

## PROPERTY EXAM SELF-REVIEW

You've finished your first semester in law school. You're mystified by your grades, and want to do better next semester. The last thing you want to do is review last year's exams. So don't. Wait. Wait until you're ready to think about the spring. Then ask the question: what explains your performance and how can you do better? In the process, don't worry about the rule against perpetuities. It won't be on the final. Instead, ask how, for the issues you see, you can get more credit.

In looking at the two essay questions, the first used a classic bar technique: it contained issues that either you say or you didn't. Therefore, I recommend focusing on Question B. This had issues that most students spotted. What I did, if I wrote on your exam, was to number different issues contained in the same paragraph. In general, if you recognize that the issues are distinct, and develop each one separately, you get more credit for each issue. What does it mean to "develop" an issue? Generally, it means IRAC. At the very least, identifying some legal framework for analysis and considering a counterargument to the argument you think will win.

So for your own self-review: Look at the issues I identified. Then, go over your answer, circling each portion of the answer that corresponds to an issue. If you did not address an issue, that tells you a lot. If you did address the issue, ask 1) is it clear where one issue ended and another began? 2) Did you identify a counterargument? 3) Did you reach a conclusion and explain the basis for that conclusion? 4) Did you identify alternative lines of argument?

I will have appointments available to discuss the exam, but I expect students who want to discuss their exams to have conducted the self review before the appt.

### QUESTION A

The *first* question is what interest Arlene has, and the answer is that Ted's will arguably creates two interests. The first created by the words "so long as smoking is not permitted on the premises" would appear to be a fee simple determinable, with a possibility of reverter to the grantor. Since the grantor in this case is dead, the possibility of reverter would pass through his estate, and in the absence of a residuary clause in the will, pass to his heirs. In this case, the heirs would be Arlene and Bob, who would hold the property as tenants-in-common.

The second clause, however, states that "if Arlene ever permits cigarettes to be sold on the premises in violation of the first provision, immediately to my son Bob and heirs." This provision would appear to create a condition subsequent and an executory interest in Bob. The condition in this clause, which refers to sale, is different from the condition in the first clause, and it ordinarily would stand independently of the first clause.

There is some ambiguity here about how the two clauses relate to each other, however. The second clause indicates that the grantor sees the reference to the sale of cigarettes as a violation of the first clause, suggesting that the two clauses were intended to be read together. In addition, the grantor intended that in the event of sale, the property is to go to Bob "immediately" suggesting a possibility of reverter.

The construction would then depend on the assumptions about outside facts. The technical construction of the will on its face would create a fee simple determinable with a possibility of reverter in the grantor AND a fee simple subject to Bob's executory limitation. That might be overridden by extrinsic evidence of a different intent on the part of the grantor. To get full credit, however, it was essential to explore all of the different possibilities.

The Rule Against Perpetuities was not an issue since it would not apply to the first clause so long as it was interpreted as a fee simple determinable with a possibility of reverter in the grantor, and the second clause refers to Arlene's actions, which make Arlene a measuring life validating the interest.

The *second* question is when the condition was violated. The first clause might be triggered whenever smoking first occurred on the premises. That might include smoking in the apartments, or in the coffee shop. Could private smoking in the apartments, which may or may not have been apparent to anyone, trigger an automatic reversion in the property's title? Arlene may not be aware of the smoking and not have "permitted it." In addition, smoking outside of the coffee shop may or may not be on the premises. When the bistro opens, however, with smoking and non-smoking sessions, Arlene could be expected to be aware of the smoking, and to have done nothing to stop it. Is this "permitting" smoking, however, within the meaning of the clause? Arlene could have inserted a no smoking clause in the lease. If she did not, however, she could not object after the fact. Would the failure to anticipate the issue be permission? Quite possibly not.

If the clauses were read to require sale, however, sale would clearly have begun with the addition of the cigarette machine in the bistro. Again, Arlene may or may not have "permitted" it initially. When she took over the bar after the bistro's departure, though, Arlene clearly participated in the continuation of the smoking on the premises. Accordingly, at some point, however, the deed is interpreted; it is likely to have been violated.

The *third* issue is what happens when the condition is violated. If the smoking on the premises triggers a reversion to the grantor before the sale of cigarette occurs, then the ownership changes automatically to a tenancy in common held by Arlene and Bob jointly.

Conversely, if the condition is violated only after sale begins, Bob would have a right of entry.

If the reversion occurred first as a result of smoking on the premises, there is an additional (*fourth*) issue of whether Arlene and Bob's co-tenancy is subject to Bob's executory interest. Bob's executory limitation clearly cuts short Arlene's interest. But if Arlene's interest has already ended, is there anything to which Bob's interest can apply? Only a few people raised this issue and I gave credit to anyone who did.

A possible *fifth* issue is whether the building would revert as a whole or only the parts on which smoking or the sale of cigarettes occurred. Again, relatively few raised the issue, and here the answer is likely to be that the property reverts, if at all, as a whole.

The *sixth* issue would then address what happens after reversion. If Arlene and Bob hold title as tenants-in-common and Arlene alone is in possession, can Arlene claim adverse possession against Bob. Probably not. Co-tenants have equal rights of possession of the whole, and Arlene's interest is not necessarily adverse to Bob's,

especially since it is unlikely that either of them is aware of Bob's interest, Bob has not been "ousted" or in any way denied access, and it is unlikely that Arlene is actively claiming the property to the exclusion of Bob. It was possible to argue, however, that Arlene's acts of permitting the smoking to continue constituted an active claim of ownership in spite of the deed, but this is probably not enough to constitute adverse possession of Bob's co-tenancy.

More promising is the *seventh* issue, Bob's rights as a co-tenant. Bob could get:

- a) half of any rent Arlene collected;
- b) partition. The building could be divided but sale is more likely with Arlene getting credit for mortgage payments, taxes, repairs and renovations that enhanced market value;
- c) Bob could not get a share of the market value for the portion of the property Arlene occupied, but he might get an offset as part of the distribution at sale;
- d) Bob could insist on possession of some portion of the premises once he finds out, triggering an ouster if Arlene refuses and a claim to half of the fair market rental until the matter is resolved.

The *eighth* issue would arise if the property reverted to Bob alone. I thought it less likely that Bob could get the property on his own without exercising a right of entry, but if he did, then Arlene could claim adverse possession if the property reverted more than five years ago. The issues would be:

- a) actual possession. She is clearly in possession of the whole, but is her possession under color of title? Her initial entry onto the property was pursuant to the deed, but since it would be the deed provision that triggered the switch in title to Bob, it would be hard to argue that her *adverse* possession was under color of title. For determination of the boundaries of possession, though, it shouldn't make any difference since this was a building with clearly marked boundaries.
- b) Open and notorious. Her possession is open and notorious; violation of the various smoking provisions may not be. Jx are split on whether a true owner is held to notice of the existence of a boundary line (Manillo) or the taking of a painting (O'Keefe) and the same issue would arise here. Bob knows Arlene is in possession; he doesn't realize either that smoking is occurring or that there has been a reversion. In a jx that doesn't assume knowledge, he might nonetheless be expected to inquire once the bistro with smoking and no-smoking sections opens.
- c) Exclusive. The building clearly has tenants and is open to the public for business, but this is pursuant to Arlene's express permission so it shouldn't be an issue.
- d) Continuous. The only possible argument here is that smoking on the premises is not continuous, but once the reversion occurs, it is only Arlene's possession and not violation of the condition that needs to be continuous.
- e) Hostile and Adverse: the irony here is that Arlene's violation of the condition may be said to be in defiance of the limitations on title, and therefore arguably enough to meet the hostile trespasser, but not the good faith test. If she were unaware of the condition or violation of the condition, though, she might be acting in good faith. I gave credit for articulation of the three standards, pros and

cons of adoption in a new jx, and application to the facts, with the emphasis on the application.

The *seventh* issue would occur if Bob had an executory interest triggered only after the sale of cigarettes on the premises. Bob would need to exercise a right of entry. If his right to do so arose with the opening of the bistro, then Arlene could argue laches or estoppel. Both require inaction on Bob's part, and Arlene's reliance on Bob's inaction to her detriment. I gave credit for discussion of the following:

- a) Some jx assume detriment following a period equal to the statute of limitations;
- b) The issue of whether Bob was aware or should have been aware of the violations arises again. In addition, it is hard for Arlene to claim that she relied on Bob's inaction if neither were aware of the violation, or if Arlene realized that Bob didn't know about the violation or its import;
- c) Arlene's renovations largely occurred before either the smoking or the cigarette sales occurred on the premises and therefore cannot be said to have occurred in reliance on Bob's inaction. [For the same reason, Arlene's initial renovations to the warehouse are unlikely to constitute improvements for the purposes of adverse possession since they occurred before the smoking might have triggered a reversion.]

### Question B

Although the facts begin with the terms of the lease, it is easier to start with the question, what type of tenancy?

1. Carla, C, initially had a two year lease, which she renewed several times. When the last two year lease expired in 2006, C paid the next month's rent without any discussion or understanding with the LL. Carla was therefore a holdover tenant.

A. The LL could elect either to treat C as a trespasser and evict, or to accept the rent and hold her to a new term. A accepted the rent. It is therefore probably too late to evict as a holdover.

B. At common law, the new term would be the same as the old term, viz. 2 years. Modern jxs limit creation of a new lease or holdover tenancy to one year in the absence of a writing. In addition, jx are split and the modern trend is to create a month-to-month tenancy, in the absence of an express agreement, in the holdover context. Here, there is no suggestion of an offer or counter-offer, so the result is likely to depend on the jurisdiction. [Note: the LL can elect to evict the tenant or hold her to a new term. The question of whether the new term is one year or month-to-month is not a matter of the LL's election. If the LL accepts the tenant's continued presence as creation of a new tenancy, the term is whatever term is supplied by law. The LL can change that, e.g., to month-to-month, only with the tenant's consent. Many students confused the LL's election to treat the tenant as a holdover to a right to choose the new term.]

C. If Carla can be held to a new one-year term as a holdover tenant, then Dara takes whatever interest she conveys to him. (See below).

D. If Carla has a month-to-month tenancy, then at the point where Dara starts paying rent to the LL, Dara may become a tenant in his own right. It depends on whether

C has to give notice, and whether D's assumption of the rent payments constitutes notice. The notice is notice of D's assumption of responsibility for the payments, presumably with the end of C's month-to-month agreements.

2. On what grounds can A evict D?

A. If D or C has a month-to-month tenancy, A can give thirty days notice and evict for any reason or no reason.

B. The only possible defense to termination of the month-to-month lease is retaliatory eviction. If A has terminated the lease because of D's complaints about the loft, and the complaints are valid, D can claim retaliatory eviction. That generally requires that D have complained either to A or to the authorities within a time period close to the eviction. It's not clear whether that has happened.

C. D can also complain that the eviction is motivated by discrimination on the basis of religion or national origin. A would have the following defenses:

- 1) The 1968 Act does not apply to buildings with four or fewer units where the LL resides in one of the units, something true here. Does the presence of an additional commercial unit affect that conclusion.? Not on the basis of anything we studied, but it was worth raising.
- 2) The 1866 Act appears to apply only to race, but it has been interpreted to include discrimination on the basis of national origin and would therefore apply.
- 3) The LL can respond that she has good reasons, including non-payment of rent, loud music in the apartment, violation of the clause against assignments, and D's lack of stable employment to refuse to accept him as a tenant.

3. A can attempt to evict for violation of the prohibition against assignments.

A. D can respond that the provision only applies to assignments and will not apply to subleases.

B. LL will respond that this is an assignment because C transferred her entire interest with no intention of returning. D can respond convincingly that since C continued paying the rent, while collecting directly from D, that she insulated D from any relationship with the LL and therefore this is a sublease, which does not violate the clause.

C. Even if it did violate the clause, the LL most likely waived any ability to object once she accepted a check from Dara. LL can reply that she did not know C had transferred to D, but she had objected previously, she should be aware that D is not the tenant and have a duty to inquire.

D. If the clause has been violated, and the violation not waived, is it a violation of a dependent covenant and therefore grounds to evict? It might be, but one where waiver will be strictly construed.

E. To reject C's proposed subtenant, does LL need good cause? No. 1) Virtually no jx require good cause in residential leases and only a minority follows Kendall in the commercial context. 2. If the LL needed to establish good cause, she probably can do so on the basis of D's unstable employment

history. 3. Once the LL rejected D, C's surreptitious assignment might be grounds for eviction even if the LL otherwise had good cause.

- F. Even if the original lease required the LL's consent, the holdover lease, which may be month-to-month, does not necessarily contain the same terms. Moreover, if the LL entered into a new lease with D by virtue of accepting his rent checks after C's lease changed from a two year term to month-to-month, then the clause on assignments may not apply to D.

4. Eviction for non-payment of rent. Possible defenses:

A. Violation of CQE

- 1) A allows change from coffee shop to bistro to bar, knows that the bar is intended to permit smoking, and takes it over. She has some responsibility for the change in conditions.
- 2) A knows that C inquired about the bistro's hours before entering into the lease that began when the bistro moved in.
- 3) D's failure to move out, however, undercuts any claim of constructive eviction.
- 4) Whether or not the noise or smoking could justify termination of the lease is an open question; I accepted any good argument.

B. IWH

- 1) Is smoke heavy enough to violate housing codes or constitute safety violation?
- 2) Is the noise loud enough to interfere with D's use and enjoyment?
- 3) Is LL aware of D's complaints and has LL had enough time to repair?
- 4) Do LL's earlier representations about closing times bind subsequent tenants (most likely not), and is LL responsible for the later actions?

5. Can LL evict D for playing loud music in the flat?

- 1) Depends on terms of the lease. (The case for eviction would be strengthened if the lease contains clauses that prohibit interference with other tenants use and enjoyment, and the LL expressly retains the ability to evict for violations of the clause. Otherwise, the LL may not have the power to evict on such grounds.)
- 2) Depends whether the music bothers other tenants.  
If D plays loud music at the same time as the bar does, can other tenants or LL complain about D's actions and not the bar's?