

Property, Fisher, 5/17/06

**Question 1 – 498 words**

Formal Requirements

It isn't clear that the will was witnessed by two non-interested parties and put in writing.

- If not:
  - o will invalidated, passes through intestate succession
- If met:
  - o following interests are created

Interest in Chalet

Steven has a life estate in the chalet. Ursula and Victor have a vested remainder subject to open (unborn children) and subject to divestment (by disclaiming skiing). Steven's unborn children have a contingent remainder, subject to divestment if and when it vests. Orphelia's heirs, as determined by intestate succession, have a reversion. It would only apply if Ursula and Victor both disclaim skiing by age 21 and Steven has no more children. If one of them died before disclaiming, even if before 21, their heirs would succeed to the estate.

RAP applies to CRM's and VRMSO's, but not to VRMSD. Even if interpreted to apply to the entire grant, however, it is not violated because even if Steven's current children both die and he has more, the interest will vest or not within 21 years of his death.

The joint tenancy has unity of title, interest, and possession; time is somewhat problematic. Ursula's and Victor's interests are acquired and vest at the creation of the

will, but are also subject to divestment. The unborn child's interests do not vest until they are born; thus, a court would have to find that either the interests of all children were acquired at the same time in that they take possession at the same time, or that the unborn child's interests were acquired at the same time. Also, right of survivorship is not explicit, though the provision of joint taking should a child disclaim skiing may be used to support this construction. If the court strictly construes against JT via either method, TC would be created with equal shares.

### Interest in Cottage

The five unities for TE (time, title, interest, possession, marriage) are facially met, but Ophelia attempts to control the division of the property upon divorce. Divorce terminates the TE, and normally gives way to TC. Although alternative agreements can be made on division, it is not clear that they can be made at the creation of TE, or as a condition of a devise. This could have effect the devise in two ways. Policy arguments regarding the state's support for the institution of marriage are often applied; in this case, a court may regard these words of limitation as against public policy and therefore invalid. Alternatively, the Holmesian approach might strike them as not being a recognized devise. Either of these would leave a basic TE. However, a court could also find a violation of unity of interest or possession. This would either create TC ("to Daphne and Eric") or TE by striking the limitation. The intention of Ophelia seems to be to give both the property but prevent Eric from running off with a share, but a court is unlikely to recognize such a unilateral condition on a TE.

## **Question 2 – 977 Words**

You have several interrelated means of redress, which are outlined below.

### Pond Drainage

As underground percolating water used on her parcel, Transient's use is presumptively reasonable in most jurisdictions. Even if our jurisdiction has a correlative rights regime and applies a reasonable use test, you are unlikely to succeed in the balancing. Transient's uses are productive, whereas yours are merely recreational, and it only drains the pond during the summer (although that is when you intended to use it). You can make a collateral attack on this use, however, by going after her use of the windmill. If this fails or she adopts a new energy source, and this is an English rule jurisdiction, you can buy a pump to compete for the water for the pond.

### Windmill as nuisance

We will argue the windmill constitutes nuisance as a substantial and unreasonable interference with the use and enjoyment of your land. Although Transient's awareness of the harmful effects isn't absolutely clear (only notified her of the bird problem, maybe unaware that the sound travels to your house), we should be successful in classifying it as an intentional interference. If not, we would have a slightly higher burden of showing her negligent.

*Middlesex* created a five factor test. The nature of the act is a hard claim for us, as Transient is attempting an environmentally friendly method of producing power. As to the nature of the harm, Restatement/*Prah* equates "freedom from discomfort and annoyance" with physical interference. We can analogize to *Morgan*, where constant

odors were held a nuisance. We will stress the 24 hour noise and constant effects since the mere drowning of bird noises might be considered extra-sensitive or at least low in magnitude. This connects to degree of harm, where though no economic damage there is constant interference with your livelihood. For efficiency, we should research whether her windmill technology is not actually efficient. Usage will help us if, as likely, the community has other methods for producing energy. Transient will counter that the custom includes farming, the annoyances of which you accepted. The purchase for below market rate supports a claim of coming to the nuisance.

Balancing these factors could go either way. *Morgan* only precluded summary judgment. Holmes' holding in *Middlesex* focuses on the prevention of normal cultivation, so we'll argue that it's not the normal means of cultivation and customary means don't cause nuisance. The Restatement helps by mentioning explicitly the "burden on the plaintiff of avoiding the harm" (implicit in Holmes). Most importantly we will prove Transient the least cost avoider, since you can't prevent the harm. Finally, to ensure injunction we will raise *Morgan* ("such recurring frequency and in such annoying density as to inflict irreparable injury").

### Trespass

You have a further claim against Transient of trespass via the dead birds. This is probably your easiest claim, as Transient is strictly liable for any physical intrusion on your property. However, recovery may be limited. A court may not enjoin because of the valuable benefits of the windmill, and a damage award may not fully account for your

emotional harm. If we research preventive measures (i.e. a guard) we can raise a valid reason to enjoin while maintaining efficiency (at least on trespass).

### Easement

Transient will attempt to assert a defense to the nuisance and trespass claims by claiming that she has an easement. If she and Strong had an contract then it was not recorded and you lacked notice, making it invalid as against you. However, if Strong gave her license, which by reliance in putting up the windmill creates an estoppel claim, it may be enforceable. Also, an easement obtained by prescription needn't be recorded. Unless this jurisdiction requires a claim of right (unlikely), then the elements of a prescriptive easement would be met (hostile, open and notorious, weaker versions of actual/exclusive/continuous possession). Her claim is valid if the statutory period was less than the time between the present and 1992. In *Palco*, a prescription ran against "Roodner and his predecessors," and you succeeded Strong in FS. If any of these are valid claims, you'll have to pursue Strong because the burden tells on the servient parcel upon transfer.

There is no evidence of an equitable servitude or real covenant, and even if there were neither would be enforced: an equitable servitude due to lack of notice and a real covenant due to lack of horizontal privity. It should also be noted that the nuisance claim might still be advanced in the face of some acquired right.

### Action against Strong

If we can't enjoin Transient, we will go after Strong. First, the windmill was a latent material defect. Strong will claim that he did disclose when he said Transient lived "off the grid" and that his lack of being bothered was true given his use of the land. We will have to counter that the noise problem was especially unobservable and Strong had a duty to not only answer subjectively, but disclose based on either a reasonable buyer (anybody would be annoyed) or on a subjective standard especially this buyer (birds). You have a good chance of winning here and being awarded rescission of the sale and/or damages, which we will seek based on your preferences.

Secondly, you have a claim if there are in fact hidden defects in the title. Title insurance would not cover them, but if you purchased with a warranty rather than quit claim deed you have an action against Strong. Further, failure to disclose might be used as a material defect as above.

### Recommendation

I suggest we immediately bring suit seeking injunction to cut off a prescription claim by the likely 15 year period. Depending on the actual facts and legal standards discussed above, we should then proceed with the primary goal of enjoining the use of the windmill and fallback position of compensation.

**Question III – 740 Words**

The major problem with current federal anti-discrimination law involving property is the inconsistencies, or “gaps”. Some are explainable and indeed necessary in the operation of a consistent system, but as presently formulated they represent the lack of a unifying approach. They function to destroy the system’s coherence and undermine its possible justifications by failing to provide clearly joined means and ends. These gaps result from historical circumstances, which are only descriptive, and the ad-hoc, unprincipled resolution of conflicts of various rights that have arisen in this area of the law. This is damaging not only to the validity of the law in a general sense but especially to the goal of eliminating discrimination from property, because the end of discrimination cannot ultimately be achieved without changing the attitudes of individuals.

In the housing context, the policy goal is “to provide, within constitutional limitations, for fair housing.” An inconsistent system cannot be fair, and those negatively affected will never come to see it as fair. To ultimately change attitudes of those who currently view anti-discrimination laws as unfair, validate our justifications, and remain practically effective in the meantime, the law requires coherence. This incoherence provides fodder for those who would perpetuate discrimination by claiming reverse discrimination and associating their prejudicial views with the material interests of affected groups of people.

What, then, should we accept as fair? Anti-discrimination, by its express meaning, implies that each human being should have an equal right to engage in ownership and use of property without reference to the outside preferences of those that they deal with. Yet while *Huntington* rejected an intent requirement in the FHA, the

dictates of the 14<sup>th</sup> Amendment and §1982 demand intent to establish discrimination. Any justification on the grounds of impracticability of determining intent is thereby undermined. Further, so long as the goal is fairness, it is unjustifiable. Consider the prospective landlord or seller of a house subject to suit for refusing a potential client. Although we may not know their intent, they are certainly aware of it. Thus, they will consider it unfair.

In response, and in consideration of freedom to associate, the FHA adopted the non-professional (§3603.b.1) and Mrs. Murphy's Boarding House (§3603.b.2) exceptions. These create a zone of permissible discrimination. However, §1982 does not respect this zone where race is the discriminating element. It is thus legal to discriminate in some settings, and to discriminate against some groups in some ways, but not in others. This is manifestly unfair, and is seen as such by both those who discriminate and those who are discriminated against. Non-racial minorities that are discriminated against feel slighted because they are still subject to a highly invidious form of discrimination. Racists will wonder why they can't discriminate like homophobes. But most importantly, those with prejudices of varying levels who cannot be classified as outright discriminators are given the wrong message. Not only is the message conveyed that discrimination is in some sense acceptable, but those with underlying or less fully expressed prejudicial predilections are likely to view the system as a whole as being unfair. "Why do they single out white people who don't like blacks? You don't even have to be 'racist' to be accused of racism! You still have to pay even though you did nothing wrong!"



This is most harmful in its relation to property because of the views that “fence-sitting” people with prejudices have towards private property. Deciding conflicts in favor of various groups differently in different situations severely undermines the notion of holding rights in private property. Scalia’s dissent in *Pennell* is instructive: the lack of any causal connection strikes at the heart of what we consider unfair. These gaps not only undermine the practical effects of anti-discrimination law, but serve to disconnect the causal relationship between discriminatory behavior and society’s disapproval. Just as disciplining a child requires immediate consequences for them to understand what they did wrong and why it was wrong, people’s reaction to the present system isn’t to understand that discrimination is unacceptable, but rather to identify with those “unfairly” harmed, the discriminators. Gaps are permissible where they retain this connection: the government can be held to a higher standard than private citizens. But the definition of classes, the scope of discrimination permitted, and the requirement of intent must all be brought in line. Otherwise, we will be forever fighting against people’s instinct to protect their private property instead of enjoying a prejudice-free future.

**Question 4 – 744 Words**

Radin's formulation of a personality theory of property is of primary importance to the understanding of landlord-tenant law, not because it supports rent or eviction control, but because it fails. It is important to use her approach because the remaining justifications for this approach do not necessarily have any relationship to the landlord tenant context. Peace of mind, privacy, self-realization as a social being, and benevolence have no connection to a requirement of a consistent dwelling, so long as one has a dwelling to call their own. Some even cut against it, such as autonomy and personal responsibility. Most importantly, though, her case for the recognition of a continuum of property ranging from the most personal to the completely fungible, if accepted, creates a compelling theoretical justification for the reformation of the relationship between landlord and tenant that would not otherwise exist. Ultimately, I believe that even upon accepting much of her line of reasoning the conclusions she draws are erroneous. Based upon her insight, however, a viable personality-based approach to landlord-tenant law exists.

Radin is correct in pointing out that correcting for the shortage of affordable rental housing only provides a justification for government subsidy. Similarly, if we are encountering a situation where landlords have colluded in some way to extract exorbitant rates then it is fully appropriate to force them to bear the burden of recalibrating the market.

The application of a personality theory to landlord-tenant law, however, involves the claim that the tenant's occupancy becomes bound up in their own person such that it justifies a superior claim of right against the property rights of the landlord. From a

Hegelian conception of self's interaction with the concrete world (constitutive theory) she draws the conclusion that the government has an affirmative responsibility to "rearrange property rights" to ensure that everyone can "constitute themselves in property."

The first criticism is that she offers no real justification for why landlords should have to take on the burden occasioned by the attachment of their tenants to the property. As a more "exigent" claim than the landlord's fully fungible interest (assuming they have no personal attachment), it is more deserving of recognition. Accepting this, however, there is still no reason why the cost should befall the landlord. The special exemptions we give homeowners that involve "some curtailment of the mortgagee's interest" only serve to undermine those laws. Mortgagees take such risks into account; rent control strips landlords of the right to anticipate and adjust. Similarly, her argument that landlord's should have no right to a reasonable return because there is no right to remain in a business only supports permitting the landlord to put their property to a different use, not cede it to the tenant. Finally, why doesn't a personally invested landlord have a right to retain its high paying tenants?

Her primary mistake, however, lies in her temporal framing of the issue. She believes that the government should encourage and recognize the process by which the tenant becomes attached to their place of residence, essentially viewing it no different from the home that is formed when one owns a house outright. The key to Radin is the distinction between an established home versus other interests, even other dwellings. This is the only answer to why the tenant must be required to retain possession of that particular residence. This may be justified as a remedial measure, then, but cannot justify a general system of landlord-tenant law whereby longstanding renters come in and obtain

a possessory interest. Rather, since rich and poor alike become attached to a particular residence, not a particular style or level of living, it seems to be an argument in support of eliminating rental agreements and providing full ownership (or at least possessory rights) to government owned housing. In other words, we should provide for those future would-be tenants not by letting them rent and then obtain an interest, but by offering them free or subsidized housing that they cannot be ousted from. In the future, we should avoid situations where the home is not a fully stable resource.

Even this formulation, highly favorable when viewed from the tenant's perspective, cannot support rent control. To the extent that the Hegelian approach, and the other personality approaches, involve the responsibility of the individual in obtaining and keeping their property, this is especially true. Ultimately, her reasoning can only support a fully intervening state or a general policy of supporting home ownership. Putting the burden on the landlord remains unjustified.