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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Case No. 92,038

RE: JOHN O. WILLIAMS

ON APPEAL FROM THE FLORIDA BAR BOARD OF GOVERNORS

ANSWER BRIEF OF APPELLEE
BOARD OF LEGAL SPECIALIZATION & EDUCATION

THOMAS M. ERVIN, JR.
Fla. Bar No. 107788
of the law firm of
ERVIN, VARN, JACOBS & ERVIN
Post Office Drawer 1170
Tallahassee, Florida 32302
(850) 224-9135
(850) 222-9164 (FAX)

ATTORNEYS FOR BOARD OF LEGAL
SPECIALIZATION & EDUCATION

and

JOHN F. HARKNESS, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5000

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a denial of certification as a "Board Certified Real Property Lawyer." This statement of the case and facts is provided pursuant to the authorization of Rule **9.210(c)**, Florida Rules of Appellate Procedure. References herein will be to Appendix to Appellant's Initial Brief, and appropriate item number.

The record herein establishes that appellant Williams initially received a grade of 65.08 (of 100) on the 1996 Real Estate Certification Examination. A minimum **score** of 69.29 was required for a passing grade on the examination, and certification. Notice to appellant Williams of his failure to attain a passing grade was dated July 2, 1996, and forwarded by certified **mail**.

Appellant Williams thereafter availed himself of initial exam review as provided in Standing Policy **2.08(e)**. He then submitted his Petition for Grade Review pursuant to Standing Policy **2.08(f)** (Appendix, Tab 1). The said petition was dated and filed on August 16, 1996. The petition sought review of the scores awarded on two multiple choice questions (Nos. 8 and 18) and two essay questions (Nos. 1 and 6).

As to the contents of such a Petition for Grade Review, Standing Policy **2.08(f)(1)** requires the filing of such a petition "detailing the claimed grading **error(s)**," and subsection **(f)(2)** requires that:

(2) The petition shall state in detail the areas which, in the opinion of the examinee, have been incorrectly graded. The petitioner **may** provide **any** additional supporting authority deemed appropriate to substantiate the claim of incorrect grading.

As to the function of such Grade Review Panels, standing Policy **2.08(f)(4)** provides in pertinent part:

(4) The responsibility of each panel shall be to review the substantive basis for each petition filed.

A duly appointed Grade Review Panel, consisting of **Board-Certified Real Estate Lawyers**, convened on October 29, 1996, and considered the Petition for Grade Review of appellant Williams, The duly appointed Grade Review Panel issued its written opinion on **November 4**, 1996 (Appendix, Tab 2). The November 4, 1996, written opinion of the Grade Review Panel was forwarded to appellant Williams **by** certified mail on November 13, 1996.

The written opinion of the duly appointed Grade Review Panel was as follows:

DECISION OF GRADE **REVIEW** PANEL

THIS CAUSE came on for consideration on October 29, 1996, of a Petition for Grade Review filed by Applicant **RE96-022**. After having reviewed the Petition for Grade Review, Petitioner's exam answers, exam, the model answers, and range finders, the panel concludes as follows:

1. Essay **#6** should be increased from 3 to 4.
2. All other grading **be** deemed correct.

Respectfully submitted this 4th day of November, 1996.

/s/ G. Thomas Smith

G. Thomas Smith, Chair, Grade Review Panel.

Jim Conner

David Preeely

Neal Sivyver

Appendix, Tab 2.

The effect of the **Grade Review** Panel's increase of petitioner's score from 3 to 4 on Essay No. 6 (which had a total potential score of 11 points) was to increase appellant's examination score by 1.83 points, from 65.08 to 66.91. Since the revised score was still less than that required for a passing score **(69.29)**, certification was denied.

As to the effect and finality of decisions of such Grade Review Panels, Standing Policy **2.08(f)(5)** commands that:

(5) Panel decisions shall close the grade review process.

Although the process of grade (or score) review is completed and closed **after** the decision of the Grade Review Panel, a limited right of further review is afforded by Standing Policy **2.08(g)**, which provides and restricts as follows:

(g) Upon completion of the grade review, either the petitioner or the committee may elect to proceed with an appeal, to the AC, pursuant to the appeal procedures set out in the 400 series of the BLSE policies. Such appeal shall be limited to the procedural issues set forth in this review and petition process and to clear and unequivocal allegations of fraud, discrimination, arbitrary or capricious action.

Appellant Williams next filed, in letter form with attached exhibits, a petition for review by the Certification Plan Appeals Committee (Appendix, Tab 3). The said petition was dated November 27, 1996, and received (i.e., filed) on December 4, 1996.

As to Certification Plan Appeals Committee ("**CPAC**") proceedings, and standard of review upon such petitions, Standing Policy **4.03(a)** provides:

4.03 Standard of Review

(a) Appeals from Review Panels.

The AC shall limit its consideration to the procedural issues set forth in the BLSE policies and to clear and convincing allegations of fraud, discrimination, or arbitrary or capricious action.

As to proceedings before CPAC, Standing Policy 4.07 provides that:

4.07 EVIDENCE

No evidence shall be presented on appeal that was not presented to the BLSE or RP. [i.e., Grade Review Panel]

(Bracketed information added.)

The matter came before the Certification Plan Appeals Committee on March 18, 1997, at which hearing appellant submitted the materials which appear at Tabs 10 and 11 of appellant's Appendix.

The Certification Plan Appeals Committee entered its order on March 19, 1997 (Appendix, Tab 6). The appeals committee ordered as follows:

ORDER

THIS CAUSE came before the Appeals Committee of the Board of Governors of The Florida Bar on March 18, 1997. The Appeals Committee thoroughly reviewed the briefs and heard oral argument. It hereby REMANDS to the original 1996 Real Estate Certification Grade Review Panel examinee # 344's answers to essay question number 1. This answer shall be reconsidered in light of the material attached to this Order.

The decision of the Grade Review Panel shall be rendered at least ten days in advance of the May 13, 1997 Real Estate Certification

Examination. The decision shall be final and shall not be subject to review by this Committee.

DATED this 19th day of March, 1997.

John C. Patterson, Jr., Vice-chair
Appeals Committee

This "**remand**" by the Certification Plan Appeals Committee was proper recognition that examination grading is properly performed by the independent Grade Review Panel made up of attorneys with the requisite expertise in the area of certification at issue.

The Grade Review Panel duly reconvened on April 9, 1997, and issued its decision of same date (see Appendix, Tab 8, pp. 2-3). That decision was as follows:

DECISION OF GRADE REVIEW PANEL

THIS CAUSE came before the Grade Review Panel on April 9, 1997, upon remand by the Appeals Committee of the Board of Governors.

The Grade Review Panel specifically reconsidered Examinee #344's answer to essay question number 1 along with the material attached to the March 19, 1997 Appeals Committee's Order. The Panel voted unanimously to reaffirm its November 4, 1996 decision in which it determined the grade assigned to essay question number 1 by the Real Estate Certification Committee to be correct.

DATED this 9th day of April, 1997.

/s/ G. Thomas Smith
G. Thomas Smith, Chair, Grade Review Panel
Jim Conner
David Preaely
Neal Sivyer

Appellant next filed his appeal to the full Board of Governors of The Florida Bar (Appendix, Tab 7). The appeal came before the

full Board on November 21, 1997, with **oral** argument before the Board by appellant and the representative of appellee Board of Legal Specialization and Education.

The Board of Governors, by Order of December 2, 1997, affirmed the denial of certification (Appendix, Tab 9). The Order was as follows:

ORDER

THIS CAUSE came before the Board of Governors of The Florida Bar on November **21**, 1997. Having thoroughly reviewed the briefs and **heard** oral argument, the Board of Governors hereby **AFFIRMS** the decision of the Certification Plan Appeals Committee to deny board certification.

DATED this 2 day of December, 1997.

Edward R. Blumberg, esq.

Appellant Williams has now sought review in this Court. Herein he urges that the awarding of a grade of 3 on his answer to Essay Question No. 1, and a grade of 4 on his answer to Essay Question No. 6, was arbitrary and capricious.

The scoring guide for use in such grading (for **all** areas of certification) provides as to assignment of answer scores that:

<u>Score</u>	<u>Description</u>
6	A 6 answer demonstrates a high degree of competence in response to the question. While not reserved for a perfect answer, a 6 answer demonstrates a full understanding of the facts, a complete recognition of the issues presented and the applicable principles of law, and a good ability to reason to a conclusion. A 6 answer is clear, concise, and complete.

- 5 A 5 answer demonstrates clear competence in response to the question. A 5 answer demonstrates a fairly complete understanding of the facts, recognizes most of the issues and applicable law, and reasons fairly well to a conclusion.
- 4 A 4 answer demonstrates competence in response to the question. A 4 answer demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues and law, and adequate ability to reason to a conclusion.
- 3 A 3 answer demonstrates some competence in response to the question but is inadequate. A 3 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicable law, and demonstrates inadequate reasonability ability.
- 2 A 2 answer demonstrates only limited competence in response to the question and is seriously flawed. A 2 answer demonstrates little understanding of the facts or law and little ability to reason to a conclusion.
- 1 A 1 answer demonstrates fundamental deficiencies in understanding facts and law. A 1 answer show virtually no ability to reason or analyze.

Appendix, Tab 7, final page.

In these proceedings appellant argues that arbitrariness arises from failure to increase his score regarding Essay No. 1 from the assigned "3" to a higher score. He argues that his increased, assigned score of "4" (by the Grade Review Panel) on Essay No. 6 should have been an increase to "6."

It is appropriate to note that in proceedings before the Grade Review Panel, which raised appellant's score on Essay No. 6 from a "3" score to a "4," appellant urged that:

The Examinee, therefore, asserts that his grade on question #6 should be upgraded to at least a five (5).

Appendix, Tab 1, p. 24.

In the proceedings before the Grade Review Panel which affirmed appellant's score of "3" on Essay No. 1, appellant urged that:

However, the Examinee asserts that his answer to essay question No. 1 demonstrates either competence or clear competence and that grade should be upgraded to either a four (4) or a five (5).

Appendix, Tab 1, p. 17.

Under Policy **2.08(f)(5)**, as to **all areas** of certification, the grade review process is "**closed**" after a decision of the independent Grade Review Panel. Thus, an applicant is initially graded by members of the subject area certification committee, and is thereafter afforded a second, independent grade review by a Grade Review Panel composed of qualified lawyers in the subject area who had **no** involvement in either creating or initially grading the certification exam. Only then is the grading process "**closed.**"

In further appeal proceedings before the Certification Plan Appeals Committee, and the Board of Governors, the "**closed**" grade review process is **not** continued. Test scores are **not** regraded, under applicable rules and policies, by either the Certification

Plan Appeals Committee or the Board of Governors. Under Policy 2.08(g), such further review is restricted, in pertinent part, to:

clear and convincing allegations of fraud, discrimination, arbitrary or capricious action.

Appellant has previously acknowledged that he **"makes** no allegations of fraud nor discrimination" (Appendix, Tab 3, p. 1). Thus, he essentially urges that the process whereby he received a failing score or grade constituted clearly demonstrated "arbitrary and capricious action" (see Appendix, Tab 3, p. 2) and that, on that basis, either the Certification Plan Appeals Committee or the full Board of **Governors** should have reversed the actions of the Board of Legal Specialization and the independent Grade Review Panel, and ordered him certified.

Appellant's Statement of the Facts (Appellant's Initial Brief, pp. 2-3) is both conclusory and argumentative. As an example, appellant states as **"f acts"** at page 2 of his Initial Brief:

Appellant's answer to question #1 is legally correct and is supported by review course materials that the Bar prepared and sold specifically for preparation of this exam. Appellant's answer is also supported by case law and Attorney's Title Fund Notes, which are the industry standard in the real estate field. The Bar refused to give credit to Appellant because his answer did not match the Bar's model answer for that question.

This statement of **"fact"** is not authorized by the record. Question No. 1 dealt, in part, with the type of ownership of condominium property received and held by a husband and wife. The question expressly stated, in pertinent part:

Mr. And Mrs. Jones purchased a condominium apartment in Dade County, Florida 1981. The condominium consists of 100 units. Title was taken in the name of 'Sadie Jones and Jacob Jones, as Joint Tenants.' Mr. and Mrs. Jones have each been previously married and each has adult children from their prior marriages.

Appendix, Tab 1, p. 9.

It is, of course, well established that married persons **may** hold real property (1) as an estate by the entirety, (2) as a joint tenancy, with right of survivorship, or (3) or as tenants in common. The question expressly noted that the deed to Mr. and Mrs. **Jones conveyed title to them as joint tenants**, without mention of right of survivorship.

Under these circumstances, the model answer prepared by the area certification committee and used in grading stated, in pertinent part:

When Sadie Jones and Jacob Jones took title as 'joint tenants,' they each acquired an undivided one-half interest. When title is taken as 'joint tenants,' the presumption is that tenancy in common was intended. In order to rebut the presumption, the deed should **state that they are taking as joint tenants with the right of survivorship and not as tenants in common.**

Appendix, Tab 1, p. 10.

Appellant's answer, however, was as follows, in pertinent part:

Mr. and Mrs. Jones owned the property as tenants by the entirety because assuming they were married when they took title as **joint tenants they became tenants by their entirety.**

Appendix, Tab 1, p. 13.

Appellant has argued below, and herein, that the materials he has included in his Appendix, at Tabs 10 and 11, establish that his answer (tenancy by the entireties) is clearly correct, and the model answer (tenancy in common) is wrong.

This Court may note, however, that the review course materials at Tab 10 of appellant's Appendix state in pertinent part that creation of a tenancy by entireties is:

Automatic when conveyance is made to a husband and wife, unless a **contrary** intent is stated. Marital stated does not have to be stated;

(Emphasis supplied.)

This Court may also note that the title note at Tab 11 of appellant's Appendix states as to a tenancy by the entireties:

Even though a deed does not specify that the grantees take by the entirety and even though they are not referred to as husband and wife in the deed, a tenancy by the entirety is created if the grantees are in fact husband and wife in the absence of a contrary expression of intent in the deed. **American Central Ins. Co. of se. Louis, MO. v. Whitlock;** 165 So. 380 (Fla. 1936); and **Espenship v. Carter,** 514 So.2d 1108 (Fla. 1st DCA 1987). The recording of an affidavit of marital status in such cases would be an appropriate method for establishing the form of tenancy created by such a deed. Title Standard 6.1. The form of the tenancy created can be important if a judgment is recorded against one of the grantees or if one of the grantees should die while still in title. See **TNS** 18.0305, 20.01.10 and 30.02.07.

(Emphasis supplied.)

Thus, both materials relied upon by appellant expressly recognize that a tenancy by the entireties is not automatically

created by a conveyance to husband and wife where there is a contrary exvression of intent in the conveyance or deed.

The model **answer**, prepared by the area certification committee, and the affirmance of a **"3"** score by the Grade Review Panel upon two sewarate reviews, were obviously based upon the dual premise that (1) conveyance to husband and wife expressly **"as joint tenants"** was contrary to an intent to convey to them as tenants by the entireties, and (2) in the absence of **"right of survivorship"** language in the deed, what was legally and effectively created was a tenancy in common.

The record also reflects that appellant has conceded below that his answer to this question also missed, **or** omitted, seven separate **"issues"** included in the model answer (see Appendix, Tab 1, pp. **15-18**), arguing as to most that those omitted issues were **"outside"** the scope of the question presented. The record reflects that the question presented was as follows:

All of Mr. Jones' children agree that the apartment should be sold. They have located a buyer who is willing to purchase the property for \$150,000, which is its approximate fair market value.

You have been retained to represent the buyer, Shirley Black. It is your responsibility to make sure that Mrs. Black obtains a marketable and insurable title. From whom will conveyances be required? Please discuss fully. In addition, please discuss the title issues which arise in the facts described and explain the ways of resolving them.

Appendix, Tab 1, p. 10.

Finally, appellee Board of Legal Specialization and Education notes that as to the purpose of real property certification, Rule 6-9.1, Rules Regulating The Florida Bar, states as follows:

RULE 6-9.1 **GENERALLY**

A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed below may be issued an appropriate certificate identifying the lawyer as a "**Board Certified Real Estate Lawyer.**" The purpose of the standards is to identify those lawyers who practice in the area of real estate and have the special knowledge, skills, and proficiency to be properly **identified** to the public as certified real estate lawyers.

(Emphasis supplied.)

As to the purpose and necessity of successful completion of examination, Rule **6-9.3(e)**, Rules Regulating The Florida Bar, provides:

(e) Examination. The applicant must pass a written examination that is practical, objective, and designed to demonstrate special knowledge, skills, and proficiency in real estate law to justify the representation of special competence to the legal profession and the public.

(Emphasis supplied.)

Thus, the standards that the area certification committee and the Board of Legal Specialization and Education have been directed by this Court to apply are those of "**special**" knowledge, skills, proficiency and competence in the field of real estate law.

SUMMARY OF ARGUMENT

In the instant matter appellant was properly denied certification as a **"Board Certified Real Estate Lawyer"** because he failed to pass the required certification examination, R. Regulation Fla. Bar **6-9.3(e)**.

Appellant was properly tested and thereafter provided his rights of appeal and review at every phase of the proceedings. His contentions of improper grading were carefully considered. In the process of grade review he actually received a grade increase on one answer, and did not receive an increase on the other because his substantive contentions were without merit, and his answer merited only the **"3"** score awarded.

Despite the fact that the **"grade review process"** was closed two levels of review earlier (by action of an independent Grade Review Panel), this Court is now requested by appellant to evaluate whether the scoring of his individual answers was correct, or flawed and require adjustment. The authorization of limited review of alleged **"arbitrary and capricious"** action after grade review is closed should not be allowed to effectively keep the process of grade review **"open"** through proceedings in and decision by this Court.

Appellant's arguments of secrecy shrouded process and **"Caligula-esque"** procedures is wholly without merit. The certification program and examination-related procedures are established and available not only in applicable rules and standing

policies, but also in an extensive Board Certification Examinations Technical Manual.

Appellee BLSE respectfully submits that appellant Williams has failed to demonstrate any basis for relief by this Court. His answers were graded properly and he simply failed the requisite certification exam, His ensuing denial of certification was not the product of any arbitrary or capricious action or any unfairness.

It is respectfully submitted that this Court should affirm the action of the Board of Governors of The Florida Bar.

ARGUMENT

POINT I

APPELLANT HAS FAILED TO DEMONSTRATE THAT THE SCORING OF HIS ANSWER TO ESSAY QUESTION NO. 1 WAS ARBITRARY, CAPRICIOUS OR UNFAIR, OR THAT CPAC OR THE BOARD OF GOVERNORS ERRED IN AFFIRMING THE DENIAL OF CERTIFICATION.

Point I of Appellant's Initial Brief (pp. 7-8) is directed solely to essay question No. 1, and this point of answer will, therefore, be likewise restricted.

In answer to this point it is first appropriate to note that this matter was commenced as a "grade review" appeal. The system for "grade review" in the certification process must be viewed as a whole, but with different functions being performed at different steps in the process.

When appellant was advised of his failing score on the May, 1996, Real Estate Certification Examination, his first recourse under established standing policy was to review, with a member of the Real Estate Certification Committee, the exam, model answer, his answer, assigned scoring, and other matters relating to his failing score. Appellant availed himself of that review and, in the process, identified two objective questions and two essay questions (Nos. 1 and 6) which he believed were incorrectly graded.

A basic premise of the certification system for all areas of certification is that the process of examination grading, or scoring, of answers should be performed by lawyers who, by prior certification, have demonstrated special knowledge and competence in the area of law and practice being examined.

To this end, independent Grade Review Panels have been provided in the "grade review" process. To ensure independence of this process, the certified lawyers who are selected to serve on such review panels are expressly proscribed from having had any prior involvement with the subject examination as a committee member, exam or "model answer" drafter, or grader. Standing Policy **2.08(f)(3)**.

At the grade review level appellant was specifically authorized to present "any additional supporting authority" to substantiate his claim of incorrect grading. Standing Policy **2.08(f)(4)**.

Appellant Williams availed himself of this Grade Review Panel process and, in fact, secured an increase of his score on Essay No. 6 from a "3" to a "4" (Appendix, Tab 2). The independent Grade Review Panel determined that the initial grading of Essay No. 1, and assignment of a "3" score, were correct (Appendix, Tab 2).

Because appellant's overall examination score remained below passing even after the Grade Review Panel's increase of score on Essay No. 6, appellant was not entitled to certification. R. Regulating Fla. Bar **6-9.3(e)**.

At this point in the certification appeals process the functions to be performed, and standards for review, change. When the Grade Review Panel completes its task, the remaining available steps of appeal are to be performed by bodies (CPAC and the Board of Governors) which are not comprised of attorneys with established

(by prior certification) special knowledge and expertise in the area of law being examined.

For this reason, Standing Policy **2.08(f)(5)** expressly states that decisions of Grade Review Panels close the grade review process, and Standing Policies **2.08(g)** and 4.03 establish that proceedings before the Certification Plan Appeals Committee and the Board of Governors will extend to, and consider, only "procedural **issues**" in the review and petition process and "**clear** and convincing" demonstrations of "**fraud, discrimination, or arbitrary and capricious action.**" In short, neither the Certification Plan Appeals Committee nor the Board of Governors regrade or **rescore** examination answers. Their review function is restricted, as described above.

It is appellee **BLSE's** view that to allow an applicant, such as appellant, to appeal to CPAC, and then the Board, and argue that an assigned grade on an exam answer is "**arbitrary**" is to allow the exception (of limited review) to swallow the whole, and effectively continue the grade review process throughout all levels of appeal, contrary to the express provision of Standing Policy **2.08(f)(5)**.

Such a system is analogous to allowing unsuccessful Bar admission applicants to challenge the scores awarded on individual Bar examination questions through three earlier levels of review, and then bring the matter of each answer grade or score to this Court for review and requested adjustment on the basis of alleged arbitrariness in earlier scoring and scoring review, Appellee BLSE

respectfully submits that such a system was never intended, or provided for, in creation of the certification appeals process.

If, however, an assigned answer grade (or grades) **is** subject to review as **"arbitrary"** at the level of the Certification Plan Appeals Committee, then the standard for review must be whether **"arbitrary and capricious"** action of both the initial area certification committee **and** the independent Grade Review Panel is established by **"clear and convincing"** evidence. Standing Policy **4.03(a)**.

In the instant matter the Certification Plan Appeals Committee properly recognized that its function did not extend to regrading or **rescoring** real property examination answers. In proceedings before CPAC the appellant vigorously urged that the materials he has included in his appendix at tabs 10 and 11 established that the model answer to Essay Question No. **1 was** wrong; that his answer was right; and that, therefore, his answer deserved a higher score, and denial of same was arbitrary and capricious.

Under these circumstances (and in proper recognition that appellant's contentions were properly part of the **"closed"** grade review process), the Certification Plan Appeals Committee granted appellant an unusual second opportunity to present his argument and contentions to the Grade Review Panel. By its order, the Certification Plan Appeals Committee **"remanded"** for reconsideration by the independent **Grade** Review Panel the issue of whether appellant's answer to Essay Question No. **1 was** properly scored or graded (Appendix to Appellant's Initial Brief, Tab 6).

Contrary to appellant's argument, the Certification Plan Appeals Committee did not, by its order, find that appellant's answer to question No. 1 had been graded erroneously or unfairly. It did not instruct or suggest that the grade on appellant's answer be revised. In recognition that the subject of appellant's contentions came wholly within the grading and grade review process, it merely ordered, in pertinent part, that:

It hereby REMANDS to the original 1996 Real Estate Certification Grade Review Panel examinee # 344's answers to essay question number 1. This answer shall be reconsidered in light of the material attached to this Order.

The decision of the Grade Review Panel shall be rendered at least ten days in advance of the May 13, 1997 Real Estate Certification Examination. The decision shall be final and shall not be subject to review by this Committee.

Appendix, Tab 6.

The clear import of this holding by the Certification Plan Appeals Committee was to reject all of appellant's **"appeal claims"** of clear and convincing arbitrariness, but to afford appellant one additional opportunity to present to the Grade Review Panel his contention (and supporting materials) that his answer to Essay Question No. 1 should be graded more generously than the assigned score of **"3,"** which under the established scoring system denotes:

3. A 3 answer demonstrates some competence in response to the question but is inadequate. A 3 answer demonstrates a weak understanding of the facts, misses significant issues, fails to recognize applicable law, and demonstrates inadequate reasonability ability.

Appendix, Tab 7, Final Page.

The Grade Review Panel did, again, review appellant's answer and grade as requested and entered its decision upon second review, as follows:

DECISION OF GRADE REVIEW PANEL

THIS CAUSE came before the Grade Review Panel on April 9, 1997, upon remand by the Appeals Committee of the Board of Governors.

The Grade Review Panel specifically reconsidered Examinee #344's answer to essay question number 1 along with the material attached to the March 19, 1997 Appeals Committee's Order. The Panel voted unanimously to reaffirm its November 4, 1996 decision in which it determined the grade assigned to essay question number 1 by the Real Estate Certification Committee to be correct.

DATED this 9th day of April, 1997.

/s/ G. Thomae Smith
G. Thomas Smith, Chair, Grade Review Panel
Jim Conner
David Pressly
Neal Sivyer

Appendix, Tab 8, pp. 2-3.

Even at this point, the process of review available below to appellant was not complete. Appellant then took an appeal to the full Board of Governors, which affirmed the action of CPAC and the denial of certification (Appendix, Tab 9).

Appellant has argued herein, and at each step of the process below, that his answer to Essay Question No. 1 is correct, and the model answer which was considered in determining his grade or score of "3" is wrong. He asserts this as established fact in the Statement of the Facts of Appellant's Initial Brief (see p. 2).

At the risk of rekindling before this Court the long closed "grade review" process, appellee BLSE is compelled to respond. Appellant was wrong when he answered the exam question; he was wrong at the levels of CPAC and Board of Governors review; and he is wrong in these proceedings.

The primary **or** initial issue posed by Essay Question No. **1 was** what type of title interest was created when a residential condominium was conveyed to Mr. and Mrs. Jones when the conveyance **was** to, and title taken, as follows:

Sadie and Jacob Jones, as Joint Tenants.

Appendix, Tab 1, p. 9.

Appellant insists that, because it is not necessary that the husband and wife status be expressed in such a deed, a tenancy by the entireties was created. As authority, he cites review course materials included at Appendix, Tab 10, and a title note included at Appendix, Tab 11.

He overlooked, and continues to overlook, that while the stated form of conveyance was silent as to marital status of the grantees, it was **not** silent **as** to the conveyance of title intended. It expressly stated that title was conveyed and transferred to the Jones **"as** Joint Tenants," and did **not** provide for any right of survivorship.

It is clear that, under modern law, married persons **may** hold property individually, as tenants in common, or as joint tenants, as well as hold property as tenants by the entireties. See AmSouth Bank of Florida v. Hepner, 647 So. 2d 907, 909 (Fla. 1st DCA 1994).

If the deed of realty is silent as to the nature of the estate being conveyed, then an estate by the entirety is presumed to be intended and created. AmSouth, supra, at p. 909.

The rule of presumption or construction, however, is not absolute. It has been recognized that the estate by the entirety is not automatically created where there is express language in the deed showing a contrary intent. Essenshis v. Carter, 514 So. 2d 1108, 1109 (Fla. 1st DCA 1987); Estate of Suggs, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981).

This "**contrary intent**" exception **is** specifically recognized in the materials relied upon by appellant and included at Appendix, Tabs 10 and 11. The review materials at Appendix, Tab 10, state in pertinent part as to creation of an estate by the entirety:

Automatic when conveyance made to husband and wife, unless a contrary intent is stated.

(Emphasis supplied.)

The title note included at Appendix, Tab 11, states in pertinent part as to the issue of estate created:

Even though a deed does not specify that the grantees take by the entirety and even though they are not referred to as husband and wife in the deed, a tenancy by the entirety is created if the grantees are in fact husband and wife in the absence of a contrary expression of intent in the deed. American Central Ins. Co. of St. Louis, MO. v. Whitlock; 165 So. 380 (Fla. 1936); and Espenship v. Carter, 514 So.2d 1108 (Fla. 1st DCA 1987). . . .

(Emphasis supplied.)

In the instant case the deed stated that tile was conveyed to "Sadie and Jacob Jones, as Joint Tenants," The requisite **"contrary intent"** was, therefore, clear and express on the face of the deed.

Appellant has also cited Dixon v. Davis, 155 So. 2d 189 (Fla. 2d DCA 1963), as supporting his **"correct"** answer that a tenancy by the entireties was created, That reliance is misplaced. In Dixon v. Davis, *supra*, the court held in pertinent part at page 191:

Florida adheres to the common law principle that husband and wife **are** legally one person, and where land is conveyed to both husband and wife, unless a contrary intention is expressed in the conveyance they acquire title as tenants by the entireties. It should be remembered, however, that the creation of such an estate rests upon a rule of construction which is based upon the presumption of intent. If a contrary intent appears, it will be followed.

(Emphasis supplied.)

In Dixon v. Davis, *supra*, the court held that conveyance language of **"share and share alike"** showed contrary intent and created a tenancy in common, not an estate by the entireties,

By like measure, the express deed language that Sadie and Jacob Jones were to receive title **"as Joint Tenants"** demonstrated a contrary intent to tenancy by the entireties ownership.

Moreover, since a tenancy by the entireties was not created then Section 689.15, Florida Statutes, came into operation where the deed was to the Jones **"as Joint Tenants"** without any mention of survivorship. That **statutory provision is as follows:**

The doctrine of the right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, except in cases of

estates by entirety, a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship; and in cases of estates by entirety, the tenants upon dissolution of marriage, shall become tenants in common.

(Emphasis supplied.)

See also Estate of Suggs, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981).

The model answer applied in grading answers on the Real Property Certification exam, therefore, properly and correctly recognized that when the property was taken by Sadie and Jacob Jones **"as Joint Tenants,"** without any express provision for right of survivorship, that which was **created was** a tenancy in common.

Thus, in the instant matter, appellant not only **"missed"** in his answer to Essay Question No. 1 that conveyance **"as Joint Tenants"** represented a contrary intent to creation of an estate by the entireties, he also **"missed"** that the presence of such a contrary intent would preclude the estate by the entireties; **"missed"** that the use of the **"as Joint Tenants"** language without expression of right of survivorship would create a tenancy in common under Florida law; and **"missed"** a number of deeds and other steps which would be required for his examination **"client"** to obtain marketable and insurable title.

Moreover, appellant has previously noted that he **"missed"** or **"omitted"** seven separate issues included in the model answer (Appendix, Tab 1, pp. 15-18). Appellant's after-the-fact argument that the answers were outside the scope of the question as he

construed it does not carry weight where the broad inquiry extended
to:

All of Mr. Jones' children agree that the apartment should be sold. They have located a buyer who is willing to purchase the property for \$150,000, which is its approximate fair market value.

You have been retained to represent the buyer, Shirley Black. It is your responsibility to make sure that Mrs. Black obtains a marketable and insurable title. From whom will conveyances be required? Please discuss fully. In addition, please discuss the title issues which arise in the facts described and explain the ways of resolving them.

Appendix, Tab 1, **p.** 10.

It is, therefore, respectfully submitted that even if substantive law must be examined at this ultimate point of review, and even if scores on individual exam answers must **be** reviewed for indicia of arbitrariness, appellant has failed to show any error or **"unfairness"** in the grading below. He has failed to demonstrate any arbitrary **or** capricious action in the grading of his answer to Essay Question No. 1, or in the denial of certification.

POINT II

THERE WERE NOT "MULTIPLE CORRECT" ANSWERS TO ESSAY QUESTION NO. 1, AND APPELLANT HAS NOT BEEN ARBITRARILY OR UNFAIRLY DENIED CREDIT FOR THE ANSWER GIVEN,

Appellee BLSE first respectfully submits **that** there were not, **and could not be, "multiple correct"** answers to Essay Question No. 1. The title, when conveyed to "**Sadie** Jones and Jacob Jones, as Joint Tenants," **could** not be both a tenancy by the entirety and a tenancy in common. The types of ownership **are** mutually exclusive.

For the reasons set forth in preceding Point I, appellee BLSE respectfully submits that the estate created **was** a tenancy in common, **as set forth in the model** answer. However, **assuming arguendo**, that tenancy by the entirety was a possible or arguable created estate, this would not establish that the **"3"** score awarded for appellant's answer was arbitrary and capricious.

Appellant's answer was that a tenancy by the entirety **was** created. He **did not** answer or recognize that the conveyance to the Jones expressly **"as Joint Tenants"** could be interpreted as an expression of intent contrary to creation of a tenancy by the entirety. He did not answer or recognize that since this **"possible"** holding existed, leading to the possible establishment of a tenancy in common, the securing of marketable **and insurable** title would require appropriate action to remove title claims of Sadie Jones' three heirs.

If appellant had recognized by his answer (as he does in this point of argument) that this creation of tenancy in common was even

a possibility, his score would likely have been higher. Had he also included in his answer the steps necessary to address this possibility, his score undoubtedly would have been higher. He did not and that omission, together with the omission of seven other issues recognized in the model answer, is sufficient to establish that the awarded score of "3" was not arbitrary, capricious or unfair.

Appellant also argues that the grading process is flawed, stating at page 9 of Appellant's Initial Brief:

The Bar's grading review processes are flawed in that they ask only whether an **examinee's** answer matches the Bar's model answer. The process precludes any challenge to the validity of the model answer itself and thus makes possible the absurd situation confronting Appellant,

This argument is clearly erroneous and without basis. One of the clear functions of the Grade Review Panel as part of the grading review process is to consider such a **"substantive"** disagreement with prior scoring under the model answer. Policy **2.08(f)(2)** expressly authorizes an applicant, such as appellant, to submit to the Grade Review Panel **"any** additional supporting authority deemed appropriate to substantiate the claim of incorrect grading." Policy **2.08(f)(4)** expressly commands that the Grade Review Panel shall **"review** the substantive basis for each petition **filed."**

In the instant matter the appellant was afforded not one but two Grade Review Panel reviews of his answer as to Essay Question

No. 1. After the second review, the decision of the Grade Review Panel expressly recited that:

The Grade Review Panel specifically reconsidered Examinee # 344 's answer to essay question number 1 along with the material attached to the March 19, 1997 Appeals Committee's Order.

Appendix, Tab 8, pp. 2-3.

Thus, it is clear that appellant's supplementary materials and substantive arguments were given the requisite consideration in the grading review process. The process was not restricted to whether appellant's answer matched the model answer. Appellant was allowed to challenge the correctness of the model answer as part of the grading review process.

Finally, it must be pointed out that appellant repeatedly refers to the materials included in his appendix at Tab 10 as being **"endorsed by BLSE."** Again, this is simply not so.

The materials at appendix, tab 10, reflect on their face that the review course at issue was a presentation of the Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section.

The review course was neither presented nor **"endorsed"** by either BLSE **or** the Real Estate Certification Committee. Indeed, all promotions of such review course include a specific disclaimer as follows:

These courses will not necessarily prepare you for the Real Estate Certification Examination or the Wills, Trusts & Estate Certification Examination. *The individuals involved in the preparation of the Certification Examinations have not contributed to the programs.* The

Real Estate Certification exam will be in Orlando on May 14, 1996. The Wills, Trusts & Estates Certification exam will be in Orlando on May 13, 1996. Any questions regarding the exam may be directed to Ms. Ellen Day at (904) 561-5600, ext. 6791.

In the instant matter it appears that the review course materials were correct in recognizing that an expression of contrary intent in the deed would preclude creation of an estate by the entireties (Appendix, Tab 10). It is noted, however, that such courses are not "endorsed," or participated in, by appellee BLSE or the attorneys involved in the certification examination process.

POINTS III AND IV

THE CERTIFICATION PROCEDURES AND STANDARDS ARE NEITHER SECRET NOR EXCESSIVELY DISCRETIONARY, AND THE PROCESS OF GRADE REVIEW BY INDEPENDENT GRADE REVIEW PANELS IS APPROPRIATE AND FAIR.

In answer to appellant's Points III and IV, appellee first notes that these proceedings began as, and are a continuation of, a grade review appeal.

Appellant has argued that the certification examination process, and methodology applied, is "shrouded in secrecy." This is simply not so.

The certification, and examination, system has evolved since inception with regular review and input from attorneys, committees and other Bar groups. There has been developed and established for use in the program a **"Board Certification Examinations Technical Manual."** Appellee will not herein burden the Court with the entire manual and extensive appendix, but includes in **appellee's** appendix to this answer brief a copy of the Table of Contents of same.

This Technical Manual is not a confidential document. It is available to any member of The Florida Bar upon request. The Technical Manual has, as its primary purpose, use in the training, guidance and conduct of the certification examination process of persons directly involved in that process. It is, therefore, not widely published (as, for example, in the September issue of *The Florida Bar Journal*), but it is available upon request.

To the undersigned's best knowledge, appellant has never requested the Technical Manual, Given the nature of the proceedings, this is not particularly surprising.

At the first level of review, the Grade Review Panel, the focus of review is whether the score or grade assigned to his answer was correct, and appellant's substantive contentions and supporting materials that it was not. The Technical Manual would have little bearing on such substantive contentions, and it was not presented to the Grade Review Panel as part of appellant's **"case."**

In subsequent proceedings before the Certification Plan Appeals Committee the instruction of Policy 4.07 is that:

No evidence shall be presented on appeal that was not presented to the BLSE or RP [i.e., Grade Review Panel].

(Bracketed information added.)

This is not an unreasonable rule. The system should not, and does not, contemplate that in every grade review appeal the disappointed applicant can compel the BLSE or the Bar to come forward and affirmatively justify or prove the reasonableness of all phases or steps of the certification examination process.

This Court, in approving the certification system, has delegated many such **"quasi-legislative"** system development functions to the Board of Governors, to BLSE, and to area certification committees. There is no showing whatsoever that these various committees and bodies have not properly performed their respective functions, both generally and with respect to appellant Williams. Indeed, in 1996, the entire certification system was, again, reviewed by the Program Evaluation Committee of the Board of Governors of The Florida Bar which issued its evaluation report stating in pertinent part:

The Program Evaluation Committee met with Dr. Sue Legg, Director of Instruction Resources at the University of Florida and consultant to the Board of Legal Specialization and Education. Dr. Legg was hired by the BLSE to help provide consistency and continuity within the certification program. Since being hired by the BLSE, Dr. Legg has assisted the certification committees in producing a technical manual on certification examinations. The manual is a blueprint to ensure consistency in testing, and establishes specifications for skills to be tested, test content, format and scoring procedures. The certification testing procedures appear to be fair, but should be closely monitored on an ongoing basis. Also the current certification standards appear to be adequate.

Appellee's Appendix.

Appellant has cited several prior decisions of this Court regarding the certification program. Appellee notes that it was this Court which determined and directed that certification be predicated upon written examination, The Florida Bar Re Amendment to the Bvlaws Under the Integration Rule (Kloridaic ' ' ation Plan), 407 so. 2d 22 (Fla. 1986), and this Court which, by applicable rule, directs that certification applicants must pass such an examination. R. Regulating Fla. Bar 6-9.3(e).

Appellant has also argued that the Grade Review Panel function is fatally flawed because the panel members do not review answers of all applicants, only those of the petitioner. In this contention appellant overlooks that, at this stage of review, the focus of review is a petitioner's substantive contentions regarding the quality and grading of his answer. In the instant matter the Grade Review Panel did not need to read all answers of others to evaluate the merits of appellant's substantive contentions and

supporting materials, and conclude after such review where the answer fell on the 1-6 grading scale. The Grade Review Panel found that the answer was properly graded as a "3" as to Essay Question No. 1, and as to Essay Question No. 6 increased the awarded grade to a "4." No error or arbitrariness is shown as to either grade determination.

APPENDIX TO
ANSWER BRIEF OF APPELLEE
BOARD OF LEGAL SPECIALIZATION & EDUCATION

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**THE FLORIDA BAR
BOARD CERTIFICATION EXAMINATIONS**

TECHNICAL MANUAL

**The Florida Bar
Board of Legal Specialization and Education**

April 1996

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**AN EVALUATION OF THE
BOARD OF LEGAL SPECIALIZATION AND EDUCATION**

I

Board of Governors
Program Evaluation Committee
(1995-1996)

James Ball Fenson, chair
Charles A. Francis, Vice Chair
Jack P. Brancion
S. Sammy Cacciatore, Jr.
Michele Kane Cummings
Lawrence Glenn Matthews, Jr.
Manuel R. Morales, Jr.
William S. Spencer
Michael P. Stafford

Staff Assistance

Dale Ann **DeHart**, Director of Research, Planning and Evaluation
Dawna G. Bicknell, Director of Legal Specialization and Education

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Discussion

The **purpose** of this recommendation is to ensure that the **Committee's** leadership is fully knowledgeable about the Committee's responsibilities.

7. Applicants for certification should not be approved for certification on a **tie** vote of **CPAC members**.

Discussion

At present, applicants are approved for certification if there is a tie vote among CPAC members. This should not be the case. A **tie** vote indicates that 50 percent of the **CPAC** members do not endorse this individual's application. A stronger endorsement from CPAC members should be required. It is the responsibility of the applicant to prove that the BLSE erred **in** its decision; there is a presumption **of** correctness on the part of the BLSE.

8. The certification **testing** procedure⁸ should be **closely** monitored on an **ongoing basis**.

Discussion

The Program Evaluation Committee met with Dr. Sue **Legg**, Director of Instruction Resources **at** the University of Florida and consultant to the Board of Legal Specialization and Education. Dr. Legg was hired by the BLSE to help provide consistency and continuity within the certification program. Since being hired by the ELSE, Dr. Legg ha& assisted the certification committees in producing a technical manual on certification examinations. The manual is a blueprint to ensure consistency in testing, and establishes specification⁸ for skills to be tested, test content, format and scoring procedures.

The certification testing procedures appear to be fair, but should be closely monitored on an ongoing basis, Also the current certification standards appear to be adequate.

Test Standardization Project
Florida Bar Board of Legal Certification and Education
Sue M. Legg, Ph.D.
January 1996

The goals of the Standardization Project are:

- to clarify the purpose of the examination so that it corresponds with and extends the definition of certification;
- to define the content covered by the examination so that it fairly represents the specialization;
- to format the examination so that it represents the skills defined in the test purpose statement, and
- to score the examination reliably.

To implement these goals, each committee has developed test specifications that indicate how the committee plans to implement these goals. The draft specifications are sent to a representative group of attorneys in the field for review. Any necessary modifications are made, and the specifications then become the basis for examination development and scoring. Modifications to the specifications are made periodically. If these modifications are substantial, the specifications are subjected to additional peer review. A brief summary of the specifications follows.

Purpose of the Examination. Using models of test purpose from the American Bar Association and the California Bar Association, the committees identified those skills and abilities that represent a lawyer with at least five successful years of practice in the certification area. Representative skills and abilities included: issue spotting, knowledge and application of the law, and legal analysis. The configuration of skills and abilities was modified by each committee to fit the practice in the area of certification.

Content Definition. Within each certification area, content priorities are set for the examinations. These priorities are established to provide guidance for the development of each examination. In this way, the examinations represent the field of practice rather than the subspecialties of committee members.

Examination Format. Test format involves the number and types of questions examinees are to answer. The examination is determined by the skills listed in the test purpose, the breadth of content to be covered, and the need for reliable scoring. Legal analysis skills may best be measured by essay questions whereas application of the law may be more effectively measured by multiple choice questions. If the content in the certification area is relatively homogeneous, then several essay questions may provide adequate content coverage. In more diverse areas, a combination of required and optional essays may more fairly represent the field. In either case, a combination of essay and multiple

choice questions will do the best job of wide content coverage and accurate skill measurement.

Reliable Scoring. There is generally a tension between adequate content representation and reliable scoring. Examinees can respond to approximately four essay questions and 50-60 multiple choice questions in the examination period. Each essay requires between 5-8 minutes each to score. Since each essay is read twice, a single examination may take at least one hour to complete. In order to provide for stability in the scoring process, centralized scoring sessions are conducted. The eight committee members complete the scoring over one weekend. Thus, it is possible to score approximately 5 essays for 100 examinees. For this reason alone, it is advisable to limit the number of essays assigned. Logistical issues, however, are only one of the factors in reliable scoring. The standardization project has implemented several others:

Committee Based Scoring. Committees are urged to develop and score their own examinations. While outside participation by other experts is encouraged, the basic responsibility for consistency in the application of standards lies with the certification committee members.

Holistic Essay Scoring. Essays are scored holistically i.e. by general impression of the qualities of each essay as represented by a scoring rubric. The scoring rubric provides definitions for a six point scale developed by members of the American Bar Association. Holistic scoring identifies response patterns typical for each scale point. Readers select these typical essays, called range finders, from the pool of essays and use them as standards for the reading. Range finders for an essay in a content area can be used to calibrate other essays in the same area that are written in subsequent years. Adherence to the standards represented by the range finders will help to stabilize the scoring process.

Statistical Analysis of Multiple Choice Questions. Each multiple choice test is subjected to an item analysis provided by Florida State University's examination service. The results of the item analysis are provided to the committee for their consideration in evaluating the quality of the questions.

These procedures have been documented in a technical manual that includes the results from the test administrations.