

## Question 5

Alice and Bill were cousins, and they bought a house. Their deed of title provided that they were "joint tenants with rights of survivorship." Ten years ago, when Alice moved to a distant state, she and Bill agreed that he would occupy the house. In the intervening years, Bill paid nothing to Alice for doing so, but paid all house-related bills, including costs of repairs and taxes.

Two years ago, without Alice's knowledge or permission, Bill borrowed \$10,000 from Lender and gave Lender a mortgage on the house as security for the loan.

There is a small apartment in the basement of the house. Last year, Bill rented the apartment for \$500 per month to Tenant for one year under a valid written lease. Tenant paid Bill rent over the next seven months. During that time, Tenant repeatedly complained to Bill about the malfunctioning of the toilet and drain, but Bill did nothing. Tenant finally withheld \$500 to cover the cost of plumbers he hired; the plumbers were not able to make the repair. Tenant then moved out.

Bill ceased making payments to Lender. Last month, Alice died and her estate is represented by Executor.

1. What interests do Bill, Executor, and Lender have in the house? Discuss.
2. What claims do Executor and Bill have against each other? Discuss.
3. Is Tenant obligated to pay any or all of the rent for the remaining term of his lease, including the \$500 he withheld? Discuss.

## Answer A to Question 5

### What interests do parties have in the house?

The court must decide between competing claims by Bill (B), Executor (Exec)[,] and Lender (L).

### Joint Tenancy

Alice and B originally took title as joint tenants with the right of survivorship. Joint tenancy required the existence of four unities – time, title, interest, and possession. Assuming these unities were present, the distinguishing feature of a joint tenancy, the right of survivorship, will apply.

Under the right of survivorship, on the death of one joint tenant, his/her interest automatically passes to the surviving tenant(s). Thus, if a joint tenancy existed between Alice and B, B would automatically get Alice's interest at her death.

The issue here, though, is whether any actions by the parties changed the joint tenancy before Alice's death.

### Severance/L's mortgage

A unilateral act of mortgaging the property may sever a joint tenancy, depending on the type of jurisdiction.

### Lien Theory

A lien theory jurisdiction holds that a unilateral mortgage does not automatically sever a joint tenancy. Therefore, if this is a lien theory jurisdiction, normal survivorship rules would apply, and at Alice's death the following would occur:

Alice's interest would pass to B through the right of survivorship. B would thus be left with a fee simple absolute, subject to L's mortgage. Exec gets nothing.

### Title theory

However, in a jurisdiction which follows the title theory, a unilateral mortgage by a joint tenant is held to sever the joint tenancy. The result is that joint tenants become tenants in common, with the mortgagee the equitable owner of the undivided portion legally belonging to the mortgagor.

In a title theory jurisdiction, the following would occur:

Immediately upon B's mortgaging the property, the joint tenancy was destroyed. Alice and B were then tenants in common, each with an undivided  $\frac{1}{2}$  interest. B's interest was subject to L's mortgage[.]

At Alice's death, her undivided  $\frac{1}{2}$  interest passes through her estate. It will thus be held in trust by Exec to be distributed per the provisions in Alice's will. B will continue to hold his undivided  $\frac{1}{2}$  interest. L will have an equitable ownership interest in B's undivided share by virtue of its mortgage.

## 2. Claims of Exec and B against each other

Exec, as the executor of Alice's estate, may be legally able to assert any claim against B that Alice had during her life. B could counter with any claims he had against Alice.

### Exec's claims - Rent

A tenant has a duty to account to co-tenants for any rents or profits received from use of the land. Exec will claim interest in  $\frac{1}{2}$  of the rents B received from Tenant.

B rented out the basement apartment to Tenant for \$500/month. B received rent for seven months, a total of \$3,500. Since Alice had a right to  $\frac{1}{2}$  of the rents, Exec will lay claim to \$1,750.

### B's claims against Exec

B will counter for claims for Alice's share of house-related bills, repairs, and taxes.

### House-related bills

The house[-]related bills may or may not be subject to partial reimbursement from Alice's estate. Mortgages or loan payments are generally apportioned between the tenants according to their interest. Since Alice and B had equal interests, B may claim compensation for Alice's half of any such payments made by him.

Some bills, however, are the sole responsibility of the tenant in possession, since they are based on his use or enjoyment of the property. Therefore incidental expenses or use charges such as utility bills will not be subject to reimbursement.

### Repairs

Tenants in possession may receive contribution from non-possessory tenants for regular repairs (distinguished from improvements). Thus B may receive reimbursement from Alice's estate for  $\frac{1}{2}$  of the regular repairs B had done to keep the property in good condition.

## Taxes

Tenants out of possession are also liable for their respective share of taxes levied upon the property. B may therefore claim reimbursement for ½ of the taxes he has paid.

### 3. Tenant's obligation to pay remaining rent?

B and Tenant (T) entered into a one-year lease. After seven months, T refused to pay rent and has moved out. T will try to get out of his duty to pay rent for the remaining term.

## Warranty of habitability

Generally at common law, a tenant's duty to pay rent was considered independent of the landlord's duty to provide the premises. Tenants took the premises as they were; "caveat emptor" was the rule of the day.

Because the harshness of application to tenants, courts have modernly considered residential leases (commercial leases are not protected). Thus, if a landlord provides premises that are not inhabitable, tenant's duty to pay rent may be excused.

"Uninhabitability" has been fairly strictly construed by courts. Property is typically considered "uninhabitable" only if it fails to provide the barest essentials - four walls, a roof, and running water/plumbing.

Here, T will claim that the malfunctioning toilet and drain render the premises uninhabitable. A court will probably find for T, because the lack of working plumbing would result in a possible health hazard. T may thus be excused from paying rent until the problem is repaired.

Many courts allow the tenant, in cases where the landlord has failed to repair, to contract himself to have the repairs done and deduct that amount from the rent due.

Here, T did notify B of the need for repairs, and B never responded. T was therefore eligible to engage in "self-help" by contracting for the needed repairs himself. He did so, and withheld the amount from the rent owed to B. He was within his rights to do so.

## Constructive eviction

At issue is whether T can avoid the five months remaining on his lease with B.

If the problem with the toilet and drain render the premises completely uninhabitable,

forming a nuisance to T, then upon proper notice to B[,] T can quit the premises. He will be relieved of his obligation to make future rent payments by virtue of the doctrine of constructive eviction.

Here T notified L of the nuisance conditions. T's own plumbers were unable to repair. Because the condition was a nuisance - a health hazard - T could quit the premises. Since he did so, he can claim constructive eviction.

Therefore T is not liable for any rents remaining on his contract with B.

## Answer B to Question 5

5)

1. \_\_\_\_\_ Interests of Bill, Executor and Lender

### Joint Tenancy

Alice and Bill took title as “joint tenants with rights of survivorship.” The creation of a joint tenancy requires the presence of the four unities. Joint tenants must take by the same title instrument, at the same time, with identical interests and rights to possession. A and B took title at the same time and by the same deed and apparently had identical interests and rights to possession and thus a valid joint tenancy was created. Joint tenants have rights of survivorship that entitle surviving tenants to automatic ownership of the interests of deceased joint tenants. Thus a joint tenant’s interests are not devisable or descendible. As a consequence, as long as B did not sever the joint tenancy by mortgaging his interest, B became sole owner of the house upon A’s death.

### Title Theory v. Lien Theory of Mortgages

A joint tenancy is severed, i.e., survivorship rights cease and the tenancy becomes that of tenants in common, when, without the permission of the other joint tenant(s) one joint tenant transfers his or her ownership interest in the property. There are two conflicting theories regarding the consequences of one joint tenant mortgaging his or her interest in a joint tenancy without permission. The title theory of mortgages deems the tenancy terminated once the property is unilaterally mortgaged because it treats title as passing from the mortgagor to the mortgagee[,] thus severing the unity of title. The lien theory of mortgages holds that the joint tenancy remains intact despite the mortgage, concluding that the mortgagee only holds a lien on the property so the unity of title is not disrupted. Thus, the effect of B’s mortgage to Lender on his joint tenancy with A will depend on which theory the jurisdiction applies. If it applies the title theory, then the tenancy was severed and A’s interest became devisable and descendible and is thus now part of her estate. If the lien theory is applied, then the tenancy was not severed and B automatically took title to the house upon A’s death.

### Equitable Conversion

Lender certainly has an interest in the one-half share of the house that was B’s at the time he mortgaged the house. Lender’s rights to the other half depends on whether B took title to the entire property upon A’s death as discussed above. B only had the power to encumber what he owned – an undivided one-half interest – and thus at the time of the mortgage L only had a security interest in B’s half of the house. Whether L will have a security interest in the entire property, assuming the lien theory of mortgages applies, depends on the application of the doctrine of equitable conversion. Under this doctrine

equity deems done that which ought to be done. Thus, if B represented to L that he owned the house alone and thus L thought his security interest was in the entire property, then the doctrine of equitable conversion could apply to L's mortgage and give L an interest in the entire house.

## No Adverse Possession

If the title theory of mortgages applies and thus B does not take A's share of the house, he may argue that his uninterrupted possession of the house for the past ten years gives him title by adverse possession. Adverse possession operates to give title to one who occupies property under certain circumstances for a statutorily prescribed period (i.e., the statute of limitations on trespass). To make out a valid claim of adverse possession to possession must show the [sic] his possession was continuous [sic] for the prescribed period, that his possession was open and notorious (such that the rightful owner would have notice of the trespass), that possession of the property claimed was actual (no constructive possession) and that the occupation of the property was hostile (i.e., not with permission of the owner). B's possession of the house likely satisfied the first three requirements as he openly lived in the house[;] however, his claim will fail because occupation by a joint tenant is not hostile absent an ouster of the other tenants. A and B agreed that B would occupy the house after she moved away and thus there was no ouster and no hostility.

## 2. Claims of Executor and Bill

### Executor's Claims – Rents

The general rule is that joint tenants are not entitled to rents from other joint tenants even if one tenant has sole possession of the property unless their [sic] has been an ouster (i.e., exclusion of one tenant of another who [h]as a right to possession). Thus, Executor will not be entitled to any rent claimed for B's occupation of the house because B had not ousted A from the house. However, joint tenants are entitled to their pro rata share of any rents collected from non tenants. Thus, Executor has a claim to half of the rents received by Bill from Tenant, i.e., \$1750.

### Bill's Claims – Repairs and Taxes

Joint tenants are responsible for their pro rata share of taxes and repair costs absent and [sic] agreement to the contrary. Joint tenants are not responsible for expenses related to another's use of the property. Here B paid for taxes and repairs with no contribution from A for the ten years that he was in sole possession of the house and thus under the general rule A's estate could be held liable to B for her half of these expenditures. Executor would argue that B was obligated to give A notice of any necessary repairs prior to making expenditures that she would be responsible for. Executor would also argue that A and B had an implied agreement that B would make

these payments in return for having exclusive use of the house. That B had never requested payment from A during the ten year period indicates that this was indeed the case. Finally, A's estate would not be liable for "house-related bills" that were incident to B's use of the property as joint tenant's obligations extend only to repairs and taxes.

### 3. Tenant's Obligations

#### Covenant of Quiet Enjoyment – Constructive Eviction

Every lease includes an implied covenant of quiet enjoyment. This covenant [sic] obligates a landlord to do and refrain from doing whatever is reasonably necessary to enable a tenant's quiet enjoyment of the leased premises. This obligation [sic] includes landlord's duty to make repairs to the premises if a condition is interfering with the tenant's quiet enjoyment. A continued refusal to comply with this obligation can give rise to a claim of constructive eviction. A constructive eviction will be found when 1) a condition causes a substantial impairment of the tenant's quiet enjoyment, 2) the tenant gave adequate notice to the landlord of the condition and the landlord failed to take appropriate remedial measures[,] and 3) as a result the tenant gave up the lease and moved out. A malfunctioning toilet and drain could certainly cause a substantial impairment of one's enjoyment of an apartment. This is especially true here where the premises consisted of a small basement apartment that likely had only one bathroom and not much ventilation. Tenant gave landlord notice of the problem and even attempted to have the problem fixed himself. Finally, tenant promptly moved out. Thus, tenant has a valid claim for constructive eviction and is thus not liable for the remaining term of the lease. Tenant could also recover damages from B for breach of contract.

#### Implied Warranty of Habitability – Standard and Remedies

Also implied in every residential lease is the implied warranty of habitability. This warranty requires landlords to provide property that is fit for basic human habitation. The standard can be based on housing code but generally extends to basic amenities such as running water, electricity, heat in cold climates, etc. A malfunctioning toilet that is apparently beyond repair would very likely be found to be a breach of the implied warranty of habitability. Among a tenant's remedies for breach are 1) move out, 2) withhold rent (may be required to keep in escrow), 3) repair and deduct the cost from the rent[,] and 4) remain and sue for damages. Tenant availed himself of the third option by seeking to have the toilet and drain repaired, however the repair was beyond the abilities of the plumbers. As long as tenant's efforts were in good faith he should be entitled to repayment for the \$500 he spent to repair the conditions despite the fact that conditions were not capable of being repaired. The continuing breach also gave tenant the right to vacate and terminated his obligations under the lease.