

## QUESTION 2

Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny “as joint tenants with a right of survivorship for so long as neither Martha nor Lenny make any transfer of Greenacre. In the event of such a transfer, Greenacre shall automatically revert back to Oscar.”

Subsequently, without Lenny’s knowledge, Martha conveyed all of her interest in Greenacre to Paul. She died shortly afterwards. Unaware of Paul’s existence, Lenny paid the property taxes.

Paul entered into a written lease of his interest in Greenacre with Sally for a two-year term at a rental of \$500 per month. At the end of the lease, Sally stopped paying rent, but continued to occupy Greenacre without Paul’s consent. After three months, Paul confronted Sally. Although they did not agree to a new lease, Sally paid Paul the three months’ rent she had not paid and resumed paying him monthly rent.

Lenny then attempted to sell his interest in Greenacre. He soon learned that Sally was occupying Greenacre and that Paul had acquired Martha’s interest.

Concerned about conflicting property interest claims regarding Greenacre, Lenny commenced a lawsuit seeking to quiet title against Oscar, Martha’s estate, Paul, and Sally, and to obtain from Paul an accounting and contribution for a share of the rent paid by Sally and for a share of the property taxes paid by Lenny.

1. What property interest in Greenacre, if any, is the court likely to find possessed by Oscar, Lenny, Paul, Sally, and Martha’s estate? Discuss.
2. Is Lenny likely to obtain an accounting and contribution from Paul? Discuss.

## QUESTION 2: SELECTED ANSWER A

### 1. Interests in Greenacre

To determine who has what interest in Greenacre (G), the validity and effect of each transfer/agreement must be determined. Generally, property may be transferred by sale, gift, will, or intestate succession. Leases may also create interests in possession of property.

#### ***Oscar***

First, it must be determined what interest Oscar (O) had in the property. A fee simple is the largest property interest possible and O began with a fee simple interest in G.

#### **Fee Simple Determinable**

A fee simple defeasible is a fee simple interest that may be cut short by a subsequent event. When a fee simple defeasible contains terms of duration (e.g. as long as, for the time that, until, etc.), it is a fee simple determinable. A fee simple determinable will be a fee simple until a designated event occurs. Here, O's conveyance to Martha (M) and Lenny (L) was likely a fee simple determinable because it contained the phrase "for so long as." Thus, this conveyance conveyed a fee simple determinable interest to M and L.

#### **Possibility of Reverter**

The grantor of a fee simple determinable interest retains a possibility of reverter. Here, O's conveyance additionally contained explicit language that he retained a possibility of reverter. A possibility of reverter means that fee simple automatically reverts to the grantor at the time the designated event occurs. The grantor need not go to court to claim this interest; the interest automatically vests at the occurrence of the subsequent event. Here, O had a possibility of reverter. The event in question was if either M or L made any transfer of G. Thus, if his possibility of reverter was valid, O gained a fee simple interest in G at the time M transferred her interest in G to Paul (P).

#### **Restraints on Alienation**

However, the possibility of reverter here may not be valid because it may be an undue restraint on alienation. Generally, courts do not allow title instruments/conveyances that absolutely prohibit future transfer of the property. Restraints on alienation may be

allowed if the restraint is only conditional/for a moderate time period (e.g. does not transfer for the next 50 years). However, absolute restraints on alienation are invalid. Any language indicating such absolute restraint will be struck from the instrument, so the resulting interests will remain. Here, the proposed restraint was absolute--O conveyed to M and L so long as neither transferred G. There was no condition or limited time period on this restraint; it was absolute. So, this clause will be struck from the instrument and the remaining interests will exist. With this clause struck, there is no future event that gives O a possibility of reverter. Rather, it changes M's and L's interests to fee simple interests and strips O of his possibility of reverter. Thus, because of the striking of the invalid restraint on interest, O conveyed G in fee simple to L and M and retains no interest in the property. So, O has no interest in G.

### ***Lenny***

As discussed above, because the alienation language had to be struck, L received a fee simple interest with M in G from O.

### **Joint Tenancy**

There are various forms of co-tenancies. Each form allows all co-tenants to possess the whole of the property, though each holds only a lesser, divided share of the property. A tenancy in common is the default form. A joint tenancy carries the additional right of survivorship between joint tenants. This right of survivorship means that when one joint tenant dies, the surviving joint tenant receives the deceased joint tenant's interest in the property automatically, and the deceased tenant's interest is no longer part of her estate and so cannot be passed through probate. A joint tenancy exists when property is conveyed by an instrument that indicates intent for the property to be held as a joint tenancy with a right of survivorship, and when the four unities of (1) possession, (2) interest, (3) time, and (4) title exist. Here, O conveyed G to M and L "as joint tenants with a right of survivorship." So, the explicit language indicating intent to convey as a joint tenancy and to convey a right of survivorship is present.

#### **1. Possession**

The unity of possession means that all joint tenants have equal right to possess the whole property. Here, although L and M (and P as M's successor) took various degrees of possession of G, there is no indication that any ousted the other at any time--i.e. no

tenant ever prevented the other from taking possession of the whole property. Thus, there was unity of possession.

## **2. Interest**

Unity of interest means that each joint tenant must have an equal share interest in the property--i.e., for two joint tenants, each must have a 50 percent interest rather than, e.g., one having a 40 percent and one a 60 percent interest. Here, it is not indicated what interest each L and M had in G, so presumably each was conveyed a 50 percent interest in G. So, there was unity of interest.

## **3. Time**

Unity of time means that each tenant must have acquired her interest in the property at the same time. Here, initially, both L and M acquired their interests in G at the same time--when O conveyed it to them. However, subsequently, M conveyed her interest to P. So, P acquired his interest in G at a different time than L (the remaining joint tenant), thus destroying the unity of time (discussed more below).

## **4. Title**

Unity of title means that each tenant must have acquired her interest in the property by the same instrument. Here, as with the unity of time, L and M initially had unity of title because both originally acquired their interests in G by means of the grant from O. However, when M conveyed her interest in G to P, P then got title from M's conveyance while L still had title from O's conveyance. So the unity of title was also broken at that time.

Thus, while M and L originally were tenants in common because the four unities were present and the intentional joint tenancy and right of survivorship language was included in the relevant instrument, the joint tenancy ended when M conveyed her interest in G to P because this broke the unities of time and title.

## **Tenancy in Common**

When any of the unities for a joint tenancy are broken, the tenancy reverts to a tenancy in common. A tenancy in common is the default form. Under a tenancy in common, each co-tenant has equal right to possess the whole of the property, but only a lesser divided interest in the property. Under a tenancy in common, each tenant may devise

her interest in the property or it will pass through intestate succession because a tenancy in common has no right of survivorship.

Here, because the unities of time and title were broken when M conveyed her interest in G to P, the tenancy reverted to a tenancy in common. So, at that point, L and P held G as tenants in common with no right to survivorship. However, each's interests in the property (i.e. 50 percent share) was not affected.

So, at the time of the action, L held a 50 percent interest in G as a tenant in common.

### ***Paul***

Next, it must be decided what interest P had.

### **Inter Vivos Transfer**

P obtained his interest in G by an inter vivos transfer from M. It must be determined that this interest is valid. First, the provision in the conveyance from O that the property was conveyed to M and L so long as neither transferred it could prohibit the transfer. However, as discussed above, that provision of O's conveyance was an invalid absolute restraint on alienation, so must be struck from the instrument. Thus, M was not restrained from transferring by means of O's clause in his conveyance. Second, the nature of a joint tenancy may prevent M from transferring her interest. Generally a joint tenant may transfer her interest in the property without the consent of her joint tenants. The effect of the transfer is that it converts the joint tenancy to a tenancy in common, but permission is not required to make the transfer. By contrast, a tenancy by the entirety--which is a joint tenancy held by married spouses--requires that property interest cannot be transferred without consent of the other tenant-by-the-entirety. Here, there is no indication that M and L were married to each other, so no indication that this was a tenancy by the entirety rather than a joint tenancy. So, as a joint tenancy, M was not required to obtain L's permission to transfer to P. Third, as a transfer of interest in real property, the Statute of Frauds would ordinarily require that the conveyance be in writing. Here, it is not clear whether the conveyance was in writing, but the Statute of Frauds may nonetheless be satisfied by part performance if P did two of the three: took possession of the property, made payment for the property, or made improvements on the property. So, M's transfer to P was likely valid.

### **Tenancy in Common**

As discussed above, thus, P holds a 50 percent interest in G as a tenant in common with L.

### **Lease to Sally**

However, P has also entered a lease with Sally (S) that may affect his interests. There are three kinds of landlord-tenant leases--(1) tenancy for years, which is a lease for a definite period of time; (2) periodic tenancy, which is a lease for a definite period (e.g. one month) that automatically renews at the end of each period; or (3) tenancy at sufferance, which is a tenancy caused by the holdover of property by the tenant after a lease has ended. Generally, rental leases need not be in writing unless they are a lease for years for greater than a 1-year term (because the Statute of Frauds requires a writing for any contract that cannot be performed within one year). Here, the initial rental agreement was for 2 years, but was in writing. P initially rented G to S as a tenancy for years with a fixed two-year term. A tenancy for years automatically terminates at the end of the fixed period. So, here, this tenancy terminated at the end of two years.

A periodic tenancy is created by implication if a tenant pays rent and the landlord accepts it each period. Typically, a periodic tenancy is created at the end of a tenancy for years when the tenant pays rent and the landlord accepts. However, here, S stopped paying rent at the end of the two-year lease, but remained on G as a holdover. So, at that time, a Tenancy at Sufferance was created. However, when S subsequently paid P for those three months and resumed paying monthly rents, a periodic tenancy was created if P accepted those rents. There is no information to the contrary, so P presumably accepted those rents.

Thus, at the time of the action, P owned a 50 percent interest in G as a tenant in common, but leased possession of G to S as a periodic tenancy.

### ***Sally***

S's interest in G is only that granted her by her lease with P. Because P, as a tenant in common, has a right to possess the whole property, he may lease the whole property to a tenant. Further, as discussed above, at the time of the action, S and P had a periodic

tenancy by implication. Thus, S has an interest in possessing the whole of G (but no ownership interest) as a periodic tenancy.

### ***Martha's Estate***

Finally, as discussed above, M's inter vivos transfer to P was valid. Thus, that property was no longer in M's estate at the time she died. So, M's estate has no interest in G.

## **2. Likelihood Lenny Can Obtain an Accounting and Contribution from Paul**

Next, it must be determined whether L can obtain an accounting and contribution from P, his tenant in common.

### ***Rights to Third-Party Rents***

Generally, tenants in common each have a right to possess the whole property. So, one tenant may not demand rent from her co-tenant because the co-tenant possesses the whole of the property exclusively. However, co-tenants may demand accounting for rents received from third parties. Here, P, a co-tenant, rented G to a S, a third party, and received rents from S. So, L may demand an accounting for the rents received from S in proportion to his interest in the property. Here, L had a 50 percent interest in G, so may demand 50 percent of the rents received from S.

### ***Contribution for Operating Expenses***

Generally, tenants in common are not entitled to contribution from other co-tenants for costs expended to repair or improve the property. However, they are entitled to contribution for basic operating expenses--which include property taxes. Here, L paid all property taxes on G after M died. Because property taxes are operating expenses, L is entitled to demand contribution from P for his share (proportionate to his interest in the property). Here, P had a 50 percent interest in G, so L may demand that P pay him contribution for 50 percent of the property taxes.

## QUESTION 2: SELECTED ANSWER B

1. What Property Interests in Greenacre is the Court Likely to Find Possessed by Oscar, Lenny, Paul, Sally, and Martha's Estate

### Oscar

#### **Fee Simple Determinable and the Possibility of Reverter**

The issue is whether Oscar has the possibility of a reverter interest in Greenacre. Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny as joint tenants with the right of survivorship, but included a fee simple determinable ("FSD"), so that if Martha or Lenny ever transferred Greenacre, the property shall automatically revert back to Oscar.

Thus, Oscar attempted to give Martha and Lenny an FSD, and leave for himself the possibility of a reverter. A possibility of reverter follows an FSD. A possibility of reverter means that the property automatically reverts back to the grantor upon the happening of an event, and thus, the grantor does not need to take any action in order to regain access to the property.

#### **Improper Restraint on Alienation**

The issue is whether Oscar's FSD to Martha and Lenny contained an improper restraint on alienation. If Oscar's FSD is found to be a complete restraint on alienation, then the condition will be removed and Martha and Lenny will own Greenacre in fee simple. Oscar will be left with no remaining interest in Greenacre.

An owner of property may grant interests in property subject to certain conditions. These are known as defeasible fees and include fee simples determinables ("FSD") and fee simples subject to conditions precedents ("FSCS"). A court will generally uphold such conditions, as long as they are reasonable restraints on use and not complete bars



on alienation. Public policy favors free alienability of property. Thus, a court will generally invalidate a FSD if the condition contains a complete restraint on alienation. A court will remove the condition, and leave the grantee with a fee simple absolute interest in the property.

Here, Oscar stated that neither Martha nor Lenny may make any transfers of Greenacre. Lenny and Martha's estate will thus argue that this condition is a complete bar on alienation, and thus invalid. The two will argue that in the event that they are to sell Greenacre, it will automatically revert back to Oscar. Thus, they will argue that this is a complete restraint on alienation because it does not require any action from Oscar to determine whether or not to take back Greenacre: it simply automatically reverts back to him upon any alienation of the property.

Oscar, however, will argue that this is not a complete restraint on alienation. He will argue that Martha and Lenny may do whatever they like with the property and may use it however they like; they may even rent it out to tenants, but their only restraint is that they may not entirely transfer the property. Thus, he will argue that when Martha transferred her interest in Greenacre to Paul, Greenacre automatically reverted back to him. However, this argument is a weak one, for it appears that the condition is one barring complete alienation.

### **Conclusion**

If a court finds Oscar's argument persuasive, then Oscar has a fee simple absolute in Greenacre, for Greenacre reverted back to Oscar when Martha transferred Greenacre to Paul. If this is the case, then Paul, Lenny, Martha's Estate, and Sally have no interest in Greenacre. However, a court is more likely to find Oscar's restraint on alienation complete and unreasonable. Thus, a court is likely to find that Oscar transferred Greenacre to Lenny and Martha in fee simple absolute, and that Oscar retains no interest in Greenacre.

## **LENNY'S INTEREST IN GREENACRE**

### **Joint Tenancy**

The issue is whether Lenny owns Greenacre in fee simple, or as a tenancy in common with Paul. Oscar granted Greenacre to Lenny and Martha "as joint tenants with a right of survivorship." As discussed above, the condition that Oscar placed on Greenacre is likely an invalid restraint on alienation, and thus Oscar granted Lenny and Martha the land as joint tenants in fee simple. A joint tenancy gives the co-owners equal right and possession to the property. The right of survivorship, a unique aspect of a joint tenancy, allows one joint tenant's interest in the land to pass to the other joint tenant upon death. A joint tenancy is created with the four unities are present: the joint tenants must have equal interests, rights to possession, must have obtained title by the same interest, and must have obtained title at the same time. Thus, at the onset, Lenny and Martha owned Greenacre as joint tenants with a right of survivorship, in fee simple absolute.

### **Severance of a Joint Tenancy**

A joint tenancy is severed when any one of the four unities discussed above is severed. A joint tenancy may be severed by one joint tenant conveying his interest to another. A severance can occur without the permission of the other joint tenant. When a severance occurs, the new owner of the land will take as tenants in common with the remaining joint tenant.

Here, Martha conveyed all of her interest in Greenacre to Paul. Thus, she severed the joint tenancy. When she severed the joint tenancy, Lenny and Paul became tenants in common.

### **Tenancy in Common**

In a tenancy in common, the only unity that exists is the unity of possession. There is no right of survivorship. Thus, when Martha transferred her interest to Paul, Paul and Lenny became tenants in common, with equal rights of possession in Greenacre. Lenny lost his right of survivorship when Martha transferred her interest to Paul. Lenny

may argue that because he did not consent to Martha's transfer, when Martha passed away they were still joint tenants, and her interest passed to him through the right of survivorship. However, this argument will fail. As discussed above, consent of the joint tenants is not necessary for severance.

### **Conclusion**

Thus, a court will likely find that Lenny has a fee simple absolute interest in Greenacre and that he is a tenant in common with Paul.

### **PAUL'S INTEREST IN GREENACRE**

As discussed above, Martha conveyed her interest in Greenacre to Paul before her death. She therefore severed the joint tenancy. Paul thus takes the same as Lenny: he has a fee simple absolute interest in Greenacre, and is a tenant in common with Lenny.

### **MARTHA'S ESTATE'S INTEREST IN GREENACRE**

A court is likely to find that Martha's estate has no remaining interest in Greenacre. Before Martha's death, Martha conveyed all of her interest in Greenacre to Paul. Thus, Martha has no remaining interest in Greenacre.

### **SALLY'S INTEREST IN GREENACRE**

The issue is whether Sally created a new periodic tenancy when she resumed paying monthly rent to Paul. Paul, a co-owner of Greenacre, entered into a written lease of Greenacre with Sally for a two-year term at a rental of \$500 per month. At the end of the lease, Sally stopped paying rent but continued to occupy Greenacre without Paul's consent. After Paul confronted Sally, while they did not enter into a new lease, Sally paid Paul the three months' rent she had not paid and resumed paying him monthly rent.

A lease is a possessory interest in property whereby the tenant maintains a present interest in the property, and the landlord retains a future interest. There are four types of leases or tenancies: tenancy at will, tenancy at sufferance (a holdover tenancy),

periodic tenancy, and tenancy for years. Here, it seems as though initially, Sally and Paul entered into a tenancy for a term of two years. Thus, they had a tenancy for years, which was to terminate at the end of the two year period.

### **Holdover Tenant - Tenancy at Sufferance**

When Sally stopped paying rent, but continued to occupy Greenacre without Paul's consent, Sally became a holdover tenant. When one stops paying rent but remains on the premises, one becomes a holdover tenant. A holdover tenant is one who was once properly on the landlord's premises, but has exceeded her permission to occupy the premises, and thus remains on the premises unlawfully. A landlord has the right to evict the holdover tenant and sue for past rent, or the landlord may create a new periodic tenancy, by operation of law, with the tenant.

### **Periodic Tenancy**

Although they did not agree to a new lease, Sally and Paul entered into a new periodic tenancy by operation of law. It appears as though Paul accepted Sally's late payment of the three months' rent, and Sally resumed paying Paul monthly. Thus the pair created a new month-to-month periodic tenancy, where rent will be due every month. The periodic tenancy will require notice to terminate it. The amount of notice required will be one month, the time of one period under their lease. If Paul has indeed accepted Sally's three months' rent she has not paid and has accepted her next month's rent, then Sally is a tenant and Paul is her landlord.

### **Conclusion**

Sally has a present possessory interest in Greenacre under a periodic tenancy. However, as long as proper notice is given, she or Paul may terminate the periodic tenancy at any point, and Sally will retain no interest in Greenacre.

## 2. Is Lenny Likely to Obtain an Accounting and Contribution from Paul?

The issue is whether Lenny may obtain a contribution from Paul for a share of the property taxes paid by Lenny and whether Lenny may obtain an accounting from Paul for a share of the rent money paid by Sally.

### **Contribution**

A contribution is a payment from one co-tenant to another co-tenant to reimburse a co-tenant for necessary costs spent in maintaining the property. Co-tenants who do not presently occupy the property (live there or otherwise do business on the premises) are required to share the costs of necessary improvements, principle payments on the mortgage, and taxes paid on the property. If one co-tenant pays these costs up front, he is entitled to contribution from his co-tenants.

Here, Lenny paid taxes on Greenacre. Thus, he is entitled to contribution from Paul to reimburse him for half of the amount spent.

### **Accounting**

An accounting is a sharing of the profits derived from the property that two tenants co-own. Co-tenants of a property are entitled to share in the profits gained from leasing the property to a third party.

Here, Paul leased the property to Sally. He obtained \$500 per month for two years, plus as discussed above, started a new periodic tenancy with Sally at the end of the two year period. Lenny is thus entitled to a receipt of half of the profits earned from the leasing of Greenacre to Sally.

### **Conclusion**

Lenny is likely to obtain both an accounting and contribution from Paul.