ARIZONA STATE UNIVERSITY COLLEGE OF LAW

PROPERTY LAW, SPRING 2011

Professor Karjala

FINAL EXAMINATION
Part 1 (Essay Question)

MODEL ANSWER

Monday May 9, 2011 8:30 a.m.

Instructions

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. Think about all the facts in the problem: If your answer does not make use of a particular fact, it is quite possible that you have missed an issue.

GOOD LUCK!
Problem

Alice and Bill are the record owners of and live in houses on neighboring properties in a town in State X. Alice’s house is on the corner of Silver and Gold Streets, fronting Gold Street, and Bill’s house is next door also fronting Gold Street. After Bill, more houses continue along Gold Street with the same orientation. At the rear property line of all these houses on Gold Street is a set of hills that makes direct access to these houses from the rear very difficult except by crossing over the property of someone else living on the same side of Gold Street. (Alice, living on the corner, does not have this problem, as she can access the rear of her house directly from Silver Street.) The houses along Gold Street are all quite close together, each standing only a few feet from the property lines between it and its two neighbors on either side. (Of course, Alice, living on the corner, has only one such neighbor – Bill.)

Twelve years ago, which was several years after both Alice and Bill had acquired ownership of their respective properties and moved in, Bill decided to go into the handicrafting of decorative and sometimes functional items made from rock. Although Bill earns money from selling these items, it is really as much a hobby as a business, and Bill has a comfortable retirement income. For his rock handicrafting, Bill set up a large bin in his back yard to hold truck loads of rock and other heavy materials, but to take delivery he needed access over Alice’s property. He only needed such access once every two or three years, so he asked Alice for an easement. Alice agreed to allow truck deliveries for Bill’s handicraft purposes at roughly the 2-3 year frequency specified. Bill, having heard about the Statute of Frauds, asked Alice to grant the easement in writing. Bill found a standard form “Deed of Easement” pursuant to which Alice granted Bill “an easement for truck ingress and egress over the rear 15 feet of [description of Alice’s lot] for the purpose of delivering materials.” Alice duly signed the deed and handed it over to Bill, but she asked Bill not to record it because “We are friends and I don’t feel comfortable making things too legalistic.” Dutifully, Bill did not record the deed. He did, however, begin his deliveries and by now has had four or five loads delivered to his bin, the last one about 1 year ago. Alice herself had a small pickup truck that she kept parked on the path used for Bill’s deliveries and moved it as necessary on those relatively few occasions when Bill had a rock delivery.

About 6 months ago Alice closed on a deal to sell her house to Carol. Before the closing, Carol noticed the path occupied by Alice’s truck but simply assumed it was used only by Alice. Carol also noticed the storage bin in Bill’s back yard and, mainly out of curiosity, asked Alice what it was. Alice replied that she had no detailed knowledge – only that her neighbor Bill probably used it for storage of some kind. Alice disappeared shortly after the closing (and presumably is now in Brazil). Carol wants to remodel her house, moving the garage so that it can be accessed from Silver Street. Bill notices her preparations and, upon learning her intent, realizes that Carol’s reconstruction would completely block his delivery access path. He informs Carol of his easement and immediately records the deed he received from Alice. Carol believes, however, that she is a good faith purchaser for value and without notice of Bill’s claim. She says she would never have bought the house if she had thought she could not change the garage location. She very much regrets the “inconvenience” to Bill but believes she has no realistic choice other than to go ahead with her plan.

Bill now seeks an injunction to stop Alice from constructing anything on her property that would prevent truck access to his back yard. He argues that his express easement from Alice
should be recognized and enforced against Carol because Carol has not yet invested in the home reconstruction and therefore was not a “purchaser” within the meaning of the recording statute at the time she received actual notice of Bill’s interest. Moreover, Bill also claims that, in any event, he has acquired an easement by estoppel or an easement by prescription against Alice and that in either case such an easement is enforceable against Carol. You are the judge and have found the facts to be as described herein. Write an opinion deciding the case. State X is a notice jurisdiction for recording act purposes. The statute of limitations for adverse possession and prescription is 10 years.

MODEL ANSWER

Validity of the Easement

No issue is before the court concerning any covenants Alice made to Carol. We do not know whether the deed from A to C was a general or special warranty deed, in which case Alice may be liable under the covenant against encumbrances, or a quitclaim deed, in which case Alice would have no liability under such a covenant. If the deed was a quitclaim deed, it might theoretically have bearing on the issue of whether C had inquiry notice of Bill’s claim, but the majority of courts do not deny BFP status to a purchaser under a quitclaim deed (text p.693). Because no evidence has been presented on the matter, this court cannot allow any determinations to depend on how it might be resolved.

A first issue is whether Alice actually conveyed an easement to Bill by means of the Deed of Easement.” No evidence has been presented to suggest that Bill paid any consideration for this easement, so the question is whether Alice made a valid gift of an easement to Bill. A gift of an interest in land is valid if the donor manifests an intent to make a gift and there is a valid delivery. In the case of real property, both the Statute of Frauds and the delivery requirement are met by symbolic delivery of a deed describing the interest transferred and signed by the donor. The deed in this case, too, is at least evidence of an intent to transfer the easement, but it is not necessarily conclusive. Alice’s request that Bill not record the deed, and Bill’s accession to that request, suggest that the parties might have considered the transaction to be a mere permissive license on a personal level from Alice to Bill. Alice may also have feared that she would have difficulty selling her house at some later date if it were subject to a recorded easement of this type, and that may have been the basis for her unusual request that Bill not record the deed. It would, however, run contrary to the purpose of the Statute of Frauds to allow extrinsic evidence to contradict the clear language of such a traditional instrument of transfer as a deed. While Alice was not, apparently, a lawyer, most people understand that deeds serve the sole purpose of transferring interests in property. I conclude, at least preliminarily, that Alice made a valid gift of an easement to Bill. [NOTE: Virtually the entire class missed this gift issue.]

Although it has little or no bearing on the ultimate resolution of this case, we should address briefly the question of whether the easement from A to B was appurtenant or in gross. It seems highly unlikely that either party intended the easement to be personal to B, in the sense that B could continue to use it even after he (hypothetically) no longer owned his Gold Street property. Moreover, while the ancient common law rule that “the burden does not run where the benefit is in gross” (text p.875) is of questionable ongoing validity, it is certainly the case that Bill did not intend to lose his easement if Alice sold her property. Alice’s intent to bind her successor owner is less clear, as discussed above, but this is not addressed well by the appurtenant/in gross distinction. If the easement is in gross, Bill can continue to use it even after he leaves; if it is appurtenant, Bill’s successor can use it (to move rocks). We can question
whether A would have agreed to either of these scenarios had they been pointed out to her. The real issue is the one discussed above – did A give B a revocable license, notwithstanding the apparent express grant of an easement in the deed or did this grant actually have the result indicated by the formal transaction, which was the grant of an easement?

Is Carol Bound by the Easement?

Had Bill recorded the deed prior to Carol’s paying for the property, Carol would have had constructive notice and that would be the end of the matter. Bill did not record, however, and while there is no evidence as to whether Carol ever recorded her deed from Alice, Carol still prevails over Bill for recording act purposes unless she had notice of Bill’s interest at the time of her purchase. Our State X is a notice jurisdiction, so even if Bill was the first to file as between him and Carol, Carol still prevails over Bill. Bill’s argument that Carol had actual notice of his interest prior to any significant investment in reconstruction borders on the frivolous. The question is whether Carol had notice of Bill’s interest at the time she paid money to Alice. (The facts make it clear that the deal between Alice and Carol was a sale, and nothing suggests that it was anything other than an arms-length transaction at fair market value. At a minimum, Carol paid “value,” because that is inherent in the notion of a “sale.”) At that time, Carol definitely did not have the constructive notice that arises from a duly recorded deed.

An issue remains whether Carol had inquiry notice of Bill’s interest. Carol saw the path used by Bill to bring in his rock loads every few years and simply assumed that it was used only by Alice’s truck. This was not an unreasonable assumption and, at least in itself, should not be deemed to have placed Alice on inquiry notice of whether Bill was using the path. Carol also noticed Bill’s storage bin, however, and did ask about that. The answer she received from Alice, while somewhat deceptive, was basically true, namely, that Bill was using the bin for some kind of storage. Had Carol thought hard about the matter, she might well have asked how Bill was getting things into his storage bin, given the very limited access to his back yard from Gold Street. Carol has testified that she would not have purchased Alice’s property had she known she could not remodel to change the garage location, so this might have given her an even greater incentive to inquire more deeply. Had she asked Bill about it, he very likely would have immediately recorded his deed, as he did when he saw Carol’s preparations for remodeling, and it would not have been difficult for her to ask him prior to closing the deal with Alice. This is a very close call on inquiry notice, but on balance I will give the benefit of the doubt to Carol. I therefore hold that Carol was not put on inquiry notice of Bill’s interest prior to her closing of the purchase from Alice. (Had there been proof that the deed from A to C was a quitclaim deed, it might have been sufficient to turn the tables on the inquiry notice issue. It is one thing to say that C does not lose her BFP status by taking a quitclaim deed; it is another to say that it has no effect whatsoever on the inquiry notice issue.)

Does Bill Have a Prescriptive Easement?

If Bill had a prescriptive easement against Alice, it would not be covered by the recording act and Bill would prevail even over a subsequent BFP like Carol. A prescriptive easement has essentially the same requirements as for adverse possession, namely, open, notorious, continuous and hostile possession or use for the statutory period of 10 years. Had there been no deed or oral agreement (license) from Alice to Bill, this court would have to consider whether these elements were present. It appears that they were. While Bill only used the easement once every few years, Alice had actual notice of such use (she even moved her truck to allow Bill’s loads to get in), and having large trucks going through one’s back yard, even just once in awhile, is pretty “open.” It was continuous in the sense that the easement was used for its intended purpose as much as a
record owner of such an easement would have used it. Moreover, A had actual notice of B’s use, and at least part of the continuity requirement is to insure that the property owner will in fact observe the unauthorized occupation or use when he or she decides to inspect the property. When the property owner has actual notice of the use, continuity is much less important. While B’s use was not “exclusive” because Alice also used the path for her truck, and while some jurisdictions (such as Texas in the *Othen* case, p. 786) do apparently require exclusive use even for prescriptive easements and not just for adverse possession, this court does not believe that an exclusivity requirement makes sense in the context of prescriptive easements, which seems to be the approach used in most states (text p. 797). Absent the actual written grant of an easement, the facts in this case would justify a finding of “no hostility” concerning Bill’s use, that is, that Alice’s grant was a mere permissive license that was revocable by Alice at any time. However, a court in our sister state of Arizona has concluded that, when an easement is granted orally with the intention to record a written transfer, subsequent use by the grantee is “hostile” notwithstanding the ineffectiveness of the grant because of the absence of a writing. When the parties act as though an easement has been given, they are effectively “hostile” insofar as their legal positions are concerned, even though they remain on friendly personal terms. Moreover, here B had a true, enforceable easement against A, so he clearly used the easement under a claim of right. Consequently, while the matter is close, I conclude that Bill would have had a prescriptive easement against Alice had there been no written instrument of transfer.

The question therefore becomes whether the written and signed “Deed of Easement” makes a difference in the prescription analysis. I conclude that it does make a crucial difference. As preliminarily concluded above, the written deed was a valid gift of an easement from Alice to Bill. That means that, as between Alice and Bill, Alice could not have revoked the easement. True, Bill’s failure to record may have the effect that his easement is not effective against a BFP, but failure to record has no effect whatever as between him and Alice. Having granted the easement to Bill, Alice had no right to stop Bill from using her property to bring in his rock loads. Alice could not bring a trespass action against Bill for so using her property. Consequently, no cause of action ever accrued in favor of Alice, and the statute for a prescriptive easement never started to run. Because Bill had no prescriptive easement against Alice, there is none against Carol, either. [NOTE: Only a few answers even mentioned the Arizona *Paxson* casel, notwithstanding its pretty clear relevance to the “hostility” requirement. Almost no answer found or discussed the important difference that results between an invalid oral transfer (*Paxson*) and a valid written transfer as involved in this problem. This is a key difference between the Statute of Frauds and the recording acts: A writing is necessary under the SOF to validate a transaction *between the parties* and the recording acts operate to protect the interests of BFP *third parties*. We hammered away at this distinction in class, so it was disappointing that no one was able to apply it in a real problem.]

Does Bill Have an Easement by Estoppel?

An easement by estoppel can arise when a license for ingress and egress is used, with the knowledge of the purported servient tenement owner (Alice here), to make substantial and costly improvements on the purported dominant tenement in reliance on the license. When a license has become irrevocable by estoppel, the cases generally hold that it is binding on successors to the servient property (e.g., text p.775). In the case of *Holbrook v. Taylor* (774), the dominant tenement owner was allowed to use a road across the servient property to construct a house that was otherwise nearly inaccessible, and the servient owner was not allowed to block access subsequently. In all of the cases of which this court is aware, however, the reliance involved construction of an improvement on the dominant property, such as a home, or at least the significant improvement of the access road, at considerable cost to the dominant owner. Here,
except for the storage bin Bill has made no improvement to his land. All of his reliance, such as it is, has to do with his rock hobby/business. Moreover, no evidence has been presented of his having invested heavily in his hobby/business of rock handicraft. Nor has any evidence been presented on the issue of whether he could not achieve his purposes – albeit perhaps at a somewhat higher cost – by bringing smaller loads of rock to his back yard along the side of, or even through, his own house. Bill has always had access to his home from Gold Street. There does not appear on these facts to be the same level of reliance that has led courts in those jurisdictions recognizing easements by estoppel to find such an easement on specific facts. I conclude that Bill does not have an easement by estoppel.

As discussed above, an actual easement was granted from A to B, so we have the same issue concerning whether there can be an easement by estoppel where there has been an actual grant. There would be no need to “estop” Alice from revoking her “license” to Bill, because, as between the two, Bill owned an easement. On the other hand, an easement by estoppel does not originate in trespass but rather in reliance. Still, B was not relying on A’s goodwill to haul in his rock loads. Rather, he was relying on the express and enforceable (against A) easement A had granted him. On this ground as well the court will find that B had no easement by estoppel against A, and therefore none against C, either.

Conclusion

Bill has a colorable case on many of the issues involved in this dispute. He has a colorable case that Alice did, in fact, make a valid gift of the easement to him. He makes a colorable case that Carol was on inquiry notice of Bill’s interest that would have led to actual notice had she been more diligent. He has a colorable case that, but for the written deed, he would have had an easement by prescription against Alice, and therefore against Carol. On balance, however, this court holds that his inquiry notice argument and his prescriptive easement argument fail, along with his less colorable argument for easement by estoppel. With many of the arguments in relative equipoise, this court believes itself justified in falling back on the maxim that, as between two relatively innocent parties (Bill, for following Alice’s request not to record, and Carol, for believing Alice’s deception concerning Bill’s use) the loss should fall on the person in the best position to have avoided the problem. Here that was Bill, because there would have been no problem at all had he simply recorded his deed.

This court has also entertained the possibility of finding a more equitable solution somewhere in between shutting Bill out completely and preventing Carol from reconstructing her house in accordance with her plans. For example, the court might recognize Bill’s easement but require him to compensate Carol for the loss suffered by being prevented from modifying her house. Or this court might deny the injunction on the condition that C reimburse B for some or all of his damages. Here there is no evidence on which to base a determination of either’s loss. If Bill’s case for estoppel, a prescriptive easement, or inquiry notice were stronger, this court might well have adopted such an approach, having an additional hearing if necessary. Bill’s loss, however, arising as discussed above from his own failure to record, is only a reduced ability to carry on his hobby or side business unnecessary to his livelihood. The court does not feel justified in so drastically interfering with Carol’s legitimate expectations of what she can do with her property.