

Thursday Morning
July 31, 2003
Essay Questions 7 - 12



TEXAS BAR EXAMINATION

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ANSWER QUESTION 7 IN THE RED ANSWER BOOK

QUESTION 7

Settlor, a Texas resident, irrevocably transferred cash and rental properties to Texas Bank as Trustee for the use and benefit of herself and her adult child, Daughter. The instrument transferring the properties included the following provisions, among others:

- **“Distributions**. At Trustee’s sole discretion, Trustee may pay to Settlor and Daughter all of the net income of the trust during Settlor’s lifetime, for their unrestricted use and benefit. Whenever Trustee determines that Settlor’s income is not sufficient for Settlor’s or Daughter’s reasonable support, comfort and health, Trustee may in its discretion pay to Settlor or Daughter so much of the principal as Trustee determines to be required for those purposes. Upon Settlor’s death, any of the remaining property or income therefrom shall be distributed to Daughter.
- **“Transferability**. The interests of Settlor and of Daughter in the principal and income of the trust may not be voluntarily or involuntarily transferred before payment or delivery of said interests to Settlor or Daughter, and such interests may not be subject to execution, garnishment or any other proceeding for the payment of Settlor’s or Daughter’s debts.”

After the trust was established, two suits were filed in Travis County, Texas: (A) Hospital sued Daughter and obtained a money judgment against Daughter for the cost of unpaid emergency services Daughter incurred; and (B) Creditor sued Settlor and obtained a money judgment against Settlor for past due rent on Settlor’s apartment.

During Settlor’s lifetime, Hospital and Creditor filed garnishment proceedings against Texas Bank, seeking to reach Daughter’s and Settlor’s respective interests in the trust to satisfy the judgments.

1. **Did Settlor create a valid trust and, if so, what are the legal characterizations that best describe the trust? Explain fully.**
2. **Can Hospital garnish Daughter’s interests in the principal and/or income of the trust to satisfy Hospital’s judgment against Daughter? Explain fully.**
3. **Can Creditor garnish Settlor’s interests in the principal and/or income of the trust to satisfy Creditor’s judgment against Settlor? Explain fully.**

Answer the next question in the LIGHT GREEN answer book.

ANSWER QUESTION 8 IN THE LIGHT GREEN ANSWER BOOK

QUESTION 8

ABC, whose main office is on Commerce Avenue, in Bee County, Texas, is in the business of selling new and used household appliances through door-to-door salesmen.

In February 2002, a customer returned an electric water heater to ABC because its heating element malfunctioned. ABC repaired the unit for possible resale.

On March 1, 2002, Salesman, an ABC employee, put the refurbished water heater in his pickup truck and drove to Buyer's house, hoping to make a sale. Salesman told Buyer that the water heater in his pickup truck was "just like new," "had never broken down," and "had never been repaired." Buyer needed a water heater for his home and agreed to purchase the unit on the spot for \$200.

Salesman brought the water heater into Buyer's house, and Buyer handed him \$200 in cash. Buyer signed a document dated March 1, 2002, containing the purchase price, the model number of the water heater, and ABC's address. Salesman told Buyer that Buyer could cancel the transaction within 48 hours by returning the water heater to ABC's main office, but the document Buyer signed did not contain any cancellation provision, and Salesman did not give Buyer a copy of the signed document.

On March 2, 2002, Buyer called ABC seeking to return the water heater because it had failed to provide any hot water. ABC's receptionist told Buyer that all sales of used appliances were "final" and that ABC would not return Buyer's money.

On March 3, 2002, the water heater malfunctioned, resulting in a fire that destroyed Buyer's home and everything in it.

What are Buyer's rights and remedies, if any, against ABC under the applicable Texas consumer protection laws? Explain fully.

Answer the next question in the YELLOW answer book.

ANSWER QUESTION 9 IN THE YELLOW ANSWER BOOK

QUESTION 9

On June 1, Jake purchased from Dealer, and took possession of, a portable cement mixer for use in Jake's Texas home remodeling business, which he operated as a sole proprietor. The price was \$2,000, to be paid in installments, and Jake gave Dealer a security interest in the cement mixer. Dealer perfected the security interest by properly filing a financing statement.

The promissory note Jake signed provided for accelerated payments in the event of a default, and the security agreement contained a provision by which Jake waived notice of sale in the event of repossession by Dealer.

On July 1, Jake obtained a business loan from Bank and gave Bank a security interest in all present and after-acquired equipment. Bank perfected its security interest by properly filing a financing statement.

Jake failed to make any payments to Dealer, and, on September 1, Dealer properly notified Jake of the default, accelerated the indebtedness in accordance with the note and security agreement, and demanded that Jake return the cement mixer. Jake refused. Dealer then contracted with Speedy Repo, Inc. to repossess the cement mixer.

Anticipating trouble, Speedy Repo hired Officer, a local off-duty police officer, to accompany Speedy Repo's employee in carrying out the repossession. They found the cement mixer on a public street in front of a house where Jake was repairing the driveway. As they were hitching the cement mixer up to Speedy Repo's truck, Jake confronted them and told them to leave it alone and go away. Officer displayed his police badge and revealed his service revolver and told Jake that they were authorized by Speedy Repo to take the cement mixer. Jake, afraid of a violent confrontation, shrugged his shoulders and walked away.

A week later, Dealer sold the cement mixer for \$1,400. Dealer, relying on the waiver contained in the security agreement, did not give notice of the sale to Jake. Nor did Dealer give notice of the sale to Bank because Dealer had no actual knowledge of Bank's security interest. Dealer now seeks to recover from Jake the \$600 balance owed.

- 1. What rights, if any, does Jake have against Dealer, Speedy Repo, or both arising from the way the repossession was carried out? Explain fully.**
- 2. Does Dealer have a right to a deficiency judgment against Jake, and, if so, how should the amount be calculated? Explain fully.**
- 3. What rights, if any, does Bank have against Dealer? Explain fully.**

Answer the next question in the BLUE answer book.

ANSWER QUESTION 10 IN THE BLUE ANSWER BOOK

QUESTION 10

John purchased a sofa from Carol. On January 1, 2002, John gave Carol a check for \$500 payable to the order of Carol. The check was drawn on John's account at Big Bank. He postdated the check to January 15, 2002 because he did not have enough money in the account to cover it, but he intended to deposit sufficient funds by January 15. John did not notify Big Bank that he had postdated the check. In addition, John wrote on the face of the check the words "NON-NEGOTIABLE."

Thereafter, the following events occurred:

- On January 1, Carol indorsed the check, "Pay to the order of Robert as agent for Carol, /s/ Carol." Robert had agreed that he would use the \$500 to pay for Carol's yard work while she was on vacation.
- On January 3, Robert indorsed the check, "Pay to the order of Fred, /s/ Robert," in exchange for a Super Bowl ticket having a face value of \$250.
- On January 4, Fred offered the check to Susan for a discount. Susan gave Fred \$350, and Fred indorsed the check, "Pay to the order of Susan without recourse, /s/ Fred."
- On January 4, Susan indorsed the check, "For deposit only, /s/ Susan" and deposited it at Hometown Bank, which credited her checking account for \$500.
- On January 8, Big Bank dishonored the check because there were insufficient funds and returned it to Hometown Bank, which debited Susan's account for the \$500 and returned the dishonored check to her.

1. **Was John's check a negotiable instrument? Explain fully.**
2. **What liability, if any, do John, Carol, Robert, and Fred have to Susan on the check? Explain fully.**
3. **Does John have a cause of action against Big Bank for dishonoring the check before January 15, 2002? Explain fully.**

Answer the next question in the ORANGE answer book.

ANSWER QUESTION 11 IN THE ORANGE ANSWER BOOK

QUESTION 11

Husband and Wife married in 1998 and have at all times resided in Texas. During the first two years of their marriage, Husband worked at a local grocery store so that Wife could finish college. During the last three years, Wife was the main breadwinner, earning \$85,000 annually as an accountant, while Husband stayed home to care for Daughter.

Husband and Wife filed for divorce in 2003 and became involved in a dispute over custody of their three-year-old Daughter. Wife sought to be appointed sole managing conservator with the right to determine the primary residence of Daughter, and Husband sought to be appointed a joint managing conservator.

Husband filed a demand for a jury, but the court set the case for a non-jury trial.

After hearing the evidence, the court appointed Wife sole managing conservator of Daughter with the exclusive right to determine the primary residence. In making this ruling, the court stated that, even though Husband had done an excellent job of caring for Daughter, the court believed it was in the best interest of Daughter to be with her Mother, because "Daughter is very young."

Stating the same reasons, the court awarded limited rights of access and possession to Husband, allowing only one Saturday per month and no overnight access.

Did the court err in:

- 1. Denying Husband's motion for a jury trial? Explain fully.**
- 2. Appointing Wife as sole managing conservator with the exclusive right to determine the primary residence of Daughter? Explain fully.**
- 3. Awarding these limited rights of access and possession to Husband? Explain fully.**

Answer the next question in the PURPLE answer book.

ANSWER QUESTION 12 IN THE PURPLE ANSWER BOOK

QUESTION 12

Husband and Wife married in Austin in 1990 and resided in Texas throughout their marriage.

During the marriage, Wife worked at a company with a pension plan to which she made monthly contributions. Husband worked as a waiter in a restaurant that did not offer pension benefits.

During the marriage, Wife inherited a small cottage on the Gulf coast from her grandmother. Husband and Wife purchased a parcel of land adjacent to the cottage, held in Husband's name alone.

Husband and Wife filed for divorce in January 2002. At the time suit was filed, they had the following property: the cottage on the Gulf, valued at \$100,000; the adjacent parcel of land, valued at \$25,000; Wife's retirement account, valued at \$50,000; and a joint savings account with a balance of \$75,000.

While the divorce was pending, Husband entered into the following transactions:

- A. In April 2002, Husband withdrew the balance of \$75,000 from the savings account and gave it to Girlfriend stating, "Well, at least Wife won't be able to get her hands on the cash."
- B. In June 2002, Husband sold the parcel of land to Buyer for its fair market value of \$25,000. Buyer did not know that the divorce was pending.

When Wife learned of these transactions in the course of taking depositions in preparation for trial, she moved to have them declared void.

1. **How should the court rule on Wife's motion to void these two transactions? Explain fully.**
2. **To whom should the court award the cottage and the retirement account? 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.