

Vermont Bar Examination
July 2013
Question 3

A Vermont statute requires that corrections officers retire at age 55. Correction Officer Appleman retired involuntarily upon reaching age 55. He had been performing at an above-satisfactory level immediately prior to retirement. Shortly thereafter he filed suit against the State of Vermont challenging the constitutionality of the forced retirement statute. Corrections Officer Bannon, age 45 at the time, also joined as a plaintiff in the suit. Plaintiffs claimed the mandatory retirement statute violated the Vermont and U.S. Constitutions, while the State responded that the statute was necessary to maintain prison safety. At trial, Plaintiffs offered expert evidence that not all 55-year-olds have diminished physical capabilities, and that physical capabilities diminish at different times for different individuals based on a variety of factors. Plaintiffs' expert witness also testified that fitness tests were a reliable way to determine whether a corrections officer could meet the physical requirements of the job. Plaintiffs' expert testified that Corrections Officer Appleman was fit for duty at the time he was forced to retire.

The State introduced expert testimony that the physical capabilities of most individuals diminish significantly sometime between reaching 50 and 55 years of age. The State's expert questioned the reliability of fitness testing to determine whether individuals could meet the physical duties of a corrections officer. The State also introduced evidence that a fitness testing program would cost the State substantially more than mandating retirement at age 55.

The trial court held that the mandatory retirement statute is constitutional and entered judgment. The Court found that physical fitness is important to performance of a corrections officer's job duties. Plaintiffs did not appeal.

Sometime later, the legislature amended the statute to require corrections officers to retire at age 52. Corrections Officer Bannon reached 52 years of age shortly after the effective date of the amended statute and again filed suit challenging the constitutionality of the new mandatory retirement age.

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1. Should Corrections Officer Bannon have been dismissed as a plaintiff from the first lawsuit? Discuss.
2. Did the trial court in the first lawsuit correctly decide that the mandatory retirement age was constitutional? Discuss.
3. Would any preclusion doctrine apply in favor of the State in Corrections Officer Bannon's second lawsuit? Discuss.

Question 4

Henry comes to see you. His wife, Susan Simpson, died recently at her home in Vermont and he is trying to settle her estate. He brings with him three documents: a copy of a trust document executed in Vermont in 1980; a handwritten will dated 2010, also drafted in Vermont, and signed by Susan and by two witnesses; and a document signed by Susan, dated in 2010, that says, "I hereby revoke the trust I created in 1980." Henry tells you that Susan was mentally competent throughout her life.

Henry explains that in 1980 Susan was married to her first husband, Spiro. The 1980 trust is titled "Susan Simpson Irrevocable Trust." The trust document provides that all of Susan's property be held in trust for the benefit of Spiro. At the time Susan created the trust, she owned a home as tenants by the entirety with Spiro and owned a bank account in her sole name. Both the home and the bank account are located in Vermont. She never re-titled the bank account or the house in the name of the trust. Spiro died in 1981. Susan and Henry married in 1990.

The will provides that all of Susan's property is to be divided equally between two charities: the local theater company and the local animal shelter. The will does not mention Henry. The theater company went out of business in 2012.

1. What effect, if any, does the trust created in 1980 have on the disposition of Susan's property? Discuss.
2. Is Susan's 2010 will valid? Discuss.
3. Discuss and analyze the forum(s) that will decide any disputes about Susan's will and trust, and the process for resolving those disputes.
4. How should Susan's estate be distributed? Discuss.

Question 5

Last summer, Don Davis's then-girlfriend Gale broke up with him and began dating Davis's friend Vincent. A few days later, Davis attended a party at a friend's apartment in Smalltown, Vermont. Gale and Vincent were also there. At one point during the party, Davis took his handgun from his car, tucked it in his waistband, and returned to the party. Several times at the party, Davis tried to speak with Gale about getting back together, but she rebuffed his efforts. Gale eventually went into a bedroom with Vincent and some other partygoers. Davis tried to push his way into the bedroom, but Vincent pushed him back out and slammed the door. Davis then announced, "I'm not playing around," took his gun out, and cocked it. Vincent opened the door to find a gun pointed at his face. As Vincent smacked the gun away, Davis fired but missed. Davis then ran down a hallway, stopped, turned around, and fired two more shots back in Vincent's direction, missing both times. Davis was tackled and subdued by partygoers while others called the police. Defendant Davis was charged with attempted second-degree murder and tried in Vermont Superior Court.

At trial, Officer O'Neill from the Smalltown Police Department testified that she was the first officer to arrive and secure the scene, but had remained outside the apartment for the rest of the investigation. She did not speak to any witnesses or collect any evidence.

Police Officer Owens also testified. He described entering the apartment, seeing Davis being held down, and hearing him yell, "I'll get you yet, Vincent! Don't think I'll be buying any more pot from you!" Officer Owens recounted handcuffing Davis and taking him to the police cruiser. Officer Owens heard Davis mutter, "I can't believe I missed him." Prior to trial, defense counsel filed a motion to suppress Davis's two statements, on the grounds that he had not been read his *Miranda*

rights prior to making the statements, and the statements were irrelevant and unduly prejudicial. The Court denied the motion.

Davis testified that he was holding the gun without intent to fire, but that it went off when Vincent attacked him without provocation. He also testified he did not intend to harm Vincent.

Davis's counsel requested that the jury had to decide unanimously which shot fired by Davis formed the basis for the murder charge. The Court refused to give the jury the requested instruction. The jury returned a verdict of guilty.

After the trial, the Court learned that a juror and Officer O'Neill had a personal conversation in Smalltown during the trial. The Court took testimony about the conversation. Officer O'Neill testified that, while shopping, she had recognized a past acquaintance without realizing the woman was a juror in the case. They exchanged pleasantries. The juror told the officer that she had not previously understood the scope of the officer's job and now had an appreciation for her work. The officer then realized that the woman was a juror and ended the conversation. The juror testified that she had not recognized the officer's name on a witness list, but immediately recognized her when she walked into the courtroom to testify. The juror also testified that her acquaintance with Officer O'Neill did not affect her evaluation of the evidence.

Davis moved for a new trial, arguing that the conversation between the juror and the officer violated his right to a fair trial and impartial jury. The Court granted the motion.

For each of the following three rulings by the Court, explain whether the ruling was correct. Be sure to address any contrary arguments.

1. The Court's denial of Davis's motion to suppress.
2. The Court's denial of Davis's requested jury instruction.
3. The Court's grant of Davis's motion for a new trial.

Question 6

Alex and Bernard have come to see you for advice about the formation of their business: manufacturing and selling the world's first double-decked skateboard. They plan to operate the business out of a warehouse and factory in Mountainville, Vermont, where Alex was born and raised. Bernard is a Canadian citizen legally

residing in Vermont. Alex and Bernard have been offered start up financing of \$100,000.00 by Maple Tree Bank for development costs and initial lease payments. Alex and Bernard will be the sole original owners and employees of the business, though they hope to sell their new product nationally and internationally within five years.

Alex and Bernard are considering the formation of one of three Vermont-registered entities: Partnership, S-Corporation, or Limited Liability Corporation.

1. Describe the requirements for formation of each type of business entity under consideration. What additional documents, if any, would you recommend drafting?
2. What are the advantages and disadvantages of each type of entity for Alex and Bernard's situation? Explain and provide a recommendation.
3. For each type of business entity, under what circumstances would Alex and Bernard be personally liable for the debt owed to Maple Tree Bank? Discuss.
4. Assume for purposes of this question only that Alex and Bernard formed a Vermont corporation. For the first two years of the business, Alex paid the monthly rent on his home from the business checking account without informing Bernard. A customer is injured after the collapse of the decks on one of the skateboards and sues for personal injuries. Are Alex and/or Bernard personally liable to the customer? Discuss.