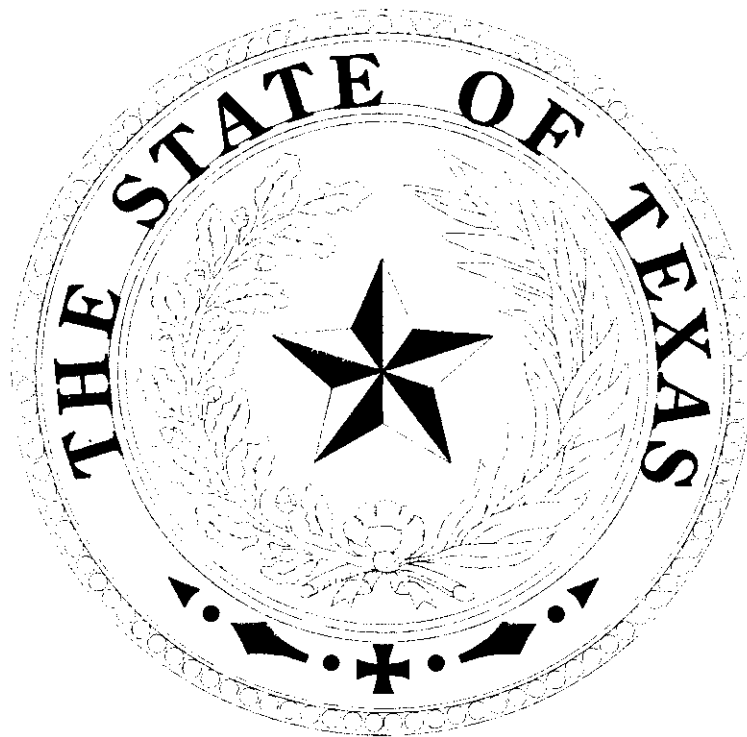


Thursday Afternoon
February 24, 2011
Essay Questions 7 - 12



TEXAS BAR EXAMINATION

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If **WRITING**, answer Question 7 in the **RED** answer book.
If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 7

Mother and Father married in 1990. Two children were born during the marriage. The family lived in a house that Father had purchased prior to the marriage. Mother worked full-time during the marriage. Father worked full-time until he was disabled as a result of a car accident in 2000. Mother filed for divorce in 2008.

At the time of the divorce, Father was receiving disability benefits, and the two children, ages 10 and 12, were each receiving \$300 a month in social security benefits because of Father's disability. The children would continue to receive those payments until they reached their majority.

At the divorce trial, Mother testified that Father frequently pawned community property items like televisions, DVD players, lawnmowers, and bicycles, and used the money for his own benefit. Father denied that he pawned these items, but he admitted he sold two of the family's automobiles while the divorce case was pending. Mother also testified that, during the marriage, she had contributed part of her salary to the mortgage payments on the family's home.

The trial court determined that the family's home was Father's separate property and that the community property consisted of Mother's 401k retirement plan, in which the sum of \$90,000 had accumulated, an automobile that Mother had purchased with a loan from her 401k plan, and household goods and furniture. The trial court found that Father's net monthly resources were \$1,000.

The trial entered an order awarding the house to Father as his separate property and 100% of the community property in existence at the time of the trial to Mother. The trial court also ordered Father to pay \$250 per month in child support.

1. Did the trial court abuse its discretion in awarding the house to Father and 100% of the community property to Mother? Explain fully.
2. Did the trial court abuse its discretion in its child support order? Explain fully.

If **WRITING**, answer Question 8 in the **LIGHT GREEN** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 8

Bob and Jane married in Texas in 2000. They had one child of the marriage. Bob was the sole wage earner and family breadwinner. Jane did not work outside of the home. Beginning in 2006, their marriage began to deteriorate. Jane filed for divorce in 2009.

At the divorce trial, there were two contested issues. One had to do with a transaction in which Bob's father, Richard, furnished \$100,000 to help finance construction of the home in which Bob and Jane lived. The other contested issue was what level of Bob's earnings would be used as the basis for calculating child support.

The \$100,000 furnished by Richard: Bob testified that he and Jane had frequently discussed obtaining a loan from his father to build their family home. Bob described the subsequent arrangement with his father as an oral loan agreement negotiated between his father and himself. Bob explained he handled all the financial transactions during the marriage, and that, as a consequence, the periodic advances made on the loan by Richard were made by checks written by Richard payable to Bob. Bob also testified that he repaid his father \$10,000 on the loan from his earnings during the marriage. Bob produced checks drawn on his and Jane's joint checking account and payable to Richard totaling \$10,000.

Richard testified that the transaction was indeed a loan, that there was an unstated understanding that the loan was to both Bob and Jane, that the repayment arrangements were vague and fluid, and that Jane did not participate in the negotiations and was not present when he delivered the advances to Bob. Richard also testified that neither Bob nor Jane executed any documents to evidence this oral agreement to the financing arrangement. Richard produced checks totaling \$100,000 made payable to Bob and deposited by Bob in a new checking account Bob had established in the same bank where Bob and Jane maintained their joint account. The new account was in Bob's name only and is the account from which he had made disbursements to the building contractors.

Jane testified that she was never involved in the transaction between Bob and his father, Richard. Jane explained that Bob was in charge of all financial matters and that, although she never specifically asked Bob or Richard, she was under the impression that the \$100,000 was a gift from Richard to Bob.

The child support issue: Bob testified that he worked on a commission basis, set his own hours, and that he earned 25% less per month in 2008 than he had in 2007. He also testified that his employer, Lance, was the person who determined which projects were assigned to him. Bob explained that the reduction in his 2008 income was due to the fact that Lance assigned less work to him and more work to other employees with lower commission percentages.

Lance testified he reduced Bob's workload for two reasons: (1) Bob's emotional state was problematic because he was experiencing family difficulties, and (2) Lance's business decreased because of adverse business conditions.

Jane testified that she believed that Bob's reduced earnings in 2008 were the result of voluntary underemployment contrived by Bob and Lance to set the groundwork for reduced child support in anticipation of a divorce.

The trial court found that the transaction with Richard was a loan rather than a gift.

The court also found that Bob's monthly net resources were \$4,000 in 2007 and \$3,000 in 2008 and that Bob had been voluntarily underemployed in 2008. Accordingly, the court concluded that Bob's 2007 earnings were more reflective of his actual earning potential and calculated the child support based on that higher earning potential.

1. Did the court err in finding that the transaction with Richard was a loan rather than a gift? Explain fully. Do not discuss the Statute of Frauds.
2. Did the court err in finding that Bob was voluntarily underemployed in 2008? Explain fully.

If **WRITING**, answer Question 9 in the **YELLOW** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 9

Rip operates a mail order support business from his home. Two-and-a-half years ago he purchased a paper-folding machine on credit from Miracle Company ("Miracle") for \$10,000. To pay for the machine, Rip agreed to make 36 monthly payments of \$304 to Miracle. Rip gave Miracle a note and security agreement to secure the debt.

To help his son make the high school baseball team, Rip bought an automatic pitching machine from Knuckler Company ("Knuckler") last April. Knuckler agreed to finance the \$5,000 purchase price. To pay for the pitching machine, Rip agreed to make 24 monthly payments of \$219 to Knuckler. Rip gave Knuckler a note and security agreement to secure the debt.

Last July, Rip's income drastically declined when he lost his best customer. For the next three months, he could not pay the monthly payments on the paper-folding machine. Miracle declared Rip in default and accelerated the debt, which it was entitled to do under the security agreement. Although Rip had made payments totaling \$7,600, he did not object when Miracle repossessed the paper-folding machine. A week after the repossession, on October 1, Miracle sent Rip a written proposal offering to accept the paper-folding machine in full satisfaction of Rip's debt to Miracle. Rip never responded to Miracle's offer.

Rip also missed making the August, September, and October payments on the pitching machine. He called Knuckler and told them he could no longer afford to make the payments. Knuckler agreed to accept the pitching machine in partial satisfaction of Rip's debt, but only if Rip also agreed to pay Knuckler \$1,500 on the balance of the debt. Rip agreed, and the parties put their agreement in writing. Thereafter, Knuckler took the pitching machine from Rip's house on October 30.

On December 1, Rip received a big order from a new customer with an up-front payment of \$20,000. Rip would like to get the paper-folding machine back from Miracle and the pitching machine back from Knuckler.

1. What rights and remedies, if any, does Rip have with respect to the paper-folding machine? Explain fully.
2. What rights and remedies, if any, does Rip have with respect to the pitching machine? Explain fully.

If **WRITING**, answer Question 10 in the **BLUE** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 10

Andy found an original Picasso painting being offered for sale by Vincent on an Internet auction site. Vincent accepted Andy's \$25,000 bid, which was subject to Andy's inspection and verification of the painting's authenticity. Vincent sent the painting to Andy's office in Dallas, Texas, where an expert confirmed that the painting was authentic. Andy phoned Vincent to inform Vincent of the inspection results. Vincent told Andy that he would travel to Andy's office to collect a check for the purchase price.

Jackson, a temporary employee working in Vincent's office, overheard Vincent and Andy's phone conversation. Unknown to Vincent, Jackson flew to Dallas the next day and, pretending he was Vincent, presented himself to Andy and asked for the \$25,000 check. After a short conversation with Jackson about the beauty of the painting, Andy left his office momentarily to retrieve the painting from another room. While Andy was gone, Jackson noticed two checks in Andy's partially opened credenza drawer. Jackson quickly grabbed the two checks and put them in his pocket.

After a few minutes, Andy returned with the painting, which the two briefly admired. Andy then wrote a check on his account at Busy Bank, payable to Vincent for \$25,000. Jackson took the \$25,000 check, thanked Andy, and left the office. Later that day, Jackson indorsed the \$25,000 check by forging Vincent's signature.

One of the two checks Jackson took from Andy's credenza was a blank check for Andy's account at Busy Bank. Jackson made this check payable to himself for \$5,000, and forged Andy's signature as maker of the check. Jackson indorsed this check by signing his own name. The other check Jackson had taken from the credenza was drawn on Busy Bank for \$10,000, payable to Andy, and signed by Carla as maker of the check. Jackson indorsed this check by forging Andy's signature.

Jackson deposited all three checks into his own account later the same day at a Dallas branch office of Midway Bank. Midway Bank then presented the checks to Busy Bank. All three checks were paid by Busy Bank. Three days later, Jackson withdrew all funds from his Midway Bank account and closed the account. Jackson then disappeared and his whereabouts are unknown.

Who among Andy, Carla, Busy Bank, and Midway Bank, if any, will bear the loss on the following checks:

1. The \$25,000 check? Explain fully.
2. The \$5,000 check? Explain fully.
3. The \$10,000 check? Explain fully.

If **WRITING**, answer Question 11 in the **ORANGE** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 11

In 2000, Ronald established an express trust naming his granddaughter Bonnie as income and remainder beneficiary. Ronald named himself trustee, and his brother Willard as successor trustee. The trust property included a 300-acre parcel of land located in Texas; 10,000 shares of stock in a wind farming company called WindPower, Inc.; and \$1,000,000 in cash. Ronald died in 2002, and Willard assumed his position as trustee.

As the years passed, Bonnie became increasingly concerned over Willard's actions as trustee. In 2010, she retained an attorney to sue Willard for mismanagement of the trust. At trial, the following facts were established:

- In 2006, Willard invested \$25,000 of the trust's assets in a racehorse owned by his girlfriend. He testified that he made the investment in an effort to diversify the trust's portfolio and that the racehorse was from an excellent bloodline and had a good chance of becoming a champion.
 - In 2008, Willard purchased for himself from the trust 5,000 of its shares of the WindPower, Inc., stock. He paid fair market value for the stock.
 - In 2009, Willard sold the 300-acre parcel of land after learning of a developer's plan to build a theme park in the area. The sale resulted in a large profit to the trust, and Willard, a real estate agent, took a 6% commission on the sale as a broker's fee.
 - Every year that Willard had served as Trustee, he paid himself \$20,000 per year out of the trust assets as compensation for acting as Trustee.
1. Explain fully whether or not each of the following actions violated Willard's duties as trustee:
 - a. Investing in the racehorse.
 - b. Purchasing the WindPower, Inc., stock from the trust.
 - c. Selling the 300-acre parcel of land and taking a commission from the sale.
 - d. Paying himself compensation for acting as trustee.
 2. What remedies does Bonnie have for Willard's violations, if any, of his duties as trustee? Explain fully.

If **WRITING**, answer Question 12 in the **PURPLE** answer book. If using **LAPTOP**, be certain you answer in the **correct** screen.

QUESTION 12

Jenny contacted Myra, an agent for Insurance Company (“Insurance”), in January of 2009, to obtain premises liability and property damage insurance coverage for her high-end furniture store, Classic Furniture (“Classic”). When Myra came to inspect the premises, Jenny showed her a detached building located behind Classic where restorations were performed on valuable antiques (“Restoration Building”). Myra delivered to Jenny a policy of insurance issued by Insurance and assured Jenny it would cover the entire business and its contents. When Jenny received the policy, she noted that there was no reference made to the Restoration Building. She called Myra, who told her that the omission was simply a mistake and that the policy did include coverage for the Restoration Building. Jenny made the required premium payment on behalf of Classic.

On July 1, 2009, a fire destroyed the Restoration Building and its contents. The fire department’s investigator determined that the fire was caused by a short circuit in an electrical switch. Jenny sent the appropriate completed claim forms to Insurance’s office on July 5, 2009, including a copy of the fire department’s final investigation report.

Insurance never conducted an investigation into the cause of the fire. Jenny called Insurance several times and left messages inquiring about the status of Classic’s claim. Her calls were never returned. On August 15, 2009, Jenny received a letter from Insurance advising her that Classic’s claim was being denied because: (1) the policy did not cover the Restoration Building; and (2) Insurance suspected that the fire was caused by arson (which was not covered by the policy).

Jenny hired an attorney, Albert, to help her with Classic’s claim on the policy. Albert agreed to represent Classic on a 33% contingency fee basis on whatever he collected from Insurance.

1. What causes of action under Texas consumer laws, if any, does Classic have against Insurance for denying coverage under the policy and denying Classic’s claim for the loss of the Restoration Building? Explain fully.
2. What remedies, if any, is Classic entitled to obtain against Insurance? Explain fully.

This concludes the Texas Essay portion of the exam.

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