28 November 2015

MEMORANDUM

TO: Property Section 7

RE: The Sample Exam

I thought that the sample exams were good. No one failed. There were a few dismal performances on individual parts. But those that did badly on one part compensated for it by what they did on other parts. As a general matter, people did better on question 1 than they did on question 2. That suggests that a bit more review of covenants may be beneficial. Each one of the three questions posed had what my colleague David Rosenberg calls a "core issue." Very few people saw all of these core issues; most of you saw pieces of them; fewer saw the "core issues" with regard to the covenant in 1980 than saw the core issues in questions 1 and 3.

Let me take it question by question.

(1) So far as Ebenezer's title is concerned, the core issue seems to me to be two interrelated issues: When was the condition that the land be farmed breached, if it has been breached? Could Ebenezer possibly be adversely possessing against his wife? The issues are interrelated. If the condition was breached when David ceased to farm, then Clarissa was the owner of the land (pursuant to the valid [she's a life in being] executory interest in the will) and Ebenezer was either adversely possessing against her or was on the land with her permission (far more likely, in my view). This makes a difference because at common law, David is Clarissa's heir at law, and Ebenezer can't be her heir.

If, on the other hand, the condition is not going to be breached until the subdivider ceases to use the land for agricultural purposes, then E. and C. held a fee simple determinable as tenants by the entirety pursuant to David's informal deed, and the issue from the point of view of Fiona, the subdivider, is what happened to the possibility of reverter that normal American doctrine implies following a fee simple determinable with an executory interest (the one in the Audubon Society) held void under the rule against perpetutities?

Andrew's will limits the land to Bartholomew and his heirs so long as "they" farm it. If "they" is Bartholomew and his heirs at law, the condition was breached when David joined the Foreign Legion. If "they" means the persons to whom the land is limited, Bartholomew, his heirs, assigns, devisees, etc., the condition hasn't been breached yet. If Clarissa's executory interest fell in, did she have a cause of action against her husband? If it did not, did the possibility of reverter descend to the survivor of Bartholomew and Clarissa (the latter)? In either event, is David estopped by his deed?

No one saw the interrelationship of these issues completely. There were, however, pieces of the answer that were worth some credit:

(i) Under Andrew's will, the executory interest in Clarissa is valid under the rule against perpetuities because she is expressly made a measuring

life, but the interest in the Audubon Society is void because there is no measuring life.

(ii) The conveyance from David to Clarissa and Ebenezer fulfills the requirements of the statute of frauds.

(iii) The conveyance creates a tenancy by the entirety in the two of them since the statute expressly does not apply to married couples.

(iv) If Clarissa was seised of a fee in her own right, then Ebenezer is entitled to a life estate in the farm by curtesy consummate. The problem says that none of her children survived her, which clearly suggests that she had children, and no one other than E is mentioned as a possible father of the children. (In the future, I'll take curtesy out with another statute.)

(2) So far as the covenant in 1980 is concerned, the attempt to create an executory interest in the Audubon Society is void under the rule against perpetuties for the same reasons that it is void in Andrew's will. Many of you then went on to consider whether the covenant might have been enforceable in law or equity by the original convenanting parties or by the Society. Before you got to that, you might have considered whether it is enforceable at all. If the covenant is disapproved of for policy reasons (it is perpetual; it seems to be impeding the natural development of the land), might not a court say that the parties did not provide for enforcement either in law or in equity? The parties provided an enforcement mechanism (forfeiture). That mechanism is void. Should a court now give the parties an enforcement mechanism that they did not provide for? Nothing is the instrument says that the benefit of the covenant is to run with the land, and failure to mention this, at least in some cases (see *Charping*), has led courts to hold that the benefit does not run.

(3) So far as the garden with the buried child is concerned, many of you saw (and to good effect) that this might not be a substantial problem for Fiona. The garden is far smaller than the whole parcel, and she might well be able to build around it. I was inclined to agree with those who thought that David had an enforceable covenant with regard to the garden, though the precise contents of that covenant are quite unclear. I was disappointed, however, that so few of you took up the issue about the statute that I thought that I had flagged for you. Totally apart from the constitutionality of the statute (a rabbit hole down which many ran), there is substantial reason for believing that a court would not apply the statute to this case. The legislative history tells us that "burial grounds" in the statute was intended to mean "burial grounds of native peoples." Is there any ambiguity in the statute that will allow us to look to the legislative history? Sure. As some of you saw, "burial grounds" does not necessarily mean any spot where one person happens to have been unceremoniously buried. Further, what is the Bureau of Indian Affairs (or the local historical commission) doing being concerned about a spot that the Starks have used dump the unfortunate child?

A "model answer" to the question follows.

I. Does Ebenezer own any interest in Stark Farm? If so, what interest?

1. Ebenezer is in possession of Stark Farm. He has been in exclusive possession since the death of his wife, Clarissa, this year. He possessed it with her for eighteen years. So the question is whether anyone not in possession has a better claim.

2. In 1980, Andrew Stark had clear title to the farm. That year he entered into a agreement with four of neighbors. This agreement may have created non-possessory interests that affect Ebenezer's title. These will be considered

later. One thing, however, about the agreement is quite clear. To the extent that it attempts to create a springing executory interest in the Eden Audubon Society if the land is used for other than agricultural purposes, the interest in the Eden Audubon Society is void under the Rule Against Perpetuities (RAP). Ebenezer's possessory rights cannot be defeated by the Eden Audubon Society under this instrument however he or Fiona use the land.

3. In 1983, Andrew Stark died devising the land to his son Bartholomew in fee simple. The language of the devise pretty clearly made the fee determinable ("for as long as they shall farm the land"). It then made alternative devises over in fee to Andrew's daughter Clarissa "if she then be living, otherwise to the Eden Audubon Society." The devise over to Clarissa is valid under RAP because it must take effect during her lifetime. The alternative devise is void under RAP because it could take effect well beyond any life or lives in being plus twenty-one years. Under the doctrine of "conservation of estates," something must be left over (the fee after the determination of the preceding fee not having been fully disposed of), and this "something" must be a possibility of reverter retained in the devisor. Under the doctrine of *Independent Baptist Church of Woburn*, this possibility of reverter passed by the residuary clause in A's will to his residuary devisees, his son and daughter. (If the court does not follow *Woburn*, the reverter could pass to Andrew's heirs at law, and we don't know who they are. They seem to be the same people, i.e., Clarissa and Bartholomew.)

4. Bartholomew farmed the Stark Farm for five years, dying intestate and leaving as his heir David, who farmed Stark Farm until 1995, when he went off to the Foreign Legion. The question is whether the limiting condition in Andrew's devise occurred then. If it did, then the land automatically became Clarissa's under the (valid) executory devise under the will. The devise says that Bartholomew's interest (and that of his heirs) shall last "as long as they shall farm the property." The words "and his heirs" are taken as words of limitation not words of purchase. If we follow that line, we have a possible argument that the limiting condition is not violated unless whoever holds the fee ceases to farm the land. In this case, the restriction has not been violated yet. On the other hand, the word "they" rather seems to contemplate that Bartholomew and his heirs (and their heirs at law) must farm the land. In that case the restriction was violated when David ceased to farm. It is unclear which interpretation a court would take, and so we must pursue both possibilities.

5. If the condition was violated in 1995, David's letter to his aunt and uncle was a nice gesture, but totally unnecessary (except for the "covenant" about the garden, see below). His aunt already owned the land. She and her husband entered onto the land and proceeded to farm. (It is possible that a court might hold that the possibility of reverter was held by David and his aunt as tenants in common. Though this is unlikely, granted the "survivor" language in the will, the conveyance would then have the effect of transferring the fee in one-half of the property to Clarissa and Ebenezer, and the other half to Clarissa outright, with resulting fractional shares from then on.)

6. If the condition was not violated in 1995, then the letter from David to C. and E. was necessary to give them title to the property. It is an informal conveyance, but it has all the elements of a valid informal conveyance under the Statute of Frauds: the names of the grantor and grantees, a description of the property (the Stark Farm, there can't be more than one), words indicating the present passage of an interest ("The land is all yours."), and the signature of the grantor. (Ebenezer may bolster his claim under *Metzger* with arguments of partial performance, detrimental reliance, and estoppel, though his case for that the claim is not as strong as that of Susie Hayes.) Of course, David cannot convey anything more than he's got, which is a fee

simple determinable. The seven-year statute of limitations (1920) would help bolster C. and E.'s claim against David. It could not, however, help in any claim against an outstanding possibility of reverter because the cause of action (under the assumptions given) would not have accrued. (It is inconceivable that a court would interpret the 1920 statute as being anything more than what it seems to be, a shortened statute of limitations for those who possess under color of title and pay taxes.)

7. If the condition was violated in 1995, and C. and E. entered the land (whether they knew it or not) under Clarissa's title, her death in 2011 passes the title to the land back to David. (Ebenezer is now probably in adverse possession, although he may have a claim to a life estate by curtesy.) There is just barely a possibility that Ebenezer could be regarded as having adversely possessed against Clarissa's title by fulfilling the requirements of the 1920 statute, but it is rare that adverse possession can be established between two people both of whom are living on the land, unless the one seeking adverse possession clearly claims that he is holding adversely to the other person. A more fruitful line for Ebenezer would be to claim that both he and Clarissa, thinking that they had a cotenancy (it would be tenancy by the entireties under the exception to the statute), possessed in such a way as to estop her heirs (David). This just might work. The doctrine of estoppel by deed [which I didn't expect anyone to remember, but some people intuited it] might bar David from claiming the land now, granted that he tried to convey it in 1995.

8. If the condition was not violated in 1995, and the reverter is still outstanding, who's got it? Whether the devise in 1983 created a joint tenancy, a tenancy in common, or joint life estates with alternative contingent remainders in the survivor, we need not decide, because the heirs of both the residuary devisees are the same, David. Estoppel by deed could apply here as well. The only other possibility that there is an outstanding interest in anyone else is if there were other heirs of Andrew, and the court determines not to pass the land by the residuary devise.

9. We conclude this part by saying that Ebenezer may own the land, but David may have a claim by descent from Clarissa or a possibility of reverter, which claims may or may not be barred by estoppel. Ebenezer should be required to succeed in a quiet title action before Fiona enters into this transaction.

II. Can anyone invoke sanctions against Fiona for converting the land to residential uses?

1. We confine ourselves here to the issues raised by the 1980 instrument, the limitation on the devise of 1973 having been treated above and the problem of the garden being treated below.

2. As we have already seen, the executory interest created by the 1980 instrument is void under the RAP. The question is whether the covenants created by that instrument are enforceable by anyone else against the Stark Farm. One could argue that the instrument created one and only one enforcement mechanism--the executory interest. That interest is void, and no other mechanism having been provided, the court should not supply for the parties an enforcement mechanism that the parties did not create.

3. This is certainly a possible holding, particularly if the court believes the instrument to have been unwise. It creates what seems to be a perpetual restriction, tieing up large amounts of land in what the parties to the covenant contemplate will not be its highest and best use, at least from an economic viewpoint. As such, it creates a substantial restraint on alienation if not in the technical sense, at least in the broad sense. Should parties,

some of whom are now dead, and all of whom may be dead, be able to dictate the use of large tracts of land forever?

4. On the other hand, it is hard to imagine that a court would be so narrow as to hold that the covenants could not be enforced as covenants between the original parties to the transaction. The question, then, is whether the burden of these covenants should run with the land, granted that the enforcement mechanism that the parties contemplated is void?

5. There is some evidence that the parties to the covenants intended that their successors would be bound. The instrument expressly says so. It does not say, however, that the parties intended that the benefit of the covenant should pass to the successors of the convenantees. Failure to so specify may result in the covenant not running with the land. See *Charping*. It could certainly result in the covenants not being enforceable once the original parties to the covenant had all died or parted with their interest in the benefited land.

6. One could imagine a court holding that even though it was not expressed, and perhaps not intended, that the successors in interest to the covenantees be able to enforce the covenants, it was clearly intended that the Eden Audubon Society be able to do so. It cannot enforce them in the way contemplated, but we could give the EAS the power to enforce in equity. That, of course, leaves us with a holder of a benefit in gross, although most American cases that have dealt with this problem recently have found some way to allow holders of benefits in gross to enforce them.

7. If we are discussing the running of the burden in law, the agreement raises some privity problems, there being no horizontal privity other than privity of contract. Since, however, the only effective enforcement would be had in equity, that need not concern us.

8. In equity notice substitutes for privity. Nothing in the problem says that this instrument was recorded, so we do not have the notice provided by the record. Fiona does not seem to know about the instrument, but we cannot exclude the possibility that one of the potential beneficiaries of the covenant might record it. (There’s an interesting ethical question here: We clearly do know about the covenant. Are we obliged to tell Fiona about it, when it’s not in her interest to know about it? I’m inclined to think that we probably should tell her about it, because if she finds out in some other way, it’s likely to queer the deal with her. If we are honest about it, and say that we’ll bring a quiet title action about it, we may keep her talking to us.)

9. The covenant certainly touches and concerns the land in the traditional sense, it being concerned with how the land is used. Some courts might use the touch and concern requirement as a vehicle for expressing the kinds of policy concerns reflected in (3), above.

10. Even if a court found that there was someone who could enforce the covenants in equity, there remains the problem of changed conditions. The impact of the covenant on the burdened land is severe. Agricultural use of this land does not seem to be an economically viable option. Nor is it at all clear that with the possible exception of the Audubon Society anyone receives any economic benefit from the existence of the covenants. On the other hand, this is a hard case. Changed conditions are hard to prove, and here the parties seem to have contemplated the very changed conditions that happened.

11. We conclude this part by saying that there is probably less risk that the covenants would stand in the way of Fiona’s proposed development than there

is that David stands in the way, but there is some risk. Again, a quiet title action might be in order.

III. The Garden

1. What kind of risk to Fiona is posed by the putative buried child in the garden? Two obvious ones: (1) She may find herself bound by the possible covenant that E. and C. entered into with David: “I’m sure that you ... and anyone who comes after you will see to it that nothing ever happens to the garden” followed by a letter in which E. and C. agreed to respect David’s wishes. (2) The possible application of the 1980 statute. There’s a third risk that’s not a legal one: If it becomes generally known that a child is buried in the garden, will that fact impede sales of houses, not only those built over the garden but elsewhere in the area?

2. So far as the legal risks are concerned, the covenant with David meets the traditional requirements for a running covenant, at least in equity: intent, touch and concern, and notice. This last is a particular problem for the future if the exchange of letters becomes part of a public quiet title proceeding. The problem is not whether there is some kind of commitment to David (and perhaps to David’s successors, but that issue is not before us), the problem is what is the content of the commitment? “I’m sure that you will see that nothing ever happens to the garden” is mighty vague. Could, for example, the garden be kept as open space, as residences were built around it? Perhaps David could be persuaded to agree to the reburial of his aunt/uncle in some more appropriate place. We need to know more about just how much of a hindrance to the development of the site either keeping the garden open space or reburying the remains would be. Facially, it does not seem to be a major problem.

3. The same issues are raised by the statute. Before we ask the question whether the statute is enforceable against Fiona, we ought to ask how burdensome compliance with the statute would be to her. Suppose she simply didn’t excavate in the garden. Suppose she got her permit and reburied the remains. Neither of these things seems likely to be a major stumbling block for a substantial residential suburban development.

4. Fiona also has some arguments against the application of the statute to her situation. The statute is badly drafted, but the history is known. It was designed to protect the burial grounds of native peoples. This is obvious on the face of the statute (note the mention of the Bureau of Indian Affairs; what do they have to do with the buried child of the Starks?). One can imagine a court holding that these are just not “burial grounds” within the meaning of the statute. One can also imagine a court saying that David, not being a “descendant” of the buried child, is not entitled to a hearing under the statute.

5. While one can imagine constitutional objections being raised to this statute (how is one to determine whether an excavation of burial grounds is “in the public interest”), the arguments about its literal applicability to this situation and the probable low cost of compliance make it unnecessary to consider the constitutional issues.

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