

FACTS:

Molly owned in fee simple a one-acre parcel and built a large lovely home there three years ago (called "Homeacre") and lived there until her death. Molly handwrote a valid will that in relevant part provided as follows: "I leave Homeacre to my son Mason and my daughter Jane and their heirs and assigns, as joint tenants in common, and then to the survivor." Only Jane wanted to move in and did so and Mason did not. Jane was excited to be a homeowner as she had always dreamed of being a great "do it yourself" person for home repairs and improvement projects. There was a small deck on the second story of the house with a gorgeous view of a lake situated on neighboring land. The first thing Jane did was to spend \$500 fixing all the toilets in the home that had never consistently worked properly. Jane wanted to change the existing deck on the home and so tore down about 75% of the deck so that only some of the deck framing and support remained. Now when you open the door that used to open onto the small deck, there is only a 2 feet by 6 feet strip of wood resting on top of the remaining framing. As it was the only way to see the lake from the house, Jane would still walk out onto the remains of the deck even though there was no rail and only the small strip of wood to stand on. But then she got bored with the deck project, abandoned it as it was, and moved on to something more ambitious. When Jane moved in the basement of the home remained unfinished and was only appropriate for storage. In only 4 weeks, Jane completely refinished the basement, putting up drywall, installing a tile floor, building a bathroom and bedroom, as well as a giant TV viewing room with a fireplace. She was so proud it had turned out so well that she barely noticed the fact that some of the tiles were installed unevenly and on weird angles and some of the drywall wasn't exactly straight.

While Jane was in the midst of these projects, she agreed to rent out the place, and entered into a one year written lease with Tony, a student at a nearby college. The lease provided for a possession date of January 1 and termination date of December 31 in the upcoming year and \$1,000 a month in rent. As planned, Jane moved out and Tony moved in. Both before and after he moved in, Tony noticed the state of disrepair of the deck but never said anything.

4 months after Tony moved in, tragically Jane died. In her will Jane left all her property interests to Goodwill, her favorite charity. Mason lived out of state, and had no knowledge of Jane's projects nor of the lease until he discovered them upon Jane's death. Jane never told him, not being sure whether he would approve. It turns out that Jane's work on the basement increased the value of the home by \$50,000 (if the drywall and tiles are fixed), while restoring the deck to its original condition would cost \$10,000. Tony wants to move out and be released of any further obligation to pay rent.

GO ONTO NEXT PAGE**Page 3 of 4**

QUESTION: Mason has come to you seeking your legal advice. Describe and evaluate for him the issues raised and your neutral legal analysis of these circumstances. In other words, fully discuss all relevant and applicable law and facts regardless of who you predict will be successful. Be sure to raise any relevant counter-arguments and possible alternative outcomes. Assume that the state of Delavania where these events occurred has no controlling law addressing the basement improvements. How might the law respond? Why?

NOTE: You have an hour and 45 minutes to respond.

END OF EXAMINATION

HAPPY HOLIDAYS!

Page 4 of 4

1)

Interpretation of Ambiguous Conveyance

The issue here is whether Molly, the property owner, conveyed a Joint Tenancy with the right of survivorship or a tenancy in common to her children. Molly had a fee simple absolute and conveyed her interest in her property to her two children as "joint tenants in common and then to the survivor." The language presented in this conveyance has multiple interpretations as either a joint tenancy with the right of survivorship "JTROS" or a tenancy in common "TIC". Due to the rule against the creation of new estates, Molly's conveyance cannot remain as is because it is not currently legally recognized as a type of interest. Therefore, the court would have to determine which interest, JTROS or TIC, the grantor intended to convey to her children.

In making this determination, the court would apply the presumption against forfeitures which looks at whether JTROS or TIC would result in possession being with the transferees for the longest amount of time. With a JTROS, the property would stay with the children, Jane and Mason, the longest because after the death of the first to die, the property becomes a fee simple absolute "FSA" in the survivor of the two. In this situation, if the court interprets the conveyance to be a JTROS, Mason would retain a FSA after Jane's death due to the right of survivorship; which keeps the property with Mason. However, either of the two would have been able to sever the JTROS. Jane's actions in leasing the property to Tony may have severed the JTROS depending on the jurisdiction. Applying, *Tenhet v. Boswell*, the court determined that the JTROS was not severed by the lease and that the lease ended upon the death of the lessor. Therefore, applying the precedent in *Tenhet*, the JTROS would still be intact after Jane leased the property to Tony, but Tony's lease would have ended upon the death of Jane. If either

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Mason or Jane did not want the JTROS they could have severed the tenancy in some jurisdictions by writing a deed from themselves as JTROS to themselves as TIC. Or they could have sold their interest to another which would have severed as well. If the tenancy is severed they would have a TIC and could have been able to partitioned the property as well.

True, but off point here

On the other hand, the conveyance could be interpreted as a TIC, where both Jane and Mason would have power over their fractional share of the property, which is 50%. In both a JTROS and a TIC Jane would be able to possess the entire property. In addition, with a TIC, Jane would be able to lease her fractional share of the property to Tony without the consent of Mason. However, Jane has the right to transfer her share of the property to whomever she wants upon death; therefore, Goodwill, the charity organization, would validly receive Jane's 50% property interest upon her death. If the court determined a TIC was the correct interpretation, Mason would have a TIC with Goodwill after Jane's death.

In interpreting the ambiguous conveyance the court must look at what the grantors intent was. The conveyance explicitly states that the property goes to both of the children and then to the survivor of the two. It can be interpreted that the intentions of the grantor were to keep the property among the two children for as long as possible. The type of concurrent ownership that would be most consistent with the grantors intentions would be a JTROS, so the property would stay with Mason after Jane's death and Goodwill would have no interest.

Obligations of Co-tenants

- 1) The second issue is whether mason has a duty to pay for the maintenance and upgrades done to the property. The rule is that the cotenants share in the benefits and the burdens of the

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property; however, co-tenants are not financially responsible to pay for unnecessary, non-maintenance upgrades to the property. First, Jane spent \$500 dollars in repairing the toilets that did not work. Toilets are a necessary function of a house that is occupied and are considered a maintenance expense. However, Mason could argue the doctrine of laches applies here; which occurred because Jane did not do an accounting within a reasonable amount of time and Mason detrimentally relied on not having to pay for the expense. Therefore, I believe the court will determine that although Mason would have had an obligation to contribute to the maintenance of the property, Jane's not engaging in an accounting to require Mason's payment within a reasonable time has exempted him from having to pay a portion of the cost. In addition to maintenance upgrades, Mason is responsible for mortgage and taxes on the property.

Second, Jane chose to upgrade the deck and the basement of the home. Without Mason's consent both are considered waste of the property. The deck is considered affirmative waste because it decreases the value of the property and the basement is considered Amiliorative waste because it increases the value of the property. Jane, or her estate, could also argue the doctrine of laches applies here and she would not have to compensate Mason because she did not believe Mason would bring suit for Waste, which is detriment reliance, and he waited for a long period of time. However, applying the *Moore v. Phillips* case where the daughter did not sue the mother because they were estranged, we can assume that Mason did not sue his sister because they were estranged (he was not even aware that she had passed away). However, despite the fact that the deck and basement changes are considered waste, the court would have to determine if Mason was responsible, as a co-tenant, for paying for a portion of the upgrades. The rule states that unless the co-tenants both agree, the out of possession co-tenant "OOPT" is not

responsible for paying for these upgrades.

2) A related issue is whether Jane, as the IPT, has an obligation to pay, Mason, the OOPT rent. The rule is no, Jane is not required to pay Mason rent; however, Mason as the OOPT, does receive a benefit through decrease, via credit, in the amount of rent in mortgage or utility that he owes. The public policy behind this is that the IPT is only doing what they have the right to do as co-possessor of the entire property; therefore, they should not have to pay rent to the OOPT. Arguments in favor of Mason receiving rent however say that the IPT has sole possession, therefore, the OOPT should be compensated in some way. The only way Mason would have been able to receive rent is if Jane made an affirmative action to oust Mason from the property, such as changing the locks. She did not engage activity consistent with ousting Mason therefore, she should not be obligated to pay him rent.

3) Finally, in regards to the obligations of co-tenants, is Mason entitled to the rent Jane receives from the lease to Tony? Jane has the right to lease the property as a JTROS and as previously noted, it does not sever the JTROS based on *Tenhet*. However, can Mason, as co-owner of the property receive a portion of the rent she receives? *Carr v. Deking* was a case where the father and son had a co-tenancy and the father rented the property without the son's permission. The son wanted to evict the lessor but could not because his father had the right to rent. The court determined that the only way the son could receive a portion of the rent is to affirm the lease. Similar to *Carr v. Deking*, Jane rented the property and Mason's consent or lack-there-of is irrelevant. Mason cannot collect rent unless he affirmed the lease to Tony. In

doing so after the fact, Tony would receive possession of the entire property but would be paying less because the lease was affirmed after-the-fact.

Tenancy

- 1) First, we must determine what type of tenancy was created between the landlord, Jane, and the tenant Tony. Despite the fact the Tony payed monthly rent, his lease would be considered a term of years because it has a definitive end date, December 31. The term of years states the whether there is a death of the tenant or the landlord, the tenancy relationship continues. However, because the court will probably interpret the coneyance as a JTROS, his lease expired as a result of her death.

- 2) The next issue is whether Tony can claim constructive eviction "CE" or a breach of implied warranty of habitability "TWOH" based on the condition of the property that he rented from Jane. Constructive eviction deals with the quiet enjoyment of one's property. In order to show constructive eviction Tony would have to show that Jane's behavior substantially and materially deprived him of the use and enjoyment of the property, and he abandoned the property. Mason may succeed on the constructive eviction grounds for the deck. Jane's behavior created the unusable condition of the deck when she began remodeling it but chose to abandon the project half way thorough which is the material portion of the legal standard. In addition, Tony is not able to enjoy that portion of the property. Although Tony did not abandon the entire proeprty, he could argue that like in Minjak, he had to partially abandon the property (i.e. he had to abandon the deck). Jane on the other hand will argue that it was not substantial because Tony

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was aware of the unusable condition of the deck prior to renting the property and the unusable condition resulted in a lower rental value than had the deck been completed; therefore, Tony was compensated for the loss of deck use prior to renting the property. The court will probably conclude that Tony's prior awareness of the deck's condition prevents him from prevailing for constructive eviction. However, had the court found there was constructive eviction Tony could have remedies that include: rescission, rent relief, prorate the rent, punitive damages, injunction, or possibly withholding rent depending on the jurisdiction.

The IWOH claim is non-waivable and it must be in a residential property and regard the physical condition of the property which affects the tenants ability to have decent, healthy, and safe housing. Tony's complaints are about the physical condition of the deck and the crooked tiles in the basement. Unlike Tony's claim, *Javins* claimed that the walls were falling down and was essentially uninhabitable. Therefore, it is highly unlikely that the court would determine the crooked tiles falls into the IWOH because they do not affect the decency, health, or safety of the property. The deck on the other hand has a bit more substantial due to its unsafe nature. However, Jane would most likely argue that the deck was not a part of the living quarters and he was aware of the damage prior to moving in and he never complained about its disrepair. The court will probably determine that this is not a breach of the IWOH. However, if the court does hold that this was IWOH, the remedies would include rescission, rent withholding, rent abatement, he could fix the deck and withhold the cost, sue for an injunction, talk to the housing board, see if there can be a criminal penalty, and possibly collect compensatory damages.

3) After the Tenant, Tony, leaves the property, can Mason recover for his breach in paying

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rent? The JTROS would have ended the lease upon the death of Jane. However, had the court determined the conveyance gave Jane and Mason a TIC, Mason would have three choices in regards to receiving rent from Tony: first, Mason could accept the surrender and immediately file suit for back rent, damages, cost of finding a new tenant, and loss of rent before a new tenant was found; second Mason could re-let on Tony's account but he would have to wait till the end of Tony's lease term before he could sue for the same damages in option 1 including uncollected rent during the lease term; finally, Mason could, depending on what the jurisdiction follows, use the traditional rule of waiting until the end of the lease term and suing for all the rent or if they follow the modern rule, mitigate by reletting (similar to option number two). The option that most benefits the landlord is option number two because the landlord can sue for all of the same aspects in option number one including uncollected rent and he does not have to surrender the lease.

If it has been determined that the lease ended upon the death of Jane via JTROS, Mason could have filed for eviction upon her death. However, because tony has a lease, which requires eviction proceedings, and not a license the provides the opportunity for self-help, Mason would have gone to court to evict Mason.