

### **MODEL ANSWER - QUESTION I - JULY 2009**

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

### **MODEL ANSWER - QUESTION II - JULY 2009**

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### **MODEL ANSWER - QUESTION III - JULY 2009**

(1) Joinder of offenses is governed by Vt. R. Cr. P. 8. Offenses may be joined in a single information if either of two tests are met:

1. The offenses are of the same or similar character, even if not part of a single scheme or plan;  
or
2. Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

These offenses may not be joined because neither test is met. The license suspension charge is not of the same character as the burglary charges. Potentially, one could argue that, because Doug was arrested for DLS while transporting property allegedly stolen during the burglary, the offenses are part of a "single scheme or plan." However, the facts state that the burglary took place the night before Doug was arrested for DLS; there's little basis for tying the burglary to the DLS.

(2) Motions to suppress evidence on the grounds the evidence was obtained illegally must be raised prior to trial. Vt R. Cr. P. 12(b)(3). Doug's attorney should therefore file a motion in limine to challenge the lawfulness of the searches of Doug's person and/or car. Failure to file a timely motion may result in waiver. Rule 12(f).

(3) The officer should be permitted to testify about Andy's statement to Doug, but the issue is a close one.

Andy's statement implicates Doug in the burglary and thus is hearsay: an out-of-court statement offered to prove the truth of the matter asserted. V.R.E. 801. It is not admissible under V.R.E.

802, unless it satisfies an exception. Because Andy is beyond the reach of subpoena, he is an unavailable declarant. Thus, the exceptions in both Rules 803 (availability of declarant immaterial) and 804 (declarant unavailable) should be considered.

Several possible exceptions could be argued:

- excited utterance (Rule 803(2)). An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. V.R.E. 803(2). “The underlying rationale for the exception lies in the assumption that a person’s powers of reflection and fabrication will be suspended when she is subject to the excitement of a startling event, and any utterances she makes will be spontaneous and trustworthy.” *In re Estate of Peters*, 171 Vt. 381, 391, 765 A.2d 468, 476 (2000). “A statement does not necessarily need to be made immediately following an exciting event to fit within the excited utterance exception. The exception does require, however, that the excitement be “caused by the event or condition.” *State v. Lemay*, 180 Vt. 133, 908 A.2d 430 (2006) (quotation omitted). Here, the State can plausibly argue that the events leading up to the statement (the sudden stop of the car, the verbal fight, the fact that he ran off) show that Andy was startled by learning of the burglary of the jewelry store and was under the stress of that excitement when he made the statement. Doug’s attorney might argue that merely learning of the burglary is not the type of “event” covered under the rule; Andy didn’t actually observe the burglary. The facts, however, generally suggest that the statement is an excited utterance.
- Present-sense impression (Rule 803(1)). Under Rule 803(1), a “statement describing or explaining an event made while the declarant was perceiving the event or condition, or immediately thereafter” may be admissible. Here, Andy is not describing or explaining an event, so this exception does not apply.
- Mental, emotional, or physical condition. (Rule 803(3)). The statement does not qualify under the exception for then-existing mental, emotional, or physical condition. A “statement of the declarant’s then-existing state of mind, emotion, sensation, or physical condition” is not excluded under the hearsay rule. V.R.E. 803(3). However, the exception generally does not extend to “a statement of memory or belief to prove the fact remembered or believed.” The State is offering this statement to prove Andy’s belief that Doug robbed the store, not to prove Andy’s mental state.
- Statement against interest (Rule 804(b)(3)). The State might argue that Andy’s statement was a statement against his interest, because he was potentially exposed to liability of some kind for associating with Doug and traveling in the car with stolen property. This exception is unlikely to apply, however. Any potential liability for Andy is highly uncertain and speculative; he did not admit any involvement with the crime.

In sum, the statement probably satisfies the excited utterance exception to the hearsay rule, but does not satisfy any other exception.

Even if admissible as an excited utterance, however, the statement may be excluded because the prejudice to Doug outweighs its probative value. Rule 403. The statement would be offered to prove that Doug robbed the jewelry store. The statement was made by someone who was visibly angry at Doug. Also, Andy is not available to testify and the jury would have no information to assess why Andy believed Doug robbed the store, and how credible Andy's belief was. The court might exclude the statement under Rule 403 or admit it but allow the defendant to raise these concerns about the probative value of the statement.

A particularly good answer would point out that Andy's statement does not raise concerns under the Confrontation Clause. The Confrontation Clause bars admission of testimonial statements, where the defendant does not have the opportunity to confront the declarant. Non-testimonial statements, like this one, are subject to the traditional hearsay rules.

(4) The metal tool is admissible. The police officer had probable cause to arrest Doug for DLS and properly conducted a search incident to arrest and found the tool. A search incident to a valid arrest is an established exception to the warrant requirement. The leeway afforded to police to perform a search incident to arrest is somewhat more limited under the Vermont Constitution than under the federal constitution. *See State v. Neil*, 958 A.2d 1173 (Vt. 2008). The Vermont Supreme Court has held that, in the absence of exigent circumstances, the police needed a warrant to search a closed pouch found in a defendant's pocket as part of an otherwise valid search incident arrest. *See id.* Here, however, the pointed metal tool was not in a closed container and plainly represented a potential weapon. The officer properly removed and seized the tool.

(5) The watches are not admissible. The police officer did not have a warrant to search Doug's car and no exception to the warrant requirement applies here. The officer was not permitted to search the car as part of a search incident to arrest. *See State v. Bauder*, 181 Vt. 392, 924 A.2d 38, 2007 VT 16; *Arizona v. Gant*, 129 S. Ct. 1710 (2009). Doug was already handcuffed and in a police car, so there was no risk that Doug would obtain a weapon from or destroy evidence in his car. Moreover, there was no likelihood that the officer would find evidence related to the offense of arrest in the car. Doug was arrested for driving with his license suspended, and physical evidence in the car is not relevant to that offense. *See Arizona v. Gant*, 129 S. Ct. at 1719. Finally, even if the officer had probable cause to search the car for evidence of burglary, no exigent circumstances excused the officer's failure to obtain a warrant. The car was parked and the driver and only remaining occupant was handcuffed in the police car. The officer had time to obtain a warrant. *See State v. Bauder*, 181 Vt. at 407. The exclusionary rule applies in this situation, and the watches must be suppressed because they were found during an illegal search.

## MODEL ANSWER - QUESTION IV - JULY 2009

1. The will executed by Bob on behalf of Andrea is not effective. Although the Power of Attorney grants Bob authority over all of Andrea's affairs, Vermont does not recognize wills executed pursuant to a Power of Attorney. Wills must be personally executed by the testator to be effective. 14 V.S.A. §3504(b).
2. The trust is valid. The express terms of the Power of Attorney grant Bob the power over all of Andrea's affairs, including any action that Andrea could perform personally. Even though a trust could function to transfer property that otherwise would pass through a will, a settlor need not personally create the trust. *In re Estate of Kurrelmeyer*, 179 Vt. 359, 367-68 (2006).

*Add discussion of attacking validity of trust for self-dealing.*

3. Because the will executed by Bob is invalid, any property owned by Andrea (as opposed to the Trust) would be devised pursuant to the terms of Andrea's old will leaving all of her property to her three children. Thus, one must analyze whether the transfers to the trust complied with Bob's duties as a fiduciary, and are therefore valid or invalid. "A fiduciary duty is implied in every agency as a matter of law." *Id.* at 369. Bob was obligated to exercise the power of attorney as a fiduciary to benefit Andrea, and not to advance his own interests. Each of the transactions must be analyzed separately to determine whether the transaction is valid.

Bob used the power of attorney to transfer Andrea's bank accounts to the Trust at a time when Andrea was still competent, and apparently with Andrea's knowledge and consent. While Bob benefits from this transfer, he was implementing Andrea's intent. This transaction appears to be valid.

The transfer of the real estate and art collection occurred at a time when Andrea was incompetent. By its terms, however, the Power of Attorney is effective at all times, including times when Andrea is incompetent. The transfers of the real estate and art collection appear to reflect Andrea's intent and therefore serve her interests. While there may be substantial evidentiary issues in any proceeding, and questions over whether transferring all of the art collection as opposed to some part of it was in Andrea's interest, these transactions are likely valid.

There is no evidence in the fact pattern to support the transfer of the stock. The transfer of the stock provides no apparent benefit to Andrea, and substantial benefit to Bob. In the absence of some evidence establishing how this transfer would benefit Andrea, it is likely invalid.

4. The Vermont Probate Court and the Vermont Superior Court for the county in which Andrea resided could each have jurisdiction over the disputes described in this fact pattern.

The Probate Court holds jurisdiction over the administration of estates. In the Probate Court, both Bob and Andrea's children would file the wills they seek to have administered and objections to the allowance of the will. Once the Probate Court determines that the will prepared by Bob is invalid, and allows the twenty-year old will, the administrator of the estate would file an inventory of the property. If that inventory omitted the property transferred by Bob to the Trust, Andrea's children would file an objection. The objection would then be adjudicated in the Probate Court, subject to appeals to the Superior and then the Supreme Court. 14 V.S.A. § 117.

It is also possible that the administrator of the estate could bring an action in the estate's name against Bob, the Trust and the museum seeking recovery of the property or damages. Such an action would be filed in the Superior Court in which any of the parties resided, subject to an appeal to the Vermont Supreme Court.

*Tom—It is a very hard catch for someone to know that there is a right to litigate this in court. Meg Be prepared to give credit if someone gets the will issue wrong.*

## **MODEL ANSWER - QUESTION V - JULY 2009**

### **1. Breach of Fiduciary Duty Claim**

The problem here results from the fact that Ike owns a majority interest in CEC, the company with whom Mariana contracts to install a critical piece of equipment and obtain inventory, all which is integral to the success of Transcendence, Inc. In other words, Ike has a material financial interest in the transaction for purposes of the Vermont Model Business Corporations Act, meaning that his potential for financial reward from CEC would reasonably be expected to impair the objectivity of his judgment when participating in action on the authorization of the transaction. 11A V.S.A. § 8.60(2).

Under 11 V.S.A. § 8.61(b), a director's conflicting interest transaction may provide the basis for a lawsuit for damages or other sanctions against a co-director on the ground that the director has a separate interest in the transaction not shared by the other director/shareholders. The "safe harbors" to the rule require full disclosure of all material facts concerning the director's interest

in the transaction, and further that the conflicted director / shareholder recuse himself so that the transaction can be approved by the majority of disinterested director / shareholders. Otherwise, the party attempting to validate the transaction establishes to the satisfaction of the court that the transaction was “fair to the corporation,” meaning (A) fair in terms of the director's dealings with the corporation; and (B) comparable to what might have been obtainable in an arm's length transaction, given the consideration paid or received by the corporation. 11A V.S.A. § 8.60(3). A minimum of two disinterested directors is authorized to approve a director's conflicting interest transaction.

Given that Paul objected to the transaction, and given Ike's conflict of interest, the transaction was not properly authorized, even though Ike made his co-members aware of the conflict. Moreover, Paul can validly say that Mariana and Ike breached their duty of loyalty to the company, and that his investment in the company suffered as a result. *See Lash v. Lash Furniture Co. of Barre, Inc.*, 130 Vt 517 (1972) (“There is a fiduciary duty in directors of corporations not to let outside commitments, personal or otherwise, divert them from their duty to further the interests of the company they represent. The presence of competing interests may disqualify the directors from acting in a representative capacity.”).

## **2. Contractual Claims and Statute of Limitations**

Transcendence, Inc. may have a breach of contract claim against CEC on two grounds: first, the faulty installation of the cremation unit; second, the quality of the biodegradable burial urns.

CEC has solid defenses to the contractual claims. Regarding the unit, the critical problem will be whether the unit is considered a “good” subject to Article 2 of the UCC, or a “service” outside of the UCC, based on the fact that the unit required custom design and installation services. When a contract is for goods, the 4 year statute of limitation under 9A V.S.A. 2-725(1) controls. If the contract is for services, the 6 year statute of limitation under 12 V.S.A. §511 controls.

The Supreme Court has ruled twice in recent years is the key determination is whether the transaction “predominantly or essentially relates to goods or services” or whether a good or service is the “dominant factor or essence” of the transaction. *Lamell Lumber Corp. v. Newstress Int'l, Inc.*, 2007 VT 83 (2007); *Openaire v. L.K. Rossi Corp.*, 2007 VT 120 (2007). The outcome depends primarily on the language of the agreement itself, the circumstances of its making or performance, or whether materials were incidental to overall objective of the design service.

An argument can be made that despite CEC's use of design skill to integrate the cremation unit into the house, the essence of the contract was to provide a good – a cremation unit – to accomplish a specific objective. But given the need to integrate the unit into the old funeral home, it's equally possible that the installation skill of CEC's personnel was the predominant feature of the transaction.

The other problem with respect to the urns and the unit are the warranty disclaimers on the back of the purchase orders; however, especially given the unique nature of the product (i.e., a customized cremation unit and biodegradable burial urns) Transcendence, Inc. may nevertheless have a sound basis for claiming breach of the warranty of merchantability and/or fitness for a particular purpose. 9A V.S.A. § 2-314 (merchantability), 2-315 (“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose”).

While these warranties may or may not be excluded under 9A V.S.A. § 2-316, they cannot be so excluded if they qualify as “consumer goods.” That may be the case with the urns.

### **3. Priority to Proceeds of Sale**

Both CEC and Brightstar Bank (“BB”) are unsecured creditors due to the defects in the UCC-1 financing statements.

- The cremation unit is more likely than not a “fixture” because it is directly integrated into the architectural and ventilation system within the funeral home business; the facts suggest it cannot be easily removed / reattached to another location. 9-102(41) (“goods that have become so related to particular real property that an interest in them arises under real property law.”)
- The urns appear to qualify as inventory, because they are either furnished with the funeral service being provided, or are goods regularly consumed in the business. 9-102(48).
- CEC is trying to secure a purchase money security interest in the unit, but if the unit is a fixture, it can only be perfected by a fixture filing. Since CEC never recorded its interest in the land records, it will not have superpriority over BB's “all assets” lien.
- CEC is also trying to secure a purchase money security interest in the inventory, but under 9-324(b), the PMSI only has priority to the extent that the interest is perfected. The

UCC-1 financing statement does not use the correct name of the debtor as found in the Vermont Secretary of State's office. The name is misspelled, and misidentifies the organization as an LLC, not a corporation. Under 9-503(a)(1), a financing statement sufficiently provides the name of the debtor "if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized."

- Regarding BB, there is a closer case with respect to perfection. If the unit is a fixture, although the document contains a legal description of the property, and has the correct debtor name and the record owner of the funeral home, the description in the statement does not indicate that it covers this type of collateral (i.e., the cremation unit). 9-502(b)(1).
- By contrast, if the unit qualifies as equipment, there is no perfection because the UCC-1 was not recorded in the correct place.

#### **4. Successor Liability**

Mariana needs to think twice about purchasing the Transendence, Inc. assets for 10% of the purchase value based on the doctrine of successor liability. This doctrine is discussed most extensively in *Gladstone v. Stuart Cinemas, Inc.*, 178 Vt. 104 (2005). The general rule of successor liability is that the liabilities of a predecessor corporation will pass to the successor only when the change is occasioned by statutory merger or consolidation. In cases where the change is accomplished by the sale of assets only, the purchasing corporation assumes no liabilities of the selling corporation unless one of five commonly-applied exceptions apply:

- (1) the buyer expressly or impliedly agrees to assume the corporation's liabilities;
- (2) the transaction amounts to a de facto merger or consolidation;
- (3) the purchasing corporation is merely a continuation of the selling corporation;
- (4) the sale is a fraudulent transaction intended to avoid debts and liabilities;
- (5) inadequate consideration was given for the sale.

The single most important factor for applying the mere continuation theory is the continuity of ownership and management, which is exactly what we have in this case. There is also a good case to be made that the sale may be intended to avoid debts / liabilities owed to CEC and BB (despite their unsecured status), or that the consideration is inadequate.

## MODEL ANSWER - QUESTION VI - JULY 2009

By subdividing the farm and conveying a common right-of way easement by deed to each of the lots she sold, Franny created rights to use and obligations to maintain the easement, the so-called Old Town Road. The deeds for each of the lots creates the right to use the Old Farm Road to access the lots. The lot owners' use of the road is, however, limited to access a single family residence. The obligations created by the deed are that each of the lot owners are required to share in the maintenance of the road. The deeds do not expressly authorize Franny to use the Old Farm Road, and similarly do not expressly obligate her to pay for expenses.

1. Nina Nueve is using her property as a single family residence, but has an extensive garden which has grown to the point where she has opened a farm stand and is selling produce from her garden. The issue presented by the other lot owners is whether the grant of the right of way over the Old Farm Road exceeds the use granted by the deed, and thus whether it is impermissible. "The character of an easement depends on the intent of the parties as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement." *Barrett v. Kunz*, 158 Vt. 15, 18, 604 A.2d 1278, 1280 (1992). In this instance, although Nina is engaging in a commercial activity on her property, that use by itself does not resolve the question presented by the other property owners. Gardening, even quite extensive gardening, is a common residential activity and would not be considered something other than a residential use. The operation of a farm stand, however, may be considered beyond a strictly residential use. At the time Franny created the right of way, her "intent" and the "object and purpose" in creating the easement was to permit access to the properties, and that the use of the properties should residential in nature, and preserve the open and agricultural nature of the area.. It should also be considered that the property had been used as a farm, and that the character of the area is still agricultural. Thus, the extensive gardening and farm stand may not be beyond the use contemplated by Franny at the time she created the easement.

Second, and most importantly, is whether Nina has increased the burden on the right-of way, by either increasing the amount or type of use. *Buttolph v. Eriksson*, 160 Vt. 618, 618, 648 A.2d 824, 825 (1993) (mem.). The amount of traffic and visitors expected to access a commercial farm stand may be greater in number and different than would be expected to visit a property used exclusively as a residence. In this instance, however, the Nina does not have any greater number of visitors than the other lot owners and much of the traffic *is* the other lot owners. Thus, it does not appear as though Nina's use of the Old Farm Road is increasing the burden on the right-of-way, and that any increase in her use is reasonable under the circumstances. *Buttolph*, 160 Vt. at 619 ("Any increase in defendants' use of the driveway after becoming full-time residents on their

property was a reasonable change in usage and is not grounds for now limiting their usage of the driveway.”).

2. The other lot owners are seeking additional repair costs from Nina because of their perception that she is making greater and more harmful use of the Old Farm Road. Nina’s obligation to pay additional road repair costs would arise out of an un-permitted use or damage to the road. In this instance, we have determined that her use of the road is permitted and that she makes no greater use of the road than the other lot owners. In fact, if any additional damage is being caused by traffic to the farm stand, it may be attributable in part to the other lot owners who frequent the farm stand. Since they each have their own right to use the Old Farm Road, that use is should not be attributable to Nina, and thus the other lot owners bear responsibility for their own use and any additional wear that places on the Old Farm Road.

Each of the lot owners’ deeds contains a provision which expressly obligates each property owner to pay their pro rata (in this case equal) share of the road expenses. Since there is no exception or formula based on use, and the Nina’s use is permitted and no greater than the other property owners, the lot owners will not be able to require Nina to repair the road.

3. Franny created the easements for the lot owners over the Old Farm Road, but apparently did not reserve for herself the right to use the Old Farm Road. Absent a express grant, Franny would only be entitled to use the Old Farm Road to access her property if she obtained an easement by prescription. It appears that Franny has been using the driveway for more than 15 years, and may be entitled to an easement by prescription. The establishment of a prescriptive easement or right of use is shown by “open, notorious, hostile and continuous possession of the property at issue for a period of fifteen years.” *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 155, 559 A.2d 1068, 1070 (1989). The general rule is that open and notorious use will be presumed to be adverse and under a claim of right, unless there is found an exception which rebuts that presumption, such as evidence of permission of the owner of the land to use the right-of-way. *Buttolph v. Eriksson*, 160 Vt. 618, 618, 648 A.2d 824, 825 (1993) (mem.). According to the plan, Franny’s driveway has run from the Old Farm Road since the property was first subdivided and each of the other property owners would have to pass her driveway to reach their own. Franny’s use was therefore “open, notorious and hostile” to the rights of the other lot owners. Moreover, since her driveway has always been located there, her use has been continuous. Therefore, Franny is entitled to use of the Old Farm Road by easement by prescription, but only for that portion that she has used “openly, notoriously, hostilely and continuously to access her property.

4. The deeds to the lot owners do not obligate Franny to pay road maintenance and repair. Neither does Franny's prescriptive right to use the Old Farm Road obligate her to pay a share of the expenses for maintenance and repair of the road. Under those circumstances the only repair or maintenance she would be obligated to perform would be that which is necessary to prevent her use from interfering in the other lot owner's use of the road.

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