July 2001 Bar Examination Sample Answers

DISCLAIMER
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Question 1. - Sample Answer 1.

1. No. Susan and John cannot challenge the validity of Jane's life estate. A valid gift requires a donative intent, a delivery and an acceptance. There was a purported gift of homeplace from Mr. Smith to Mrs. Smith in 1990. There are two issues concerning the validity of the gift: (1) was there a valid delivery of the deed; (2) was there an acceptance of the gift. First a delivery can be actual, constructive or symbolic. A presumption of delivery arises when a grantor records a valid deed. Actual delivery is not required. Here, Mr. Smith recorded the deed to his wife. Therefore, a presumption of delivery arises. Second, there must be an acceptance of the deed. Accepting can be – and often is – implied. It is clear from the facts that Mrs. Smith accepted the deed. Acceptance can be implied from the fact that she made a devise of homeacre in her will. Since there is nothing in the facts to suggest that Mrs. Smith didn't accept the deed or to rebut the presumption of delivery, Susan and John cannot challenge the validity of Jane's life estate. The conveyance doesn't otherwise violate any laws which would invalidate it.

2. No. Samuel is not entitled to cut timber off the property because such an action would constitute waste. The holder is entitled to use the land for their life, so long as such use is not to the detriment of the beneficiaries. Cutting trees would constitute active waste, since such an action was apparently not in the contemplation of Mrs. Smith, because such an action will decrease the value of the property, and because the timber wasn't being harvested before Mrs. Smith's death. If Samuel could prove one of the foregoing, he might be able to legally cut the timber for Jane's benefit. Nonetheless, despite Jane's unfortunate medical condition, Samuel has an undivided duty of loyalty to the remaindermen, John & Susan. To cut the timber would breach his duty to them, and he would be liable to them in tort & breach of fiduciary duty, as such action constitutes waste.

3. Yes. John and Susan should be concerned about the fact that the farm workers are crossing the homeplace. Such an action by farm workers begins the statutory period for an easement by prescription. An easement by prescription is similar to the theory of adverse possession. It requires continued & uninterrupted use, public or open & notorious use, adverse or hostile use [w/o owner's consent] for the statutory period, which in Georgia is 20 years for undeveloped land and 7 years for developed land. Farm workers action of crossing the land has started the statute of limitations for easement by prescription since all the requirements are seemingly met: use is hostile b/c it's w/o owner's consent; it's public and open, and it's continuous. Since Samuel must act for the benefit of the remaindermen, he should stop farmer workers from using the land, as it appears from the facts that they could use the nearby highway.

John and Susan could require Samuel to prevent the crossing of farmacre by farm workers under his duty of loyalty. A temporary restraining order [T.R.O.] could be sought, which is an equitable remedy. The requirements of a T.R.O. are (1) immediate injury & (2) likelihood of success on the merits of the case. T.R.O. are available for trespass. Here injury is immediate & it appears [from the discussion in (2) above] that success on merits is probable. A. T.R.O. in Georgia is good for 30 days, then a full hearing is held.

Question 1. - Sample Answer 2.

1. The issue in this question is whether there was delivery of the deed to Mary Smith, such that the property was rightfully hers to convey to Jane as a life estate. The question of delivery concerns the grantor's intent to make a present conveyance. In Georgia, recording a deed even without the knowledge of the grantee creates a rebuttable presumption of delivery. However, this much be considered in light of the fact that the deed, if found within the grantor's possession at death, creates a rebuttable presumption of non-delivery. Thus we must look to the facts & circumstances to see what facts & circumstances relate to either of the aforementioned presumptions.

John and Mary were presumably married in this case. The facts don't indicate that he left a will, so it is reasonably inferrable that the property belonging to him passed by intestate succession. In Georgia, a surviving spouse is entitled to a child's share of the property, no less than 1/3 of the estate. With this, plus the fact that Mary alone lived at the residence on the property after John's death and until her death in 1999, there is sufficient evidence that there was valid delivery of the deed. Thus, Mary rightfully had title to convey to Jane.

Susan and John, Jr., as John Smith's heirs-at-law (assuming he died intestate) really wouldn't have any compelling evidence of non-delivery of the deed, aside from the fact that the deed was physically located in John's sale at his death.

Thus, Jane's life estate would be valid because the conveyance from John to Mary was an effective delivery.

2. The issue presented is whether Samuel's cutting the timber for Jane's benefit constitutes such waste that the remaindermen would have a right to enjoin. There are three kinds of waste: (1) voluntary or affirmative waste – when the life tenant (LT) engages in extraction of natural resources that deplete property of its value; (2) permissive waste – where LT lets property fall into disarray or (3) ameliorative waste – waste that enhances the property.

The type of waste involved here is voluntary/affirmative waste as the trees (natural resources) are being cut down & thus will diminish the value of the property.

The life tenant has a duty to preserve the property for the remaindermen. Thus, the remaindermen are entitled to take action when the life tenant is engaging in such waste that would injure their interest.

Furthermore, the "open mines doctrine" would not prove to be an exception here. Under the Doctrine, any taking of natural resources from the property (by creating mines, drilling for oil, taking timber) that has occurred prior to the present possessor may remain & be continued. New activities are enjoined. The taking of timber would be a new activity because timber wasn't taken

from property prior to Jane's life tenancy.

Thus, Samuel, as Jane's guardian (of person & property), would not be entitled to take timber off property according to doctrine of affirmative/voluntary waste.

3. John and Susan should be concerned about the fact that farm workers are crossing the homeplace. The issue here is whether an easement has been granted by Samuel.

Easements may be expressed or implied. Because an easement involves an interest in land, though non-possessory easements usually arise by writing to satisfy the Statute of Frauds.

In the facts, there is nothing that tells us whether Samuel's giving permission to allow the farm workers to cross the homeplace was in a writing, thus the easement may be implied.

Easements by necessity are implied when land adjoining the land with the easement is landlocked. Here, that is not the case since the facts tell us that the adjoining farm could be accessed by way of a nearby highway.

Another type of easement is a prescriptive easement. This would not be implied here because like adverse possession, use of the easement must be open & notorious, hostile, adverse & continuous. It also must be used in Georgia for 7 years if improved land, 20 years for wild lands. We don't know how long the farm workers have used it, but they had permission from Samuel so this theory wouldn't work.

Question 1. - Sample Answer 3.

1. Susan and John will not be successful in their challenge of Jane's life estate interest in the property.

The main issue affecting existence of Jane's life estate is the validity of the execution and delivery of the deed from John to Mary. There may also be a question regarding Jane's condition, but her capacity is irrelevant to validity of the life estate.

To complete a conveyance of real property, the deed must be validly executed and delivery must occur. Valid execution, a writing signed by the grantor describing the property and evidencing intent to convey. Delivery of the deed is also necessary. The controlling factor in determining whether delivery has occurred is the intent of the grantor. If the grantor manifests an intent to grant a present interest in the property to the grantee, successful delivery will occur. Actual delivery to the grantee is not necessary. Recordation of the deed raises a presumption of delivery. While the holding of the deed by grantor at death may raise a presumption against delivery normally, this presumption will be overridden when delivery has occurred.

In this instance, proper execution of the deed appears to be present. The real issue involves delivery of the deed. John executed the deed of the property to Mary and recorded the conveyance. This raises a presumption of delivery. His holding of the deed in his safe is not likely to override this presumption. His actions are sufficient to manifest a present intention for Mary to have possession of the property. Although the lack of communication to her cuts against this manifestation of intent, this will not defeat the deed. The fact that Mary was already in possession of the property negated the need for such communication. Delivery and execution of the deed

occurred, and the subsequent grant of the life estate to Jane was valid.

2. Samuel may not cut all of the timber from the land as this would constitute waste in violation of the rights of the remaindermen.

The main issue in the timber cutting actions is the preventing of waste by the life tenant. First of all, Samuel has authority to act on behalf of Jane, the true life tenant. While a life tenant is generally entitled to te ordinary use and profit of the property, they may not engage in actions which would harm the interests of the remaindermen. Such actions are characterized as waste and may be enjoined by anyone with a vested remainder. One type of waste which is prohibited is voluntary waste. This involved the depletion of natural resources on the land. Unless the land can only be used that way, was used that way prior to occupation, is necessary for maintenance, or the LT has express permission, the life tenant may not commit voluntary waste. The remainders may have the action enjoined to prevent harm to their interest.

In this case, Samuel seeks to cut all the timber from the land. This constitutes depletion of natural resources and is therefore voluntary waste. It will not be permitted unless one of the above exceptions apply. The need to provide support for the life tenant is insufficient justification. While cutting a portion of the timber may be permissible as the ordinary profit of the LT, cutting all the timber would greatly harm the interests of Susan and John. They may sue to have this activity enjoined.

3. Susan and John should not be concerned with the crossing of the farmers unless they are damaging the property.

The main issue in the crossing is whether the farmers may gain title to a portion of the property as an easement.

Easements are rights to use the property of another and may arise explicitly, by implication, or by operation of law. Express easements must be in writing. Easements by implication require prior ownership by one owner. A prescriptive easement requires the use to be (a) open and notorious (b) hostile [without permission], (c) continuous and (d) for statutory period.

Here, there is no easement given to the farmers because it's not in writing (not express) and the requirements for a prescriptive easement aren't met. The use must be adverse and hostile, but this use is with the permission of the life tenant. The farmers are not gaining any interest in the property.

The only possible complaint by the remainders may be if the crossing is damaging the property sufficiently to constitute permissive waste (allowing damage/failure to protect the property). If this action can be shown to constitute waste, the activity may be enjoined.

Question 2. - Sample Answer 1.

(disclaimer)

1. This written contract (K) is controlled by the Uniform Commercial Code (UCC) because it covers a sale of goods. "Goods" under the code include crops because they are deemed to be tangible, moveable items to be sold apart from land, even though they are grown with the land. Thus, the

UCC would apply to the contract.

2. A common law contract must set forth the price to be paid as one of the material terms of the contract generally. However, under the UCC where the contract/writing evidences an intent to agree on the price later, a court can employ the "gap filler" provisions of the UCC to add a price term to the contract if the parties fail to do so. The price supplied is the fair market value at the time set for delivery. This would favor Buyer since price has skyrocketed.

3. Under the UCC, a contract must specify the quantity being sold. However, when a Buyer contracts to buy all of a Seller's "output" (or a Seller contacts to sell all of a Buyer's requirements), such contracts are not invalid for lack of a quantity term. Instead, the Buyer will be required to purchase everything that Seller produces as long as the quantity does not exceed the parties' expectations at the time of contracting by a disproportionate amount.

In this situation, buyer contracted to buy (and Farmer to sell) all of the Vidalia onions that Farmer produced in Toombs County. This contract would be deemed an output contract, and the lack of a specified quantity term would not invalidate the contract.

Moreover, Buyer is not being forced to buy an extraordinary, disproportionate amount of onions beyond his expectation at the time of contracting. (To the contrary, he is purchasing substantially fewer and will have to look elsewhere to met his expectations). Therefore, the contract is a valid output contract.

4. A party is usually in breach of the contract when he fails to deliver all of the goods at the time set for delivery. However, the UCC recognizes "commercial impracticability" as a defense to breach of contract for failure to perform. The party seeking to avoid performance must show something beyond mere inconvenience to perform the cause of the impracticability must be unforeseeable and outside of that party's control. An unexpected drought would be unforseeable and could not be said to have been contemplated by the parties at the time of contracting.

Farmer might also bolster this argument by saying that the contract specifically called for Vidalia onions to be grown on his farm in Toombs County and that destruction of the crop's yield was further evidence of his inability to perform. Farmer could not just supply any onions from anywhere else in Georgia (or the rest of the world) because the contract expressly called for Vidalia onions to be grown on his farm.

Question 2. - Sample Answer 2.

1. Georgia has adopted the Uniform Commercial Code (hereinafter UCC). Article 2 of the UCC applies to the sale of goods. Goods are defined as items that are moveable and identifiable at the time of the sale. Crops are goods under Article 2 of the UCC and thereafter this transaction falls under Article 2.

Article 2 also applies to merchants. Merchants are defined as persons who buy and sell goods. In this case, the farmer and the buyer have a history of buying and selling goods. Article 2 does not define a merchant as a casual seller but as someone who buys and sells as a trade of business. There both the farmer and the buyer are merchants. So Article 2 of the UCC applies to the transaction.

2. Under the UCC, a writing need not contain all the essential common law terms to constitute a valid contract. When there is an intention on both sides to enter into a contract, the UCC will fill in a price term left open in the contract.

Here, the price of the onions under the contract is to be determined mutually by the parties. This expresses an intent to have a binding contract and therefore the contract is enforceable. Under the UCC, the court will impose a commercially reasonable price which is fair to both parties. The UCC allows the court to take into account such circumstances as trade custom and course of dealing. Course of dealing will be especially useful in this case because the parties have entered into previous contracts. However, the reasonable price at the time of delivery is the primary test.

Therefore, the court will consider the drought and skyrocketing prices of onions when determining a commercially reasonably price.

3. The UCC requires that a contract, to be valid, must contain a quantity term. However, that requirement does not apply to requirement and output contracts. Here, the farmer and the buyer have entered into a valid output contract because buyer agrees to purchase "all the Vidalia onions Farmer produces at his farm." This language creates a valid output contract and meets the quantity requirement of the UCC. All that is required of the farmer is that he produce and present his output in good faith. Therefore, because the output contract describes the quantity with sufficient certainty and definiteness, it complies with the UCC.

4. A breach of a contract occurs when a party either repudiates before time set for delivery or fails to discharge its duties at the time set for delivery. In this case, the buyer will argue that an output contract is not valid if the output is disproportionate to the output given by the parties in the past.

The farmer has the defense of commercial impracticability which will excuse his disproportionate output. Commercial impracticability occurs when (1) a material element of the contract becomes impractical to perform; (2) the impossibility is due to no fault of either party; (3) the impracticability was unforeseeable at the time the parties entered into the contract; (4) the adversely affected party did not assume the risk.

It could be argued that a drought was foreseeable. However, a drought so severe that is would limit the farmer to only 30% of production certainly was not foreseeable.

Question 2. - Sample Answer 3.

1. Sales of goods are governed in Georgia by the Uniform Commercial Code, Article 2. Goods are generally movable personal property. Here the parties are contracting for the sale on onions, which is a crop. Georgia classifies the sale of crops as goods, not the sale of real property. Therefore, the Uniform Commercial Code, will govern this contract.

2. Generally a price term does not have to be specified in a UCC contract in order to form a valid contract. If the parties intend to be bound, the court will not void a contract for indefiniteness for lack of a price term, but will generally require a reasonable price which generally is the fair market value at the time of delivery.

Here the parties used the price term "mutually determined" which is a valid price term and not indefinite. The parties contemplated and were willing to take the risk that the value of the onions

could increase or decrease before the crops were harvested and delivered.

The farmer can expect to receive a reasonable price for his onions considering all the facts and circumstances. Here a drought has decreased the normal yield in Toombs County so the fair market value of the crop has increased and the farmer will receive a higher price than last year's price if the price is reasonable. Here a higher price is probably reasonable considering the severe droughts and the unusually low yield.

3. Generally, a quantity term must be specified in a contract in order for the contract to be valid. However, an exception to this rule exists when the contract is a requirements or an output contract. A requirements contract is a contract where the parties agree one will supply the other with all it needs of the product while an output contract is a contract where one party agrees to buy all the other products. Neither a requirements contract nor an output contract will fail for indefiniteness for lack of a quantity term. Here the parties entered an output contract by the buyer agreeing to purchase all the farmer's onion crop. Therefore, the contract will not fail for indefiniteness for lack of a quantity term.

4. Generally, a court will excuse a party's performance for the proper defense of impracticability. A proper defense of impracticability applies where the event is not foreseeable at the time of entering into the contract, which excuses the party's performance.

Here, neither the farmer nor the buyer could foresee the "severe and unexpected" drought in Toombs County because no one can predict the weather conditions for an entire growing season. The court thus is likely to excuse the farmer's lower yield.

In addition, the farmer will have the specific language of the contract as a defense. The contract provides that buyer will purchase "all" onions and does not specify a definite quantity. Here the farmer can argue that he/she conformed to the terms of the output contract by selling buyer all the onions he/she produced even though the amount may be significantly less than the previous year's amount.

Question 3. - Sample Answer 1.

(disclaimer)

Equitable Relief The first four listed remedies are in the nature of affirmative equitable relief, and thus should be brought in the superior court of the county of the defendant against whom relief is sought.

Equitable relief is available in the court's discretion where (1) a legal remedy is unavailable or will not sufficiently redress the plaintiff's harm and (2) relief is feasible for the court to order/ administer. Each condition is met in this case.

(1) An injunction is typically granted against a private (non-governmental) defendant, to restrain or order the offending party to do something. Because other forms of relief will be more effectual and are better- tailored to the situation at hand, injunctive relief is not the best option here.

(2) Mandamus is an equitable writ commanding a governmental official to affirmatively do something. This writ is probably the best available relief against the GBI Director, since the relief

sought is for the GBI to remove Francis's name from the sex offender registry.

(3) Prohibition is a remedy wherein the court orders a governmental official subject to the court's jurisdiction to refrain from performing some act. Here, the harmful conduct has already been carried out by the probation officer and the GBI. If the court were to grant relief, and the probation officer and GBI persistently engaged in further similar conduct, a writ of prohibition (not to mention contempt proceedings) would perhaps be appropriate. But a writ of prohibition is not the best choice here.

(4) Quo warranto is a challenge to an official's authority to perform some act, and a charge that the official has exceeded the scope of their lawful authority. Here, the probation officer has clearly exceeded his/her authority by taking the action of registering Francis as a sex offender, when by law the probation officer is neither required nor authorized to carry out this act. Consequently, a quo warranto action against the probation officer would be (in addition to the writ of mandamus against the GBI Director) the way to get Francis relief if the officer's act is persistent and continues after Francis obtains mandamus relief.

(5) A declaratory judgment action is an action at law whereby parties seek to have a court declare and define the legal rights and obligations of the parties to the suit. These suits are typically brought where legal rights and duties are unclear, which is not the case here. The probation officer simply misinterpreted the statute. While it may be instructive and beneficial to give the probation officer and GBI an authoritative declaration of the parties rights vis-a-vis one another, the forums of relief discussed above are better-suited to the situation. They are better suited primarily due to the fact that equitable remedies require parties to do something, and failure to perform is punishable by contempt. By contrast, a declaratory judgment would simply leave the parties as they are, with (perhaps) a clearer view of their rights than before. But if Francis were declared legally correct (and he would be), he would have to bring another suit(s) to enforce his previously-declared rights. These would be suits in equity, to make officials perform or cease certain acts.

Thus Francis's best option is to sue for a writ of mandamus to command the GBI Director to remove his name from the sex-offender registry; and if the probation officer were to persist in re-registering Francis, a writ of prohibition or quo warranto action against the officer would be appropriate.

Question 3. - Sample Answer 2.

1. In junction – An injunction is a form of equitable relief and as such it can only be granted by Superior Courts. They are typically issued in breach of contracts cases where money will not make the innocent party whole. A typical example of a contracts injunction would be in a personal services contract where a singer was under an exclusive contract to perform at a venue on a particular night. If the singer refused to perform under the contract and instead wanted to perform at another venue the superior court could issue an injunction forbidding the singer from performing at another venue. The court would not order the singer to sing at the original venue because that is akin to indentured servitude and thus against public policy.

Injunctions are also issued in torts cases to prevent waste (either permissive or affirmative but not ameliorative), or to prevent a nuisance from continuing. In essence an injunction is an order in equity from a superior court telling someone or some entity to refrain from doing something in

the future.

2. Mandamus – mandamus is a writ that commands a public official to do something that the law requires them to do but which at the present time they are failing to do. For instance, if the law required the clerk of Superior Court to provide indigents with free copies of their conviction, and the clerk refused to comply with the law, then you could seek a writ of mandamus from the court to order the clerk to comply with the duty imposed upon them by the law.

3. Prohibition – this is another type of writ that is issued by a court to forbid a public official from doing a particular act. It is the counter part to a writ of mandamus. A writ of prohibition might be issued to prevent a clerk of Court from disclosing the identity of a rape victim.

4. Quo warranto – This requires a public official to give a legal justification for proposed action before the court.

5. Declaratory Judgment – a declaratory judgment can be sought by either party to a civil action to determine what the rights and liabilities of the parties are with respect to a particular issue. For example, a civil litigant might attempt to have the court issue a declaratory judgement that the defendants in his case did in fact breach the contract. Once this is conclusively determined by the court the parties may decide to settle the case, or they may proceed to litigate regarding available damages. This could also be used to get the court to declare some state action unconstitutional.

Since, Donal Francis will incur additional criminal liability for failure to register in his home county if his name remains on the list, the primary objective should be to remove his name. Almost certainly the Sexual Predator Registrant Act requires that the director of the GBI maintain these records accurately . Even if this duty is not imposed on the director of the GBI explicitly, it is certainly implied from the law itself. The records are important because it helps to protect the health, safety, and welfare of the community in which these sexual predators reside. However, given the fact that anyone on the list is looked upon with distrust and disrepute, it is doubly important to maintain accurate records. Such a duty would protect the citizens and the innocent people who could accidently end up on the list and suffer injury to their business and/or reputation. Therefore, the court would not hesitate to impose a strict record keeping obligation on the GBI director if one did not already exist in the law itself.

With this statutory duty in mind it is clear that Mr. Francis' best remedy is to position the court for a writ on mandamus which would order the GBI director to remove his name from the list because it was placed there in error. This writ would be granted if the GBI director was under a legal duty to make the correction and he refused to do so in spite of a valid request.

Here a valid request was made, the director refused to comply, and he is under a legal duty to make the correction because of the Act itself or at least imposed upon him by the sprit of the Act.

Question 3. - Sample Answer 3.

1. The issue is whether the Deputy's Sheriff's recount of child's statements about being sexually abused were hearsay and therefore inadmissible during Amos' criminal trial. The general characterization of hearsay under the Federal Rules of Evidence, is that hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. It is clear that Sheriff Deputy's recount of the conversation with the child was hearsay. Under Federal Rules certain

hearsay statements are admissible if they fit under a hearsay exception. However under the Georgia Rules of evidence there are no exceptions to hearsay, but the categories of non hearsay. Under Ga. Rules of Evidence statements of a minor child's recounting of present sexual abuse to another person or authority figure is admissible. The statements are treated as statements for seeking treatment. The policy behind allowing such statements is to allow for a minor child such as the three year old child to obtain help and are reliable based on child's age . The child "unavailability " to testify are irrelevant to the admission of the statements.

2. Issue - whether an expert witness can give an opinion as to the defendant being the person who committed child molestation against the victim? In Ga. an expert may give testimony concerning her assessment of the facts, but not legal conclusions or opinions to issues which must be decided by the jury . The trial court erred in allowing in Clara's statement that child was truthful in stating Amos as the molester . Her statements were highly prejudicial. Even a hypothetical assessment that Amos was the molester would have been improper to similarly inadmissible.

3. Issue - whether the prosecution may use prior consistent statement of a witness to rehabilitate that witness on rebuttal after an attack on cross-examination. Traditionally prior consistent statements may not be used to bolster a witnesses credibility. However, where the witnesses credibility concerning the witnesses testimony are attacked on cross-examination prior consistent statements are allowed as a way of rehabilitating the witnesses credibility not for evidentiary purposes just refute impeachment. Clara's statements may be admissible and not resulting in reversible error.

4. Issue - whether a witness spouse who asserts marital privilege may be compelled to testify against defendant spouse concerning possible sexual molestation charges concerning their daughter. Under the Federal Rules and Ga. Evidence rules the spousal privilege is held by the witness spouse. Marital privilege allows the witness spouse to choose not to testify against her spouse before or during their marriage but does not include after the marriage. It is clear from the facts Betty -the witness spouse- refused to testify by exercising this privilege. The court would normally be in error to compel her to testify unvoluntarily against her husband. However, a noted exception to the marital privilege is when the matter concern crimes against the witness spouse, the children of the couple, and possible crimes to which witness spouse may be involved against third parties. The Court under this exception did not err in compelling Betty to testify against Amos concerning his possible sexual molestation of their daughter.

Question 4. - Sample Answer 1.

(disclaimer)

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Question 4. - Sample Answer 2.

1. The trial judge probably did err in allowing Sheriff Fife to testify as to the statement given to him by the 3 year old victim. Although Georgia recognizes that a statement given by a child under 14 years old to a person is admissible if that statement involves an allegation of child abuse, it may not be admissible in the present case. In order to be admissible, the statement must have been given by a child who is available to testify.

In this case, the statement was given by a child under 14 years old (the victim is 3 years old) and it involved an allegation of child abuse, presumably. (Sheriff Fife was at the home to investigate allegations of child abuse, and that was his purpose in speaking with the child.) Even though the victim who made the statement was only 3 years old, and would probably be unable to understand the oath, she would still be competent to testify if she had perceived a relevant event, remembered it, and could communicate it. Under Georgia law, a child's inability to understand the oath will not preclude the child from being competent to testify regarding child abuse, as long as the child is otherwise competent.

The problem with Sheriff Fife's testimony is that although the child victim may be competent to testify, she was not available to testify because she refused to testify. In deciding whether this merits a new trial, we should consider whether it is mere harmless error.

2. Clara, a FCS social worker, testified to her opinion regarding whether or not the child victim was telling the truth. The problem with the trial court's decision to allow this testimony is that it is opinion testimony, which is not allowed under the Georgia Rules of Evidence. If the question for the jury is purely one of opinion, her opinion may be allowed, but that was not the case in this trial. The jury was asked to be a fact-finder as well. As a licensed social worker who works with abused and neglected children, Clara may have qualified as an expert and the testimony may have been allowed if Clara was testifying to facts reasonably relied upon on experts in her field to form opinions. However, there is not any evidence that Clara was introduced as an expert in telling for sure whether a child is telling the truth about abuse even as a FCS social worker.

In addition, Clara's testimony involved a hearsay statement by the child-victim which probably should not be allowed. The child's statement that Amos was the molester was being introduced to prove the truth of that matter and, as such, should not be allowed. It also cannot be allowed as prior identification because, since the child refuses to testify, she cannot be a witness. Prior identifications by witnesses at the trial are the only kind allowed.

3. Clara's prior consistent statement was properly admitted. Although prior consistent statements will not generally be allowed, they are allowed in certain narrow circumstances. If the witness is accused of having fabricated her statement because of bias or improper motive, then a statement made before the alleged bias or motive existed may be introduced to rebut the charge of recent fabrication. If Amos' attorney only attacked Clara's veracity, then the prior consistent statement should not have been admitted. However, if the defense attorney, in questioning Clara's motives on cross-examination also suggested that she had recently fabricated her testimony, her prior consistent statement was admissible to rebut those changes as long as the statement was made before the motive to fabricate existed.

4. The trial judge was correct when he ordered Betty to testify against Amos, her husband. Although a marital privilege does exist in Georgia, a spouse may be forced to testify if the issue is one involving child molestation. The marital privilege exists to allow a person to refuse to testify against her spouse in a criminal case. However, this case involves the molestation of a child, so Betty may be required to testify only as to the issue of her daughter's molestation, and Betty cannot be compelled to testify regarding any other issues.

A second type of privilege protects confidential communications between spouses. The record shows no indication that this privilege was asserted. If it was asserted, Betty may be required to testify regarding her child's abuse only, but cannot be compelled to testify as to any other issue.

Although it was not presented in the record, and so is irrelevant for our purposes, it might be argued that Clara testified as to confidential information because, as a social worker, she was bound by client confidentiality. This is not a good argument because the 3-year old victim was not her "client." Clara was acting as an investigator.

Question 4. - Sample Answer 3.

MEMORANDUM

Four errors were specified in the motion for New Trial. Each raises evidentiary issues, and each will be discussed individually below:

(1) It is argued that the Court erred in allowing hearsay testimony concerning a statement given to Deputy Fife by the child victim. Normally, this would be inadmissible hearsay since it is an out-of-court statement offered to prove the truth of the matter asserted. However, Georgia has a special rule regarding statements made by victims of child abuse about the alleged abuse. Such statements are admissible under the Georgia Rules of Evidence. The rule only applies to statements by child victims of abuse; it does not apply to statements by child witnesses of child abuse because the Georgia Supreme Court held that part of the rule unconstitutional. The statements given by the child victim are admissible under the rule even if the child refuses to testify at the trial. This rule promotes the public policy of protecting victims of child abuse.

(2) Error is also alleged in the admission of a certain statement by Clara, the agent for Family and Children Services. It seems that the admission of this testimony was, in fact, error. Unless qualified as an expert, Clara was a lay witness, and lay witnesses generally may not give opinions or draw conclusions about things that are not readily apparent to the average person. Concluding that a child was a victim of molestation and that a child was telling the truth requires very specialized knowledge. Even with such knowledge, such a conclusion likely involves a high degree of speculation. This type of opinion is not appropriate from a lay witness. Clara certainly has experience dealing with children in general and with child victims of molestation in particular, but if the prosecution wanted Clara to testify as to her opinions regarding the fact of molestation, they had to qualify her as an expert. Only an expert may testify regarding her opinions on a matter requiring specialized knowledge. A lay witness, even an experienced one, may not draw conclusions on a specialized issue. This is of no assistance to the trier of fact, and it may confuse the issues. Admitting Clara's conclusions was error, unless she was qualified as an expert in the field of child abuse.

(3) The court did not err in admitting Clara's prior consistent statement. A prior consistent statement is admissible as a hearsay exception to refute accusations of recent fabrication or improper motives. The statement must have been made before the alleged motive arose. This is not bolstering, because Clara's credibility had been attacked on cross-examination. Once a witness has been impeached by the opposing party, it is permissible to offer evidence establishing that witness truthfulness. Since Clara's motives were attacked, a prior consistent statement made before the alleged motive arose is admissible to help establish her veracity. There was no error in admitting the statement since it is a hearsay exception.

(4) The court did not commit error in requiring Betty to testify against Amos. Normally, the spousal immunity privilege would allow Betty to refuse to testify against her husband. However, spousal immunity is inapplicable in the case of intra-family crimes. Since this is a case of child molestation, the witness-spouse, who holds the privilege, can be forced to testify. Since spousal immunity is not applicable in cases of child molestation, it was not error for the court to require Betty to testify against Amos.