SUPREME COURT OF FLORIDA

JOHN O. WILLIAMS,
Appellant

v.

THE FLORIDA BAR,
BOARD OF GOVERNORS,
Appellee

CASE NO. 92,038

APPELLANT'S REPLY BRIEF

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I. BECAUSE QUESTION #1 INVOLVES AN UNSETTLED ISSUE OF LAW, IT DOES NOT MATTER WHETHER THE MODEL ANSWER IS DEFENSIBLE; IF APPELLANT'S ANSWER IS LEGALLY VALID, IT SHOULD RECEIVE CREDIT.

The Florida Bar's approach to Appellant's grade challenge has been to defend their model answer rather than consider the merits of Appellant's answer. This approach is flawed, however, because the legal issue in question #1 has not been conclusively determined in Florida. Appellant does not seek to prove the model answer is wrong. Appellant has simply maintained that if his answer is supported by legal authority, then it is arbitrary action and a violation of due process to deny him credit. Since the issue is unresolved, both answers deserve dignity to the extent that there is authority in support of them. A grader should not pick one answer to the exclusion of the other, particularly when the excluded answer has at least as much authority to support it as the model answer. Appellant has sought a review of the merits of his answer, and until the Bar's brief filed with this court, has had no indication from the Bar as to what they thought was wrong with his answer. Appellant finds their critique flawed. Appellant does **not** seek to have this court resolve an issue of real estate law. Appellant simply asks whether, given that there is no definite controlling authority, his answer is not also a valid, plausible approach among various possible interpretations.

Appellant agrees with the Appellee that "The primary or initial issued 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 (who were and remained husband and wife) when the conveyance was to, and title taken, as follows: "Sadie and Jacob Jones, as Joint Tenants." (Applee.'s Brf. at 22.) Both parties agree that when husband and wife take title to real property in both names, a tenancy by the entireties is established unless contrary intent is shown in the deed. The issue with regard to the correctness of Appellant's answer is whether using the words "as joint tenants" in the deed establishes contrary intent.

What type of intent is contrary to the creation of a tenancy by the entireties? First let us consider what a tenancy by the entireties is: an estate consisting of the four unities required for a joint tenancy with right of survivorship, plus an additional unity of marriage; in short, it is a joint tenancy with right of survivorship plus marriage. AmSouth Bank of Florida v. Hepner, 647 So.2d 907 (Fla. 1st DCA 1994). The issue thus becomes whether granting title to a married couple "as joint tenants" is somehow contrary to such a notion. Although this court has not definitively passed on this question, it is entirely reasonable and defensible to conclude that the grant was consistent with, rather than contrary to, a tenancy by the entireties.

"Tenancy in common" and "joint tenancy with right of survivorship" are very precise terms of art. The ambiguous phrase "as joint tenants" does not create a joint tenancy with right of survivorship. Nor does it clearly indicate an intent to create a title held as tenants in common without a right of survivorship. The phrase does not clearly indicate any intent other than a generic description completely consistent with the purpose and policy underlying an estate by the entireties. The rule creates a

presumption in favor of a tenancy by the entireties that must be overcome. The policy behind the presumption is the protection of one spouse from the impecuniary acts of the other spouse. Dixon v. Davis, 155 So.2d 189 (Fla. 2d DCA 1963).

Appellee asserts that the conveyance shows an intention to create a tenancy in common between the husband and wife. The Bar's interpretation could create a situation where one spouse unintentionally disinherits the other from up to one-half of the property because such an interpretation rules out right of survivorship. The legislature recognized that spouses have a different relationship than others who own joint property. The legislature thus carved out tenancies by the entireties as an exception to the statutory presumption regarding survivorship and joint property. Section 689.15, Florida Statutes. The Bar's interpretation would also place one spouse at risk of judgments against the other spouse. This rather separate state of affairs strikes Appellant as inconsistent with a grant to a husband and wife "as joint tenants."

The authority relied upon by the Appellee in fact supports the Appellant's position. Appellee cites Dixon v. Davis for the premise that Florida adheres to the common law principle that husband and wife are legally one person. Id. One of the primary reasons for this principle is to protect one spouse from the impecunious acts of the other. Appellant sees nothing in the grant language that is contrary to these notions.

Appellee's reliance on section 689.15, Florida Statutes, is similarly misplaced. That statute creates a general rule against a right of survivorship in all conveyances

to two or more. However, the statute also carves out an exception for tenancies by the entireties. The statute dovetails with the policy and presumption creating tenancy by the entireties discussed above. Section 689.15 does not help to interpret whether a conveyance creates a tenancy by the entireties, however. One must make that determination before one can apply this section.

It is true that Appellant did not answer all the issues on question #1 correctly. He must, however, have answered a substantial portion of the important issues since he was a given a score of three (3) even after "missing" the central, initial issue. If you decide that his position on the central issue of the question is meritorious (and by implication the issues which naturally flow therefrom), then Appellant should have received a score reflecting competence (a score of four (4)) or clear competence (a score of five (5)).

II. APPELLANT'S ANSWER TO QUESTION #6 PROVED THE MODEL ANSWER WRONG, AND CHANGING HIS SCORE ONLY ONE POINT IS ILLOGICAL AND CAPRICIOUS.

Unlike question #1, the law governing question #6 is well settled by no less than a U.S. Supreme Court opinion. Consequently, only one answer is possible.[1]

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[1] At issue was the impact of a homeowner's bankruptcy on a creditor's attempt to levy and execute on property claimed as exempt homestead during the bankruptcy proceeding. The model answer stated that the bankruptcy did not protect the homeowner because the property claimed as homestead was greater than the half-acre limitation on homestead. Appellant cites a Supreme Court case addressing this issue that comes to the opposite conclusion. The homeowner's bankruptcy did indeed protect him because the creditor failed to properly object to the claimed exemption and thus the entire property was protected. Taylor v. Freeland and Kronz, 503 U.S. 639 (1992).

This issue is a crucial "fork in the road" of question #6. When Appellant rightfully concludes that the bankruptcy protects the homeowner, other issues flowing

Since Appellant's answer to question #6 was mutually exclusive of the model answer, and since Appellant's answer is supported by a U.S. Supreme Court opinion, the only possible conclusion is that the model answer is simply **wrong**. This reveals an enormous problem with question #6 that is not limited to one applicant's exam.

The initial grading assigns a score according to whether the answer demonstrates "competence," "some competence," "clear competence," etc. When Appellant is in the position of correcting the drafter of the model answer, i.e., the ideal answer, Appellant's answer is most definitely more competent than any model answer that fails to include the U.S. Supreme Court case on point. The Bar's action in raising Appellant's score by one (1) holistic point is nonsensical.

In order for the Grade Review Panel to be able to increase the score the proper amount, it needed to know who else answered the question correctly, because the grading is done not on an empirical standard, but rather on a comparative standard using rangefinders (which are sample answers providing examples of various score levels). Since the model answer was proved wrong, it follows that the rangefinders must also be wrong.

The appropriate, albeit inconvenient and uncomfortable, response to discovery that there is Supreme Court authority contrary to the model answer, would be: 1) to regrade all of the applicants' answers to question #6; 2) re-calculate all applicants' total scores, substituting the new #6 grade for the old; and 3) using whatever secret

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from the opposite conclusion of the model answer become moot.

formula applies,[2] re-determine the passing score.[3] This process is mathematically necessary because the exam is graded on a curve. Appellant's results therefore depend on his ranking relative to other applicants, and this is the only way to extract valid results from that particular administration of the exam.

The Bar made a mistake. It was a big mistake. It now refuses to take appropriate remedial action and compounds its shameful behavior by attempting to cause Appellant to bear the burden of the Bar's mistake. Petitioner has made it plain that the Bar was barking up the wrong tree on question #6. Rather than changing trees, the Bar decided just to bark a little louder. Raising Appellant's score one (1) point is precisely that illogical; there is no basis for the extent of the change, which is the definition of capriciousness.

III. THE BAR'S APPELLATE PROCEDURE VIOLATES DUE PROCESS FOR TWO REASONS:

A. IT REFUSES TO GRANT CREDIT FOR CORRECT ANSWERS, WHICH IS ARBITRARY AND FUNDAMENTALLY UNFAIR

Despite the Bar's lengthy policies and appeal process, its appellate procedure is fundamentally flawed. No amount of focus on the **existence** of policies will cause meaningless and flawed reviews to satisfy the requirements of due process: if an answer is correct and the Bar refuses to grant credit for it, that refusal constitutes the

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[2] We refer to "secret formula" because Appellant still does not know how passing grades are determined, despite several requests for such information, both verbally and in writing, at various stages of this process.

[3] Appellant does not address the rights of other applicants whose scores might be affected by such re-grading, nor must such issue be decided to rule on this case.

very essence of arbitrary and capricious conduct. None of Appellee's protestations refute this.

The correctness of Appellant's answer is intrinsically linked to the demonstration of arbitrary action. This appeal does not "swallow the whole." (Applee.'s Brf. at 18.) In fact, Appellant has difficulty conceiving the arbitrary and capricious claim that would arise **without** some connection to an applicant's grade. An applicant who, for example, would claim that they were arbitrarily denied certification on the basis of race or gender would also have to show that they had passed the exam to establish arbitrary action. While Appellee's theory attempts to create a tidy dichotomy between substantive appeals and arbitrary and capricious appeals, the theory quickly becomes unworkable in practice.

B. THE BAR EITHER OPERATES IN SECRECY AND WITHOUT STANDARDS GENERALLY, OR ARBITRARILY WITHHELD MATERIAL INFORMATION IN THIS PARTICULAR CASE; EITHER IS REPUGNANT TO THE REQUIREMENTS AND CONCERNS OF THIS COURT.

Appellant has several times requested, both verbally and in writing, information from the Bar about the grading process and other exam-related issues. (Applt.'s Appendix to Initial Brief, #7 (8-8-97 letter to Jack Harkness); Applt.'s Appendix to Initial Brf., #3 (11-27-96 letter to Jack Harkness).) Appellant has requested information on the range of scores. The Bar has not responded meaningfully to any of his requests. The first mention of the Bar's technical manual in this process appeared in its brief filed with this court on February 9, 1998, approximately 18

months after Appellant first requested such information. The Bar's silence prevents challenges to flawed policies and creates the opportunity for abuses to go unchecked. These are not necessarily mere theoretical concerns in this case.

How is the passing score determined? Is it a function of the highest score received? Why will the Bar not release the formula for determining the passing score? Why will the Bar not inform applicants of the highest score? What if an applicant were denied certification because there was a simple math error in determining the passing score? Current procedures and practices do not allow applicants to protect themselves against such an unfortunate and unfair event. Worse, what if the committees were arbitrarily determining the passing grade by reviewing test results and making their determination based on a desire to keep their membership small and exclusive, even at the expense of denying otherwise qualified applicants their certification? This possibility exists today, in this very case, because the Bar refuses to disclose procedures and information. This court has repeatedly expressed its abhorrence of such a situation, whether it actually or occurs or the mere possibility of it occurring exists.

What is the standard of review at each level of the appellate process? What is the issue before the reviewing committees: must the petitioner establish that the model answer is wrong? Can the petitioner establish that his answer is right? Is the only issue whether petitioner's answer matches the model answer? What if there is no method afforded to challenge the merit of a model answer, and the drafter (they are human after all) made a mistake? The mistake would likely be perpetuated through

the various review levels. The test results would be invalid and the Bar would potentially certify unqualified lawyers and unfairly deny this valuable asset to competent, deserving lawyers.

The Bar states that model answers go to the Grade Review Panel with a presumption of correctness. Applt.'s Appendix to Initial Brf., #4 at 7. How strong is that presumption? What is the basis for that presumption? What is the process for creating model answers? What steps are taken to insure their validity? Since the committee members volunteer their time, what if they have a law clerk draft the question and answer? Might any resulting deficiencies also be awarded this presumption at all levels of review?

How are rangefinders created and used? As holistic grading is dependent upon clusters within a population, is it appropriate to utilize this method when only approximately 30 examinees constitute the population?

Finally, even if the Bar's technical manual provides some or all of the above information, the Bar's failure in this particular case to provide the manual to Appellant after his numerous requests is a violation of due process, because he did not have the benefit of such information while going through the appellate process. He was prejudiced because he did not have the opportunity to evaluate his case or craft his arguments with the benefit of important and relevant information that could have affected the outcome of this case. As another example, did the Appellant have the

right to present witnesses at any stage of the proceeding? Appellant has consulted with several experts, including board certified real estate attorneys, who have reviewed his answers and agreed with his positions.

CONCLUSION

Appellant has satisfied all practice and experience requirements for board certification as a real estate specialist and has written an exam showing the requisite level of competency. There is no danger of harm to the public in allowing Appellant to hold himself out as a board-certified real estate lawyer. The Bar has engaged in arbitrary and capricious conduct and violated Appellant's right to due process. This court should not remand for further proceedings but should order the Bar to certify Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was served by U.S. Mail on Thomas Ervin, Attorney for the Florida Bar, Ervin, Varn, Jacobs & Ervin, P.O. Drawer 1170, Tallahassee, FL 32302 and on Dawna Bicknell, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399 on this 2 day of March, 1998.

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