

REAL PROPERTY  
Professor Kathleen J. McCarthy  
Kern County College of Law  
Midterm, Fall 2021

Instructions:

There are three (3) questions in this examination. You will be given three (3) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

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Question 1

Oscar owns Blackacre in fee simple absolute.

Oscar's will provides: "I hereby leave Blackacre to Alice for life, and upon the death of Alice, to Brad for life, and upon the death of Brad, to Alice's grandchildren."

Brad is Alice's only child. Brad has two children, Xena and Yurie.

When Oscar dies, Alice is 75 years old, Brad is 55 years old, Xena is 21 years old, and Yurie is 18 years old.

The state where Blackacre is located follows the common law.

1. Describe the estates held by Oscar, Alice, Brad, Xena, and Yurie, and why.
2. Does any part of Oscar's devise violate the Rule Against Perpetuities? Explain.
3. If Oscar's devise violates the Rule Against Perpetuities, what language in the devise could have saved the devise?

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Question 2

Greenacre is a tract of 100 acres owned by Obe in fee simple. There is a house on Greenacre, which sits inside a fenced area of five acres.

Obe executes a Deed conveying Greenacre to Ann in fee simple and puts the Deed in a drawer in his desk without telling Ann anything about the Deed or his gift of Greenacre to her. Subsequently, Obe dies, and Ann discovers the deed in Obe's desk.

Ann moves to Greenacre and takes up residence in the house. Ann maintains the house and the five-acre fenced area but does nothing with the rest of Greenacre. Ann does not record the Deed from Obe that she had discovered but instead keeps the Deed in the same desk drawer in the house where Obe had left it.

Ann was not aware of the provisions of Obe's will which stated: "I leave all of my real and personal property to Blake." Blake on the other hand knows he inherited from Obe under the will. Blake lives in another state and does not seek to occupy or otherwise make use of Greenacre. Blake does not grant permission to anyone to enter or to use Greenacre.

Ann resides in the house for ten years, then she also died. During the ten years Ann lived in the house on Greenacre, Blake was incarcerated for four years.

Ann's will provided: "I leave all of my interest in any real property to Clair."

Immediately after Ann's death, Clair moves into the house on Greenacre and lived there for another six years before Blake discovered Clair was living in the house on Greenacre and filed a lawsuit against Clair.

The statute of limitations for ejectment is fifteen years. Assume further that this jurisdiction has a four-year disability statute for purposes of tolling the applicable statute of limitations.

In the litigation between Blake and Clair what issues will arise and what is the possible outcome.

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Question 3

Tom rents Greenacre, a farm with a house plus fields and barns and storage facilities, for a term of 5 years for \$24,000/yr, payable on the first of every month at \$2,000/month. Larry is Tom's landlord and also owns and farms on a property upstream from Greenacre. Tom tells Larry that he intends to live in the house on Greenacre and work the Greenacre farm as his primary business.

The main source of water for Greenacre property is from a stream through the property and a shallow well, which produced crystal clear water, but only enough for use in the farmhouse. Tom and Larry talked about the need for access to the stream water to farm on Greenacre and the fact that there are long established upstream farming operations which already use some of the water from the stream, including the farm Larry owns and operates, but nothing regarding this topic was included in the rental agreement.

Tom moves into the farmhouse and uses the well water for his household needs. He also begins to farm Greenacre using water diverted from the stream. Three years into the lease, the drought conditions worsen such that water can no longer be pulled from the well and the upstream farmers, including Larry, start to take nearly all the stream water. Tom cannot get enough water to continue farming Greenacre.

Tom begins to run late on his monthly payments. For three consecutive months Larry accepts payment of the rent on the 15th, not the 1st of the month. When the next month's rent is not paid on the 1st Larry begins the eviction process by delivering a 3-Day Notice on the 2nd of that month. On the 6th of that month, Larry files an unlawful detainer suit to evict Tom and recover all rent owed, plus costs and attorney's fees.

Tom is properly served with the lawsuit and in defense asserts that Greenacre has the following problems:

- (1) The lack of water has resulted in Tom not being able to farm Greenacre as he had envisioned. He blames part of the problem on the fact that Larry is using the stream water for his own farming operations. He believes he has suffered loss profits of \$25,000;
- (2) The minimal water from the stream is now being used for the household needs in the Farmhouse and it is not as good quality as the water from the well but it is still potable; and,
- (3) The hot-water heater in the Farmhouse repeatedly failed to work and, despite repeated requests from Tom, Larry did not fix it, and Tom fixed it himself costing \$1,500 in materials.

Please discuss the most reasonably likely outcome(s).

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**Question 1**  
**Answer outline**

**1. Estates in land held by each Party**

“Estates in land” may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years. They may be “freeholds,” which give possession under some legal title or right to hold. “Estates in land” may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years.

Seisen means possession of the property which creates responsibility for the feudal services connected to the property. Property must always be seised.

There are present interest estates which refer to estates where one has the right to possession now. And future interest estates where one has the right to possession, if at all, in the future. “a fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.”

A future interest is an estate that does not entitle the owner to possession immediately but possession in the future. It is a present legally protected right to property. It is not an expectancy.

The Life Estate is an “Estate in Land” which has its duration measured by the lives of one or more persons. An estate that is not terminable at any fixed or computable period of time but cannot last longer than the life or lives of one or more persons.

Every life estate is followed by a future interest — either a reversion in the transferor or a remainder in a transferee, or both.

One type of future interest in Transferor is a Reversion. This is a future interest that arises in a grantor whenever the grantor transfers to another a lesser estate than the grantor has and does not at the same time transfer the balance of the estate to a third party. A Reversion arises by operation of law from when the Transferor has not made a complete disposition of his interest. Think of it as the retained interest when less than the whole is given away.

All Reversionary Interests are vested. Because it is a vested interest, a reversionary interest is not subject to the Rule Against Perpetuities.

**Oscar** has Fee Simple Absolute ownership which is the largest estate and he has the right to sell, encumber, give, and devise Blackacre. Gift by Will effective at Oscar's death; mere expectancy before O's death. If devise to Alice's grandchildren violates RAP, Oscar's testamentary estate has Reversion after Brad's Life Estate.

**Alice** has a life estate which is a freehold estate, measured by A's life. Alice's estate is vested with immediate possession because Oscar's transfer is not effective until he dies and Alice is then the immediate possessor. Rule in Shelly's case provides a life estate to A plus a Remainder to A's heirs = FSA to A. Although B, X and Y could be Alice's heirs, since they are her descendants, they are named as parties in the will not as Alice's heirs. Because O's will does not listed the subsequent owners as "the heirs of A" so Shelly's case does not apply.

**Brad** also has a life estate which freehold estate, measured by B's life. Brad has vested remainder for life which is a future possessory interest. Brad's possession is delayed until natural termination of A's life estate.

**Xena & Yurie** have a vested remainder in Fee Simple Absolute subject to open. A vested remainder in fee simple subject to partial divestment (also called subject to open. A vested remainder "subject to open" / "subject to partial divestment" is created when there is a transfer to a class of persons and subject to diminution – i.e., more children or grandchildren born or added. This is a class gift and the class members would take title as tenants in common, undivided interests. A class members' heirs could take this interest since survival not required to take.

## 2. Rule Against Perpetuities:

Rule Against Perpetuities ("RAP") is violated in this case but various doctrines can save the gift.

RAP provides that no interest can vest more than a life in being plus 21 years. RAP limits the period of time between creation of the contingent future interest in a third party and its vesting in interest. It has nothing to do with the timing of the possession of the future interest. RAP is a rule of proof. The person with the future contingent interest must prove beyond a doubt that their interest will vest within the time limitation of RAP.

Problems arise with the RAP when there is a class gift like in this case with the remotely vest gift "to Alice's grandchildren." Although X and Y are class members at the time of O's death there is the possibility that more members may be added to a class at a remote point in the future creates a potential RAP violation.

There was the "all-or-nothing rule" which provided that if a gift to one member of the class might vest too remotely, the whole class gift is void. A class gift is not vested in any member of the class until the interest of all members have vested. For a class gift to be vested under the rule, the class must be closed, and all conditions precedent for each and every member of the class must be satisfied, within the perpetuities period.

A gift that violates RAP is void and stricken from devise. The last estate "to Alice's grandchildren" would be stricken creating a Reversion to O's testamentary estate after B's life estate terminates. The FSA remaining interest would be distributed under "residue clause" of O's will.

However, solutions to the RAP class gift problem have been developed. The rule of convenience or class closing rule may save an otherwise invalid interest by closing a class within the RAP. Under the rule of convenience, a class will close as soon as one member of the class is entitled to immediate possession or enjoyment, even if this means closing the class before it closes naturally, or physiologically — that is, when the possibility of births (or adoptions) ends (i.e., at the death of a class's ancestor). When the class closes prematurely under the Rule of Convenience no person born (conceived) thereafter can share in the gift. The class will close when any class member can demand a distribution or possession—here at B's death. Consequently, all members of the class who will be permitted to share in the remainder will be determined on B's death.

The class of "Alice's grandchildren" could "open" because of the fertile octogenarian rule. Alice could adopt/beget another child, who could then add to the grandchild class more than 21 years after A and B (the "lives in being") die plus 21 years.

### 3. Saving the devises

The will could have been written better such as "to Ace's grandchildren living at Brad's death".

The Perpetuity Reform Movement has developed additional devices to avoid violations of RAP through statutory repairs. Some states passed statutes to remove doctrines like the fertile octogenarian or the unborn widow so as to limit the number of violations of RAP. Other statutes authorizing courts to reform a document in a way that avoids any RAP violation while effectuating the transferor's intent as nearly as possible. There is also the wait-and-see doctrine which provides that rather than invalidating a future interest we wait and see whether a contingent interest actually vests within some permissible vesting period. The focus is on actual rather than possible facts existing at the end of the estate proceeding the future interesting question. The uniform of statutory rule against perpetuities (USRAP) has been enacted in more than 25 jurisdictions (including California) provides a flat 90-year vesting period. It focuses on the fact at the date of termination instead of the date of creation. The Restatement Third's supports a two-generation approach which focuses on the lives of those only two generations away from the testor.



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Question 2  
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**Obe's transfer Ann of Greenacre in Deed:**

A Deed may validly convey real property by inter vivos gift (during one's lifetime) so long as there is: (i) donative intent, (ii) delivery, and (iii) acceptance. The issue as to whether the gift of Greenacre to Ann through the Deed effectuates a transfer centers around the requirement that the Deed needed to be delivered to Ann.

**Delivery:**

There have been three stated reasons for requiring delivery: (1) Handing over the object makes vivid and concrete to the donor the significance of the act performed. By feeling the "wrench of delivery," the donor realizes an irrevocable gift has been made. (2) The act is unequivocal evidence of a gift to the actual witnesses of the transaction. (3) Delivery of the object to the donee gives the donee, after the act, prima facie evidence in favor of the alleged gift.

There are three methods of delivery: Actual, constructive, and symbolic.

**Actual delivery:** If an object can be handed over, it must be. If actual or manual delivery is not practicable because of the size or weight of the object, or its inaccessibility, constructive or symbolic delivery may be permitted.

**Constructive delivery:** Delivery can be accomplished by the handing over a key or some object that will open up access to the subject matter of the gift. A constructive delivery is adequate: (1) when the evidence of donative intent is concrete and undisputed; (2) when there is every indication that the donor intended to make a present transfer of the subject-matter of the gift, and; (3) when the steps taken by the donor to effect such a transfer must have been deemed by the donor as sufficient to pass the donor's interest to the donee.

**Symbolic delivery:** involves the handing over something symbolic of the property given.

The leaving of the deed where Alice would find it could effectuate delivery but there is not enough facts given to be sure. Was the deed left in common area? Was it left somewhere Ann would find it? Did Obe tell Ann to look for a gift where the Deed was found? If Claire's only claim to Greenacre is through this Deed she will have a difficult time proving her case without more evidence of the delivery of the Deed.

**Obe transfer to Blake of real and personal property in Will:**

There is nothing in the question which would lead one to question the capacity of Obe to make a will nor question the lack of formalities of a will. Blake would take Greenacre in Fee Simple Absolute because there is no indication that a lesser estate was intended. Acceptance by Blake of the gift under the will is presumed.

**Ann's Adverse Possession:**

Gaining title by adverse possession results from the operation of the running of the statute of limitations for ejectment, or recovery of real property.

To obtain title by adverse possession there must be (i) an actual entry giving exclusive possession that is (ii) open and notorious, (iii) adverse and under a claim of right ("hostile" or "under a claim of title"), and (iv) continuous throughout the statutory period.

**An Actual Entry Giving Exclusive Possession:**

Ann needed to be in exclusive possession of Greenacre which she was.

**Open And Notorious:**

Ann's possession was open and notorious as to the 5 acres but not as to the remaining portion of Greenacre. Under the claim of right argument only that which is actually possessed and enclosed will pass by adverse possession. However, she may still obtain title to that portion if it is determined that she held the property under color of title.

**Adverse And Under A Claim Of Right ("Hostile" Or "Under A Claim Of Title"):**

A requirement for adverse possession is that the possession be hostile, meaning that the possessor holds the property in a manner inconsistent with the rights of the owner. The requirement that the possession be hostile does not mean the parties must have a dispute as to title during the period of possession, but that the claimant's possession must be adverse to the rights of the record owner. The possessor does not have the true owner's permission to be on the land.

Under the majority rule or the Modern View or Connecticut Rule the possessor's state of mind is irrelevant, and the hostility element is satisfied as long as the possessor intends to be on the property. The majority view is that the adverse possessor need not be aware that the land in question is not his own. The idea is that the hostility requirement should not be used as an invitation to inquire into subjective states of mind.

Under the minority rule, the possessor must act in good faith, meaning that he must believe the land is his, or he must know that he is possessing another's land. The subjective state of mind of the possessor is relevant.

**"Color of title."**

Adverse possession under color of title is based on a written instrument, judgment, or decree which purports to convey real property but is for some reason defective. The good faith of the occupant in relying on a defective instrument is a crucial element to establishing adverse possession based upon color of title.

Color of Title is a claim founded on a written instrument. There is a requirement of good faith belief the property is theirs on the part of the adverse possessor. Gets the entire property covered in the title document.

Ann is occupying the property under color of title based on the Deed from O found in drawer. Therefore, it is possible for her to adversely possession all 100 acres.

### **The Statutory Period**

If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment and title to the property vests in the possessor.

Statutes of limitations also serve a procedural function by reducing the error costs caused by using stale evidence to decide a dispute. The purpose of adverse possession law is simply that of quieting title to property after passage of a significant time.

The Statute did not run during Ann's occupancy of only 10 years but the issue as to whether there was a tolling of the statute is relevant because, if so, even Claire would fail to meet the required possession time. (10 plus 6 minus 4 equals 12. 3 year short of 15 year statute.)

### **Tolling:**

There are 3 Causes of Disability – (1) Not age of majority, (2) Unsound mind, or (3) imprisoned.

Blake suffered from a disability and tolling could occur during his 4 years of incarceration. However, for the disability to be considered for tolling Blake must have been under disability (incarcerated) at Ann's entry onto land. If he was incarcerated in the middle of the 10 years there would be no tolling.

### **Clair's Adverse Possession:**

Two different views as to why adverse possession is allowed. The English view is that "time runs against the true owner from the time when adverse possession began, and so long as adverse possession continues unbroken it makes no difference who continues it". The sleeping policy of adverse possession. The American view is the earning policy of adverse possession. Under this view, the privity requirement made it theoretically more difficult for the successor squatter to gain title by adverse possession.

A transfer from one adverse possessor to another by conveyance or mere delivery of possession is sufficient privity and no new cause of action arises as to the second possessor because he is the successor in interest of the first. Tacking is permitted if successive occupants are in privity, and they are in privity if there is a *voluntary* transfer of either an *estate* or *possession* from one occupant to another. In this case Claire is in privity with Ann because the transfer of possession was simultaneous and through Ann's will.

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**The Lease.**

A lease is a contract containing the promises of the parties. It governs the relationship between landlord and tenant over the term of the lease. Under common law - lease covenants are independent. Default by one party does not excuse the other party from performance. Under modern law lease covenants are dependent.

This lease is a term of years which is an estate that lasts for some fixed period of time or for a period computable by a formula that results in fixing calendar dates for beginning and ending, once the term is created or becomes possessory.

**Duties of the Parties.**

Certain rights and liabilities flow between landlord and tenant from this property relationship. Tenant duties are to repair, refrain from committing waste, and pay rent. Landlord duties are to deliver legal and physical possession, covenant of quiet enjoyment, implied warranty of habitability, and doctrine of retaliatory eviction.

At common law, covenants in a lease were independent of each other, meaning that one party's performance of her promise did not depend on the other party's performance of his. Thus, if one party breached a covenant, the other could recover damages but still had to perform her promises-such as to pay rent-and could not terminate the landlord-tenant relationship. However, modern courts are likely to construe covenants as dependent when the other party's breach relates to a material part of the lease, excusing one party's performance after proper notice and time to cure.

**Statute of Frauds.**

In most states, the Statute of Frauds requires that a lease creating a tenancy for more than one year be memorialized in writing. The Statute of Frauds requires a writing that contains the essential terms of the agreement and is signed by the party to be charged.

The exceptions to the Statute of Frauds are Part Performance and Estoppel. Part Performance allows the specific enforcement of oral agreements when particular acts have been performed by one of the parties to the agreement. Estoppel applies when unconscionable injury would result from denying enforcement of the oral contract after one party has been induced by the other seriously to change his position in reliance on the contract.

In this case there was an implied agreement that Tom would be provided water from the stream so that he could farm. But this implied promise was not in writing, and it will be difficult for Tom to prove the terms of the oral contract. Although it was mentioned that Tom intended to farm the property there is not a clear statement that but for the ability to farm using the stream water Tom would not have entered into the lease and, therefore, estoppel will not compel the enforcement of a possible promise to provide sufficient stream water for farming. The same result will occur with the implied agreement that the crystal-clear well water will always be available.

### **Right to Water.**

The fact that Larry himself is a user of the stream water does not change the result. The prior appropriation doctrine incorporates the principle of "first in time, first in right." First in time is first in right - prior possessors defeat subsequent possessors because first in time is first in right. The appropriation doctrine provides the first to put the water to beneficial use and continues to use the water wins. It applies the rule of capture to water. The rule of capture rewards the possessor who has succeeded in decimating the given fugitive resource. Under Water Law an appropriation is the rough equivalent of having the water within certain control. Under the doctrine of relation back, the date of appropriation relates back to the first act toward diverting water if the appropriator meets the due diligence requirement. The facts of the question provide that Larry and the other upstream farmers were using the water first.

### **Tom's Procedural Defense.**

Tenants must pay rent to landlord as an essential condition of tenancy and rent must be timely unless excused. It can be argued that Larry's acceptance of rent on 15th instead of the 1<sup>st</sup> for 3 months a modified the due date. Therefore the 3-day notice on the 2<sup>nd</sup> was premature. If Court deems 3 Day Notice premature, Tom will win (for now) and he will not be evicted until and unless Larry starts again with the process.

### **Tom's Defenses to Rent Claim**

Under common law the doctrine was caveat lessee: the tenant took the premises "as is," and landlords were under no obligation to warrant their fitness.

### **Constructive Eviction**

If a landlord commits acts or omissions sufficient to actually evict the tenant, the tenant is no longer obligated to pay rent. And likewise, if a landlord commits acts or omissions sufficient to constructively evict the tenant, and the tenant leaves within a reasonable period, the tenant is no longer obligated to pay rent under the lease. There is Constructive Eviction: If

- (a) the condition of the leased premises amounts to a breach of the covenant of quiet enjoyment,
- (b) if the breach is so substantial as to justify the tenant absenting the premises, and
- (c) if the tenant thereafter leaves within a reasonable time, then it was as though the tenant has been evicted (the eviction was "constructive").

Once evicted the tenant is relieved of the obligation to pay rent. Since Tom is still living in the house, he cannot bring this defense and be excused from paying the rent for the house.

Tom also cannot claim constructive eviction of the farm: To establish a claim for constructive eviction, the tenant must prove: (i) The landlord, or persons acting for him, breached a duty to

the tenant (acts of neighbors or strangers will not suffice); (ii) The breach substantially and materially deprived the tenant of her use and enjoyment of the premises (e.g., flooding, absence of heat in winter, loss of elevator service in a warehouse); (iii) The tenant gave the landlord notice and a reasonable time to repair; and (iv) After such reasonable time, the tenant vacated the premises. The lack of water to farm was not caused by Larry but a combination of factors of which Larry's use of the water for his farm is just one. Furthermore, Tom would have to establish a duty on the part of Larry to provide sufficient water and that is not a term written in the lease agreement.

### **Covenant of Quiet Enjoyment.**

"In every lease there is an implied covenant that the T shall have the right of possession, occupancy, and beneficial use of every portion of the leased premises". This covenant, whether express in lease or implied by law, imposes on landlord a duty to provide suitable premises. However, this is not really a defense to an eviction case for failure to pay rent. Rather, Tom has causes of action for damages in contract for his claimed losses \$25,000. He will have difficulties proving his case. First there is no written contract obligating Larry to provide enough water for farming and proving a breach of such an obligation will also be difficult. Tom would have to prove that Larry caused the lack of water.

### **Implied Warranty Of Habitability.**

A landlord has no common law duty to repair or maintain the premises. The duty must be provided for in the lease or required by statute or by the implied warranty of habitability. The implied warranty of habitability applies only to residential leases. Therefore, any lack of repair of the premises regarding the farm portion of the property is not a breach of the warranty of habitability.

In the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This warranty of habitability is implied in tenancies for a specific period or at will. Additionally, the implied warranty of habitability covers all latent and patent defects in the essential facilities of the residence.

"Repair and deduct" remedy of statute authorizing tenant, after giving reasonable notice of "dilapidations" to his landlord, either to (1) quit premises without further liability for rent or (2) repair the dilapidations himself and deduct cost of such repairs, up to one month's rent. Tenant properly raised the defense of breach of warranty of habitability in an unlawful detainer action. Tenant's duty to pay rent is mutually dependent upon landlord's fulfillment of his implied warranty of habitability.

In order to bring a cause of action for breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord "of the deficiency or defect not known to the landlord and [allowed] a reasonable time for its correction."

### **Breach of the Warranty of Habitability by Larry.**

A landlord is not a guarantor of every amenity customarily rendered in the landlord-tenant relationship" and that landlords are not "absolute insurers of services which do not affect habitability." But there is "an unqualified obligation on the landlord to keep the premises habitable"

The implied warranty of habitability does not require that premises be maintained in accord with the reasonable expectations of the tenants. The warranty protects only against conditions that materially affect the health and safety of tenants or that, in the eyes of a reasonable person, deprive tenants of the essential functions a residence is supposed to serve.

Not have any water in the house would be a breach of the warranty however, the reduction of the quality of water from crystal-clear to just still drinkable is not a breach. Water is the type of core requirement of habitability that a landlord must provide and maintain for tenant. But perfect water is not required. The lack of hot water on the other hand is a breach.

### **Damages.**

The foundation of the implied warranty of habitability is in contract and, therefore, standard contract remedies (recession, reformation and damages) are available. Also, perhaps consequential damages for discomfort and annoyance arising from the breach. With a breach of the implied warranty of habitability a tenant can remain in possession, withhold rent and still defend against possession suits initiated by the landlord.

Because the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability. The measure of damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue.

When the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent.

Damages can also be allowed for a tenant's discomfort and annoyance arising from the landlord's breach of the implied warranty of habitability. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages.

Remedy is offset of the \$1,500 repair cost (assuming that is reasonable) against the claim for the \$2,000 rent owed. And possibly allow a judgment for a few more dollars for the fact that Tom fixed the water heater himself and the annoyance for having to deal with it. A Court also has discretion to require Tom to pay the reduced \$500 rent and thereby not evict Tom if Tom pays that amount in X days.

Extra Points: Prevailing party will get attorneys' fees under the lease

Who is prevailing party?

Result is a push

Looking for answer that recognizes that there may not be a prevailing party and therefore no attorney fees award.



1)

**Describe the estates held by Oscar, Brad, Xena and Yurie**

Oscar

Oscar owns **owned** Blackacre in fee simple absolute until his death, but presently has no personal interest. Upon his death his estate and property, including Blackacre pass through probate in accordance with his will.

Alice

Life Estate: A life estate is a lesser estate than fee simple absolute, which grants the holder the right to possess the property for the duration of their lifetime, or to transfer the property in a lesser estate.

Following Oscar's death Alice has a life estate in Blackacre.

Brad

Remainder: A remainder is the interest held by a transferee following the natural termination of a life estate. A remainder is vested if nothing must occur other than the natural termination of the prior estate for the interest holder to take possession.

Upon Oscar's death. Brad has a vested remainder as the only thing that must occur is for the prior estate (Alice's life estate) to terminate naturally.

Xena and Yurie

As we will see below, at common law Xena and Yurie's supposed interest violates the Rule Against Perpetuities (RAP). But, if their interests did not violate RAP they would vested remainder subject to open being that their interest was subject only to the natural termination of the estate preceding their interest, and that at the time the interest was created they were alive (i.e. ascertainable). The interest is subject to open because until both Alice and Brad die, the class could grow.

**Does any part of Oscar's devise violate the rule against perpetuities**

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Rule: An interest in property must vest or forever fail to vest within 21 years of a life in being at the time the interest is created.

The rule against perpetuities, in its common law form, is not concerned with what happens, only what could conceivably happen at the time the interest is created. Here, the rule is violated in two ways:

Alice the fertile Septagenarian

Alice could still have children, who could then have grandchildren well after her death. Alice could have a child tomorrow and die giving birth, that child could produce Alice's grandchildren 50+ years into the future. At the time the interest in the grandchildren is created (Oscar's death) the class of Alice's grandchildren could easily continue to grow for more than 21 years.

Brad the fertile 55 year old

Brad, at the ripe young age of 55 (according to the the Rule Against Perpetuities) could continue producing grandchildren for another 30 or 40 years.

Modern Approach

Modern courts take a more lenient approach to RAP and often one of several modern rules:

"wait and see" approach - The court will wait and see whether the reality of the situation violates RAP before making a determination

Uniform Statutory Rule Against Perpetuities - TheUSRAP provides for a 90 year vesting period beyond which any remaining interests are then destroyed

Cy Pres - The Cy Pres doctrine allows the court to revise the devise to align with the grantor's intent without violating RAP

Conclusion

At common law Both Xena and Yurie's interests violate the rule against perpetuities. However modern courts will likely take a more lenient approach using one of the above methods.

What Language could have saved the devise

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Perpetuities savings clause: A perpetuities savings clause can save a devise which would otherwise violate RAP by adding language which would vest any interest within 21 years of a life in being at the time the interest was created.

Here the devise could be saved by adding a perpetuity savings clause, such as "If this interest does not vest or fail to vest within 21 years of a life in being at the creation of the interest the remainder goes to Xena and Yurie." In this way the full will would provide: "I hereby leave Blackacre to Alice for life, and upon Alice's death, to Brad for life, and upon the death of Brad, to Alice's grandchildren but if this interest fails to vest within 21 years of a life in being at the creation of the interest the remainder goes to Xena and Yurie."

2)

### **Deed**

A deed is a document that passes legal title from the grantor to the grantee. A deed becomes the operative document after the sale of land has closed/completed. There are three types of deeds: Quit Claim Deed, Warranty Deed, Statutory Special Deed.

### **Delivery of Deed**

In order for a deed to be valid it must be delivered and accepted and meet the additional criteria. A deed must define the parties, be in writing, signed, witnessed, describe the land, have an intent (donative), and does not require consideration.

Here, Obe executed the deed with the intent to give Greenacre to Ann. However, before he could advise her of his intentions he passed away and she discovered the executed deed shortly after his death.

Obe's deed does not provide sufficient details regarding the elements within; however, we assume that since it is an executed deed that it has satisfied all elements except acceptance. We will further explore acceptance below to ensure that the deed would be valid.

Based upon the facts regarding delivery, the deed was not physically delivered to Ann. She found the deed. One can argue that although it was not physically handed to her it was set aside with the intention of passing the deed to her. Obe did not have an opportunity to gift the deed to Ann because he passed away, an act that was beyond his control. His passing interrupted his ability to provide physical delivery to Ann.

On the other hand this is debatable, since in order for a deed to be valid it must satisfy all elements in order to be a valid deed. If there was no delivery then the deed would be void and Ann would not have an interest in the title of Greenacre.

For the sake of argument, we will assume that Obe saving the document and setting it aside for Ann constitutes delivery. If delivery has been satisfied and other elements with the exception of acceptance then it is likely that the title from Obe to Ann is valid. In order to verify it is important to review acceptance and determine if this element has been satisfied.

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Therefore, it is arguable that there was delivery of a deed from Ore to Ann when he stored/saved the deed in the box with the intent to deliver to him.

### **Acceptance of Deed**

In order for a deed to be valid, there must be acceptance from a grantee along with other criteria addressed above. The person that accepts a deed may do so with express or implied intent.

- Ann -

Here, Obe executed a Deed conveying Greenacre to Ann in fee simple. Ann is not aware of this conveyance and Obe has not given her any notice regarding his intention of conveying the property to her. One may argue that her lack of knowledge defeats the acceptance aspect and it would void the deed that was transferred.

However, it can be argued that despite her lack of knowledge initially, she found the deed in Obe's desk after his death. Ann showed an express intent to accept the deed because she moved to Greenacre shortly after and took up a residence in the house.

It is therefore reasonable to conclude that Ann showed implied acceptance through her actions and taking initiative to move into the property.

**Therefore, the Ann's acceptance of the deed was valid and could be deemed as properly accepted.**

### **Gift**

A gift requires donative intent, delivery and acceptance to be valid. A gift can be given without consideration. If there was consideration then it would not be a gift, it would be contract.

Here, Obe gave Ann a gift, Greenacre. Obe had donative intent to give Ann Blackacre. He delivered the gift to Ann, saving the deed in a box. And the last element is satisfied as defined above, Ann properly accepted the gift. Blake will argue that the gift fails because the gift was neither delivered or accepted. Based upon the review above for delivery an acceptance, there has been proper delivery and acceptance.

The gift would be valid. However, this does not prevent Blake from asserting his rights in Greenacre. If Blake pursued an action against Ann, a court would be able to determine and establish whether

these two elements were satisfied should Blake pursue legal against to regain his possessory rights over Greenacre.

There appears to be a valid gift based upon the facts, however, we will further review if the gift she was provided will give her possessory interest or rights in Greenacre.

***Therefore, there is a valid gift from Obe to Ann. There is a valid gift and elements have been satisfied.***

### **Record of Deed**

There are multiple means to record a deed, some of which includes: Race Notice, Pure Race. Race Notice allows the first person to record the deed to have the ability to take legal title. Pure Race Notice allows a bona fide purchaser (BFP) to have the highest level of legal title over a person that has not recorded a deed.

Here, Blake is a BFP and his interest in Greenacre surpass Ann's interest. Ann did not record the deed, she only went onto the property. Blake may argue that Ann would be a trespasser on Greenacre and would not have a right to title of Greenacre because she failed to record in a reasonable and timely manner. One may argue that although she did not record the deed, she took reasonable steps to show an intent to be physically present on the property for 10 years.

The lack of recording the deed is an issue that we can resolve through the facts. Blake is a BFP and he has already claimed his interest in Greenacre. He was aware that the deed was given to him through a fee simple absolute. Blake would retain the possessory interest and it would surpass Ann's interest in the property.

Ann's failure to record the deed in a timely manner prevents her to claiming the deed in fee simple, because the court will recognize Blakes interest over hers. However; she can make a valid argument that despite recording Obe had donative intent to give her the property and it would be unfair for the property to be passed to someone else.

She may further argue that there is a possibility that due to Obe's untimely death he did not have an opportunity to make a revision to his conveyance to Blake. Yet, the court looks at the parties intent, and weighs it against fairness. Since Obe did not update or make changes to the conveyance to Blank, his interest is still valid and warranted. He took the steps to take interest in the property under fee simple absolute and he would retain those interests.

***Therefore the property was not properly conveyed to Ann by deed and would not be valid title. Ann passed away and passed her interest to Claire; however, this interest would not be valid since Ann did not have a valid deed to start with. She had no right in conveying an interest. The court would recognize the conveyance of Greenacre to Blake, the BFP, and he would have possessory rights of Greenacre.***

### **Adverse Possession**

Allows a party that has wrongfully entered property to obtain possession for a statutory period if their entry is actual and exclusive, open and notorious, hostile, and exclusive for the statutory period.

### **Actual / Exclusive**

- Ann -

Actual means that there must be physical possession. Physical possession can be established through partial possession that is reasonable, or through a tenant. Exclusive requires that the owner is excluded from the use of the property and that it is not open or available to the public.

Here, Ann immediately moved to Greenacre upon learning of the gift, Greenacre, that Obe intended to convey to her. She is physically present for 10 years up until her death. Physical possession would be satisfied up until her death.

- Clair -

Here, upon notice of Ann's death Clair moved onto Greenacre and lived there for 6 years with a physical presence on the property. Her physical presence for 6 years and it was exclusive until Blake discovered her on Greenacre and filed suit against her. Before this timeframe the owner was not on the property and the property was not open to the public

***Therefore, Clair's entry was actual and exclusive for 6 years. However, the timeframe ended once Blake discovered her on the property.***

### **Open and Notorious**

Entry must be open so that it puts the owner on notice of the entry. The entry also must be notorious, meaning that the adverse possessor is required to use the property as the original owner did and intended to use it.

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- Ann -

Here, Ann entry on Greenacre was open such that it would put the owner, Blake, reasonably on notice of her entry and trespass onto the property. Ann lived on the property for 6 years. It can be argued that her entry was open because of her active physical presence on the property. She did not hide or attempt to conceal her entry onto the property.

***The open elements has been satisfied.***

Next, She lived on the main property and maintained a five-acre fenced area. One can argue that her maintenance of the property was consistent with what the original owner did. It can be argued that her maintenance of the house supports that she was taking care of the property and using the property as intended.

***Therefore, the notorious element has been met.***

- Clair -

Here, Clair entered onto Greenacre after Ann's death. She remained on the property for 6 years. She lived in the house until she was discovered. There is no additional details in the facts to indicate details of her entry. One can assume that her entry was open such that it alerted Blake who did not live on Greenacre and was incarcerated for 4 years of her entry onto the property.

Therefore, it can be argued that Clair did not attempt to hide or conceal her entry of Greenacre, because she was under the impression that Ann had legal claim to the property and it was legally transferred to her in fee simple absolute. Blake will argue that Ann had no rights to the land and her conveyance was invalid.

However, despite the invalidity there is evidence to support that Clair would qualify as an adverse possessor on the property. She was someone who wrongfully entered, unintentionally, the property and she has the possibility of having possessory rights for a prescribed statutory period if she satisfies all required elements.

***The element of Open is satisfied by her visible and open entry onto the land, which would reasonably put the true owner on notice.***



***The entry was exclusive such that she used the property as the original owner, who she believed to be Ann, did. Therefore the element of exclusive has been satisfied.***

This would reasonably notify Blake that someone was on his property and was using it. However; he did not know that anyone was on his property until he discovered Clair.

### **Hostile**

- Ann & Clair -

Here, both Ann & Clair were on the premises, Greenacre, without the true owners permission. Blake will argue that he never spoke with them directly for them to know that their entry was not permissible. However, this argument will fail because he stated that he does not grant permission to anyone to enter or use Greenacre, his intent was to keep people off of his premises. Eventhough Ann & Clair were not aware of this, they were on the property without his permission.

If Blake wanted to have a defense to the adverse possessor he could claim that he gave them permission, which would void adverse possession. However, since this was not communicate to either Ann or Clair, one can only go by his intent and his right as an owner which was to exclude people from his property.

***Hostile element has been satisfied***

### **Continuous**

An adverse possessor must use the property for the statutory time period.

- Ann & Clair -

Both Ann & Clair had continuous entry on Blackacre in the term of years. Ann was on the property continuously for 10 years and Clair was on the property for 6 years. Blake will argue that there is not sufficient support to show that Clair was continuously on the property.

One could argue that 6 years is a reasonable timeframe to satisfy a continuous entry. There appears to be no break in the chain of physical possession of Greenacre. As soon as Ann passed, Clair entered the property and remained until she was discovered by Blake.

Therefore, their entry was continuous and would satisfy the element of a continuous entry.

### **Tacking/Tolling**

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Tacking is available for adverse possessors to toll their time to meet the required statutory period.

Here, it can be argued that Clair's time on Greenacre was interrupted by Blake when he came onto the property and disturbed her entry before the statutory period.

### **Disability**

The statutory period cannot accrue if the owner is afflicted by a disability.

Here, Blake will argue that Clair's adverse possession has not satisfied the statutory period. Clair will argue that she was unaware of Blake being the owner of Greenacre, and had no prior knowledge of his incarceration. Upon this discovery, Clair can argue that his incarceration is not applicable to impact the statutory period and therefore her continuous entry for the statutory period remains. The facts support that Blake has not satisfied his argument that disability would render the adverse possessor's possessory interest void.

***Therefore, since Blake's entry disrupted Clair's possession of the land she would have a valid argument with the court to restart the statutory period that was previously prescribed.***

***The conveyance from Ann to Clair is invalid as described above. Clair would be an adverse possessor. She wrongfully entered Greenacre, and her entry was actual / exclusive, open / notorious, hostile, and for a continuous statutory period. Therefore, based upon the review of the elements above it appears that Clair had satisfied all elements of Adverse Possession***

3)

To establish the rights of the parties we must first determine the terms of the lease.

### **Lease and Terms**

Rule: To be valid and not violate the statute of frauds a lease must be in writing and contain the essential terms including the parties, the property, and the rent

Here, the facts tell us the parties (Tom and Larry) have agreed the Tom will lease the property (a farm with house plus fields and barns and storage facilities), and the rental amount and period (period of 5 years for \$24,000/year payable at \$2,000 month on the first of every month) The term of 5 years makes this lease a tenancy for years. In this case the lease is both commercial (farm, barns, storage facilities) and residential (house). The fact pattern does not indicate whether this lease was in writing, if not the lease may be void for violating the statute of frauds.

### **Landlord Duties**

The landlords duties are to deliver possession of the leased property, not violate the covenant of quiet enjoyment, and in residential leases not violate the implied warranty of habitability. The lease did not contain any language regarding the water issues which are the major issue in this controversy.

**Possession:** Larry delivered possession of the farm, fields, barns and storage to Tom.

**Covenant of Quiet Enjoyment:** The covenant of quiet enjoyment protects the tenant from interference with the use and possession of the premises for its intended purpose by the Landlord, property owner or their agents. There are three primary modes through which a Landlord can violate the covenant of quiet enjoyment; (1) eviction, (2) partial eviction, and (3) constructive eviction.

**Constructive eviction:** Rule: Constructive eviction occurs when a landlord substantially interferes with a tenant's use of the property. There are four criteria: (1) the landlord must breach a duty owed to the tenant, (2) the breach must substantially interfere with the tenants use of the premises, (3) the tenant must give the landlord reasonable time to resolve the breach, and (4) the tenant must vacate the property or utilize another remedy within a reasonable time.

**Implied warranty of habitability:** The implied warranty of habitability requires that a residential property be suitable for human residence (i.e. electricity, heat, plumbing, protection from the weather. Issues with the house and the domestic water supply would be covered by the implied

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warranty of habitability as part of the lease covered residential property, but issues with the farm and water supply from the stream would not be covered as those are really more of a commercial lease.

### Tenant Duties

Tenants duties are to pay rent, not commit waste, and make minor repairs.

### **Larry's Unlawful Detainer Suit**

Larry has sued Tom for unlawful detainer to evict him, and to recover all rent owed plus costs and Attorneys fees. In response to Larry's unlawful detainer suit Tom asserts the following defenses:

### **Constructive Eviction: Lack of water for farming operations**

The issue here is whether Larry the covenant of quiet enjoyment in constructively evicting Tom from the Farm.

### Quiet Enjoyment & Constructive Eviction

Rules: See above

While there was no duty written in the contract regarding the water, Larry did lease Tom a farm with fields and a stream. Part of the covenant of quiet enjoyment is not to interfere with the tenant's use of the property as it was intended. Even absent language in the lease, it is clear that if a landlord leases a farm with fields and barns and storage facilities an intended use is farming. By not allowing sufficient water to pass to Tom, Larry (among other upstream farmers) has interfered with Tom's intended use of the leased property. Here, there was no duty written in the contract regarding the water. Larry did lease Tom a farm with fields and a stream.

In analyzing the constructive eviction elements: (1) the landlord must breach a duty owed to the tenant, (2) the breach must substantially interfere with the tenants use of the premises, (3) the tenant must give the landlord reasonable time to resolve the breach, and (4) the tenant must vacate the property or utilize another remedy within a reasonable time.

Tom Breached the duty by interfering with the intended use of the property. The breach prevented Tom from farming, a substantial interference with his use of the property, Tom began to make late payments which Larry accepted for three months giving Larry constructive if not actual knowledge of

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the lack of water. For his part Tom stopped farming the fields, effectively vacating the part of the property he was constructively evicted from while he remained living in the house. In response to the constructive discharge the tenant may (1) terminate the lease by leaving and not paying rent, abate the lease payment, or stay and sue for damages.

### Abatement

Rule: After providing notice and time to repair, a tenant may the full or partial rent to offset the their loss of use.

### Stay and Sue for Damages:

Here, Tom may argue that farming was his only source of income, thus he should be able to abate the entire rent because he was constructively evicted from the fields. Obviously Larry will argue that Tom has violated his obligation to pay rent and should leave the property, and pay the rent plus costs owed.

## **Lack of well water for domestic use**

### Implied warranty of Habitability

Rule: See above

Domestic water is also covered under the implied warranty of habitability. Here, however, Tom is able to get enough water from the stream for domestic purposes. While it is not as high quality as the well water it is potable water and is sufficient for the requirements of the implied warranty of habitability. Beyond that, the drought is an act of God and likely absolves the Landlord of responsibility for the well drying up.

## **Broken hot-water heater in farm house**

Tom repeatedly requested that Larry fix the hot-water heater.

### Implied warranty of Habitability

Rule: See above

Hot water is one element which is covered by the implied warranty of habitability.

### Abatement

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Rule: After providing notice and time to repair, a tenant may generally fix an issue which interferes with the implied warranty of habitability and abate the rent to offset the cost.

Here, Tom repeatedly requested that Larry fix the hot-water heater. Implied in the repeated requests is that Tom provided ample opportunity for Larry to fix the issue. When this did not occur Tom fixed it himself at a cost of \$1,500 and he can abate the rent by this amount.

Conclusion:

The court will likely find that Larry violated the covenant of quiet enjoyment regarding the water for the fields, and the implied warranty of habitability for the hot water heater. The court will likely offset back rent and costs to repair the water heater with Tom's lost profits. Hopefully next year will bring normal rainfall.

**END OF EXAM**