)(4). Patricia could also seek judicial dissolution arguing that the "directors or those in control of the corporation has acted... in a manner that is illegal, oppressive or fraudulent." 11A V.S.A. §14.30(B). Given Aaron's and the Board's illegal acts, Patricia should be able to convince a court to dissolve the corporation.

5. Patricia acting either as a general or limited partner may seek dissolution of the limited partnership by court decree if Aaron refuses to dissolve the limited partnership. 11 V.S.A. §§ 1399, 1400. Patricia would have a more difficult time seeking judicial dissolution of the limited partnership as there is no evidence of illegal or oppressive actions by Aaron in the role of general partner of the limited partnership, unlike his actions as president of XYZ Corporation. While it is debatable as to the wisdom of hiring a cleaning service, the business

judgment rule would apply and it is likely that a court would find the contract not unreasonable and not require judicial dissolution over a minor cleaning contract.

### **MODEL ANSWER - QUESTION V - JULY 2008**

The question asks for an assessment of admissibility of various pieces of evidence. For most of these questions, it is necessary to discuss three things: (i) is the evidence relevant?; (ii) is the evidence hearsay; and (iii) if the evidence does constitute hearsay, are there any exceptions that would render the statement admissible, or is there a privilege that can be raised.

A. **BURNER'S EXPERT TESTIMONY.** The main question for Burner's testimony concerns whether it satisfies the requirement for expert testimony pursuant to V.R.E. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), as interpreted most recently by the Vermont Supreme Court in USGEN New England, Inc. v. Town of Rockingham, 2004 Vt. 90 (2004) and 985 Associates v. Daewoo Electronics America, 2008 Vt. 14 (Feb 8, 2008).

Under Rule 702, an expert's testimony must be (1) based upon sufficient facts or data; (2) produced using reliable principles and methods; and (3) produced by applying the principles and methods reliably to the facts of the case. As stated in Daubert, the evidence in question must be both relevant and reliable.

Burner's report is undeniably relevant because it goes to the major issue in the case – mainly, whether POWER's and DEVELOPER's negligence caused the fire. The more difficult question is whether, by relying purely on news accounts of the fire and DEVELOPER's specification sheets, the methodology underlying the report was inherently unreliable.

The fact that the primary source of evidence concerning the specific fire arose from newspaper reports rather than anyone with expertise (e.g., a fire marshall) weighs in favor of unreliability, but the neighbors' attorney will likely argue that Burner's reliance on this source only goes to credibility, and should not be excluded on its face. Review of the specification sheets may be a legitimate source for the report, but only if Burner is sufficiently qualified (i.e., has the credentials to draw conclusions regarding combustion from reviewing manufacturer specifications). Given that he has a PhD in electrical engineering, he will be able to draw conclusions from the specification sheets, and that this skill will compensate for his relatively short time (one year of experience) as a fire investigator.

B. **ACE CHEMISTRY'S EMAIL.** This email comes from a witness who will likely testify in court, either at the request of POWER or as a result of a deposition notice. Ace's email and testimony will undeniably be relevant because they suggest that something other than clean wood was being burned at the Vermont plant. Though the email itself is hearsay, it may qualify as a business record in the event that such investigations were made at or near the time by Ace if it was the regular practice of POWER to prepare such reports in the ordinary course of business (e.g., for liability purposes following a fire); however, an exception for business records is where the circumstances indicate some lack of trustworthiness, which may be a problem here given that the report was prepared after litigation commenced. VRE 803(6).

The main question here concerns attorney client privilege and work product doctrine. Under VRE 502, a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, including representatives of the client (which can include any person who, while acting in the scope of employment for the client, makes a confidential communication) and the client's attorney. A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the representation.

It appears as though Ace's inclusion of you on the "cc" line of the email was intended to make the document subject to the attorney client privilege doctrine vis-à-vis POWER, although you would want to be able to establish that (i) Ace was retained by POWER, and (ii) Ace knew that you were serving as POWER's attorney for the litigation). The key under VRE 502 is whether Ace intended that it not be disclosed to third persons other than those to whom the disclosure was made in furtherance of rendition of professional legal services to the client.

A related question concerns the fact that DEVELOPER's president and general counsel were also copied on the email. It is not clear whether Ace mistakenly thought that you were serving as counsel to both POWER and DEVELOPER, but regardless, it appears that the matter is one of common interest to the two parties related to a pending action for purposes of Rule 502(b)(3), and would therefore be insulated from a waiver argument.

Work product is a better doctrine to exclude the document, since it protects the mental impressions, conclusions, opinions, and legal theories, but also the factual and deliberative materials used to create such an impression. The Vermont Supreme Court has stated that the discovery rule – VRCR 26(b)(3) – is co-extensive with the common law work product privilege for evidentiary purposes. In re PCB File No. 92.27, 167 Vt. 379 (1998)). The work product doctrine may offer broader protection to Ace's report, provided that the neighbors cannot make a showing of necessity to obtain the material.

C. CEO'S FLAME-MAIL. As a threshold matter, this evidence may be of questionable relevance pursuant to VRE 401, i.e., it is not clear whether the email is being introduced to prove anything in particular, although it could arguably suggest a cover-up. Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. You may want to challenge the statement in and of itself as unfairly prejudicial under VRE 403; CEO was blowing off some steam, and this statement won't help the jury get to the heart of the issue in the case.

Since the fact pattern suggests that CEO is unavailable to testify, this piece of evidence is hearsay. More importantly, it falls within the exception of a statement against interest (insofar as it suggests that burning of industrial debris took place at Shrewsbury) by a former employee of POWER, in which case it would not be hearsay at all pursuant to VRE 804(b)(3). To apply, we would need to show that CEO's statement was so far contrary to his pecuniary interest, or so far tended to subject him to civil liability, that a reasonable man in his position would not have made the statement unless he believed it to be true.

The avenue that may be available to you is the spousal privilege in VRE 504, which would allow Wendy to claim that the email was made confidentially during the marriage, albeit while both were employed at POWER. The privilege protects from disclosure any confidential communication between the person invoking the privilege and his/her spouse when made during the marriage. There is no indication of any criminal exception that would render the privilege unavailable to Wendy. The only remaining question was whether the use of POWER's email system can be considered "confidential," and this issue will likely require a more in depth investigation as to the customary practices and expectations concerning the use of email within POWER; however, given that the key for confidentiality under Rule 504(a) is that a communication not be intended for disclosure to any other person, there is a strong likelihood that Wendy could successfully invoke the privilege.

D. INSURANCE REPORT. "Relevant evidence" under Rule 401 is evidence that has any tendency to make the existing of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This statement, assuming proper authentication, is being offered to make an inference regarding the burning of industrial debris at the Shrewsburg plant, based on a past event at another POWER plant. Certainly, we can raise a relevance objection, but the plaintiffs are likely to argue that they are entitled to bring the evidence in to establish their case by circumstantial evidence. Much may depend on whether plaintiffs are successful getting around your attorney client privilege / work product arguments in Section B.

Even assuming the plaintiffs could surmount a relevance objection, this type of insurance-based evidence is normally inadmissible pursuant to VRE 411, except to show proof of agency, ownership, control, or bias / prejudice of a witness. None of those exceptions appear hear. except to prove habit, intent, causation, industry custom, and ownership, but not liability. See VRE 411.

Beyond Rule 411, VRE 407 renders inadmissible proof of subsequent remedial measures, which seems to be a core component of the statement in the adjustor's report. Given these rules, the evidence is inadmissible.

E. INDUSTRIAL DEBRIS BUSINESS PLAN. Without more, it seems relatively clear that the Industrial Debris plan is irrelevant, because it concerns the motives of a third party with no clear connection to POWER, VT, and would be prejudicial under Rule 403. Section F suggests, however, that Power's motives might be relevant insofar as there appears to have been a connection at least with POWER, CT, and bringing in the information could be sufficient, when combined with some of the other evidence in the other paragraphs, to establish a circumstantial case.

The evidence is also hearsay – it is being offered to prove that at least one third party was trying to sell industrial debris to power plants in New England, which the neighbors would like the judge or jury to infer as including POWER, VT (given what appears to have happened with POWER, CT).

While you would like to exclude the evidence as hearsay, the neighbors may try to argue that since the link was available from the CT Secretary of State's website it is, in effect, a public record (i.e., records, reports, or compilations in any form of a public office or agency setting forth information such as factual findings, or matters observed in cases where the agency has a duty to report).. But you can argue that the exception to the public record rule applies insofar as "the sources of information or other circumstances indicate lack of trustworthiness", because the agency did not actually prepare or necessarily review the report – they only added a link on their website to help visitors obtain additional corporate information. VRE 803(8)(B).

A strong argument can be made, however, that the business plan itself is a business record, independent of whether it qualifies as a public record, since such documents combine information prepared by a person with knowledge of a business, and completed in the regular course of business. VRE 803(6).

F. PENNY PURCHASER'S NOTES. Penny's notes are relevant insofar as they show that POWER CT was purchasing (or at least engaging in a dialogue to purchase) debris to be used as a fuel for the CT plant, which can then be used for the jury to make an inference concerning VT.

Because of Penny's inability to remember the meeting (i.e., she was unavailable for purposes of the hearsay rule), the pencil notes will be considered hearsay, especially insofar as the neighbors will offer the document to prove the meeting between Industrial Debris Ltd and POWER to sell industrial debris.

Two applicable exceptions may exist to the hearsay rule: recorded recollection, and business records. Remember that even though the recorded recollection could be read into the record, the exhibit itself could not be admitted unless you offer it at trial. This limitation does not apply to the business records rule, but the neighbors will have to establish that it was in the regular practice of POWER for Penny and others to keep pencil notes of such meetings. VRE 803(5) and (6).

### **MODEL ANSWER - QUESTION VI - JULY 2008**

Each of Harry's three statements should be separately evaluated pursuant to both the Fifth Amendment's prohibition upon the use of involuntary statements, and the Miranda rule, which requires a waiver of rights before interrogation of a person who is in custody.

Harry's statement on the telephone would no doubt be found to have been voluntarily made. He picked up the telephone and spoke without duress, when he could simply have refused to speak or have hung up the telephone.

His statement was made without a Miranda waiver, and therefore would be inadmissible if he was in custody and subjected to interrogation. Custody is present when a reasonable person

would feel that he or she was not free to leave. An argument could be made that Harry was in custody because the police had surrounded the house and he could not have freely left the house. However, it is not at all clear that he was aware of that fact.

Even if he is found to have been in custody, his statement will not be suppressed if he was not subjected to interrogation, which consists of words or conduct by the police which they could reasonably foresee would lead to an incriminating statement. The only question asked by the police was whether anyone else was hurt, so a strong argument can be made that there was no interrogation.

Harry's statement in the police cruiser was made without any interrogation, and therefore there will be no Miranda issue even though he clearly was in custody. Furthermore, there are no facts from which it could be argued that the statement was involuntary.

Finally, Harry's statements at the police station were the result of custodial interrogation, but he was apprised of his Miranda rights and waived them. There are no facts suggesting that his statements were involuntary, or that his waiver was involuntary. Harry did reference his earlier statements as a reason for talking with the police, so an argument could be made that if the earlier statements were inadmissible, this statement should be excluded as well, under the "cat out of the bag" doctrine.

The standard for whether a jury instruction should include one or more lesser included offenses is whether some rational view of the evidence would support the lesser included offense or offenses.

The defendant is charged with first degree murder, which requires murder with premeditation, or in the course of committing one of certain felonies, none of which are present here.

Second degree murder is a lesser included offense of first degree murder, and differs from it in that it does not require premeditation, and can be satisfied with proof of an intent to kill, or an intent to do great bodily harm, or of wanton disregard of the likelihood that one's actions will result in death or great bodily harm. Harry's statement to the police that he just wanted to scare the victim would support a claim that he did not intend to kill her, but rather acted with wanton

disregard of the likely result of his actions, and thus this lesser included offense should be included in the instructions.

Involuntary manslaughter requires proof that the defendant engaged in criminally negligent conduct resulting in death. Again, if the defendant argues that he simply fired in order to scare the victim, but not to kill her, an instruction on involuntary manslaughter should be given.

Finally, voluntary manslaughter requires proof that the defendant intended to cause death, but where his actions were mitigated by actual and adequate provocation. An argument could be made that Harry was provoked by his neighbor's thoughtless conduct, but a court is unlikely to find that a rational view of the evidence would support a finding that the provocation was adequate in light of the nature of the defendant's reaction.

Board of Bar Examiners

2418 Airport Road, Suite 2

Barre, VT 05641

TEL: (802) 828-3281

FAX: (802) 828-1695