

# Chicago-Kent College of Law

## Property

### Professor Perritt

### Spring 2011 Exam

### Model Answer

#### Question I

A. Drew, representing Mary Frances, should sue Charlie Bob for trespass, seeking an injunction and damages. He should anticipate defenses of adverse possession and prescriptive easement. If Charlie Bob prevails on either of those defenses, Mary Frances should then pursue an action for nuisance, seeking an injunction and damages.

As the owner of a Fee Simple Absolute interest in Virginia Gentleman, Mary Frances has the right to exclude anyone she wants, and she wants to exclude Charlie Bob and his invitees.

Charlie Bob will assert a privilege to continue to engage in his activities on “his” one-acre section, based on adverse possession or prescriptive easement. The two theories are similar, except that exclusive possession is required for AP and is not required for prescriptive easement. For both, Charlie Bob must establish (1) actual entry, (2) continuous, (3) for the prescriptive period, (4) open and notorious, and (5) hostile to the interests of the original landowner.

The statement of the facts suggests that Charlie Bob had already been using the one acre for 21 years before Mary Frances bought Virginia Gentleman. That period is almost certain to satisfy element (3); most states provide limitations periods of 20 or fewer years, but we would need to confirm Virginia’s period.

Charlie Bob has actually entered, thereby satisfying element (1), and his use likely qualifies as “continuous” under element (2) even though it has been intermittent—occurring only during hunting season. The continuity element of adverse possession and prescriptive easement usually is satisfied by a pattern of use similar to that customary for the particular use—hunting.

Hostility (element 5) seems easily satisfied, because Charlie Bob just came on the land, not caring who owned it. Now he is using it like he owns it, so he’s got a pretty good argument under the prevalent objective standard, under the defiant trespasser standard, *and* under the claim of right standard.

Charlie Bob’s weakest argument is on element (4)-- open and notorious. While he made no attempt to hide his activities, the camping, shooting, and beer drinking might escape notice of a reasonable property owner, who might think all the commotion was coming from somewhere else. Nevertheless, a reasonable property owner would surely investigate whether the noise was on his own land, sometime time during 21 years. So Charlie Bob also has a pretty good argument on this element as well.

Charlie Bob has pretty strong arguments on all of the elements. The question remains: is it Adverse Possession or only a Prescriptive Easement? Charlie Bob was using the one acre only for a limited set of activities: tenting, drinking, shooting, and—presumably—general hell raising. These activities are not necessarily inconsistent with other activities on the one acre by the original property owner; i.e. Charlie Bob may not be able to establish that his use of the one acre was exclusive. But it's hard to overcome his argument that he established a prescriptive easement in gross, the scope of which was to (a) camp in a tent, (b) drink beer, (c) shoot at what he perceived to be deer, (d) with a 0.30 calibre rifle (e) during hunting season.

All of this establishes, at most, a prescriptive easement on the property when Mary Frances bought it. Whether her ownership is burdened with the easement depends on the priority of her interest vis-à-vis Charlie Bob's. That, in turn, depends on whether she was a bona-fide purchaser for value without notice of Charlie Bob's easement. If she is, she takes clear of the easement. Nothing in her chain of title shows any easement, so she does not have record notice. Charlie Bob, however, will argue that she had inquiry notice: the same conduct that satisfied the open and notorious element of adverse possession or prescriptive easement communicated enough to a prudent purchaser in Mary Frances's position that she should have inquired further. A prudent purchaser would have walked the land and seen the empty beer cans, the evidence of camping, and spent rifle shells. If there during hunting season, she would have heard the gunfire and the carousing.

Drew, on behalf of Mary Frances, will argue that the legal standard for inquiry notice is higher than the standard for open and notorious (that's a question of Virginia law we will have to research), and in any event, what was sufficient to put the previous owner on notice over a 21-year period is insufficient to put a purchaser on notice during a necessarily brief inspection of the property, especially if it occurred outside hunting season (when Mary Frances inspected, or was entitled to inspect the property, is a fact question we'll have to investigate).

If Mary Frances had inquiry notice, she takes subject to Charlie Bob's interest and will lose an action for trespass.

But that's not the end of the matter. Well represented by Drew, she has another theory that can hoist Charlie Bob on his own petard. If (and only if) he establishes a property interest—either adverse possession or prescriptive easement, she can maintain a nuisance action against him for intangible injury to her remaining unencumbered nine acres from his activities on “his” one acre. I will defer analysis of substantive nuisance issues to my answer to subquestion (B).

B. Charlie Bob can attack the ordinance as ultra vires, as a violation of his 14<sup>th</sup> Amendment due process rights, or as a taking of property entitling him to just compensation.

All three theories depend on his being able to establish adverse possession or prescriptive easement, considered in the answer to subquestion (A); otherwise he has no standing to attack the ordinance at all and no property interest for his due process or takings challenges.

The ordinance is ultra-vires, he will argue, because it exceeds the authority granted the Buchanan County Board of Supervisors by the Virginia statute set forth in the appendix. It's ultra vires in

two respects. First, it is not premised on a finding that the area is “so heavily populated” as to make firearms or arrows shot from bows hazardous to the inhabitants. The area of Virginia Gentleman is only thinly populated, as evidenced by its size of 10 acres. Second, the ordinance exceeds the authority to prohibit the outdoor shooting of firearms or arrows from bows because it prohibits hunting deer with *anything* except blowguns, including knives, tomahawks, traps, poison, and lassos. These are strong ultra-vires arguments.

Even if the ordinance is not ultra-vires, he should argue that it represents state action (easy—it’s the county’s legislative body that adopted the ordinance), depriving him of his property (full use of his adverse possession or prescriptive easement), without due process of law. To overcome this argument, the county must meet its burden of articulating a legitimate state interest and a rational relationship between the restrictive measures embodied in the ordinance and achievement of the state interest. The county likely will succeed in establishing a legitimate state interest under the deferential standard of *Euclid*: protecting residents from being shot by stray bullets or arrows, protecting deer from being threatened with extinction, reducing noise pollution due to gunfire or the thwangs of bowstrings being released.

The county will have a harder time, and Charlie Bob a better time, regarding the rational relationship requirement. The ordinance is overbroad in that it prohibits even those weapons, such as knives, tomahawks, traps, poison, and lassos less dangerous to humans than blowguns, and just as quiet. The ordinance is underinclusive in that it prohibits hunting only deer with any weapon except blowguns. The risks of accidental shootings and noise remain from hunting other animals.

He’s got a pretty good shot in his due-process attack.

That leaves his takings argument. There is no trespassory invasion so he cannot establish a categorical *Loretto* taking on that ground. What he is doing may or may not be a nuisance; if it is, the county’s restriction is categorically *not* a taking. Whether it is a nuisance depends on the magnitude of the harm to surrounding property owners, the suitability of his use of his own property, and the relative cost of abatement. Hunting on large parcels of land in western Virginia is common, and so suitability is likely satisfied. Charlie Bob could abate the nuisance fairly easily, by changing his hunting practices. The other property owners could not. What are they supposed to do? Wear flak jackets and ear protectors 24/7? The harm to surrounding property owners depends on the care with which the activities are conducted. Wild shooting at all hours of the day and night, increasing the risk of bullets going astray, likely would be a nuisance. On the other hand, quiet, careful, sober, aiming of a 0.30 caliber rifle or an arrow at a deer almost certainly is not a nuisance. Even the latter is prohibited by the ordinance, so it does more than prohibit a pre-existing nuisance.

That leaves the *Lugar* category of taking and the Penn-Central balancing. The ordinance constitutes a *Lugar* categorical taking only if Charlie Bob has been deprived of all economically beneficial use of his property. In this regard, he is better off if he has established only a prescriptive easement in subquestion (A) than if he has established adverse possession. If he has established adverse possession, there are lots of economically beneficial things he can do with

his one acre: build a house, build a heavy-metal music arena, build an alligator refuge, or set up a couch and rent it out for sleeping. On the other hand, if he has a prescriptive easement, the scope of which is as set forth in the answer to subquestion (A), the ordinance takes almost everything he has: shooting deer with a 0.30 calibre rifle. Using a blowgun to hunt deer would be outside the scope of his prescriptive easement because he has never done it before. That leaves only the camping, drinking, and carousing, which are not economically beneficial, he will argue. So he's got a shot at establishing a *Lugar* taking.

If he is relegated to balancing, he likely will lose his takings argument. He has not been singled out; there are no investment-backed expectations; there are few other ways to pursue the legitimate state interest. The burden is no greater on Charlie Bob than necessary to achieve the interest.

If he can establish a taking, he gets just compensation, represented by the market value of what the state has taken away. That almost certainly is far less than the cost of a deer-hunting trip to Nepal.

C. Peyton Randolph's nuisance action against Mary Frances borders on the frivolous. Nuisance lies when one property owner uses her real property so as to interfere with another person's use of his real property. There are two big problems with this theory in the context of the shot pig, either of them fatal to the theory. First, Mary Frances is not doing anything with her property that affects Peyton Randolph or his late pig. The actor is Charlie Bob and his invitees. Mary Frances has already tried and failed to curtail Charlie Bob's activities. The lawsuit outcome proves this. So she was powerless to prevent the harm that befell the pig and that might befall any replacement.

Second, the pig's use of Virginia Gentleman was not Peyton's use of his land, unless he can establish a far-fetched theory that free-running pet pigs are part and parcel of the bundle of rights representing his property. To do that, he would, in effect have to establish an appurtenant easement by prescription or some kind of covenant burdening Virginia Gentleman, and there are no facts to support either.

Even if he jumps these hurdles, Peyton Randolph's position is weak on the merits: he can easily abate by fencing the pig in, chaining it up, or keeping it in the house, rather than letting it run hog-wild.

D. Charlie Bob will win an action to enjoin Drew's interference with his judicially-recognized easement. Charlie Bob recorded the court judgment thereby giving both the foreclosing bank and, later, Drew, record notice of the easement. So neither the bank nor Drew qualified as a bona-fide purchaser without notice, entitled to priority over the easement. It doesn't matter that the bank recorded the mortgage. When it took the mortgage, it had record notice of the easement, so it had a mortgage only on Virginia Gentleman, less the easement. That's all it could foreclose on and all it could transfer to Drew. The shelter rule cannot benefit Drew because the bank has no shelter to offer. Moreover, Drew had actual notice of the easement, having participated in the earlier controversy.

About the only argument for Drew would be that the judgment was outside his chain of title. The judgment should be recorded in the grantor index under “Scalise, Mary Frances,” in which case, it *would* be within his chain of title. If it’s indexed some other way, Drew will argue that it could not give him record notice, but the caselaw says that errors in indexing do not prevent record notice, as counterintuitive as that may be. Charlie Bob had the obligation to make sure the judgment was recorded and indexed in the proper way.

E. “To Spencer Taylor for life, until he allows Charlie Bob or anyone to store firearms or blowguns in any structure existing at the time of this conveyance then to Andy and his heirs in fee simple absolute.”

Drew and his heirs have a reversion, subject to complete divestment. Under the doctrine of merger, formally separate future interests held by a person and “his heirs” merges into one future interest held by the person and his heirs as a single legal unity. At least I think this is right. I need to confirm it through research. Spencer Taylor has a life estate subject to an executory limitation. Andy and his heirs have a shifting executory interest in fee simple absolute.

The Rule Against Perpetuities does not apply to interests in the grantor, including reversions. It does not apply to possessory interests, such as Spencer Taylor’s life estate.

It does apply to Andy’s shifting executory interest, but that interest is valid under the Rule because it is certain to vest or be defeated within a life in being, to wit, Spencer Taylor’s. Drew’s and Andy’s lives are not measuring lives because it makes no difference when either of them dies.

## Question II

A. Melissa and Trevor have a joint tenancy in fee simple determinable, based on Stella’s express language in the deed, on the condition they didn’t use any of the property to misappropriate Stella’s creative ideas. Stella has a possibility of reverter in the property.

As Melissa and Trevor are joint tenants, they can sue each other for waste if one of them causes damage or destroys the value of the property. This waste can be voluntary waste, permissive waste, or ameliorative waste. Melissa, however, gave a quitclaim deed to Ryan Kimball, meaning that Melissa granted whatever interest she had in the property to Ryan, keeping nothing. This deed severed the joint tenancy, creating a tenancy in common between Ryan and Trevor.

Therefore, Melissa’s heirs do not have a claim for waste against Trevor, because Melissa no longer had any property interest in Scriptacre, not even a future interest. Melissa’s heirs probability of success is very low. The heirs have no property interest to be wasted.

Even if they did, it would be hard to establish waste. The theory that Trevor diminished the value of the property by not working hard enough is “imaginative” in the extreme and receives no

support in the caselaw. The theory that he diminished the value of Scriptacre by allowing Ernest to trigger the condition for terminating the fee not only blows up Trevor's interest no longer giving him the power to commit waste; it also blows up everyone else's interest, except for Stella's leaving the heirs without property interest to be wasted. So this theory is not only imaginative; it is dangerous to the position of Melissa's heirs.

B . For Stella to recover for copyright infringement, she must have a copyright. She doesn't. Moreover, to sue, she would have to register any copyright with the U.S. Copyright office in order for a federal court to have subject matter jurisdiction over her claim. (Copyright infringement is within the exclusive jurisdiction of the federal district courts).

For Stella to have a copyright, she must create something original and then fix it in a medium of expression. Stella's story is a literary work under 17 U.S.C. § 102. It is "original" unless she simply repeated verbatim someone else's story. But she did not fix this story in any kind of medium of expression. She didn't write the story down and she didn't record it herself. The fact that she did not fix her story makes her action for copyright infringement unavailable, because she does not have a copyright in her story.

She told everyone in the audience to not record the story, thereby negating any argument that Trevor's fixation of her story was done under her authority and control. His fixation is not attributable to her and thus is of no legal significance to whether she has a copyright or not. If she had written down or recorded the story herself before (or while) telling the story, then she could sue for a possible infringement. But since she didn't, she does not have a meritorious copyright infringement claim against Ernest.

If Stella had fixed her story, then Trevor's sound recording may be an infringing act of reproduction. With that sound recording, Ernest created a derivative work on top of the story and publicly distributed it on You Tube to make it public. In order to create his work, Ernest almost certainly copied some form of Stella's story at least once. Ernest violated Stella's exclusive rights to reproduce, to create derivative works and to distribute publicly. If anyone clicked on the YouTube "play" icon, Ernest (or his agent, his web hosting service) publically performed Stella's work.

Ernest would argue that the end song was very different from the original story—so different that his creation was not a derivative work at all. Whatever elements were common to Stella's story and Ernest's song were not copyrightable. Stella can't have exclusive rights in the concept of a dog, or the concept of drinking beer. Under this version of the facts, what Ernest distributed and performed was not Stella's copyrightable work. Ernest would argue that the recording of Stella's story merely caused him to think up a new, original, and independent song idea.

Ernest also would argue that his song is a parody of Stella's story, thus qualifying him for the Fair Use privilege.

Stella would lose her copyright infringement lawsuit on fixation grounds without ever getting into all this controversy over how Ernest used the recording, or whether it was fair use.

C. Evaluating Maggie's child's ("The Child") legal position requires an analysis of who has what interest in Scriptacre.

Under the deed from Melissa, Ryan has a fee simple subject to an executory limitation. Maggie White's children have an shifting executory interest subject to the condition precedent that Ryan publishes a book. The executory interest is in a tenancy in common with Trevor. As The Child's lawyer, I will argue that Ryan did indeed publish a book, so Maggie White's children's future interest became possessory and they were allowed to move into the property. Maggie had only one child. Once the trigger is pulled, the class of children is entitled to possession and the class closes under the Rule of Convenience. Therefore, The Child is a co-tenant with Trevor, who actually has leased to Emil. If Trevor excludes Maggie's child The Child has a claim for ouster.

I think I will lose this argument, however, because Trevor will come back with the argument that the conveyance to Maggie's children violates the Rule Against Perpetuities ("RAP"). Kimball and Maggie White are the only measuring lives in the conveyance. If Maggie dies with the one child, Kimball may have submitted a novel to be published and died before the novel was published. If the publishing company takes way too long and ends up publishing the novel 21 years after Kimball has died, then the child of Maggie would be supposed to get it, but it would vest too remotely. Therefore, Maggie's children's interest is invalid under RAP. A violation of the Rule does not vitiate the whole conveyance, just the interest that violates it. Therefore, Ryan has a fee simple absolute in the co-tenancy as Melissa originally did. Therefore, Trevor and Ryan are still co-tenants, and Maggie's child does not have any property interest. Thus, Trevor can prevail in a trespass action against Maggie White's child.

Apart from this, which seems like a pretty strong argument for Trevor, the trigger may not have been pulled for Maggie's child's interest to become possessory. A blog is not a novel, and posting a blog entry is not publishing, at least in the traditional sense of "novel" and "published." There is a reasonable argument that a public posting on the Internet qualifies as "publishing," but it's a huge stretch to characterize a blog entry as a novel. Even a short-story-length blog entry is far too long for anyone to read it. So bloggers keep their entries shorter. This wrangle should be resolved according to the grantor's intent, but it is a second, independent barrier to the Child's prevailing.

The strongest argument for The Child is that Trevor has no possessory interest in Scriptacre to assert against The Child. This is so for two reasons. First, Trevor has leased the property to Emil, who in turn has either assigned his lease to subleased it to Ernest. Ernest might be able to exclude the Child, but not Trevor.

Moreover Trevor may not have *any* interest in Scriptacre, if the Facebook posting of Ernest's song triggered the possibility of reverter to Stella.

D. Ernest has been assigned the leasehold from Emil. Since it is an assignment, he gets all the rights and privileges that Emil had from Trevor, because Emil did not leave any possessory interest behind. Since Emil could have sued Trevor for a breach of a covenant of quiet enjoyment, Ernest is also allowed to sue Trevor for a breach of quiet enjoyment. Therefore, Trevor is initially his best target to sue. A covenant of quiet enjoyment is implied in a lease. A landlord (Trevor), however, is only liable for any act or omission by himself or someone under his authority causing a significant disturbance in the use and enjoyment of Ernest's possessory interest. Trevor is going to argue that Stella's rampage wasn't under his authority, because he had no control over Stella and her rage. He did not consent to Stella barging in and destroying the property of Ernest.

Stella has a possibility of reverter in Scriptacre, however, so Trevor may be liable on the covenant because Stella is asserting "superior title." Moreover, Ernest can argue that Trevor caused Stella's intrusion by allowing Ernest to engage in conduct that would trigger the condition making Stella's future interest possessory. There is an irony in making that argument. Ernest essentially is saying, "you, Trevor, should have included in the lease that was assigned to me a prohibition on my doing anything with Stella's creative ideas. You didn't, so you caused the conduct that terminated my possessory interest or allowed Stella to interfere with it.

All this suggests that Stella may be a better target than Trevor. Stella interest may have become possessory, but the lease is still good until the lease expires, so Ernest still has a possessory interest until the end of the lease. Stella was acting as a landlord and came in to the premises and destroyed Ernest's property.

Stella might have the power to terminate the lease and evict Ernest for spreading her creative ideas around. But as a landlord, she may not use self help in the modern era. Even under the common law, the privilege to use self help requires peaceable methods. What Stella did was hardly peaceable. Taking a sledge hammer to the property of the tenant's is not a permissible use of self help. Ernest has a strong case against Stella, Stella being his best target.

Another theory is that Stella's implied covenant of quiet enjoyment to Trevor and Mellissa runs with the land, so that Ernest could recover from Stella, without having to decide who is Ernest's current landlord.

E. A threshold question is whether the "assignment" is valid. It purports to transfer an interest in land. The Statute of Frauds requires a writing signed by Emil. The version of the Statute in effect in most states, however, provides an exception for contracts of one year or less, and another exception for contracts that *might* be performed within a year. The phrase, "I'm out of here for a while," signifies an intent to return at some point, suggesting that all Ernest got was a sublease terminable at the will of Emil. That would bring the conveyance to Emil within the "might be performed within a year" exception. Even if he got everything Emil had, it was a one year lease, which falls within the "one year or less" exception. I'll have to research the applicable Statute of Frauds in this context.

If the “assignment” is invalid, then Ernest has only a license, which is revocable at the will of Emil. Until Emil revokes it, however, it is a property interest, good against everyone else in the world, and enforceable through an action for trespass.

If Ernest has only a license or a sublease, Emil still is in privity of contract and privity of estate with Trevor, leaving Emil responsible for the rent obligations and other obligations imposed on him by the original lease. Ernest has whatever obligations to Emil they agreed on, probably an obligation to pay rent, at least.

If the assignment was valid and interpreted as an assignment, Ernest stands in Emil’s shoes and is obligated to Trevor as his landlord. He has the possessory interest of a tenant in common with Ryan or The Child. Emil has no obligations to Trevor imposed by property law, but he remains liable on the lease as a contract.

Ryan (or The Child) and Ernest are co-tenants so they have an undivided equal share to use the entire property. Ernest does not have a right to exclude Ryan, and he has a duty not to commit waste to Ryan’s interest, to Trevor’s or to Stella’s. Ernest does have a right that Ryan (or The Child) not oust him from possession. Ernest does not have the power to sell the property, but he has the power to sublease (unless he is a mere licensee) and to assign his interest to someone else, providing that Trevor or Emil has not forbidden his tenants to sublease in the lease (usually not allowed in modern day anyways). Ernest has a duty to keep up the property though, because he does have current possessory interest to avoid any liability from Ryan, Trevor, or Stella based on waste. Ernest has the right of quiet enjoyment for any significant interference done by Trevor or anyone under their authority. And, Ernest also has rights under an implied warranty of habitability against Trevor, if the premises become inhabitable not by the cause of Ernest himself. Ernest has the right to exclude others from possessing the property during his lease.

