

**KENTUCKY BAR EXAMINATION**

**JULY 24, 2007**

**ESSAY QUESTIONS 1 - 6**

## **QUESTION NO. 1**

John and Mary Stump were married on June 20, 1996, in Cincinnati, Ohio, where their marriage is so recorded. They happily resided in Cincinnati until recently.

Mary went out with friends on December 28, 2005, to Newport, Kentucky, to a late-night spot, and met Hank Tucker. One thing led to another and Hank and Mary ended up at Hank's place, which led to intimate relations.

About two weeks later, Mary, overtaken by guilt, told John what happened with Hank. Until this time, John and Mary had a good relationship, but John decided they should separate and evaluate their marriage. John remained in Cincinnati at the marital home and Mary went back home to her parents in Lexington, Kentucky, and established residence in Fayette County, Kentucky, on January 12, 2006.

Alone, John was devastated as he did not want to live without Mary, so the following weekend he drove to Lexington, Kentucky, to see her. Initially, the meeting was cordial; however, John became angry and struck Mary in the face, causing bruising, and then threatened to kill her when she told him she wanted a divorce. John also found out Mary was pregnant. John and Mary previously had no children and John felt sure this was not his child, although nobody else knew, not even Hank Tucker.

The following Monday morning Mary came to your office to talk about a divorce action and possibly an EPO. You were busy but scheduled an appointment for later in the week, on January 23, 2006.

On Tuesday, Mary received a call from the Kentucky State Police that John had been killed in an automobile accident. While driving in Lexington on Monday night, John was hit head-on by an ACE Trucking Company truck that was in the wrong lane of travel. John was killed instantly upon impact, with no question as to liability, clearly the fault of ACE Trucking Company (ACE).

The next morning an adjuster from ACE's insurance company calls Mary and tells her that the full policy amount is \$2,000,000.00 and they are offering this entire sum to settle with the survivors due to the wrongful death of John. Mary tells the adjuster that she has an appointment with you and will let the company know. John had no other assets or debts.

Mary comes to her appointment on January 23, 2006, relates these facts to you, and wants you to handle everything. Under Kentucky law, answer specifically the following questions for Mary:

1. Could Mary have filed a divorce action and gotten an immediate divorce in Fayette County? Please explain.
2. Could Mary have obtained an EPO (Emergency Protective Order), and would a DVO (Domestic Violence Order) have been granted? Please explain.
3. Could Mary and/or her unborn child receive the money (wrongful death, \$2,000,000.00)? Please explain, elaborating on Mary's best position.
4. Can Mary seek child support? Please explain.

## **QUESTION NO. 2**

Mr. and Mrs. Homeowner (“Homeowners”) sued Acme Chemical Company (“Acme”) for injuries they claimed to have suffered as a result of exposure to pesticide spray Acme had applied to their home. On the eve of trial, the parties orally agreed that Homeowners would voluntarily dismiss and release their claims against Acme in exchange for \$50,000. Acme’s authorized representative stated Acme wanted to “buy their peace for \$50,000”, and Homeowners said they were willing to settle their claims for that amount. The lawyer for Homeowners wrote the following letter to counsel for Acme:

This letter is to confirm our settlement of the above-captioned matter wherein Acme Chemical Company has agreed to settle the claims of Mr. and Mrs. Homeowner for \$50,000. Please forward to this office a release which you desire Mr. and Mrs. Homeowner to sign, along with your check made payable to Mr. and Mrs. Homeowner in the amount of \$50,000.

Acme does not dispute the accuracy of the letter. In response to the letter, Acme’s counsel sent Homeowner’s counsel a Settlement, Release and Indemnification Agreement which released Acme from liability in exchange for the payment of the \$50,000, and required Homeowners to indemnify Acme against claims by third parties, resulting from the pesticide applied by Acme to the Homeowners’ home.

Homeowners refused to sign the Settlement, Release and Indemnification Agreement. Instead, they signed and returned a Release which released Acme from liability for their claims, but did not contain an indemnification provision for third party claims. Acme insisted on an indemnification and refused payment.

Because of this impasse, Acme filed suit against Homeowners alleging breach of contract to which Homeowners counterclaimed with their own breach of contract claim.

The questions presented are:

1. Was there a valid and binding contract formed between the parties?

Discuss your answer.

2. If a valid and binding contract does not exist, what additional facts would be required for such a contract to be formed?

3. Assuming there was a valid and binding contract, under these circumstances would it be proper or improper for the Court, in interpreting the contract, to evaluate extrinsic evidence to ascertain the parties' intentions?

4. If a valid and binding contract exists, which party breached the contract and explain why.

### **QUESTION NO. 3**

Herman Blume is the sole shareholder and President of Blume Mfg., Inc., a manufacturing facility located immediately next to the newly built Riverview Public Grade School on Riverview Drive in Riverview City, Kentucky.

On the evening of July 13, 2005, Herman's twin children, Ronny and Donny, got on their bikes and decided to visit their Dad at his office above the manufacturing facility where he typically worked late into the evening.

The sun set as Ronny and Donny headed North on Riverview Drive, toward the manufacturing facility. As was typical, Ronny and Donny began to kick and punch each other as they peddled down the road. Because it was so dark, Magnus Buchan, a truck driver who had just made his final delivery of the day, did not see Ronny and Donny on their bikes as he pulled his rig away from the loading dock and proceeded out of the gate of Blume Mfg., Inc., southbound on Riverview. Herman, testing his new infrared binoculars, was watching the entire incident unfold from his office window. As fate would have it, Ronny and Donny's kicking and shoving caused them to veer westward off the road and fall safely into the muddy drainage ditch just as Magnus drove obliviously by.

The next morning at City Hall, Riverview City Mayor, Margaret Yang, was telling the City Manager, Bert Fischer, that she was tired of receiving complaints about the lack of lighting on Riverview Drive, when she received a phone call from Herman Blume, her largest campaign contributor. Mr. Blume, upset at the near tragedy he witnessed, demanded that the City install lighting over Riverview Drive.

Immediately after the call, Mayor Yang instructed Bert to install a street lamp in order to illuminate Riverview Drive. Bert hired Edward Applebee Lighting, LLC. The

lighting contract provided for installation of a street lamp at a specified location and continual maintenance of the street lamp for a monthly fee. Specifically, the contract provided that Edward Applebee Lighting, LLC would inspect and repair, as needed, the street lamp on the first Monday of each month.

Sometime before 8:00 a.m. on December 31, 2006, the bulbs in the Riverview Drive street lamps died. Edward Applebee still had a headache from his New Year's Eve party and failed to inspect the street lamps on the first Monday of January.

On January 31, 2007, ten-year-old Dirk Calloway was coming home from flying his kite in the open field behind Blume Mfg., Inc. where he and his friends routinely played among the industrial materials left by Blume Mfg., Inc. Dirk was hurrying home across Riverview Drive when he was hit and killed by a car driven by Dr. Peter Flynn.

Dr. Flynn, upset after just learning that he was penniless from investing in a fraudulent pyramid scheme, had taken a wrong turn down Riverview and failed to see Dirk crossing Riverview Drive in the darkness. Three days later, Dr. Flynn took his own life when he realized that he had let his auto insurance lapse while studying for his board exams.

Mr. and Mrs. Calloway, Dirk's parents, have retained you to represent them.

Identify what claims, if any, that Mr. and Mrs. Calloway could bring against the City of Riverview and Edward Applebee, LLC and provide and discuss all relevant legal authority for those claims. Also, please advise as to whether or not Riverview City may raise the defense of governmental immunity.

#### **QUESTION NO. 4**

Questions refer only to United States income tax. Please explain fully your answers.

In December 2004, client's lottery ticket number was drawn, and client was given the choice of a \$2,000,000.00 payment in 2005, or serial payments beginning in 2005. In 2004, client executed a document electing the former choice, and in 2005 he received the \$2,000,000.00 payment. Client is a cash basis, calendar year taxpayer.

1. Will client's lottery winnings be taxable in 2004 or 2005?
2. Can client deduct from his taxable income money spent on lottery tickets in 2004?
3. Can client deduct from his taxable income money spent on lottery tickets in 2005?
4. In 2005, client's brother-in-law sued client contending that by agreement brother-in-law had paid one-half of the cost of the winning lottery ticket and was entitled to one-half of the lottery proceeds. In 2006, client expended \$40,000.00 to defend successfully this lawsuit. Is this \$40,000.00 expense deductible from 2006 taxable income?

## **QUESTION NO. 5**

Grandma Jones was knocked down and her purse was snatched from her hand as she walked to the Smallville Mall. She was unable to describe the thief, but Smallville Police Detective B.B. Gunn looked at the blurry, grainy video images from the mall security camera and thought the perpetrator resembled Freddie Flatt. Freddie is a simple-minded 20 year old, one of the “usual suspects”, with no visible means of support. He had a history of truancy and theft charges as a juvenile, but nothing significant as an adult. The more Gunn looked at the video tape, the more convinced he became that Freddie was the culprit.

The purse was found in the parking lot outside the mall, but \$85.00 in cash was missing from it.

By pure coincidence, on the day after the purse snatching, Freddie went to City Hall to pay a parking ticket, and Gunn saw him. Gunn approached Freddie and said, “I need to talk with you about the purse theft at the mall. Come over to my office so that we can talk.” Freddie followed Gunn down the hall to the police detective’s office, where they sat across from one another at a small table. Detective Gunn removed his jacket, revealing the badge clipped to his belt and his shoulder holster. He told Freddie all about the purse snatching incident at the mall, and that Grandma Jones was shaken but not injured. He told Freddie that the mall cameras captured the entire event and that Freddie’s face was clearly recognizable on the video tape.

Freddie denied his guilt and protested his innocence. Gunn repeated the accusation and reminded Freddie that he had no “adult” record and that first-time offenders who admit guilt always get probation, but those who plead innocent and are found guilty at trial serve prison time. Freddie denied his guilt again and said, “I don’t

know what to do.” The Detective replied, “The best thing you can do for yourself is to come clean. Tell the truth. Own up to what you did and it will go much easier for you.”

Freddie threw up his hands and said, “OK. I’ll tell you what you want to hear. If you say I stole the purse, I stole the purse. I did it. I am sorry.”

At that point Gunn set a cassette recorder on the table and turned it on. He said, “I will need to get this on tape. First I need to advise you of your rights.” He read the proper Miranda Warning card to Freddie and Freddie signed a form acknowledging that he had been advised of his rights and that he understood them. Gunn said, “Tell me what happened.” Freddie answered, “Like you said, Grandma Jones was in the Mall. I snatched her purse. I left the purse in the parking lot and kept the \$85.00.” Freddie was booked and held in jail until he posted bond. Freddie was indicted and charged with robbery – the use of force against a person in order to commit a theft. The prosecutor intends to present as evidence at trial, the audiotape of Freddie’s statement to Gunn.

Identify the provisions of the United States Constitution and the Kentucky Constitution that could be invoked to challenge the State’s ability to present that evidence, and analyze those provisions in the context of the foregoing facts to reach an opinion on whether the taped confession can be presented as evidence against Freddie.

## **QUESTION NO. 6**

Alice lived alone in a house near a large park. At 7:00 a.m., when walking through a secluded part of the park as she did each morning before work, Alice was beaten and raped by Bart, a man with whom she was acquainted. There were no third-party witnesses to the event.

After the assault, Alice ran home and locked the door. She did not call anyone and did not answer her telephone when it rang. She did not go to work.

Worried that she had not called and had not reported to work, Alice's co-worker, Steve, went to her house during his lunch hour and knocked on the door. Alice had spoken to no one since the assault 5 hours before. When Alice answered the door, she said nothing. Her silence continued for several minutes, during which Steve (who could see the bruises on her skin), repeatedly asked, "What happened to you? What happened?" Finally, Alice blurted out: "It was Bart! In the park! He raped me!" Alice said nothing else to Steve, but began sobbing hysterically, and continued to do so as Steve drove her to the hospital for medical treatment.

When asked by the emergency room nurse during the examination how she had been injured, Alice explained the events of that morning, describing the assault and rape, and specifically identifying Bart as the perpetrator. The nurse called the police. Alice then gave a detailed written statement to the police officer, again identifying Bart as the perpetrator.

The following week, Alice testified before the grand jury, under oath, describing the beating and rape by Bart. Bart was indicted and the case was set for trial. Before the trial, however, Alice moved to another state and could not be located or served with a subpoena. Bart's attorney immediately filed a motion to dismiss the indictment, but the Commonwealth contended it could prove Bart committed the crime, even in the absence of Alice's testimony at trial, with the following evidence:

- (i) Testimony of Steve, describing Alice's statements made to him in her home;
- (ii) Testimony of the nurse describing Alice's statements made to her in the emergency room;
- (iii) Alice's written statement to the police; and
- (iv) A transcript of Alice's sworn grand jury testimony.

Analyze each of the four types of evidence the Commonwealth proposes to introduce at trial and determine whether each will be admissible at trial. Your analysis should include a discussion of relevant hearsay exceptions, if any.