

## Question 5

Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris “jointly with right of survivorship.” The deed provides: “If Blackacre, or any portion of Blackacre, is transferred to a third party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre.”

In 1976, without the knowledge of Chris, Beth conveyed her interest in Blackacre to Frank.

In 1977, Beth and Frank died in a car accident. Frank did not leave a will and his only living relative at the time of his death was his cousin Mona.

In 1978, Chris and Andy learned that Beth had conveyed her interest in Blackacre to Frank. When Mona approached Chris a day later to discuss her interest in Blackacre, Chris told her that he was the sole owner of Blackacre and she had no interest in Blackacre. Chris posted “No Trespassing” signs on Blackacre. He also paid all of the expenses, insurance, and taxes on Blackacre. Andy and Mona have never taken any action against Chris’ possession of Blackacre.

1. What right, title, or interest in Blackacre, if any, did Andy initially convey to Beth, Chris, and himself? Discuss.
2. What right, title, or interest in Blackacre, if any, are held by Andy, Chris, and Mona? Discuss.

## Answer A to Question 5

### 1. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE DID ANDY INITIALLY CONVEY TO BETH, CHRIS, AND HIMSELF?

Andy owned Blackacre in fee simple absolute, which indicates absolute ownership and means he had the full right to convey Blackacre.

#### **Joint tenancy**

In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship."

A conveyance of land requires that the deed be lawfully executed and delivered. A conveyance to multiple parties can create a tenancy situation. A conveyance creates a joint tenancy when the four unities are present: possession, interest, time and title. The unity of possession means the joint tenants have the equal right to possession; interest means they have an equal ownership interest in the land; time means they received their ownership interest at the same time; and title means they received their ownership interest via the same instrument (such as a deed).

When a joint tenancy is created, it carries a right of survivorship (ROS), which usually must be expressed in the conveyance itself. The ROS means that when one joint tenant dies, the other succeeds to her entire interest in the land. In a situation involving two joint tenants, this means the surviving joint tenant would succeed to the entire ownership interest in the property. However, a joint tenancy can be severed by a sale, partition, or mortgage (in title theory jurisdictions). The severance of a joint tenancy typically results in a tenancy in common.

Here, Andy created a joint tenancy between Beth and Chris. This is because the deed expressly contained the words "jointly with a right of survivorship," and the four unities were present: Beth and Chris each have a 1/2 interest in Blackacre, right to possess the whole, and received their interest at the same time (1975) and by the same instrument (the deed from Andy).

Thus, there was a joint tenancy between Beth and Chris.

### **Fee Simple Subject to Condition Subsequent**

However, the deed also contained another provision which potentially affects the parties' rights in Blackacre: the deed provided "If Blackacre, or any portion of Blackacre is transferred to a third party, either individually or jointly by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Through this language, Andy purported to create a fee simple subject to a condition subsequent (FSCS). A FSCS is an ownership interest in land whereby the present possessor owns the land until a specified condition occurs, whereby the grantor then has the option of exercising his right of reentry and re-taking possession of the land. To create a FSCS, the grantor must use express conditional language in the conveyance and reserves a right of reentry, using words such as "but if" and "the grantor shall have the right to re-enter." In other words, the express conditional language must indicate that the interest conveyed is subject to the grantor's right of reentry if the specified condition occurs subsequent to the conveyance.

Here, the specified condition is the transfer of Blackacre or any portion thereof, either individually or jointly by Beth and Chris. Andy carved out the right of reentry by stating "Andy shall have the right to immediately re-enter and repossess Blackacre." Thus, Andy purported to create an arrangement where he could cut off Beth and Chris' rights in Blackacre, reenter the land and possess it, if any portion of the land was transferred. This constitutes a FSCS.

Thus, under Andy's purported conveyance, Beth and Chris would be joint tenants with respect to their interest in Blackacre: a fee simple subject to a condition subsequent.

### **Restraint on Alienation**

However, Andy's purported conveyance is problematic because it is a restraint on alienation. A restraint on alienation occurs when the grantor attempts to restrict the alienability (e.g. transferability) of the land. A grantor may impose certain conditions in connection with his conveyance of the land, such as restrictions on what purpose the land may be used for. However, when the grantor attempts to impede the grantee's

ability to transfer the land to others, the courts will classify that as a restraint on alienation.

The law will uphold reasonable restraints on alienation, but not unreasonable restraints on alienation because of the public policy favoring the free transferability of land. When there is an unreasonable restraint on alienation, the court will simply strike the restraint from the conveyance and declare that the grantee holds the property without the restraint. A restraint is generally reasonable if the restriction lasts only for a specified period of time, such as a restriction during the grantor's life. It is generally unreasonable if the restriction continues indefinitely and applies even to the grantee's heirs and assigns.

Here, there is a restraint on alienation: the conveyance completely restricts Beth and Chris' rights to transfer the property because it provides that Blackacre or any portion thereof may not be transferred. This is probably an unreasonable restraint on alienation because there is no time limit to this restriction - Beth and Chris are indefinitely prohibited from transferring Blackacre; presumably, even their heirs/devisees could not transfer the land. Moreover, the prohibition is not for a reasonable time, such as for a set period of years.

Andy may argue the restraint is reasonable because it does not expressly apply to Beth and Chris' "heirs and assigns" -- he may argue that this restriction does not apply indefinitely, but rather only during the period of Beth and Chris' lifetime. He may argue their heirs and assigns are free to transfer the land. He may also argue that the creation of a joint tenancy restricts their ability to transfer anyway because doing so will sever the joint tenancy. However, these are weak arguments. The restraint is still probably unreasonable because it is a total restriction during the tenants' lifetimes, which is a significant amount of time. Beth and Chris may not even transfer a portion of Blackacre. While they would lose joint tenant status by a transfer, they still have the option of doing so in the absence of the restraint. Thus, the restraint is unreasonable.

Accordingly, the court would likely strike the condition Andy included in the deed. This would mean that Beth and Chris hold Blackacre in fee simple as joint tenants.

### **Conclusion: initial conveyance**

Thus, the initial conveyance means Beth and Chris held Blackacre in fee simple as joint tenants.

## **2. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE ARE HELD BY ANDY, CHRIS, AND MONA?**

### **1976: Beth's conveyance - severance of joint tenancy**

In 1976, Beth conveyed her interest to Frank.

A joint tenant may sell her interest, but as indicated above, the sale of her interest severs the joint tenancy because it destroys the unity of time/title. When a joint tenancy is severed, the new tenants hold as tenants in common (TIC) with each other. TIC have no right of survivorship, which means that upon death, their interests in the property pass to their devisees/heirs through a will/intestate succession.

Here, Beth's sale to Frank severed the joint tenancy because it destroyed the unities: Frank and Chris do not have their interests conveyed by the same instrument and at the same time. So Frank became a TIC with Chris, and Beth no longer had any ownership interest. As of 1976, Frank and Chris both had a 1/2 interest in Blackacre. This is the case even though Chris did not know about the sale to Frank--the sale severed the joint tenancy nonetheless.

### **1977: Beth and Frank's death**

In 1977, Beth and Frank died. Beth no longer had any interest in Blackacre. Frank's 1/2 interest as a TIC with Chris would pass via will or intestacy. Because Frank did not have a will, his interest would have to pass through intestate succession. Frank's only living relative was his cousin Mona, so she would be his heir under the principles of intestate succession. Thus, Mona would get Frank's 1/2 interest in Blackacre via intestate succession, and continue to hold Blackacre as a TIC with Chris.

Thus, as of 1977, Mona and Chris each had a 1/2 interest in Blackacre as TIC; Andy had no interest in Blackacre.

### **1978: Chris' ouster**

In 1978, Chris learned about Mona. The issue is whether he deprived her of her ownership interest in Blackacre through his actions.

Chris and Mona were co-tenants (and specifically TIC) which means each had certain rights and duties. Each tenant has a right to possess the entire premises, so one tenant in exclusive possession has no duty to pay rent to the other. Moreover, the tenants are jointly responsible for paying ordinary expenses associated with the property, such as property taxes and maintenance expenses.

Moreover, because each tenant has the right to exclusive possession of the property, a tenant in exclusive possession cannot claim ownership of the entire property through adverse possession unless he commits an ouster. An ouster is when one tenant expressly excludes the other from possession of the premises, by preventing the tenant from possessing the premises and/or through words/conduct indicating they have no right to possess the premises.

Here, Chris probably committed ouster of Mona. As a co-tenant, she was entitled to possession of the premises, but Chris would not let her have possession. Chris told her he was the sole owner of Blackacre and she had no interest in Blackacre, which constitutes an expression that she had no right to possess Blackacre. Moreover, Chris put "no trespassing signs" on Blackacre, and also paid all of the expenses, insurance and taxes on Blackacre (he never sought compensation from Mona). Thus, his exclusive possession of Blackacre was notwith Mona's consent--even though she did not take any action against Chris' possession of Blackacre, that does not indicate that Chris and she consented to this arrangement whereby he would have exclusive possession. Rather, he clearly indicated that she could not possess the premises, thus committing an ouster and entitling him to claim adverse possession if he meets the elements discussed below.

### **Adverse possession**

A person in possession of land may have the possession ripen into title through the application of adverse possession (AP). A tenant must meet several elements to show they have acquired title through AP: continuous possession of the land for the statutory period, open and notorious possession, exclusive possession, actual possession, and hostile possession.

**Continuous:**

The possession must be continuous throughout the statutory period. It is unclear what is the statutory period in this jurisdiction, but Chris has possessed the property for such a long time that it is likely he has met the statutory period. Since his ouster occurred in 1978, it has been 32 years that he has possessed the property. The statute of limitations usually ranges from 10-20 years, so he likely has met the element of continuous possession.

**Open and notorious:**

The possessor must possess the property as the true owner would--in other words, his possession must be open and notorious such that a reasonable inspection of the property would reveal the possession. Here, Chris took ample actions to make his possession open and notorious; not only did he live on Blackacre, but he also posted no trespassing signs, paid the upkeep, and informed Mona that she had no interest in Blackacre. Thus, his possession would put a true owner on notice.

**Exclusive:**

Chris' possession was exclusive because he alone lived on Blackacre.

**Actual:**

Chris actually possessed the whole of Blackacre because he presumably lived on it.

**Hostile:**

Finally, the possession was hostile (i.e. without the true owner's consent) because Chris committed ouster, as described above.

Thus, Chris can probably meet the elements of adverse possession and claim title to Blackacre entirely (he already had 1/2 interest in Blackacre, and acquired the other 1/2 of Mona's interest through AP). Andy and Mona have never taken action against Chris' possession of Blackacre, so they did not defeat his claims and he likely owns it all via adverse possession. Note that he would have to file an action to quiet title before he could convey Blackacre to a third party.

**Conclusion:**

Thus, the final rights, title and interest in Blackacre are as follows: Chris owns all of Blackacre; Andy and Mona own nothing.

**[Alternative analysis re restraint on alienation]**

If the restraint on alienation analyzed above in Andy's original deed was valid, and Andy did in fact have a right to re-enter and repossess Blackacre, the final outcome would be the same because Andy never exercised that right of re-entry, and Chris succeeded to ownership of the whole property by adverse possession. (Of course this might be problematic because Andy could argue that the "hostility" element of AP was met because he allowed Chris to possess the property because he did not try to exercise his right of reentry). Nonetheless, the better analysis is that the restraint on alienation was invalid.



## **Answer B to Question 5**

### **1. Andy's Initial Conveyance of Blackacre / What interest was Conveyed?**

#### **Joint Tenancy Discussion**

Andy (A) conveyed Blackacre by written deed, thereby satisfying the Statute of Frauds, to Beth (B) and Chris (C). The language of the deed was to B and C "jointly with right of survivorship." On this language alone, B and C have a joint tenancy.

Joint tenancies are created when two or more people receive land under circumstances such that the four unities, possession, interest, time, and title, are met. Here, both B and C took possession at the same time (from A's grant), they have the same interest (they both own an undivided one-half interest in Blackacre), they have the same right to possess the whole, and the title they have in Blackacre will be the same (although exactly what title they own will be discussed further here).

Additionally, to create a valid joint tenancy, express language concerning the right of survivorship should be used. The right of survivorship means that when one joint tenant dies, he or she may not pass their share via will or intestacy; it passes automatically to the remaining joint tenant or tenants. Express language is required, because this automatic passing on an interest bypassing the probate system, which is generally "frowned up." Thus, courts will infer a tenancy in common (to be discussed further below) if express language is not used. Here, express language was used, as A conveyed to B and C "jointly with right of survivorship." As such, the requirement for a valid joint tenancy were met.

#### **Attempt at Fee Simple Subject to Condition Subsequent**

A's deed to B and C also contained language that "if Blackacre, or any portion of Blackacre, is transferred to a 3rd party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Here, A was attempting to create a fee simple subject to a condition subsequent. Unlike a fee simple absolute, where the recipient has full ownership and control of the land indefinitely, and which is alienable, descendably, and devisable, a fee simple

subject to a condition subsequent means that the takers ownership is conditioned upon a certain occurrence either being met or avoided. A fee simple subject to a condition subsequent is similar to a fee simple determinable in that both reserve an interest in the grantor, here A. However, a fee simple determinable uses express durational language (To A, for so long as....) where as a fee simple subject to a condition subsequent conveys the interest in full, but then conditions it upon a certain occurrence or non-occurrence. Another important distinction is that a fee simple determinable creates a possibility of reverter in the grantor, which means that the grantor's right vests automatically as soon as the occurrence takes place (without any action needed on the part of the grantor) while a fee simple subject to a condition subsequent creates a right of re-entry, which does not occur automatically and requires that the grantor affirmatively exercise his or her right to retake the land if the condition is met. Here, A attempted to create a fee simple subject to a condition subsequent, retaining a right of re-entry in himself. He did not use durational language, but instead conveyed to B and C as joint tenants, but then he added a condition. He also used the words "right to immediately re-enter" which indicate a right of re-entry rather than a possibility of reverter.

### **Restraint on Alienability**

Though A attempted to reserve for himself a right of re-entry, the condition on the land amounts to a total restraint on alienation. A restraint on alienation is when a grantor attempts to make it so that the grantee cannot sell the land. The right to sell land, however, is one of the rights inherent in property ownership, such that restraints on alienation are not viewed favorably. Reasonable restraints of alienation may be tolerated. For example, a condition that the grantee cannot sell the land for 15 years, until a cloud on the title will be resolved, may be tolerated. Similarly, other restraints are possible, such as those that affect the appearance of the land, or the purpose for which the land is used. Total restraints on alienation, on the other hand, will be stricken as void. Here, the condition that A attempted to include will amount to a total restraint on alienation, as it stated that B and C could not transfer Blackacre or any portion of it, and it was an indefinite condition. Therefore, the condition will be considered to be void, and it will be stricken from the deed.

## **Conclusion**

Because this was a fee simple subject to a condition subsequent, the effect of the stricken clause will be that B and C have a fee simple absolute (discussed above). A's future interest will be eliminated. Thus, A initially conveyed to B and C a joint tenancy with right of survivorship in fee simple absolute.

## **2. Rights, Titles, and Interests in Blackacre of Andy, Chris, and Mona**

### **Andy's Interest**

As discussed above, Andy's interest in Blackacre terminated when he included a total restraint on alienation in his deed to B and C. Because the condition will be stricken, there is no stated occurrence that can cause A to be able to validly exercise his "right to immediately re-enter and repossess Blackacre" though that was his intent and desire. Because his right to re-entry is impossible, it too will be stricken and A has no remaining interest in Blackacre.

### **Mona's Interest**

In order to discuss what interest Mona has in Blackacre, it is necessary to first discuss Beth's conveyance to Frank and Frank's subsequent death.

### **Beth's conveyance to Frank**

B conveyed her interest in Blackacre to Frank without the knowledge of C. When one joint tenant conveys his or her interest in the joint tenancy, the result is that the joint tenancy is severed. The reasoning is that the grantee who receives the conveyance will not share the four unities with the remaining tenant, thus they cannot be joint tenants with respect to one another. However, this does not mean that B cannot convey her interest in Blackacre - she can - it simply means that the person she conveys to will be a tenant in common with her former joint tenant.

A tenancy in common is when two or more people each own an undivided interest in land. An undivided interest means that each has the right to possess the

whole. The four unities are not required, so that one tenant in common may own a larger interest in the land, but each will still have the right to possess the whole.

Here, when B conveyed to Frank, the joint tenancy was severed as between B and C, and C and Frank became tenants in common, each with an undivided one half share in Blackacre. There will be no remaining right to survivorship, as tenants in common do not have this right. The fact that B did not give notice to C of her conveyance is irrelevant - joint tenants do not need the consent of one another to convey their individual interests in the land.

### **Frank's Death**

Frank died in a car accident after he received his interest in Blackacre. He did not leave a will, meaning that he died intestate. The facts indicate that his only living relative was his cousin Mona, which means that Mona will receive all of Frank's real and personal property via intestacy.

### **Mona's Interest**

Mona thus received Frank's undivided one-half interest in Blackacre via intestacy, and became a tenant in common with C. This means that at the time of Frank's death, Mona HAD the right to possess Blackacre with C. However, as will be discussed further below, Mona may have lost this interest via adverse possession. More facts are needed as to the passage of time since Chris told Mona that she had no interest in Blackacre and posted "no trespassing" signs, thereby ousting Mona and initiating a hostile possession of Blackacre. If the statutory length of time has passed, Mona will have lost her interest in Blackacre, because (as discussed below) the other requirement for adverse possession will have been met. If, however, the requisite amount of time has not passed, Mona can exercise her undivided one half interest in Blackacre and remain a tenant in common with Chris. She would be advised to bring an action to quiet title in order to do this.

### **Chris's Interest**

As discussed above, C was initially a joint tenant with B, and then became a tenant in common with Frank when B conveyed to him. Subsequently, he became a tenant in common with Mona when she inherited Frank's interest via intestacy.

C, though, may now possess all of Blackacre in fee simple absolute via adverse possession. When C told Mona that she had no interest in Blackacre, he effectively ousted her, basically meaning affirmatively kicked her off the property, thereby starting the adverse possession clock running. The requirements of adverse possession are a continuous, adverse, open, and hostile possession for the required statutory period of time. Here, C's possession was continuous for however long it's been since he ousted Mona - the facts do not indicate that C ever stopped possession Blackacre. His possession is open - he lives there and posted a No Trespassing sign for all to see. It is hostile and adverse, because it is not with Mona's consent. For this prong, it doesn't matter if C thinks that he is entitled to full ownership or not as subjective good or bad faith is irrelevant. The fact that C paid the insurance and taxes is not required by a majority of jurisdictions, but it certainly does not pose a problem for C that he did pay them, as indicated in the facts. Therefore, as long as the statutory time period is met, C will possess all of Blackacre via adverse possession.

Finally, it should be noted that although C may have acquired title via adverse possession, it will not be marketable. In order to convey the land in fee simple to someone else, and not just convey his one half interest, C will have to bring an action to quiet title against Mona.