

**JULY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Real Property

QUESTION

Sam and Paul entered into a written contract on September 1, 1999, for the sale by Sam to Paul of a mountain lakefront lot improved with a residence (the “parcel”) for \$100,000. The contract was silent as to the quality of title Sam would convey, but provided that a quitclaim deed would be used. Paul failed to tender the agreed-on price on the performance date. Sam sued Paul for specific performance on July 5, 2000. Paul defended the suit on the ground that Sam’s title is not marketable.

Sam’s claim of title goes back to Owen, who owned an unencumbered fee simple absolute in the parcel. The parcel, which was accessible only during the summer months, had been occupied by Owen and Owen’s family as a summer vacation home since 1980. In 1984, Owen conveyed the parcel by recorded deed to “my daughter, Doris, and my son, George, so long as they both shall live, and then to the survivor of them.”

Owen died testate in 1987. Owen’s will made no specific reference to the parcel, but the residuary clause left to Doris “all my other property not specifically disposed of by this will.” Doris and George and their families continued to use the vacation home each summer. Doris died testate in April 1988, her will “devising and bequeathing all my estate to my son, Ed.”

George executed a deed in May 1988, purporting to convey a fee simple absolute in the parcel to Cain. Cain and his family occupied the parcel during the summers of 1988 through 1996. In May 1997, Cain conveyed the parcel to Sam. Sam’s family occupied it during the summers of 1997 through 1999.

The statute of limitations on actions to recover land in this jurisdiction is 10 years. There is no statute or decision by an appellate court either repudiating or affirming the common law doctrine of destructibility of contingent remainders.

Who should prevail in Sam’s suit against Paul? Discuss.

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Real Property

ANSWER A

Sam and Paul entered into a contract to buy the “parcel.” Paul, as the buyer, failed to tender the agreed upon price at the closing date. Paul is claiming that Sam did not have marketable title. Sam is claiming that he did have marketable title and is asking for specific performance. In order to determine which party should prevail, the marketability of Sam’s title must first be analyzed.

The Property Passed to Sam by Valid Conveyance

The 1984 conveyance

The 1984 conveyance from Owen was in the form of a life estate and a contingent remainder. A life estate is an estate in land that lasts for only the life of the grantee. It can either be expressed “for life,” or implied “so long as they both shall live.” A contingent remainder is attached to the life estate. It is an interest that occurs naturally at the end of the previous interest. It is contingent because it is unclear in whom the interest will vest.

Here, the language “so long as they both shall live” is sufficient to create a life estate in both George and Doris. Therefore, they are tenants in common for the term of life. It is valid to create a life estate by deed in the manner which Owen did here. Further, both Doris and George each have a contingent remainder. The remainder is certain to occur after the termination of one of the life estates. However, it is not clear in whom the interest will vest - therefore, it is a contingent remainder. Doris dies in April 1988. At this point her life estate terminated and the contingent remainder vested in George who was still alive at this point. He now owns a fee simple in the parcel and can convey it as he wishes.

Note, however, that in order for this analysis to be valid, the deed must have been validly executed, delivered and accepted. There are no facts that state that the deed was not validly executed, which would require a description of the property, present words of conveyance, and that it be signed by the grantor. A life estate is sufficient to create present words of conveyance. Further, the deed was recorded which raises a presumption of delivery. Finally, deeds that benefit a party are presumed to be accepted by that party absent evidence to the contrary.

Owen’s Will

Paul will argue that Owen’s will conveyed the property to Doris. Owen’s will did contain a residuary clause that left to Doris all of his remaining property. However, the parcel is not included in this provision because the parcel was conveyed to Doris and George in the manner discussed above when the deed was conveyed. If for some reason that deed was not valid (perhaps because it was not delivered and accepted as discussed above), then the parcel would have gone to Doris by Owen’s will. However, absent evidence that shows that, Owen’s will did not convey the parcel to Doris.

**JULY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Real Property

Doris' Will

Paul will argue that Doris' will conveyed the parcel to Ed. It is true that if Doris owned the parcel in fee simple for the reasons discussed above, the property would have passed to Ed. However, for the reasons discussed above, it does not appear that Doris did own the parcel in fee simple. Thus, it did not pass to Ed.

George to Cain and Cain to Sam

As long as George did validly own the parcel in fee simple, which it appears he did because as discussed above the contingent remainder vested in him at the time of Doris' death, then he had the right to convey it to Cain. Further, assuming that George had the property validly, then Cain had good title to convey to Sam.

Destructibility of Contingent Remainders

The destructibility of contingent remainders is an ancient doctrine that dictates that if an interest does not vest by the time the prior interest terminates, then the later interest has been destroyed. At that point, the property reverts back to the grantor. This is used in situations such as "to A for life, then to B if B has reached the age of 21." At A's death, if B had not reached the age of 21, then under the doctrine, B's interest will be destroyed and the property will pass back to the grantor. In jurisdictions that have abandoned the doctrine, the interest merely reverts back to the grantor until the later interest does indeed vest. The other party will have a springing executory interest that will divest the grantor of their interest at the time that their interest vests.

Here, although Paul may argue that George's interest was destroyed, that is not the case. Even if the doctrine was held to be still in place, George's interest did vest immediately upon Doris' death. There were no conditions that prevented it from doing so. Thus, George's interest would not be destroyed. However, if the jurisdiction had abandoned the doctrine the property would revert to the grantor's heirs. In this case that would be Ed since both Owen (the grantor) and Doris are dead and Ed is the heir of Doris' interests. This would create a springing executory interest in George for when his interest did vest. However, as discussed above, his interest vested at the time of Doris' death.

Adverse Possession

Adverse possession requires that a party be in possession of a property in a manner that is (a) hostile, (b) exclusive, (c) continuous, (d) open and notorious, (e) for the statutory period of time. Hostility means that the property was occupied without the true owner's permission. Exclusive means that others were excluded from the property. Open and notorious means that the property was occupied in a way that would put the true owner on notice of the possession. Finally, the statutory period was 10 years in this case. If the possessor of property did occupy the property themselves for the statutory length of time, they can still establish adverse possession by

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Real Property

showing that adding together their predecessors in interest was sufficient time for adverse possession. This is called tacking.

Sam will argue that even if he did not receive the deed through valid conveyances he owns the property by right of adverse possession. Even though this is a summer home and possession was not truly continuous, this will not bar adverse possession. A party must occupy the land in the manner which it was intended to be occupied. Thus, if it is a summer vacation home, then occupying it only in the summer months for the purpose of vacation is sufficient. Further, the occupation was hostile, meaning without permission. It was also open and notorious, the fact that the families were there is sufficient to put the true owners on notice. Finally, Sam can use tacking to establish that the adverse possession was for a sufficient period of time. Cain occupied the land from the summer of 1988 through 1996. It was then conveyed to Sam, who occupied it in the summers of 1997 through 1999. When you add Sam's occupation with that of his predecessor in interest Cain, then this equals 11 years. Since the statutory period is ten years, this is sufficient to establish adverse possession.

Marketable Title

Generally

Implied in every land sale contract is the requirement that title be marketable. This means that the title must be of a quality such that a reasonable person would be satisfied with the ownership of the parcel. Title is not marketable if there are encumbrances or encroachments on the property. Further, title is, of course, not marketable if the grantor does not own the property he is purporting to convey. Finally, title acquired by adverse possession is not marketable in and of itself. The grantor must have the title certified through a hearing to quiet title.

Sam will argue that because the contract provides for the use of a quitclaim deed, this means that the title does not have to be marketable. He will claim that a quitclaim deed only conveys that which the grantor does indeed have and makes no warranties for title. However, the requirement of marketable title is implied into every land sale contract. The use of quitclaim deed merely means that after the deed is delivered the contract merges into the deed and the grantor is not liable if a problem is subsequently discovered. However, Sam must still deliver marketable title to Paul, because the prospective use of a quitclaim deed does not abrogate the implied need to deliver good title.

Title by Conveyance

If Sam did properly own the property because it was conveyed to him properly as discussed above, then he does have marketable title. There are no encumbrances on the property and there is no evidence of any encroachments.

Adverse Possession

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Real Property

If Sam acquired the property by adverse possession, George did not own it because of an invalid conveyance or the destructibility of contingent remainders, then his title is not marketable. As stated above, title acquired by adverse possession is not marketable unless a suit has been brought to quiet title. Because there is no evidence that such a suit occurred, if Sam did acquire by adverse possession, Paul is correct in claiming that he does not have marketable title.

Specific Performance

Specific performance is available when (a) there is a valid contract, (b) all conditions have been met, (c) legal remedies are inadequate, (d) there is a mutuality of remedies, and (e) the other party has no defenses.

Here, there does appear to be a valid contract. Further, it would seem that all conditions have been met because Sam acquired title by valid conveyance. However, if Sam acquired title by adverse possession or did not acquire title at all, then the condition of providing marketable title at closing would not have occurred. Further, legal remedies are inadequate because this is land. One of the primary reasons that legal remedies are seen to be inadequate is if the property is unique such that damages would be insufficient. Land is by definition unique and thus legal remedies are inadequate here. Additionally, there must be mutuality of remedies. Courts have begun to abandon this requirement, holding that if there isn't mutuality of remedies, then the court will hold specific performance until the other party performs. Finally, it would not appear that Paul has any defenses here.

Thus, so long as Sam does have marketable title for the reasons discussed above, he would prevail in his suit. Although traditionally only the buyer could require specific performance, modern jurisdictions grant that right to both the buyer and the seller. Therefore, assuming Sam does win the underlying suit, he has the right to compel specific performance.

ANSWER B

Sam v. Paul

The issue in this case is whether Sam has a marketable title.

Contract of sale between Sam and Paul.

Statute of fraud and writing requirement

Contract of sale of real property has to be in writing in order to be enforceable, and has to be signed by the party charged and contain price and description of the real property.

Sam and Paul entered into a written contract on September 1, 1999, and the land was identified in the contract and the contract price is set to be \$100,000. So this contract has satisfied the statute of fraud. They have an enforceable contract.

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Real Property

In each contract of sale of real property, there is an implied covenant of marketable title by the seller. Marketable title doesn't have to be a perfect title, but the seller has to show that he has title to the property.

Sam may argue that the contract provided that a quitclaim deed would be used. Quitclaim deed means that the buyer would have whatever interest that the seller may have in the property. There is no warranty that the title is good.

Since the contract hasn't been performed, quitclaim deed doesn't come into play. If the seller and buyer fully perform the contract and the buyer accepts the quitclaim deed, the covenant of marketable title disappears.

In this case, since Paul did not perform the contract, he has the right to request a marketable title from Sam.

Owen's transfer to Doris and George

Owen had a fee simple absolute in the parcel since 1980. In 1984 Owen deeded his interest to Doris and George.

According to the language of the deed, Doris and George will have the parcel as tenants in common for life of either one of them who dies first and the survivor has the contingent remainder.

Assuming the common law doctrine of destructibility of contingent remainders does not apply in this state

Then Doris and George will have tenancy in common and the survivor will be fee simple absolute upon the death of the other.

Owen's will in 1987

Since Owen doesn't own the property anymore, he cannot leave it in his will. So Owen's will will have no effect on the title of the parcel.

Doris' death in April 1988

On Doris' death the parcel will directly be passed to George, because Doris only has a life estate. So Ed will have no title to the parcel.

George's conveyance to Cain

Because George has a fee simple absolute, he can convey the same to Cain.

**JULY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Real Property

Cain conveyed to Sam

Cain has a good title and he can convey to Sam. So Sam has a marketable title. Therefore, Sam should be entitled to specific performance because real property is unique and compensation at law is always adequate.

Assuming the common law doctrine of destructibility of contingent remainders does apply in this state

Owen's conveyance to Doris and to George

If the principle is applied in this case, the survivor's contingent remainder is destroyed. Now we should read the deed as follows: Doris and George will have tenancy in common for the life of one who dies first. Owen has the possibility of reverter interest in the property.

When Owen died in 1987; he left all of his residuary property to Doris. This will include the possibility of reverter interest in the parcel.

When Doris died in April 1988, Doris and George's tenancy in common for life of Doris ended. The property's title automatically passed to Owen's estate. Since Doris inherited the residuary property from Owen, the parcel's title shall be passed to Doris' estate.

In Doris' will, Doris left all her estate to her son, Ed. So Ed has a fee simple absolute to the parcel.

Since George did not have title to the property, he cannot pass any title interest to Cain in 1988.

Adverse possession

But Cain may argue that he obtained title to the parcel through adverse possession. To satisfy statutory requirement of adverse possession, Cain has to show that:

- (1) His possession is his title to the owner of the property.
He thinks he is the owner of the property. His possession should be perceived as hostile.
- (2) His possession is exclusive.
Cain may show that the family has occupied the parcel for summer vacations. Nobody else ever has occupied the parcel besides them.
- (3) His possession is lasting through the statutory limitation.
This requirement is not met. Cain was on the property since 1988 to 1996 - only eight years.
- (4) His possession is uninterrupted.

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Real Property

Ed may argue that Cain only occupied the property during summer time - not all year long.

Cain may argue that as long as the occupancy matched with the nature of the property, he has met the requirement. Here the parcel is a summer vacation home. So Cain's using it as a summer vacation home met with the uninterrupted possession requirement.

- (5) His possession is visible.
Since they were there every summer, this requirement is met.

- (6) His possession is adverse to the owner.
This requirement is met because he treated the property like his own property. It is adverse to the interest of the owner.

But since Cain only occupied the parcel for eight years, the statute requires 10 years, Cain did not obtain title through adverse possession.

Sam's continued adverse possession

Sam bought the property from Cain and continued using it as his summer home from 1997 to 1999.

Sam may argue that he can tack the adverse possession period of Cain with his own. This is allowed as long as there is no gap between Sam's possession and Cain's possession.

In this case, Sam obtained the property in May 1997 and started to use it in the summer of 1997, so there is no gap between these two possessions.

To prove his own adverse possession, Sam has to prove all the elements we just discussed in Cain's situation.

Once Sam has established his own adverse possession, he may add the eight years of Cain's adverse possession. He has complied with the "10 year" requirement.

So Sam has obtained the title and the property through adverse possession.

But adverse possession does not render Sam's title marketable. Sam has to ask the court to declare title in his name.

Since the real property contract of sale is not usually time of essence, so even if Sam cannot provide a marketable title, he should be allowed to be given reasonable time to cure the deficiency.

Specific performance requested by Sam

**JULY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Real Property

Specific performance is an equitable remedy. To be qualified for this remedy, Sam has to show that:

- (1) Remedy at law is inadequate.
Since land is unique, so damage at law is not an adequate remedy.
- (2) The contract term has to be definite and certain. This contract is clear on what is for sale and how much is the price. So this requirement is met.
- (3) The remedy is feasible to the court.
Since the court has personal jurisdiction on both Sam and Paul, this remedy is feasible.
- (4) Mutuality of performance.
This is an old test. New trend is to meet the security of performance test. The court has to be sure that both performances can be secured. There is no problem here. The court may order Paul to pay the price and Sam to convey the property.

There are no defenses available in this case. Laches, unclean hands are not shown in the fact pattern in this case.

So Sam should be entitled to specific performance.