

# **Florida Board of Bar Examiners**

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

**July 2007  
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**This Study Guide is published semiannually with essay questions  
from two previously administered examinations  
and sample answers.**

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

## **JULY 2007 AND FEBRUARY 2008 FLORIDA BAR EXAMINATIONS**

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

Part I of this publication contains the essay questions from the July 2007 and February 2008 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.

# **QUESTION NUMBER 1**

## **JULY 2007 BAR EXAMINATION - FAMILY LAW**

Harold and Wilma, who have always resided in Florida, were divorced in Miami. They were awarded shared parental responsibility of their daughter, Dotty. Wilma was awarded primary custody, and Harold was awarded visitation with Dotty. The divorce decree was silent regarding relocating Dotty outside of Florida.

Dotty had a loving relationship with both parents. To the extent Wilma allowed it, Harold always exercised his visitation. After the divorce, the parties' relationship deteriorated. When they argued, Wilma would not allow Harold to pick Dotty up for his visitation.

In an effort to distance herself from Harold, Wilma abruptly moved to Ohio with Dotty. After arriving in Ohio on Dotty's 8<sup>th</sup> birthday, Wilma called Harold and told him she was staying in Ohio for an indefinite period.

Despite an investigation, Harold could not locate Dotty. Nine months later, Wilma served Harold with a Petition from Ohio requesting that she be allowed to permanently relocate Dotty to Ohio, that she have sole custody of Dotty, and that Harold's visitation be supervised. Harold continues to reside in Florida. Harold wants to litigate this case in Florida and also wants to get custody of Dotty.

Senior Partner represents Harold and she has asked you to prepare a legal memorandum addressing each of the following questions:

1. Will the case be tried in Florida?
2. Will Wilma's request to relocate Dotty to Ohio be granted?
3. Will Wilma's request for sole custody of Dotty be granted?
4. Will the court require Harold's visitation with Dotty to be supervised?
5. Will Harold's request to have custody of Dotty be granted?

Please include your reasoning for your responses to the foregoing questions.

## **SELECTED ANSWER TO QUESTION 1**

**(July 2007 Bar Examination)**

### **1. Jurisdiction over the case.**

Child custody is a bitter issue that is inevitable when dealing with a divorce involving a child. Both parents have the equal obligations for support of the child; more importantly, each parent has the **right to visitation of the child**. The court also has the authority to require that a parent granted physical custody must **foster a loving relationship** with the non-custodial parent. Physical custody of the child is not to be confused with **parental custody**. The court will commonly award shared parental custody which gives both parents the equal right to make important decisions involving the child's medical treatment, education, and welfare. Furthermore, even when a court awards only one parent with physical custody, the other parent has a right to visitation. The court will commonly award visitation and enforce it without restrictions absent a showing of wrongdoing, abuse, or other relevant factors suggesting that supervised custody would be preferred. Finally, the court will generally allow a parent with physical custody to freely move and relocate absent a special provision in the child custody agreement requiring prior court approval or restrictions. However, the initial child custody agreement is not permanent. Upon a showing of **substantial change**, the court may issue a **child custody modification**.

The facts in this case show that Harold (H) and Wilma (W) were awarded shared parental custody. This means that although W was granted physical custody of their daughter (D), W must allow H to be involved in the decision-making and upbringing of D. Here H was awarded the right to visit with D. This is a right that he has fully exercised and the court will take this into consideration when deciding whether or not D and H have a loving and significant relationship. Finally, the facts show that W as physical custodian did not foster a loving relationship with D's rightful father and shared decision-maker, H. More importantly the facts do not indicate that the child custody agreement issued by the FL Court had any provision regarding a limitation on mobility and relocation.

In order to greatly facilitate the decisions and custody hearings that are in the **best interest of the child** all states have adopted the **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)**. This act allows for a continuing and standard jurisdiction for proceedings dealing with child custody enforcement and modification. In applying the UCCJEA the first question revolves around the establishment of the correct **homestate**. The homestate is the state where the child and one parent have lived for a **continuous six months** just prior to the filing of the present action. A homestate may also be the state where the child and parent had a previous homestate (domicile of the child and one parent for a continuous 6 months just prior to the filing of the present action) if it was the homestate within the last 6 months and one parent still resides there. Nevertheless, the homestate jurisdiction is not always exclusive. One exception to the general homestate rule is when a state has a **significant connection and substantial evidence** with the child custody dispute. Furthermore, a foreign court may also refrain from exercising jurisdiction when the focus is inconvenient or if another state's court would more adequately be able to decide the case. Finally, the UCCJEA also states that the court where the original child custody



agreement was procured will exercise **exclusive continuing jurisdiction** for as long as there is at least **one parent** still in the jurisdiction and the state has a **significant connection and substantial evidence** with the child custody agreement and need for modification or enforcement.

In this case the facts show that W and D have moved and relocated to Ohio. They have continuously resided there for a total of 9 months. According to the general homestate rule, Ohio as the state where the child and parent lived for a continuous 6 months prior to the filing of the petition should exercise its homestate jurisdiction under the UCCJEA. However, H is not without recourse. H will first argue that Ohio is not the appropriate venue. H will argue that it would be highly inconvenient for him to be forced to litigate and enforce his rights in a foreign and distant jurisdiction. Furthermore, he should argue that since FL is the state where the initial petition was filed and custody agreement issued should exercise its exclusive continuing jurisdiction. The facts indicate that H is still a resident of FL. Therefore, he has satisfied the first prong for exercising continuing jurisdiction. However, W will argue that H has been remiss in his duties as a father for the last 9 months. The facts show that H has not once visited or had a connection with D for a significant period of time. However, the court will regard this argument as frivolous. H has tried to maintain a relationship with W. But for W's bad faith, fostering of hateful feelings, and intentional concealment H has been unable to contact either W or more importantly D. The FL Court will take all these facts and issues into consideration in deciding that D still has a significant connection not only with H but also the state of FL. As the initiation jurisdiction, FL also maintains all substantial evidence surrounding the original custody dispute. H will be successful in arguing that the Ohio court should refrain from exercising jurisdiction and allow FL to maintain its exclusive continuing jurisdiction.

## **2. Request for relocation.**

**Absent a particular provision** in the original child custody agreement the physical custodian of the parent is free to relocate from one place to another. However, this right is not conclusive. The court will take into consideration what would be in the **best interest of the child**. The court will also take into consideration the non-physical custodian parent's rights to visitation and relationship with the child. Furthermore, the court will consider the reasons and motives behind the relocation.

In this case the facts show that there was no provision restraining W from relocating to Ohio. The agreement neither required that the court give prior approval, she obtain consent, nor was she required to give H notice of her intention to relocate. However, as stated above this right to relocate is not unchallengeable. H will argue to the court that he has regularly exercised his visitation rights and that H and D have an established and loving relationship. Furthermore, he will argue that W's motives for relocation are not supported by a rational reason. H will be able to show that W intentionally moved out of the state to break all ties between H and D. W may argue that her motivation for relocation was to provide a better life for her and D. She may further argue that her career or aspirational goals require that she move to Ohio. Nevertheless, the facts indicate to the contrary. She was primarily motivated by bad faith and this fact will significantly persuade the court. Finally, the court will consider the fact that she went into hiding and intentionally, willfully, and wantonly concealed herself

and D from H for a significant period of time. The court will probably give this fact great weight and rule that W will not be granted her request to relocate to Ohio.

### **3. W's request for Sole Custody.**

As noted above a child custody arrangement is not conclusive and may be **modified** upon a showing of a **substantial change in circumstances**. When making a modification ruling the court will continue to use the same judgment and discretion when deciding the original decision. The court must consider what is in the **best interest of the child**.

The facts show that W is not a responsible and reasonable physical custodian. The court generally requires that a physical custodian allows the other parent to exercise visitation rights. However, the facts in this case indicate that W is very unlikely to allow H to visit with D. Furthermore, nothing indicates that H is not a positive force in D's life. W will not be able to show any reason to be granted sole custody. H is not remiss, and to the contrary has a loving relationship with D. H has **an equal right to make important decisions regarding D's medical treatment, educational, religious and welfare**. The court will probably not consider there to be a substantial change in circumstances and thus not likely take away H's shared parental responsibility, also known as **legal custody**. W will not be awarded sole custody.

### **4. Supervised Visitation.**

As discussed above upon a substantial **change in circumstances** the court may modify a child custody agreement if it is in the **best interest of the child**. The facts show that H has continuously exercised his visitation rights. More importantly, it was W who temperamentally refused to allow H to have steady and stable visitation with D. W has not produced any facts as to persuade the court why H should not be trusted to be left alone with D. D and H have a loving relationship and there is no reports or evidence of abuse to substantiate a change in circumstances. Finally, the court will consider that **it is in D's best interest to have a loving and caring relationship with both of her parents**. Inappropriate and ungrounded supervised visitation will hamper H's ability to foster such a loving relationship. Therefore, the court is unlikely to require that H's visitation be supervised.

### **5. H's request for physical custody.**

As discussed above upon a substantial **change in circumstances** the court may modify a child custody agreement if it is in the **best interest of the child**. The court will also take any other relevant facts and factors into consideration. H will show that W did not foster a loving relationship in D with H. Furthermore, H will be able to show that he is capable of not only allowing W to have visitation with D, but she is in a better position to provide a stable and nurturing environment. W's abrupt relocation without any justifiable reason will weigh greatly in H's favor. Furthermore, H will be able to show that W's actions constituted abuse. Although not physical abuse, emotional abuse and deprivation is abuse none the less. It is in **D's best interest**, to be able to live in a rational, loving and stable home. A place where she can have a steady education and build lasting friendships. H will probably be able to show that W's recent abrupt psychological and emotional issues s a substantial change in circumstances.

*Therefore, H will probably be able to modify the original child custody agreement and obtain custody of D because it is in her **best interest**.*

## **Q** QUESTION NUMBER 2

### **JULY 2007 BAR EXAMINATION - FLORIDA CONSTITUTIONAL LAW**

The City of Beachville, Florida, desires to promote commerce and tourism by constructing a convention center on vacant land the City owns. The convention center will be owned by the City, but the facility will be operated by a private company – Conventions, Inc. Once the convention center is built, the City proposes to lease it to Conventions, Inc. for a period of 20 years. Under the terms of the lease, Conventions, Inc. will retain all revenue generated by the operation of the convention center throughout the period of the lease. The lease provides that the real property on which the convention center is built and the improvements thereon will be exempt from ad valorem taxation by the City. Because the City wants the convention center operated as a first-class facility, the lease requires that all persons who become employed at the convention center become members of a national labor union of convention center workers that is known for the expert training of its members.

The City plans to issue bonds to finance construction of the convention center. The bonds, which will be secured by a mortgage on the convention center and underlying land, will be payable from a new tax the City intends to impose on parking. The Florida Legislature recently enacted a law, stating: “The governing authority of any municipality with a population of 300,000 or more on March 1, 2006, may impose a tax on the rental of space at parking facilities within the municipality that are open for use by the general public.” Beachville is one of three municipalities in Florida that had a population greater than 300,000 as of March 1, 2006.

You are a law clerk for the City Attorney. Prepare a legal memorandum analyzing all of the issues arising under the Florida Constitution in connection with the City’s convention center plans. Set forth in your analysis your conclusions as to the issues and the basis for each of your conclusions.



## SELECTED ANSWER TO QUESTION 2

### (July 2007 Bar Examination)

Issue:

**The first issue is whether the city of Beachville may build a convention center.**

*In Florida, in order for a city to take an action, that action must be one which is traditionally provided for by the city. The city may spend or act for the general welfare of its residents which includes passing regulations that promote the health and safety of its citizens.*

*Building a convention center appears to be for the general welfare of its citizens. This convention center will provide revenue for the city and a place for recreation for its residents. However, one problem that may arise is that in Florida there is a prohibition of using the state's taxing powers to benefit a private corporation. Here it looks as if the municipality will lease this property out to a private corporation. An opponent to this proposed action may argue that the municipality is using its taxing power to benefit the private corporation that is leasing this facility. However, this argument will likely fail because the city is allowed to build capital projects such as convention centers because it is providing for the general welfare of the residents of that city.*

Conclusion:

*The city will be able to build a convention center because it is providing for the general welfare of its residents and allowed to engage in capital projects.*

Issue:

**The next issue is whether the property will be exempt from ad valorem taxes as provided by the lease.**

Rule:

*Normally all municipality property is exempt from ad valorem taxes. However when deciding if the municipality property is exempt from ad valorem taxes you must look to the **government purpose v. commercial purpose test**. If the land is being used for a private purpose it is not exempt from ad valorem taxes, on the other hand if the property is being used for a government purpose it will be exempted from paying these taxes.*

Analysis:

*In this problem the City and Conventions Inc. will argue that this is being used for a government purpose. They will argue that Convention Inc. is excused from paying taxes because it is a lease, and the municipality will argue that it will be exempt from paying taxes on the land. The municipality will argue that since it owns the property it is municipality property which is exempted from ad valorem taxes. Further Convention Inc. will argue that since it is providing a public benefit it is a government purpose. However, in the State of Florida, municipalities may not exempt leases from ad valorem taxes because it is being used for a commercial purpose. Here Beachville is leasing its property to a private corporation. Convention Inc. is using the property for profit and this*

*will be considered a private/commercial purpose which is not considered a government purpose. Normally to be exempt from ad valorem taxes the government must be using the property for government purposes. However this is not the situation in this case, because Beachville is leasing it to a private corporation for that private corporations benefit.*

*Conclusion:*

*Thus the private/commercial purpose test v. the government use will reveal that the convention center is used for a private/commercial purpose and will not be exempted from ad valorem taxes.*

*Issue:*

***The next issue is whether the city may require workers who are employed by the convention center must become members of a national labor union of convention center workers.***

*Rule:*

*In Florida, the right to work is an enumerated right in the Florida Constitution. These rights are looked upon as fundamental rights. **In Florida, one may not be granted or denied work based on their membership or non-membership to a union.***

*Analysis:*

*In this situation, Beachville incorporated into the lease with Convention Inc. that all workers must become members of a national labor union. Under Florida law this is a problem because there is a fundamental right to work. In order for the city to overcome this fundamental right it must show that there is a compelling government interest in employing union workers and that the provision is narrowly tailored to meet this goal, and that it is the least restrictive alternative. Here the city will argue that there is a compelling interest to make sure that the facility is a first class facility and that the lease provision is closely related to that interest by requiring that its employees become a part of this union. The city will argue that in order to have great facilities it must have their workers belong to a union that is known for its high quality, and that this lease is narrowly tailored to meet the interest of having a top-notch facility. Further the city will argue that this is the least restrictive alternative because there is really no other way to train and ensure that employees are of the best quality except for if they join this union. However this argument will likely fail. Although it may be a compelling government interest to ensure that it has a profitable and first class convention center, Union membership will not ensure quality. Belonging to a national union of workers does not guarantee quality. The mere membership to a union will also not guarantee that the facility will be first class. Further this is not the least restrictive alternative because the city may make alternative provisions that can require quality such as employee reviews and strict guidelines for employment.*

*Conclusion:*

*The provision in the lease that requires membership to a union will ultimately fail because their fundamental right to work in Florida that requires that employees are not hired or retained because of their membership or non membership to any union.*

Issue:

**The next issue is whether or not the financing plan for this convention center complies with the Florida Constitution.**

Rule:

*In order for a bond to issue it must first be for a public interest and may not directly benefit a private entity, or it will be in violation of Florida's prohibition on using its taxing power to benefit a private corporation. In Florida, there are two types of bonds that may issue in order to finance government projects. **General Obligation Bonds** are bonds that repayment is guaranteed by the full faith of the government. In order to pass a general obligation bond there must be a referendum by the people on whether it may issue. Things such as schools and bridges require no such vote. **Revenue Bonds** are bonds that are paid back from the revenue that the project generates. Municipalities may issue a bond without a vote if it matures within one year.*

Analysis:

*In this question the bond looks like a general obligation bond. This looks like a general obligation bond because the city intends to pay these bonds back with a tax on parking in the whole city and not as a revenue generated from the project itself. Further the lease provides that all revenues from this project will be retained by the private corporation, Convention Inc. In order to pass this bond the city will have to have a referendum on the bond and no such vote was held. The municipality may argue that this bond matures in less than a year and therefore requires no such referendum. This bond is secured by a mortgage. Normally mortgages require more than 1-year repayment and therefore this municipality must have had a referendum to issue a bond that requires the full faith of the government. However the City may argue that this is a revenue bond because it will create more parking for the convention center and it will, in theory, collect revenue from the parking at this convention center. However fees are normally charged directly for the thing is to pay for. Here the parking will be taxed on everything and go into a general tax fund that does not directly pay for the convention center. The municipality may argue that this parking tax is a mere fee. Municipalities are allowed to charge a fee with no enabling referendum. However, in order to have a valid fee the fee must pay exactly for the thing it purports to charge. Here the parking will be taxed and the tax will go directly to the convention center. Here the parking fee does not directly pay for parking it pays for the convention center. This will be seen as a general tax and not a fee because it generates surplus that goes to pay for the convention center.*

Conclusion:

*In order for this bond to issue, Florida law requires that there be a referendum. Since no such referendum was indicated in the facts, this bond will fail to issue since it is most likely to be classified as a general obligation bond. Further the Supreme Court of Florida has mandatory jurisdiction on bond certification.*

Issue:

**The next issue that must be addressed is whether the law enacted by the Florida Legislature is a valid law.**

Rule:

*In order for the legislature to pass a law it must be passed in a legislative session. Laws must have a title that gives notice and is not confusing, contain a single subject, and must contain an enabling clause that reads: "be it enacted by the legislature of the State of Florida." **General laws** are laws that cover everyone in the state even-handedly and only require passage of the Florida legislature. A **special law** is one that applies to only a certain person or groups of persons, or a certain geographic area such as a city. Special laws require either notice before the passing or a referendum after the passing or the law will have no effect. **General laws of application** are laws that are general laws that apply uniformly to an area such as one that has a minimum or maximum population requirement.*

Analysis:

*First, there is no enabling clause. On its face this provision is unconstitutional because there is no enabling clause, unless there is an enabling clause this law will have no effect. This law is not confusing, and assuming the title gives notice it may be valid. Further there are no facts to indicate that it may contain more than a single subject, so this law may be valid and pass this requirement. This law passed by the legislature is a general law of application. This law is a **prohibited general law of local application** because it is a population minimum that is fixed in time. No matter how much time passes the cities that meet this requirement on March 1, 2006 will always have the same population. Further the facts indicate that Beachville is one of 3 total municipalities to have over 300,000 people as of this date. This law therefore only applies to 3 municipalities and it is clearly not a general law. The legislature may argue that this is a valid general law because it only requires a minimum population, and that cities/municipalities may grow past this number and fall within this law. However this is a prohibited general law of local application because it is fixed in time and no city may change its population retroactively to qualify for this statute.*

Conclusion:

*The legislature has passed an invalid law that is special because it only applies to certain cities that have a population of over 300,000 on a certain day.*



# **Q**

## **QUESTION NUMBER 3**

### **JULY 2007 BAR EXAMINATION - REAL PROPERTY**

Seller owned a 130-acre farm in Sunshine County, Florida. The farm, located three miles outside the city limits of Sunnyville, was unoccupied. On May 1, 2006, Seller orally offered to sell the farm to Buyer for \$250,000 on the following terms: with \$40,000 down and the remainder to be paid in three annual \$70,000 payments. On May 5, 2006, Buyer agreed to purchase the farm and gave Seller a \$40,000 check. Seller gave Buyer a receipt, which said: "Received from Buyer: \$40,000 down payment for the sale of my 130-acre farm in Sunshine County at a price of \$250,000." The receipt was signed by Seller. It was agreed that Buyer would occupy the farm immediately, but that Seller would not deliver a deed to Buyer until the final payment was made.

On May 15, 2006, Buyer began living on the farm along with his wife and their 11-year-old son. Buyer moved his animals and equipment onto the farm, and Buyer paid \$30,000 to have a new barn built on the property.

On August 1, 2006, Seller received an offer from Investor to purchase the 130-acre farm in Sunshine County from Seller for \$400,000 cash. Seller immediately accepted the offer and, in exchange for Investor's payment, delivered to Investor a warranty deed. Investor knew that Buyer and his family were living on the farm, but Investor thought Buyer was a tenant. Investor never asked Buyer why he was there. Investor recorded the deed in the property records of Sunshine County on August 4, 2006.

On September 1, 2006, Buyer died, survived only by his wife and son. Buyer's will devised all of his property to his wife.

Discuss each of the sales by Seller and the rights and ownership interests of the various parties to the farm.

## SELECTED ANSWER TO QUESTION 3

### (July 2007 Bar Examination)

#### Seller's sale to Buyer

*Seller's sale of the 130-acre farm in Sunshine County, FL to Buyer raises issues of contract formation, the Statute of Frauds (SofF) and Homestead property.*

#### 1. *Is there a valid K?*

*In order to have a valid K, there must be an offer, acceptance, consideration, and no valid defenses. An offer is an invitation to enter into a K, that is sufficiently definite to put the power of acceptance in the offeree. Here there appears to be a valid offer by Seller to sell the farm to Buyer because Seller's statement to Buyer offered to sell him the farm on certain terms of payment. Buyer accepted Seller's offer by showing a manifestation of an intent to enter into the K by giving Buyer the \$40,000 check that Seller requested as part of his payment terms. This check and Seller's promise to sell also constituted valid consideration for the contract, which in FL can be either a benefit or detriment to the parties (which is the minority rule). While these terms indicate that there was an offer, acceptance, and consideration, Seller has the defense of the statute of frauds, discussed below.*

#### 2. *Statute of Frauds*

*According to the SofF, in order to protect buyers and sellers from fraud, certain contracts must be in writing, such as those in consideration of marriage, those that cannot be performed within one year, those for the sale of goods of \$500 or more, and those for an interest in land. In Florida, the sale of an interest in land is subject to special SofF provisions. In FL, in order to satisfy the SofF, a land sale K must be in writing, adequately describe the property to be sold, name the parties to the K, the price paid, be signed by the party to be charged under the K, and be witnessed by two subscribing witnesses.*

*Here, the original agreement between Seller and Buyer was not in writing. Buyer could argue that his \$40,000 check to Seller was a writing to satisfy the statute, since a writing is all that is required, not a formal K. However, Buyer would probably lose on this argument because the check was not signed by Seller, who would be charged by Buyer's estate under the K. The receipt that Seller gave Buyer for his check could also serve as a writing to satisfy the statute because it is signed by Seller and indicated the parties, the property, and the terms of the K, as long as Seller did not own more than one 130-acre farm in Sunshine County. However, because the receipt was not signed by two subscribing witnesses, Seller could successfully argue that it does not satisfy FL's statute of frauds.*

*However, there are two exceptions to the statute of frauds that can serve to satisfy the statute if there is no formal writing: part performance and equitable estoppel.*

*Under the doctrine of part performance, in a land sale K without a writing, the statute of frauds will be satisfied if a party does two of the following three things:*

1. *Pays all or substantially all of the K price;*
2. *Occupies the property; or*

### 3. Improves the property.

*Buyer can argue that he satisfied all three of these conditions and that the statute of frauds is subsequently satisfied. Buyer paid Seller \$40,000, which was the initial payment that Buyer was supposed to pay. While Seller will argue that \$40k was not all or substantially all of the K price, Buyer would argue that it was all of the K price that was then due, and thus he had paid all monies due. Buyer would most likely win on this provision, especially since the payment terms were in a separate signed writing by Seller. Buyer will also argue that he took possession of the property by occupying the farm and that he improved the farm by building a \$30,000 barn on the property. Thus, Buyer could satisfy the SofF under the doctrine of part performance.*

*Buyer could probably also satisfy the SofF under the doctrine of equitable estoppel because Buyer and Seller agreed to allow Buyer to move onto the property and it was reasonable foreseeable to Seller that Buyer would have expended time and money to move onto the property, which Buyer did incur, and thus Seller should now be estopped from alleging that there was no K.*

### 3. Equitable Conversion

*The fact that Buyer and Seller agreed that Seller would not deliver a deed until the final payment date should not pose a problem for Buyer, because under the doctrine of equitable conversion, once the K for the sale of property was signed (or proved by a substitute for signing), equitable title to the property vested in Buyer, even though Seller still had actual title, and both parties would be able to enforce specific performance of the K in court. Specific performance is a valid remedy because land is involved and damages alone would not provide the parties the benefit of their bargain.*

### 4. Homestead

*Under the FL Constitution, a homestead property is a natural person's primary residence in FL. It may be up to 160 continuous acres outside of a municipality, or half an acre in a municipality. Since the 130-acre farm here was outside the city limits of Sunnyville, and Buyer moved there with animals and equipment (indicating it would be his primary residence) Buyer could claim the property as his homestead property. Homestead property is protected from judgments of creditors except for mortgages, taxes, and home improvement liens. There are restrictions on the devise of homestead property if the deceased is survived by a spouse and/or minor child. Since Buyer was survived by both, he could not devise his homestead property away from his son by leaving it to his wife, so the wife takes a life estate in the property, with a remainder in the son.*

### 5. Damages

*Buyer's wife, as guardian for her son, should sue Seller (and joint Investor) to enforce the land sale K under the doctrines of equitable conversion and breach of K. They should be successful in doing so, and the court should order that title to the farm be given to the wife and son upon payment of the full K price.*

### Seller's sale to Investor

*Seller's sale of the farm to Investor was improper given that the farm was already under K to Buyer. Given that the sale from Seller to Investor was consummated and Investor has the deed to the property, there does not appear to be a contract formation issue. However, there is a significant issue as to whether Investor's title is superior to Buyer's heirs' title.*

*FL operates as a notice jurisdiction for the sale of property. In FL, buyers of real property are subject to actual, constructive, and inquiry notice. A buyer has actual notice of a prior conveyance if he or she actually knows that there was a prior conveyance, and a buyer has constructive notice when the prior conveyance has been recorded in compliance with the recording statute. Neither was the case here because the sale to Buyer was not recorded, and the facts do not indicate that Investor had actual knowledge of the conveyance to Buyer. However, in FL a buyer is also subject to inquiry notice (via case law) which puts the duty on the buyer to take a physical inquiry of the property to determine if someone else is in possession, and if they are to inquire as to their ownership rights. It does not appear as if Investor satisfied his duty of inquiry notice on the farm. Although Investor knew that Buyer was living on the land, he did not inquire as to whether Buyer was a tenant or whether Buyer was the rightful owner of the property. Had Investor inquired of Buyer, he would have found out about the sale between Buyer and Seller. Since Investor did not satisfy his duty of inquiry notice, his title will not win in an action over Buyer's heirs' title. Even though Buyer recorded his title, his recorded title is only valid against a subsequent bona fide purchaser for value, not a prior purchaser who should have had notice of (that would be different in a race jurisdiction, which FL is not).*

*In an action by all three parties (Seller, Investor, and Buyer's family), to quiet title the court should order that title belongs to Buyer's heirs because Investor did not conduct inquiry notice of the property, and thus Buyer's heirs' title would be superior. However, Investor would still have a claim against Seller for damages on the grounds that Seller violated the covenants that accompany a warranty deed, specifically the covenant of warranty. These covenants are seisin, right to convey, covenant against encumbrances, quiet enjoyment, warranty, and further assurances. In a land sale contract, the damages that Investor would receive are the difference between the market price of the property and the contract price of the property.*

# **Q** QUESTION NUMBER 1

## **FEBRUARY 2008 BAR EXAMINATION - CONTRACTS**

Worried about the wildly fluctuating price of oil, Airline wrote to Oil Company requesting a firm price on jet fuel for one year. On December 15, 2006, Oil Company wrote to Airline, stating: "I offer to supply you with any jet fuel ordered by you during the upcoming year beginning January 1, 2007. Price: \$1.50 per gallon, to be ordered by you in minimum quantities of 50,000 barrels. Because of your past business, this offer will not be withdrawn during the year." Airline received the letter on December 20, 2006.

On December 24, 2006, Airline replied in writing: "I accept your offer." Mail was delayed during the holidays and Oil Company did not receive this communication until December 31, 2006. Because the price of oil was rising so rapidly, Airline called Oil Company on December 26, 2006, and orally stated to Oil Company's agent: "I accept your offer of December 15<sup>th</sup>." In the same telephone conversation, Airline requested the immediate shipment of 100,000 barrels. Oil Company's agent orally agreed to ship 100,000 barrels that day, but informed Airline that the price for the rush order would be \$1.70 per gallon. Oil Company delivered the fuel that day. Based on the \$1.50 price for 2007 from Oil Company, Airline cancelled all other negotiations with suppliers.

During January and February 2007, Airline ordered 200,000 barrels of fuel, the fuel was delivered, and Airline paid for it at the rate of \$1.50 per gallon. Airline also paid for the 100,000 barrels shipped in December 2006 at \$1.50 per gallon. During the first week of March 2007, severe weather destroyed a key pipeline in a major oil producing region resulting in the disruption of the world supply of oil and causing the market price of jet fuel to rise to \$2.00 per gallon. On March 7, 2007, Oil Company mailed a letter to Airline reading: "The offer dated December 15, 2006, is revoked." The letter did not arrive until March 16, 2007. Airline placed the following orders, all by mail: 50,000 barrels on March 10, 2007; 50,000 barrels on March 17, 2007; and 100,000 barrels on March 30, 2007. Oil Company received all orders 2 days after mailing, but refused to fill any of the March 2007 orders.

In April 2007, Senior Partner requests that you prepare a memorandum of law regarding this matter. In your memorandum, discuss the claims of Airline and Oil Company, as well as any defenses they might have. Do not discuss any issues related to damages.

## **SELECTED ANSWER TO QUESTION 1** **(February 2008 Bar Examination)**

*A valid contract requires offer, acceptance, consideration, and no valid defenses. The law governing contracts depends on the subject matter of the contract. The UCC will govern contracts for the sale of goods, and Florida common law will govern contracts for the sale of services.*

*The subject matter of the agreement between Airline Company, (hereinafter "Airline") and Oil Company (hereinafter "Oil") is jet fuel. Jet fuel is a good and therefore the UCC will govern the agreement between Airline and Oil since it is a contract for the sale of goods.*

*An offer is a manifestation of intent to enter a contract by words or conduct that gives the offeree the power to accept. To be valid, an offer must have language of commitment and definiteness (i.e., details).*

*Acceptance is the manifestation of intent to be bound by the terms of the offer.*

*Consideration is a bargained for exchange. Florida follows the minority rule in that consideration can be satisfied by either a benefit or legal detriment, or both.*

*Under the UCC a valid contract does not have to state all material terms. Rather, a contract under the UCC is valid if it is signed by the parties and contains a quantity term.*

*Airline's written request to Oil was not an offer but a request for information. A request for information is not a valid offer because it does not contain language of commitment and definiteness.*

*Oil's reply on December 15, 2006 is a valid offer because it contained language of commitment and was definite. Oil's offer was firm in that Oil promised not to withdraw the offer during the year. Under the UCC a firm offer is valid without consideration. Firm offers are valid for 90 days unless the contract states otherwise. Under the UCC, firm offers cannot be revoked for 90 days and arguably for any time longer than 90 days if the parties so intend. In this instance, Oil offered to hold the offer open for one year. Airline accepted Oil's offer by communicating a manifestation of intent to be bound by the terms of the offer when Airline called and verbally accepted. The mailbox rule does not apply under the UCC. The mailbox rule states that an offer is accepted upon dispatch, meaning upon placing the acceptance in the mail. However, since this is a contract for the sale of goods, the mailbox rule does not apply. Therefore, the offer was accepted when Airline telephoned Oil indicating his/her intent to be bound by the terms of the offer.*

*The offer and acceptance created a valid contract. The type of contract created was a requirements contract. A requirements contract is a contract where the seller agrees to supply all that the buyer requires. A requirements contract is valid under the UCC even though the quantity terms are not specific. Another type of contract is an output contract which is a contract where the buyer agrees to buy all that the seller produces. However, in this fact situation an output contract was not created.*

*Claims of Airline Company:*

Requirements Contract: A valid contract under the UCC was created between Airline and Oil. The type of contract created is a requirements contract because Oil agreed to sell Airline all that Airline required during “the upcoming year.” Airline ordered 100,000 barrels from Oil following the phone conversation accepting Oil’s offer to supply jet fuel. Airline ordered a rush shipment of 100,000 barrels. Oil replied that the price for the rush would be \$1.70 per gallon instead of the contracted price of \$1.50. Airline could argue that this was a breach of contract because under the terms of the contract the prices was set at \$1.50 per gallon. This likely would not be breach of contract by Oil given the circumstances for needing a rush shipment.

Airline relied on the contracted price of \$1.50 per gallon for year 2007. Since this was a requirements contract, Airline was reasonable in cancelling all negotiations with other suppliers for fuel.

Breach of Contract: Airline may have a breach of contract claim against Oil for revoking the contract. Oil’s attempt to revoke the offer is likely a breach since Oil’s offer to supply Airline with jet fuel was accepted orally by Airline. An offer can only be revoked before acceptance. Here, Airline would likely argue that Oil breached the contract to supply jet fuel when Airline received the letter from Oil on March 17, 2007. Revocation of an offer is effective when received. Airline would claim that he entered into a requirements contract with Oil and that Oil breached that contract by failing to supply Airline with his requirements for jet fuel in 2007.

Even if each transaction was a separate contract – arguably the letters sent to Oil and Oil’s silence would imply a contract under the letter exception available in the UCC.

Defenses:

Firm offer is not revocable under UCC. UCC permits a firm offer for 90 days or unless otherwise agreed to by the parties. In this case, Oil was obligated to keep the offer open for a year if in fact each separate transaction was a separate contract. If one year provision in the contract is not enforceable because of the defense of SOF, then 90 days ends March 15. Contracts begin on date entered regardless of time of performance.

Promissory Estoppel: Even if there was not a valid requirements contract entered into between Oil and Airline, Airline relied on Oil’s promise to sell jet fuel at a price of \$1.50 for a period of a year. Promissory Estoppel is the equitable doctrine for enforcing a contract when one party relies to his detriment on the promise of another. The key to promissory estoppel is reliance. It is Airline’s reliance on Oil’s promise to sell jet fuel for the year that may entitle Airline to promissory estoppel.

SOF: Airline would likely argue that a valid defense to the statute of frauds defense of Oil is that the UCC provides an exception to the rule that allows a silence of one party to be considered acceptance. This is the letter acceptance exception. Under this exception which again is in the UCC only – it provides that a contract is enforceable even if the contract is not signed by the party to be charged. It allows a letter signed by the plaintiff to be sufficient to enforce the contract provided there was a history of dealings between the parties. Also, a defense to SOF is where the parties substantially perform. This allows promissory estoppel to enforce the contract.

Claims of Oil Company:

K for sale of Jet fuel at a price of \$1.70:

Oil company would likely have a claim for \$1.70 price of jet fuel shipped in December. Oil would likely argue that Airline offered to purchase 100,000 barrels from Oil over the phone and that Oil accepted by shipping the barrels of jet fuel that same day. Acceptance by shipment of goods under the UCC is a valid form of acceptance. Oil would likely argue that they are entitled to the \$1.70 price since the offer to sell Airline jet fuel at the price of \$1.50 was for year 2007. As stated above, a valid contract under the UCC need not include all material terms – the quantity and signature of the parties will suffice.

Quote:

Oil would likely argue that the letter of December 15 was a price quote and not an offer. A price quote is not an offer but is for informational purposes only.

Series of Ks and Firm Offer: Oil company would likely argue that a series of contracts were entered into between Oil and Airline, not a requirements contract. Oil would likely argue that his firm offer of December 15, 2006, merely obligated him to hold the offer to purchase jet fuel open. Again, a firm offer does not require consideration under the UCC. Additionally, Oil would likely argue that the firm offer was only valid for 90 days rather than for a year. However, it is arguable that the firm offer would be held valid for one year under the UCC.

Mailbox Rule: Under UCC the mailbox rule does not apply.

Revocation: Oil would likely argue that each order from Airline was an offer. If each order was an offer, Oil would likely argue that it did not accept the offers submitted by mail. Instead, Oil would likely argue that it revoked its firm offer when it sent its letter dated March 7. However, under the UCC a firm offer is not revocable for 90 days unless the parties otherwise agree.

Impossibility of Performance: Oil would likely argue that a valid defense to contracts that were formed after the March 2007 storm destroying key pipelines made it impossible to perform. Impossibility is a valid defense when there is a severe change that the parties did not contemplate in when they entered the contract that materially effects performance. An act of god is one type of change that allows impossibility of performance to be a valid defense.

Statute of Frauds: The SOF requires certain contracts to be in writing to be enforceable. Under the UCC the SOF requirements is relaxed in that it allows a promise for the sale of goods to be enforced provided a writing contains the quantity and signature of the party to be charged. Although Airline will argue that the offers mailed in March created valid contracts under the letter doctrine exception to the SOF defense, Oil will likely argue that this exception is not applicable in this case because there was not a sufficient history of dealings between the parties. Therefore Oil's silence could not have constituted acceptance.

Anticipatory Repudiation: Oil will likely argue that even if the Airlines verbal communication to Oil in December constituted an acceptance to a requirements contract, that Airline repudiated by indicating on the phone that he cancelled the contract.



## **Q** QUESTION NUMBER 2

### **FEBRUARY 2008 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW**

Representative is a duly-elected member of the Florida House of Representatives. Representative believes that wealthy individuals are unfairly treated by the courts when they are involved in dissolution of marriage litigation. As a result, Representative proposed legislation that provides for the following: where a marriage is dissolved by final judgment by the appropriate circuit court after a trial and the parties had an aggregate net worth of \$5 million or more at the time of the filing of the dissolution petition, the judgment shall not be reviewed by appeal. Instead, the Governor of the State of Florida shall conduct a de novo review of the record and circuit court's judgment and, by Executive Order, affirm or reverse the judgment.

Representative had difficulty finding sufficient support for his bill, but agreed to an amendment that increased the criminal penalty for domestic battery when the battery is witnessed by a child age 12 or under. As so amended, the bill was passed by the Florida House of Representatives and the Florida Senate, and presented to the Governor for his signature on March 9, 2007. The citation name of the legislation is "The Dissolution of Marriage Review Act" (the Act). The law is identified at the beginning of its full title as "an act relating to domestic relations." The full title is lengthy and identifies those existing provisions of the Florida Statutes which it amends or repeals.

On April 20, 2007, the Governor vetoed the Act. The Florida Legislature adjourned sine die on May 9, 2007, without taking any further action on the bill. The Act provided for an effective date of July 1, 2007.

You represent Wife, who filed a petition for dissolution of marriage on July 5, 2007. After a trial, the circuit court entered a judgment dissolving the marriage, distributing the property, and providing for alimony and child support. The family had sufficient assets for review of the judgment in accordance with the Act, and Husband has filed a petition with the Governor's office to review the judgment. Wife, however, is opposed to such review.

Discuss the challenges that Wife can make under the Florida Constitution and the likely outcomes of the challenges?

## SELECTED ANSWER TO QUESTION 2

### (February 2008 Bar Examination)

#1 There are a number of challenges the wife might consider. They will be addressed in order of facts presented. First there is an Equal Protection issue. This law was created to arguably protect the wealthy, but wife could argue it is to benefit the wealthy. As a class of people being treated differently, wealthy people do not fall under the categories of protection requiring strict scrutiny, discrimination based on sex, religion, ethical or race backgrounds or disability – therefore under both the US & Florida Constitutions a class based on wealth would be subject to the rational basis test. It is the goal of the law rationally related to any legitimate govt. purpose & the burden is on the plaintiff wife in this case, to prove otherwise. The govt. may argue that this law legitimately provides needed protection for a class of people that appear to receive unfair or biased treatment in the courts. This would be the only argument wife may not overcome as rational basis is an easy standard for the state to meet. Wife's best counter would be that the basis for the protection of the wealthy is not accurate & therefore the protection is not needed. She could further argue that this law discriminates against the opposing spouse but the result is likely the same.

#2 The wife's next argument is much stronger as it is based on the Separation of Powers argument as provided by the Florida Constitution. The FL Constitution provides that the 3 branches – Legislative, judicial, and executive each have their separate & specific functions and cannot be directed, encroached on or interfered with by one or both of another branch of govt. without specific authority designated in the FL Constitution. This is similar to the Separation of Powers under the US Constitution, but more specific and stringent in many regards especially in the realm of Executive branch encroachment on the Judicial branch as it appears to be the case here. The Governor, as part of the Executive branch under this law would be encroaching on the judicial branch's area of responsibility under the FL Constitution by becoming the appeal agency from the Circuit Ct. Under the FL Constitution the District Courts of Appeal have specific jurisdiction for appeals of Circuit Court judgments. Wife has a very good cause of action that this provision of the law makes it unconstitutional under the Separation of Powers provision of the FL Constitution as the executive branch would be encroaching on the judicial branches specific jurisdiction and duties. The Legislative branch has police powers to make law, but cannot pass legislation to become law that would require any branch to encroach on another branch for their duties set forth in the FL Constitution.

#3 Wife further can argue that this law denies her access to the courts. Access to the cts. is a specific right given to the people in FL under the FL Constitution. These rights are similar to the Bill of Rights found in the US Constitution but are more enumerated and specific. One of these Articles of Rights is the right to access of the courts. The FL Constitution provides that the District Ct. of Appeal shall hear appeals made from the Circuit Cts. Wife should be allowed to appeal any final judgment of her dissolution of marriage to the respective DCA. If husband wants to appeal, it should be heard by the DCA, not another court or branch of govt. The dissolution, of marriage is not a simple dissolution, i.e. there are children, child support and alimony issues, so the proper venue is the circuit ct. The proper venue for an appeal would be the respective DCA. This legislation specifically takes it out of the DCA thereby denying wife access to the cts. State could argue that an alternate venue is provided and it is for public necessity – two reasons previously found by cts. to be somewhat compelling as counter arguments, but neither should hold water here as the venue is inappropriate under the Sep. of powers argument and no public necessity seems to be involved unless you are wealthy enough to be worth over \$5 million.

#4 Wife should further argue that the legislation itself as presented is unconstitutional. The FL Constitution provides that legislation as it is titled should have a single subject, be easily understood by the public, the title and subject of the legislation be closely related as one topic and it not be vague or overbroad. In this case wife would argue that the title “The Dissolution of Marriage Review Act” and its full title “an act relating to domestic relations” is too vague and overbroad. The intent of the legislation is understood from the facts and the law is understood from the facts. However, reading the title in and of itself could be easily interpreted as having to do with a lot of other domestic relation or family law issues – not what the facts indicate the legislation is really about. Additionally, the addition of the criminal penalty for certain domestic violence is a completely different matter that is unrelated – thereby violating the single-subject requirement. Therefore, the legislation as it is titled and written to include the unrelated criminal law, appears to violate the FL Constitution’s requirement for legislative acts be of one subject and not vague & or overbroad.

#5 Wife has an additional argument that the law was vetoed by the governor and not overridden by a vote of both houses of the legislature. In this argument the state most likely would prevail in arguing that the Governor’s veto did not occur. When the Legislature is in session, the Governor has ways in which to veto a bill upon presentment to him by the Legislature. If the Governor does not affirmatively veto the bill within the prescribed time, the bill will become law. Here the bill has an effective date of 1 July 2007. Therefore, it became law at that time. Wife would most likely not prevail in this argument. Wife most likely would prevail in her argument that this Act is unconstitutional under the FL Constitution in that it violates the Separation of Powers, denies her access to the courts and violates the Single Subject Rule as well as being vague & overbroad. Wife probably would not prevail on Equal Protection and veto arguments.

# **Q**

**QUESTION NUMBER 3**

## **FEBRUARY 2008 BAR EXAMINATION – TRUSTS**

Mr. and Mrs. T are Florida residents. To avoid probate, Mr. T created a trust "for all of my property" with himself as trustee. The trust instrument provided that Mr. T had the right to revoke the trust at any time. Mr. and Mrs. T were set forth as income beneficiaries for life and, upon Mr. T's death, half of the trust property was to be "held in trust for my son, Sammy, until he reaches the age of 30." The other half was to be held by his daughter, Dana, "to be distributed, at her discretion, to the charitable institutions of her choice." The trust instrument was dated and signed at the end by Mr. T and two witnesses, all of whom signed in each others' presence.

Mr. T died without leaving a will. At the time of his death, he and Mrs. T owned their \$400,000 home as joint tenants with right of survivorship. Mr. T also held, in his name only, stocks and bank accounts that were valued at \$800,000 at the time of his death. None of these assets had been transferred to a trust.

Shortly after Mr. T's death, Mrs. T and Sammy, now 21 years old, filed a petition in probate court seeking to have all or a portion of the trust declared invalid. Attached to the petition is a typewritten note signed and dated by Mr. T prior to his death. The note reads, "I hereby amend my trust to leave all of my property to Mrs. T when I die." Dana predeceased Mr. T and she had no children.

As the law clerk to the probate judge, prepare a memorandum addressing the issues and possible outcomes.



## SELECTED ANSWER TO QUESTION 3

### (February 2008 Bar Examination)

*CREATION: To create a valid trust in FL you need: Intent by the settlor to create a trust, a trustee (although trust won't fail for want of a trustee), trust property (res), delivery of the res to the trustee, and ascertainable beneficiaries (or charity beneficiary). The creator must also have capacity, and there is nothing in the facts that seems to negate his capacity to create the trust. Here there appears to be a valid trust (discuss the attempted modification/revocation infra). In an inter vivos trust, the settlor need not "transfer" trust property to himself if he names himself trustee (no need for a strawman). Mr. T being the sole trustee is OK, the rule is that he just cannot be the sole trustee and sole beneficiary (because then who would sue him for breach of trust). Here it appears that Mrs. T is an income beneficiary, and there are other residuary beneficiaries as well. An inter vivos trust in FL can be revocable or irrevocable depending on the language of the trust. Here the trust specifically states it is revocable (even though the default in FL is revocable unless expressly irrevocable). This means that Mr. T has no obligation to keep the terms of the trust as they are, and can amend or revoke at any time. After the trust was created, and when he died, Mrs. T found a note that purported to amend/revoke the trust agreement. While a trust agreement need not be in writing, a testamentary trust must abide by the Statute of Wills which requires two witnesses. Mrs. T might argue that this note was done during T's lifetime and that the note amended/revoked the current trust instrument when he executed it. However, this argument will likely fail because it clearly states "...in trust when I die." This is a testamentary trust and therefore must comply with the Statute of Wills, and although he signed it, he must have had two witnesses. Therefore, we probably have a valid trust under the original terms.*

*TERMS: Mr. and Mrs. T wanting to keep the Income interest for life is fine. But, there is a problem because the income interest for Mrs. T seems to end at the time Mr. T dies. At HIS death, he wants half of his estate to go to his son and the other half to charity...leaving nothing for Mrs. T, his wife. Under FL law, it is likely that Mrs. T will not be left without anything. The facts do not seem to indicate any type of pre or post-nuptial agreement between Mr. and Mrs. T. In the absence of such agreement, Mrs. T will be entitled to an Elective Share (and a Homestead). The facts state that Mr. and Mrs. T own a home worth \$400K. In FL, a natural person can have one Homestead in FL (must be their principal place of abode). If this house is in fact Homestead property, then it is subject to restrictions on alienation (although protected from most creditors). If a decedent is survived by a spouse or minor children, they cannot freely devise the property (except if antinuptial or similar agreement to devise away from spouse). Here there appears to be no agreement, and Mr. T was survived by his spouse. If Mr. T was also survived by minor children, then the spouse typically gets a life estate, with a vested remainder in the children. However, in our case it says that one of his children (Dora) predeceases him, and the other (Sam) was 21 "shortly" after his death. Therefore, it appears he has no minor children, and the wife would get the property in Fee Simple. However, even if this is not a Homestead, the Wife will most likely receive the property outside of the trust anyway. The facts state that they owned the property as Joint Tenants with Right of Survivorship, and therefore it is not transferable without consent of the other Joint Tenant. The court will need to find if the wife consented to this property being put into the Inter Vivos trust, and therefore alienating her rights too. If the court finds she consented, then the property stays in the trust. If the court finds that she did not consent to it being put in the trust, then the Right of Survivorship automatically controls and she takes the property free and clear.*

*ELECTIVE SHARE: The wife may also argue elective share. If there is no agreement (prenup), then a spouse in FL is entitled to 30% of the elective estate. This includes money currently in a revocable trust, which is our case here. This would be another situation where it would matter if the home was a Homestead or not, because if it was it would not be included as part of her 30%. Here, there appears to be \$800K that was in his name (her share would be \$240K of that.) The rest would be split up in proportion among the son (\$280K) and the "daughter" as trustee for charities (\$280).*

*SON (SAMMY): At Mr. T's death, the son's rights became vested (assuming trust is valid, etc.). The instrument seems to be silent as to what the duties of the trustee are ...or even if there is a trustee. If there is not a trustee, the court will probably appoint one, the trust will not fail for want of a trustee. However, Sam may argue that there was no intention to create a trust at death despite the word "trust" used. Sam would argue that because the language is so vague, it does not offer the trustee (or appointed trustee) any rules for distributing the property, except to "hold in trust till 30." The court will look to whether the intent of Mr. T was to create a trust for Sam. Being that Sam was young and probably financially irresponsible when the trust was created, the court would probably find there was an intent to hold in trust half of the estate for Sam. The court will look at other factors to determine the duty of the trust or trustee. Maybe the court would find it most appropriate to pay income to Sam until he reached age 30, or maybe that the trustee has discretion to distribute income or principal for Sam, but only for necessities. Either way, the court would probably find a valid trust and intent for Sam.*

*CHARITABLE TRUST: A charitable trust, unlike a private trust, must not have specific beneficiaries. It must be for the goods of the "general public." Causes such as education, religion, science, public service are valid charitable trust beneficiaries. Here, Mr. T's grant to Dana as trustee was very broad and vague. But what about the trustee, Dana is dead. Once again a trust (testamentary) will never fail for want of a trustee. The court will most likely appoint. Mrs. T may argue that the trust terms are so vague and that no specific cause or charity is named, and therefore the trust fails. However, court may find that Mr. T just had a general purpose to promote general welfare and may leave it up to the trustee to decide. The court may find that the trust gave Dana the power to appoint the charities at her discretion, and therefore the ascertainable part would lie in Dana. Under the Restatement of Trusts, in this situation, where the beneficiaries are unascertainable and the settlor gives his intent to promote the power to appoint, the Restatement of Trusts says to allow the appointment because it is most inline with his intent. However, a majority of states at this time hold the opposite. They find that the power to appoint renders the trust invalid for purposes of unascertainable beneficiaries. FL has not ruled on their view of the situation, so I am sure Mrs. T would argue the Majority, and a representative for possible charities or Sam may argue the Restatement. However, this is a charitable trust, and they may argue that the beneficiaries are supposed to be unascertainable. The court would likely find the beneficiaries were to be appointed by Dana. However, Mrs. T may now argue that this appointment power was special and that it was only Dana that Mr. T trusted to appoint to appropriate charitable beneficiaries. The charitable rep would obviously argue that this was a general power of appointment and the court should appoint a new trustee to appoint to charitable organizations (because this would be more in line with the intent of the testator). If the court rules this was a special power of appointment, or rules that the trust provision is too vague or lacks identifiable charities, then the result would be a resulting trust. A resulting trust would go back to Mr. T's estate.*

*RESULTING TRUST: Any part of this estate that fails would "result" back to the estate of Mr. T. In this case, it would pass by his will, however, the facts tell us that he did not have a will, so it would pass intestate. Assuming Sammy is the child of Mr. and Mrs. T (not from another marriage) then Mrs. T would get the first \$60K plus the remaining 50%, and Sam would get the other remaining 50% (OF WHATEVER RESULTS). If Sam is a child of Mr. T's from another marriage, then they would split 50/50 without Mrs. T taking the first \$60K.*

## **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 41.



## 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)