July 2000

QUESTION 1

Hal and Wanda have been married for eleven years. Hal is a 38-year-old high school graduate working for a building contractor as a heavy equipment operator. Hal earns $42,000 a year and has the usual fringe benefits, including health coverage and an employer-funded retirement plan.

Wanda is 37 years old. She did not graduate from high school and, except for a brief period of employment in a clerical job before the birth of her first child 16 years ago, she has never been employed. She possesses no particular skills that would make her employable except in minimum wage jobs.

Hal and Wanda have one child of their marriage, aged 4. Wanda is the managing conservator of her two children, aged 12 and 16, from a prior marriage. She receives $1,000 per month in child support from her ex-husband. Hal and Wanda agreed at the time they married that Wanda would stay home, keep house, and care for the children.

Hal and Wanda rent their home. Their property consists of the following: two automobiles encumbered by outstanding loans, the balances of which are roughly equal to the values of the vehicles; household furnishings; Hal's interest in his employer's retirement plan; $4,500 in savings; and $800 in a checking account. They owe about $4,000 in credit card debt.

Six months ago, Hal began having an extra-marital affair with another woman and moved out of the marital home to live with the other woman. Since Hal moved out, Wanda has made no effort to get a job, but, to enhance her employability, she has entered an adult education program aimed at obtaining a high school diploma.

Wanda has filed for divorce and is seeking, among other things, an award of spousal maintenance.

1. Is Wanda eligible for spousal maintenance? Explain fully.

2. Assuming that Wanda is entitled to spousal maintenance, what relevant statutory factors would the court consider in determining the duration and amount of an award of spousal maintenance? Explain fully.

3. What events or circumstances would cause an award of spousal maintenance to be diminished, increased, or terminated? Explain fully.

Question 1 - Family Law

Subpart 1

The question involved the statutory prerequisites for spousal maintenance. Most answers correctly observed that it was only available if the marriage was longer than ten years, but few knew that the spouse seeking maintenance must exercise due diligence to seek suitable employment or must be in the process of developing skills to become self supporting.

Most answers did not contain all of the elements required for spousal maintenance.

Subpart 2

With respect to the second subpart of the question asking about the factors a court must consider when determining the duration and amount of a spousal maintenance award, many confused these with the factors a court uses in order to equitably divide the community estate.

Many misread subpart two of the question and gave the statutory percentage of the husband's income that could be awarded to the wife (20%).

Subpart 3

Subpart three inquired about when the spousal award terminates. Many did not know that cohabitation could terminate the award. Others had misconceptions such as if the husband remarried, the award could be decreased or that the award could be extended past the statutory three year maximum if the wife became disabled.

In general, too many answers contained bad grammar, incorrect spelling, and poor organization.
While points were not deducted for such shortcomings in this section, an answer is apt to be graded higher when the grader can understand what the examinee is trying to say. No points are given when the grader has to "guess" at what the examinee is trying to say.

July 2000

QUESTION 2

In 1992, Mother and Father met in Dallas, Texas and began dating. Mother became pregnant. Father was thereafter transferred by his employer to Chicago, Illinois and Mother followed him there. They were married in Chicago, and a few months later Mother gave birth to Child.

Mother and Father continued to live in Chicago. Each year during the holiday season, they would return with Child to Dallas and spend two weeks visiting their friends and family.

In 1996, Mother and Father divorced in an action brought in the court in Illinois. In the divorce, Mother was named managing conservator of Child, and Father was named possessory conservator and required to pay child support. Mother immediately moved back to Dallas. Father continued to live in Chicago. Each year after the divorce, Father returned to Dallas at Christmas and again during the summer to take Child back to Chicago for the periods of possession granted in the divorce decree.

To enforce collection of Father's child support payments, the Illinois court issued an income withholding order that was served on Father's employer, who regularly withheld the payments and remitted them to the appropriate agency in the State of Illinois. The Illinois agency forwarded the payments to Mother.

In December 1999, Father lost his job. He moved from Chicago to Milwaukee, Wisconsin, where he now resides and where, in January 2000, he obtained a new job. His new job pays a lower salary. He has not made any child support payments since December 1999. He still intends, however, to exercise his rights to take possession of Child during the periods set out in the Illinois divorce decree.

All three states (Illinois, Wisconsin, and Texas) have adopted the Uniform Interstate Family Support Act.

1. What procedures are available to Mother to enforce future payments under the child support order? Explain fully.

2. Does a Texas court have jurisdiction to collect the arrearages sought by Mother? Explain fully.

3. In which jurisdiction(s) can Mother attempt to have the support order modified? Explain fully.

Question 2 - Family Law

Subpart 1

Subpart 1 asked about the options available to enforce future payments under a child support order. Most knew that it could be sent directly to the new employer but many failed to list registration in Texas, as well as in Wisconsin, as an option.

Too many did not read this question closely and listed specific Texas penalties for the failure to pay child support, and a good number erroneously answered that the mother was entitled to withhold visitation as a means of compelling payment. While no points were deducted for this extraneous information, it indicates that many did not read this question closely.

Subpart 2

Subpart two inquired about jurisdiction in Texas. Many answers simply failed to discuss why the court would or would not have jurisdiction over the father.

Many responses indicated that specific arrearages must be reduced to judgment in Illinois before Texas could register an Illinois child support order

Many examinees simply did not answer the question asked and spent much time discussing why it was better for the mother to seek assistance from Wisconsin sources or why Illinois must handle enforcement of its own child support order.

Many respondents referred to the UCCJEA as being the controlling statute. These examinees referred to rules governing custody under that statute as relevant to their answer to the question.

Their responses were couched in the very different concepts ("SAPCR court") detailed in the UCCJEA. Points were not deducted; however, no points were earned.

Subpart 3

Subpart 3 inquired about the proper jurisdiction(s) for modification of child support. Too many erroneously chose Illinois for the reason that it was a "court of continuing jurisdiction" and failed to include Wisconsin and Texas (only with the consent of the parties).

February 2001

QUESTION 9

Sue and Jim have been married for 10 years. Jim works for a computer manufacturing company. He maintains a checking account on which Sue is a co-signer for Jim's convenience.

Jim regularly deposits his salary checks into this account and pays the family's household bills from this account. The current balance in Jim's account is $22,000, which is made up of the following: $2,000 from Jim's salary and $20,000 he received in an insurance settlement for injuries in an auto accident ($10,000 of the settlement was for lost wages, $5,000 for damage to the car owned by Jim and Sue, and $5,000 for Jim's pain and suffering).

Sue runs her own business selling vitamins door-to-door for a multi-level marketing organization. She has not incorporated her business. She is paid commissions on her own sales and, in addition, on the sales made by other salespeople she recruits, trains, and supervises. Each of the salespeople she hires is required to advance $5,000 to cover the cost of training and vitamin samples.

Sue maintains her own business checking account, into which she deposits her commissions and from which she pays her business expenses. The current balance in Sue's account is $20,000, which is made up of the following: $5,000 in vitamin sales commissions; $10,000 she received as a gift from her father to help her start the business; and $5,000 from a loan Jim made to her from his checking account.

Molly, recruited by Sue, has been unsuccessful as a salesperson. She sues Sue for breach of contract and fraud, claiming that she was inadequately trained and deceived by Sue into putting up her $5,000.

1. **Does Jim, as Sue's husband, have any personal liability to Molly? Explain fully.**

2. **Which of the components of the two checking accounts can Molly reach to satisfy her judgment if she prevails in her suit on the basis of:**
   (a) Breach of contract? Explain fully.
   (b) Fraud? Explain fully.

Question 9 - Family Law

Question 1: Is a non-breaching or non-tortfeasor spouse personally obligated on a judgment against the other spouse?

This question calls for an understanding of the circumstances under which one spouse may be liable for the other spouse's debts. It does not call for a dissertation on the dangers of not incorporating or forming an LLC or under what circumstances a corporate veil may be pierced.
This question requires one to know that absent a specific agency relationship or a debt for necessaries, the innocent spouse is not personally liable - in other words, that person's separate property may not be touched. (Sec. 3.201, Family Code) However, the person may be at risk of losing some community property. Marriage does not create agency (Sec. 3.201(c), Family Code) nor does it create an automatic assumption of debts incurred by the other spouse during marriage.

Question 2. The question asked: which of the components of the two checking accounts could be accessed by the plaintiff in the event of a judgment against the wife (A) under breach of contract and (B) under fraud?

This is a family law question - it does not call for a determination of whether the husband had privity or if the parent company should be sued. It does not ask for the damages that might apply under contract law or what would be available in a DTPA action. To answer the question, the examinee must first characterize the assets in each checking account: both spouses' separate property, both spouses' sole management community property, and the joint management community property.

There seemed to be a fundamental misunderstanding among the examinees of what constitutes sole management community property. There was a great deal of use of the term, but the husband's sole management property frequently was not characterized correctly. Few recognized that the wife's signature authority on the husband's account (for his convenience) did not defeat the sole management of some of the assets. Additionally, commingling does not defeat tracing. Money is fungible, but it is traceable. The funds in both accounts were easily traced.

<u>A. Breach of Contract:</u> Many examinees did not do well on this because they determined that the most the plaintiff could get under a breach of contract action was $5,000, or the benefit of the bargain. (This is not a contracts question.) The assets that could be reached in this problem are, in order: wife's separate property ($10,000 gift); wife's sole management community property ($5,000 commissions and $5,000 loan); and joint managed community property ($5,000 car damages). Breach of contract damages could not reach the husband's sole management community property (Sec. 3.202(b)(2), Family Code). Contracts entered into by one spouse do not automatically bind the other spouse; not all contracts are community obligations. (Sec. 3.201(b), Family Code)

<u>B. Fraud:</u> Fraud affects the entire community property estate, but cannot reach the innocent spouse's separate property ($5,000 for pain and suffering) unless the spouse would be liable under other law. (Sec. 3.202(a), Family Code) Fraud will reach the husband's sole management community property ($2,000 wages and $10,000 recovery for lost wages). (Sec. 3.201(d), Family Code)

February 2001

QUESTION 10

Sally, an 18-year-old clerk, worked for ABC Department Store. Quint, age 40, was her boss. They began having an affair, and Sally moved in with Quint. They lived in a large family mansion owned by Quint's wealthy mother, who was in a care facility for the terminally ill.

Sally had no property and earned only minimum wage. Quint earned $90,000 a year and owned 10% of the stock of ABC Department Store. His stock was worth in excess of $2,000,000.

Sally became pregnant and began pressing Quint to marry her. Quint wanted to continue his relationship with Sally and was happy at the prospect of becoming a father, but resisted marrying her. Sally persisted, and Quint finally agreed but insisted that he would not marry her unless she signed a premarital agreement. Sally reluctantly agreed. Quint himself prepared and presented Sally with a premarital agreement that contained the following provisions:

a. The earnings of each spouse shall be that spouse's separate property;
b. All income from a spouse's separate property shall be that spouse's separate property;
c. Any inheritance Quint receives from his mother shall be deemed community property;
d. If Quint and Sally divorce, Sally waives any spousal support;
e. If Quint and Sally divorce, as child support, Quint shall set up a $200,000 trust fund for the benefit of any children; and
f. Sally waives any right to have Quint disclose the nature and extent of his assets.

In fact, Quint did not make any disclosures concerning his assets. Sally studied the agreement carefully and, after several weeks of thinking about it, reluctantly signed it.

They married, and Quint supported Sally and their child. Two years later, Sally filed for divorce. Quint's mother is still alive.

Sally challenges the enforceability of the agreement both in its entirety and as to each of the provisions. She also seeks a temporary order requiring Quint to pay spousal and child support.

1. **What must Sally prove to have the agreement set aside in its entirety? Explain fully.**

2. **Discuss whether each provision of the agreement is legally enforceable. Explain fully.**

3. **If the court finds the agreement enforceable, in whole or in part, may the court nevertheless grant Sally's request for temporary spousal and child support orders during the pendency of the divorce? Explain fully.**

Question 10 - Family Law

1. Chances of Setting Aside the Agreement in its Entirety

Examinees often seemed confused about the meaning of "unconscionable" and many examinees thought that it meant "merely unfair". Many took the incorrect position that Texas law simply does not permit waiver of the right to disclosure. A number of examinees insisted that Quint had the statutory responsibility to provide Sally with a lawyer or that the mere fact that she did not consult with a lawyer invalidated the entire agreement. Many examinees thought that because Sally was pregnant she had no choice but to sign the agreement and that this constituted duress. This was perceived to be a main reason for the unconscionability of the agreement. Many examinees took the position that Quint was under an obligation to marry Sally, regardless of his responsibility to his child, and that his initial refusal to marry Sally constituted duress.

A few examinees argued that Quint could not prepare the agreement as this constituted the unauthorized practice of law or that his preparation of the instrument rendered the agreement unconscionable. Others spent valuable time arguing that the existence of a common law marriage voided the agreement. Some interpreted the facts as indicating Quint had not signed the agreement and therefore it was not binding. Another argument was that the enforceability of the agreement depended on whether the corporation was a subchapter S corporation.

Many examinees overlooked certain necessary facts. Sally sought this divorce. Quint did not seem anxious to avoid any obligation he had to the child. Sally carried a significant burden of proving five separate factors before the entire agreement could be held unenforceable (many thought one or two factors would render the agreement void, voidable, etc.) Quint was under no duty to marry her, and he was willing to support the child. Many answers ignored the fact that Sally studied the agreement for several weeks. Also ignored was the fact that Sally must have known she was consciously waiving something since she and her husband and child lived in a beautiful home. Many answers were simply conclusions with very few supporting statements.

2. Which portions of the Agreement are legally enforceable?

Most correctly answered that A and B were enforceable, but many examinees merely stated that conclusion and gave no reasons. Most recognized the problems with C in that only married persons could effectively agree to such a division. Many argued that spousal support and disclosure of assets could not be waived under any circumstances, but the Family Code provides otherwise. Most examinees saw a problem with limiting child support; fewer indicated that the trust provision was possibly enforceable as additional support to the child in the future.

3. Temporary Support

Relatively few examinees correctly observed that Sally's waiver covered all spousal support, temporary and long term. Many argued that the waiver had nothing to do with eligibility...rather, the length of the marriage was determinative. Since she was married less than 10 years, temporary support was impossible. Some examinees found the waiver enforceable but insisted the court had the right to grant temporary support to the spouse as well. Many examinees concluded that temporary spousal support simply could not be waived. Many answers presumed that eligibility for temporary child support automatically made the spouse eligible for temporary spousal support as well.

July 2001

QUESTION 5

Husband (H) and Wife (W) married in New Braunfels, Comal County, Texas and resided there for 12 years. H succeeded his father as president of the largest bank in town, and acquired 1,000 shares of stock in the bank. It is unclear whether the stock was a gift from his father or whether it was compensation from the bank to H during the marriage.

H and W quarreled often, and, during one of H's frequent fits of temper, H shoved W into a wall, causing her to suffer a concussion. Nine months ago, W left New Braunfels and took the couple's only child, a ten-year-old son, with her. They moved in with W's mother in Dallas, Texas, where the two of them have resided ever since.

H filed a divorce action in Comal County and included a prayer that he be named managing conservator of the child. The following events occurred during the pendency of the divorce case:

1. W moved to have the case moved to Dallas County. The court denied W's motion.

2. Pursuant to H's request and over W's objection, the court impaneled a jury to hear the issues of who, as between H and W, should be the managing conservator and possessory conservator of the child.

3. The court ultimately disregarded the jury's findings that H should be the managing conservator of the child and that W should be the possessory conservator and concluded that, because of the incident of domestic violence, it was in the child's best interests that W should be the managing conservator and H the possessory conservator.

4. The court refused H's request to submit to the jury the issues relating to child support and ultimately ordered H to pay $1,000 per month in child support.

5. The court refused H's request to submit to the jury the issues relating to the terms and conditions of access to and possession of the child and ultimately ruled that H would have the standard possessory and access rights to the child.

6. The court refused H's request to submit to the jury the issue of whether the 1,000 shares of bank stock were community property or H's separate property and ruled that the stock was community property.

Did the court commit error in taking each of the actions described above? Explain fully.

Question 5 – Family Law

Subpart 1: Many examinees apparently confused venue requirements when modification of custody or child support is sought with permissive venue when a divorce is first filed. When each parent lives in a permissive venue, the first to file for divorce will set the venue, regardless of where the child may live. Had the mother been the first to file the action in Dallas County, the venue would have properly been fixed there. A number of answers indicated that only the dissolution and property issues could be heard in Comal County but that the custody questions had to be heard exclusively in Dallas.

Subpart 2: Many examinees who had difficulty seemed convinced that the consent of both parents was required if a jury was to be impaneled. Others insisted that only the judge could hear custody matters in bench trials. Some examinees seemed to believe that the child of ten in the hypothetical fact situation could choose which parent to live with, all to the exclusion of a jury or judge deciding the issue.

Subpart 3: Most of the incorrect responses suggested that a judge could always ignore the jury's decision regarding custody because the jury’s decision is merely advisory. Also, most incorrect responses contained an assumption that the court could ignore the jury's decision if the best interests of the child would be served. Many seemed to believe that the single act of shoving the wife rendered the husband too abusive to be named the managing conservator for the child.

Subparts 4 and 5: Those examinees who answered incorrectly apparently confused the binding nature of the jury's custody decision with the jury’s advisory role if the court requests its assistance with child support and visitation. Some responses spent too much time discussing irrelevant issues, such as spousal maintenance.

Subpart 6: Incorrect responses tended to express the belief that the court was far more experienced in marital property law than the laypersons on the jury in the first place and should make the characterization of the stock accordingly. Most incorrect responses confused the court's exclusive role in dividing marital property in a "just and right" manner with the task of characterizing said property as either separate or community.

QUESTION 6

Husband (H) and Wife (W) are contemplating a divorce. Together, they have the following assets:

An Individual Retirement Account (IRA): Before the marriage, W worked for Dotcom Company. She ceased working there on the day she and H got married and has not worked outside the home since then. During her years at Dotcom, W funded an IRA with part of her earnings. The IRA was invested in a mutual fund. The value of the mutual fund on her last day of work was $15,000. Today, the mutual fund is worth $22,000. The $7,000 increase in value consists of $1,000 from reinvested quarterly dividends; $2,000 from reinvested capital gains distributions; and $4,000 from market appreciation.

A Bank Account: This account has a current balance of $5,000 and has never had a balance of less than $2,500. The account was opened after the marriage with a $3,000 gift to H from his grandfather. H periodically made deposits to the account from his earnings and intermittently withdrew funds to pay household living expenses.

A Rental House: Before the marriage, H purchased a house as a rental property. The purchase price was $100,000. H paid a $16,000 cash down payment and took out a mortgage of $84,000. The rental income has always been used to pay the mortgage payments. The current principal balance on the mortgage is $80,000. Principal payments totaling $2,000 were made before the marriage and principal payments totaling $2,000 were made during the marriage. The market value of the rental property on the date of the marriage was $100,000 and is now $130,000.

1000 Dotcom Company Shares: A year after W quit her job at Dotcom, the Board of Directors decided to reward the company's first five employees for their contributions to the success of the company by giving them a "bonus." The Board awarded W, as one of those five employees, 500 shares of Dotcom Company. The shares have since split 2 for 1.

What proportion of each of these assets is separate property and what proportion is community property? Explain fully.

Question 6 – Family Law

First question: The IRA. Few examinees seemed to realize that a small portion of the increase in market value would be due to the reinvested dividends, which are community property; therefore some community property money would be mixed in with the separate property appreciation. A number of examinees thought that the dividends were community property only if they were paid in cash. There seemed to be a fundamental misunderstanding of the characterization of appreciation of assets. Many examinees did not seem to recognize that only income from separate property was community property and incorrectly suggested that an increase in the value of separate property belonged to the separate estate rather than the community. Some examinees mistakenly thought the question concerned whether the IRA was a defined benefit or a defined contribution plan. Some examinees discussed ERISA, but it was inapplicable. The Texas Family Code, not ERISA, controlled the characterization of these assets.

Second question: The bank account. A number of examinees, instead of discussing the correct analysis of "community property out first, or separate property sinks to the bottom" wrote that "first in, first out" (FIFO) or "last in, first out" (LIFO) rules apply. Too many examinees went through most or all of the analysis and then incorrectly concluded that either (1) H lost all of his separate property and made it community property by commingling, or (2) the principles did not matter because H could get all of his original $3,000 separate property back if there were $5,000 in the account.

Third question: The rental house. This was not a math test, so that errors in dividing or multiplying did not prevent an examinee from doing well on this part. However it was necessary to understand the concepts involved in applying a statutory formula in Sec. 3.402 of the Texas Family Code. Some examinees seemed confused by the formula and may not have realized that the enhanced value of the property is multiplied by a ratio (all community property money invested ***divided by*** the total money invested in the property). The most common mistakes were failure to recognize what the enhanced value was and what figures to use in the ratio. As the numerator, a number of examinees used 4,000 as the community property interest, mistakenly subtracting the total mortgage due today (80,000) from the original mortgage (84,000). Many examinees wanted to use the mortgage figures in the ratio.

Fourth question: DOTCOM shares. Many of the examinees who did poorly on this part demonstrated common misconceptions such as:

- A gift must come from a family member;
- It is impossible for a company to gift an employee; and
- Bonuses are always separate property or always community property.

Some examinees had difficulty distinguishing between a gift (separate property) and a bonus that is a guaranteed part of one's salary (community property). Too many examinees opined that if the IRS classifies a bonus or a reward as income, and income is community property, then the stock reward must have been community property. While understanding IRS regulations is important in other contexts, this question called for application of Texas marital property law rather than income tax law. Some examinees apparently thought that W *earned* the bonus before she was married and did not seem to realize that it was simply a thank you gift. It was not compensation for her previous work, deferred or otherwise. Most examinees wrote that the property in question was subject to a "just and right division" by the court but then, in a way that suggested a fundamental misunderstanding of "just and right division," many proceeded to make a fifty-fifty absolute division instead.

<u>QUESTION 5</u>

On October 1, 1998, John and Mary began living together in Plano, Collin County, Texas. They often referred to one another in the presence of others as “my old lady” and “my old man.” On occasion when Mary went to the doctor for check-ups, she listed John as the person to contact in case of emergency. John listed Mary as his “next of kin” on his employment application.

They planned to have a formal wedding on November 30, 1999, and they rented a hall for the ceremony and the reception. However, on November 1, 1999, they had a falling out, and John left and moved in with a friend in Plano. John thereafter told several of his friends that he was glad he and Mary had not gone through with the wedding ceremony because Mary had been “impossible to live with.”

In January 2000, Mary moved permanently to San Antonio, Bexar County, Texas. On December 1, 2001, John won $1 million in the lottery. When Mary found out, she filed suit for divorce in Bexar County, alleging that she and John had been informally married on October 1, 1998 when they first moved in together.

John filed a motion to have the case transferred to Collin County and has denied any marriage ever existed.

1. **Should the Bexar County court transfer the case to Collin County? Explain fully.**

2. **Does Mary have sufficient grounds, based on these facts, to establish that she was married to John? Explain fully.**

Question 5 – Family Law

Although a majority correctly analyzed the venue question, others seemed to ignore the Family Code regarding venue of dissolution actions and declared that Collin County was the proper venue either because the marriage occurred there or because it was a more convenient forum for the parties and the witnesses. As to the elements necessary to prove an informal marriage, a number of examinees had difficulty with the requirement of an agreement to be married. Many did not seem to understand that intent was only a single element of an agreement to be married. Also, many examinees failed to mention any problem with the timing of Mary's divorce petition. Others suggested there was a two-year "statute of limitations" rather than a rebuttable presumption that no marriage existed if no proceeding to prove a marriage is commenced within two years following the date of separation.

February 2002

QUESTION 6

Husband (H) and Wife (W) married 10 years ago in Austin, Texas and have continuously resided there in a home they purchased shortly after their marriage. They have no children.

They jointly own a real estate brokerage firm. W is a licensed broker and manages the firm. H, a surveyor, is employed full time elsewhere but works part time at the brokerage firm.

Both H and W have a history of verbally abusing one another. Two weeks ago, H gave W a black eye as she was trying to hit him with a telephone. Within the last week, H told W that, unless she stops nagging him, he is going to blacken her other eye. W has decided she wants a divorce.

W wants to achieve the following goals:

- Limit H's ability to contact her;
- Prevent H from having any access to the property and accounts of the brokerage business; and
- Gain for herself exclusive possession of the family home.

What procedures are available to W under the Texas Family Code, with or without notice to H, by which W can attempt to achieve those goals, and, for each procedure, what factual showing must she make? Explain fully.

Question 6 – Family Law

Some examinees who were unsure of notice and hearing requirements applied concepts learned in procedure and were able to reason whether or not H should receive notice by applying the concept of due process rights. Many examinees were unable to identify specific procedural devices. Too often, they used restraining order in place of protective order or vice versa.

Additionally, many examinees delved into the future by detailing final divorce division of property and contact issues without determining what needed to be done to obtain the relief desired in the present. Many examinees spent their time discussing irrelevant aspects of family law.

QUESTION 11

Jim and Nancy announced their engagement. Shortly before the wedding, Nancy's mother sponsored a shower for Nancy and, during the shower, presented Nancy with a new car as a wedding gift.

Shortly after the marriage, Jim gave Nancy a large diamond ring as a Valentine's Day gift.

While married to Nancy, Jim suffered a personal injury, and, after some litigation, the case was settled. The settlement agreement set forth specific amounts for each of the following components of damages: Jim's pain and suffering, Jim's lost wages, Jim's medical expenses, and Nancy's loss of consortium.

After three years of marriage, Nancy files for divorce. There is no suggestion that Jim has been abusive toward Nancy. Jim's current salary is $200,000 per year. Nancy has no special training and presently lacks earning ability adequate to provide for her reasonable needs. In addition to a division of their property, Nancy seeks an award of spousal maintenance.

1. **What are Jim's and Nancy's community or separate property interests in the car, the ring, and the settlement money? Explain fully.**

2. **Is Nancy entitled to an award of spousal maintenance for any period of time after the divorce decree? Explain fully.**

Question 11 – Family Law

Many who had difficulty with this question apparently overlooked the fact that Nancy's mother gave the car to Nancy rather than to Nancy and Jim. A number of examinees incorrectly supposed that if a husband gives his wife a large diamond ring, the community might maintain an interest in the ring.

July 2002

QUESTION 12

Bob and Judy married in Dallas, Texas and resided there for several years. Before their marriage, Bob and Judy had estates that were comparable in size and they each had equal earning potential. With full knowledge of each other's property and financial obligations, they entered into a written premarital agreement. The key provisions of the agreement are that, in the event of a divorce, "neither of them would be entitled to support of any kind from the other, and support for any children of the marriage will be equally divided between them."

In 1996, their son, Charley, was born with a disability that will require lifetime care. It is not likely that he will ever be able to support himself.

In 2000, Judy became approximately 50% disabled from asthma, and the family moved to Arizona on medical advice.

One month ago, they moved back to Dallas so that Charley could attend a special school in Dallas. The tuition is $30,000 per year. The move back to Dallas probably will have an adverse effect on Judy's asthma, causing her to become more than 50% disabled.

While the family was living in Arizona, Bob entered into a relationship with his secretary, Samantha, who is now pregnant with Bob's child. Bob wants to divorce Judy as soon as possible so he can marry Samantha.

Bob currently earns $200,000 per year but states: "Starting over with Samantha will be expensive, and I want to minimize the amount I might have to pay my old family."

Answer the following questions for Bob:

1. **How long must I reside in Texas before I can file for divorce in Texas? Explain fully.**

2. **How long must I wait before I can marry Samantha after the divorce? Explain fully.**

3. **Are the two key provisions of the premarital agreement enforceable? Explain fully.**

4. **If the court orders me to pay support for Charley,**
    (a) **For how long can the court require the payments to continue? Explain fully.**

    (b) **Once the court sets the amount of the payments, can that amount be changed in the future? Explain fully.**

    (c) **Can the support obligation to Charley be discharged in bankruptcy? Explain fully.**

Question 12 – Family Law

Among those who had difficulty with this question, many seemed to have an incorrect belief that a valid and binding prenuptial agreement may be unenforceable if it turns out later that one spouse or the other is not happy with it.

February 2003

QUESTION 1

While married to and cohabiting with Husband, Wife gave birth to Child. Both Husband and Wife knew that Child was the result of Wife's adulterous relationship with Bert. Although Husband never formally adopted Child, he accepted Child as his own, and together Husband and Wife reared Child, always holding out to the public that Husband was Child's father. Bert was never informed of Child's existence.

On Child's fifth birthday, Wife filed suit against Husband for divorce, and sought to be appointed sole managing conservator of Child. Husband answered the suit, asking to be appointed joint managing conservator of Child.

When Bert heard Wife was divorcing Husband and that she had a five-year-old child, he confronted Wife, who admitted Bert was Child's father.

Bert intervened in the suit, acknowledged paternity of Child, and asked for visitation rights.

Wife then asked for an order requiring Bert to pay child support based on the Texas Family Code child support guidelines from the time of Child's birth. Bert is a prosperous businessman who has net resources of $5000 per month.

The court ruled Husband did not have standing to sue for appointment as managing conservator of Child. The court appointed Wife sole managing conservator but granted visitation rights to Bert.

The court ordered Bert to pay $1000 per month for the support of Child plus a payment of $60,000 to cover the period of Child's birth to the date of the suit. The order requires continued payment of child support from Bert's estate in the event Bert dies before Child reaches age 18.

1. **Did the Court err in ruling that Husband does not have standing to seek to be appointed managing conservator of Child? Explain fully.**

2. **What factors should the Court have considered in ruling on Wife's request for retroactive child support? Explain fully.**

3. **Did the Court err in ordering:**
    - **(a) Bert to pay $1000 per month in child support? Explain fully.**
    - **(b) Bert to pay $60,000 in retroactive child support? Explain fully.**
    - **(c) Bert's estate to continue payment until Child reaches age 18? Explain fully.**

Question 1 – Family Law

The first part of the question asked whether the Court erred in ruling that Husband lacked standing to seek to be appointed managing conservator of Child. The most common problem was identification of the call of the question: standing. Many possibly got caught up in the emotion of the problem and missed what they were asked, focusing instead on the best interest of the child. The second most common problem was pinpointing and discussing *all* of the relevant factors to determine Husband's standing. Many discussed only the factor that Husband is the presumed father because he was cohabiting with Wife when Child was born. Many others discussed only the factor that Husband held Child out as his own and had care, custody, and control. Both factors needed to be discussed.

The second part asked about the factors the Court should have considered in ruling on Wife's request for retroactive child support. The most common error, again, was forcing this problem into a "best interest of the child" discussion. The call of the question requests a discussion of factors. The second biggest error was that many only discussed one factor. Finally, many concluded Bert should not have to pay retroactive child support, and answered the question in that fashion, without discussing how they reached that conclusion.

The third part asked whether the Court erred in ordering (a) Bert to pay $1,000 per month in child support, (b) Bert to pay $60,000 in retroactive child support, and (c) Bert's estate to continue payment until Child reaches 18. The most common error was that many people reached the conclusion that Bert should not have to pay child support at all and answered all three subparts with a simple statement of this conclusion. It is unlikely that a question that is written with three subparts can be answered with one simple conclusion.

February 2003

QUESTION 2

Hal and Wanda have been married and have resided in Texas since 1995. In 1999, Hal's father gave Hal a house, and Hal and Wanda began to occupy it as their homestead.

In 2000, Hal borrowed $50,000 from Bank, signing an unsecured note. Hal alone signed the note and used the proceeds as working capital for a new business. Wanda took no part in the business.

In 2001, without Wanda's knowledge, Hal borrowed another $50,000 from Bank as additional working capital for the business. Hal signed a promissory note for $50,000 and executed in favor of Bank a mortgage on the house as security for the loan.

The 2000 loan from Bank and the 2001 loan secured by the mortgage to Bank are both now in default.

In 2002, Pedestrian was awarded damages in the amount of $150,000 for injuries she sustained in 2001 when Hal negligently struck her while driving his car.

Throughout her marriage to Hal, Wanda has deposited her salary in an account that is in her name alone. The account has a balance of $250,000.

1. **Does Bank have a valid mortgage on the house? Explain fully.**

2. **Is the $250,000 in the account in Wanda's name liable for:**
   a) **The 2000 loan from Bank? Explain fully.**
   b) **The 2002 judgment against Hal? Explain fully.**

Question 2 – Family Law

Regarding the mortgage against the house, most examinees realized that without the wife's consent there could be no mortgage against the homestead. However, a fairly common incorrect response concluded that because it was the husband’s separate property, that trumped the rule that both spouses have to consent to an encumbrance against the homestead.

Regarding whether the bank could get to W’s account for repayment of the loans, most examinees only got as far as the fact that the account was community property. The majority of those knew that it was the wife's sole management community property, but many did not seem to know what rights that created. Only a handful included the distinction that because the debt to the bank was a contractual obligation, and not one for necessities, the wife's sole management community property could not be reached.

As to the last section (whether the sole management community property account would be subject to the judgment) most examinees seemed to know this.

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.**

Question 11 – Family Law.

Most examinees did not have difficulty with part 1. As to part 2 many examinees focused exclusively on the best interest of the child and did not explain the presumption. Others who knew there was a presumption did not demonstrate that they knew how to apply it or what the presumption meant, i.e., that the wife would have had to put on evidence before the judge could find that joint management conservatorship was not in the best interest of the child. For example, many people wrote that there is a presumption, but that "the judge has a great deal of discretion in setting custody." Many only discussed the joint management/ sole management conservatorship issue and did not address whether the mother should have been permitted to determine primary residence. Surprisingly few people noted that part 2's answer was subject to the judge's initial error in failing to grant the jury trial.

Many answers addressed the impermissible gender bias. However, some only addressed gender bias as a reason for finding that the judge erred.

Many examinees relied upon the mother's high salary when assessing who should have been awarded custody. Only a handful pointed out that this would come into play when determining child support, but that it did not rebut the presumption of joint management conservatorship.

As to part 3, many examinees recognized that this was not enough visitation, but they did not explain their conclusion. Many others knew the schedule set by the standard possession order, but they did not know that it is presumed to be in the best interest of the child.

Some test takers did not appear to recognize that the three subparts addressed different issues. For example, many people gave the same answer for two subparts, e.g., for 1 and 2 they only addressed the question of a jury trial, and for 2 and 3, they only addressed custody, not visitation.

July 2003

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.**

Question 12 – Family Law.

Many examinees had difficulty with subpart (a) of part 1. Many apparently did not recognize that the husband committed a fraud on his spouse, and therefore, the gift to his girlfriend was voidable. A very common problem was that examinees simply concluded without explanation that Husband had no right to drain the account. Another common mistake was that, instead of addressing the call of the question, some examinees discussed whether the account was community property or separate property. Many concluded that the money would be difficult to retrieve from the girlfriend, and therefore, the transaction was not voidable. The difficulty of retrieving the money from the girlfriend had nothing to do with the question whether the transaction was voidable.

Subpart (b) called for consideration as to whether the property was Husband's "sole management community property" and as to whether Buyer was a bona fide purchaser. Many of the examinees who had difficulty with subpart (b) concluded that the land was a gift from Wife to Husband, and therefore, was his separate property. Others addressed only one of the issues. Some examinees discussed "homestead," but the fact pattern made it clear that the land was a vacant lot and was not a homestead.

In part 2, subpart (a), a few examinees simply stated their conclusion that the cottage was separate property without giving any explanation or reason. As to subpart (b) some examinees may not have read the question carefully. They answered that the retirement account should go to the wife, given the husband's bad acts in part 1. That is not what was asked. Again on this subpart, a number of examinees gave only their final conclusion without any explanation.

February 2004

QUESTION 1

Bob and Sally were married. Their only child, Allison, is five years old. On her way to pick up Allison at school one day, Sally was struck and killed by a car. For several years before the accident, Bob had subjected Sally to physical and mental abuse.

Sally had confided Bob's conduct to her mother, Martha, Allison's maternal grandmother. Shortly after Sally's death, Martha, fearing for Allison's physical health and welfare, seeks visitation rights to Allison.

Martha has Sally's diary, in which Sally described an episode where Bob had threatened her with a gun. Martha also has affidavits from friends of Sally that describe other incidents of abuse by Bob over a long period of time.

Martha does not know whether Bob's abuse of Sally extends to Allison as well.

1. **Does Martha have standing to sue for visitation rights to Allison? Explain fully.**

2. **Under the Texas Family Code, what must a court find in order to issue a valid order granting Martha visitation rights? Explain fully.**

3. **What grounds, if any, under the U.S. Constitution can Bob assert to limit Martha's ability under the Texas Family Code to obtain visitation rights? Explain fully.**

Question 1 – Family Law.

By far, the most common error was that most examinees did not seem to understand the first question because they did not know the meaning of “standing.” Instead, they equated standing with the granting of visitation. As a result, many of the answers to the first question resembled the answer to the second question. The second most common error equated visitation of the grandparents to custody, and therefore listed the elements necessary to terminate Bob’s parental rights or to grant any managing or possessory conservatorship. Many answered the second question by merely stating that the court would have to find such an order in the best interest of the child, then went on to describe what that meant or how the facts applied. Only a handful correctly stated that it was necessary to find that at least one of the parents still had parental rights. In answer to part 3, many examinees said they found no constitutional grounds for Bob to assert. A few said that state law governs family law, so that constitutional issues were not relevant.

February 2004

QUESTION 2

Carol and William divorced in 1996. During their marriage, they had one child, Ben. Carol is the managing conservator and William is the possessory conservator of Ben. Carol and Ben live in Texas. After the divorce, William moved to California. William has not made any attempt to visit Ben or pay child support since the divorce.

In 2000 Frank moved in with Carol and Ben. In 2002 Carol and Frank were married. Frank expressed an interest from the beginning in adopting Ben, who is now 12 years old.

Carol consents to the adoption. William's attitude about it is unknown. Ben does not wish to be adopted.

1. **What impediments, if any, under the Family Code would have prevented Frank from adopting Ben while he and Carol were living together unmarried? Explain fully.**

2. **What steps must Frank take and what must he establish in order to adopt Ben now? Explain fully.**

Question 2 – Family Law.

As to part I, a common problem was that examinees did not seem to understand that the question called for them to discuss specific impediments, if any, under the Family Code. Some of the less successful answers to this part did little more than discuss the child's best interest. As to the fact that Carol and Frank were not married, many examinees based their answers on concerns about morality or the best interest of the child rather than addressing the specific statutory impediment in the Family Code. Also, a number of examinees did not seem to understand the significance of Ben's age with respect to whether his lack of consent to his own adoption was an impediment.

Again in part II, a common problem was that examinees did not focus on what the question called for, i.e. the steps Frank must take to adopt Ben and what he must show. Some examinees discussed whether Frank would be successful or how the court might rule. Others discussed only the impediments that existed after Frank and Carol married. Many based their answers solely upon what is in Ben's best interest. Many answered this question stating that Frank must terminate William and Carol's parental rights.

July 2004

<u>QUESTION 11</u>

Husband and Wife married in 1990. During the marriage, Wife never worked outside the home.

In 1995, Wife was seriously injured in a fall that left her with substantial physical impairment. After her injury, Wife was unable to keep the couple's residence as clean as Husband desired. Husband became physically abusive to Wife. Wife told Husband she was going to divorce him, and Husband threatened to beat her if she did.

Wife filed for divorce in 2003. The only significant asset in the community estate is the couple's residence. Neither spouse has any separate property. Husband's income is $10,000 a month. Wife has no means to pay attorney's fees. Wife wants to continue to reside in the home while the divorce is pending.

1. **What relief may Wife seek, and what is the likelihood that she will obtain relief for**
    a. **Husband's threat to beat her if she files for divorce? Explain fully.**
    b. **Her lack of any means of support during the pendency of the divorce action? Explain fully.**
    c. **Her inability to pay attorney's fees? Explain fully.**
    d. **Her desire to continue to reside in the home while the divorce is pending? Explain fully.**

2. **Assume that Wife seeks to obtain maintenance as part of her final divorce decree:**
    a. **What must wife establish to be awarded maintenance as part of the final divorce decree? Explain fully.**
    b. **What limits, if any, are likely to be placed on the extent and duration of any such maintenance? Explain fully.**

Question 11 - Family Law

As to part 1, Many examinees seemed unclear about the difference between a protective order and an injunction. Some examinees seemed to think the Wife's showing of need to receive temporary support was the same as the showing required for Wife to receive an award of maintenance. A few examinees did not appear to know that an attorney may not work on a contingency basis in a divorce action.

Concerning part 2, most of the examinees who had difficulty did not demonstrate familiarity with the relevant statute. Without addressing the requirements specified in the statute, some examinees concluded that the single fact that Wife was disabled was sufficient for her to receive maintenance. Some examinees who did demonstrate familiarity with the statute nevertheless did not discuss how the statute applied to the facts given.

July 2004

QUESTION 12

In 1995, Harry purchased Greenacre, located in Dallas County, Texas. The deed of conveyance named Harry as the sole grantee. Harry's wife, Betty, agreed to use $100,000 from their joint savings account to purchase Greenacre, and she was present at the closing. Betty and Harry never lived on Greenacre, and they never claimed it as homestead.

In 1999, John, the son of Betty and Harry, married Sue. Shortly after their wedding, Sue and John purchased Greenacre from Harry. Betty was not a signatory to the deed from Harry to Sue and John.

In 2000, Sue and John built a home on Greenacre and began living there.

In 2001, Sue initiated divorce proceedings against John. Sue listed Greenacre as a community asset of her marriage to John as the result of the conveyance from Harry. Betty promptly intervened in the divorce suit, seeking a declaratory judgment that the deed Harry signed and delivered was ineffective to pass title to Sue and John. Harry is unavailable to testify.

1. **How is the court likely to characterize the nature of the ownership of Greenacre as originally conveyed to Harry? Explain fully.**

2. **How is the court likely to rule on Sue's claim that Greenacre is a community asset of her marriage to John? Explain fully.**

Question 12 - Family Law

A number of examinees had difficulty with the presumption in a divorce that property is community property unless there is clear and convincing evidence that rebuts the presumption and shows that it is separate property. Many of the test takers did not appear familiar with the concept of presumption and the quantum of proof necessary to overcome it. Some appeared to know the presumption, but they took the position that only slight evidence was needed to rebut it. Some examinees did not answer fully in that they did not give reasons for concluding that the property was community property.

Many examinees had problems with the distinction between joint management community property and sole management community property. Some examinees took the position that the wife's signature was required to convey non-homestead property even though it was the husband's sole management community property.

A number of examinees concluded that if something is community property, the wife always owns exactly half and the husband always owns exactly half. Many examinees demonstrated some familiarity with the concept of Inception of Title, but they did not apply it.

Some examinees seemed to feel that just because Harry and Betty used community funds, the community property was joint management (rather than sole management) community property even though Harry's name was on the deed alone.

QUESTION 7

Jack and Karen, both residents of Dallas, Texas, started dating in 1999 and began living together in 2000. Their relationship was stormy. Jack was suspicious and jealous and lost his temper regularly. Karen left him several times after he hit her, but she returned when Jack apologized.

Jack and Karen married in Dallas in 2001, following the birth of their son, Larry. Jack's physical violence against Karen escalated. In August 2003, Karen finally called the police after Jack dragged her across the room by her hair. Karen took Larry and moved in with a friend who had an apartment in Dallas.

In September 2003, a Dallas County District Judge found that Jack had committed family violence and entered a protective order against him for the benefit of Karen and Larry.

In October 2003, Karen filed suit for divorce. Karen sought to be appointed sole managing conservator of Larry and asked for child support in the amount of $2000 a month. She attached a copy of the protective order to her petition. Jack answered the suit and asked to be appointed joint managing conservator of Larry.

In November 2003, Jack went to the apartment where Karen was living and threatened to beat her and her friend. In December 2003, after Jack pleaded no contest, the Dallas County District Court found him guilty of violating the protective order.

In February 2004, a trial was held on the petition for divorce. Karen offered, and the court admitted into evidence, a certified copy of the December 2003 judgment and sentence reflecting Jack's conviction for violation of the protective order. Karen testified that she earned $1000 a month working part time and that she had no other means of support. She stated she owed her friend $750 a month for her share of the apartment rental and that child care cost her $500 a month.

In his trial testimony, Jack acknowledged he had committed family violence against Karen during the course of their relationship. Evidence established that Jack's income was $6000 a month.

1. **What is the primary consideration the court must take into account in determining the issue of Larry's conservatorship, and can the court properly name Jack and Karen joint managing conservators in this case? Explain fully.**

2. **What factors should the court consider in awarding child support, and what amount is the court likely to order? Explain fully.**

Question 7 - Family Law

Concerning Part 1, the most common problem was that examinees did not demonstrate knowledge of the relevant law with respect to the issue of whether a court can award joint custody to a parent who has been convicted of domestic violence within the past two years. Many insufficient answers also showed a lack of understanding of the meaning of joint custody and its implications.

As to Part 2, too many examinees did not seem to understand what the question was asking, and they did not demonstrate knowledge of the relevant law. The question asked for factors to be considered in awarding child support. Some examinees discussed only the “best interest of the child” and the 20% rule. Some examinees seemed to believe that the relevant factors were related to how close to 20% the Court could order in its discretion.

Many of the less successful answers restated unnecessary facts or discussed other aspects of Texas law that were not asked in this question. When a question such as this one is broken down into two parts, examinees would be well advised to read all the questions carefully and consider labeling and organizing their responses accordingly.

February 2005

QUESTION 8

Husband and Wife married in 1995. Shortly after their wedding, Husband's father gave Husband and Wife 5,000 shares of Y Corp. stock, evidenced by a certificate issued to "Husband and Wife as their community property."

During the marriage, Husband and Wife divided the Y Corp. dividends equally. Wife contributed her half of the dividends toward the couple's living expenses. Husband placed his half of the dividends in a savings account that he opened in his own name. No other funds were deposited into the savings account by Husband or Wife.

Husband and Wife acquired a residence in 1996 at a purchase price of $250,000. Wife's mother gave Wife $50,000 to use as a down payment. Husband and Wife co-signed a bank note for the remaining $200,000. All payments on the bank note were made from Wife's earnings from her job during the marriage.

In 1999, Husband and Wife purchased a ranch. Both of them signed the promissory note to the seller to finance the entire purchase price of $400,000. Title to the ranch was taken in Husband's name alone.

In 2000, Wife inherited $100,000. Wife contributed $25,000 of her inheritance to build a new barn on the ranch and $75,000 to pay down the principal on the $400,000 note. Other than the $75,000 payment, the remaining payments on the ranch note have come from Husband's earnings from his job during the marriage.

In 2003, Husband filed suit for divorce. The assets of Husband and Wife consist of the following:

(1) 5,000 shares of Y Corp. stock;
(2) The savings account;
(3) The residence, currently valued at $400,000; and
(4) The ranch, currently valued at $600,000.

1. **For purposes of division of marital property, how should the court characterize the ownership of these four assets? Explain fully.**

2. **Upon division of the property, what rights of reimbursement, if any, does Wife have with respect to the following claims for economic contributions she made during the marriage, and what would be the measure of any such reimbursement:**

   a. **The $50,000 down payment on the residence? Explain fully.**
   b. **The payments made on the $200,000 bank note on the residence? Explain fully.**

Question 8 - Family Law

Many of those who missed 1(a) correctly stated that one cannot give a gift to the community, but then said that due to the way the husband's father worded the stock certificate, it was community property. The savings account contained the cash dividends which are income from stock not the shares themselves. Nevertheless, many examinees incorrectly concluded in 1(b) that the account was the H's separate property.

Some examinees answered 2(b) incorrectly because they addressed the W's contributions to the ranch, rather than her contribution of SMCP to the residence note. It is very important to read the entire question carefully and address the question that was asked. Many seemed to have forgotten the inception of title rule regarding the residence and ranch, and instead talked about things that happened after H & W became the owners (which were irrelevant to characterization as community or separate.)

July 2005

QUESTION 1

Jerry and Pauline divorced in 1995. The divorce decree named Pauline as managing conservator and Jerry as possessory conservator of the couple's minor child, Ken. The court determined that Jerry's net resources, generated from his small business, were $2500 a month and ordered Jerry to pay child support in the amount of $500 per month.

In 1999, Jerry married Ann, a widow who had substantial income from investments she had inherited. Before their marriage, Jerry and Ann signed a premarital agreement. The premarital agreement specified that the property each of them owned before the marriage would remain their separate property, and that any income or property generated by that separate property during the marriage would remain each spouse's separate property. After his marriage to Ann, Jerry continued to operate his small business and continued to make regular child support payments to Pauline.

In 2002, Pauline petitioned the trial court to modify Jerry's child support obligation. In her petition, she alleged that "circumstances of the child or a person affected by the order to be modified have materially and substantially changed and support payments previously ordered should be increased and paid until the child graduates from college."

At the hearing on Pauline's petition, Pauline argued that the Texas Family Code prohibited Jerry from relying on his premarital agreement to escape paying child support from the proceeds of one half of Ann's income. Pauline argued that one half of Ann's income should be characterized as community property and included in Jerry's net resources. Jerry argued his premarital agreement with Ann precluded the characterization of income from Ann's separate property as community property. He proved that his own net resources were still $2500 a month. Jerry argued that any increase in his child support obligation would be in violation of the statutory guidelines and that, in any event, his obligation would cease when Ken turned 18, not when Ken finishes college.

Pauline presented no evidence at the hearing that Jerry was underemployed or that he hid his business income by diverting it to Ann or by paying household expenses with business funds. She claimed only that, adding Ann's income to his, Jerry was now wealthy enough to have his child support obligation increased and to be required to support Ken until he graduated from college.

The trial court added Ann's income to Jerry's income in determining Jerry's net resources in calculating Jerry's child support obligation and, based on that substantially greater value of the resources, increased Jerry's monthly support obligation to $1500 and ordered Jerry to make monthly support payments until Ken graduated from college.

1. **Was it error for the court to combine Ann's income with Jerry's in determining Jerry's net resources? Explain fully.**

2. **Was it error for the court to deviate from the child support guidelines? Explain fully.**

3. **Was it error for the court to order child support payments beyond age 18? Explain fully.**

Question 1 – Family Law

Subpart 1-- A common problem was recognizing the issue-- i.e., the impact of a remarriage and a premarital agreement on child support payments assessed in a previous marriage. A number of examinees seemed unfamiliar with the relevant law and the Family Code as to whether a subsequent spouse's income may or may not be considered in the assessment of child support payments.

Subpart 2 -- Again, the most common problem was recognizing the issue to be resolved. The question called for more than a general recitation of the Family Code section that outlines the percentage of income to be assessed in child support payments. Also, many did not discuss the propriety of reassessment of child support payments if Pauline could have shown underemployment or fraud.

Subpart 3 -- A number of examinees did not seem to know that child support payments do not necessarily terminate at 18 if the child is still in high school.

QUESTION 2

Bob and Claire met in January 1999 and began to date regularly. In March 1999, Claire moved into Bob's home in Dallas, Texas. She resided in Bob's home but retained her old P.O. Box mailing address.

In January 2000, Claire told Bob, "We don't have to get married to be married. You've had problems with your credit. Let's get your debts straight and then we'll do it right."

Bob and Claire separated in January 2001. In January 2004, Bob sued Claire for divorce. In his complaint, he quoted Claire's January 2000 remarks as evidence of their alleged agreement to be married and alleged further that they had ceased to live together as husband and wife in January 2001.

At trial, Bob presented the following evidence and nothing more:

- He understood from Claire's statement, as quoted above, that he and Claire were married, albeit not ceremonially.
- He agreed to marry Claire and considered himself her husband.
- Claire never said she did not want to marry him; rather, she said she did not want to have a ceremony because she wanted to keep her own name to protect her credit.
- They cohabited in Texas continuously from March 1999 through January 2001.

At the close of Bob's case, Claire presented no evidence, rested, and moved for an instructed verdict. In her motion, Claire asserted (a) under the Family Code she is not required to present evidence because of a presumption in her favor, and (b) in any event, Bob's evidence fails to establish a common law marriage.

How should the court rule on each assertion of Claire's motion? Explain fully.

Question 2 – Family Law

On part (a), the most common mistake concerned the effect of (1) the presumption in Claire's favor (as to whether there was an agreement to be married) and (2) Bob's introduction of some evidence of an agreement ("we don't have to marry to be married") to rebut the presumption. Many examinees did not know the presumption, but instead asserted the law in terms of a statute of limitations, i.e., that Bob only had two years from the date the couple separated to prove a common law marriage. Many incorrectly stated the presumption as "because they were separated for more than two years, there was a presumption that there was no marriage." The presumption went only to one of the three common law marriage elements: an agreement to be married. Similarly, very few examinees understood that it only took evidence as to the element of an agreement to rebut the presumption. Many examinees who recognized a presumption seemed to believe that Bob had to put on evidence of all three common law marriage elements to rebut it and did not seem to understand that Bob could rebut the presumption by showing a scintilla of evidence as to the element of an agreement.

As to part (b) many did not mention that Bob could have introduced a written declaration of marriage. The most common mistake on (b) was stating that there was a required minimum number of years (with answers ranging from 1 to 10 years) to meet the cohabitation requirement.

February 2006

<u>QUESTION 11</u>

Lewis and Jennifer married in January 1990. Ben, the only child of their marriage, was born in 1992. Lewis filed for divorce in January 2002.

From the time of his birth, Ben suffered from a health condition that caused him to experience frequent seizures. As the result of this condition, Ben required constant parental attention. In February 2002, Ben underwent an operation that was intended to cure him. From the time of the operation until the divorce trial in January 2003, Ben experienced no seizures.

At the divorce trial, Jennifer gave the following testimony: (a) that because of Ben's health condition, he requires substantial care and personal supervision; (b) Ben requires two hours of therapy on a daily basis; (c) as a result, Jennifer is unable to accept full-time employment; (d) the best job she has been able to obtain under the circumstances is as a bus attendant with the school district, which pays $100 per week; (e) her monthly expenses, post-divorce, will be $3,000; and (f) the $400 she earns per month means that her monthly income is about $2,600 less than her monthly expenses.

Lewis testified that Ben has had no seizures since his operation and that Jennifer and he were planning to reduce Ben's medications over a period of time, until at some point the medications may no longer be necessary. Lewis acknowledged that his net monthly resources are $6,000.

Ben's physician testified that Ben seems to be functioning as well or better now than he was before the operation, although he could not guarantee that the seizures would not recur.

Based on the foregoing testimony and, without any further findings, the trial court awarded semimonthly spousal maintenance payments of $650 to Jennifer for one year and ordered Lewis to pay $1,500 in monthly child support.

1. **Based on the provisions of the Family Code governing spousal maintenance, did the Court err in making the award of spousal maintenance? Explain fully.**

2. **Based on the provisions of the Family Code governing child support, did the Court err in making the award of child support? Explain fully.**

Question 11 – Family Law

As to part 1, in many of the less successful answers to this question, a number of examinees did not seem to recognize that the question sought factors for imposing spousal maintenance. Many seemed to focus on emotional aspects rather than spotting the issue and giving a proper response based upon applicable law. As to the second part, many did not narrow their response to the answer called for, but instead gave broad statements of child support law and general discussion.

February 2006

QUESTION 12

Joe and Linda married in 1978. Soon after the marriage, Joe started up a business called Management Services, over which he had sole management and control, including sole control over the income generated by the business. Linda had no involvement in or knowledge of the Management Services. During the 1980's and 1990's, Joe earned a very high income through the operation of Management Services.

In 1981, Joe met Missy and commenced a romantic affair that continues to date. Missy knew all along of Joe's marriage to Linda.

In 1995, Joe purchased a house for Missy and made the $160,000 down payment and all subsequent mortgage payments with funds drawn on Management Services' business account. In 2004, Joe purchased an expensive sports car for Missy.

When Linda learned of the affair in January 2005, she sued Joe for divorce. She also sued Joe and Missy to recover for herself the entirety of the property and funds Joe had given to Missy during his marriage to Linda.

By way of defense, Joe asserted that, (1) to the extent that the money and payment for the property came from his income from Management Services, he was free to dispose of it as he saw fit, (2) in any event, the court had no power to award more than half of the property in dispute to Linda, and (3) as to the house and sports car, he was within his rights to make gifts to persons outside the marriage.

At the trial, Missy testified that she opened an account in her own name at State Bank in 2004 with a single deposit of $300,000. Missy admitted that this money came from Joe. Missy also testified that she had an account in her own name at County Bank and that, from January to June of 2004, her deposits to that account totaled $100,000. Neither Missy nor anyone else testified concerning the source of the $100,000. Missy also testified that, from 1981 to the present, she did not have a job and had no independent means of support.

The trial court granted the divorce and awarded Linda a joint and several liability judgments against Joe and Missy in the amount of $400,000, representing the total of the deposits in the two banks.

The Court also awarded to Linda the sports car and Missy's house.

1. **In light of the defenses asserted by Joe, did the Court err in awarding Linda the joint and several liability judgments and the house and sports car? Explain fully.**

2. **What form of remedy should the Court impose to secure the return of the money, the house, and the car to Linda? Explain fully.**

Question 12 – Family Law

In the less successful answers to this question examinees demonstrated the most difficulty with the following issues:

- Analysis and explanation of Joe’s defenses
- Remedies to secure the return of the money, house, and car
- The court’s authority to divide property in a just and right manner
- The nature of spouses’ ownership interest in community property
- The classification of income earned during the marriage as community or separate
- The many factors on which a court’s unequal division of assets may be based
- The effect of a finding that gifts were a fraud on the spouse
- The joint and several liability judgment against Missy

QUESTION 9

Bill and Jane married in 1985. They had one child, Wanda, who was born in 1990. Jane filed a Petition for Divorce in 2005, at which time Bill and Jane's community property, totaling $1,500,000, consisted of their homestead (valued at $350,000), two automobiles (each valued at $50,000), Bill's retirement account (valued at $750,000) and an investment portfolio (valued at $300,000). All assets were acquired during the marriage.

The only ground for divorce Jane alleged in her Petition was that the marriage had become insupportable because of a discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation. Jane sought a "just and right" division of the community property.

At the trial, the evidence showed that (1) the couple's minor child, Wanda, is 15 and attends a private high school which requires her parents to pay a substantial tuition (although the dollar amount was never testified to); (2) Wanda has a learning disability which requires a private tutor at a cost of $500 per month; (3) Wanda requires substantial dental work likely to exceed $15,000 before she reaches the age of 18; (4) Bill worked as a petroleum engineer during the marriage and continues in the same occupation; (5) Bill is 57 and is in excellent health; (6) Bill's net resources are $10,000 per month; and (7) Jane has a high school education, has not worked outside of the home since the marriage, has had difficulty finding employment since the separation, and is handicapped by a finger injury. At trial there was also evidence of Bill's adultery during the marriage and evidence that Bill physically abused Jane.

The trial judge awarded as a "just and right" division two-thirds of the community estate to Jane and one-third of the community estate to Bill. The court also ordered Bill to pay $2,000 per month child support.

1. **Did the court have the power to award Jane a disproportionate share of the community estate, and, if so, what considerations justify the disproportionate award? Explain fully.**

2. **Did the trial court err in the amount of child support it ordered Bill to pay? Explain fully.**

Question 9 – Family Law

Part 1:
Many did not recognize that the question sought discussion of the factors analyzed to impose an uneven division of the community property. Though similar to the factors necessary to impose spousal maintenance, the two inquiries are different. Many answered this question as if it were a spousal maintenance question. Others misinterpreted the question as seeking analysis of how the community property should be divided. Some examinees discussed such issues as the best interest of the child or the child support calculation although these did not factor into how the community property should be divided.

Part 2:
Many did not seem to recognize that the statutory 20% of income used to calculate child support is limited to the first $6,000 earned. Some examinees discussed matters that the question did not call for, such as how long child support lasts or the factors necessary to extend this obligation. Others seemed confused about the elements that factor into the child support calculation.

QUESTION 10

Debbie and Charles married in 2001. In 2005, they filed for divorce. The trial court, in dissolving the marriage, must characterize various items of property held by the couple. The items of property and the only evidence adduced at trial relating to them are as follows:

1. Blackacre. In 2002, Debbie's mother, Linda, conveyed Blackacre to Debbie by a deed, which recited:

> "For good and valuable consideration, Linda does hereby grant, sell and convey unto Debbie, as her sole and separate property and estate, Blackacre."

Charles claims Blackacre is community property because it was conveyed to Debbie during the marriage.

2. Funds from a Personal Injury Settlement. In 2003, Charles was injured in a car accident. Charles filed a personal injury lawsuit alleging the right to recover damages for mental anguish, physical impairment, lost wages, and lost earning capacity. In 2004, Charles settled the lawsuit for $190,000.

During the divorce trial, the court admitted into evidence the following release of Charles' claims in the personal injury suit:

> "It is understood and agreed that this is a full and complete release and includes all sums of any kind or character, including by way of illustration, but not by way of limitation: actual damages sustained by claimant; exemplary damages; medical, hospital, drug or nursing bills; property damages; loss of income or of profits; mental anguish; and physical impairment."

At the time of the divorce trial, $69,000 remained in Charles' possession from that settlement.

3. A 2000 Mercedes Automobile. Charles bought a Mercedes and obtained a car loan in 2000, one year before the marriage. Commencing in 2001, the loan payments were made with community funds and the lien was released and final title was acquired during the marriage.

4. Royalty Income. At the time of their marriage, Charles owned oil and gas mineral interests in real property he had inherited. The primary source of income for the couple's living expenses over the term of the marriage were Charles' royalty payments from the inherited mineral interests, which continue to provide $10,000 a month on average. Charles did not expend any significant time, talent or labor with regard to these royalty payments during the marriage.

How should the trial court characterize these properties (as separate or community property)?

1. **Blackacre. Explain fully.**

2. **The remaining funds from the personal injury settlement. Explain fully.**

3. **The Mercedes. Explain fully.**

4. **The continuing royalty income. Explain fully.**

Question 10 – Family Law

Among the less successful answers to this question, many examinees incorrectly speculated as to how the court would characterize the assets if other evidence were considered. This seemed to disregard the statement in the fact pattern that: “The items of property and the only evidence adduced at trial relating to them are as follows….”