**JULY 2006 BAR EXAMINATION**

**BOARD'S ANALYSIS**

**QUESTION 1**

Payment of Traffic Fine for Speeding

The court should not allow the introduction of evidence that White paid the fine for the speeding ticket. The payment of the fine for speeding is not admissible in the civil trial that arose from the same occurrence. It is neither a guilty plea nor an express acknowledgment of guilt and, therefore, not relevant. Payment of the fine by White is a choice to exercise a statutory right to pay the fine without appearing in court and is not equivalent to a guilty plea and not an admission. Briggeman v. Albert, 322 Md. 133 (1977).

Guilty plea for Negligent Driving

White's guilty plea to the negligent driving charge is admissible as an admission. The guilty plea to a traffic offense in open court as part of a plea bargain, compromise or as a matter of convenience is an admission of a party opponent. The evidence of the guilty plea is admissible in the civil trial occurring out of the same occurrence as the traffic offense unless it is determined on the record that the prejudicial effect of the evidence outweighs its probative value. Maryland Rule 5-403. Under these facts the evidence would be allowed. An answer that finds that the prejudicial effect of admitting the evidence of the plea outweighs its probative value will get partial credit. The party against whom the evidence is offered is free to explain the circumstances under which the plea was entered. Crane v. Dunn, 382 Md. 83 (2003).

The admission does not conclusively establish liability and may be rebutted or explained in the subsequent civil case. Nicholson v. Snyder, 97 Md. 415 (1903).

*Nolo Contendere* Plea to Driving While Impaired by Alcohol

White's plea of *nolo contendere* to the charge of driving while impaired by alcohol is inadmissible in the civil case brought by Foxworthy. A plea of *nolo contendere* is neither an admission of conduct nor a conviction. McCall v. State 9 Md.App. 191 (1970).

## QUESTION 2

**Analysis**: Rule of Professional Conduct 1 .6 Confidentiality of Client Communications and the Crime/fraud exception. Newman v. Maryland 384 Md. 285, 863 A.2d 321 (2004).

At issue is the relationship between the confidentiality requirements of Rule 1.6 and the evidentiary attorney client privilege.

The evidentiary privilege applies only in proceedings in which the attorney may be called as a witness or produce evidence adverse to his client. Rule 1 .6 expands this to all information related to a client subject to several exceptions such as "crime/fraud".

There are two different statements. Those made in his office prior to the crime being committed and during the course of representation and the statement made after the crime and not in connection with representation in which you are asked to conceal criminal conduct on behalf of a client seeking your assistance.

The statement in his office with Mercedes present is also confidential communications as they were conducted as part of his representation. The mere presence of a third party non-client does not necessarily waive the privilege; at issue is the intention of the secrecy. It is clear these communications were made in the scope of representation and not "on the outside."

The statements regarding the found swords and disposing of them are clearly within the crime-fraud exception as he is being asked to possibly assist his client in destroying evidence of a crime. The casual statements made in his office are likely not admissible unless the attorney had a reasonable belief at the time that he was assisting them in engaging in a criminal act.

His disclosure of the statements prior to the crime were properly made to the Divorce Court Rule 1 .6, however. The May 1 , 2006 statement is inadmissible in the Criminal trial but the statements of May 5, 2006 are admissible under the crime-fraud exception. Rule 1 .6 provides that a lawyer shall not reveal information relating to the representation of a client without the client's consent. Under Rule 1.6 the attorney's disclosures to the divorce court are appropriate as they were demanded by the Court.

## QUESTION 3

(A)

As a preliminary matter, Rex is an employee of the *Post Gazette*. His visit to the nursing home was specifically authorized by his editor and was in the course of his business as a newspaper reporter. Thus, the Post Gazette is liable for any tort committed by Rex under the doctrine of *respondeat superior*. *Henley v. Prince George's County*, 60 Md. App. 24 (1984)

Trespass. A cause of action lies in trespass. Trespass is a tort involving "an intentional or negligent intrusion upon or to the possessory interest in property of another." *Mitchell v. Baltimore Sun,* 164 Md. App. 497 (2005) (quoting *Ford v. Baltimore City Sheriff's Office,* 149 Md. App. 107 (2002). Consent, either expressed or implied, constitutes a complete defense to a trespass claim. *Mitchell* at 508. Frank Bigman's private room was his home. While Rex's entrance into the common areas of the nursing facility was permitted and he complied with visitor regulations established by that facility, his unannounced entrance into Mr. Bigman's private room was a trespass. *Id.* at 511. Even if you believe that Rex did not commit a trespass when he entered the room because having the door "slightly ajar" created an implied consent to enter, continuing to stay after being asked to leave exceeded the scope of any consent that may have been implied. *Id.* at 516. Thus a successful cause of action for trespass is likely.

Invasion of Privacy. The tort of invasion of privacy includes four different types of invasions. One form of invasion is intrusion upon the seclusion of another. *Id.* at 522 (quoting *McCauley v. Suls,* 123 Md. App. 179 (1998). Intrusion upon the seclusion of another is the intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person. *Mitchell* at 522 (quoting *Furman v. Sheppard,* 130 Md. App. 67 (2000). Rex's refusal to leave Frank's room after several requests and his continued questioning indicates Rex's intent to intrude upon Frank's solitude and private affairs, and could be seen as highly offensive. *Mitchell* at 522. Thus a successful cause of action for invasion of privacy is likely.

Intentional Infliction of Emotional Distress. In order to prevail on a claim of intentional infliction of emotional distress, the conduct must be (1) intentional or reckless; (2) the conduct must be extreme or outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; (4) the emotional distress must be severe. *Mitchell* at 525; *Carter v. Armarak Sports and Entm't Serv's, Inc.,* 153 Md. App. 210 (2003) (quoting *Manikhi v. Mass Transit Admin.,* 360 Md. 333 (2000). To satisfy the element of extreme and outrageous conduct, the conduct "must be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Mitchell* at 525; *Batson v. Shiflett,* 325 Md. 684 (1992) (quoting *Harris v. Jones,* 281 Md. 560 (1977). To satisfy the degree of emotional distress being severe, it must be so severe that "no reasonable man could be expected to endure it… to function [or] to attend to necessary matters." *Mitchell* at 525; *Harris* at 571. It is difficult to conclude that Rex's trespass into Frank's room and his attempt to question Frank about his son's steroid use was atrocious or utterly intolerable in a

civilized society. Nor can one readily conclude that shortness of breath and a few nights of restless sleep is so severe that no reasonable man could be expected to endure it, to function, or attend to necessary matters. Thus a successful cause of action for intentional inflection of emotional distress is not likely to be successful.

(B)

The involvement of family members in the legal affairs of persons with diminished capacities raises difficult issues. First, the lawyer's client in this matter is Frank. Maryland Rule of Professional Conduct 1.14 sets out ground rules. To the extent possible, a lawyer shall maintain a normal attorney - client relationship with a client with diminished capacities. The lawyer may consult with family members, like Buddy, but, ultimately, decisions regarding the legal matter are to be made by the client. The lawyer is under a particular obligation to treat such clients with dignity and respect.

Buddy's statement about his father's medical condition appears to be well-meaning and in good faith. Buddy did not attempt to instruct the lawyer how to fulfill the lawyer's professional obligations. Instead, Buddy brought to the lawyer's attention his concerns about his father's condition and the possible negative effects of a trial. These are material factors that a lawyer should consider in advising a client. At this point, in the preliminary stages of representation, the lawyer should discuss Frank's health condition directly with him. The lawyer is not under a professional obligation to disclose the communication from Buddy to his father.

## QUESTION 4

A. A declaratory judgment is an appropriate vehicle to determine whether or not the oral agreement between Albert and Fred is enforceable against Fred's Estate. Maryland Annotated Code Courts & Judicial Proceedings Article § 3-407. Dan, as a beneficiary of Fred's Estate, has standing to bring such an action. Courts & Judicial Proceedings Article § 3-408.

B. Maryland Rule 2-211 requires joinder of any person if, in the person's absence, complete relief cannot be accorded among those already parties or disposition of the matter will impair the person's ability to protect a claimed interest in the property. Unlike some defenses, the failure to join a necessary party may be raised at any time through trial. Maryland Rule 2-324. Failure to join a necessary party may be raised for the first time on appeal. *Bodnar v. Brinsfield*, 60 Md. App. 524 (1984). Thus, this defense may be raised in post trial motions, either a Motion for a New Trial under Maryland Rule 2-533 or a Motion for a New Trial pursuant to Maryland Rule 2-534. The motions were timely filed and the Court clearly has the authority to grant either or both motions on their merits.

Courts & Judicial Proceedings Article § 3-405 states that any person who "has or claims any interest which would be affected by the declaration, shall be made a party." Is there such a person? The only person mentioned in the facts other than Albert and Dan is Beth. Determining whether or not either of the motions should be granted involves analyzing the nature of Beth's ownership interest as it relates to the litigation. Beth certainly has an interest in the farm as she is an owner of an undivided interest as a tenant in common. But the declaratory judgment action concerns only Fred's interest in Blackacre. The resolution of this dispute will have no effect upon Beth's interest. She will continue to own her interest as a tenant in common regardless of the outcome of the litigation. Thus, the Curt should deny both motions.

C. Filing of the notice of appeal does not divest the trial court of jurisdiction over the post trial motions. Maryland Rules 8-202 (c); *Edsall v. Anne Arundel Co.*, 332 Md. 502 (1993).

## QUESTION 5

**ANSWER TO A:**

Big may appeal the judge's refusal to dismiss any portion of the indictment on grounds that the indictment for possession and distribution of cocaine after his sentencing in District Court for possession violates the Fifth Amendment right to be free of double jeopardy, applicable to the states via the Fourteenth Amendment . The Fifth and Fourteenth amendments to the United States Constitution prohibit the State from placing a person in jeopardy twice for the same offense in the same sovereign. The question thus becomes whether the latter indictment was for the same offense as that handled by the District Court. The test is whether two or more offenses charged arose from the same incident or course of conduct, or, if the relationship between the offenses is such that they are the same in law for double jeopardy purposes. Jones v. State, 357 Md. 141 (1999) Another test was proffered by the Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932), namely the "required evidence" test. In this test if "each offense requires proof of fact which the other does not, the offenses are not the same for double jeopardy purposes [but]where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes."

Under the facts, Big was found guilty of possession of the drugs he sold to the two officers and later indicted for possession and distribution of those same drugs. Clearly it is double jeopardy to find him guilty of possession twice, and it is also double jeopardy to find him guilty of distribution since possession is a lesser-included crime of distribution, there being no element in the crime of possession that is not contained in the crime of distribution. State v. Woodson, 338 Md. 749 (1990). Additionally, all charges were brought in State Court for Anne Arundel County, thus, there is no separate sovereign to negate double jeopardy.

**ANSWER TO B:**

Again, Big may appeal the sentence on grounds that the sentencing hearing violated his Fifth Amendment Due Process right to a fair trial, applicable to the states via the Fourteenth Amendment. First, sentencing is a "critical stage" of a criminal proceeding, and under the Sixth Amendment, a defendant has the right to counsel at all critical stages of a prosecution. Here, it appears that Big hurriedly attempted to waive his right to counsel by requesting to proceed without counsel, saying "Well, I want this over with." However, to be an effective waiver, the waiver must be knowing and intelligent. Here, there is no indication that the waiver is knowing and intelligent because Big only learned of his attorney's absence upon arriving in the courtroom the day of sentencing, so Big didn't appear to have much time to assess his decision or its consequences. And since his attorney was unexpectedly hospitalized on the very morning of sentencing, Big was clearly unprepared to present witnesses or mitigating evidence, as he was entitled to do at sentencing. In death penalty cases, a defendant is given even wider latitude to confront witnesses. Moreover, there is no indication that the Court questioned Big in any way to determine if he understood the consequences of his decision or whether the waiver was "knowing and intelligent". The judge should have carefully questioned

Big and scrutinized his waiver, as required. Whether there has been an intelligent waiver of the right to counsel depends upon the particular facts and circumstances surrounding each case, including the background, experience and conduct of the defendant. In such cases, an appellate court will consider the totality of the circumstances to determine whether the waiver was knowing and intelligent. State v. Wischhusen, 342 Md. 530, 677 A.2d 595 (1996) Here, the totality of the circumstances does not seem to indicate that the waiver was knowing and intelligent.

Additionally, Big may appeal on grounds that being brought into the courtroom in handcuffs and leg irons was unduly prejudicial, particularly in a capital case, adversely affecting the jury's perception of him and in violation of the Fifth and Fourteenth Amendments. Deck v. Missouri, 125 S.Ct. 2007 (2005) Although the facts indicate that correctional officers claimed Big was a "flight risk", there is no indication of a showing of need and, in any case, there were other, less prejudicial means to address this concern.

Finally, Maryland Rule 8-306 provides for an automatic appeal to the Court of Appeals of both the determination of guilt and the sentence whenever a sentence of death is imposed.

## QUESTION 6

The court ordered that (1) Brian continue alimony payments for an additional two years; (2) that sole custody be granted to Patti and then to Brian in four years; and, (3) that Brian be jailed for contempt and that the purge amount be the same as his arrears.
Brian can make the following arguments on appeal (and can expect the following responses from Patti):

Alimony/Child Support

The separation agreement arguably addressed the amount and duration of the alimony payments. Since it was incorporated and merged into the absolute divorce awarded in April, 2005, Brian can argue that the court could not modify the alimony arrangement if there was no provision to extend the time for an additional two years, unless it was prepared to revisit the entire award.

Brian can argue, in the alternative, that there has been a material change of circumstances since he is no longer employed with a salary of $150,000, and this change should result in a reduction or discontinuance of his support obligations. Patti will counter that Brian voluntarily impoverished himself by deliberately quitting his job, thereby choosing to reduce his income. Moore v. Tseronis, 106 Md. App. 275, 664 A.2d 427 (1995) Patti will ask that the court assess his "potential income" ( i.e., his earning capacity). Sczudlo v. Berry, 129 Md. App. 529, 743 A. 2d 268 (1999) Patti may also argue that any moneys received from Nicole Michie should be factored into Brian's income. She may not be successful with this argument since it has been held that a third party's payments of household expenses, etc., should not be considered in determining child support payments. Allred v. Allred, 130 Md. App. 13, 744 A. 2d 70 (2000)

Custody

An award of custody is always subject to modification by the court. Maryland Family Law Code Annotated, Section 5-1038; Taylor v. Taylor, 246 Md. 616(1967) Thus, the fact that the couple's separation agreement and final order of divorce were merged will not preclude consideration of Brian's request to amend any prior custody award.

The Court must assess what would be in the best interests of the child in its review of Bryan's appeal of the custody award. The award of sole custody to Patti for a period of time, and then to Brian, does not appear to be in Kyle's best interests. As a parent is generally accorded visitation/custody rights even where there is evidence of marital misconduct. Moreover, one need not be in loco parentis to be given such rights. Accordingly, Brian's relationship with Nicole and the fact that he is not the biological parent does not bar his right to be awarded custody of Kyle. The court is charged with assessing what is *presently* in the best interest of the child. The court is not clairvoyant and cannot know that it would be in Kyle's best interests to be sent to Brian *four years* from the date of the order.

Patti will likely agree that it would not be in Kyle's best interest to be sent to live with Brian

in four years. She may also argue that she has always shared joint custody with Brian and that arrangement is the best for Kyle if Brian also continues his support payments.

Contempt/Arrears

The court may not make a finding of contempt for failure to pay spousal or child support without allowing Brian an opportunity to prove by a preponderance of the evidence that he had the means to do so. Maryland Rules, Rule 15-207. If the court has made a finding of contempt it "may specify imprisonment as the sanction if the contemnor has the present ability to purge the contempt." Maryland Rules, Rule 15-207. It would be a violation of the Fourteenth Amendments due process safeguards to hold otherwise. Wilson v. Holiday, et. al., 364 Md. 589, 774 A.2d 1123 (2001) Under the facts it does not appear that the court allowed Brian the opportunity to show whether he was able to purge the contempt, and it should be reversed on appeal.

Patti has no successful counter to this argument unless she can show that Brian does have the ability to pay the purge amount.

## QUESTION 7

### Business Associations

Dreamview

On the given facts, Carter could not successfully attach Dreamview to satisfy its judgment against Greenacre.

Separate corporate identities. Greenacre, Inc. and Dirt Cheap, Inc. are separate Maryland corporations and therefore have separate corporate identities.

Instrumentality rule. Dirt Cheap, Inc. may have been a controlled corporation and its affairs so organized and conducted as to make it an instrumentality, agency, or adjunct of Greenacre with such domination that Dirt Cheap, Inc. was a business conduit for Greenacre. However, that is not enough to pierce the corporate veils of Greenacre and Dirt Cheap without fraud or the enforcement of a paramount equity.

Fraud. Fraud is enough to pierce the corporate veils of Greenacre and Dirt Cheap, if fraud occurred. The given facts state that Ryan had provided documentation to Carter which identified Dirt Cheap, Inc. and not Greenfield as the owner of Dreamview. This documentation had been provided prior to Ryan's statement that "we own Dreamview and it would generate enough cash for the repurchase within the one year period". The issue of due diligence of Carter in determining title to Dreamview if Carter considered that important is also present.

Paramount equity. In the given facts, there is no identification of an equity which requires enforcement and which is paramount to the ordinary expectations of a land development transaction.

Estoppel. Equitable estoppel would be arguably precluded because of the failure of Carter to exercise reasonable diligence to protect his position. He received the documentation, prior to funding the transaction, that Dreamview was titled in the name of Dirt Cheap, Inc.

Ryan

Ryan was the sole stockholder of both corporations. However, stockholders are not generally individually liable for corporate debts or obligations except to prevent fraud or to enforce a paramount equity.

The analysis of fraud and paramount equity as applied to Greenacre and Dreamview does not change as to Ryan. The title ownership of Dreamview by Dirt Cheap, Inc. was made known to Carter prior to the signing of the promissory note between the Carter and Greenacre.

If Ryan purposefully allowed Greenacre to become dormant, Carter may have an action against him for tortious interference with the Carter/Greenacre note objection. Constructive fraud. Probably not. Information on title to Dreamview was made available to Carter.

*Dixon v. Process Corporation*, 38 Md. App. 644, 382 A. 2d 893 (1978)
*Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295, 340 A.2d 225 (1975)
*Starfish Condominium Association v. Yorkridge Service Corporation, Inc.*,
295 Md. 693, 458 A.2d 805 (1983)

## QUESTION 8

Abel may raise the defenses of entrapment and necessity.

Entrapment occurs when a police officer or government agent induces the commission of a crime by one, who, except for the government's enticement, solicitation or persuasion, would not have committed the crime. There are two elements to the defense: presence of an inducement by the government and the absence pf a predisposition on the part of the defendant. Authorities differ as the essential nature of the defense. Those cases that focus on the inducement turn on the question of impropriety per se. Maryland focuses on the element of predisposition.

In this case, Baker has clearly induced Abel to commit the offense, both by persuading Abel and by physically placing the handgun in Abel's possession. The evidence also indicates that Abel is indisposed toward possessing a handgun, and would not have committed the offense but for the speech and conduct of Baker. Abel's trafficking in stolen goods is irrelevant. Sparks v. State, 91 Md. App. 35, 603 A.2d 1258, cert. den., 327 Md. 524, 610 A.2d 797 (1992).

The defense of necessity is included within self-defense. In a sudden emergency a person may avail himself or herself of a weapon in the immediate vicinity but not otherwise being lawfully carried. The defense does not negate mens rea, but is based on a comparison of two evils. Circumstances compelling the commission of a crime make the offense excusable. The defense does not excuse the carrying of a handgun because of a strong belief that an attack upon the person is a strong possibility or is otherwise apprehended.

There are five elements: (1) the defendant or others must be, or reasonably appear to be, in immediate danger of death or bodily injury; (2) the defendant must not have intentionally or recklessly placed himself or herself in the situation; (3) the defendant must not have a reasonable legal alternative; (4) the handgun must be made available without preconceived design; (5) the defendant must relinquish possession of the handgun as soon as the necessity ends.

In this case, although Abel had a strong belief that an attack on his person was a strong possibility, an immediate danger is not reasonably apparent. Nor did Abel relinquish possession as soon as Abel was away from Charlie.

The defense of entrapment will probably succeed, but the defense of necessity will probably fail. Crawford v. State, 61 Md. App. 620, 487 A.2d 1214 (1985), aff'd, State v. Crawford, 308 Md. 683, 521 A.2d 1193 (1987).

## QUESTION 9

Banks do not have to accept a check. Banks are not liable for refusing to pay checks, unless the check is accepted. Banks may only accept a check in writing, but acceptance need only consist of a signature of a bank official or a stamp mark that indicates that the check is certified. Under 3-409, acceptance/certification becomes effective upon notification by the bank.

It is unlikely that the account printout on the check would constitute acceptance, because it is not a signature that indicates the check is certified. Moreover, Tessa never notified Harry that the Bank had accepted the check as required for acceptance to become effective. Because ABC is not required to cash a check or accept a check, ABC can refuse to cash a non-customer's check if that individual refuses to provide adequate identification. If the bank had accepted the check, then ABC would have been obligated to pay the check, and Noll's obligation to Harry would have been discharged. Because ABC did not accept the check, Holder must either cash check at his own bank or get Noll to cash it at ABC, since Noll is not discharged of his obligations to Harry.

## QUESTION 10

Initial stop/seizure of Mr. Meanor on Main Street. Mr. Meanor's counsel will argue that the initial stop and seizure of Mr. Meanor by police was not supported by probable cause and, therefore, unreasonable. Mr. Meanor's attorney will argue that any evidence recovered from that point forward should be suppressed as fruits of the poisonous tree. Violation of a traffic law provides probable cause for the stop of an automobile. Thus, Officers may have been able to stop the van for failure to use a turn signal. It is immaterial that the stop for failure to use a turn signal was probably a pretext to stopping Mr. Meanor so that the officers could search the van.

Initial search of the van was unreasonable because the officers had no reasonable suspicion that criminal activity was afoot. Officers had no probable cause to search the van. Nonetheless, Mr. Meanor has no reasonable expectation of privacy in a stolen vehicle (no standing) and cannot assert a violation of his 4th amendment rights. The key to assessing the right to assert an expectation of privacy challenge to an improper search depends upon the relationship of the individual claiming standing to the owner of the vehicle. A thief does not have standing to challenge the constitutionality of a search of the stolen automobile. *Gordon Colin & Orville Heath v. State of Maryland,* 101 Md. App. 395; 646 A.2d 1095 (1994).

The recovery of marijuana was okay and the marijuana will be allowed into evidence because Mr. Meanor had no standing to object to the search. The arrest of Mr. Meanor was based upon the marijuana and therefore the handgun will be allowed in evidence as a result of a search incident to a lawful arrest. Recovery of cocaine is also proper under the inventory search exception to the warrant requirement.

The identification of Mr. Meanor by Angelina, however, was unreasonably suggestive based on the totality of the circumstances (only Mr. Meanor was in the office, he was at the police station, he was handcuffed, and officers walked Angelina past him, etc.).

## QUESTION 11

These facts raise issues relating to the effect on title to real estate of spouses who hold title to real property, either as tenants by the entirety or as joint tenants with the right of survivorship.

These tenancies are similar in that both require the unity of time, title, interest and possession. Any number of persons may hold title as joint tenants with the right of survivorship. A tenancy by the entirety is limited to married couples. Upon the death of a joint tenant, or a spouse in the case of a tenancy by the entirety, title remains vested in the surviving tenants or spouse.

Destruction of any of the unities will convert a joint tenancy to a tenancy in common. Only dissolution of marriage will convert a tenancy by the entirety into a tenancy in common.

A grant to spouses in the absence of specific language that they hold as tenants by the entirety, creates a rebuttable presumption that the grantor intended that they hold as tenants by the entirety.

There is no legal prohibition against spouses holding title to real property as joint tenants with the right of survivorship if that is the intention of the grantor.

On these facts, the intention of the decedent, Amos, was controlling despite the fact that his personal representative conveyed the property to Beth and Clem as "husband and wife". While this designation accurately describes their relationship, it is insufficient to overcome the precise directive of Amos' will that Beth and Clem were to hold title as "joint tenants with the right of survivorship." Under these facts the intent of the testator rebuts the presumption.

An option granted by one tenant by the entirety, whether or not exercised, will not affect the tenancy. An option granted by a joint tenant will destroy the unity of title if it is exercised by the optionee. Unity of title was not altered on these facts.

Clem's personal loan from Penny Bank did not involve the real property. Standing alone, it would not have destroyed either a tenancy by the entirety or a joint tenancy.

The divorce on May 15, 2005 would have severed a tenancy by the entirety resulting in a tenancy in common between Beth and Clem. The divorce had no effect on a joint tenancy which is not dependent upon the marriage relationship.

A judgment and recorded lien against only one tenant by the entirety cannot effect a severance of the tenancy. It would have severed the joint tenancy if the bank had executed on the judgment and levied on the property prior to Clem's death. Its failure to do so resulted in a loss of the lien on the property. Beth became the sole owner of the farm as surviving joint tenant when Clem died on July 2, 2005.

## QUESTION 12

The central issue is whether or not Bob's representations concerning the paving and curbing of the roadway are admissible into evidence in the suit filed by Paul against Don. Paul's attorney should anticipate the following defenses asserted by Don to bar admission:

(a) The testimony of statements made prior to the execution of a contract for the sale of an interest in land is barred by the Statute of Frauds which provides that no interest in land may be granted unless in writing signed by the party granting it or his/her authorized agent.

Don will argue that neither the contract nor the deed into which the contract merged made any reference for paving and curbing the roadway; and, that admitting the testimony would violate the Statute of Frauds.

(b) That Bob's representation is inadmissible because it would violate the Parole Evidence Rule which precludes admission of extrinsic evidence to vary or contradict the terms of a written contract; that upon delivery and acceptance of the deed all prior negotiations merged into the deed, eliminating any contractual rights not included in the deed.

(c) In the event the court allowed the testimony, Paul should also anticipate that Don will claim that Bob was not his agent in this transaction but acted as an independent contractor, or, alternatively, that if Bob was an agent, he acted beyond the scope of his employment and his representations cannot be attributed to Don, as principal.

Court's Rulings:

(a) Statute of Frauds defense – An oral agreement to pave and curb the roadway is independent of or collateral to and not inconsistent with the contract or deed.

It is an undertaking or "task" which could reasonably be completed within one year.

An oral argument to pave and curb a roadway is not within the purview of the Statute of Frauds. It is not a grant (sale) of realty or an interest in land.

(b) <u>Parole Evidence Rule</u>

Parole evidence rule does not preclude testimony by purchaser (Paul) concerning developer's (Don) oral promise to pave and curb the roadway since the promise or agreement did not contradict, alter or vary the terms of the contract or deed. Admissible to prove a collateral agreement.

(c) Agency

There are no facts that indicate that Bob was directed or otherwise controlled by Don with regard to his agreement to sell the lots. Bob, at a minimum, had apparent authority to make the contested statement. If Paul reasonably relied on Bob's representations to his detriment, Don is bound by the representations of his agent. Paul's reliance would be unreasonable if he should have known that Bob was acting outside the scope of his employment. The facts indicate that Paul reasonably relied on Bob's representations and that paving and curbing of the roadway were contributing factors in Paul's decision to enter into the contract for the building lot.