

UNIVERSITY OF WINDSOR
FACULTY OF LAW

PROPERTY LAW FINAL (WINTER) EXAMINATION

(PROFESSOR PAUL D. OCHEJE)

MONDAY, APRIL 11, 2005 AT 9.00 A.M.

DURATION: 3 HOURS (180 MINUTES)

INSTRUCTIONS:

1. This is an **open-book** examination. You may bring into the examination room your class notes, supplementary materials, texts or copies of articles, all of which may be annotated with your marginal notes. Out of considerations of fairness to your colleagues, however, **you may not bring** into the examination computers or materials obtained from any library, except photocopies as aforesaid.
2. Be sure to write your answers in the examination answer booklets provided, and to include the following information on each booklet: candidate's examination number, name of professor, and the number of the booklet (e.g., 2 of 3).
3. This examination consists of six questions in two parts:

LLB Students: ANSWER FOUR (4) QUESTIONS ONLY – AT LEAST, ONE QUESTION FROM EACH PART, BUT NOT MORE THAN ONE QUESTION FROM PART TWO.

JD Students: ANSWER TWO (2) QUESTIONS ONLY – ONE FROM EACH PART OF THE EXAMINATION.

Please follow the instructions for each question meticulously.

4. All questions carry equal marks. Please allocate your time judiciously.
5. Unless otherwise indicated, assume that the **law of Ontario** applies. All hypothetical facts have been carefully compiled to provide complete scenarios for the questions that follow. However, if you need to assume additional facts, please do so expressly.
6. Write **legibly in ink** and in **full sentences**. "Point-form" answers are not permitted in this examination.
7. This examination consists of nine (9) pages (including this page). Please be sure that you have all of the pages.

8. All question papers must be returned with the completed examination.

PART ONE

QUESTION ONE

Maxwell Fairchild is Ninety- Five years old. He is a man of considerable wealth: most of his possessions are in real estate, and the rest are in stocks and bonds. He has never made a secret of his concerns about the fickle and profligate ways of his son, Maxwell Fairchild, Jr. (Junior). One thing he is proud of, however, is that, in spite of his weaknesses, Junior has remained in a stable marital relationship. Junior got married to Dianne Winbush when they both were 22: they are now 30, and yet to have a child. The elder Fairchild wishes to distribute a sizable part of his wealth among his immediate family – his son, his daughter –in-law, and the grandchildren (if and when they are born) – but he is leery of leaving the grandchildren’s share of the property in the care of his son. As such, he plans to gift The Serenia Estate, prime residential rental property composed of twenty-five bungalows which are currently fully occupied, to -

- (a) my son, Maxwell Fairchild, Jr., and his wife, Dianne, for the duration of their lives, remainder to the children of their marriage who attain 21 years of age. (Tip: the “fertile octogenarian”).

He distributes the remainder of his property as follows:

- (b) to my sister, Elaine, one-half share of my house at No.32 Regent Street, Tecumseh, Essex County, for life, remainder to my cousin, Philip, in fee simple upon his attaining the age of 40 (he is currently 21).

- (c) to my brother, Steven, my three-bedroom bungalow at 29 Beckwith Street, LaSalle, for life, then to his widow for life, and then the remainder to their surviving children. (Tip: the “unborn widow”).

- (d) to the use of my trustee, The Regent Cottage, my holiday resort on Lake Pleasant, in trust for my grandchildren who attain the age of 21 by the year 2010 or within 21 years of their father’s death (the oldest grandchild is 15).

- (e) to the use of my trustee in trust for my grandchildren who marry during the life of my son, Franklin Goodyear, Jr., or within 21 years of his death, all of my personal property, including 5,000 shares of the Canadian Breweries Limited and Government Treasury Bonds worth 5,000,000, to be shared equally between/among them.(Tip: Personal Property).

- (f) to Alice, my sister, in fee simple to the use of her son, Nathan, for life, and then to Nathan’s first child to attain 21 years of age in fee simple (Nathan has no children). (Tip: The Rule in *Purefoy v. Rogers*).

The perfectionist to the end, Maxwell Fairchild wants to make sure that he has validly distributed his assets in order to avoid any disputes about his property after he has

passed. He consults you for a legal opinion on each of the gifts that he wishes to make.

Question:

Advise Maxwell Fairchild. As a practical matter, how would you save each of these gifts from the pitfalls, real or potential, which you have identified?

QUESTION TWO

Pointe West is a new subdivision in Windsor which was completed by Lakeshore Homes in December, 2000. Pointe West was described in the advertisement blitz that preceded its completion as the “ideal futuristic abode of the digitally savvy”. Many agree that the subdivision has measured up to its billing. The entire subdivision bears the mark of high technology, but by far the futuristic concept of the development is most evident in its common area, referred to as “The Commons”. The area contains a giant self-cleaning swimming pool and a self-operating gymnasium equipped with electronic surveillance, training, music and sanitation systems. The common area is maintained through the financial contribution of all the homeowners of the subdivision. All homeowners become members of the Oakwood Gardens Development Association (OGDA), a body charged with maintenance of the subdivision.

Although the houses are of various designs, each of them cost, at least, \$500,000 to build. “In order to maintain the high living quality of the neighbourhood”, Lakeshore Homes required each of the homeowners to covenant as follows:

- (a) that they shall not convert their home or any part of it to commercial use;
- (b) that they shall not keep any domestic animals, except those certified by a veterinarian as pets;
- (c) that the lands and premises comprised in their deeds of transfer shall never be sold, assigned, transferred, leased, rented, or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of objectionable race or nationality; and
- (d) that they shall not refuse, omit or neglect to pay monthly dues to the OGDA.

All the home-owners accepted these terms. Soon after Karl Johnson (Karl) moved into Oakwood Gardens, he sold his house to Mitch Dunbar (Mitch). Except for term (c), the deed of transfer of the house to Mitch made no mention of the terms which Karl agreed to with Lakeshore Homes. But Mitch, who has lived in Windsor since 1985, knew about the famous new residential development and the terms upon which prospective home-owners were allowed to buy homes in it. In fact, Mitch would have bought a home at Oakwood Gardens in 2000 when the subdivision opened, but he changed his mind because he thought that the aforementioned terms were an arrogant imposition on home-owners. Soon after he moved into his home, Mitch promptly turned the garage of his home into a convenience store in which he offered for sale cigarettes, cookies, lottery tickets, candies and other articles. He brought with him

into the subdivision a Himalayan goat which roams the neighbourhood without a handler, and a Mexican Rooster, which crows endlessly at the crack of dawn, waking up the neighbours. The other homeowners are livid with Mitch. They have asked Lakeshore Homes to enforce the terms of the deed against Mitch, but having assigned all of his rights, including the covenants, to the homeowners, Lakeshore Homes is no longer interested in the affairs of Oakwood Gardens. As the controversy over Mitch's 'un-neighbourly' behaviour rages, Mitch has applied to court to have all of the covenants declared void and of no effect.

Question

Will Mitch succeed?

QUESTION THREE

Judith Sawyer got married to Jeb Huggins in 1960. At the time of their marriage, Jeb's father, owner of lot No. 11 in Section A of the City of Windsor, made a gift of his property to them as follows:

I give, advise, and bequeath all of my real estate to my son, Jeb Huggins, and his wife, Judith, jointly in fee simple. Should they decide to sell the property, each of them is to have an equal share of the proceeds of the said sale.

As it turned out, Jeb's marriage to Judith was not one made in heaven. The marriage was bedeviled by myriads of problems, including Jeb's continued violence, culminating in a separation in 1970. Judith then relocated to Toronto. However, her health began to fail shortly after the separation, and she did not wish to leave matters relating to her estate untidy. She conveyed to herself her undivided share in the property which she co-owned with her husband, and appointed her brother, Tim Sawyer, as the executor and sole beneficiary of her estate. Judith's condition continued to deteriorate, and in 1975, she passed away. Jeb continued to live on the property, but he rented out the basement apartment of the matrimonial home (which he owned jointly with Judith) for \$700 a month. In addition to major renovations costing in excess of \$20,000 which Jeb carried out on the home after Judith had left, he carried out periodic repairs and generally kept the premises in clean and attractive condition. Jeb also paid off the balance of the mortgage on the home which stood at \$10,000, and has continued to pay all appropriate taxes on the property.

Jeb was inconsolable at the death of his wife. Although they remained separated, Jeb and Judith had become good friends. In an ironic way, both became stronger friends once separated than when they lived under the same roof as husband and wife. Out of a sense of obligation to a man she regarded as a friend, above all else, Judith asked her brother, Tim, not to insist on her share of lot No.11, if such would put Jeb to considerable hardship. At the time of Judith's passing, Jeb was 65 years old. Accordingly, Tim did not raise the matter of his sister's estate with Jeb for a long time.

However, in 1985, ten years after his sister's passing, Tim thought that it was appropriate to make his claim to the property while Jeb was still alive, in order to avoid future problems. Tim, therefore, applied to the court to have the property partitioned, or, in the alternative, sold, and the proceeds shared with Jeb. Since Jeb had been living on the property alone after his separation from Judith, Jeb also demanded an accounting of all benefits which Jeb had received as co-owner of the property during and after Judith's passing.

To Tim's claim, Jeb responded –

- (a) that Judith and himself were joint tenants, so that Judith's purported devise to Tim was void.
- (b) that the property in question was matrimonial home or family property and its disposition, without his consent, was void, being in violation of the provisions of the Family Law Act, RSO 1990, F.3.
- (c) in the alternative, that partition was an inappropriate remedy in the circumstances as the property was not physically amenable to division.
- (d) that, given his advanced age and his emotional attachment to this property, sale of the property, which is the only alternative if Tim's claim succeeded, should be postponed until he has passed away.
- (e) As regards accounting, that after a set –off of the benefits against his own expenses on the property, he had not retained any benefit for which he could be called to account.

Question:

Canvass fully the legal issues raised by the above fact pattern.

QUESTION FOUR

Michael and Jane began to live together in 1990. At the time, Michael was a law student, while Jane was a political Science Major, at the University of Windsor. Jane completed her programme in 1992, but Michael had two more years to graduate. Jane and Michael planned to wed after Michael's graduation, and then move to Toronto to pursue their careers. Jane was very lucky in the Job market; she got two financially lucrative offers in Toronto soon after her graduation, but she turned them down as she could not bear the thought of living apart from Michael even temporarily. She then accepted another offer in Windsor. Although this latter offer was far less lucrative, she was happy to accept it as it afforded her the opportunity to continue to live together with Michael and to help defray their living costs. Michael's last year in the law programme was especially costly; his expenses shot up astronomically: he had to attend conferences and moot trials in far-flung locations, visit courts and law firms in northern Ontario, and change his wardrobe to suit the demands of his soon- to-be profession. All of this put serious demand on Michael's financial resources, which were rather meager to begin with. Jane provided all of Michael's needs without complaint. She also cooked his meals and did his laundry on weekends, as Michael needed all the time to study for his final examination.

Michael graduated in 1994 with a Bachelor of Laws (LL.B). Soon thereafter, however, things began to change. Michael wished to practise law in Windsor for “a few years” before moving to Toronto, and he persuaded Jane to remain with him. It was difficult for both at the beginning as Michael’s legal practice did not yield enough to pay even the office rent. Jane paid the rent for their apartment as well as for the office only sharing the cost of grocery with Michael. She also ensured that Michael was properly dressed for his profession by buying him clothes and shoes periodically.

About three years into legal practice in Windsor, things turned around dramatically for Michael. Major successes in litigation brought with them considerable fame and wealth. Michael invested his wealth wisely in real estate and in blue-chip and technology stocks and bonds. Jane thought that fame and financial success put Michael in a better position to make their move to Toronto a very comfortable one and was looking forward to it. But Michael told Jane that he was no longer keen on moving to Toronto. As Jane was just about to term with this abrupt change in plans for the future with Michael, she got the rudest shock of her life when Michael confessed to her that he was no longer in love with her and would not wish to prolong a charade by continuing to live with her.

Jane feels let down by Michael. She feels that she has contributed to making Michael a lawyer, and is exploring her legal options.

Question

Advise Jane.

PART TWO

(Answer only one question here)

QUESTION FIVE

Until quite recently, the Tichewa First Nations community had occupied the Lower Taskanash river basin for, at least, four hundred years. The basin is about 1,500 square kilometers in size. The present claimants of the basin can trace their genealogy back over Two Hundred years through four generations. There is no written evidence of the historical sequence of occupation of the land, but the claimants maintain that their ancestors became occupants of the land after the battle of the Red Moon. Anthropological and historical evidence confirm that this battle occurred in 1850. In that battle, the Tichewa claim that their ancestors were victorious over the Akanapi, who were the original occupants of the basin. Since then, the Tichewa further claim, their ancestors had occupied the land unchallenged by any other aboriginal group. The Tichewa had established a political system, with a paramount chief at its apex. The paramount chief was regarded as God’s representative on earth. He was in charge of the community shrine and he mediated between the community and the world of the deceased and the yet unborn. The chief was also the repository of the community political and social power; supported by a Council of (lesser) Chiefs, he represented

the community in negotiations with other communities, and he also mediated in disputes between members of the community. Life in the community revolved around fishing and hunting. These activities did not only constitute the economic mainstay of the community but they had spiritual dimensions. Fishing and hunting were major social occasions. Participation in these activities by the mass of the community offered the leaders a yardstick for gauging the vitality of the community. The records demographics, communal spirit, etc. by this yardstick, this was a thriving community. The records of the French explorers who came into Canada in 1885 indicated that the Tichewa were a robust community with whom they were happy to trade liquor and other articles for animal furs which the community produced in abundance.

Much of the land of present-day Canada was acquired by British Crown through treaties of the cession concluded between the Crown and the First Nations people. But the Lower Taskanash river basin was never so acquired. As development spread from major centers into the hinterland, the basin came under serious encroachment from the activities of government, its agents, and other occupiers of land. By the 1970s, the Tichewa had been almost completely displaced and pushed out of the basin, to make way for "development". The area that used to be the Tichewa community is now heavily built and occupied by an array of business outfits, private homes, recreational grounds, and subdivisions. Some of the Tichewa were eventually relocated on a reserve near London, Ontario, but some have created a new village on the outskirts of the basin. Both groups have managed to replicate their communal ways of life on the reserve and in the village, and their social and economic mainstay still revolves around fishing in the Taskanash River, and hunting in the environs of their current locations.

Two years ago, in response to official claims of a well-founded apprehension that the fish-stock in the Taskanash was being depleted at an alarming rate, the Ontario Parliament passed legislation to control fishing in the Taskanash. Titled "An Act to Conserve the Taskanash Fish- Stock", the Act provides that the Minister may issue licences to the Tichewa permitting them to fish on the Taskanash only for food, but not for commercial purposes. The Tichewa consider this to be a calculated attempt by the government of Ontario to destroy their social and economic life, and they have decided to ignore this Act. Recently a member of the community was caught fishing in the river without a licence, and the quantity of fish found in his possession seemed to indicate that he was fishing for commercial purposes, rather than for food; he was arrested and charged with a litany of offences under the Act.

At a meeting which the community held in the aftermath of the arrest of the member, the Tichewa decided to: 1/ challenge the Ontario government on the legal validity of the provincial Act as it relates to the Tichewa, and 2/ file a claim for compensation against the Crown in respect of the Lower Taskanash basin which, they claim, was effectively seized from them at the turn of the 20th Century.

Question

You have been consulted and retained as counsel for the Tichewa community. Comprehensively canvass the Tichewa case.

QUESTION SIX

Commenting specifically on the saga of the Indian residential schools, but generally on Aboriginal-Crown relations, a highly-placed government official said in 2001:

“Acknowledging the past (and contemporary realities) is the only way to allow us (Canadians) to move forward with dignity”.

Question

1/ What is the “past”, and what are the “contemporary realities” of Aboriginal-Crown relations alluded to here?

2/ Given your understanding of the role of law in social change, do you think that the law can effectively help Canadians to “move forward with dignity”?

Set out your answer fully.

END OF EXAMINATION

HAVE A GREAT SUMMER EVERYONE!

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