

**Thursday Afternoon**

**February 26, 1998**

**Essay Questions 7-12**



**TEXAS BAR EXAMINATION**

COPYWRITE© 1998 TEXAS BOARD OF LAW EXAMINERS

THIS MATERIAL, OR ANY PORTION HEREOF, MAY NOT BE REPRINTED WITHOUT THE ADVANCE WRITTEN PERMISSION OF THE TEXAS BOARD OF LAW EXAMINERS

ANSWER QUESTIONS 7 AND 8 IN THE **RED** ANSWER BOOK

## QUESTION 7

In 1985 Ken and Alice started living together in Houston, Harris County, Texas. At the time, they were not married, either ceremonially or informally, to each other or to anyone else. In October of 1986 a child, John, was born to the couple and in March of 1987 Ken and Alice married. That marriage, which produced no other children, continued until July of 1993, at which time the couple divorced. At the time of the divorce, which was granted in Harris County, Alice was named sole managing conservator of John, and Ken was ordered to pay monthly child support of \$300. As the possessory conservator, Ken was awarded standard rights of possession of John, who continued to live with his mother in Houston. Ken paid John's child support as ordered by the court through the end of 1994.

In January of 1995 Alice remarried and, shortly thereafter, moved with her new husband and son John to El Paso. At the same time Ken, who remained in Houston, stopped paying child support, except for a single \$300 payment in June of that year. Furthermore, Ken did not evoke his right of possession of John from the time the boy moved to El Paso until June 15, 1997. On that day John flew to Houston to spend the next 42 consecutive days with his father. Ken paid for John's plane ticket, but continued to neglect his child support obligation.

On July 4, 1997, Ken was arrested for felony possession of cocaine and, unable to post bail, was incarcerated in the Harris County jail. Alice was not notified of this development at the time. Instead, John was left in the care of Ken's live-in girlfriend, Rachel, who was herself on felony probation for delivery of a controlled substance. Over the next ten days, while Ken remained in jail, Rachel frequently used drugs, often in John's presence. Concerned neighbors finally contacted Child Protective Services, who came to the home on July 15. Upon arrival at the home, caseworkers found John dirty and unkempt, and Rachel apparently under the influence of drugs. Lying in plain view on the living room coffee table, the caseworkers observed a single video tape entitled "Spicey Girls" and the notations "XXX" and "Not for Sale to Minors". The video cover also depicted a pornographic photograph of a child. Neither the video nor the cover were seized, and the video was not reviewed by the CPS workers. Nonetheless, John was removed from the home by the caseworkers.

Later that same evening Alice was informed of the situation by Child Protective Services. Alice flew to Houston the next morning, retrieved John, and returned with him to El Paso. Immediately upon her arrival in El Paso, Alice consulted you in regard to petitioning the court for an involuntary termination of Ken's parental rights.

### **Answer fully the following questions:**

- [1] Based upon the foregoing facts, discuss the appropriate grounds, if any, upon which Alice pursues an involuntary termination of Ken's parental rights.
- [2] In what court should Alice file termination proceedings? Explain why. Describe the circumstances, if any, under which this suit may be transferred.
- [3] In the event that Alice files an involuntary termination case against Ken, what must each party prove in order to prosecute or defend the suit? What standard of proof must be met in regard to each of those facts?
- [4] Assume that Ken is ultimately convicted of the offense of felony possession of cocaine and sentenced to serve time in prison. What bearing, if any, might this fact have on Alice's effort to terminate Ken's parental rights?

## QUESTION 8

In 1988 you represented Bill in his divorce from his first wife. The dissolution of that marriage was very unpleasant and Bill has always been bitter about the property settlement resulting from that divorce, resenting the amount of property which his first wife received. Although you have continued a social friendship with Bill, you have not represented him in any other legal matters over the past ten years.

In January of 1998 Bill and his fiancé Kate came to see you at your office. At that time, Bill and Kate informed you of their intention to marry. The wedding was set for the following week. This was also the second marriage for Kate, who had divorced in 1996. At the January office conference, Bill and Kate expressed their mutual desire to execute a premarital agreement. They requested that you advise them concerning their respective rights, and then draft an agreement which would be equitable to both parties. During the interview with Bill and Kate you learned the following:

Bill is 55 years old, has an MBA from the University of Texas, and is a successful real estate developer. Bill has no children and wishes to have none. Bill's significant property includes a \$500,000 home purchased in 1994, with an outstanding balance of \$375,000. Bill has a retirement plan in effect since 1992, subject to an outstanding debt of \$200,000. Over the past six years, Bill has deposited \$20,000 per year into this plan. It is Bill's intention to continue to deposit a like amount annually during the remainder of his career. Bill also possesses shares of stock with a current market value of \$65,000. Lastly Bill owns a 1992 Porsche automobile with a fair market value of \$35,000. That car is free of liens. Bill's gross income last year was \$150,000.

Kate is 30 years old, has one year of college, and is employed as a salaried office worker with an annual income of \$22,000. Although Kate has no children, she acknowledged to you that she would like to have one. Kate possess no significant property in her own name, other than a single \$5,000 certificate of deposit and an automobile upon which her credit union holds a lien.

Bill wishes for he and Kate to execute a written premarital agreement which provides the following:

1. that any property and assets which Bill now owns, as well as any future increase in value to those assets, will remain his separate property. That property includes the house, the retirement plan, the stock portfolio, and the Porsche, previously described;
2. that Kate expressly waive any future claim for post-divorce maintenance;
3. that in the event Bill and Kate should have any children, total child support payments will not exceed 15% of Bill's monthly net resources, with a maximum monthly child support payment not to exceed \$3,000

Further, although not reducing the provision to writing, Bill and Kate have agreed orally that all joint living expenses during the marriage will be paid from Bill's income.

Although Kate appears to be willing to accede to the proposed agreement, clearly this premarital agreement is primarily Bill's idea. Kate has not consulted another attorney concerning this proposed agreement and expresses no interest or intention in doing so.

**Discuss fully the following questions:**

- [1] Would the provisions Bill wants in the agreement as stated in 1, 2, and 3 above, be enforceable?
- [2] What problems, if any, might you encounter by representing both Bill and Kate?

**Answer the next two questions in the GREEN answer book**

**QUESTION 9**

On February 5, 1997, First Financial agreed to finance the purchase of inventory for Computer Plus, a retailer of computer products and equipment. Computer Plus has stores in Texas and California with its chief executive office in California. First Financial timely and properly perfected a security interest in all of the present and future inventory of Computer Plus. On March 1, 1997, Computer Plus sold computer equipment from its inventory financed by First Financial to Planet Engineers, Inc., on credit. Computer Plus files to perfect the security interest in the equipment created by the sale of the computer equipment to Planet Engineers, Inc., with the Secretary of the State of Texas.

On April 22, 1997, Computer Plus obtained a working capital loan from Main Street Bank and gave Main Street Bank a security interest in all of Computer Plus' present and future assets, including inventory and accounts receivable. On the same day, April 22, Main Street Bank filed to perfect its security interest with the Secretary of the State of Texas. Planet Engineers, Inc., failed to make the April 1<sup>st</sup> and May 1<sup>st</sup> payments to Computer Plus and Computer Plus repossessed the equipment sold to Planet Engineers, Inc., on May 20, 1997. On May 30, 1997, Computer Plus resold the repossessed computer equipment to Star Entertainment Corporation which paid the purchase price by negotiating and delivering to Computer Plus certain promissory notes that were payable to Star Entertainment and that had been executed and given to Star Entertainment by third parties.

On June 1, First Financial's president comes to your office and tells you that he is concerned about Computer Plus' financial condition and asks you the following questions:

- [1] What security interests, if any, are held by First Financial and Main Street Bank in Computer Plus; inventory? Explain Fully.
- [2] What security interests, if any, are held by First Financial and Main Street Bank in Computer Plus; accounts receivable? Explain Fully.
- [3] What effect, if any, would the sale of the computer equipment to Planet Engineers, Inc., have on the security interests of First Financial and Main Street Bank. Explain Fully.
- [4] What effect, if any, does the repossession of the computer equipment have on such security interests? Explain Fully.

**Question 10 appears on the next page**

## QUESTION 10

A. Stella Stealth sneaked into Della Drawer's office, removed Della's checkbook, drew a check on City Bank payable to Fred Johnson, and signed Della's name as drawer, all without Della's permission. Joe Jones, Stella's boyfriend, endorsed the check in Johnson's name and cashed it at Corner Grocery. Corner Grocery endorsed the check and deposited it in State Bank where the real Fred Johnson (who never saw the check) had an account. Upon presentment of the check by State Bank, City Bank paid the check to State Bank and charged Della Drawer's account for same. Della Drawer did not receive her bank statement with the forged check attached until more than 30 days after the forged check had been paid, but promptly reported the forgery and demanded that City Bank credit her account for the amount of the forged check. At the time of cashing the check, neither Corner Grocery, State Bank, nor City Bank had knowledge that Della's signature on the check was a forgery or that Fred Johnson's endorsement signature on the check was also a forgery.

**Answer fully the following questions with regard to the fact situation:**

[1] Is City Bank required to restore the amount of the forged check to Della Drawer's account?

[2] What recourse, if any, does City Bank have against Corner Grocery because of its endorsement of this check or against State Bank as the depository bank who took the check for collection?

B. Steven Sellers dies on July 28, 1997, in a tragic automobile accident. His wife, Debra, was to become the Independent Executrix of Steven's estate in accordance with Steven's will. Bill Banker was the Seller's lifelong friend and lending officer, who always took care of the Seller's banking needs at Security Bank. Banker not only knew of Steven Sellers' death, he was going to serve as pallbearer at his funeral and was aware that Debra was to be appointed as Independent Executrix of Steven's estate. Banker has sought your legal advice regarding the following issues which have arisen.

**Discuss fully the following:**

[1] Under what circumstances, if any, could Security Bank continue to accept, pay or collect on outstanding checks written by Steven Sellers following notification of his death?

[2] What, if anything, could Debra Sellers do to stop payment on a check by her late husband on the day before his death on his separate account for large sum payable to Jerry Fernwood, a person whom she has never met, but who happened to have been the one who reported Steven's fatal accident to authorities?

**Answer the next two questions on the YELLOW answer book**

**QUESTION 11**

Grandfather (“G”), a widower, has accumulated wealth and desires to dispose of some of it through the use of trusts. His first act on Monday morning is to phone his attorney’s office. On his attorney’s private answering machine, G leaves the following recorded telephone message, “Effective tomorrow, I’m giving you my liquor store business for my son, Jim, including all inventory, accounts receivable, the property on 10<sup>th</sup> street, and my liquor store account with First State Bank. I want all income, in quarterly payments, to go to Jim for life, and at his death, I want the income to go to Jim’s only daughter, Lou until she’s 35. Then she can have it all. I’ve sent the bank a letter today to tell them the account is yours, as trustee, from now on. The delivery service will bring you all the books and record tomorrow. I’ve talked to Jim already and told all my suppliers and debtors. I’ve made up my mind about this, but I might want to change it or get rid of it later. Draw up whatever papers we need. By the way, if I do decide to change something or call this whole thing off later, how can I do it? Call me.”

Later that Monday, G and his trusted friend, Hal, drove to the office of G’s stock transfer agent. By written instrument, G conveyed his mutual fund holdings to Hal as trustee of a revocable trust which named G’s girlfriend, Ty, age 65, as beneficiary. The stated purpose of the trust was to soothe G’s conscience for having wronged Ty on many occasions. No consideration was paid by Hal or Ty. G retained the power to modify the trust and to add property to the trust. By a second written instrument, G conveyed his 300 shares of technology stock in trust to Hal as trustee of a revocable trust benefitting G for life and then to Hal. Hal, as trustee, took possession of the shares of stock that very day.

G also conveyed a parcel of commercial real estate to his daughter Jan. The grantee was referred to as “Jan Jones, trustee”. G did not explicitly set forth any trust terms or trustee powers or limitations in the deed or in any other document. After executing and recording the deed with the county clerk, G placed the deed in an envelope, along with a copy of the Texas Trust Code, and mailed it by certified mail to Jan.

On Tuesday, as G drove down Ty’s street on his way to tell her about her status as his named beneficiary, he saw her through the window in the arms of another man. G immediately picked up his cellular phone and called Hal with instructions that the recently created trust drafted in favor of Ty was revoked, effective immediately. The betrayal was too much for G. He suffered a massive coronary that evening and died. He had not had a chance to meet with his attorney concerning the trust agreements for Jim and Lou.

**DISCUSS THE FOLLOWING FULLY:**

[1] Did G create a valid trust in favor of son, Jim and granddaughter, Lou? Explain.

[2] Assume that a trust was created for Jim and Lou. When G’s attorney heard G’s recorded message, he did not wish to serve as trustee. What would be the result? What action should the attorney take? What action should the attorney avoid?

[3] Answer G’s final question for the attorney: assuming a valid trust had been created and assuming G had not died until much later, how could modification or revocation be accomplished?

[4] Did G create a valid trust for his daughter, Jan? Explain.

[5] (a) Did G create a valid trust in favor of Ty? (b) For purposes of discussion, assume G created a valid trust in favor of Ty. What was the effect of G’s notice of revocation?

## QUESTION 12

Jean and Bob are related as aunt and nephew. D, who was Jean's father and Bob's grandfather, is deceased. D left a duly executed will containing a testamentary support trust for the benefit of W, his beloved bedridden wife, who is not related by blood to Jean or Bob. W resides in a retirement center. Jean and Bob are the named remaindermen who will become beneficiaries of the trust corpus upon the death of W. The trust is funded with D's substantial separate property, including cash, securities, and real property. D named TR, a trusted friend and professional associate, to serve without bond as executor of his will and trustee of the trust benefitting W. The fiduciary powers set forth in the will and trust instrument place total discretion in TR to sell personal and real property and administer the trust, using income or corpus for W, as the trustee determines is necessary and proper. The trust instrument contains a perpetuities savings clause.

The trust has been in effect for one year when Jean and Bob come to you to relate the grievances against TR. Their major complaints are as follows:

- (1) Shortly after D's death, in response to Jean's and Bob's requests, TR promised that he would allow them to remove and keep items of family personal property such as antique furniture, engraved silverware, monogrammed linens, and photos from the father's/grandfather's house, but then proceeded to sell off or dispose of the contents of the house without ever allowing them to make their choices.
- (2) TR has begun developing trust property, specifically, a one-story shopping center, when, Jean and Bob argue, he should have sold it and invested the proceeds to provide a higher yield to the trust. Jean and Bob report that the center has been vacant for months and appears to be depreciating in value. Several of the lease spaces have been vandalized. TR has entered into a partnership with a little-known local commercial real estate entrepreneur in developing the center. TR has spent trust assets to effect significant repairs and alterations to the center. Lease spaces have been enlarged and modernized. Landscaping has been upgraded, indoor and outdoor access ramps have been installed, and renovated restrooms equipped with disability accommodations have been added. Jean and Bob inform you that they questioned TR about his failure to sell the property and invest the proceeds. TR's reply to Jean and Bob is that the commercial real estate market has been poor but seems to be improving.
- (3) During the past year, TR, as trustee, has received two cash dividends and one stock dividend from Aerospace Industrials, one of the trust investments. TR has used the dividends to pay for weekly massage therapy for W. Jean and Bob question this use as excessively expensive and inappropriate.

### DISCUSS THE FOLLOWING FULLY:

- [1] What remedy, if any, do Jean and Bob have against TR for his breach of promise regarding the items of family property they requested?
- [2] Discuss whether TR can be successfully challenged for his handling of the commercial real property trust assets.
- [3] Given the facts above, discuss the proper allocation to income and corpus and proper use and allocation to the present and future beneficiaries of the Aerospace Industrials (a) case dividends and (b) stock dividend.

**WRITE THE PLEDGE ON THE BACK COVER OF THE YELLOW ANSWER BOOK.**

