

# **Florida Board of Bar Examiners**

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

## **Florida Bar Examination Study Guide and Selected Answers**

**July 2009  
February 2010**

**This Study Guide is published semiannually with essay questions  
from two previously administered examinations  
and sample answers.**

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# **PART I – ESSAY QUESTIONS AND SELECTED ANSWERS**

## **JULY 2009 AND FEBRUARY 2010 FLORIDA BAR EXAMINATIONS**

### **ESSAY QUESTIONS AND SELECTED ANSWERS**

Part I of this publication contains the essay questions from the July 2009 and February 2010 Florida Bar Examinations and one selected answer for each question.

The answers selected for this publication received high scores and were written by applicants who passed the examination. The handwritten answers are typed as submitted by the applicants. The answers are reproduced here with the consent of their authors and may not be reprinted.

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 2.

## ESSAY EXAMINATION INSTRUCTIONS

### Applicable Law

Questions on the Florida Bar Examination should be answered in accordance with applicable law in force at the time of examination. Questions on Part A are designed to test your knowledge of both general law and Florida law. When Florida law varies from general law, the question should be answered in accordance with Florida law.

### Acceptable Essay Answer

- Analysis of the Problem - The answer should demonstrate your ability to analyze the question and correctly identify the issues of law presented. The answer should demonstrate your ability to articulate, classify and answer the problem presented. A broad general statement of law indicates an inability to single out a legal issue and apply the law to its solution.
- Knowledge of the Law - The answer should demonstrate your knowledge of legal rules and principles and your ability to state them accurately on the examination as they relate to the issue presented by the question. The legal principles and rules governing the issues presented by the question should be stated concisely and succinctly without undue elaboration.
- Application and Reasoning - The answer should demonstrate your capacity to reason logically by applying the appropriate rule or principle of law to the facts of the question as a step in reaching a conclusion. This involves making a correct preliminary determination as to which of the facts given in the question are legally important and which, if any, are legally irrelevant insofar as the applicable rule or principle is concerned. The line of reasoning adopted by you should be clear and consistent, without gaps or digressions.
- Style - The answer should be written in a clear, concise expository style with attention to organization and conformity with grammatical rules.
- Conclusion - If the question calls for a specific conclusion or result, the conclusion should clearly appear at the end of the answer, stated concisely without undue elaboration or equivocation. An answer which consists entirely of conclusions, unsupported by statements or discussion of the rules or reasoning on which they are based, is entitled to little credit.
- Suggestions
  - Do not anticipate trick questions or attempt to read in hidden meanings or facts not clearly expressed by the questions.
  - Read and analyze the question carefully before commencing your answer.
  - Think through to your conclusion before writing your opinion.
  - Avoid answers setting forth extensive discussions of the law involved or the historical basis for the law.
  - When the question is sufficiently answered, stop.

# **Q** QUESTION NUMBER 1

## **JULY 2009 BAR EXAMINATION – CONTRACTS/ETHICS**

One week before her 18th birthday, Mary saw the following ad in the prior week's local newspaper:

"Owner of Red Model T Sports Car Interested in Selling  
\$300  
Contact Seller c/o ABC Food Co., Main Street, Anytown, Florida"

Mary, who always wanted that particular car, told her Dad about the ad. Dad, although hesitant, told Mary that he is a customer of ABC Food Co. (Company), that the Company is reliable and because Dad enjoys fixing cars as a hobby, he would be willing to help Mary fix up the car, if necessary. Because the ad is a week old, Mary convinced Dad that they must send in the purchase price immediately. Dad then gave Mary a check in the amount of \$300, payable to Company, to buy the car. In her excitement, Mary simply mailed Dad's check, without any explanatory notation, directly to Company.

The Company's bookkeeper received the check in the mail with Dad's name. The bookkeeper deposited the check and credited the amount against Dad's overdue outstanding balance due the Company.

Two weeks later, Mary contacted Seller about the car. Seller told Mary he has no record of her responding to the ad and that in any event the ad was incorrect and the purchase price was \$3,000. Seller told Mary that she can have the car for \$3,000, and that he will ask his boss if the Company would return the \$300 to Dad. In addition, Seller told Mary that Mary must pay for and pick up the car by the end of the following week. Mary said "ok." A day later Seller turned down an offer to sell the car for \$2,500 from a third party.

Two days later, Dad and Mary phoned Seller and told Seller that they want the car for the \$300 already paid. Seller told Dad and Mary that a deal is a deal and that he expected Mary to pay him the \$3,000 for the car. Mary replied, "good luck" and hung up the phone. A week later Seller sold the car to another buyer for \$2,000.

In the meantime, Dad contacted Attorney, a sole practitioner, about the car transaction with Seller. Attorney indicated that she knows the Company well because her previous law firm represented the Company, and Attorney had worked on collection matters on behalf of the Company. Dad is impressed with Attorney and retained her.

Please discuss:

1. The validity of the contract to purchase the car.
2. Claims of Mary and Dad; and counterclaims of Seller.
3. Any ethical issues concerning Attorney.

# **SELECTED ANSWER TO QUESTION 1**

## **(July 2009 Bar Examination)**

### Essay #1

*This memorandum will discuss the validity of the K to purchase the car, the claims of Mary and Dad, and the counterclaims of Seller. It will also address any ethical issues concerning Attorney.*

### **Validity of K to purchase car**

*This first issue to be decided is whether the **common law (CL)** or the **Uniform Commercial Code (UCC)** governs the transaction in this case. The UCC governs transactions that involve the sale of goods and the CL governs transactions that do not deal with the sale of goods and can apply to K's for services. Here, the transaction is for the sale of a car, which is considered a good, so the UCC will govern this transaction. The next consideration is whether the parties are merchants, since the UCC applies special rules to merchants. A merchant is one who regularly deals in goods of the kind sold. Here, it does not appear that either party is a merchant. Seller seems to be selling her own car, and Mary is young and not a merchant engaged in any sort of business.*

*The next issue is whether the **Statute of Frauds (SOF)** will apply. The SOF requires that certain K's be in writing, signed by the party to be charged. This is to prevent fraudulent transactions. SOF applies to K's for: (1) K's for marriage, (2) a K that is for longer than a year, (3) Land sale K's, (4) executory K's (future K's), (5) sale of goods over \$500, (6) guarantors, (7) suretyships, and in FL, a few other K's, such as a K for newspaper subscriptions. Here, the first possible transaction was for the sale of a car for \$300, and therefore, would not be required to be in writing. However, the 2<sup>nd</sup> attempt at the transaction was for the sale of the car for \$3,000, which would be required to be in writing and signed by the party to be charged. Also, a K may be taken outside the scope of the SOF if there is Partial Performance or under the UCC, especially manufactured goods.*

*The next issue in determining the validity of the K, is whether there was a valid **formation of a K**. For valid formation, there must be an offer, acceptance, consideration, and no valid defenses to formation.*

*An **offer** is an expression of an intent to invite acceptance, which must include the essential terms, and puts the power of acceptance in the offeree. Here, Mary may argue that the advertisement that she read in the paper was an offer. However, advertisements are usually considered to be mere invitations for offers. Therefore, there would not be an offer at that point. Therefore, when Mary sent the check payable to Company to buy the car, this was an attempted offer in response to Seller's invitation for offers. An offer is effective upon receipt. However, the offer was not clear in its terms, as it was signed by Dad, not payable to the Seller, but to the company she worked for, and had no explanatory notation as to what the money was for. Therefore, the Company probably acted reasonably when it credited the \$300 against Dad's*

overdue outstanding balance due to the Company. Therefore, at this point, there still does not appear to be a valid K.

The first possible real offer would have been when Mary contacted Seller 2 weeks later and Seller told Mary that she could have the car for \$3,000. This was a clear offer that invited acceptance, and did. Since this was probably the first real offer, it would not be considered a modification. Modifications to K's under the CL require consideration, but under the UCC do not require consideration. Therefore, if a K had already been formed, this still would have been a valid modification, as this is a sale of a car governed by the UCC. However, this appears to be merely an offer at this point.

Since Seller claims that the price was meant to be \$3,000 instead of \$300, there might be an issue of **Mistake**. There are 2 kinds: (1) Mutual Mistake and (2) Unilateral Mistake. Unilateral mistakes are those such as typographical error, computations, etc. However, this is only a defense if the non-mistaken party knew or should have known of the mistake. If this is the case, then the mistaken party is the one who may seek Rescission of the K, treating the K as if it never was formed. Mutual Mistake is only a defense if both parties were mistaken, but not as to price.

An **acceptance** is a manifestation of assent to the terms of the offer, either by express communication to the offeror of acceptance, or by conduct that is conformity with the performance that the offer invited. When the offer asks for a promise in return, it is a Bilateral K; when the only way to accept is by performance, it is a Unilateral K, whereby beginning performance makes the K irrevocable. Since here, this would have been a Bilateral K, since performance was not the requested mode of acceptance, Mary's sending the check in did not make the K irrevocable, or form a K. However, when seller verbally offered her the car, and Mary said "ok" this was a manifestation of assent to the terms of the offer and will likely be considered a valid acceptance. Under the UCC, acceptance need not be the "mirror image" of the offer, as under the CL.

**Consideration** is a bargained for exchange, and in FL, it merely requires a legal detriment to one party or a benefit to another, or both. Here, there was consideration, since there was money to be exchanged for a car, which is a legal detriment to Mary and a benefit to the Seller.

Therefore, a K appears to have been formed for the sale of the car for \$3,000.

There are possible valid defenses to formation here however, as discussed below.

### **Claims of Mary and Dad and Counterclaims of Seller**

Mary and Dad may have a claim for **Specific Performance** if money damages would not be an adequate remedy. Specific performance is reserved for items that are unique in nature, such as land and antiques. Here, the car may not be considered unique. Even if it is, Mary and Dad will probably not be able to get Specific Performance, since the car has already been sold to another buyer. FL protects **Bona Fide Purchasers (BFP)** for value who have no notice of a prior sale or title defects. The facts do not tell us enough to determine if the buyer here was a BFP or not.

An argument that Seller may have in counter claim, is that Mary and Dad **Anticipatorily repudiated** the K. This is when a party breaches the K, clearly and unequivocally before performance is due. Here, Mary's expression of "good luck" and hanging up the phone to Seller after Seller telling her she needed to pay and pick up the car by the end of the following week, appears to be clear and unequivocal that she was refusing to perform. Therefore, Seller had the option to either sue immediately for breach of K, wait for the date of performance to see if she performed, then sue for damages if she didn't or try and mitigate (cover) Seller's damages in the meantime, by reselling the car, which she did here.

If Seller is going to be counterclaiming against Mary and Dad for damages of breach of K, Mary and Dad will argue that the **SOF** was not met and therefore, they have a **valid defense to K formation**. Here, the K was required to be in writing, since it was for the sale of goods for more than \$500, here a car for \$3,000. As mentioned above, the SOF requires that certain K's be in writing, signed by the party to be charged. This is to prevent fraudulent transactions. SOF applies to K's for: (1) K's for marriage, (2) a K that is a for longer than a year, (3) Land sale K's, (4) executory K's (future K's), (5) sale of goods over \$500, (6) guarantors, (7) suretyships, and in FL, a few other K's, such as a K for newspaper subscriptions. There was also no partial performance that evidences an intent to sell and buy the car.

Mary and her Dad may argue that Mary was a minor when she attempted to K, and therefore would be under an **incapacity**, which is a valid **defense to formation**. However, Seller may argue that she was a minor when she first sent the check in, but 2 weeks had passed before the next contact. After a week, Mary became 18 and no longer incapacitated, and therefore could contract on her own, or reaffirm an existing K that she entered into while a minor. However, it would be Mary's choice whether to reaffirm or whether to get out of the K.

Seller may also counterclaim for **Expectancy damages**, which are K damages to put the non-breaching party in the place they would have been, had the K been performed. This means that Seller could seek damages in the amount of \$1,000, since this is the difference between the K price with Mary, and the amount Seller got in reselling the car and mitigating her damages.

If a defense to formation is successful in negating the K, Seller may argue **Promissory Estoppel**, since she relied on Mary's acceptance, by turning down another offer on the car a day later. Promissory Estoppel is when the promissor makes a promise, that they could reasonably believe would lead to reliance on the part of the other party, the other party did in fact rely on the promise, and that party suffered a detriment due to their detrimental reliance. It is an equitable tool to disgorge Unjust Enrichment, and the remedy for Promissory Estoppel, is Restitution. Restitution is a type of damages that puts the party who relied, back in the position they would have been had they not relied. Therefore, Seller may counterclaim for the money that she turned down in reliance on Mary's supposed acceptance of the K. This would probably be in the amount of \$500, since the K with Mary was for \$3,000, she turned down an offer for \$2,500.

## **Ethical Concerns**

The **Rules of Professional Responsibility** govern ethical issues for attorneys. Here, there is a possible ethical concern of a **conflict of interest**. A lawyer may not represent a client in a matter where the clients interests are **directly adverse** to those of another client they have. They also may not represent clients where the attorney's representation would be **materially limited** (such as not zealously representing one client for fear of hurting another client's case).

There are also rules regarding **Former clients** and an attorney's representation. An attorney, if they do represent one client against a former client, may not use any information they obtained **confidentially** through prior representation of that client.

Here, Attorney has previously represented the Company, whom Seller works for. This may not be a conflict of interest since the suit is not against the company. However, if the attorney reasonably believes that his representation would be affected by representing Mary and Dad against a former client, he should decline representation of this matter.

# **Q**

## **QUESTION NUMBER 2**

### **JULY 2009 BAR EXAMINATION – FAMILY LAW**

Husband, a salaried executive, married Wife, an hourly worker. Before their marriage, Husband owned a home in New York. Days before their wedding, Husband gave Wife a prenuptial agreement stating that Wife would waive alimony and any interest in his home. After reviewing the document, Wife signed it.

After 17 years of marriage, Husband, who was 70, decided to retire to Florida. Husband sold his New York home for \$750,000.00, and terminated his 26 years of employment with Work, Inc. Wife, who was 45, was able to immediately find a similar job in Florida making \$13.00 per hour, and allowing her to contribute to a 401K Plan.

The parties purchased a home in Florida for \$1,000,000.00 using their joint savings, which included the proceeds from the sale of Husband's home. The home was titled jointly to the parties as husband and wife.

After living in Florida for 9 months, Husband filed for divorce when he learned Wife was unfaithful. Husband sought a special equity in the parties' home, all of his 401k through Work, Inc., and half of all other assets. After filing the petition, Husband moved into a nursing home in Florida.

Wife suspects that Husband has dementia. She comes to you seeking advice regarding the following issues:

1. Can the dissolution action be suspended or dismissed?
2. Can the prenuptial agreement be set aside?
3. Does Wife have any rights with respect to the marital home, taking into account Husband's claim of special equity?
4. Does Wife have any rights with respect to her 401K and the Husband's 401K? and
5. Does Wife have any rights to alimony, should the prenuptial agreement be set aside by the court?

Discuss fully each issue including Wife's likelihood of success as to each issue. Assume Florida law applies.

## **SELECTED ANSWER TO QUESTION 2**

### **(July 2009 Bar Examination)**

1. Can the dissolution action be suspended or dismissed?

Florida is a no fault divorce state. In order to dissolve a marriage, all that is required is that the marriage be irretrievably broken. If one party does not want to end the marriage and there are no minor children, the court can order counseling and continue the proceedings for 3 months to see if a reconciliation can be effected. If the wife does not want the divorce, she can go to counseling but the divorce will be granted if a reconciliation cannot be effected. In addition, if a party is mentally incompetent for more than 3 years, a divorce can be obtained even if the marriage is not irretrievably broken. The wife may argue that the husband has dementia and therefore lacks capacity to dissolve the marriage. The court will have to determine if Husband lacks the capacity to enter into a divorce. If he does and remains so incapacitated, a divorce may be granted after 3 years. If he is not lacking capacity then the divorce will proceed after the period of counseling.

2. Can the prenuptial agreement be set aside?

Prenuptial agreement in a writing that satisfies the Statute of Frauds will be upheld so long as there was no undue influence, fraud or duress in entering into the agreement. There is sufficient consideration for the agreement by the agreement to enter into the marriage. There may be indicia of undue influence, fraud or duress if the timeframe between presenting the agreement and signing it is short or if the spouse did not have an opportunity to consult counsel. Here, it appears the prenuptial agreement was presented to Wife by Husband just a few days before the wedding. In addition, the Wife reviewed the prenuptial on her own without advice of counsel. The Wife could argue that there was not full financial disclosure when she entered into the agreement. This is generally not necessary for the prenuptial agreements except in cases where the contesting spouse was really treated unfairly in the agreement. It is valid to waive alimony and the interest in his non-marital home in the agreement. Since the wife currently earns only \$13 an hour, she will not be able to maintain her standard of living evidenced by living in a \$1 million dollar home. Because of the large disparity in the financial resources of the parties when they entered into the marriage and throughout, the agreement will not be deemed fair. The court will probably set aside the agreement based on the factors and will award the wife permanent periodic alimony as discussed in the alimony section below.

If, at the time of entering into the agreement, the terms are so one sided as to make it unconscionable, the agreement will be set aside. The court may not find enough for unconscionability but there is enough indicia of undue influence to at least set aside the waiver of alimony.

3. Does the wife have any rights with respect to the marital home, taking into account husband's claims of special equity.

Florida is an equitable distribution state, the marital assets will be divided 50/50 unless there is a claim for unequal distribution. The court must first determine what the marital assets are. Marital assets include: (1) anything acquired during the marriage by either one or both spouses, except for a gift, bequest, descent to one spouse; (2) enhancement of or appreciation in value of non-marital assets because of the contribution from one or both of the spouses or because of contribution of marital funds; (3) interspousal gifts; and (4) benefits accrued during the marriage in retirement plans, 401K, pension plans and profit sharing plans.

Florida courts follow the statutory guidelines for equitable distribution. Factors taken into account to make the equitable distribution are: (1) contribution of each spouse to the marriage, (2) contribution of each spouse to care and education of children, (3) contribution of each spouse to homemaking services, (4) the financial sources and resources of each spouse, (5) the duration of the marriage, (6) the need for a spouse to maintain an asset free from interference from the other spouse.

The house in Florida was purchased with the couple's joint savings and it was titled jointly in both names. In Florida, there is a presumption that property that is titled in both names of husband and wife owned as tenants by the entirety is marital property to be divided equally 50/50. The home was purchased with money in a joint account, the joint account is marital property. Any funds that Husband put into the account from the sale of his non-marital home have now been commingled and will be considered a gift to the other spouse. The Husband will argue that he should get special equity in the home because of his contribution from non-marital assets to the purchase. Special equity has been abolished in Florida. He can file a claim for unequal distribution of marital assets. This claim will likely fail because the home will be presumed to be owned 50/50 because it is titled jointly and held as tenants by the entirety. Since the proceeds of the sale of the Husband's non-marital home were commingled, he will not be able to get any unequal distribution for the proceeds from the home sale and it will be deemed a gift to the Wife.

In addition, in Florida, a natural person who owns a home can claim a homestead in the home if there is residence, they are entitled to protection for ½ acre within a municipality and up to 160 contiguous acres outside a municipality. The homestead cannot be sold, gifted or mortgaged without the consent of both spouses. So Husband cannot in any way protect the home or convey it away from the spouse without her consent. After a divorce the house will be held as a tenancy in common and it will be the homestead of the spouse who is awarded the house or they will each get the proceeds if it is sold but it must be sold with consent of both spouses. It may also be argued that since the Husband moved to a nursing home, he has abandoned the homestead and the homestead now belongs to the wife. This argument will fail because the Wife still lives there and she is still married so she will still need the Husband's consent if she wanted to mortgage, sell, or gift the house.

4. Does Wife have any rights with respect to her 401K and the husband's 401K?

As stated earlier, the benefits accrued in the 401K during the marriage will be considered marital assets and will be subject to equitable distribution. The wife will be able to get half of the benefits accrued in her husband's 401K during the marriage.

If the husband had benefits that accrued prior to the marriage in the 401K, he would be able to keep those.

5. Does Wife have any rights to alimony, should the prenuptial agreement be set aside?

Alimony is awarded based on each spouse's need and ability to pay. In Florida, there are statutory guidelines for alimony awards. There are four types of alimony that can be awarded in Florida:

Temporary Alimony during the pending litigation of the dissolution. It cannot be waived by agreement.

Permanent Periodic Alimony available for the maintenance and support of a spouse that does not have the ability to be self-sustaining. It can be modified upon a substantial change of circumstances. This type of alimony can be waived in a prenuptial agreement.

Rehabilitative Alimony is for the education and training of a spouse that needs it to become self-sufficient.

Lump Sum Alimony is a definite sum paid one time or in periodic installments, it is final and can be used to achieve an equitable distribution of property. It is final and payable even if the payor spouse dies.

The factors that a Florida court considers to determine an award of alimony are: (1) Standard of living during the marriage, (2) Duration of the marriage, (3) Age, physical and mental condition of the parties, (4) Financial sources and resources of the parties, (5) Education and career sacrifices made by either spouse, (6) Contribution to the marriage in the form of homemaking services, care of children and contribution to the marriage, and (7) any other factor that will promote equity.

The court may also look at adultery on the part of one party in making the alimony determination but only if it resulted in depletion of the marital assets. There is no indication here that there was any depletion of marital assets but it will be taken into account as a factor if there was depletion.

Here the wife is 45 years old and works in a job that pays \$13.00 an hour. She does not appear to have any non-marital assets since she began contributing to the 401K when she was already married. Given her age, she is able to continue working and there is no indication that she has any disabilities that may affect her. Because of the disparity in financial resources between the husband and wife, the court will determine that permanent periodic alimony should be awarded and set aside the prenuptial agreement. She will also be awarded temporary alimony during the pendency of the dissolution proceedings.

# **Q**

## **QUESTION NUMBER 3**

### **JULY 2009 BAR EXAMINATION – FL CON LAW**

Wanda Woods comes to your office for help with her debts. After an interview and review of public records you discover the following:

Wanda Woods lives in a mobile home on six acres of property in rural Citrus County. The recorded deed to the property is in the name of Wanda's father, Frank Woods. Frank Woods died in 1990 without a will, leaving behind his wife, Molly Woods, and their two minor daughters, Wanda, age 10, and Sally, age 8, at the time. When Molly died intestate in 2001, Wanda had already moved out, but Sally still lived at home. Molly had health care bills totaling \$10,000 when she died. Sally moved out shortly after her mother died. Wanda was living in an apartment at the time, but was evicted for non-payment of rent and a judgment for \$3000 was entered against her and recorded in 2003. Wanda then moved into the mobile home by herself.

In 2004, Wanda married Howard who moved into the mobile home with Wanda. Wanda went to Banking Company in 2005, borrowed \$20,000 secured by a mortgage on the property, and used the proceeds to make repairs to the home. Although Howard never signed the mortgage, both Wanda and Howard paid on the mortgage until 2006 when Wanda and Howard got a divorce. Wanda still lives on the property with their two-year-old son, Sammy.

Banking Company has now filed a foreclosure complaint against Wanda. Wanda has someone who is willing to buy the property for \$150,000. She offered to give your law firm a mortgage on her interest in the property in lieu of a cash payment for her legal fees.

Please prepare a legal memorandum discussing the interests each party holds in the subject property. In your memo, include an evaluation of the title, possible claims against the property, and her offer to pay your firm.

## **SELECTED ANSWER TO QUESTION 3**

**(July 2009 Bar Examination)**

*Under the Florida Constitution natural persons who own Florida property and make it their primary residence are entitled to homestead exemption on 1/2 acre of land inside municipalities and up to 160 contiguous acres of property outside the municipality. The homestead protection is for land and property owned by the parties; it may include apartment and condominiums, but a mobile home as in this example may not carry the "permanency" of the land required for homestead since a mobile home could be readily mobile. Under these facts however it seems that the mobile home is a homestead. It's been permanently in this location since before 1990 when Frank died. Homestead protects the property from claims of creditors as long as those claims are not "related to the land." Claims such as mortgages to purchase the home or to improve the land are "related to the land" and are therefore exempt from the homestead protection. However 3<sup>rd</sup> party judgments not related to the land such as judgments for accidents and personal loans cannot be satisfied by placing a lien on homestead property, the remedy of such creditors remains to be satisfied either personally by the debtor or through non homestead property. Homestead also seeks to protect the family. Under homestead a homestead property automatically inures to the family of the deceased regardless of a will or other bequest provision to the contrary and regardless of whose name the property is titled under. If there is a surviving spouse and surviving minor children the property passes to the spouse as a life estate and to the children upon the death of that spouse. Here If Frank's house was his homestead the property automatically passed to Molly for her life upon Frank's death, the facts indicate that Wanda was 10 and Sally was 8 when Frank died, and as minor children they would obtain the rest of the estate upon the death of their mother.*

*If Molly's hospital obtained a judgment against her the hospital would not be able to attach a judgment on the home because as homestead property it would be exempt from the judgment of creditors not attached to the land. However if Molly left any money behind the hospital bill would be satisfied from said assets after paying the funeral expenses.*

*When Molly died both Wanda and Sally obtained a remainder fee absolute as tenants in common to the home. As such they would each be entitled to complete use of the property. Wanda is entitled to reside in the mobile home. Tenants in common are also entitled to sell their interest or attach liens on them and their interest also pass through intestacy. In Florida any conveyance or title to be held with rights of survivorship must expressly state said wish.*

*The facts state that creditors obtained a judgment against Wanda for unpaid rent which was recorded in 2003. In order to qualify for Homestead exemption the party must own and make the homestead property their primary residence and should claim the property as homestead before the creditors lien attaches to it. Wanda owns the property along with Sally. The judgment against her was entered and recorded in 2003. Wanda will argue that she is entitled to homestead exemption for the 3000 credit because the judgment was for a credit that did not concern this mobile home, and as such the landlord should not be entitled to put a lien on her half of the property. The other party will argue that Wanda was not living in the home at the time the judgment was entered and therefore it was not her permanent residence, they will also argue that she did not claim it as her homestead before the judgment attached since Wanda moved in to the home after the judgment was entered making the home susceptible to the claim of the landlord judgment against her. The creditor in this claim is likely to succeed against Wanda.*

*Wanda is entitled to complete use and ownership of the land, for an undivided one half interest. She would be entitled to place a lien on her half of the property even without Sally's consent. However, if Wanda and Howard made their interest in the property their homestead, it does not matter that Wanda held title to the property in her name only, Howard would still have to consent to any encumbrances on their half interest in the land making the encumbrance invalid against the property. The bank also took with notice of the debt of Wanda against the former landlord since they recorded their judgment in 2003, the bank would have notice in 2005 that there was already in existence an encumbrance on the home.*

*The bank however will argue that the funds from the mortgage were used for improvements on the land and as such are enforceable against Wanda and the land despite of the homestead exemption. Wanda will argue that since she was married to Howard when she mortgaged the house, the bank needed his consent in order to encumbrance the land and their subsequent divorce does not affect requirement, since at the time of the mortgage they were validly married. The bank will argue that Howard received the benefit of the mortgage and made payments on the loan evidencing his acquiescence and acceptance of the encumbrance, making the mortgage valid. If the bank forecloses on the loan, the new purchaser would take subject to the prior loan, and the foreclosure sale would simply pay the judgment of the bank foreclosing on the land first. All previous judgments would continue with the land. However the judgment that attaches here seems to be personal to Wanda.*

*Wanda has a right before judgment on foreclosure is rendered to pay all back dues on the land and bring it current before the extreme measure of foreclosure is rendered. This is called equitable redemption. If Wanda succeeds in selling the home, she could satisfy the judgment of both creditors on the day that title is to pass to the new buyer pay the judgments with those fees. In addition any money left over from the sale will carry with it the homestead protection against any other future creditors up until she reinvests the money in another homestead property. However, the protection will only be up to the amount Wanda spends in reinvesting in the future home.*

*However, Wanda can only sell her half of the interest to the land. Her sister Sally still has a right to half of the land. Sally could join the sale however and they could share the proceeds. Only one half of the property will be subject to the creditors claims, and only Wanda's half would have the homestead protection since Sally has not lived in that property she might be deemed to have abandoned her homestead. Her half of the proceeds will not carry homestead protection.*

#### *Adequacy of payment*

*Florida lawyers can generally obtain a contingency dependent on the outcome of a civil litigation. Said contingency fees however must be disclosed to the client and contain an expression of all of the clients rights under it. The lawyer if possible should also advise the client of the terms and to seek independent counsel advice. The terms of the contingency must also be fair to the client and cannot be excessive.*

*Wanda here is offering a mortgage on her property in order to secure the services.*

*Accepting the mortgage on the home of a client is not likely to be ethical since it involves a sort of business deal with the client that making client too susceptible to their vulnerable positions in order to secure legal counsel. Business negotiations with clients are not prohibited per se by the rules as long as they are in writing, are fair, and the lawyer provides for the client with an opportunity to seek separate counsel on the deal. However, in this case the interests of the lawyer are too commingled with the interest of the client. Having the lawyer's interest attached to the land at issue and which is the subject of the litigation as a way to secure payment for the lawyer's service puts the lawyer and the client's interest at risk of the lawyer seeking to protect his interest rather than the interest of the client. As such this payment arrangement will be objectionable under the rules.*

# **Q** QUESTION NUMBER 1

## **FEBRUARY 2010 BAR EXAMINATION – FAMILY LAW/FLORIDA CONSTITUTIONAL LAW**

The parties divorced, after a six-year marriage and 3 children, when Wife admitted having an affair. The final judgment incorporated the parties' settlement agreement and ordered Husband to pay Wife \$2400 per month for fifteen years, at which time Wife shall move and quitclaim her interest in the big house that the parties owned outright. Husband was also ordered to pay child support in an amount based on his salary as an engineer. The time-sharing schedule in the parenting plan called for the children to live with Wife, but they would spend two weekends a month with Husband. In any future disputes, attorney fees would be paid to the prevailing party's attorney.

Soon the parents began an equal time-sharing arrangement where the children stayed with each parent for half of each month. Husband made timely payments to Wife until he lost his job as an engineer due to a construction slow-down. He accepted a job as a math teacher, earning less, and he began to pay Wife only half. Wife maintained a steady relationship with her boyfriend, who stayed with her when the children were away. The oldest child turned 18 and graduated from high school.

A year later, Husband filed a petition to retroactively modify and terminate alimony and child support and to recover all child support paid for the third child. He alleged that he was not the biological father of the third child, and he sought genetic testing of all three children. In her answer, Wife alleged that the second child would not graduate from high school until he was nineteen; that Husband was named on the children's birth certificates; and that she told Husband, at the time of their divorce, that her boyfriend fathered the third child. She also answers that the monthly payments for her were equitable distribution and not alimony. Wife also filed a counterpetition for contempt and to collect arrearages. She requested attorney fees based on her need and Husband's ability to pay. Husband asked for attorney fees if he was the prevailing party. Husband gave his attorney a lien on his house and waived homestead protection in any action to collect fees not awarded by the court.

Assume that the evidence will be consistent with the parties' allegations, and draft a memo discussing potential claims and defenses raised by the pleadings, including the issue of attorney fees.

## **SELECTED ANSWER TO QUESTION 1** **(February 2010 Bar Examination)**

*Memo*

*Re: potential claims and defenses raised by the pleadings, including the issues of attorney's fees.*

*The first issue to address is the issues alleged in the pleading of the Former Husband (hereinafter "FH"). The FH's Petition seeks to (1) retroactively modify and terminate alimony and child support; (2) recover all child support paid for the 3<sup>rd</sup> child; (3) FH's seeking of genetic testing of all 3 children.*

*Let us first look at the request to retroactively modify and terminate alimony. The Final Judgment (hereinafter "FJ") required the FH to pay the Former Wife ("FW") \$2400.00 per month for 15 years. This was based upon the parties' settlement agreement which was incorporated into the FJ. At the time of the FJ, the FH was an engineer. Thereafter, he lost his job as an engineer and accepted a job as a math teacher and began to unilaterally pay only ½ of the FJ amount of \$2400.00.*

*For starters, it appears from the facts that the FW is receiving permanent periodic alimony, paid monthly for 15 years. (We will get to the Wife's arguments as to this being not alimony, but rather equitable distribution payments later on. But for now, we must analyze this argument under a theory that it is alimony.) In Florida, to seek a modification of spousal support (alimony) the FW must show that a change in financial circumstances, that are permanent, and not contemplated at the time of the entry of the FJ. This is based upon the premise that the settlement agreement and FJ allocated a support amount to the FW that met her need and was in the confines of the FH's ability to pay at the time of the FJ.*

*The FH will argue that he is entitled to this modification due to the fact that he lost his job, through no fault of his own and had to take a job at a lesser pay rate - i.e. that of a math teacher versus his employment at the time of the FJ - i.e. an engineer. The FH will argue that this is premised on the fact that in Florida you are entitled to seek this modification of alimony if your ability to provide alimony is less than that at the time of the FJ. While he can also argue decreased need of the Wife, amongst other things (to be argued below). The central prong in alimony reduction requests is the decreased ability of the payor spouse. Here, the FH will clearly argue that the lessened income was through no fault of his own, was involuntary, and herein meets the criteria for a downward modification of spousal support.*

*The FW will argue conversely that the FH's reduction in income was not voluntary and is not permanent. She will argue this based upon the premise that obviously the FH is educated at an engineer's level and his employment as a teacher is not in conjunction with that level of employment he has customarily earned.*

*It appears from the facts that the FH has a good argument that his lessened income is involuntary, not contemplated at the time of the FJ and from his perspective - certainly permanent.*

*The next issue to address is the FH's request to not necessarily reduce the alimony amount as discussed above, but to terminate it all together. As argued above, the FH will claim that his ability to prospectively provide support will no longer be capable, due to his change in financial circumstances. This, according to the FH, permits him to seek a modification all the way to zero dollars. Next, the FH will argue 2 very important points: 1. The need of the FW is no longer present; and 2. The cohabitation with the boyfriend by the FW warrants him a termination of alimony as a matter of right, pursuant to applicable Florida Statute.*

*In Florida, if the needs of the FW are not longer present for the permanent periodic alimony, the FH can seek to reduce and/or terminate his alimony. Here, this argument is coupled with his lack of present ability to pay the alimony. The FH will argue that the FW's needs are being met. There is nothing in the facts to indicate that this is based upon any increase in her own personal financial picture, i.e. there is no indication of what her financial picture was at the time of the FJ versus what it is now. Accordingly, the FH's argument turns to the full financial picture of the FW. That being, her current needs are being met by the boyfriend. The FH will first argue that the FW's needs are being met by the relationship she shares with the boyfriend. Accordingly, the FH will argue that in looking at the totality of the financial resources of the FW - she has no unmet need.*

*The FW will argue, and probably prevail on this argument for 2 reasons. The first being that she had the boyfriend at the time of the FJ, as indicated in the facts. Further, Courts in Florida will generally not look at the financial resources of another party in determining the financial resources as the FH is arguing. Admittedly, for the FW, this is not a strong argument, as this usually applies when looking at purposeful hiding or undervaluing of resources when the paying spouse is making the claim of diminished ability.*

*However, the argument turns to the FH's 2<sup>nd</sup> argument on this point: cohabitation. Florida has adopted a cohabitation statute, that provides the paying spouse a vehicle to terminate alimony when it can prove the elements therein. Usually, permanent alimony remains for the life of either party, or until the remarriage of the receiving spouse. This statute provides the alternative means to terminate an award of alimony. This is the FH's strongest argument for the termination of the alimony award. To prove cohabitation, the FH must prove a number of enumerated elements in the statute: These include, the parties (FW and boyfriend) holding themselves out as a married couple; the creation of joint accounts with the intent of being classified as marital; the living exclusively under the same roof; the structure of their financial pictures – i.e. allocation of household expenses; and the title of both personal and real property, as well as the years the parties have engaged in this behavior.*

*Here, the FH will argue that this is clearly the case of the intent behind the cohabitation statute. While the specific facts may not outline the enumerated elements of cohabitation, the totality of same renders the FW and boyfriend as being cohabitants, as defined under the statute and the FH will be able to prove same under the clear and convincing evidence criteria required for same.*

*The FW will argue that this is not a cohabitation case in the least bit as argued by the FH. On top of being together at the time of the FJ, there is nothing present to indicate that the FW and the boyfriend had a cohabitant relationship as outlined in the statute.*

*My conclusion on this cohabitation issue is that the FH has a strong argument and with the additional facts that would be provided in the course of discovery, under the Florida Family Law Rules of Procedure, he may be able to prevail on this issue.*

*The next issue in the FH's pleading is his request for a retroactive calculation of his spousal support payments. Here, the FH will generally not prevail as Florida defines the cut-off date for the application of a downward modification of spousal support to be the date upon which he files his Supplemental Petition. Accordingly, the FH's claim for retroactivity will apply to the date in which he filed his petition.*

*Next, we must take a look at a couple of defenses that the FW has available to her on the issue of the FH's alimony claim. We will get to her claim that the support payments were actually equitable distribution when closer to analyzing her counter-petition.*

*However, the FW can also argue, assuming arguendo that the payments are alimony, that the FH has unclean hands in his request for a downward modification of alimony. There is nothing that appears in the facts, that she raised this as an affirmative defense, but it should nonetheless be noted that she has that available as a defense. The FH unilaterally stopped paying the full amount and decided to pay ½. This self-help measure is frowned upon by the Court's in Florida, and more to the point, would be an available defense the FW can raise.*

*At this time, on this issue, I would conclude that the FH's argument on retroactive modification/termination of alimony is weak and will probably fail, and his request for a termination will depend on the analysis of whether the payments were support at all, and if he can prove up the elements of the cohabitation statute.*

*Next, we must analyze the 2<sup>nd</sup> issue of the FH's pleading – that is retroactivity modify and terminate child support. Florida Court's define child support as being for the benefit of the minor children. To seek a modification of termination, the standard set must be met, namely, that again there is a change in financial circumstances that were not present at the time of the FJ, the change was not contemplated at the time of the FJ and the change is permanent. Florida further permits under statute a modification either upward or downward, when it can be shown that the change in circumstances would result in a 15% or \$50.00 change in the Florida Statute child support guideline amount.*

*Here, we must first look at what was in place at the time of the FJ. There were 3 minor children and the Wife was technically the majority timesharing parent, per the parenting plan, with the facts showing that the FH enjoyed 2 weekends a month in timesharing with the minor children. Per Florida Statute, this appear on the facts, to be a non-gross up situation for purposes of calculating child support – namely that the FH did not enjoy 40% of the annual overnights with the children.*

*The facts further state that at some point the parties mutually agreed that the time-sharing would become equal, with each parent having the minor children ½ the time. Further, the facts state that the oldest child turned 18. Florida courts generally state that when the FJ is silent as to the reapportionment of child support upon one of the children coming off the guidelines, that there is no automatic reapportionment of the support for the remaining children. Of course, the FW is arguing that the minor child is not going to graduate until he was 19. In Florida, courts generally allow child support to continue past the age of 18 of the minor child if there is a reasonable expectation of graduation by the time the child will turn 19. This works with general premise that the support of a child ends at 18, dies, or otherwise becomes emancipated.*

*Here the FW will argue that the support of all 3 remains, for that very reason. The FH will next argue that the change in the timesharing schedule entitles him to a downward modification of the child support amount, due to the fact that he is now exercising approximately 50% of the time with the minor children. This would in fact be a substantial change in circumstances and coupled with his income going down by way of becoming a math teacher, would presume to meet the threshold either of the applicable case law standard or the statutory permitted showing. Here, the new child support guidelines would be run at the gross up method (in excess of 40% of the overnights) and would show a probable decrease in the prospective amount.*

*The general premise is that the FH is not entitled to a modification except as to the date of filing his supplemental petition. But, there is a case law that permits the retroactive calculation to go back to the date a change in custody occurred. Here, the FH will argue that the change in the custodial arrangements meets that criteria and he is entitled to this downward modification/termination retroactively back to that date they changed the custodial agreements.*

*A couple of other points. If it is argued that the oldest child is no longer eligible for support due to his age, it is generally not automatic, the FH must still seek the petition to modify based upon the 3 children. Further, as stated, support is for the benefit of the children and nothing in the facts indicated that the FH should be entitled to any termination. If the new guidelines show with their respective incomes and the time-sharing schedule, it is possible that the actual amount to be exchanged is near zero – or in some cases, the schedule and the income could result in the FW now paying the FH.*

*In conclusion on this point, I would argue that the FH has a very strong argument to downward modify the support, but has a relatively weak argument to terminate and/or retroactively apply the termination or modification based upon these circumstances.*

*The next argument of the FH is the issue of being able to recover ALL child support of the 3<sup>rd</sup> child. The FH is raising this argument based upon the claim that the child is not his. The FW argues that the FH is on the birth certificate of all the children. She further concedes that she told the FH at the time of the divorce that the boyfriend was the father. In Florida, children born of the marriage are presumed to be of the father. This is further bolstered by the fact that the children have the father on the birth certificate. The FH will argue that he was told the boyfriend was the father and seeks genetic testing of all 3 kids.*

*Res judicata* applies to the issue of all 3 children and FH's now request for genetic testing. This is presumed, because the FH waived his right to seek genetic testing of the 3 children and the FJ serves as *res judicata* that the 3 children are his. Accordingly, he is barred from now applying for genetic testing of the 3 children. The FH will argue that he still has an opening at least to the oldest child, in that the FW told him that the oldest was not his child. Unfortunately, for the FH, the facts indicate that this was told to him also at the time of their divorced and his path of relief would have been better suited to delay the entry of the FJ at that time and seek the genetic testing. Again, *res judicata* applies. The FH will still argue, but that facts do not present themselves, that he is entitled to Florida 1.540/Florida Family Law procedure 12.540 in that he was induced into or otherwise fraudulently convinced that the child was his. Under these sets of rules, if the FH can show it, he can seek a motion to set aside the FJ. There is a 1-year time bar on the bringing of such a motion. The FW will argue, that this time has passed, if it has, but more to the point – the FH knew of it at the time of the FJ – so he is barred from seeking it now.

My conclusion seems to indicate that the FW is correct on this issue and the FH will be barred from seeking either genetic testing or recouping of his support paid on the oldest minor child.

Next, we must look at the FW's counter-petition. But first, I want to make sure we hit on the remaining issues not already discussed above raised in the FW's Answer. That issue is that the monthly payments were equitable distribution, rather than support. For the FW to prevail, we will have to analyze that Florida recognizes payments in the form of lump sum alimony. These payments can be paid monthly for a set duration of time. In following the FW's arguments, this would be the case as she was provided these payments in conjunction with some form of equitable distribution. She will raise this argument and there are no facts to indicate that Florida Statute 61.08 was used in providing an award of alimony, namely need/ability, standard of living, and related issues. Again, there are no facts either way, present.

But, if the amount was lump sum for the purposes of equitable distribution – the FW would argue that this is a vested award, not subject to modification. The FH will argue that the absence of the facts present shows it was an alimony award and that his arguments above hit on that point. Further, the FH may argue that the quit claim deed component shows that there was a sole exclusive use and possession element, either for child support or alimony, which is always modifiable and can be set for a set duration if in the best interest of the minor children, feasible and financial doable. The FH will argue that this signing over a quit claim deed at the end of that period of payments was in further conjunction with support and not a term of equitable distribution.

Again, the facts will decide, but I tend to agree that it appears it was for support – but if shown otherwise – the FW would prevail as these are not modifiable.

*Now, looking at the FW's counter-petition: She has raised: Contempt and to collect arrearages. I would first advise that seeking contempt is not available under a petition, but rather should be raised by motion and in conjunction w/Florida rule of civil procedure 12.610. Contempt is only available for unpaid child support and alimony and is not available if the payments were deemed for equitable distribution. Here the FW if it is concluded that the payments are for support (alimony) she will raise the arguments that they are due and unpaid. To find contempt, the FW must show that there was a FJ with a required payment, and the FH has not paid. At that point the burden shifts to the FH and he must show that the reason for non-payment was not voluntary. Certainly, the FH will raise the same issues set forth above as to why no payment of either support or alimony.*

*I conclude that the FW will have a tough time showing contempt for the reasons set forth above.*

*Her better argument is for arrearages. As stated, if the payments are for equitable distribution – they are vested and owed. If they are for alimony, any unpaid amount that doesn't modify or terminate assuming arguendo that the FH prevails on his claim, still remains owed as vested. Same issue with the child support. The court will have to determine when, if any, the new amount should be applied and from when and any unpaid child support that doesn't fall in that criteria is vested and owed as an arrearage.*

*Homestead protection, the issue that the FH gave his attorney a lien and waived homestead to collect fees not awarded by the court. Contingent fees are not available in family law matters, except in collection of support issues. Nonetheless, the FH will argue that it is not the case herein and he is permitted to give a lien on his homestead property. He is correct, this is permissible by the contract in Florida. However, the issue will certainly center around what right, if any, the FW ultimately has and/or retains in the house, given the limited facts herein. The FH cannot, however, contract away any right the FW has in homestead on the property and if that is ultimately found – it would be an impermissible and/or unenforceable lien.*

*Prevailing party.*

*Normally in Florida family law matters – need and ability are the threshold for contribution of fees. Under 61.16, Florida Statute, there are a number of criteria to award same. Each party in a modification proceeding has the right to request fees from the other.*

*Further, in contract - the parties have the right to seek prevailing party fees. This is irrespective of need and ability. Here the facts if either prevailed, as defined by the courts on their respective positions, would be entitled to seek contribution as the prevailing party. This is generally more reserved in motion practice, enforcement, contempt, than in supplemental petitions to modify, b/c those rights remain, but as stated, each would have the right to claim they were the prevailing party. I would conclude that given all the facts, the FW would probably prevail.*

## **Q** QUESTION NUMBER 2

### **FEBRUARY 2010 BAR EXAMINATION – REAL PROPERTY/FAMILY LAW**

Husband and Wife owned Blackacre, acquired during their marriage and consisting of 160 acres of farmland in Florida County, with eighty acres located on each side of Division Road, running north and south through their property. Both Husband and Wife were previously married and each had a grown child from a prior marriage. They had no children together and lived in a modest condominium in Smalltown that Husband owned when they married. Over time, they became mutually disenchanted with one another and, acting *pro se*, jointly filed a petition for dissolution of marriage. It was a friendly divorce, and they entered into a marital settlement agreement, of which Blackacre was the only significant asset. They agreed, and the marital settlement (that they both signed) stated that Wife would have ownership of the eighty acres located east of Division Road, and Husband would own the eighty acres west of that road. In a quick hearing before a judge with a crowded docket, they were divorced and their settlement agreement was approved by the court and made a part of the Final Judgment of Dissolution of Marriage. No deeds were prepared and exchanged with regard to their property, and neither the Marital Settlement Agreement nor the Final Judgment contained a precise legal description of Blackacre.

A few years later Wife, anticipating her retirement, sold the south forty acres of her land to her son (Son), who paid her \$10,000 as a down payment, and they both signed an agreement-for-deed to “the Southwest quarter of the Southwest quarter of Section 26, Township 5 South, Range 17 East, consisting of 40 acres.” Son, to preserve his own and his mother’s privacy, did not record the agreement-for-deed, but nonetheless began making regular payments to his mother pursuant to the terms set forth in the agreement-for-deed. At that same time, he also filled out appropriate documents with the county property appraiser and, in the years that followed, paid all required property taxes as they became due. Within a year, Son had built a new home on the property and moved in with his family. At the same time, in anticipation of a part-time farming operation, he built a fence around the forty acres.

About the time Son completed his home, Wife and Husband remarried one another and lived in their condominium in Smalltown. This second marriage lasted eight years and ended when Wife died intestate. Husband, who never got along with Son, discovered the unrecorded agreement-for-deed in Wife’s personal papers and wrote Son a letter demanding that he vacate the property. Husband’s letter asserts that there is no public record that the property has ever been conveyed to anyone else, and that he is the rightful owner, as Wife’s survivor in a tenancy by the entirety, of the 160 acres and that he intends to take legal action to remove Son and take possession of the property.

Son has come to your firm seeking advice as to where he stands with regard to Husband’s demand for the property. Your senior partner has asked you to prepare a memorandum in this regard for a scheduled meeting with Son. He asks you to anticipate the following issues.

- a. Effect of divorce on tenancy by the entirety property, including various alternative dispositions of such property pursuant to that litigation.
- b. Validity of “conveyance” of 80 acres to Wife in the settlement agreement on the above-stated facts.
- c. Effect on possible litigation of the vague legal description in the settlement agreement, the lack of any legal description at all in the Final Judgment of Dissolution, and the legal description in the agreement-for-deed signed by Wife and Son.
- d. Effect on possible litigation of the fact that the agreement-for-deed was never recorded.
- e. Whether remarriage of Wife and Husband reinstated their tenancy by the entirety on the 160 acres of farmland?
- f. Given Wife’s death, what interest can Husband assert with regard to the 160 acres? With regard to Wife’s estate?
- g. Does Son have defenses beyond those relating to the legality of the documents discussed above?
- h. What is your conclusion as to whether Son will prevail and why?

## SELECTED ANSWER TO QUESTION 2

### (February 2010 Bar Examination)

A. A divorce automatically turns a tenancy by the entirety into a tenancy in common. The actual disposition of the property can be more complicated if the property was the homestead of the spouses and there are minor children. There is a presumption that minor children should be given the most stable environment possible, and one aspect of that stability is the house in which they live. As such, the primary residential parent may be entitled to continue living in the house with the minor children. If there are no minor children, the property may also be divided other than 50/50 during equitable distribution. Equitable distribution is the court deciding the property rights of each ex-spouse to the marital property accumulated during their marriage. The beginning presumption is that each spouse will be entitled to an equal share, but a court may award unequal shares if that would be more fair by looking at statutory factors in favor of unequal distribution. A court may also consider the desirability of keeping an asset intact (such as a business or the family home); and may order that one spouse pay a lump sum of alimony or that he make periodic payments to equalize the shares.

B. A final judgment of dissolution of marriage, serves to settle the property rights and responsibility for debt of the parties, and may govern alimony, child support, and child custody and visitation. Where the parties have no minor children and they agree on a division of assets and debts, they can file for divorce in an expedited proceeding in the county courts. Here, it appears that is what occurred. The judge approved and incorporated their Marital Settlement Agreement into the final divorce decree. When the divorce decree became final, it settled the property rights of the two parties. It is legally valid.

C. Although there was no legal description of the property in the Marital Settlement Agreement, the description provided is sufficiently specific to identify the property in question (Blackacre) and how the property is to be divided. Division Road is the dividing line, with each spouse owning half of the road (or to the side of the road, if the road is owned by the State). The lack of any description in the judgment of dissolution is fine because it incorporates the Settlement Agreement, which does contain sufficient specifics to be valid. The legal description in the agreement-for-deed signed by Wife and Son may be problematic because it does not identify the map to which it refers. If there is an official county map, and the legal description matches that, that would probably be OK. The Statute of Frauds requires that contracts for land be in writing signed by the party being charged, and Florida requires the signature of two witnesses when conveying real property. However, where the requirement for a signed writing has been satisfied (as it is here), extrinsic evidence explaining ambiguities can be introduced by either party (the parole evidence rule will not prevent its introduction). That rule is complicated with real property however, because there is a requirement that land be identified in the signed writing for a conveyance to be valid. Where there is an attempt made to identify the land, and extrinsic evidence is needed to clear up an ambiguity, it is unclear whether the conveyance is valid. However, even if not properly executed initially, Son's actions (the fence) have clearly identified the bounds of the property (see G below).

D. *The fact that the deed was not recorded is irrelevant to this fact pattern. Florida has a notice type recording statute, which says that a deed will not be good against a subsequent purchaser for value, or creditor, without notice if not properly recorded. Unless Husband sells the entire property in bad faith, the recording statute is irrelevant. If Husband did sell the property, it would be relevant if the purchaser was a “bona-fide purchaser” for value and without notice (BFP), however, Son’s possession of 40 acres of the property would be implied notice that would prevent the purchaser from being a BFP.*

E. *No, the remarriage did not automatically reinstate the tenancy by the entirety. First, Wife had already conveyed 40 acres to Son, so she no longer owned those 40 acres. Second, marriage does not automatically convert property individually held by one spouse into a tenancy by the entirety. If Wife and Husband had wanted to reconvey the 120 acres they still owned, they could have done so and by each spouse conveying the property to both spouses jointly, created a tenancy by the entirety.*

F. *Wife died intestate. When someone dies intestate, their property is distributed according to the statute. Here, Wife was survived by Husband and Son, who was from a previous marriage and not related to Husband. As such, Wife’s property will be inherited, half by Husband and half by Son (if Son were also the child of Husband, Husband would received \$60,000.00 off the top of the estate, and then split the rest of the estate 50/50 with Son). There are special rules regarding the family’s homestead. It cannot be conveyed if the decedent is survived by a spouse or minor children, except that it can be conveyed to spouse if there are no minor children. However, here Blackacre was not the couples homestead because they resided in a condominium somewhere else. Husband may have homestead rights to that condominium. Husband is obviously entitled to keep his 80 acres, which never became marital property (he owned them individually before the second marriage and never reconveyed them into a tenancy by the entirety). Son is entitled to keep the 40 acres he owns, and both Husband and Son have a claim to half the remaining 40 acres that are part of Wife’s estate.*

G. *Even if the initial conveyance to Son was invalid, Son now owns the property because of adverse possession. Son took title under color of deed (which would allow him to claim the entire 40 acres, even if he had only fenced a portion of it), lived on and improved the property, and erected a fence around the whole 40 acres. Adverse possession will award title to someone who continuously, openly, and notoriously possesses property that he does not own long enough that the statute of limitations will prevent an ejectment action or an action to quit title. In Florida that statutory period is seven (7) years. Also in Florida, the adverse possessor must notify the county property appraiser of his possession and pay all taxes thereon. Here, Son fenced the property and lived on it continuously for eight years. He notified the county appraiser and paid all of his taxes. Because there was an attempt to convey the property, Son cannot be said to have been living on the property at his mother’s sufferance, even if the conveyance was invalid, because neither Son nor his mother presumably knew about any potential defects in the deed. Since Son adversely possessed the land for more than 7 years during which time he paid all applicable taxes, he now has valid title, even if the initial conveyance was invalid.*

*H. Son will prevail. Son's adverse possession is clear and would be sufficient independent grounds to award him the property. The court may avoid deciding the issue of the initial conveyance and decide on the clearer ground of adverse possession. If the court were to decide on the grounds of the initial conveyance, I think that the attempted legal description would be sufficient to satisfy the requirement that the land be identified, so long as it is clear from other evidence that there is only one sensible interpretation.*

## **Q** QUESTION NUMBER 3

### **FEBRUARY 2010 BAR EXAMINATION – TORTS**

Acme Products, Inc. (Acme), a Florida corporation, manufactures small power tools. One of its products is an electric-powered nail gun. Acme's regional sales manager calls on Basic Rentals (Rentals), another Florida corporation which operates several outlets in Florida. Acme's sales manager tells Rental's president that Acme's nail gun is safe, dependable, affordable, durable, and can be used for nailing all types of wood and wood products. Rentals buys 50 of Acme's nail guns at \$200 each and sends them to its outlets for rental.

Penny wants to make a piece of furniture from Brazilian walnut, a very hard wood. She goes to the nearby Tampa, Florida, store of Rentals and she rents a nail gun manufactured by Acme. The nail gun sat on top of Acme's original shipping carton. The following statement was printed on the outside of the carton: "Suitable for nailing all types of wood and wood products." When Penny attempts to nail two pieces of wood together, the ejected nail from the nail gun fails to penetrate the wood, bounces backward, and strikes Penny in the left eye, resulting in a total, permanent loss of vision in that eye and partial, permanent brain damage.

Penny retains an attorney and the attorney hires an expert. The expert expresses his opinion that the nail gun has a design defect that caused the nail to bounce off the hard wood. During discovery, it is revealed that the nail gun, when delivered to Rentals by Acme, had a warning label that stated, "DANGER: DO NOT OPERATE UNLESS WEARING PROTECTIVE EYEWEAR." However, the nail gun used by Penny had been cleaned with a heavy-duty solvent designed for removing grease from restaurant equipment by an employee of Rentals after a prior rental. As a result of this cleaning, the adhesive which attached the label to the nail gun dissolved, the warning label fell off, and was not replaced or reattached.

During discovery it is further revealed that several months before Penny's rental of the nail gun, Acme discovered that its nail gun would misfire when working with very hard wood resulting in the nail bouncing off the wood. Acme concluded that the risk to the public was small if the user of the nail gun wore protective eyewear. Acme further concluded that the cost of recalling all of its nail guns or notifying purchasers about the misfiring or warning the public about the misfiring would have a major financial impact on Acme's profitability. Acme, therefore, took no action.

You are the law clerk for the trial judge assigned to Penny's complaint. Prepare a memo for your judge that discusses the claims that Penny may bring against Acme and Rentals, defenses which may be advanced by Acme and Rentals, and the likely outcome under Florida law. Include in your discussion the types of damages that Penny could seek.

## SELECTED ANSWER TO QUESTION 3

(February 2010 Bar Examination)

### MEMORANDUM

*Penny has filed a complaint in your court; below please find a discussion of the variety of claims that Penny may bring against various parties in the action, the parties' defense to such claim, and the likely outcome of the case.*

*The first issue to point out is procedural. First, it is noted that both Acme and Rentals are Florida Corporations, and therefore can be sued and defend suit in Florida, there is no indication that they have not filed an annual report, and therefore could be brought before court. Penny should consider whether to sue both in the same proceeding or whether to sue only one. Typically, as will be discussed below, Rentals will have a right of indemnification against the manufacturer, Acme, if Penny decides to sue Rentals only under a strict liability theory. It is also important to note that there is no joint and several liability in Florida, so if, under particular claims, such as negligence, the court finds both Acme and Rentals to be at fault, Penny will only be able to recover against each party that which she is owed by that party based on their percentage of fault. This is also because Florida recognizes comparative pure negligence theory, which allows a parties' awards to be reduced by their fault, but also allows what a defendant is owed to be reduced as well.*

*Furthermore, Judge, your court may likely allow Penny to joint both parties in the action. Although neither party is an indispensable party, the issues relate to both parties, and there should be no issue as a result. In addition, this will then allow either Rental/Acme to serve a cross claim on the other party defending on the circumstances, or if not joined, to sue separately in order to recover any indemnification that may be necessary (which will be discussed below).*

#### **Claim 1:** Breach of Warranty

*The first claim Penny may bring may be a breach of warranty claim against Acme for stating that the packaging is "suitable for nailing all types of wood and wood products." In fact, Acme knew months before Penny rented the gun that this was not true. An express warranty is a warranty that represents the basis of the bargain, and describes the use of goods at issue. Here, it is clear that Acme's statement is an express warranty to Penny, which she can see on the printed outside of the carton, and picked knowing that it was a very hard piece of wood that she had to work with, and needing something to fit that need.*

*In addition, it is possible she may be able to bring an implied claim of merchantability or an implied claim of warranty of fitness for a particular purpose, which she may bring against Rentals as well. The implied warranty of merchantability states that, when sold by a merchant, the product will work as intended. Here, the nail gun did not work correctly to put nails into wood. In addition, under the fitness for a particular purpose breach (which here can only apply to Rentals as it involves the store having knowledge of certain facts, discussed immediately now), the Plaintiff must show that there is a particular purpose in which she needs the product and she expressed such purpose, the person in the store knew of such purpose, and the product did not work for that*

purpose. Here, Penny will argue that she told Rentals that she needed a wood for certain Brazilian walnut, that they knew of it, and still gave her a gun that does not work. Rentals, however, will have a valid defense to such claim. This is because, as per Rental's knowledge, this product did work for that specific purpose. In fact, Rentals themselves, for any type of liability that Penny may recover, may well have a claim themselves for breach of express warranty or for fraudulent misrepresentation of a product against Acme. Rental may bring this as a cross-claim, if both parties are a part of the suit, or, additionally, may bring a separate suit against Acme for indemnification for any recovery, or additional tort claims. Rental will NOT be able to use its claims it has against Acme, however, to avoid its express warranty to Penny. When Rentals bought the product, they were expressly told that the nail gun is safe, and can be used for all nailing and all types of wood, which turned out not to be true, and represented the basis of the bargain, and a major part of the goods description. Thus, Rentals may be able to recover the purchase price at a minimum of such products due to the breach of the express warranty.

**Claim 2:** Fraud/Misrepresentation

In addition, Rentals may have a cause of action for fraud or misrepresentation given that Acme knew of such discrepancies, but still failed to warn, and in fact, specifically stated the OPPOSITE to its potential retailers. Additionally, Penny herself may have a claim for fraud or misrepresentation as does Rentals. The statement on the carton that it is suitable for all types of wood was expressly fraudulent. Acme knew that the nail gun would misfire with very hard wood, yet still intentionally misrepresented this fact. Intentional misrepresentation occurs when there is a misrepresentation, there is scienter, the party relies on the misrepresentation to buy the product, and is harmed by it. Penny can argue that they engaged in the tort of misrepresentation in order to induce her to buy a product that was not suitable for her use. She may be able to recover the contract price for such claim, and also additional damages given the nature of the misrepresentation. It is also an interesting issue whether the express warranty made to Rentals may be imputed to Penny as well. If this is possible, then Penny may be able to recover for the fraud/misrepresentation made by Acme to the retailer, and also for the express warranty made to Rentals, although less likely.

Rentals may also try to argue that they could return the product since there was no writing and this is a sale of goods, which requires that for products over 500 dollars, there must be a writing. However, there is an exception to such a statute of frauds defense where the parties have already paid for the products or accepted the products, which is the case here, so Rentals will not be able to get back the contract price for the outstanding products under this theory.

**Claim 3:** Negligence

The third claim Penny can bring is negligence claim against both Rentals and Acme. In order to establish negligence a party must show that there is a duty, the duty was breached, causation and damages. Penny will easily be able to show damages and causation, as it is clear she suffered serious permanent injuries due to the alleged negligence of the parties. In addition, there is no doubt that the nail caused the injury. The question is whether Acme breached a duty of care as a reasonable manufacture under the circumstances. Here, there can be no doubt that Acme was negligent, if not

*grossly negligent for such actions. Acme has a duty of reasonable care in creating the products it creates, and it knowingly created a dangerous product.*

*Penny should bring a claim not only for damages for pain and suffering, and any economic damages or emotional distress, but also for punitive damages. In Florida, a person can bring a claim of punitive damages if it is reasonable from the face of the pleadings. Here, Acme chose its own financial impact rather than protecting the life of someone else. In Florida, punitive damages are capped for certain cases, including three times compensatory damages or 500,000 dollars. Penny may be able to recover punitive damages on top of any other claims.*

*In addition, Rental may be liable for negligence as well. While a retailer does not have a duty to make sure the product is 100% effective, it should provide a reasonable inspection of such product. Penny may argue that Rental, upon being told the use of the wood, never checked or inspected such a product, and thereby was negligent. In addition, Penny may argue that the employee's act of cleaning the equipment removed the label warning, and thus, prevented Penny from knowing that she was required to wear glasses. There is an issue of whether Retailer will be liable for the negligence of his employee. Rental can be liable under a vicarious liability theory if the employee was acting within the scope of his employment. No facts indicate that he was not, and therefore, Penny may be able to prevail against Rental. Rental may try to argue that the employee was on a frolic (i.e. was not supposed to clean this equipment as part of its job), however, the facts indicate that Rentals required such progress after a prior rental. Rental may ultimately be partially liable for failing to reattach important warning labels to the product, and Penny may be able to recover some liability against Rental, although likely not the full liability.*

*Even if there is some negligence, the parties may argue that Penny was also negligent, and thereby reduce any damages that are awarded to her. Acme may argue that she did not use protective eyewear, as required, although there is the issue of whether Penny should assume the risk of that use. In addition, the parties may argue assumption of risk, which is a defense to negligence as well, but not a full defense, by arguing she was working with nail guns, which is a dangerous product, and assumed the risk of what may happen. Most likely, Penny's damages for negligence will be reduced slightly based on her own negligence in the action.*

#### **Claim 4: Strict Liability, Product Liability**

*Penny may bring a claim against Rental or Acme under strict liability. Torts law has a particular category as it relates to products liability, which allows a Plaintiff to recover against a retailer or manufacturer (any person in the stream of commerce chain), if certain circumstances are met. In order to show strict liability, a Plaintiff must show that the party at issue was a merchant, that there was an unreasonably dangerous condition of the product, that the product was in the hands of the defendant (i.e. that it was in the defendant's control so that a third party would not be the one responsible for any damages or changes to the product), and that the Plaintiff made a foreseeable use of the product.*

*First, there is no doubt that both parties are merchants, and so the first prong is covered. The second requirement, that the product be unreasonably dangerous, can be met in a number of ways. First, there can be a manufacturing defect so that only that one particular product is defective, there can be a design defect so that ALL products*

are defective, or there can be a failure to warn. Here, manufacturing defect is not at issue. The issue here is a design defect, and also the implication of the warning about protective eyewear.

Penny will argue that there was a design defect and that there was a reasonable alternative design that Acme could have implemented. She has expert support to back up that assumption. Acme will defend that there was no reasonable alternative design, since their costs analysis showed that any redesign and recall was outweighed by the major financial impact to Acme's profitability. Penny will likely prevail in this regard. A design defect is not reasonable if it would make the product not effective (i.e. making a knife less sharp) or if it would be cost inhibitive to having the type of product on the market. Here, this is not the case at all. Acme simply did not want to lose business, and Penny will likely prevail on such factor.

However, Acme will argue that they warned by putting in a notice of the protective eyewear, and therefore they are not liable since they did not fail to warn about the potential defect. In addition, Acme will argue that there is no way to remake the product for wood cutting without this issue, and so the only solution would be to put a warning such as the one at issue on the box. Penny will argue, alternatively, that failure to warn does NOT override a design defect if there is a more plausible way to design the product. Here, Acme could have recalled all the products, and likely should have discontinued the product, and should not have chosen to do "nothing" to make clear the actual design defect. At a minimum, if there was no reasonable design defect (if there was no way for Acme to design a product for nail cutting that would not cause the problem with hard wood), then a warning would be effective. However, the warning here just tells individuals to wear protective eyewear, NOT the risks of not wearing such eyewear. As a result, even if there was absolutely no way for Acme to redesign the product for it to still be effective, the warning at issue here would not protect Acme from liability.

Finally, Penny would have to show that the product remained with the Defendants (i.e. in a way that it was in their control) in order to prevail as well. Acme will argue that here, in fact, the nail gun used by Penny was cleaned by an employee from Rental. However, this was an employee by Rental. Acme may also argue that this was a rental facility, and therefore, it constantly left the hands of the chain of commerce here and ended up with random people. While a plausible argument, given that on discovery specific information came out about the misfire, it may be hard for Acme to override the product liability claim by arguing this break in the chain of manufacture, but not impossible.

Lastly, Penny must have had a foreseeable use of the product. Penny used it for its specific purpose and therefore likely will prevail on this claim. Assuming that Acme prevails on the above and it is found that the warning was sufficient to protect Acme from liability, Penny may still argue there was no warning on her machine. Acme would then likely have to bring a cross-claim against Rental, or argue it is not liable for strict liability, due to an intervening third party that was unforeseeable who removed the product. This would likely not hold much weight if Acme was in the business of selling to rental companies, as it would have to know that its product would be cleaned and reused, and therefore, the warning label may fall off.

Note that ultimately, even if Rental is found liable, they will be able to recover fully from Acme under an indemnification theory. Rental will not be able to defend that it has a claim against Acme for indemnification. It will be required to pay Penny notwithstanding such valid claim. This is because, for strict liability product liability, the ultimately liability rests with the manufacturer notwithstanding the fact that Rental could be liable in a suit. Thus, if Acme and Rental are both in the case, Rental will file a cross claim for indemnification for any damages.

As relates to Penny's recovery, unlike negligence, there is no defense that Penny was also negligent under strict liability. However, Acme and Rental may argue the assumption of risk argument above, which can still apply to strict liability in some circumstances. However, generally, it is strict liability for a reason, this means that the Defendants are liable notwithstanding knowledge, intent, etc.

### **Claim 5: Battery**

Penny might also bring an intentional tort claim of battery against Acme. Rental could not be sued under such claim as intentional torts require an intent to cause the battery or a substantial certainty such battery would result. One cannot be liable for the intentional tort of another. However, Penny might argue that Acme intended to cause a harmful and offensive contact to her by selling her a product with a known defect for the nail to bounce off the wood. Acme will defend that it did not intend to harm her, but this will fail as Penny will argue that Acme does not have to intend to HARM her, but just has to intend to put the offensive contact into motion that causes the harm. Penny would not be required to prove damages under the intentional tort theory. In addition, Acme may defend that it did not intend an offensive contact. This would be a more difficult question, but I believe, Judge, that you could come out either way, and argue that there as an offensive contact and such conduct was intended by Acme's actions.

Penny may even try to bring a claim of intentional infliction of emotional distress, which requires that a party act outrageously and such outrageous behavior causes emotional distress. Here Acme will argue it was not outrageous as it had a warning on the label, and it was cost-prohibitive to fix the product. Penny will argue that knowingly selling a product for wood that will cause harm to eyes is intentional, and caused her significant emotional stress.

Acme may defend that Penny consented impliedly to the harm by using the nail gun, which is a dangerous product. However, Judge, this is likely not a strong defense, as one does not consent to be tortured upon by total permanent injuries. This normally applies in situations where one plays football and gets knocked down, not when one is using a product that it meant to be safe for the purpose it is being used.

### **Damages**

Penny will have a wide variety of damages to seek. First, under certain theories, such as the warranty theory above, Penny might seek contractual damages to recover the purchase price of the product due to the breach of the express warranty. In addition, and most importantly, she will seek damages for pain and suffering, as well as economic damages for loss of her ability to work and compensatory damages for any medical bills or other bills that she is required to pay. In addition, as discussed above, Penny may have a claim for punitive damages, which require that the party either act

*intentionally or with gross negligence, which is the case here, as Acme knew about the defect before selling the product to Penny, and still chose to sell such product.*

## **PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS**

Part II of this publication contains sample questions of the Florida multiple-choice portion of the examination. Some of the multiple-choice items on the Florida prepared portion of the examination will include a performance component. Applicants will be required to read and apply a portion of actual Florida rules of procedure, statutes and/or court opinions that will be included in the text of the question. Sample items 21 to 23 are examples of multiple-choice items with performance elements included. The questions and answers may not be reprinted without the prior written consent of the Florida Board of Bar Examiners.

The answers appear on page 47.

## **MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS**

These instructions appear on the cover of the test booklet given at the examination.

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination booklet with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use the instruction sheet to cover your answers.
9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.
10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.
11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.
12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up, and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet to one of the proctors outside the examination room. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

13. THESE QUESTIONS AND YOUR ANSWERS ARE THE PROPERTY OF THE BOARD AND ARE NOT TO BE REMOVED FROM THE EXAMINATION AREA NOR ARE THEY TO BE REPRODUCED IN ANY FORM.

## 23 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. After the close of the pleadings both plaintiff and defendant duly made motions for summary judgment. Which of the following statements is correct?
  - (A) Summary judgment can be entered only after all discovery has been completed.
  - (B) Motion for summary judgment is the proper motion on the ground that plaintiff's complaint fails to state a cause of action.
  - (C) Since both parties have filed summary judgment motions that assert there are no genuine issues of material fact, summary judgment for plaintiff or defendant will be granted.
  - (D) If plaintiff's proofs submitted in support of his motion for summary judgment are not contradicted and if plaintiff's proofs show that no genuine issue of material fact exists, summary judgment will be granted even if defendant's answer denied plaintiff's complaint.
  
2. Pete Smith is the active partner and Bill Jones is the silent partner in a general partnership known as "Pete Smith Plumbing." After six years of being uninvolved in the management of the partnership business, Bill purchases 100 toilets for the business. Pete is incensed because it will probably take years to use up the inventory of so many toilets and seeks your advice. The best advice is
  - (A) Bill can bind the partnership by his act.
  - (B) silent partners are investors only and cannot bind the partnership.
  - (C) unless his name is in the partnership name, third persons are "on notice" that he is unauthorized to contract for the partnership.
  - (D) Bill, as a silent partner, is not authorized to purchase and, therefore, the sale may be set aside.
  
3. Defendant was seen leaving Neighbor's yard with Neighbor's new \$10 garden hose. Neighbor called the police, who charged Defendant with the second-degree misdemeanor of petit theft by issuing him a notice to appear in the county courthouse one week later.

Defendant appeared at the scheduled place and time and asked the judge to appoint a lawyer to represent him. The judge found Defendant to be indigent. The judge

- (A) must appoint Defendant a lawyer.
- (B) must appoint Defendant a lawyer if the State subsequently charges Defendant by information.
- (C) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail for more than six months if convicted.
- (D) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail at all if convicted.

4. Which statement best describes the profit sharing relationship of a general partnership where the partners have agreed only on voting percentage and the voting shares are unequal?
- (A) Partners share in proportion to their contributions to the capital and assets of the partnership.
  - (B) Partners share in proportion to their voting percentage.
  - (C) Partners share equally.
  - (D) Partners cannot share until they unanimously agree upon a distribution.
5. Billy was charged with grand theft. The trial began on a Thursday afternoon. The jury was empaneled, sworn and released for the day. Since Friday was the Fourth of July, the judge asked the jurors to return on Monday. The trial began again on Monday morning at 8:30. By late evening the judge had instructed the jury. Due to the lateness of the hour, the jurors were sequestered for the evening to allow them to get an early start the next morning. The jurors returned Tuesday morning and were unable to reach a verdict. Unable to reach a verdict, the trial judge allowed the jurors to go home that evening. On Wednesday morning, the jury assembled and returned a verdict of guilty.

On appeal, which of the following is Billy's strongest issue for seeking a reversal?

- (A) The fact that the jurors did not begin to consider evidence until several days after they were empaneled.
  - (B) The fact that the jury was allowed to go home after being sworn.
  - (C) The fact that the jury took several days to return a verdict.
  - (D) The fact that the jury was allowed to go home after they began deliberations.
6. Kendall and Thornton agree to form a partnership, but both agree that only Kendall will manage the business and make all business decisions and execute all contracts with third parties. After that time, Thornton then enters into a long-term service contract for the partnership with Clark, who does not know of the internal agreement. The contract of Thornton with Clark is
- (A) enforceable, as the partners' agreement cannot withhold statutory authority of a general partner to bind the partnership.
  - (B) enforceable, as Clark has no knowledge of Thornton's lack of authority.
  - (C) unenforceable, as Thornton is unauthorized to execute the contract by the partner agreement.
  - (D) unenforceable, as Clark had an obligation to confirm Thornton's authority prior to entering into a service contract with the partnership.

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
  - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
  - (C) inadmissible to impeach Sally because she received a suspended sentence.
  - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
  - (B) upon request.
  - (C) upon request and showing of good cause.
  - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
  - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
  - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
  - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.
10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
  - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
  - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
  - (D) do nothing because the newspaper is self-authenticating.

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
  - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
  - (C) brought to trial within 90 days of the filing of the motion to discharge.
  - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.
- Bill met Kathy and married her after she executed a valid prenuptial agreement relinquishing all rights she might otherwise enjoy by marrying Bill. On their Miami honeymoon they drove by the condominium and Kathy declared she'd love to live there. Bill was so happy with Kathy that after the honeymoon he signed and delivered to Kathy a deed conveying the condominium to himself and Kathy as an estate by the entirety and made plans to live in the condominium as soon as the tenant vacated. Bill died the next day. How are the foregoing assets distributed?
- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
  - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
  - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
  - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
  - (B) FBI Consultants, Incorporated
  - (C) Private Eye Partners
  - (D) Child Finder Company

14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
  - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
  - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
  - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?
- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
  - (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
  - (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
  - (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

16. Bob Wilson borrowed \$20,000 from Ted Lamar to open a hardware store. Ted's only interest in the business was the repayment of his 5-year unsecured loan. Bob was so grateful for the loan that he named his business "Wilson and Lamar Hardware" and purchased signs and advertising displaying this name. He also listed Bob Wilson and Ted Lamar as "partners" on his stationery. When Ted found out, he was flattered to the point that he voluntarily reduced Bob's interest rate from 9 percent to 8 percent per annum.

A few weeks later, Pete Smith, who had assumed that both Wilson and Lamar were operating the hardware store and was not familiar with the true situation, sold goods to Wilson and Lamar Hardware. Pete Smith has been unable to collect for the goods and he seeks your advice. Your advice to Pete is

- (A) only Bob Wilson is liable.
  - (B) Bob Wilson and Ted Lamar are liable jointly.
  - (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
  - (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.
17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

The day after the jury returns its verdict, the court enters judgment for Plaintiff. One week later, Defendant moves to set aside the verdict and have judgment entered in accordance with its motion for directed verdict. In the motion, Defendant raises arguments that were not raised at trial. Plaintiff's counsel objects to the court even hearing the motion to set aside the verdict. Should the court consider the motion?

- (A) Yes, because Defendant has raised new grounds.
  - (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
  - (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
  - (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.
18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
  - (B) can be removed from office at a meeting of the shareholders, with or without cause.
  - (C) can be removed from office at a meeting of the shareholders, but only for cause.
  - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.

19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
  - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
  - (C) 50% to Joan and 50% to the Salvation Army.
  - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
  - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
  - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
  - (B) I and II only.
  - (C) II and III only.
  - (D) I, II, and III.

**SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT**

Assume for Questions 21 - 23 that following statutes and case holding are controlling law in Florida:

Florida Statutes 47.011 Where actions may be begun. Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties. Actions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.

*Gates v. Stucco Corp.*: The appellee contended that because the defendants were residing in Dade County at the time the cause of action accrued, it was immaterial where they resided at the time the suit was filed. The law does not support that contention. It is unimportant that the appellants resided in Dade County at the time of making of the lease or even at the time the cause of action accrued. Their rights under the venue statute are to be determined on the basis of their being residents of Broward County at the time the suit was filed in Dade County. The statute as to venue applies as of the time of the filing of the suit, and not as of the time of the accrual of the cause of action.

21. Payne is a resident of Dade County, Florida and was involved in a car accident in Broward County, Florida. Payne subsequently filed a complaint against Bryant and Davis in Dade County alleging that they negligently operated their cars resulting in permanent injuries to Payne. At the time of the accident, Bryant and Davis were both residents of Broward County. At the time the complaint was filed, Davis had moved and was living in Duval County, Florida. Bryant filed a motion to transfer the action to Broward County. What action should the court take?
- (A) Grant the motion because the cause of action accrued in Broward County.
  - (B) Grant the motion but allow Payne to select either Broward County or Duval County.
  - (C) Deny the motion because Payne resides in Dade County.
  - (D) Deny the motion if Davis consents to venue in Dade County.
22. Assume for this question only that Davis moved to Dade County after the accident and was residing in that county at the time the complaint was filed by Payne. What action should the court take in response to a motion to transfer to Broward County by Bryant?
- (A) Grant the motion because the cause of action accrued in Broward County.
  - (B) Grant the motion but only if Davis consents to the transfer to Broward County.
  - (C) Deny the motion because Payne resides in Dade County.
  - (D) Deny the motion because Davis resides in Dade County.

23. Assume for this question only that the trial court granted the motion to transfer and the action brought by Payne was transferred to Broward County. Who is responsible for payment of the service charge of the clerk of the court to which the action was transferred?
- (A) Bryant only as the party who moved for the transfer.
  - (B) Bryant and Davis as the defendants in the action.
  - (C) Payne only as the party who commenced the action.
  - (D) Clerk of the Court for Dade County as the transferring jurisdiction.

## ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

<u>Question Number</u>	<u>Correct Answer</u>
1	(D)
2	(A)
3	(D)
4	(C)
5	(D)
6	(B)
7	(A)
8	(B)
9	(A)
10	(D)
11	(D)
12	(A)
13	(D)
14	(D)
15	(B)
16	(B)
17	(B)
18	(B)
19	(C)
20	(C)
21	(B)
22	(D)
23	(C)