

# **Florida Board of Bar Examiners**

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

**February 2010  
July 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**

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

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

Part I of this publication contains the essay questions from the February 2010 and July 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

## **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 receive \$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 couple's 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 depending 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.*

# **Q** QUESTION NUMBER 1

## **JULY 2010 BAR EXAMINATION – FL CON LAW**

John Holmes owns, free and clear, 160 acres in the county. John and Luisa, his wife, live in a house on 140 acres with 20 acres across the street. Luisa knowingly waived all rights of any kind to the land and house in a postnuptial agreement. John's creditors obtained judgments against him for debts related to his commercial development business. The creditors are threatening levy and execution.

The Holmes want to move into town. John has entered into a contract to sell his property, and they want to buy a house on a 1/2-acre lot in town. The seller has lived there a long time, and the ad valorem property taxes are very low. John is concerned, however, about whether they will be able to pay the property taxes. Additionally, he has heard rumors that the State of Florida wants to start collecting property taxes.

John comes to you for help with the sale. John also wants to leave a life estate in the in-town property to his Canadian nephew with the remainder to his favorite charity.

Write a memo advising John regarding the property tax consequences of his proposed sale and purchase of property; creditor claims against him as they affect the proposed sale and purchase; and, his proposed estate plan for the in-town property. Do not discuss bankruptcy law or business associations law in your memo.

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

To: Partner

From: Bar Candidate

Re: John Holmes

1. *The property for sale is likely Homestead property but can likely be transferred without Luisa's consent*

*The first issue is whether John's property that he is selling qualifies for the homestead exemption. To qualify as a homestead, the property must be owned by Florida residents, used as the primary residence, be no more than 160 acres of contiguous land if in an unincorporated area or ½ acre in an incorporated area. Further, only one residence can qualify as a homestead for any person. Here, the facts show that John and Luisa had been living in the house on 140 acres. There are no facts showing that this was a vacation or second home, and they are Florida residents, so this property likely qualifies for the homestead exemption. However, it will only extend up to 160 contiguous acres, so the 20 acres across the street will not be included in the homestead. Thus, the 140 acres qualify for the homestead exemption.*

2. *John can likely sell the property*

*The next issue is whether John can validly transfer the property without Luisa's consent. In Florida, to transfer a homestead, the owner's spouse must sign and agree to the transfer. However, a spouse's homestead rights may be waived in a valid postnuptial agreement. For a postnuptial agreement to be valid, it must be in writing, signed by both parties to the marriage, and have been made voluntarily. Also, there is no financial disclosure requirement for postnuptial agreements. Here, there are no facts one way or the other as to whether Luisa's waiver was made voluntarily, but without any evidence of duress or undue influence, a court would likely find that Luisa made a valid waiver of her homestead rights. As such, John can likely transfer the property without her consent.*

3. *John's homestead exemption will likely be portable to the in-town property*

*The next issue is whether the homestead exemption is transferable from the first property to the second. In Florida, the homestead protection is transferable, provided the new property meets the requirements of primary residence, owned by Florida residents, and only one property. The homestead protection will not be valued according to the new property at first, but will retain the value for the old house adjusted at a premium rate. However, as the town is likely an incorporated area, the homestead exemption will only apply to ½ acre, which would be the entire property. However, when transferring a homestead exemption, the amount exempted will be determined by the value of the new property, not the property being sold. So, if John does buy the new property, the homestead exemption from the first property will be portable to the new*

property, but will only extend to value and acreage of the new property. Thus, John's homestead exemption will be transferable to the new property.

4. *The tax implications for the proposed sale are that John will retain the homestead exemption*

*The next issue is whether this sale has any tax implications for John and Luisa. In Florida, homesteads qualify for tax exemptions of \$25,000 initially, plus another \$25,000 for non-school ad valorem taxes for value between \$50,000 - \$75,000. Further, property taxes on a homestead may only be increased by the less of 3% or the Consumer Price Index. Also, it is unconstitutional for the State of Florida to tax property; the only entities that can levy ad valorem taxes are 1) school districts; 2) counties; 3) municipalities; and 4) special taxing districts. Thus, the 140 acres that John wishes to sell will likely qualify for the initial tax exemption. Moreover, if John decides to buy the new property in town, as put forth above, this tax exemption will apply, and he will be taxed at the value of the property less the initial \$25,000, less another \$25,000 of property value for non-school ad valorem taxes, if the property qualifies. Further, John's property will likely not be taxed by the State of Florida, but it may be taxed by counties, municipalities (like the town he would be living in), school boards, and special taxing districts.*

5. *John's creditors will probably not be able to collect judgments or force a sale of his property*

*The next issue is whether John's creditors can recover judgments from John's property. Generally, homestead property is exempt from any forced sale or judgment lien. However, creditors may force a sale of a homestead if the debt is: 1) a mortgage; 2) a mechanic's lien for improvements to the property; or 3) unpaid federal or state taxes. Further, a property will not be protected from forced sale if the homestead protection came into existence after the judgments were entered or in an effort to evade creditors. However, if the creditors obtain executions against John, they may recover from proceeds of his sale. Here, the creditors seem to have obtained judgments relating to John's business, not unpaid taxes, mortgage, or mechanic's liens, so they would likely not be able to force a sale of either property. The creditors may argue that John is trying to evade creditors by buying a new home when he owes them money, but as discussed above, the homestead protection from his original property will be portable to his new property. Also, there are no facts as to when John acquired his first property, but if he acquired it before the creditor's judgments were issued, then the homestead protection would not apply to those creditors. But, there is no evidence of that here, so John's homestead protection would likely protect both the old property and the new home he wants to buy.*

6. *John's estate plan for his new house is likely valid and the homestead protection will not extend to his nephew, but not to the charity*

*The next issue is whether John's estate plan is valid and whether the homestead protection will pass to his heirs. In Florida, a homestead protection generally terminates on a valid devise, sale, or conveyance, but it may continue if the home is devised to the testator's spouse or children. Further, an organization or corporation may not benefit from any homestead protection; it is only for natural persons. Generally, a surviving spouse is granted a life estate in a homestead, with a vested remainder in fee simple in any minor children. Also, the Rule Against Perpetuities does not apply to life estates and vested remainders. Vested remainders are remainders which have ascertainable grantees or must vest within a certain amount of time. Assuming that Luisa's waiver was not valid, as put forth above, John may leave the house to his Canadian nephew in a life estate. However, the original homestead exemption will not continue to the nephew, and the property will be revalued and taxed at the market value. However, the nephew could create a new homestead exemption if he chooses to use the house as his primary residence. Further, the remainder in the charity is vested (as the charity is ascertainable) and is not subject to the Rule Against Perpetuities. Alternatively, if Luisa's waiver was not valid, John must obtain her consent and signature in order to devise their homestead to someone other than her. However, assuming Luisa's waiver was valid, John will be able to devise to his nephew with a remainder in the charity.*

## **Q** QUESTION NUMBER 2

### **JULY 2010 BAR EXAMINATION – REAL PROPERTY**

Buyer executed a contract to purchase from Seller a used residential house in Summer Haven, Florida in its "AS IS" condition. Seller previously occupied the house. The contract required Seller to convey marketable title.

The contract disclosed that the house and an adjacent lot owned by Seller are served by an underground private sewer line that traverses a Neighbor's land pursuant to a valid easement granted to Seller. No other statements were made regarding the sewer system. The sewer line extends from a connection point to the city's sewer system on the Neighbor's land, crosses the Neighbor's land and the land on which the house is located, and terminates in Seller's adjacent lot.

Pursuant to the contract, the house was conveyed to Buyer by a valid Special Warranty Deed that stated: "Seller reserves the right to use a sewer line in the conveyed land for the benefit of Seller's adjacent land." The deed did not mention the easement on Neighbor's land.

After the closing, Buyer first discovered that (a) the house is encumbered by a valid lien recorded prior to Seller's acquisition of title to the house, and (b) sewage periodically overflows in the house.

Buyer determined that the sewage problem existed since the initial installation of the line. Subsequent to Buyer's acquisition, the problem became worse when Seller purchased additional property and connected the house located thereon to the sewer line. The cost to fix the sewer problem is significant.

Because an alternative direct connection point to the city's sewer system is now available to Buyer, Neighbor refuses to allow Buyer to install upgrades to the sewer line on Neighbor's property. Neighbor has also threatened to block the line to prevent the acceptance of sewage flow from Buyer's house.

Buyer seeks your legal advice. Prepare a memorandum discussing Buyer's rights and remedies against Seller only.

**SELECTED ANSWER TO QUESTION 2**  
**(July 2010 Bar Examination)**

To: Senior Partner

From Junior Associate

Re: Buyer's rights and remedies

**Buyer does not have a valid cause of action against Seller for breach of covenants of title regarding the lien on the property.**

When parties enter into a contract for the sale of land, the Seller has a duty to deliver **marketable title**. Marketable title does not mean perfect title, it is just title that a reasonable person would accept and the property can have minor encumbrances. Buyer and Seller stipulated in their contract that the land would be sold "As Is" but Seller would deliver marketable title. Marketable title is required to be delivered at the time of closing and it means that the property is not encumbered by anything that was not previously disclosed. If there is a mortgage on the property and the proceeds from the sale will be used to pay the mortgage, marketable title can still be delivered. However, once the parties close, any covenants in the original contract merge with the deed and the Buyer is limited to recover under **covenants of title**.

Buyer will not be able to have a claim for breach of contract for failure to claim marketable title because the closing occurred already. However, Seller could argue that he has a claim under one of the covenants of title. A **general warranty deed** contains six covenants of title: 1) **covenant of seisin**, which says that the owner actually owns the property he is seeking to convey; 2) **covenant of right to convey** which means that the owner has the right to convey the property he claims to own; 3) **covenant against encumbrances**, which means that the Seller guarantees that there are no encumbrances on the property that were not previously disclosed; 4) **covenant of quiet enjoyment**, which means that the Seller will not be ousted from the property by someone claiming paramount title; 5) **covenant of warranty** which means that the Seller will defend from any suits brought by someone claiming paramount title; and 6) **covenant of further assurances**, which means if the Seller did not convey valid title, he will do whatever is necessary to do so. The first three covenants are present covenants and if breached at all, are breached at the time of closing. They do not run with the land and are only enforceable by the current Buyer. The last three covenants are future covenants that are breached, if at all, at some time in the future and they run with the land.

Buyer will argue that Seller breached the covenant against encumbrances. However, under a **special warranty deed**, Seller only covenants that he or she did not convey the land to someone else and that he or she did not encumber the land during ownership. The facts state that Seller delivered a Special Warranty Deed. However, the valid lien was recorded prior to Seller's acquisition of title to the house. Seller would argue that he did not encumber the property since the lien existed prior to his ownership. Seller will have a successful argument here and Buyer will not prevail under a claim of breach of the covenant against encumbrances.

Additionally, Florida is a **pure notice** jurisdiction. Notice can be by **actual** notice where the Buyer knows of any claims to title, **constructive** notice where the Buyer is on notice if the instrument is recorded, or **inquiry** notice where a Seller has a duty to inquire into the land. Seller will argue that Buyer had constructive notice of the lien since it was recorded. Buyer may argue that it was outside of Seller's chain of title but there is no indication of this. Seller will claim that Buyer had constructive notice of the lien and if he had a problem with it, he should have objected prior to closing. Now he has not his right. Florida statutes do not impose a duty on a Buyer to inquire into land but case law requires that a buyer make a physical inspection of the land. This would not help Seller because Buyer couldn't physically see the lien.

Buyer may argue that there was a breach of quiet enjoyment on the land because Neighbor won't let him use the sewer line anymore. This would also bring up the covenant of warranty. Buyer will argue that he cannot make necessary repairs on the easement and his access may even be blocked. Neighbor is claiming paramount title to the land and Buyer may have a cause against Seller that he has to defend Buyer in court against an action by Neighbor. Seller will argue that this covenant doesn't extend to him because of the warranty deed, but it is likely that it will be found to apply because Buyer is being ousted of use of the sewer line and Seller is the one who contracted with Neighbor for the easement. Seller will likely have to assist Buyer in bringing a case against Neighbor in court for continued use (as discussed below) of the easement and the right to make necessary repairs.

**Seller will have a cause of action against Buyer for misrepresentation, fraud, and/or failure to disclose a defect.**

Buyer will have a cause of action arguing that Seller breached his duty to disclose the fact that sewage periodically overflows into the house. In Florida, the seller of residential real estate has an **affirmative duty to disclose** all facts materially affecting the value of land that are known or should be known to the Seller but are not readily discoverable to Buyer upon a reasonable inspection. Something materially affects the value of land if a reasonable person would think twice about entering into the contract if the fact were known. Buyer will argue that Seller had an affirmative duty to disclose the fact that the sewage periodically overflows in the house. Buyer was able to determine that this problem existed since the initial installation of the sewer line so Seller knew or should have known about this fact. Seller had previously occupied the house and if the sewage periodically overflows it is reasonable to assume that it did so when he resided there as well. Buyer will argue that he would not have purchased the home had he known that the sewage backed up so often. He will argue that this makes the property virtually uninhabitable. Seller will argue that if Buyer had done a reasonable inspection, he would have discovered that the sewage backs up. The facts do not state whether an inspection was done, however, even if one was not done, it is likely that Buyer's argument will succeed. He may be able to **rescind** the contract and seek **restitution** of the purchase price he paid for the home. If rescission is not an option, Buyer may be able to recover **damages** for the difference in value of the home with the defect versus the amount he paid. Contract damages are measured by **expectation** interest and are meant to put the parties in the position they would have been in had the contract been performed as expected. At the very least, Buyer may be able to recover damages to fix the sewer problem. **Consequential damages** are also available in contract if they were foreseeable at the time the contract was entered into.



Buyer may also have a cause of action against Seller for misrepresentation. **Misrepresentation can be intentional or negligent.** Intentional misrepresentation requires 1) **a false statement of material fact**; 2) **scienter** or knowledge of the falsity of the fact; 3) **intent to induce** the other party to rely on the misrepresentation; 4) **justifiable reliance** by the Buyer; 5) **causation**; and 6) **damages**. Buyer will have the hardest time arguing that there was a false statement of material fact. Material fact is defined above. Seller disclosed that there was an underground sewer line but did not make any other statements about the sewer line. Seller will argue that he didn't make any false statements, he just didn't say anything. However, if Buyer is able to prove that a false statement of material fact was made, he will also likely be able to prove the rest of the elements. Seller had knowledge of the fact that the sewage periodically overflowed since he had lived on the property. Buyer will argue that Seller's statements were intentionally meant to induce him to rely on them to buy the house. Seller will again argue that he didn't make any statements so didn't have any intention to induce reliance. If statements were made, Buyer will be able to argue justifiable reliance since he moved into the property without knowledge of the sewage problem. Buyer will be able to prove that Seller's acts caused him to rely and he suffered damages as a result since the sewage keeps backing up. The damages would be the amount it will cost to fix the sewer problem. However, it is unlikely that misrepresentation will be a successful argument.

A person can have a cause of action for fraud when there is 1) **active concealment** of a latent defect in the property; 2) **an affirmative lie**; or 3) **silence when there is a duty to speak**. Scienter (knowledge of the falsity) must be proved and there must be **justifiable reliance, causation and damages**. There is no indication that Seller actively concealed the sewage problem so Buyer will not have a successful argument there. As stated above, it will be difficult for Buyer to prove that Seller made an affirmative lie since he didn't say anything other than the fact that there was an underground private sewer line. Buyer will, however, likely be successful in an argument that Seller breached his duty to speak when he remained silent about the sewage problem that he was aware of since he had lived in the home. Seller was silent to the fact that sewage overflows. Buyer will argue that he justifiably relied on the lack of statement about any problems. Seller may argue that Buyer should have asked if there were any problems with the sewage, but this will not likely be a successful argument. As a result of the failure to disclose or fix the problem, sewage continues to overflow into Buyer's home. Buyer has suffered damages since he has to clean the mess and it will be a significant cost to repair the sewage problem. Buyer will likely be successful in a fraud argument and will be able to **rescind** the contract and get the return of his purchase price (restitution) or seek **damages** for the difference in the value of the home with the defect versus without it. As stated previously, at the very least, Buyer should get compensated for the cost to repair the sewage line.

Seller will defend all of these arguments by claiming that the home had an "As Is" clause. However, the "As Is" clause most likely will not work here if the court finds that there is fraud involved or that Buyer breached his duty. However, if the court finds that the breach was not material, the "As Is" clause may preclude recovery.

**Buyer will be able to enjoin Seller from using the sewer line on his new property and may recover damages for repair of the line.**

Seller has an express easement to use the sewer line to the lot adjacent to Buyer's land. An **easement is the nonpossessory interest** involving the **right to use** the land of another. Easements can be created expressly or impliedly. Easements can be **affirmative** if they allow you to do something with the land or **negative** if they restrict the owner's use of his land. Easements can be **appurtenant**, which means that there is a **dominant tenement** that is benefited from use of the easement. Affirmative easements run with the land. An **in gross** easement is personal in nature and does not involve a dominant parcel of land. It appears as though Seller created an **express appurtenant easement by reservation**. The deed expressly stated that "Seller reserves the right to use a sewer line in the conveyed land for the benefit of Seller's adjacent land." The lots are next to each other and Seller's lot would be benefited so his is the dominant tenement while Buyer's is the servient tenement. Easements are created by grant or reservation. Because Seller reserved the right to use the land, this was an easement by reservation. Seller has the right to make reasonable use of the easement and must keep it in repair. If both Buyer and Seller use the easement, Buyer may also have the obligation to keep it in repair.

However, easements are restricted to reasonable use. The facts indicate that after Buyer bought the land from Seller, he bought more land and connected another house to the sewer line. Buyer will argue that this use by the extra house is **excessive** and should terminate the right to use the easement. Seller would argue that it is reasonably foreseeable extended use but this will not be a successful argument. Buyer will not be able to terminate the easement due to excessive use, but he will be able to enjoin the extra use. He will have to seek an injunction in court and Buyer will be restricted to using the easement to benefit the land described in the instrument, not the new land. Additionally, since Seller's extra use caused more damage to the sewer line, Seller will be required to pay at least some damages for the repair. Since both Buyer and Seller use the sewer line, the court will likely order that they split the repair costs.

Seller obtained an express appurtenant easement from Neighbor for use of the sewer line running across Neighbor's land. Because an appurtenant easement runs with the land, Buyer has the right to make the same use of the easement Seller had made even though the deed did not mention the easement with Seller. Buyer will be able to make necessary upgrades to the easement.

**Buyer may have a claim against Seller for trespass to land**

Trespass to land is the voluntary intentional physical invasion into the real estate of another. Causation must also be proved. It can be personal or by objects. Buyer will argue that the sewage coming into his home generated from Seller's home is a physical invasion. Nominal damages are available but here Buyer will be able to prove actual damages. Intend is conduct that is purposeful or done with knowledge of substantial certainty that the result will occur. Buyer will argue that Seller knew that by using the sewer system, the sewage would overflow or he at least had knowledge of substantial certainty of this. At the very least he will be able to prove that Seller's acts set the action in motion that led to the sewage overflowing.

## **Q** QUESTION NUMBER 3

### **JULY 2010 BAR EXAMINATION – TRUSTS**

Susan, a widow, signed a trust document that provided for creation of a trust to contain the proceeds of any life insurance policies in effect at the time of her death. The trustee was Susan's brother, Thomas. The beneficiaries were her surviving children and "others as the trustee in his discretion may deem appropriate." The beneficiaries would receive income earned on investment of the insurance proceeds for ten years, at which time the trust would terminate and the beneficiaries would receive the insurance proceeds in equal shares. The trust provided that during its duration, the interest of each beneficiary will be subject to a spendthrift provision.

Susan died five years later. At the time of her death she held a life insurance policy with a benefit of \$1 million payable to the "Susan's Spendthrift Life Insurance Proceeds Trust." She was survived by her daughter, Betty, and son, Carl.

One year after Susan's death, Betty and Carl received a letter from Thomas informing them that he has named Donna and Edith, Susan's distant cousins, as additional beneficiaries of the trust. Thomas's letter also advised Betty and Carl that his investment of most of the trust funds in a platinum mining operation was not earning an immediate return and he would not be paying the beneficiaries any income for the month but he expected large earnings from the investment in the foreseeable future.

Carl's ex-wife is seeking to reach the value of Carl's interest in the trust to collect a child support arrearage. Betty would like to obtain her share of the insurance proceeds as soon as possible to pay off the loan and note on the new boat her boyfriend purchased for his business as a sport fishing guide. If she cannot get the funds directly from the trust, she would like to assign her right to future trust benefits to the loan company that holds the note.

Betty and Carl seek the advice of Attorney. Discuss the issues that Attorney should address with Betty and Carl regarding validity of the trust, the actions of Thomas, the likelihood of success of any legal action by Carl's ex-wife, and Betty's ability to obtain her share of the proceeds before the end of the ten years specified by Susan. Also discuss whether Attorney can take the case on a contingency fee basis and whether Betty and Carl can recover any fees from Thomas personally or from the trust assets if they prevail in a legal action against Thomas.

## **SELECTED ANSWER TO QUESTION 3**

**(July 2010 Bar Examination)**

*Valid Trust* – A trust is legal title to property in one person for the benefit of themselves or others. In order to form a valid trust there must be: a legal purpose; intent to create a trust Res, i.e. trust property; ascertainable beneficiaries; a trustee who is not the sole beneficiary and sole trustee; a settler with legal capacity and it must be in writing if the property includes real property and comply with statute of Wills if testamentary. Here, there is a legal purpose (any purpose is sufficient so long as not an illegal purpose) to devise life insurance proceeds. The intent of Susan to make a trust is clear by the fact that she created it. The trust property is the proceeds of Susan's life insurance policies in effect at the time of her death. This is a sufficient interest in proceeds to qualify as the trust Res. The beneficiaries must be ascertainable in order to form a valid private trust (as opposed to a charitable trust, which requires unascertainable beneficiaries). Here, the beneficiaries were named as Susan's "surviving children" and "others as the trustee in his discretion may deem appropriate." Florida allows a class to qualify as "ascertainable" for purposes of beneficiaries and therefore, the class of Susan's children is sufficiently ascertainable. The discretionary language giving power to the trustee would likely be considered a discretionary power of appointment, allowing the trustee to decide who else may be a beneficiary. Here, Thomas is the trustee, i.e., Thomas holds legal title to the property. Thomas is a valid trustee because he is not the sole trustee and the sole beneficiary, which would cause the trust to fail. A trustee is important, although a trust will not fail to lack of trustee, the Court will appoint a new trustee if, for some reason, Thomas can no longer serve. Susan is the settler, i.e., the person who has created the trust and there are not facts to include that she was in any way lacking capacity at the time of creating the Private Trust. Private trusts can be express, resulting, and constructive. An express trust, like the trust created here, is one where the trust is made to Settler's indications. A resulting trust is one that arises when a trust ends and fails and there is still trust property. Here, it appears a resulting trust is formed when the trust ends after 10 years, at which time the trust would terminate and the beneficiaries would receive the insurance proceeds in equal shares.

Finally, a constructive trust can be created by the Court as an equitable remedies when there has been some wrongdoing and equity would require that property be distributed in a different way as a result.

The express private trust appears to be valid and the insurance proceeds, i.e., \$1 million, is the Res, daughter, Betty and son, Carl are the ascertainable beneficiaries. This is a testamentary trust, and therefore should be in writing, signed and attested by two subscribing witnesses. The facts are not clear on whether this was followed but it will be assumed it was for the sake of analysis. The trust also includes a spend-thrift provision – to be discussed later.

Actions of Thomas – As trustee, Thomas has many duties to the beneficiaries. The trustee also has the right to reasonable compensation. Thomas' duties include a duty not to commingle his funds w/ trust funds, a duty to be fair and impartial among beneficiaries, a duty to account to beneficiaries, a duty to invest trust assets prudently and a duty not to self-deal. There is also a duty to diversify trust assets and a duty to act personally. Although in Florida a trustee can employ others to perform trustee functions. Thomas had discretion to name Donna & Edith as trust beneficiaries if he saw it to be appropriate. Betty and Carl may argue that they were not ascertainable beneficiaries at the time of the trust creation and that they therefore should not be beneficiaries. The cousins will probably be valid beneficiaries, however, since Thomas was given such power in the trust instrument, unless it appears that Thomas is trying to fraudulently get to the trust asset through one of the cousins, which would be a breach of his duties to the beneficiaries.

Thomas' investment of most of the trust funds in a platinum mining operation can be attacked by the beneficiaries based on a failure to diversify and a failure to act as a prudent investor. Thomas is likely to be found liable for a failure to diversify, since he seems to have placed most of the \$1 million in one investment. The prudent trustee rule requires a trustee to invest prudently, the measure of prudence is based on the time of the investment. A trustee with special skills or expertise is held to a higher standard under this rule. Here, the facts do not indicate if Thomas was of special skills or expertise that would require a higher standard for his actions. It is also not clear whether a platinum mining operation is a prudent investment. The beneficiaries ("B's") will argue that a prudent investor would not invest in such an operation as indicated by the fact that the investment did not create any income in the first month. Thomas will argue that it was a sound investment because he expected a large earning from the investment in the future. However, since prudence is measured at the time of investment, it is possible that the court will find that the investment was not prudent. Self-dealing is present when an investor uses trust funds to benefit himself. Here, if Thomas was not paying income to the beneficiaries because he was using the income to pay personal loans or something else to benefit himself, the court would find he was involved in self-dealing and would remove him, make him pay trust, etc.

Spend-thrift trust – A spend-thrift trust is a trust that includes a provision restricting any voluntary or involuntary transfer of beneficiaries interest in trust assets. Here, Susan included a spend-thrift clause as to all beneficiaries. Spend-thrift trusts, however, do not protect from a transfer of the interest to pay alimony, child support or government taxes or payments. Here, Carl's ex-wife would be successful in getting at Carl's interest in the trust, regardless of the spend-thrift clause because the purpose is to get her child support arrearages.

Betty, however would not likely be able to voluntarily assign her funds directly from the trust. Once Betty received her interest, she could transfer them to the loan company that holds the note on her boat. This is so because the clause protects trust assets from voluntary as well as involuntary transfers. Betty also cannot change the purpose of the trust to get the assets before the end of 10 years unless all the beneficiaries go to court and unanimously agree to modify the trust. The settler would have to consent if still living, which is not the case here.

Contingency fee for Attorney – A contingency fee agreement allows an attorney to receive a portion of the judgment damages in the case if it is successful. These agreements must be in writing and must include terms necessary to form a valid agreement. If agreed to by Betty and Carl, the attorney may take the case on contingency fee basis.

Betty & Carl's recovery from Thomas – Trust beneficiaries are 3rd party beneficiaries to a trust and trustee can be held personally liable if appropriate and decided by the court. Here, they may sue Thomas personally for his decision to invest, if it was not prudent and also if he was involved in self-dealing. They can recover atty. fees from Thomas and interest. They can also recover from the trust.

## **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)