Thursday Morning
February 24, 2011
Essay Questions 1 - 6

TEXAS BAR EXAMINATION

If WRITING, answer Question 1 in the GOLD answer book.
If using LAPTOP, be certain you answer in the correct screen.

QUESTION 1

Billy Bob, a Texas resident, died in 2009, leaving a will written on a cocktail napkin that in its entirety stated:

> Upon my death my wife Donna gets everything till she dies.
> Being of sound mind I leave to Donna all real & personal property.
> [signed] Billy Bob

The will was entirely in Billy Bob's handwriting and was not dated. Billy Bob made no prior or subsequent wills.

Donna applied to admit Billy Bob's will to probate and then died six weeks later.

Billy Bob's adult child from a prior marriage, Wanda, entered an appearance in the probate proceeding. She claims that Billy Bob's will is invalid and, in the alternative, that the will expresses Billy Bob's intent to create only a life estate in favor of Donna, which ended upon Donna's death. Wanda seeks judgment that the remainder of the estate passes to her.

Marge, Donna's sister and the independent executor of Donna's estate, claims that the will is valid and that it expresses Billy Bob's intent to leave all of Billy Bob's property to Donna. She seeks judgment that all of Billy Bob's property belongs to Donna's estate.

How should the court rule on: (1) the validity of Billy Bob's will, and (2) the ultimate disposition of Billy Bob's estate? Explain fully.

If WRITING, answer Question 2 in the GRAY answer book.
If using LAPTOP, be certain you answer in the correct screen.

QUESTION 2

Hattie May executed a will in September 2004, which left all of her $750,000 estate to her eldest son, Jimmy, and nothing to her daughter Mary Lou or Mary Lou's descendants. Hattie May was survived by Jimmy, Jimmy's adult son Ralph, and Mary Lou's adult children, Ashley, Bridget and Connie.

Following Hattie May's death, the 2004 will was admitted to probate. After the appointment of Jimmy as independent executor, Ashley, Bridget, and Connie filed a will contest alleging undue influence by their uncle Jimmy. The following facts were established at trial:

- Prior to executing the 2004 will, Hattie May had executed a previous, valid will in 2002, which left her estate "in equal proportion to each of her children, and then to their descendants, *per stirpes*."
- Mary Lou died in December 2003. At the time of her death she lived with Hattie May.
- Ashley, Bridget and Connie each received $25,000 as beneficiaries of Mary Lou's life insurance policies. Jimmy knew about this, but Hattie May did not. Shortly after learning of this, Jimmy told Hattie May that it was time to "update" her will.
- Jimmy testified that Hattie May deferred to him on all matters involving her financial and other affairs because "she did not understand all the legal stuff and trusted him to be fair." He testified further that "she pretty much did what I told her."
- Jimmy hired and paid the attorney who prepared both wills and instructed the attorney as to their contents. He drove Hattie May to the attorney's office to sign each will. The attorney was not present when Hattie May came to the office to sign the 2004 will and never discussed it with her.
- A note in the attorney's file summarized a conversation between Jimmy and the attorney before the 2004 will was prepared, as follows: "Jimmy: need to change mama's will now that Mary Lou has passed on; Mary Lou's kids $25k each from ins. They are set. "
- After Mary Lou's death, Ashley, Bridget and Connie maintained regular contact with Hattie May and visited her frequently.
- Ashley, Bridget, Connie and Jimmy's son, Ralph, all testified that Hattie May was fair and equal when it came to her family.

Following trial, the jury found that Hattie May: (i) was unduly influenced by Jimmy; and (ii) did not intend to disinherit Mary Lou or her descendants. In accordance with the jury's findings, the court set aside the 2004 will and entered judgment in favor of Mary Lou's children under the 2002 will.

Jimmy has appealed the trial court's judgment, and you have been hired to represent Ashley, Bridget, and Connie on appeal.

1. Given the factual record, what arguments would you make in support of the jury's findings? Explain fully.

2. If court's judgment is upheld, to whom and in what proportions should Hattie May's estate be distributed? Explain fully.

If WRITING, answer Question 3 in the BLUE answer book.
If using LAPTOP, be certain you answer in the correct screen.

QUESTION 3

Fast Food Co. owned Whiteacre, a parcel located in Coleman County, Texas. Whiteacre was improved with a small commercial building surrounded by a parking lot. In 2007, Fast Food Co. conveyed Whiteacre to Irma and Jan, as tenants in common. The deed of conveyance included a restriction prohibiting the use of Whiteacre for restaurant purposes for a period of 25 years.

In 2009, Irma and Jan leased Whiteacre to Ting under a written lease for a five-year term. The lease provided that Ting would have exclusive use of Whiteacre for office purposes, that Irma and Jan would repair the roof, which was showing signs of wear, and that Ting would pay Irma and Jan each one-half of the $1,500 monthly rent. A few months later, Ting notified Irma and Jan that the roof was leaking, so Irma spent $2,000 of her own money to repair the roof. At Irma's request, and without Jan's consent, Ting sent the entire $1,500 for the following month's rent payment to Irma.

Sid, Jan's son, owned Greenacre, a small tract of land adjoining the east side of Whiteacre. He planned to open a Taco Hut restaurant on Greenacre, but Greenacre was not large enough to accommodate a drive-through lane next to the restaurant. In January 2011, without seeking the consent of Irma or Ting, and as a gift to Sid, Jan signed a written Easement Agreement purporting to grant Sid a perpetual easement across a twenty-foot-wide strip along the east side of Whiteacre "for the purpose of providing car and light truck vehicular ingress and egress to and from the restaurant on Greenacre." The easement strip included some of the parking spaces on the east side of Whiteacre.

In February 2011, Irma sold an undivided one-fourth interest in Whiteacre to Ned.

Irma claims that Jan had no right to grant Sid the easement described in the Easement Agreement. Irma also claims that Jan owes her $1,000 as Jan's share of the cost of the roof repairs that Irma paid out of her own pocket.

Jan claims that she is entitled to receive from Irma, one-half of the month's rent that Ting paid Irma after the repair of the roof, and that she is entitled to one-half of the money Irma received for the one-fourth interest in Whiteacre that Irma conveyed to Ned.

1. Did Jan have the right to grant the easement to Sid? Explain fully.

2. Is Irma entitled to reimbursement from Jan of roof repair costs, and, if so, is Jan entitled to an offset on account of the month's rent that Ting paid solely to Irma? Explain fully.

3. Is Jan entitled to receive any part of the money Irma received from Ned? Explain fully.

If **WRITING,** answer Question 4 in the **PINK** answer book.
If using **LAPTOP,** be certain you answer in the **correct** screen.

QUESTION 4

Bill and Shelly each inherited an undivided one-half (1/2) interest in Blackacre, a 300-acre tract of land in Brown County, Texas. They agreed to partition the property into two equal parcels. By a partition deed, Bill conveyed to Shelly his undivided one-half (1/2) interest in the surface only of the south half of Blackacre, called South Ranch. Bill specifically reserved his undivided one-half (1/2) interest in any oil, gas, and other minerals in and under and that may be produced from South Ranch.

Likewise, Shelly, by partition deed, conveyed to Bill her undivided one-half (1/2) interest in the surface only of the north half of Blackacre, called North Ranch. Shelley specifically reserved her undivided one-half (1/2) interest in any oil, gas, and other minerals in and under and that may be produced from North Ranch. Each of the partition deeds was properly recorded in the Brown County Real Property Records.

In January 2008, Bill conveyed North Ranch to Craig by a properly executed and recorded warranty deed. In the warranty deed, Bill reserved for himself and his heirs, successors and assigns "an undivided one-fourth of all oil, gas, and other minerals in and under and that may be produced from North Ranch." The warranty deed made no reference to any mineral interest of Shelly in the North Ranch. Craig did not check the Brown County Real Property records when he accepted the deed from Bill.

In March 2008, Bill died, and Shelly, as his sole heir, inherited all of his property.

On December 5, 2008, Craig and Shelly executed an oil and gas lease with Oilco covering the North Ranch with a primary term of two years. The lease stated that if a gas well capable of production was completed, but gas was not being sold or used, then within 90 days after the gas well was shut in, Oilco could pay $2,500 as an annual shut-in production royalty, and it would be considered that gas was being produced in paying quantities under the lease for one year following the date when the well was shut in.

On October 15, 2010, Oilco completed a well that was a dry hole on the North Ranch but determined that with additional equipment and three months of additional work it could become a producing well. There are no other wells located on the North Ranch. On November 10, 2010, Oilco sent a $2,500 check, jointly payable to Craig and Shelly, identified as a shut-in royalty payment. Because Craig and Shelly could not agree on how to divide the check, they returned it to Oilco.

1. If the work on the well on North Ranch results in production before December 5, 2010, how should the royalty payable under the lease be divided between Craig and Shelly? Explain fully.

2. Assuming that there was no production on the North Ranch before December 5, 2010 and that Craig and Shelly accepted a correct division of the November 10, 2010 payment, would that payment have extended the term of the lease beyond the primary term? Explain fully.

If WRITING, answer Question 5 in the DARK GREEN answer book.
If using LAPTOP, be certain you answer in the correct screen.

QUESTION 5

Diamond, Inc. ("Diamond"), is a publicly traded, for-profit Texas corporation operating a wholesale diamond business. Diamond is governed by a board of directors and has 200 outside shareholders. Patrick, the son of Diamond's founder, was the chairman and chief executive officer of Diamond until his death in August 2010. Patrick was not a particularly effective businessman and did relatively little work for the corporation, but his value to Diamond was in his family connections throughout the diamond industry.

In March 2009, Diamond's board of directors, at a regular meeting with Patrick present, voted unanimously to loan Patrick $100,000 to use for the purchase of a small yacht. The loan was made from corporate funds and Patrick purchased the yacht.

In July 2009, Patrick urged Diamond's board of directors to purchase the assets and assume the liabilities of Mining Corp., a Texas corporation ("Mining"), a diamond mining company owned by Patrick's close friend, George. After a brief discussion of the pros and cons at the board meeting, the board voted to purchase Mining, and the purchase was consummated. Diamond had not investigated Mining's liabilities because George had assured Patrick that all of Mining's liabilities were shown on the corporate books.

In October 2009, Diamond, having assumed Mining's liabilities, was sued by a number of former Mining employees claiming injuries from inhalation of large quantities of dust while working in Mining's underground diamond mine. An investigation by Diamond before closing the purchase of Mining's assets and assuming its liabilities would have revealed this undisclosed claim by the former employees.

In February 2010, Diamond's board of directors unanimously approved settlement of the lawsuit for $500,000, an amount of money that has caused Diamond's debts to exceed its assets.

In May 2010, Diamond's board of directors voted to give Patrick, as a bonus, a large uncut diamond, owned by Diamond and valued at $250,000.

In August 2010, Patrick set sail from Galveston on his yacht, with the uncut diamond in his possession. Unfortunately, Patrick died when his boat sank in the Gulf of Mexico. Patrick's only assets were the yacht and diamond, both of which were lost. Consequently, the $100,000 loan will not be repaid.

Diamond's board of directors now has been lawfully replaced through shareholder action. The new board seeks advice on the following questions:

1. Was shareholder approval, by either Diamond's or Mining's shareholders, required for the purchase of Mining's assets and the assumption of Mining's liabilities? Explain fully.

2. Is it likely that the members of Diamond's previous board of directors can be held liable for: (a) the $500,000 settlement; (b) the $100,000 loan; or (c) the value of the un-cut diamond? Explain fully.

If WRITING, answer Question 6 in the TAN answer book.
If using LAPTOP, be certain you answer in the correct screen.

QUESTION 6

On December 1, 2008, Hank, Irving, and Mark formed HIM Clothing Company ("HIM"), a Texas general partnership. Hank, who was within two years of being able to retire, had a great deal of experience in the retail clothing business and invaluable contacts with suppliers and customers. Hank invested $40,000, Irving invested $20,000, and Mark invested $10,000 in the business. The three partners did not sign any documents, but orally agreed that: (1) Hank would run the day-to-day operation of the business until December 31, 2010; (2) Hank would train Mark to run the business; (3) on December 31, 2010, Hank would retire and the partnership would end; (4) Irving and Mark could form a new business if they wanted to do so; and (5) any profits made by HIM would be distributed first to repay the money each originally invested. The partners had no agreement with respect to the distribution of other profits.

At the end of 2009, HIM had achieved a $100,000 after-tax net profit from operations. Hank, who had not received a salary but had worked at the store almost every day it was open in 2009, demanded that he be paid $30,000 as "salary" from the $100,000 profit. Irving and Mark agreed that $30,000 was a fair compensation for Hank's work, but declined to pay Hank anything by way of salary. This made Hank very angry. On January 10, 2010, Hank informed Irving and Mark, but no one else, that he was withdrawing from the partnership as of that date.

On February 1, 2010, Hank ordered from one of HIM's usual vendors, Supplier, $10,000 in clothing. The clothing was delivered to Hank's house and subsequently sold by Hank for a $15,000 profit, to customers Hank had cultivated while working at HIM.

Irving and Mark continued to try to operate the retail store. Without Hank's involvement, HIM's vendors slowly stopped doing business with HIM, and HIM's customer base dwindled. Irving and Mark closed HIM's doors on March 31, 2010. At the time, HIM still owed Landlord $5,000 back rent, which remains unpaid. The day after HIM closed its doors, Supplier called Mark and demanded payment from HIM for the $10,000 of clothing delivered to Hank in February.

1. What amount should each partner receive from the $100,000 profit earned in 2009? Explain fully.

2. May Irving and Mark continue to operate as HIM after Hank informed them that he was withdrawing from the partnership? Explain fully.

3. What liability, if any, does Hank have to the partnership? Explain fully.

4. What liability, if any, does Hank have to Landlord? Explain fully.

This concludes the morning portion of the Texas Essay exam.