

# February 2008 Bar Examination

## Question 1

Mom and Daddy are the divorced parents of Angel, their three year old daughter. According to Mom, she was bathing Angel after she returned home from a visitation with Daddy and Angel complained that "it hurt" around her genital area. Mom said she became concerned and questioned Angel about her complaint. She said Angel told her that she and Daddy had a "secret" that Daddy "rubbed" against her and made her hurt.

Mom called the family physician, Dr. Kildare, and reported this to him. Dr. Kildare saw Angel and her mother that night at the emergency room at the local hospital. The hospital records regarding the emergency room visit contain an entry in the nurse's notes from the now deceased Nurse Crockett indicating Angel told her "Mommy hurt me" when asked why she was at the hospital. Angel later told Dr. Kildare about the "secret" she and her Daddy had after Mom promised Angel a new doll and some ice cream. Then Dr. Kildare examined Angel and found redness and swelling in Angel's genital area. Dr. Kildare concluded that "Angel had been sexually abused by Daddy." He recommended that Angel be seen by a child psychologist, Dr. Feelgood.

Dr. Feelgood saw Angel the following week. After interviewing, testing, and evaluating Angel he arrived at the opinion that "Angel showed no symptoms or indications of having been sexually abused."

Mom filed an action to terminate Daddy's visitation privileges. The court, *sua sponte*, ordered Mom and Dad to undergo evaluations by Dr. Marcus Welby, a psychiatrist.

After the evaluations were complete, Dr. Welby opined that the evaluation of Dad did not reveal any indication of or propensity for sexual child abuse. As to Mom he opined that she exhibited symptoms of Munchausen Syndrome by Proxy, a psychiatric disorder which results in one harming or injuring a child to obtain sympathy or attention. Dr. Welby began a course of treatment and counseling with Mom. He later arrived at the opinion that Mom could have caused the injury to Angel in an effort to keep Daddy from seeing Angel.

As to the issue of sexual child abuse, *vel non*, the parties contemplate offering into evidence the following:

- a. The testimony of Mom as to what Angel told her;
- b. Dr. Kildare's testimony concerning his examination of Angel and his opinion that "Angel had been sexually abused by Daddy";
- c. Hospital records containing Angel's statement to Nurse Crockett at the emergency room that "Mommy hurt me";
- d. Dr. Feelgood's testimony and opinion that Angel "showed no symptoms or indications of having been sexually abused";
- e. Dr. Welby's opinion regarding Dad's lack of propensity for being a sexual abuser; and,
- f. Dr. Welby's opinion that Mom could have caused the injury to Angel and his diagnosis as to Mom of Munchausen Syndrome by Proxy.

As to each of these items of evidence, set out the foundation which should be laid for the admission of the evidence, the appropriate objection(s), if any; the grounds for the said

objection(s) and, whether the evidence is admissible. In answering this question rely only on Georgia law and assume that the doctors are qualified as experts and all requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* have been met.

## Question 2

Mary and John married on January 1, 2004, and separated on January 7, 2007. Mary filed a complaint for divorce on January 15, 2007. They have resided in Fulton County, Georgia, since their marriage. They have one child, Joan, born on February 15, 2006. The parties are fit and equally capable parents. They are no longer able to communicate with each other, and both feel that their marriage is irretrievably broken.

John is a doctor. He has, since June 1, 2004, conducted his medical practice through a professional corporation of which he is the sole stockholder. During this period, John has drawn a salary of \$20,000 per month from his corporation. His corporation has also contributed \$2,000 per month to a retirement plan for John. The corporation has earnings, over and above John's salary, retirement contributions and business expenses, of approximately \$5,000 per month.

The home where the parties have resided during the marriage was owned by John prior to the marriage.

John, at the time of the marriage, also had a brokerage account which held certain common stocks. John periodically buys and sells stocks. In 2006, he had capital gains of \$40,000 and in 2007 he had capital gains of \$50,000.

Mary, during the marriage, has not worked outside the home, and her working capacity is diminished due to a disability.

After the marriage, Mary opened a joint money market account with John. The account has been utilized to deposit funds received from Mary's parents. Mary's parents have, for each of the last three years, sent to Mary two checks, one for \$20,000 made payable to Mary and one for \$20,000 made payable to John. The account has a balance of \$120,000 plus accrued interest. Mary's parents filed gift tax returns annually reflecting separate gifts to each party. Mary and her parents contend that the entire \$120,000 was intended as a gift to Mary and that the amount given to John was to avoid gift tax repercussions which would have arisen if the parents had written checks only to Mary.

The case was tried by the court, without a jury, on January 30, 2008, and a Final Judgment and Decree was entered on that date. John, being unhappy with the outcome, would like to appeal and has certain questions as to rulings and decisions of the trial court.

As to issues set out in 1 through 5 below, give your opinion as to the correct holding on appeal and explain the basis of your opinion.

1. John took the position at trial that the parties should be granted joint legal and physical custody of Joan; however, the court granted sole legal and physical custody to Mary.
2. It was John's position at trial that his income, for purposes of child support guidelines, should be based on his salary of \$20,000 per month. The court, in applying the guidelines, included the income from his professional corporation and capital gains from sale of stocks.
3. John contended, at trial, that the home owned by him at the time of marriage was his

separate property and that it should be awarded to him. The court awarded the home to Mary as lump sum alimony.

4. John contended, at trial, that funds in the money market account should be treated as marital property. The court awarded the funds to Mary as her separate property.
5. The trial court did not make findings of fact. John cannot understand how the court made its decision in dividing assets.

### Question 3

Jack and Diane are husband and wife. They have no children. On a Saturday afternoon, Jack has an accident while mowing the lawn and severely cuts his hand. The injury is not life threatening, but Jack is bleeding profusely. Diane gets Jack into her car and begins to take him to the hospital.

On the way to the hospital, Diane is driving very fast, although she has activated her emergency lights. As Diane approaches a four way intersection, she notices the light is about to change to red. Not wanting to stop because of Jack's injury, Diane accelerates her speed to get through the yellow light before it turns red.

Unbeknownst to Diane, an industrial truck from Gravel Plus in front of her is carrying a large load of gravel which the driver of the truck, Paul, has not properly secured. As the truck passes through the intersection, the gate of the truck comes loose and the entire load of gravel from the truck comes spilling out directly into the street in front of Diane. Diane sees the gravel pouring out of the truck but is traveling too fast to stop in time to avoid the gravel. Diane swerves her vehicle to avoid hitting the gravel and strikes an unoccupied parked car.

During the accident, Diane strikes her head on the steering wheel and is knocked unconscious. Jack, who has been bleeding profusely for quite some time and who has now been involved in a serious accident, goes into shock. The driver of the gravel truck, Paul, calls his boss to advise of the accident; however, Paul does not go to Jack and Diane's car to make sure they are all right. During this period of time, Jack continues to bleed from his initial injury.

Eventually, an ambulance arrives at the scene. Diane has a concussion but no serious injuries. Jack, however, has continued bleeding and, because he is in shock, has been unable to alert anyone to his injury. By the time the ambulance arrives, Jack has lost too much blood, and he dies from his initial injury in the ambulance on the way to the hospital.

1. Please discuss all tort claims against Paul and Gravel Plus.
2. Please discuss all defenses that Paul and Gravel Plus might have against the tort claims asserted by Diane.
3. Is Paul and/or Gravel Plus subject to liability for Paul's calling his boss after the accident rather than providing aid to Jack and Diane? Please explain your answer.

### Question 4

OldeTowne, on the coast of Georgia, is the oldest city in the state. In and around the city are numerous national and state recognized historical buildings and archeological sites from both Colonial and Civil War times. As such, OldeTowne's primary industry is tourism.

The tallest building in the city is the 250-year-old courthouse with its distinctive 4-sided clock tower. The structure is six stories high, and can be seen from several miles away because none of the other buildings in the city, with one exception, is more than four stories high. The city has for many years used its skyline in its efforts to attract tourism, with the motto of "The prettiest skyline in the state."

The one exception is a five-story building dating back to the 1930s which was recently converted from a rundown hotel to a modern assisted living apartment building for senior citizens. Each floor of the building has six apartments. This building is on the opposite side of the city from the beach and is on the outskirts of town.

A number of developers, including Resort Hotel, Inc., have been exploring the possibility of developing unimproved beach front property in OldeTowne. Resort Hotel, Inc. has been exploring a development to include an eight-story, 240-room luxury hotel and adjoining golf course.

In an effort to determine the economic impact of these potential developments and the ability of the community's infrastructure to sustain the developments, the town council of OldeTowne has commissioned a number of studies. These studies show that a new hotel project could generate significant economic activity in the area and result in additional hotel projects. However, these studies show that a hotel of the size planned by Resort Hotel, Inc. would put such a strain on transportation, sewer and water infrastructure systems that additional development would be severely limited. The council is also concerned that this and other anticipated high-rise hotels will alter the historic and uniform skyline of the city.

Accordingly, the council begins hearings (pursuant to state law) on a local ordinance limiting the height of new construction to four stories and limiting the number of rooms per story to no more than 20. After following all required procedures, the ordinance is adopted. Since the ordinance applies only to new construction, the assisted living facility on the other side of town is exempt from its provisions.

The ordinance contains provisions for developers to apply for variances if their construction plans provide for additional infrastructure. Further, under Georgia law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property resulting from regulatory restrictions.

After the ordinance is passed, Resort Hotel, Inc. purchases an old dilapidated two story warehouse and surrounding unimproved beach front property on which to build its development.

For all purposes of this question, assume that any procedural issues relating to the enactment of the ordinance have been resolved by the courts in favor of OldeTowne.

1. If Resort Hotel, Inc. argues that the ordinance should be invalidated on the grounds that it is an arbitrary and capricious exercise of the city's police power and therefore violates Resort Hotel, Inc.'s substantive due process rights, what legal and factual arguments should the city make in response thereto?
2. Can Resort Hotel, Inc. immediately bring a claim in Federal Court to invalidate the ordinance on the grounds that the ordinance amounts to a "taking" of property without just compensation and is thus violative of Resort Hotel, Inc.'s due process rights?
3. Ignoring any procedural issues relating to the timing of bringing the claim, if Resort Hotel, Inc. brings a claim in Federal Court to invalidate the ordinance on the grounds that the ordinance amounts to a "taking" of property without just compensation in violation of its

Fifth Amendment rights, what substantive arguments can OldeTowne make to support the ordinance?

4. Assume that Resort Hotel, Inc. argues that, because the five-story assisted living facility is exempt from the ordinance, Resort Hotel is being discriminated against in violation of its substantive equal protection rights. What legal and factual arguments can OldeTowne make in response to this claim?