

MONTEREY COLLEGE OF LAW

REAL PROPERTY

Final Examination

Spring 2017

Prof. Justin O'Connell

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

Professor's Answer not available .

REAL PROPERTY
Professor Justin O'Connell
Final Exam 2017

Question 1

In 2008, Olga purchased 40 adjacent parcels of land. The parcels were undeveloped and zoned for single-family dwellings. Located near Olga's property was a large chicken farm owned by Acme Chicken. The sounds of clucking chickens could be heard faintly throughout the night on Olga's parcels.

In 2012, Acme Chicken intensified its operations, and began processing chickens into food products onsite. Over the following year, new structures were built within sight of Olga's parcels, and an unpleasant odor constantly drifted over Olga's land. Acme Chicken could have reduced the smell, but the cost of doing so would have greatly reduce its profit.

In 2013, Olga began construction of homes on each of her parcels.

In 2015, to save money on disposal costs, the Acme Chicken began legally burning chicken by-products on its property, with a permit. A faint smoke was visible at all times drifting over Olga's parcels, and the unpleasant odor continued to permeate the air.

In 2016, Olga completed construction of 40 homes on her parcels, with the intent to sell the parcels. David bought all 40 homes and parcels from Olga, but at a deeply discounted price because of the chicken noises, smell and smoke from the Acme Chicken farm.

Discuss David's possible rights and remedies against Acme, and any defenses Acme might have.

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Question 2

In 2010, Abel, Charles and David purchased Blackacre, acquiring title as joint tenants, and all three began residing on Blackacre. Able paid 80% of the purchase price, Charles paid 20% of the purchase price, and David paid nothing towards the purchase.

Later in 2010, Able borrowed \$10,000 from David, and Able executed a valid will that would give Able's share of Blackacre to David, if Able had not repaid the loan at the time of Able's death.

In 2012, Able told Charles and David to leave Blackacre, and to not come back unless they wanted litigation. Charles and David left, and stopped contributing any funds to the maintenance or taxes for Blackacre. Soon afterwards, David deeded his interest in Blackacre to himself as a tenant in common.

In 2014, Able spent \$4,000 to install a small vineyard on Blackacre, and began leasing Blackacre to a third party. Charles and David did not contribute to the installation of the vineyard, and Able did not share any of the rental income with Charles and David.

In 2017, Able died. At the time of his death, Able/Abel had not repaid David any of the borrowed funds.

What claims could Charles and David make regarding a partition of Blackacre?

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Question 3

Adam owned Blackacre and Whiteacre, which were adjacent parcels of real property. Adam lived in a home on Blackacre, and his unpaved driveway crossed over a small portion of Whiteacre to access Central Road. Although Blackacre was also adjacent to Central Road, Adam never accessed Central Road directly from Blackacre because it would cost \$10,000 to construct a second driveway to Central Road.

In 2005, Adam sold Whiteacre to David. David never inspected Whiteacre before purchasing it. Prior to David's purchase, Adam and David did not discuss whether Adam would keep using the driveway across Whiteacre. After the purchase, Adam kept using the driveway across Whiteacre on a daily basis.

In 2007, David had Whiteacre surveyed, at which time he learned that the driveway from Adam's house on Blackacre went across a small portion of Whiteacre. David immediately placed a fence across the driveway, which prevented Adam from using the driveway. That fence has been in place ever since.

When Adam discovered the fence that blocked the driveway, Adam began driving around the fence on a daily basis, crossing over a different portion of Whiteacre. David immediately began putting trashcans on this new driveway to block Adam's use, but Adam moved the trash cans each time David put them in the way.

In 2010, David saw Adam moving the trash cans, and angrily yelled "Enjoy your new driveway, jerk" at Adam. Thereafter, David stopped putting trash cans across the new driveway.

Adam has continued to use the new driveway on a daily basis since 2007, but has not used the original driveway since 2007.

Discuss the rights of Adam and David regarding the use of each driveway.

1)

David

Nuisance

A nuisance is a non-trespassory, substantial and unreasonable interference in another persons use or enjoyment of there land.

Non-trespassory

Non-trespassory means that there is not a physical invasion of your property.

If David's goal is to bring a nuisances claim he will argue that the noise is non-trespassory because it is auditory and does not create a physical invasion, the smell is non-trespassory because will it create a sensory invasion it does not physically invade the land, and the smoke is non-trespassory because while it drifts over the land it does not physically invade it.

Now if David wants to bring a trespass claim because his nuisances claim will likely fail he can argue that the smoke is physically invading his property. Not only are the particles on his land it is also a visible invasion.

Substantial/Unreasonable Interference

David bought 40 homes from Olga. This 40 homes will have to be sold or rented out as it is unreasonable to believe that David would keep all of them for personal use. The faint clucking from the chickens that can be heard at night may keep people up at night.

However, the facts do indicate that the clucking is faint and nothing in the facts show that the clucking noise substantially increased with intensification of operations. If the noise did greatly increase this would lower the property value as people do not want to purchase a

home where they will be kept up late at night. However, if the noise is still faint then this is not likely to be substantial or unreasonable as the chicken farm was present first. If the noise is faint it will only deter sensitive renters or home purchases but will not substantially or unreasonably interfere with David's ability to sell/rent the homes at fair market value.

Regarding the unpleasant odors that permeate the air this is likely to lower the property value. David will argue that it will be substantial because people don't want to smell and awful odors like chicken poop on a regular basis. David will argue that the smell will permeate the homes. If it does not permeate the homes, his future homeowners/renters would not want to open windows or use their backyards. This would substantially decrease the value and volume of people willing to live in such conditions. It will also unreasonably interfere with David's use and enjoyment of the portions of the property that are outdoors. He will not be able to use the attraction of a big yard to entice renters/purchasers if it smells also he will not be able to use that prospect to raise the property value. He will also not be able to reasonably add things like swimming pools which may add property value if he knows that no one will want to be outside. He also will have substantial interference with the number of people who want to visit him and his land. The smell may unreasonably interfere with his use of the land as a social gathering.

Regarding the smoke this will substantially lower the property value because it may be unsafe. Smoke as a result of feces could cause people to get sick if they are outside with the smoke or if the smoke permeates the homes. For example if David or any of his potential renters/buyers have asthma they would be deterred from purchase of the house or from entering into a rental agreement. This would unreasonably interfere with David's right to sell/rent his property if all potential candidates are deterred by potential health issues. Additionally, it is likely that the smoke may burn someone's eyes. This would mean that David could not enjoy the outdoor parts of his property without physical side effects. This is a very substantial interference with David's rights as a property owner.

Burden v. Benefit

When judging a nuisance case the court looks at what the benefit of nuisance is vs what burden of the nuisance.

Benefits

The Acme Chicken is a company which probably employees a lot of local people. Especially since they intensified production. It produces eggs to be sold in the community helping the economy. It processes chickens into food to be purchased from stores and restaurants. It gives the chickens a place to live.

Burden

It creates an unpleasant smell, smoke, and noise which can be heard near the property. The noise is noted to be minimal but the odor is unpleasant and constant. The smoke is also constant. The burden created is that David will not be able to sell/rent the 40 homes that he purchased from Olga. If that is the case he will be out whatever he paid for the homes and parcels. He also cannot tear them down and build something new as the area is zoned for single family dwellings.

Remedies

No Injunction

If no injunction was granted David would have to sell/rent the homes as is with the nuisances. This will reduce the property value. However, David did receive the property at a deeply discounted rate as a result of the nuisance. As a result, it is possible that he may turn a profit even without an injunction. No injunction will be good for Acme as they will be allowed to continue without interference and loss of profit.

Injunction

David may ask that Acme be ordered to move to another location, take steps to reduce smells, or stop on-site burning of chicken by products.

If Acme is ordered to move to another location this would cost the company substantial money and give David an unfair windfall as he purchased the land at a discounted price because of the nuisances created by Acme. If Acme is ordered to take the steps to reduce the smells the cost would greatly reduce the profit margin. This might lead to layoffs and ultimately the shutting down of the company because its profits are not high enough. This would create an unfair burden on Acme. Acme started burning by-products onsite to save money. Prior to that they had a long time where they would send it out. It would probably be fair to order Acme to stop the burning of by-products as they didn't in the past and the company was able to keep operations going. Also by doing this, this would reduce the smell and the smoke helping with David's property value without substantially burdening Acme.

Injunction and damages

The court may order that damages be provided for a certain amount of time followed by one of the injunctive reliefs above. This would not be fair or equitable as David did come to the nuisance and it would produce a windfall for him.

Special relief

David or Acme may pay for one of the other to leave. If Acme is able to get David's property re-zoned they may be willing to buy the property in order to expand the business.

Acme

Defense

Coming to the nuisance

David came to the nuisance when he purchased the 40 homes and parcels from Olga. By that time Acme has already increased production and started burning chicken by-products.

As a result all the nuisances that David may complain about i.e. the noises (there from the very beginning in 2008), the smell (started in 2012 when production increased, also compounded in 2015 when they started burning feces), and the smoke (started in 2015 when they began to burn feces) were already present when he made the purchase in 2016. In fact, David was able to purchase the homes and parcels at deeply discounted price because of the above. It would be an unfair windfall to allow David any sort of relief when he already received a property at a cheap value because of the nuisance. If the court were to order any sort of remedy David would unfairly benefit. This benefit would be unfair to both Olga and Acme.

Conclusion

David came to the nuisance and received a discount for such. In an essence he has already received proper damages as a result of the discounted price. The court should not afford David any remedies.

END OF EXAM

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Question 2

Joint Tenancy

Joint Tenancy (JT) occurs where there are 2 or more co-owners of property with rights of survivorship. JT requires that 4 unities be present and met: Time, Instrument/title, Identical interests, and right to possess the whole. JT is not transferable or divisible.

Here, Abel (A), Charles (C), and David (D) entered into a JT in 2010. Although they each entered into the co-ownership with different investment amounts, they each took rights to 100% of the whole as a joint tenant because of the right of survivorship. A JT avoids probate, as when one JT leaves their rights are simply evaporated and there is not affect to the rights to the others. Because JT avoids probate, it was a difficult instrument to create at common law.

Tenancy in Common

Tenancy in Common (TC) occurs where there are 2 or more co-owners who have undivided interest in property, hold individual parts, and do not have right of survivorship. At TC is divisible, transferable, and alienable.

Loan

D will argue that in 2010, when A borrowed money from him and executed a valid will that would give A's share of Blackacre to D that A severed the JT as to himself. D will argue that the relationship shifted to a JT between C and D who were in a TC with A at that point in 2010. C will assert that although A executed a valid will leaving his share of Blackacre (B) to D in 2010, since a JT is not transferable the will may have been valid, but the transfer of shares in B was not. C will assert that the JT remained in effect. For the 2010 transaction

between A and D, it is likely that A did not effectively transfer his interest in B to D at that time, and the JT remained in effect until the 2012 deed to self by D, creating a JT between A and C who were then in a TC with D.

Ouster (Argument for Both C and D)

Ouster is wrongful exclusion of one or more co-owners of property. Ouster occurs where a co-owner asserts complete ownership over the property, or acts as if the co-ownership relations is non-existent.

D will assert that an ouster occurred in 2012 when A told C and D to leave B and not to come back unless they wanted litigation. Here, D acted as if he was in complete control of B, the sole owner, and as if the co-ownership relationship did not exist.

One of the rights of co-owners is the **right to possession** of the whole, regardless of the percentage interest in the property. Both C and D will argue that A ousted them when he acted in this way. They will assert that they no longer felt that they had the right to possess the property and therefore were entitled the benefits of rent and contributions. A's estate will argue that A words alone are not sufficient enough to create an ouster in the this situation. A will argue that he comments occurred in the heat of the moment and that C and D both knew that he didn't mean it. A would evidence this by the fact that D subsequently deeded his JT to himself as a TC in the property, showing that he still believed he had a right to possession. However, C and D would further argue that the fact they they stopped paying anything towards the maintenance or taxes show that they considered themselves ousted.

Considering that there was no lock out, or physical barrier from the property, and only one communication from A to C and D and that D later deeded the property to himself, it is likely that ouster did not occur in this instance.

D Deeds to self

D will further argue that in 2012, when he deeded his interest in Blackacre to himself that he severed the JT as to C and D, creating a TC between A, C, and D.

C will argue that D was unable to deed his interest to himself in 2012. However, since a JT is alienable, it is likely that D was able to deed his interest to himself, effectively severing the JT.

Charles Claims at Partition

Based on the analysis above, C will argue that the JT between A, C, and D, existed until 2012 when D deeded to himself, leading to a JT between A and C who were in a TC with D. He will further assert that when A passed in 2017, that the right of survivorship existed still between A and C, as such A's right extinguished and A became a TC with D due to the prior deeded to self.

Right to Contribution for Improvements

In 2014 when A spend \$4K to install a vineyard, C that is was an improvement that increased the value of the property and that since he was a JT with A at the time, the entitlement to contribution passed to him. He will argue that the vineyard was an improvement which increased the value of the land, and as such he is entitled to a credit in the amount of the enhanced value. D will assert that the improvements enhanced value would have only gone to A, and since A is not in the co-ownership relationship any longer that the enhanced value must be divided pro rata.

David's Claims at Partition

Right to contribution for improvements

Based on the analysis above D will argue that in 2010 the JT was broken and JT remained between C and D where in a TC with A, and then in 2012 the relationship changed to a TC between A, C, and D. He will further assert that when A passed in 2017 A's interest passed to him.

Right to Contribution for Improvements

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Right to Rent from 3rd Parties (argument for C and D)

C will argue that since A leased the property to a 3rd party in 2014, that A had a duty to provide an accounting to C and D and that C and D had a right to their fair share of the rents. A's estate would assert that since C and D were not contributing to any of the maintenance or to the vineyard that they were not in fact entitled to anything. However, as they were still in co-ownership relationships, irregardless of JT or TC, C and D would have been entitled to an accounting and to their fair share of the rents.

Accounting (argument for C and D)

At partition an accounting would be necessary to determine what expenses had been paid by who and what rental income had been collected. The fair shares (depending on JT or TC) would be divided up pro rata and dispersed at partition. A's estate would argue that a JT would not look below the surface of the JT and as such an accounting would not be necessary here, as there would be an even spilt since they each had a right to the whole. However, with the rent to 3rd parties involved an accounting of the rents collected and expenses any be necessary. The accounting would need to account for any **debts (taxes or carrying charges, or liens)** that were unpaid by any of the co-owners and those would

need to be accounted for accordingly, as each co-owner has a duty to pay their fair share of those debts.

Partition (argument for C and D)

Co-owners have a right to partition, where the co-ownership relationship is severed. Partition can be in kind, where the court physically divides up the property, or by forced sale, where the court orders the property sold and the proceeds are divided up according to the fair share.

Partition in kind (argument for C and D)

Here, since this is physical property, the court may consider a partition in kind. Since all three parties were living on the property at one point, there may be a house, or there may be multiple houses, or maybe even they were 'roughing it' living in tents and it is undeveloped land. If there were an equitable way to divided up the land the court would prefer a partition in kind, however, if for example, there was only one home on the property, or a portion of the terrain on the property were unusable and did not have sufficient value, the court may not find an equitable way to divide the property and would need to consider a partition by forced sale.

Partition by forced sale (argument for C and D)

Where the court cannot partition in kind, they can order the property sold and divide the fair share amongst the co-tenants. Here, if the property has difficulty being divided up in kind, the court will likely force a sale.

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END OF EXAM

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Question 3

Easement

An easement is a interest in land which grants the right of use to another. Easements must be in writing to satisfy the statute of frauds (unless there is an exception), or created by operation of law. Each easement will have a creation, a scope, and if applicable, may be terminated.

Easements can be created by an express easement or by operation of law for implied by prior use or necessity, they can also be created by prescription. Profits also can create rights to use another's land as can a license, which may ripen into an estoppel.

Implied by Prior use

Creation

Operation of law creates an implied easement by prior use when there is a piece of property the has a common owner at the time of sale, with visible prior use, and inquiry notice.

Here, Adam owned both Blackacre (B) and Whiteacre (W), parcels that were adjacent to each other. Arguable this was common ownership of property that was divided at the time that Adam sold W to David (D). Although Adam (A) had access off of his property he elected to use the more convenient way to access Central Road because access from B would have cost him \$10K for another driveway.

In 2005, A sold W to D. A did not discuss with D the unpaved driveway that crossed over a small portion of W. Although D never inspected W before purchasing it, the driveway was visible and D should have been in **inquiry notice** that it existed (as a prudent buyer would have inspected the property).

After the sale A continued to use the driveway on a daily basis. After D surveyed the property and learned of the driveway he erected a fence, attempting to terminate use of the driveway.

Although A and D did not discuss the driveway and did not negotiate use of an easement, here, by operation of law, the court would be able to impose an implied easement since the use was visible and D should have been on inquiry notice. Although D would argue that this term was not discussed, he would likely be held to the standard of what a reasonably prudent buyer would have seen had he inspected the property.

Additionally, D may argue that an implied easement never existed because although the two pieces of property were both owned by A, they were individual and had already been divided, that is why they were W and B. He will argue that the common owner was as to one undivided portion of land.

Scope

The scope of the easement would be that of the prior use. The unpaved driveway which crossed over a small portion of W would be what was created in the implied easement and would be what A would be permitted to use. And other use may lead to termination of the easement.

Termination

Easements can be terminated by stated terms if there was an express easement, release, estoppel, abandonment, misuse/overuse, or by prescription.

D will argue that the implied easement was terminated when he erected the fence. However, A would argue that D had no right to erect the fence because he had an implied easement.

He would argue that there was no method available for D to terminate the easement.

However, D would argue that when the fence continued to remain in place and A instead started to drive around the fence that A abandoned the implied easement.

Abandonment

Abandonment occurs where the holder of an easement shows clear intent to no longer use the easement. D will argue that since A stopped driving on the driveway and instead drove around the fence that he abandoned it. However, A will assert that he offer no evidence of intent to abandon, he simply was looking for a short term solution to his problem with the fence. D would assert that since A took no effort to quite title to the driveway that evidence his intent and therefore abandoned the easement. A would likely prevail here because his actions show that he stopped using the easement, but there is no evidence that he intended to abandon it- is he did not intend to spend 10K to build his own driveway. Had he began to construct he own driveway that might have evidenced abandonment.

Easement by Prescription.

An easement by prescription occurs when there is non-exclusive adverse possession of the land that the easement occuppies. Prescription requires that the use be continuous, open and notorious, actual, and hostile.

Continuous

Here, D erected the fence in 2007, after which A began to drive around the fence. The use of the space around the fence was used on a daily basis. Daily use would be considered continuous. Although D may assert that the daily use was only once a day and that the use did not rise to the level of continuous, the daily use coupled with the fact that the easement was the only way off of B, it is likely that the use was continuous.

Open and Notorious

Here, the continuos use caught the attention of D, to the point that D began to put trash can in the path that A was using. A was not trying to be sneaking or drive out of W while D was away, A made it clear that the fence was not going to deter him for exit B through A. A would move the trash cans out of the way each time he used the driveway. D will assert that

the interaction between D and A in 2010, where D yelled at A, "Enjoy your new driveway, jerk" was evidence that the use was open and notorious. However, D will assert that this comment in fact is not helpful to A, but supports D's position that a prescriptive easement did not occur- because D was giving **permission** here.

Actual

Here, the use was actual. A was using W to access Central Rd on a daily basis. He was driving across W, and showed no intention to built a driveway from B to access Central Rd.

Hostile

In order for the prescriptive easement to be created, the use must be hostile. A will argue that the use was hostile. He will argue that D put up a fence to block is access to W. He will argue that once he used a different path that D put out trash can and then yelled at him- evidencing that the D did not want A using W to access Central Rd. D will argue that there may have been hostility, but only between 2007 and 2010, because the statement from 2010 gave A permission, and therefore interrupted the hostility thereby barring the use to rippen into a prescriptive easement (assuming the statute of limitation is greater than 3 years). D will further argue that that fact that he stopped putting out the trash can after that date shows that he was granting permission. However, A will argue that the statement was used as intimidation and not as permission. He will argue that D was just lazy and that is the only reason he didn't put out the cans. A will assert that the easement was already created at this point, as the statute of limitation had run (assuming it was less than 3 years) and A was now entitled to use of the land. In the alternative, A will argue that the statement was used as intimidation and not as permission.

Scope

The scope of the prescriptive easement will be that of the actual use. The scope will be limited to the space that crossed W and that went around the fence.

Termination

A easement may be terminated at some future date for the termination reasons stated above. Likely if A misused or overused the easement it could be terminated. However, if D had given permission, the easement may have become a license (which would be revokable as long as it didn't ripen into an easement by estoppel).

License

License would be verbal permission, or an express easement that is not written and does not satisfy the statute of frauds. Here, if D prevailed in his argument that he granted permission to A in 2010 with his statement about enjoying the new driveway, then he may have created a license, which could be revocable as long it wasn't detrimentally relied on- thereby created estoppel.

Necessity

Although there is a common owner, and the facts state that it would have been expensive for A to put a driveway on B, B was not landlocked and a necessity analysis is not necessary.

Express

Given that there is not easement in writing, which would satisfy the statute of frauds, and express easement analysis is not necessary.

Estoppel

Given hat there are no facts indicating detrimental reliance, and estoppel analysis in not necessary.

Running with the land

If in the future, A sold B, there may be arguments made about whether or not the easements here run with the land or not.

Dominant/Servient

Here, B would be the dominant and W would be the servient, as B is using W's land to access Central Rd.

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END OF EXAM