This examination consists of two parts. Part 1 is an essay problem that will account for roughly 1/3 of your final grade in the class. Part 2 is a set of 40 multiple choice questions that will account for roughly 2/3 of your final grade in the class. You have a total of 1 hour to complete this Part 1 of the examination.

You are permitted to have with you and to use during the examination hard copies of the textbook, any class handouts (including printouts from the class web site), your class notes and outlines, and any other materials made by you personally or by your study group (not photocopied from printed materials, except for materials referenced on the Syllabus). You are permitted during the examination to access files stored on your own computer and the class web site over the internet. The materials we have studied and our class discussion constitute the legal authorities that govern the answers to these questions. Do not rely on or cite as authorities cases, statutes, or other materials of which you may be aware but that we have not studied in class.

If answering Part 1 in longhand, please write legibly, double space, and on one side of a bluebook page only.

In answering this problem, do not begin with an elaborate discussion of the facts. Indeed, mere repetition of the facts without relevant legal doctrine will not get you any points at all. Neither, for that matter, will abstract discussion of legal doctrine that is not tied to the facts of the problem. Your analysis should weave relevant legal doctrine together with the facts to create a response that is directly relevant to what has been asked. If you believe that your resolution of a given issue basically eliminates the need to consider other issues, do not give in to the temptation to point that out and stop writing. Rather, assume (even if apparently beyond common sense or logic) that your earlier resolution is incorrect and analyze the issues that remain when that issue is decided the other way.

GOOD LUCK!
Problem

H and W were married and jointly owned, as tenants in common, the house they lived in together for over 30 years and where they raised their three children A, B, and C. A, B, and C are now adults. A and B are married and live with their spouses and children in their own homes. C, however, has never moved out from under the parental wing and still lives “at home,” i.e., in the house of his parents. H dies, leaving his 50% interest in equal portions to the children. Upon H’s death, therefore, W owned a 1/2 interest in the house, and A, B, and C each owned a 1/6 interest, as tenants in common, although only W and C still lived in the house. The house is fully paid and has a fair market value of $300,000.

This situation continued for several years after H’s death. During this period, C managed to borrow money from Lender (L) by pointing out to L that C was the owner of a 1/6 interest in the house. Eventually, C’s debt to L got up to the neighborhood of $100,000, and C has neither money nor occupation with which to repay L. L sues C in an appropriate court and recovers a judgment of $100,000. L now contacts W, A, and B and demands that they pay the judgment or L will foreclose on C’s interest in the house. L understands that, if C’s 1/6 interest is offered at a foreclosure sale, there will likely be no buyers besides L himself or the other family members (W, A, and B). L says, however, that if he forecloses and the interest is not purchased by the other family members, he L will become the owner of C’s 1/6 interest. At that point, L says he will seek a judicial partition by sale of the property so that L can be repaid but in which W would be forced to move out of the home in which she has lived for such a long time.

The family (W, A, and B) have come to you seeking advice as to how they should respond to L’s demands. They tell you that they are not interested in protecting any interests of C (although they do not wish affirmatively to harm C if it can be avoided), but they do want W to be able to stay in the house as long as she is physically able. If they really strain, they might be able to come up with the $100,000 needed to pay L off, but they wish very much to avoid having to do that, especially if it means that C remains a 1/6 owner of the house, because they fear that C would simply run up more debts and they would be back in the same boat. They need to know whether to allow L to foreclose on C’s interest and then fight L in court, if possible, to deny any partition, or to give up now and, at great sacrifice, pay the debt. C refuses to cooperate in any way in any of their actions, including, for example, agreeing to transfer his 1/6 interest to the other family members if they agree to pay off the judgment.

How do you advise the family? Can you think of any arguments that might convince the court that W should be allowed to remain in her home as heretofore, even after L acquires a 1/6 interest in it and seeks partition by sale? Remember, we generally think that partition actions are “equitable.

MODEL ANSWER

If the family members besides C (W, A, and B) simply pay off L’s judgment, C will remain owner of a 1/6 interest in the house, so if C continues to run up more debts, the family will be back in the same unpleasant position. Therefore, there must be a transfer of C’s interest to the other family members as a part of the transaction if long-term stability is to be achieved. Because C is uncooperative, it is necessary to get a judicial transfer of ownership somehow.

It seems clear that, if L goes through a foreclosure sale, there will be no bidders for C’s 1/6 interest in the house outside of L and, possibly, the family members (W, A, and B). After all,
who would knowingly pay real money for a 1/6 interest in property that he or she would have to share with others who have used it for years as their personal residence? [Note: Many answers seemed not to distinguish between a foreclosure sale of C’s 1/6 interest and an eventual partition sale once L becomes a 1/6 tenant in common. Moreover, a number of answers seemed to assume that the foreclosure sale would somehow affect the entire property, rather than just C’s 1/6 interest. These errors led to much confused analysis.] At the sale, L can bid the amount of the debt, or $100,000, even though the fair market value of C’s interest is no more than 50K, given the 300K FMV of the entire house. (It is probably worth less than 50K, because any market purchaser would be forced to share the property or forced to go to court to seek a partition.) If the family were to bid that amount in cash, L would surely be happy, as he would have his 100K. The other family members, however, would be out that much, with no increase in their standard of living. But this would at least have the effect of eliminating C’s interest in the property. Of course, if L is willing to settle for the 50K value of L’s 1/6 interest, L might agree not to bid at the foreclosure sale and allow A, B, and W to buy for that price. For A, B, W to pay more than 50K at the foreclosure sale would be a mistake because, absent transaction costs, that is all L would get from acquiring the 1/6 interest by foreclosure and then, if L is successful, getting the court to agree to a partition by sale. The question is whether the family can possibly force or entice L to accept something less than 50K.

Suppose the family were to allow L to acquire C’s interest in the foreclosure proceeding. L would then be a 1/6 cotenant in the house along with W, A, and B. According to the law we have studied, each cotenant owns an undivided interest in the entire property and has the right to use the property, subject to the right of the other cotenants to use it, too. If L were to acquire C’s interest, L would have the right, it seems, to move in with W (and perhaps C, too, if W continues to allow C to live there). It seems unlikely that L would want to do that, but it seems quite likely that W would not like to have a stranger living in her house, either. So, L and W might end up playing a little game of “chicken,” which is not an appetizing position to place W into. If W took action to prevent L from moving in, such as locking L out, it likely would be an ouster that would entitled L to collect rent from W for W’s ongoing use of the house. This, too, is not something W would be very pleased about – suddenly to start paying “rent” to live in her “own” house, where she has lived for over 30 years. On the other hand, this might be a better solution financially than paying L the entire $100,000 or even $50,000 now. If the fair rental value of the entire house is, say, $1500/month, W would be on the hook to L for 1/6 of that amount, or $250/month. If W’s life expectancy is less than 30 years, that might be the more palatable choice. L, however, is not necessarily obligated simply to accept rent from W. In principle, L can demand a judicial partition.

It seems that both L and W might be able to agree that some sort of partition action would be beneficial to both. A partition in kind is almost surely unsuitable to these facts. After all, there is only one house, and nothing in the facts suggests that the house can easily be split into a duplex, especially one whose pieces are valued 1/6 and 5/6. The *Ark Land* case (text p. 298) did order partition in kind based partly on long occupancy by the part of the family that did not want to move, but at least in that case some sort of physical partition was possible, even though the value of the land to the other side was proportionally less than it would have been had they been able to sell the property as a single piece. On the other hand, a partition by sale would mean that some third party would likely buy the house for its 300K FMV. W, A, and B would get 250K of that and L would get 50K, but of course W would also have to move out of the house. If the family members could borrow 300K somewhere, they could buy the house at the partition sale, use 50K of the proceeds to pay off L’s interest and immediately repay 250K of their loan. W would then be stuck with a 50K mortgage, but the family could repay the entire loan if they dug into their pockets for the 50K owing to L. That would be a better result than paying the full
100K amount of the debt to L, and it gives W and the family the option of paying the 50K over time. Indeed, this reasoning should induce L simply to accept a 50K payment from the family members, were they to make such an offer. Of course, the *Delfino* case (text p. 292) says that a court will order partition by sale only where physical partition is impracticable (as here) and where the interests of all the owners would be better promoted by a sale (p.294). In that case, however, partition in kind was a realistic choice. Here, while partition by sale would not advance the interests of the family members, if the choice is between partition by sale or partition in kind, partition by sale is the only realistic possibility. But perhaps the court need not order a partition at all, if the interests of all of the owners is not promoted by such a sale.

Because a partition sale is considered an “equitable” rather than a “legal” matter, it is possible that the family could convince the court to take a somewhat more generous view of their position, given the sympathetic position of the cotenant with the largest ownership share (namely, W). Courts of equity may consider themselves freer to fashion a remedy that is “fair” than one sitting as a court of law. The family could offer L, say, 25K in return for transfer of the 1/6 interest L acquires at the foreclosure sale. If L refuses, the family can try to convince the court that it is simply unfair to allow the debts of an irresponsible member of the family (C) to be used to drive an old woman from her home by a person who has no real interest in the property but is only using her long-term occupancy as leverage to force others to pay loans that L should have been more careful about making. The family can explain to the judge that they had no part in making or accepting L’s loans to C and that it would be unjust to force W out (or, worse, share living quarters with L) as a result of such loans. They can show that they have tried to be reasonable by offering 25K to L (or whatever sum is decided), but that L refused. (That amount is “reasonable,” the family would argue, because a 1/6 interest in a family residence has little value to anyone outside the family. All such a person can do with the interest is wait for the parties to agree on a sale or go to court and seek a partition (or claim an ouster and demand rental payments). No one would pay the full 50K FMV for the 1/6 interest, knowing that it could be turned into money only by fighting with the family and going to court – or waiting for W to pass away.) Consequently, the court could perhaps be convinced to order a partition by sale but delay its effect until W’s death or she otherwise moves out of the house. And the court can refuse to follow the law of ouster if L tries to make a nuisance of himself by moving into the house. It is clear that L does not really want or need to live there and that he would only be doing it to put pressure on W and the family to pay more money. Even the alternative of paying L his 1/6 share of fair rental value, assuming L is ousted, might be something the court would entertain postponing until eventual sale of the house in accordance with W’s lifelong plans (i.e., either at W’s death or at the time she voluntarily moves out of the house). [Extra credit: If this case were to arise in Arizona, the family could analogize to the statutory treatment of “liens” arising from the breach of HOA rules other than assessments: The lien may not be foreclosed and is effective only upon transfer of the property. (This analogy requires care, however, because Az. Rev. Stat. § 33-1807 does expressly allow for money judgments in favor of the association. Here, the amount of the “lien” would be the ever increasing “rent” owed to L. It is not an amount that W independently owes to L, however, and indeed the whole idea is to allow W, in the interest of justice, to avoid having to pay this rent now. Any reference to the statute is simply an analogy that should not be pushed beyond its logical relevance.)]

I would suggest offering 25K or so to L in exchange for his 1/6 interest (after foreclosure), and if L refuses taking their chances on the court’s sense of fairness. Although in principle a partition action is always available to any joint owner (e.g., text p. 291), it is difficult to imagine that a court would force an elderly woman from the home she has lived in for decades simply to pay off a careless creditor of her profligate child. Artful presentation of the case will be imperative, but if handled properly a result more favorable to W than paying L the full 100K debt,
or being forced to move at a cost of 50K, should be expected.

Notes on exam technique: Several answers referred to the Arizona homestead exemption. Some thought it might prevent the court’s ordering a partition by sale. This was a creative thought, although ultimately likely incorrect. First of all, nothing in the facts says the problem occurs in Arizona or a jurisdiction that has a homestead exemption. Second, Az. Rev. Stat. 33-1103 says, “The homestead provided for in section 33-1101, subsection A is exempt from process and from sale under a judgment or lien” (emphasis added). A partition sale is not one under a judgment or lien but rather under a right of a cotenant to an equitable partition. Most important, at least one answer that referred to the homestead exemption as a defense to the partition action seemed to regard that as determinative and therefore failed to address the many equities in the facts of the case that favor W’s effort to deny or at least delay a partition sale. The answer got a few extra points for giving the homestead exemption a shot, but lost much more by failing to make use of the facts of the case.

We might also note that, if the Arizona homestead statute applies, C might be able to avoid foreclosure by L. (As mentioned above, many answers failed to distinguish clearly between the potential foreclosure sale of C’s 1/6 interest and the potential partition action that would divide or sell the entire property. This failure led to lots of muddled thinking.) Section 33-1101(A)(1) says that a homestead attaches to the “person's interest in real property in one compact body upon which exists a dwelling house in which the person resides.” That would seem to apply to C here. If foreclosure against C’s interest is not an option for L, there is nothing more to the problem. Therefore, while recognizing the issue was worth some points, treating it as dispositive (even in Arizona, let alone where no jurisdiction has been provided) violates the instruction, “If you believe that your resolution of a given issue basically eliminates the need to consider other issues, do not give in to the temptation to point that out and stop writing. Rather, assume (even if apparently beyond common sense or logic) that your earlier resolution is incorrect and analyze the issues that remain when that issue is decided the other way.”