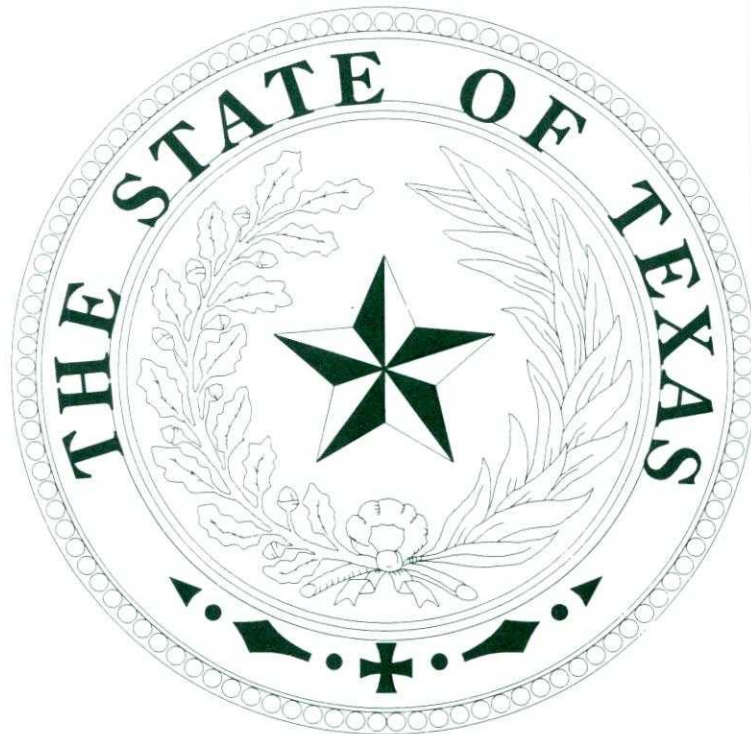


Thursday Afternoon
July 30, 2009
Essay Questions 7 - 12



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

Jane, a widow who lived in San Antonio, died in a car wreck. Jane was survived by her 16-year-old son, Alan, her brother, Mark, and her sister, Beth. Jane's will provided that, in the event of her death, Mark should be appointed guardian of both the person and the estate of Alan during his minority. Jane's estate, which she left entirely to Alan, was valued at \$2,000,000.

Mark, who was married and working as a wholesale lumber salesman, had a modest but comfortable home and excellent job security. Previously Mark had worked as a trust officer in a local bank and had been fired for mismanaging a customer's trust account.

Beth was a single woman, who worked as a highly successful securities broker specializing in the management of income-producing investments for her clients. Her work-related travel took her out of town four or five days a week.

The court appointed Mark as temporary guardian of Alan's person and estate. Mark immediately loaned himself \$50,000 from the estate funds for use in remodeling his home.

When Beth learned about the loan Mark made to himself, she filed an action to have Mark removed as guardian and to have herself appointed guardian of Alan's person and estate. Beth's petition also sought to require Mark to restore to Alan's estate the \$50,000 Mark had borrowed.

Mark opposed Beth's petition, asserting that the court was bound by the terms of Jane's will naming Mark as guardian, and Mark cross-petitioned to be permanently appointed guardian of both the person and estate of Alan. In support of his cross-petition, Mark filed an affidavit, signed by Alan, stating that Alan did not like Beth and wanted to live with Mark and Mark's wife so he could graduate from high school with his friends.

Mark testified that he borrowed the \$50,000 in good faith and that, although his intent was to extensively remodel his home, about half of the loan proceeds were to be spent to build a room and amenities to accommodate Alan's moving in with him. He claimed that, in any event, he should not be penalized for having taken the loan because, shortly before her death, Jane had promised to lend him the money.

- 1. Can the court lawfully ignore Jane's wish in her will to have Mark appointed Alan's guardian? Explain fully.**
- 2. What options are available to the court to resolve the competing requests for appointment as guardian, and how will the court most likely rule? Explain fully.**
- 3. May the court order Mark to restore the entire \$50,000 to Alan's estate? Explain fully.**

Answer the next question in the LIGHT GREEN answer book.

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

QUESTION 8

Wes, a salesperson employed by Personal Kitchen, sold Mary a set of kitchen knives and copper pans, both manufactured by Top Shelf. With only Wes and Mary present, Wes told Mary that the pans and the knives carried “a full, unlimited one-year warranty” and that as part of the warranty, Mary had a 60-day “trial period” to “cancel the transaction” for any reason.

The sale contract Mary signed was a Personal Kitchen form, which contained the following terms and no others: a description of the pans and knives; the purchase price; a “limited warranty” providing for repair or replacement of the pans at the discretion of the manufacturer; a statement that the knives were covered by a manufacturer’s unconditional warranty; and, in small print in the signature block of the form, a statement that “purchaser waives all rights under the Texas Deceptive Trade Practices Act.”

The first time Mary used the pans, the copper began to flake. She also used the knives and found that the cutting edges quickly became dull.

Forty-five (45) days later, relying on Wes’s statement that she could cancel the transaction within 60 days, Mary called Personal Kitchen’s owner and said she wanted to cancel the transaction and get her money back. The owner told Mary that, under company policy, she had missed her deadline because she had only five business days from the date of purchase to cancel the transaction. He refused to cancel the transaction or make any other accommodation.

When Mary presented a warranty claim to Top Shelf, that company rejected her claim, telling her that her retention of the pans and the knives for several weeks constituted a waiver of the manufacturer’s warranty.

Mary sued Personal Kitchen and Top Shelf for relief under the Texas Deceptive Trade Practices Act (“DTPA”). Both defendants asserted as a defense that Mary had waived all rights under the Act. Personal Kitchen, separately, asserted as a defense that Mary’s effort to cancel the transaction failed because she had missed Personal Kitchen’s five-day deadline. Top Shelf, separately, asserted the defense of waiver based upon Mary’s retention of the merchandise for several weeks.

- 1. What facts can Mary assert to overcome the defense asserted by Personal Kitchen and Top Shelf that she waived all rights under the DTPA? Explain fully.**
- 2. Can Personal Kitchen prevail on its defense that Mary did not seek to cancel the contract within five business days? Explain fully.**
- 3. Under the DTPA, what claims can Mary assert, what relief can she obtain, and is she likely to prevail against either of the defendants? Explain fully.**

Answer the next question in the YELLOW answer book.

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

QUESTION 9

In 2000, Van, a resident of Harris County, Texas, purchased Whiteacre in Washington County, Texas from Sal. In payment for the purchase, Van gave Sal a promissory note in the amount of \$100,000 (the "Note") payable in monthly installments of principal and interest on the first of each month. Payment of the Note was secured by a deed of trust covering Whiteacre, which included a power of sale. The deed of trust was properly recorded with the Washington County Clerk.

Van was a member of the board of directors of ArtCorp, a Texas non-profit corporation. Van wanted to help ArtCorp achieve its goal of opening an art museum on Whiteacre. In 2002, Van obtained Sal's consent to transfer Whiteacre to ArtCorp, with the understanding that Van would continue to make the payments on the Note. Van properly executed, acknowledged, and delivered a warranty deed conveying Whiteacre to ArtCorp. ArtCorp neglected to record the warranty deed at that time.

In 2003, after following all required procedures, Creditor recorded an abstract of judgment in the Washington County Real Property Records giving notice of its lien arising from a \$50,000 judgment against Van.

In 2004, ArtCorp recorded its warranty deed from Van in the Washington County Real Property Records.

In late 2008, ArtCorp made an oral agreement to sell Whiteacre to Bob for \$120,000. ArtCorp intended to use part of the purchase money to pay off the Note. Bob discovered Creditor's judgment lien on Whiteacre while making a search of the real property records and notified ArtCorp of its existence. ArtCorp told Bob the lien based on a judgment against Van was ineffective because Whiteacre no longer belonged to Van and not to worry about it.

Van failed to make the January 2009 payment due on the Note. On January 12, 2009, acting on Sal's instructions, Trudy, the trustee under the deed of trust, sent a written notice by certified mail to Van stating that Van's failure to pay was a deed of trust default and giving Van until January 22, 2009, to cure the default and avoid commencement of foreclosure proceedings. Trudy sent a copy of the notice of the default to ArtCorp.

ArtCorp asked Sal to postpone the foreclosure to give ArtCorp time to consummate the deal with Bob and pay off the Note. Sal refused and directed Trudy to proceed with the foreclosure. The loan documents properly waived all notices other than those required by law. Sal has also suggested to Bob that, by buying Whiteacre at the foreclosure sale, he would be better off.

- 1. What statutory requirements must Trudy fulfill as trustee in order to effect a proper foreclosure on Whiteacre? Explain fully.**
- 2. Is ArtCorp correct in its assertion that the judgment lien was ineffective? Explain fully.**
- 3. Assuming that Trudy effects a proper foreclosure, discuss whether Bob would be better off if he bought Whiteacre at the foreclosure sale rather than by buying it from ArtCorp. Explain fully.**

Base answers to all parts of Question 9 on the law in effect on July 30, 2009. Any statutory changes approved in the 2009 legislative session, but not yet in effect, need not be discussed.

Answer the next question in the BLUE answer book.

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

QUESTION 10

Hal owned Blackacre, a 150-acre tract of land in Tyler County, Texas, subject to a one-eighth (1/8th) royalty interest in oil, gas, and other minerals reserved by Raul, the previous owner of Blackacre. Hal farmed Blackacre and received income from the sale of water from a water well located on Blackacre.

Hal signed an oil and gas lease, leasing Blackacre to Ace Oil Company ("Ace"). Ace began exploration activities and preparation of a drill site. For access to the drill site, Ace constructed a new road that intersected the existing road to Hal's water well. In the process of construction, Ace left large piles of dirt obstructing part of the existing road, making it impassable. The dirt could have easily been located a short distance away from the roads. As a result, Hal lost income from water sales because the trucks that carried the water were unable to reach the well. Because Hal was angry, he installed a locked gate across the new road and refused to provide a key to Ace.

Big Oil Company ("Big") was aware that Ace had begun exploration on Blackacre. Determined to purchase royalty interests in the area, Big searched the Tyler County real property records and discovered Raul's reserved interest in Blackacre. Big purchased Raul's royalty interest.

A few days later, Big informed Hal that, since Raul had conveyed his royalty interest to Big, Hal was obligated to pay Big a share of the proceeds of sales of water when those sales resumed.

1. Was Hal entitled to deny Ace access on the new road? Explain fully.
2. What are Hal's rights, if any, against Ace for the road obstruction? Explain fully.
3. Is Big entitled to a share of the proceeds of water sales? Explain fully.

Answer the next question in the ORANGE answer book.

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

QUESTION 11

When Child was three months old, Mother relinquished actual care, control, and possession of Child to Aunt and Uncle. Mother did this because she was concerned that her own personal problems and her need to take care of Child's older sister prevented Mother from giving Child the care and attention Child needed. A few months later, the Texas Department of Family and Protective Services ("The Department") got involved. Pursuant to a safety plan implemented by The Department, Aunt and Uncle were temporarily given exclusive care and control over Child.

When Child was 18 months old, Mother told Aunt and Uncle that she was ready to take Child back full time. Before returning Child to Mother, Aunt and Uncle filed a petition in District Court in Travis County, Texas, seeking to be appointed Child's managing conservators or, in the alternative, to maintain access to Child by being appointed Child's possessory conservators. Mother opposed the petition.

At the trial, the evidence showed that Mother had voluntarily surrendered possession of Child to Aunt and Uncle when Child was three months old. The case manager of the family residence center, where Mother was residing with Child's sister, testified that the interactions between Child and Mother had been positive and case manager had no concerns about Child being returned to Mother. The supervisor for The Department, who had earlier implemented the safety plan, testified that The Department recommended reunification of Child with Mother and that it was in Child's best interest to be returned to Mother.

The trial court denied all relief requested by Aunt and Uncle. The trial court applied the parental presumption and appointed Mother as Child's sole managing conservator. The trial court denied Aunt and Uncle's request for access to Child.

- 1. Did the trial court err in appointing Mother sole managing conservator? Explain fully.**
- 2. Did the trial court abuse its discretion in denying Aunt and Uncle access to Child? Explain fully.**

Answer the next question in the PURPLE answer book.

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

QUESTION 12

Jackie sued her husband, Richard, for divorce. In the divorce petition, Jackie asserted fault grounds against Richard as the cause of the breakup of the marriage, sought an unequal distribution of the marital assets, and asserted that certain assets were gifts to her from her parents.

At the trial, Jackie described Richard as manipulative and controlling, and she testified that he refused to seek medical help for a condition that caused him to be irrational and irritable. Richard admitted that he had threatened Jackie, that he had done so intentionally, and that he had probably done so more than once. Richard admitted that he used threats to make her do what he wanted and that, on the day the parties separated, Richard ordered Jackie to get out of the house or else he would kill her. Richard testified, however, that his threat to kill Jackie was an idle threat made in anger with no present intention of carrying it out.

Jackie claimed twelve items of farm equipment as her separate property. Jackie's mother testified that, when her husband retired, he gave these items of farm equipment to Jackie. Richard agreed that the farm equipment was a gift from Jackie's parents, but Richard also testified that this gift was made to both Jackie and Richard.

The trial court ruled that the farm equipment was a gift to Jackie solely and was her separate property. The trial court also held that Richard was not an innocent spouse. The trial court awarded Jackie 75% of the community estate.

Richard asserts that the trial court erred in its ruling as to the farm equipment and in awarding Jackie 75% of the community estate.

1. **Did the trial court err in ruling that the farm equipment was a gift to Jackie solely and was her separate property? Explain fully.**
2. **Did the trial court err in its division of the community estate? Explain fully.**

This concludes the Texas Essay portion of the exam.

**BE CERTAIN THAT YOU WRITE THE PLEDGE ON THE BACK OF
YOUR PURPLE ANSWER BOOK.**