

HYBRID JD PROGRAM

**REAL PROPERTY – Section 2**

Final Examination

Spring 2025

Prof. A. Blomquist

Instructions:

There are three (3) questions in this examination.

Total Time Allotted: Three (3) Hours.

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.

Monterey College of Law – HYBRID  
Real Property Final Examination  
Spring 2025  
Prof. A. Blomquist

### Question 1

Abe owns Blackacre, a residential parcel located in a large development in a suburban neighborhood. Next door is Redacre, another residential parcel located in the same development in the same neighborhood. Bess owns Redacre. Both Abe and Bess acquired their parcels from a developer, who ensured the following covenant is recorded as to each house in the neighborhood:

All lots in the development shall be decorated with two pine trees in the front yard.

All houses in the neighborhood have several large pillars along the fronts of the houses and each house has two mature pine trees in the front yard.

One day, Bess decides to remodel the front of her home, eliminating the pillars. She showed her plans to Abe, who told her, "That looks good." In the process of the remodel, one of Bess's contractors accidentally backs equipment into one of Abe's pine trees on Blackacre, which cracks the tree trunk. Abe tries to save the tree, but an arborist he hires tells him the pine tree is hazardous, so Abe reluctantly cuts the tree down.

Abe then died, leaving Blackacre to his cousin, Carl, in his will.

Bess and Carl argue over the pine tree and the pillars. Carl eventually sues Bess for an injunction to force her to replace the pillars in the front of the house on Redacre. Bess countersues for damages for breach of the covenant requiring two pine trees on Blackacre.

1. In Carl's suit against Bess, what result? Discuss.
2. In Bess' suit against Carl, what result? Discuss.

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Question 2

Hal and Wendy are a married couple who decide to buy Greenacre, a small suburban lot in the City of Weston with a duplex on it. They purchase the property in 2010 for \$500,000 and acquire title as, “Hal and Wendy, as joint tenants.” The property is zoned for any residential use. Hal and Wendy immediately move into one half of the duplex and use the other half for storage.

Hal acquires some personal debt, so in 2015 he mortgages his interest in Greenacre with Big Bank. He signs a promissory note for \$50,000 and a mortgage.

In 2023, Hal and Wendy get divorced. Hal moves into the side of the duplex that they previously used for storage. Hal performs regular maintenance on his side of the duplex and the entire outside, including replacing the roof, but Wendy fails to maintain her half.

In 2024, Wendy tells Hal that she needs \$5,000, which is half of the cost to repair water damage caused by a plumbing leak. The leak could have been prevented if Wendy had maintained the property better. Hal refuses to pay and demands that Wendy pay for half of the value of his labor and costs in replacing the roof. Hal says Wendy owes her half of \$20,000, which is \$5,000 for materials and \$15,000 for his labor. Wendy eventually pays \$10,000 to have the water damage repaired.

In 2025, the City of Weston rezones Greenacre to only allow single-family dwellings. Hal and Wendy get an estimate to convert their duplex into a single-family dwelling, but it will cost \$150,000, which is more than they can afford. They apply to Weston for a variance, but it was denied on the basis that the zoning board does not like the appearance of duplexes.

The jurisdiction is a modern jurisdiction that follows the title theory of mortgages.

1. What interests do the parties have in Greenacre? Discuss.
2. If Wendy sues Hal for \$5,000 for his half of the repair bill, what result? Discuss.
3. If Hal sues Wendy for \$20,000 for her half of the roof work, what result? Discuss
4. Was the variance properly denied? Discuss.

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Question 3

Dave and Eva each own large adjoining parcels in a rural area. Dave uses his property to raise chickens, primarily to sell eggs. Eva farms various crops on her property.

On a recorded plat of their neighborhood, there is a 20-foot-wide easement across the north end of Dave's property for Eva to access a nearby road. Neither Dave nor Eva's deeds make any mention of the easement, and there is another road that runs along the other side of Eva's property, though it is less convenient. Eva routinely drove across the north end of Dave's property.

At the time Eva acquired her parcel, the north end of Dave's property was all dirt. In 2015, a storm came through and made the dirt impassible, so Eva decided to pave the north end of Dave's property with asphalt. Dave hated the look of the asphalt and demanded that Eva remove it. Eva refused.

In 2020, Eva began storing large farm equipment on the north end of Dave's property. The equipment was loud and scared Dave's hens so much and so frequently that they stopped laying eggs. The noise also sometimes woke up Dave in the middle of the night and startled him frequently.

In 2021, Dave and Eva got in an argument over Eva's use of Dave's property. Exasperated, Eva tells Dave, "Fine! I won't use your property anymore." She moves her farm equipment onto her property right along the border with Dave's property and makes a point of making loud noises with the farm equipment with the intent to continue to scare Dave's chickens. At this point she stopped using Dave's property.

In 2022, Dave builds a fence around his property, blocking off the north end of his property and removes the asphalt.

It is now 2025. The jurisdiction has a 5-year statute of limitations applicable to claims for adverse possession.

1. If Dave sues Eva to enjoin her from using his property, what result? Discuss.
2. If Dave sues Eva for damages for nuisance, what result? Discuss.

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## ANSWER - Real Property Sec 2-HYB-Blomquist-Sp25-HYB

### Question 1

1. (50%)

#### Equitable Servitude

Not in writing but Implied by development scheme

Intent to bind successors—implied

Touch and concerns land

Notice

    No record notice

    Inquiry notice—based on commonalities in the development

    Actual notice—none

Remedy—injunction

#### Defenses

Estoppel—Abe's statement

    Reliance

    Inequitable to enforce the servitude

2. (50%)

#### Covenant

Writing

Intent to bind successors

Touch and concern land

Privity

    Horizontal privity between Abe and developer

    Vertical privity between Bess and developer, and Abe and Carl

Remedy—damages

#### Defenses

Unclean hands

    Caused tree to come down

## Question 2

1. (30%)

Acquired title as joint tenants

Unambiguous language establishes interest in a modern jurisdiction

Mortgage

Severs the joint tenancy in a title theory jurisdiction

Big Bank—Holds a mortgage

2. (20%)

Normally entitled to half the cost of repairs

Notice given

Expenses were actually incurred

Does not apply since Wendy has sole possession of that half of the premises

3. (20%)

Entitled to half of the cost actually expended--\$2,500 for materials only

No notice was given

Expenses were actually incurred

Benefitted both parties

4. (30%)

Variance

Undue hardship--\$150,000

Reasonable efforts to comply—got the estimate

Not self-inflicted—previously conforming use

Does not substantially impinge upon the public good and the intent and purpose of the zoning plan

Justification by the City is probably insufficient, is zoning intent aesthetic?

### Question 3

1. (70%)

#### Easement

Affirmative/Appurtenant

Scope of easement

Effect of paving the easement

Effect of storing the equipment

Creation

Shown on recorded plat

Prescription

Adverse—Dave demanded Eva remove it

Open and Notorious—paving property is apparent

Continuous for statutory period—2015 to 2021

Termination

Release—not in writing

Estoppel

Promise not to use it anymore

Change in position—removing asphalt and building fence

Abandonment

Statement

Removal of equipment and stopped using easement

Prescription

Adverse—built fence and tore up asphalt

Open and notorious—fence and removal of asphalt is apparent

Continuous for statutory period—no—only 2022 to present

2. (30%)

#### Nuisance

Substantial

Loud noises, woke up Dave, startled him

Probably annoying to average person in the community

Community is rural—likely to be additional ranchers raising animals

Unreasonable

Utility—farming

Harm—No more eggs, intentional

Damages—lost profits

1)

EDALCNECZE

## 1-Carl's Suit Against Bess

### Equitable Servitude

Equitable Servitude is a promise to do or to refrain from doing something related to land. The remedy for Equitable servitude is injunction. A equitable servitude requires (1) a writing, (2) notice, (3) intent to bind, and (4) touch and concern land.

#### Writing

For an equitable servitude to be enforceable it must be in writing, which can include being recorded.

In this case, both Abe and Bess acquired the parcels from the developer who ensured the following condition was recorded, "All lots in the development shall be decorated with two pine trees in the yard." Carl is suing Bess for an injunction to force her to replace the pillars in the front of the house on Redacre, so this is not written in the covenant recorded by the developer. If the development included house plans, brochures or plat maps that showed the design for all of the houses with pillars, the requirement for writing may not be met.

Actually, an equitable servitude can be implied by a common scheme. Otherwise, good.

Therefore, the court will likely rule there is not a writing for the pillars as part of the covenant unless Carl can show the plat maps or development brochures.

#### Notice

In order for the servitude to run with the land, the party must have either: (1) actual notice, where the party actually becomes aware of the condition through their own perception; (2) inquiry notice, where a reasonable person would become aware of the condition through inquiring into it; or (3) constructive notice, where the party would have become aware of the condition through a properly recorded instrument. Solid rules

In this case, Bess has seen that all houses in the neighborhood have several large pillars along the front. Bess should have seen the pillars while being in the neighborhood. In addition, Bess has inquiry

notice, because a reasonable person would be aware of the pillars if they are on every house. The fact pattern does not state that the recorded covenant stated anything about the pillars, so Bess did not have constructive notice.

Therefore, the court is likely to rule

There are not facts to suggest actual notice, but the rest of this discussion is good. Inquiry notice is the key here.

Intent to Bind Successors

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In this case, Bess will argue that the covenant does not discuss the pillars and therefore there was not intent to bind the successors. Carl will argue that the developers and purchasers did intend to bind the successors regarding the pillars because all of the houses were built with pillars. The covenant listed the trees, because they were not part of the permanent structure. The pillars are part of the houses and would be more difficult to change.

OK. Why is this important?

Touch and Concern the Land

A promise touches and concerns the land if it affects the parties in their capacity as landowners, by enhancing the value or use of the land.

In this case, Carl will argue that Bess' house that does not conform to the other houses in the development detracts from the value of his house which impacts his capacity as a landowner.

Therefore the court will likely rule the lack of pillars on Bess' property touch and concern both Bess' and Carl's properties.

Good

Defenses to Enforcement

Defenses to enforcement include acquiescence (the P failed to enforce the restriction against others), unclean hands (the P also violated the restriction), laches (an unreasonable delay in enforcement caused prejudice to the D), and estoppel (the D reasonably relied on the P's conduct indicating the restriction would not be enforced.)

The rule for unclean hands is inaccurate.

In this case, Bess will likely argue that the equitable servitude should not be enforced because Carl has unclean hands because he did not replace the pine tree and was therefore violating the covenant. Bess may also argue for laches, though the fact pattern does not explicitly state the time frame, it could have been some time, as Abe witnessed the house with the pillars removed and then there was time for the tree to become hazardous, then Abe died and Carl inherited the

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house, which probate usually takes a long time. Bess may also argue that Abe, who owned that property at the time, told her the house looked good without the pillars. She may claim that she reasonably relied on his statement and had already paid the contractors. It would be very expensive to have the contractor come out again and install new pillars.

### Termination

Some points missed for incomplete analysis of rules. Also, some facts without analysis.

Equitable Servitude may be terminated by merger, release, abandonment, or changed conditions. Release is a written relinquishment of the right. Changed conditions is when surrounding circumstances have changed so substantially that the condition no longer serves its intended purpose.

In this case, Bess may argue that Abe released the condition when he stated, "that looks good." The pillars was not a written covenant, so the termination may not need writing. She may also argue that the conditions have changed so substantially the condition no longer serves its intended purpose. Pillars are somewhat of a fad, it could be that they are no longer in style. Abe's comment makes it sound like the house looked better without the pillars. If Bess can show the house has increased value without the dated pillars she may claim a changed condition.

Most of this discussion is off-base, but there were few points dedicated to this issue.

Therefore, Bess may be able to terminate the condition due to the outdated look of pillars.

### Injunction

For equitable servitude, the court may issue an injunction requiring the party to comply with the restriction or to cease violating the restrictions.

In this case, Carl will be filing suit for an injunction to require Bess to replace the pillars on the front of her house.

Therefore, if the court rules in Carl's favor, they will require Bess to replace the pillars.

### Conclusion

The court will likely rule against Carl and not enjoin Bess to replace the pillars. The condition for pillars in the front of the houses is highly visible and Bess would have had actual and inquiry notice to the condition. If there is a brochure or housing plans that show all of the houses with pillars, the writing requirement will be satisfied. The fact that all of the houses have pillars show an intent. The court will likely rule that the condition either is barred from being enjoined or it is terminated.

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## 2-Bess' Suit Against Carl

### Real Covenants

A covenant is a promise to do or to refrain from doing something related to land. The remedy for breach of covenants is legal damages. A covenant requires (1) a writing, (2) notice, (3) intent to bind, 4) horizontal and vertical privity and (5) touch and concern land.

Notice is not required to establish a real covenant.

#### Writing

For a covenant to be enforceable it must be in writing, which can include being recorded.

In this case, both Abe and Bess acquired the parcels from the developer who ensured the following condition was recorded, "All lots in the development shall be decorated with two pine trees in the yard."

Therefore, the court will likely rule the writing element for the two pine trees meets the writing element

Good

#### Notice

Note that no points were dedicated to this section because it was not required.

In order for the servitude to run with the land, the party must have either: (1) actual notice, where the party actually becomes aware of the condition through their own perception; (2) inquiry notice, where a reasonable person would become aware of the condition through inquiring into it; or (3) constructive notice, where the party would have become aware of the condition through a properly recorded instrument.

In this case, Carl has seen that all houses in the neighborhood have two pine trees in front of their houses which would provide actual notice. In addition, Carl has inquiry notice, because a reasonable person would be aware of the condition by looking at the deed when they inherited. Carl would also have constructive notice because the covenant has been properly recorded.

Therefore, the court is likely to rule that Carl had notice, actual, inquiry and constructive.

#### Intent to Bind Successors

For a covenant to be enforceable, there must be evidence that there was an intent to bind successors with the conditions outlined in the covenant.

In this case, the fact pattern states that both Abe and Bess acquired their parcels from a developer who ensured the pine tree covenant was recorded for each house in the neighborhood. This would show the developer intended to bind the successors. Good

Therefore, the court will likely rule the intent to bind successors element is met.

### Touch and Concern the Land

A promise touches and concerns the land if it affects the parties in their capacity as landowners, by enhancing the value or use of the land.

In this case, Carl not having one of the pine trees in front of his house does not conform to the other houses in the development and detracts from the value of the house which impacts the owners capacity as landowners. Good

Therefore the court will likely rule the lack of pine trees on Carl's property touch and concern everyone's property in the neighborhood.

### Defenses to Enforcement

Defenses to enforcement include acquiescence ( the P failed to enforce the restriction against others), unclean hands (the P also violated the restriction), laches ( an unreasonable delay in enforcement caused prejudice to the D), and estoppel (th D reasonably relied on the P's conduct indicating the restriction would not be enforced.) The rule for unclean hands is inaccurate.

In this case, Carl will likely argue for laches, because Bess is the one who damaged the trees when she was breaking the condition regarding pillars in the front of the house

How is this laches? Unclean hands would be a better defense

Therefore, the court may rule that the enforcement is barred due to laches, because it was Bess' fault that the one pine tree was removed.

### Termination

Covenants may be terminated by merger, release, abandonment, or changed conditions.

Changed conditions is when surrounding circumstances have changed so substantially that the condition no longer serves its intended purpose.

In this case, Carl may argue that due to the changed condition of the damage to the tree, the

surrounding circumstances have changed so the condition no longer serves its intended purpose.

One house is probably insufficient for changed circumstances to terminate.

Therefore, the court may possibly rule that the covenant is terminated, but that is unlikely.

### Damages

For covenants, the appropriate damages would be measured by the loss in value to the benefited estate or the cost to restore compliance with the restriction.

In this case, Bess may sue for the loss in value to her house due to Carl's house only having one pine tree. She may also sue for the cost to replace the tree on his property. Carl can likely sue Bess for the cost of the tree as she is at fault in the damage.

Good. Carl's suit does not address the tree, though.

Therefore, if the court rules in Bess' favor, they will provide Bess with damages to the loss in property value. Though she is likely at fault for the damage and destruction of the tree.

### Conclusion

The court will likely rule for the cost of the tree to be replaced, but Carl may be able to counter sue Bess for the damage and thus replacement cost of the tree.

Grade: 85

This is an excellent response! You have just a couple misunderstandings, addressed above, which is where you lost the most points. Great writing style. Easy to follow. Addressed all the major issues and almost all minor issues. Very nice job!

2)

## **1-Interest of the Parties in Greenacre**

### Joint Tenancy

Joint tenancy is a co-ownership in which each tenant holds a separate but undivided interest in the whole. It requires the four unities of time, title, interest and possession. Joint Tenancy is alienable which means severance occurs if one party transfers their interest thus making it a tenancy in common. JT features a right of survivorship and is therefore not devisable or descendible.

In this case, the fact pattern states that Hal and Wendy acquired title as joint tenants, therefore they met the elements of joint tenancy. Even though they are married, the title is for joint tenancy. Hal acquired personal debt and mortgaged his interest to Big Bank in 2015.

OK, but note that unities are not required since this is a modern jurisdiction

### Mortgages and Joint Tenancy

In title theory jurisdictions, a mortgagee transfers legal title which severs the joint tenancy and moves the co-ownership to tenancy in common.

In this case, because they are in a title theory jurisdiction, when Hal mortgaged his interest in the property it severed their joint tenancy and Hal and Wendy became tenants in common.

Good

## **2-Wendy's Suit Against Hal for \$5,000**

### Rights and Duties of Tenancy in Common

Each co-tenant has the right to possess the entire property and may not exclude another. A co-tenant must share rents from third parties and profits from natural resources. They may not seek contribution for necessary repairs, unless notice is given, but no contribution is required for improvements unless value is realized through partition or sale. Taxes and mortgage payments must be shared. If one co-tenant ousters another by denying access the ousted tenant may recover fair rental value of their share.

In this case, Hal and Wendy are tenants in common at the time of the repair for water damage. Wendy will claim that Hal owes her the \$5,000 for repair due to water damage caused by a plumbing leak. Wendy will argue that because Hal is a co-tenant and she gave prior notice for necessary repairs,

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he owes his half of the cost. Hal will argue that Wendy had a duty to keep her half in good repair and that the damage could have been prevented if Wendy had maintained the property better.

### Conclusion

Generally, good,  
but rules could be  
tied to facts better.

Therefore the court will likely rule that Hal owes the \$5,000 for his portion of the repair because Wendy did eventually pay the \$10,000 for repair after giving Hal notice of the needed repair.

## **3-Hal's Suit Against Wendy for \$10,000**

### Rights and Duties of Tenancy in Common

Each co-tenant has the right to possess the entire property and may not exclude another. A co-tenant must share rents from third parties and profits from natural resources. They may not seek contribution for necessary repairs, unless notice is given, but no contribution is required for improvements unless value is realized through partition or sale. Taxes and mortgage payments must be shared. If one co-tenant ousters another by denying access the ousted tenant may recover fair rental value of their share.

In this case, Hal is suing Wendy for \$10,000 for her half of the value of his labor (\$15,000) and materials (\$5,000) for replacing the roof. Hal performed regular maintenance on his side of the duplex and the entire outside, including the roof. The fact pattern does not state that Hal gave Wendy prior notice before he repaired the roof. Good

### Conclusion

Therefore, the court will likely rule that Wendy is not liable for the repairs to the roof because Hal did not provide prior notice. In addition, if the court does rule that Wendy is liable, they would probably rule that she owes half of the cost of the materials, not for Hal's labor, therefore she would owe \$2,500.

## **4-Variance**

### Zoning

A zoning ordinance will generally be upheld unless it is an unconstitutional taking or it is not rationally related to a legitimate government purpose.

Unconstitutional Taking

Eminent domain was not really being tested here, but no points deducted.

Under the 5th amendment, the government may not take private property for public use without just compensation. This includes physical appropriation and regulatory taking. A regulatory taking occurs when the government regulation goes so far that it effectively deprives the owner of all or nearly all of the economic uses of the property. The courts will apply the Penn Central test, considering (1) the economic impact of the regulation, (2) the extent of the interference with investment expectations, (3) the character of the government actions.

In this case, Wendy and Hal will argue that the government has committed an unconstitutional regulatory taking through the City of Weston's rezoning of Greenacre to only allow single-family dwellings. The fact pattern does not state if the rezoning only impacted Greenacre, if it did this would be unconstitutional because it is discriminatory taking from only one property. If the zoning is an entire region of the town or neighborhood, this may not be the case. Wendy and Hal will also argue that the rezoning of the property for single-family dwellings when the property is already a duplex, is effectively depriving the owners of nearly all of the economic use of the property. The defense will state that the property can still be used as a single-family dwelling even without conversion and therefore does not constitute a taking because they still have economic value.

Therefore the court, is likely to rule that the taking was not unconstitutional unless the zoning is only for Greenacre, if that is the case, the court would likely rule the taking is unconstitutional.

Legitimate Government Purpose

The legitimate government purpose is a very broad element and any purpose of public benefit is usually accepted. T

In this case, the fact pattern does not state any evidence to the purpose of the rezoning, but the usual purpose for this type of zoning would be for reduction in traffic, or noise, or lack of infrastructure for the amount of people if the property is multi-family residential. If the City of Weston discussed any government purpose for the rezoning at their public meetings, they would likely have discussed a legitimate government purpose.

Therefore, unless the City of Weston did not provide any type of government purpose and only stated that they didn't like the appearance of duplexes, the court would likely rule it was a legitimate government purpose.

Not quite right. We need the zoning scheme to serve any purpose, whether stated or not, so their subjective reasons are only one thing to consider.

### Nonconforming Use

A lawful nonconforming use is a vested property right and cannot be eliminated unless it is a nuisance, abandoned or removed via eminent domain. **This rule is inaccurate, which made the analysis below inaccurate, too.**

In this case, Wendy and Hal will likely claim their duplex is a lawful nonconforming use because it is a vested property right because the property is already a duplex and it was built when that conformed to the regulations. They will argue it cannot be eliminated unless it is a nuisance, which the city only claimed they did not like the appearance of duplexes. The property has not been abandoned or removed via eminent domain.

Therefore, the court is likely to rule that Hal and Wendy's duplex is a lawful nonconforming use.

### Variance

A zoning variance allows an exception to the zoning ordinance where the landowner shows an undue burden if the variance is not granted and that it does not violate the public good or the intent of the zoning plan.

In this case, when Hal and Wendy asked for a variance they showed an undue burden of \$150,000 to convert their duplex into a single-family dwelling. This would be an undue burden for them. In addition, because they are divorced, they each live in one half of the duplex, if it was converted to a single-family dwelling, they would not be able to each have their own place to live. One of both of them would have to move. The City may claim that \$150,000 conversion on a \$500,000 property would not constitute an undue burden. The City will also argue that the duplex violates the public good and the intent of the zoning plan. The City only stated that they denied the variance because they do not like the appearance of duplexes, this would be difficult for them to argue that this is for the public good, but they may have a slight argument that it is the intent of the zoning plan, that the appearance of duplexes drops the property value in the area. **This whole section paragraph is great!**

### Conclusion

Therefore the court is likely to rule that the variance was improperly denied. The City did not provide a strong enough argument that Wendy and Hal did not encounter an undue burden and that the variance would violate the public good or the intent of the zoning plan,

**Grade: 80**

**This essay demonstrates above-average understanding of the issues tested. Missing or inaccurate rules are where the most points were lost, so see my comments above. You are an excellent writer, so I think if you had the right/complete rules, you could easily score those points.**

3)

### **Dave v. Eva - Property Use**

In order to determine whether Dave will be successful in his suit against Eva to enjoy her from using his property, whether or not a valid easement exists must be analyzed.

#### **Easement**

An easement is a non-possessory interest in the use of another's property. Easements can be affirmative or restrictive, and can be either easements appurtenant or easements in gross.

#### **Type**

An affirmative easement allows the owner of one estate to use a portion of another's estate. A restrictive easement prevents the landowner from doing something on their estate for the benefit of another. Here, there is a 20 foot wide easement that Eva is using to access a nearby road. This would be an affirmative easement because Eva is using a portion of Dave's property to access a road.

Good

An easement in gross is also known as a personal easement and it is only applicable to a party. An easement appurtenant, has a benefit to one property and a burden to another. The property that has the benefit is the dominant estate and the property that has the burden is the servient estate. Here, Eva's land is benefitting and Dave's land is burdened so Eva's land is the dominant estate and Dave's land is the servient estate. The easement is an easement appurtenant. An easement appurtenant is said to run with the land and will continue to successive landowners of both Dave and Eva's land.

Good

#### **Scope**

The scope of the easement is what is allowed. Here, Eva is using a portion of Dave's property to access a nearby road. Assuming the easement is valid, the scope of the easement would likely be limited to that area of Dave's property, and the use would be for passing through to the nearby road.

OK

#### **Non-Conforming Use**

Because the scope of the easement was for ingress and egress between Eva's property and a nearby road, anything outside of this usage could be considered a non-conforming use and not allowed. In 2010, the same end of the property which Eva was using for ingress and egress. Although it was the same area,

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it is unlikely that storage would be a conforming use of the easement.

## Creation

Great! What are the consequences of this?

Easements can be created in several ways: express in the grant, implied by pre-existing use, implied by necessity, estoppel, or by prescription.

## Express

In order for an easement to be expressly created it must be included in the grant and satisfy the statute of frauds. Here, neither Dave nor Eva's deeds make any mention of the easement, therefore the easement was not expressly created.

## Implied by pre-existing use

Good!

In order for an easement to be implied by pre-existing use, the property would have had to have been divided by a common owner. At the time of the division the use was in place and was obvious. Here, there is a recorded plat of the neighborhood, in the plat there is a 20-foot-wide easement across the north end of Dave's property for Eva to access a nearby road. A recorded plat indicates that at one time a developer owned both Dave and Eva's estates, and that their was an intention of the property to have the easement. Further, Eva routinely drove across the north end of Dave's property, meaning she was using the easement. It is likely that Dave would be able to see Eva driving through his property. Therefore, the easement could have been created as implied by pre-existing use.

## Implied by necessity

Prior use has to predate the division of the property. Otherwise, good.

In order for an easement to be implied by necessity, the property would have been divided by a common owner, and when the property was divided one of the properties was landlocked. If the easement was not created for ingress and egress, the landowner would not be able to leave or access the property without the easement. Here, although it is easier for Eva to use Dave's property to access a nearby road, there is another road that runs along the other side of Eva's property. Even though the access to the other road is inconvenient it is not impossible, therefore the easement was not created as implied by necessity.

## Easement by Prescription

Great!

An easement by prescription is created if the use of the easement is actual, hostile/adverse (meaning they did not have permission), open and notorious, and continuous for the statutory period.

Here, Eva's use of the easement was actual. She drove routinely through Dave's property to access the road. She also paved the north end of the property in 2015 making it easier for her to use the road when a storm came through and made it impassible.

Eva's use of the easement was adverse after 2015, meaning Good permission to use it. In 2015 when she paved the north end of the property, Dave hated the look of the asphalt and demanded that Eva remove it. This could be construed as not having permission.

Eva's use of the easement was open and notorious. To be open and notorious, her use Good be known by a reasonable person with interest in the land. It is clear by the fact that Dave demanded that Eva remove the asphalt that he was aware that she was there, making her usage open.

Finally, Eva's use of the easement would have Good, but remember it's an objective standard jurisdiction has a five year statute of limitations applicable to claims for adverse possession. Eva paved the road in 2015 and used the property until Dave and Eva got in a fight in 2021. Eva continuously used the road for six years, which is continuously longer than the statutory period of five years.

### **Estoppel**

Good

An easement is created by estoppel, if the party had oral permission to use the property and changed their position in reasonable reliance on that permission. Here it could be argued that Eva reasonably relied on her ability to use the easement that was granted on the plat and invested money in paving the road. Paving a road is a substantial cost that shows that Eva was relying on the ability to use the easement. Although it is not the strongest argument, it could be successful.

### **Termination**

OK, but where is the oral permission in the fact pattern?

Because the easement was validly created, in order for Dave to sue Eva success would have had to be terminated. An easement can be terminated in multiple ways; written release, merger, prescription, estoppel, abandonment, etc.

### **Abandonment**

In order for an easement to be terminated by abandonment, there must be an indication that the easement is abandoned and an act that indicates abandonment must be present.

Here, in 2021 when Dave and Eva got into an argument over the use of the property, Eva told Dave,

"Fine! I won't use your property anymore." This statement alone is not enough for termination by abandonment. There must be an act that clearly indicates abandonment. Here, Eva moved her farm equipment onto her property right along the border with Dave's property, however this act would not be enough to indicate abandonment. Eva could have easily moved her equipment back on the property or began to use the road for ingress and egress again. Therefore, the easement was not terminated by abandonment.

### **Termination by Prescription**

Good

An easement can be terminated by prescription if the easement is removed or blocked, without permission, is open and notorious, continuously for the statutory period. Here in 2022, Dave built a fence around his property and blocked off the north end and removed the asphalt. This is a substantial blockage of the easement, that was done adversely, it was done in a way that would be considered open and notorious because it would be visible. The issue with termination by prescription is whether it was continuous for the statutory period. Here the statutory period is five years. The fence was built in 2022 and the suit was brought in 2025. That is only three years, not the requisite five. The easement was not terminated by prescription.

### **Estoppel**

Great!

An easement can be terminated by estoppel, if there is an oral agreement that the easement is terminated and the party changes their position in reasonable reliance on that agreement. Here Eva told Dave, "Fine! I won't use your property anymore." This is likely to be construed as an oral agreement to terminate the easement. In response to that statement, Dave build a fence around his property, and removed the asphalt. This could be viewed as changing his position in reasonable reliance on Eva's statement that she is no longer using the property because removing asphalt is a considerable investment. Therefore, Dave's best argument in his suit is that the easement was terminated by estoppel.

### **Rights/Remedies**

Great!

Generally estoppel is an equitable remedy, and would likely allow Dave to sue Eva to enjoin her from using his property as that is injunctive relief. If Dave sues Eva to enjoin her from using his property he is likely to be successful because the easement was validly created, and was terminated by estoppel.

### **Dave v. Eva - Nuisance**

A nuisance is a non-trespassory invasion of another's property that is substantial and unreasonable so that it prevents the use and enjoyment of that property.

The non-trespassory invasion can include sounds, smells, or blocking of views, etc. Here, Dave and Eva owned large adjoining parcels in a rural area. Dave uses his property to raise chickens for eggs and Eva has a farming operation. Eva's farming operation utilized equipment that was loud and the sound scared Dave's hens that they stopped laying eggs. The sound from the equipment would be considered a non-trespassory invasion as sound carries from one property to another.

An invasion is **Good** if it is offensive, annoying, or inconvenient to the average person in the community. Dave and Eva were in a rural community. The noise from the equipment scared Dave's hens, and also woke up Dave in the middle of the night and startled him frequently. Although it is a rural community with farming operations, the average person in the community is likely expecting some noise from equipment and animals, however noise so loud that it wakes a neighbor up in the middle of the night is substantial. People need their sleep for health reasons and sleep is a crucial part of enjoyment of one's home. Noise loud enough to wake someone up, presumably in the middle of the night, would be offensive and annoying to the average person in the community. Therefore, the invasion is substantial.

To determine if an invasion is unreasonable the **Great!** disruption to one party is weighed against the utility of cause of the invasion. Here, Eva has purposely moved her farm equipment onto the portion of her property that is along the border of Dave's property and makes a point of making the loud noises to scare Dave's chickens. Dave's chickens have stopped laying eggs, which is likely a direct impact to Dave's ability to earn money from selling those eggs. Further, Eva could possibly move her equipment to another part of her property as she is only putting the equipment there out of what seems to be spite. The facts also indicate that she is intentionally scaring Dave's chickens with the equipment. While there is utility in her farming operation, there is no utility in using her equipment to scare Dave's chickens. Therefore the invasions is unreasonable.

If Dave sues Eva for damages for nuisance, he is likely **Great!** to be successful.

## END OF EXAM

Grade: 85

This is a very well-done essay. Good solid rules. Thorough analysis. There were some minor issues addressed in my comments above, but those did not cost too many points. Very nice job!