

**FINAL Examination**  
**Property I**  
**Professor VAN CLEAVE**  
**FALL 2007**

1. You have **three (3)** hours to complete this exam.
2. This is a **closed** book exam. Students may not use any outside materials or confer with each other during the exam.
3. The exam consists of twelve (12) pages. Check to ensure you have all twelve (12) pages.
4. This examination contains two parts:
  - **Part I** consists of twenty (20) multiple-choice questions. Please mark your responses to the multiple choice questions on the separate “ParSCORE TEST FORM” using pen or pencil and following the instructions on that form. If you change your answer, place a clear **X** through the wrong answer and mark the correct answer. A machine will score the exam and any ambiguities will be counted as a wrong answer. I recommend you spend approximately **45 minutes on Part I**.
  - If you believe that any question or answer selection is unfairly ambiguous please articulate your concerns on the back of the last page of the exam. Be sure to identify clearly the relevant question. You should not ask anyone about a question during the exam. I strongly suggest that you not devote too much time to such endeavors.
  - **Part II** consists of one (1) essay question. I strongly encourage you to spend 15-20 minutes outlining your answer before writing. I have allotted sufficient time for you to outline, write and review your answers. Read the questions carefully to ensure you address all the issues identified. I recommend that you spend approximately **120 minutes (two hours) on Part II**. Please write your response in the blue books provided. Please write clearly. Write on every other line and every other page to permit instructor comments.
5. Write your student exam number on your exam envelope. Put your correct class section and student exam number at the top of this page, each page of questions, each blue book, and the ParSCORE test form. **Do not** use your name, student ID number or Social Security Number on any exam materials.
6. At the conclusion of the exam, all examination papers—including the Part I ParSCORE test form, your answers for Part II, the examination questions, these instructions, and all notes—must be placed back in the exam envelope. Failure to return all materials will result, among other sanctions, in a failing grade of “F” for the course. **Do not** seal the envelope.

## GOOD LUCK!

### PART TWO – ONE ESSAY QUESTION Recommended time: 120 minutes (two hours)

Terence purchased approximately 105 acres of land in 1955. Terence built a farmhouse, barn and other structures on the land and operated a dairy farm. The tract of land is T-shaped with the top of the “T” bordering a main road. The farmhouse, barn and the dairy farm occupy about 45 acres of the tract within the top of the T. The lower part of the tract includes about 25 acres of wetlands, which cannot be developed under state and federal law.

When Terence married his wife, Wendy, she moved into the farmhouse with him and the couple had three children, Xara, Yahir, and Zaid. All three children were born in the farmhouse and grew up on the dairy farm. After high school they all went to college away from home and eventually married. After Wendy died in 1999 the children, especially Xara, helped Terence manage the dairy farm and maintain the structures on the land. In 2005 Terence died. Terence’s will devised the 105 acres equally to Xara, Yahir, and Zaid, as tenants in common.

The siblings are unable to reach an agreement on the appropriate use of the property, and Xara has petitioned the court for partition in kind. Xara would like to move into the farmhouse and run the dairy business. Yahir and Zaid agree with the petition for partition but have asked the court to order the sale of the land.

Yahir and Zaid have presented evidence showing that the market value of the entire tract of land is between \$850,000 and \$1.2 million. Their evidence indicates that such a value is based on the sale of the entire 105-acre tract for corporate research or development. Their evidence also indicates that physically dividing the tract would result in an overall 1/3 loss of market value, decreasing the total value to between \$560,000 and \$800,000. Xara has presented evidence that if the portion of the tract that has been used as a dairy farm (the top part of the T) is retained for this use, the siblings will save about \$70,000 in federal estate taxes.

The relevant jurisdiction has long followed the common law preference for partition in kind, as explained in the attached edited case, *Delfino v. Valencias*. In addition, the legislature of this jurisdiction has adopted a statute that states:

#### §24-15

A court may order, on petition of any interested party, the physical partition of any real estate held by tenants in common. When, however, in the opinion of the

court a sale of the jointly held property will better promote the interests of the owners, the court may order the sale of the property.

Articulate and evaluate the arguments that the siblings may make as to the partition of the 105-acre tract of land, considering both the statute and the *Delfino* case. Come to a conclusion as to how a court is likely to rule and why. You should assume that Terence's will is valid, and that the siblings are all "interested parties" for purposes of statute §24-15.

### *Delfino v. Vealencis* Opinion of the State Supreme Court

The central issue in this appeal is whether the Superior Court properly ordered the sale of property owned by the plaintiffs and the defendant as tenants in common.

The plaintiff, Angelo Delfino, and the defendant, Helen C. Vealencis, own, as tenants in common, real property located in Bristol, Connecticut. The property consists of an approximately 20.5 acre parcel of land and the dwelling of the defendant thereon. The plaintiff owns an undivided 99/144 interest in the property, and the defendant owns a 45/144 interest. The defendant occupies the dwelling and a portion of the land, from which she operates a rubbish and garbage removal business. The defendant's business functions on the property consist of the overnight parking, repair and storage of trucks, including refuse trucks, the repair, storage and cleaning of dumpsters, the storage of tools, and general office work. No refuse is actually deposited on the property.

Apparently, none of the parties is in actual possession of the remainder of the property. The plaintiff proposes to develop the property, upon partition, into forty-five residential building lots.

In 1978, the plaintiffs brought an action in the trial court seeking a partition of the property by sale with a division of the proceeds according to the parties' respective interests. The defendant moved for a judgment of in-kind partition. The trial court, after a hearing, concluded that a partition in kind could not be had without "material injury" to the respective rights of the parties, and therefore ordered that the property be sold at auction by a committee and that the proceeds be paid into the court for distribution to the parties.

It has long been the policy of this court, as well as other courts, to favor a partition in kind over a partition by sale. Due to the possible impracticality of actual division, this state, like others, expanded the right to partition to allow a partition by sale under certain circumstances. This court has expressed its reason for preferring partition in kind when it stated: "(A) sale of one's property without his consent is an extreme exercise of power warranted only in clear cases."

Although under the statute a court is no longer required to order a partition in kind even in cases of extreme difficulty or hardship, it is clear that a partition by sale should be ordered only when two conditions are satisfied: (1) the physical attributes of the land are

such that a partition in kind is impracticable or inequitable; and (2) the interests of the owners would better be promoted by a partition by sale. Since our law has for many years presumed that a partition in kind would be in the best interests of the owners, the burden is on the party requesting a partition by sale to demonstrate that such a sale would better promote the owners' interests.

The defendant claims in effect that the trial court's conclusion that the rights of the parties would best be promoted by a judicial sale is not supported by the findings of subordinate facts. We agree.

It is undisputed that the property in question consists of one 20.5 acre parcel, basically rectangular in shape, and one dwelling, located at the extreme western end of the property. Two roads, Dino Road and Lucien Court, abut the property and another, Birch Street, provides access through use of a right-of-way.

Unlike cases where there are numerous fractional owners of the property to be partitioned and the practicability of a physical division is therefore drastically reduced, in this case there are only two competing ownership interests: the plaintiffs' undivided 99/144 interest and the defendant's 45/144 interest. These facts, taken together, do not support the trial court's conclusion that a physical partition of the property would not be "feasible" in this case. Instead, the above facts demonstrate that the opposite is true: a partition in kind clearly would be practicable under the circumstances of this case.

Although a partition in kind is physically practicable, it remains to be considered whether a partition in kind would also promote the best interests of the parties.

In order to resolve this issue, the consequences of a partition in kind must be compared with those of a partition by sale.

The trial court concluded that a partition in kind could not be had without great prejudice to the parties since the continuation of the defendant's business would hinder or preclude the development of the plaintiffs' parcel for residential purposes, which the trial court concluded was the highest and best use of the property.

The trial court also concluded that the effect of the defendant's business would reduce the probable fair market value of the proposed residential lots, and likely result in the loss of building lots to accommodate the defendant's business, and the rerouting of a proposed subdivision road. These concerns may have some validity, but are not dispositive of the issue. It is the interests of all of the tenants in common that the court must consider and not merely the economic gain of one tenant, or a group of tenants. The trial court failed to give due consideration to the fact that one of the tenants in common has been in actual and exclusive possession of a portion of the property since the 1920s; that the tenant has made her home on the property; and that she derives her livelihood from the operation of a business on this portion of the property. A partition by sale would force the defendant to surrender her home and, perhaps, would jeopardize her livelihood. It is under just such

circumstances, which include the demonstrated practicability of a physical division of the property, that the wisdom of the law's preference for partition in kind is evident.

Since the property in this case may practicably be physically divided, and since the interests of all owners will better be promoted if a partition in kind is ordered, we conclude that the trial court erred in ordering a partition by sale, and that, under the facts as found, the defendant is entitled to a partition of the property in kind.

There is error, the judgment is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

END OF EXAM