

BarEssays.com Model Answer
February 2015 – Question 2 (Real Property)

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred?

Joint Tenancy

A joint tenancy exists when two or more individuals own property with the right of survivorship (upon the death of a joint tenant, the interest terminates and automatically goes to the surviving joint tenants). A joint tenancy requires four unities for creation: (1) unity of possession (equal right to possess or use property), (2) unity of interest (each interest equal to others), (3) unity of time (at same time), (4) unity of title (in same instrument).

Here, Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. As “joint tenants, with right of survivorship,” each automatically got the interests of the other upon deaths if the parties’ actions prior to the deaths did not change the joint tenancy.

Thus, Amy and Bob were joint tenants with right of survivorship.

Severance of Joint Tenancy

Although an interest in a joint tenancy cannot be devised, joint tenants can convey all or part of their individual interests during their lifetimes (inter vivos) to a third party, severing the joint tenancy. Once the joint tenancy interest is transferred inter vivos, the right of survivorship to that interest is destroyed and converted to a tenancy in common.

Here, without Bob’s knowledge, Amy gifted her interest in Blackacre to Cathy by deed. Provided Amy properly conveyed her interest inter vivos, the right of survivorship was destroyed and ownership of Blackacre was converted to a tenancy in common.

Thus, the joint tenancy was severed.

Tenancy in Common

Any tenancy with two or more grantees creates a tenancy in common when each co-tenant has an undivided interest with unrestricted rights to possess the whole property (unity of possession), without a right of survivorship. Each tenant can devise or transfer his/her interest to anyone.

Here, when the joint tenancy with right of survivorship severed, Cathy and Bob became co-tenants in a tenancy in common. Each had one-half undivided interest in Blackacre with unrestricted rights to possess the whole. Each could devise or transfer their interests to anyone.

Thus, Bob and Cathy owned Blackacre as co-tenants in a tenancy in common.

Quitclaim Deed

The grantee in a quitclaim deed receives the title the grantor possesses.

Here, Amy and Bob sold all their interest in Blackacre by a quitclaim deed to David. Since Amy gifted her interest in Blackacre to Cathy, Amy deeded no interest to David. Since the joint tenancy severed, Bob deeded David a one-half co-tenant interest in a tenancy in common with Cathy.

Thus, David had a one-half co-tenant interest in a tenancy in common with Cathy.

Recording Acts

Recording acts provide a mechanism to assess priority of interests in real property. Three step approach to assess rights under recording acts: (1) What is the statute? (2) Is the party protected? (3) Apply the statute.

Statute

There are three types of recording acts: (1) race, (2) notice, and (3) race-notice. A race-notice statute requires a subsequent party to take an interest without notice of prior interests, and record first.

Here, Blackacre was located in a jurisdiction with a race-notice recording statute.

Thus, the statute was race-notice.

Party Protected

A party protected under a recording act has priority over other claimants in real property.

David

Here, since Amy and Bob sold their interests in Blackacre to David, the recording act could protect David because he was a subsequent purchaser for value.

Thus, David could be a protected party.

Cathy

Here, since Amy gifted her interest to Cathy, the recording act did not protect Cathy because she was a donee beneficiary.

Thus, Cathy was not a protected party.

Apply Statute

To assess whether David had notice and the first to record, look at the race and notice.

Race

Here, David recorded before Cathy recorded.

Thus, David was the first to record.

Notice

Notice can be actual, inquiry, or constructive.

Actual

Actual notice requires personal knowledge of a conveyance or deed.

Here, David did not know Amy gifted her interest to Cathy.

Thus, David had no actual notice.

Inquiry

Inquiry notice exists if a reasonable investigation discloses prior claims, or the appearance of real property is such that a claimant should inquire about the title.

Here, a reasonable investigation did not disclose Cathy's interest because Amy and Bob, not Cathy, sold their interest in Blackacre to David.

Thus, David had no inquiry notice.

Constructive

Constructive (record) notice exists if a deed or prior conveyances are properly recorded.

Here, David was the first to record so he had no constructive notice of Cathy's interest.

Thus, David had no constructive notice.

In conclusion, David was a purchaser of value without notice. David had priority of interest in Blackacre over Cathy.

Tenancy for Years

A tenancy for years is a leasehold estate measured by a fixed and ascertainable amount of time.

Here, David entered into a valid 15-year lease of Blackacre with Ellen. This created a tenancy for years, automatically terminating at the conclusion of 15 years.

Thus, there was a tenancy for years between Ellen and David.

Assignment

Absent any language to the contrary, a lease can be freely assigned. An assignment is a complete transfer of a tenant's remaining lease term.

Here, five years after entering into the lease with David, Ellen transferred all of her remaining interest in Blackacre, 10 years, to Fred.

Thus, the transfer was an assignment. Fred had a 10-year lease with David. Ellen had no interest in Blackacre.

2. Is David likely to prevail in his suit against Ellen and Fred?

Covenant

A covenant is a non-possessory interest or promise obligating the holder to either (1) do something (burden to run) or (2) refrain from doing something (benefit to run) relating to land.

Here, the lease between David and Ellen had two covenants: "(1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage." David sued Ellen and Fred for damages for breach of the covenant regarding hazard insurance for Blackacre. To prevail, David needed to assert the burden of the covenant ran to Fred, and the benefit ran to David.

Burden to Run

For the burden of the covenant to run, there must be (1) a writing that satisfies the Statute of Frauds, (2) intentions by covenanting parties that the successor in interest be bound (3) horizontal and vertical privity between the original parties, (4) actual (told covenant exists) or constructive (recorded in chain of title) notice of the covenant to the subsequent purchaser, (5) touch and concern of the burdened land by the covenant.

Writing

For a covenant to be enforceable, it must comply with the Statute of Frauds.

Here, David entered into a valid 15-year lease of Blackacre with Ellen so the lease was in writing.

Thus, there was a writing satisfying the Statute of Frauds.

Intent

The parties must intend for the rights and duties to run with the land.

Here, the lease specifically stated Ellen agreed to the two covenants on behalf of herself, her assigns, and successors in interest. The lease between Ellen and David was for 15 years. The lease on its face evidenced an intent that the burden run.

Thus, there was intent that Ellen and successors, like Fred, be bound by the two covenants.

Horizontal and Vertical Privity Between the Original Parties

Horizontal Privity

The parties must have privity of estate at the time the covenant is imposed (estate and covenant contained in the same instrument, such as in a deed or a lease) for the burden to run.

Here, David was the landlord of Blackacre, and Ellen was a tenant. The interest between David and Ellen in Blackacre was contained in the same lease as Ellen's agreement to the two covenants.

Thus, there was horizontal privity.

Vertical Privity

The successor to property can be held to the covenant (burden runs) only if title to the entire servient estate can be traced back to the promisor. The successor to the property can enforce a covenant (benefit runs) as long as the property interest possessed by the successor is at least some portion of the property interest held by the promisee.

Here, Ellen assigned the lease to Fred.

Thus, there was vertical privity.

Notice

Under the recording acts, a subsequent purchaser without notice of a burdening covenant is not bound by it in equity. Notice must be constructive (recorded in chain of title) or actual (told covenant exists).

Here, Ellen recorded the lease. Fred had constructive notice.

Thus, there was notice.

Touch and Concern

The covenant must touch and concern the land, which means the benefit or burden must affect both the promisee and promisor as owners of land, and not merely as individuals.

Here, the two covenants dealt with obtaining hazard insurance for Blackacre, and using any payments for damages for repair. The covenants touched and concerned the land because the insurance protected Blackacre, and reduced the use and enjoyment of the property for Ellen and Fred by requiring them to pay for insurance and use insurance payments for repair.

Thus, the covenant touched and concerned land.

Assignment – Original Tenant Rights and Liabilities

Absent a novation, the original tenant in an assignment remains in privity of contract with the landlord, and is liable for the rent and all covenants in the lease for the lease duration.

Here, Ellen, the original tenant, remained in privity of contract with David, the landlord, for all covenants in the lease for the remaining 10 years after her assignment to Fred because there was no novation. Ellen did not obtain hazard insurance for Blackacre.

Thus, since Ellen was liable for the two covenants, David would prevail against Ellen.

Assignment

Assignee tenants are in privity of estate with the landlord and liable to the landlord for rent and other covenants in the lease that run with the lease.

Here, Fred did not obtain hazard insurance covering Blackacre. While Fred was in possession of Blackacre, a building on the property was destroyed by fire due to a lightning strike. Fred was in privity of estate with David, and liable to David for not complying with the lease covenants.

Thus, since Fred was liable to David for the two covenants, David would prevail against Fred.