Final Examination Memorandum
Property Spring 2013
Professor Grimmelmann

I graded each question using a checklist, giving a point for each item (e.g., "Andropov is a bailee.") you dealt with appropriately. Ten percent of the credit in each each question was reserved for organization and writing style. I gave bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts.

Sample answers to the three questions are below. They aren't perfect; no answer in law ever is. Indeed, it was frequently possible to get full credit while reaching different results, as long as you identified relevant issues, structured your analysis well, and supported your conclusions.

If you would like to know your scores on the individual essays, please email me. If you have further questions after comparing your essays to the model answers, or would like to discuss the course or anything else, please email me and we'll set up a time to talk.

It has been my pleasure to share the past semester with you, your enthusiasm, and your insights.

James

	Wait, Wait	Cah Talk	Prairie	Total
Median	15.0	20.0	16.5	52.0
Mean	15.5	20.2	16.9	52.6
Std. Dev.	2.9	2.9	3.1	7.1

(1) Wait, Wait . . . Don't Evict Me! **(1329 words)**

[*The problem should have stated that PPP was approached by Drs. Sagal and Kasell in July 2010. I gave full credit either for moving back the date of the conversation, or for moving up the date the lease commenced.*]

Cavity's Lease

Cavity has a periodic tenancy for a term of two years, which commenced on August 1, 2010. It renewed automatically in 2012, and so it currently runs until July 31, 2014.

The lease is best characterized as a mixture of commercial and residential, based on the nature of the premises. The premises are a "house," the upper floor is suitable as a residence, and everyone involved knows that Dr. Sagal will live there. The lower floor, however, is suited for use as a commercial space, and everyone involved knows it will be used as a dental office. Therefore, the heightened protections for tenants that apply in residential leases will be likely to affect the use of the upper floor, but not the lower floor.

Dr. Sagal's "Sublease"

Dr. Sagal's interest is probably best characterized as a sublease of the upper floor. The document is titled "sublease," he pays rent to Cavity rather than to PPP, and Cavity retains a reversionary interest in the event that he chooses to vacate while Cavity's prime lease is still in force. Some states might characterize his interest as a "lease for life"; others, with more concern for the menu of lease forms, might choose to regard it as a tenancy at will, voidable by either party.

When Dr. Sagal moved out on February 10, 2013, it appears that he abandoned his sublease. Cavity's attempt to bring in Dr. Bodden as his replacement suggests that he may be treated as having surrendered his interest, and Cavity as having accepted his surrender, in which case the sublease is at an end. The better analysis, however, is that , because Dr. Bodden did not actually enter, Dr. Sagal's sublease is still in force. Gotlieb. If so, the unpaid rent is purely a matter between Dr. Sagal and Cavity.

Dr. Bodden

If Dr. Sagal's sublease is still in force, then arguably Cavity never needed PPP's consent to bring in Dr. Bodden in the first place. All that Dr. Sagal is doing is assigning his interest to Dr. Bodden. But since as a sublessor he is not in privity of estate or privity of contract with PPP, there is no relationship by which PPP could attempt to hold him to the consent clause. And unless Cavity has its own consent clause in the lease with Dr. Sagal, it may not be able to object to the substitution. By initialing consent to the first sublease, Blount may have given away the game.

PPP, however, can counter that Dr. Sagal's surrender terminated the sublease, so that the sublease to Dr. Bodden is a new sublease, not an assignment of the old one, and requires fresh consent. Or it could argue that Dr. Sagal's interest was an assignment of the entire upper floor, in which case PPP is in privity of estate with Dr. Sagal. Both arguments are plausible but not persuasive.

In any event, the refusal to allow Dr. Bodden was a mistake on Blount's part. Under Kendall, where the lease sets no standard for the landlord's consent, a refusal must be commercially reasonable. Refusing Dr. Bodden because she is a woman is not commercially reasonable; she is a

successful dentist with a thriving practice. Even if the lease is treated as residential, the refusal was still illegal. Although landlords are usually allowed to arbitrarily withhold consent for residential subleases, this particular refusal on the basis of sex violates the Fair Housing Act, which apples to residences. Thanks to Blount, PPP has breached its obligations to Cavity. The only consolation is that permission to sublease does not appear to be a sufficiently important covenant of the lease that PPP's unjustified refusal would release Cavity from its obligations under the lease. *Cf.* Medico-Dental Building. No matter what else PPP does, it should fire Blount. His sexist comments are unacceptable and are creating legal trouble for PPP.

Waste and Fixtures

Installing the window in the waiting area altered the premises, but in a way that likely made them more valuable, and PPP should not object to this change, which benefits it. The chairs and x-ray machines did not become fixtures. They are particularly suited to Cavity's business and they were easily removed. The cabinets, however, are another matter. They they appear to have been designed to fit the space, they were permanently attached to the walls, and their removal caused damage. Cavity is liable for their value as fixtures, and it committed waste by leaving holes in the wall. The light bulbs are worth too little for PPP to bother about.

Condition of the Premises

Cavity may argue that the lack of heat on the lower floor is a constructive eviction. (An implied warranty of habitability claim would fail; this is the commercial portion of the space.) A lack of heat in the winter months in the Publican climate would render the space unfit for any kind of business, and especially for dentistry. The heating is within the landlord's control, and so PPP's failure to repair it could constitute the necessary conduct for a constructive eviction claim.

That said, Kasell's claim comes too late. The tenant must provide notice of the condition to the landlord and allow the landlord an opportunity to fix it. Indeed, Kasell's failure to mention the heat until now may suggest that she is lying about how long it has been inoperable.

Cavity's Potential Abandonment

It is not clear whether Cavity has abandoned its tenancy. On the one hand, it has vacated and removed all its trade items. Indeed, Kassel has demanded the security deposit back, which would be flatly inconsistent with continuing the lease. On the other, Cavity paid its April rent. PPP would be well advised to wait a day to see whether Cavity pays the May rent.*

One option would be to reach out to Kasell and offer to accept Bodden as a tenant if Cavity is willing to return. From PPP's perspective, this would be an acceptable outcome, with two dentists to occupy the space and pay rent. But the relationship with Dr. Kasell may be irreparably damaged now that she has moved out.

Another option would be to leave the house vacant and sue for rent. This is a suboptimal strategy, however, because only Cavity is on the lease, and so only Cavity and not its shareholders-slash-employees can be held liable. One exception is that if Sagal is an assignee rather than a sublessee, and has not had his surrender accepted, he might be held responsible for $1000 per month. It is unlikely that PPP will be able to pierce Cavity's corporate veil; the sublease to Sagal respected the corporate form and dealt with him as an individual doing

* [*Recall that the examination was administered on April 30. -Ed.*]

business with the company. Since Cavity's two owners have parted ways, there is little to stop them from walking away from the company. Although the company appears to own chairs and an x-ray machine, PPP should not take the risk that they will suffice to satisfy a judgment for the unpaid rent.

PPP's best strategy, then, is to look for a new tenant. To the extent the lease to Cavity is treated as residential, it may have an obligation to mitigate damages anyway. Sommer. Indeed, a court might hold that by rejecting Dr. Bodden—a willing new subtenant—PPP has already failed in its duty to mitigate, thereby terminating its ability to collect rent from Cavity. PPP will be able to apply the security deposit to fix the holes in the walls, and to the extent that it is owed rent by Cavity, PPP may use the deposit to satisfy that debt. So PPP should retain the security deposit while it determines Cavity's intentions and seeks a new tenant.

Finally, PPP should not reenter and retake the premises until it either has clarification that Cavity has abandoned the leasehold, or has obtained a judicial order of eviction. It should not engage in a self-help eviction. Berg.

(2) Cah Talk **(1260 Words)**

The Chunkle Trust

When Myra Chunkle, the settlor, created a trust for Iona Heep, she gave up legal title to the trust corpus, including the Dart. Rex Galore, the trustee, had legal title and thus had the power to sell the Dart to Tom Tappet. Iona Heep, the beneficiary, had only equitable title, and thus is not able to prevent or unwind the sale. If $800 is too low a price—and the fact that the Dart was later sold for $5000 after receiving only $1000 in repairs suggests that it may be—then Galore would be in breach of his duty of prudence and would be liable to Heep (technically to the trust) for the difference. Galore, however, may be able to point to Chunkle's express directions to sell the cars in his defense.

Tom Tappet's Gift to Ray Tappet

Tom Tappet attempted to give the Dart to Ray Tappet. Although Tom had the necessary donative intent, as conveyed by his statement to Ray that "It's all yours," the Dart was never delivered. Irons. Andropov did not succeed in putting the Dart into Ray's possession. Ray cannot argue that the signed title functioned as a deed to make constructive delivery, because the title was not successfully delivered either. Ray did eventually obtain possession by taking the Dart from Drew A. Blank's driveway, but this is coincidental and this manner of taking possession is highly problematic. The court should hold that Tom's attempt to make a gift lapsed when Tom refused to pick up the Dart, so that this self-help "delivery" is ineffective to complete the gift.

Andropov's Authority to Order Repairs

Picov Andropov is a bailee, and as such had the authority to make repairs reasonably incident to the purpose of the bailment. Tappenden. Fixing the car so he could deliver would appear to pass that test. But if the car was only worth $800, Andropov may have exceeded his authority in ordering $1000 in repairs. At the least, Tom has a plausible argument that Andropov should have consulted with him before directing that such extensive repairs be made.

Horseshoe Road Repairs was not obligated to determine whether Andropov was the actual owner of the Dart before making repairs. Given his possession of the car with Tom's permission, he almost certainly had the apparent authority to order repairs. Tappenden. Tom owes Horseshoe for the value of the repairs to the radiator—but not for the paint job, which was not necessary to comply with Andropov's request that Horseshoe "fix the car.' Tom may recover from Andropov to the extent that he owes Horseshoe for repairs in excess of Andropov's actual authority.

Horseshoe Road's Lien and Willy Bolt's Theft

Horseshoe acquired a mechanic's lien to secure the unpaid balance of its bill to Tom for repairs. That lien lasted as long as Horseshoe retained possession. Although Horseshoe could argue that Tom abandoned the Dart when he refused to pick it up, his statement does not seem like an unequivocal statement renouncing all interest in the car. Tom has not attempted to regain possession, but that is not the same as abandoning ownership.

When Bolt drove off with the car, Horseshoe's lien vanished. Tom still owes Horseshoe for the repairs, but the debt is no longer secured by the Dart. Tom may be able to argue that Horseshoe was negligent as a bailee—or even misdelivered the Dart—by letting Bolt steal it. Bolt

is liable to Horseshoe for conversion for taking the car from Horseshoe's possession, and to Tom as the owner.

Bolt, as a thief, obtained void title to the Dart. Horseshoe did give him temporary possession, but this was not a "transaction of purchase" because it was meant to be temporary, and because he did not pay for it.

Drew A. Blank's Purchase and Modifications

Since Bolt had void title, he was unable to convey good title and Drew A. Blank also had void title. Blank could argue that he was a good-faith purchaser for value: he paid $5000 and he received a title signed by the previous owner. There is some merit to this argument, and by the reasoning of *Hauck*, Tom was negligent in leaving the signed title in the glove compartment, because it created a heightened risk that something like this might happen. But the better response is that text of the UCC controls in defining void versus voidable title. And in any event, Blank could have checked the title certificate or the DMV's records more closely, which would have indicated that the previous owner's name was Tom Tappet, not Willy Bolt. This by itself would not have definitively shown the transaction to be fraudulent, as transfer of the title certificate is not a prerequisite to transfer of ownership, but it would have put Blank on notice to inquire more closely. Bolt is liable to Blank for violating his warranty of title under UCC § 2-312.

Blank, however, takes title to the Dart as a good-faith improver, as in *Wetherbee*. The argument for "good faith" here is stronger than in the sales transaction; compare Golden Press, where the improver reasonably believed it owned all the land it built on, but would have been on record notice that it didn't. Blank invested $3500 in a car he bought for $5000, which is not a large amount by itself, but he also spent "hundreds of hours" repairing it, and the car listed for $25,000, which shows a large increase in value (assuming, that is, that Blank was being realistic in what it would sell for). The car has also been conceptually, if not physically transformed: while it is still a car, it is now an art car, one that will be valued by very different people than it would have before. Blank owes the previous owner—Tom—for the value of the car, most likely $5000.

Alternatively, if the car is returned to Tom, then Tom owes Blank for the improvements, although here the amount owed would be limited to the value actually conveyed, which might be substantially less than the full $25,000 if Tom doesn't want a tile-bedecked car and can't readily sell it.

Odessa Goodwyn may have a claim against Blank for violating her right of publicity—triggered when he advertised the car with her face on it—although he could defend by saying that it was a form of artistic commentary rather than an attempt to claim her endorsement.

Ray Obtains the Car

When Ray took the car from Blank's driveway, he may have breached the peace by smashing the window and hot-wiring it at 4:30 AM. His actions were substantially more violent than the towing company's in *Williams*. In any event, since Ray was not the car's owner and not even a secured party, he had no right to engage in self-help to obtain it. He is liable to Blank for trespass and for replevin or conversion.

Remedies

Blank is entitled to obtain the Dart from Ray; he must pay Tom $5000 for the value of the car. The remaining remedies need to be adjusted to prevent double recoveries. So, for example,

assuming that Blank receives the car and compensates Tom, it follows that Bolt is liable to Blank, but not to Tom, who has already been fully compensated for the loss of his car. Similarly, Horseshoe is not liable to Tom for losing the Dart if he has already been compensated by Blank.

(3) A Prairie Home **(1457 words)**

Note: Barb's last name should have been Russell, to match her mother, Lefty's. The problem neglected to state that Lefty died intestate without other heirs; I gave full credit either for assuming this or for completing the analysis for unknown heirs.

Theory 1: POEM Owns the Lower Hundred Acres

Garrison Ingqvist's will gave the Professional Organization of English Majors (POEM) an executory interest in fee simple over each parcel, which would become possessory if the land were ever used for commercial purposes. Because Acme's marina appears to be commercial, its use would appear to have triggered the executory limitation and vested title in POEM. If so, Barb could appeal to POEM to close the marina and eject Acme.

POEM's executory interest, however, is void because it violates the Rule Against Perpetuities; it could vest indefinitely far into the future, whenever the land is used for commercial purposes. That this interest *did* vest within twenty-one years after Lefty's death is irrelevant; it might not have, and therefore it fails. The most straightforward way to reform the will is to strike the entire clause creating the executory limitations—the final sentence—which converts the present estates into fees simple absolute.

Theory 2: Barb Is Sole Owner of the Lower Hundred Acres

Garrison Ingqvist's will created some form of cotenancy between Lefty and Dusty in the lower hundred acres. The phrase "jointly for the use of both" is ambiguous between a joint tenancy and a tenancy in common. Courts will generally construe an ambiguous cotenancy as a tenancy in common, so that outcome is more likely, but the word "jointly" may be enough to overcome the presumption against survivorship. If the will created a joint tenancy, then at Dusty's death Lefty became sole owner and Guy took nothing. This would mean that Barb inherited title to the lower hundred and is fee simple owner today. Acme cannot claim to be a good faith purchaser without notice because the will is in its chain of title; indeed, it has been recorded. So Acme knows of the joint tenancy and should have inquired about Dusty's and Lefty's survivorship interests. Thus, Barb could simply eject Acme and close the marina.

Neither Acme nor its predecessor in interest, Guy, has an adverse possession claim. Guy did not actually occupy the property, and Acme has not occupied it for the statutory period. Acme may qualify as a good-faith improver if it relied on Guy's warranty deed and was mistaken about the nature of the cotenancy. If so, Barb may need to compensate Acme if she wishes to eject it and take ownership of the marina. Producers Lumber.

Theory 3: Barb is a Tenant in Common of the Lower Hundred Acres

If the will created a tenancy in common, then Acme and Barb today are tenants in common in the lower hundred. (Barb takes via Lefty; Acme via Guy and Dusty.) Barb cannot claim to be sole owner via adverse possession because use by one tenant in common is not presumed to be hostile against the other without an ouster, and she has never prevented Guy from using the lower hundred acres. Acme's construction was probably not an ouster, since it did not prevent Barb from using the lower hundred. But when Acme's employee prohibited Barb from fishing, that was an ouster.

Barb can request a partition. Because of the ouster, she is entitled to half of Acme's profits in the resulting accounting. Gillmor. But a partition in kind will leave Acme with ownership of part

of the lower hundred, likely including the marina; a partition by sale will leave someone else with ownership of the whole marina. Either way, Barb will still need to deal with the powerboats.

Theory 4: Barb Can Prevent Acme from Using the Road

Garrison Ingqvist's will gave Lefty a fee simple in the upper hundred acres. Lefty deeded the fee simple to Barb, who owns it today.* Because the road crosses the upper hundred acres, Barb can theoretically prevent Acme from using it by suing for trespass, or through self-help by blocking the road. This would have the practical effect of shutting down the marina.

Barb should not do this, because Acme has an easement to cross the land. When Ingqvist's will severed the two parcels, they were held in common ownership and the lower parcel was apparently landlocked as a result. The will therefore created an access easement by necessity benefitting the lower parcel. (There may also be an easement by implication, if, as it appears, Ingqvist was using the gravel road to get to the dock in his lifetime.) Guy's non-use is not sufficient to abandon the easement. Barb might object to the increased burden caused by the heavier traffic, but the traffic is not stopping her from using the road. Indeed, by standing by while Acme paved the road, Barb may have created an easement by estoppel.

Theory 5: The Noise and Traffic are a Nuisance

Barb can sue claiming that the noise and traffic are a nuisance. The noise certainly sounds like it is distracting, but she may have a hard time proving that it rises to the level of being a nuisance. Acme is making a socially beneficial use that is enjoyed by numerous people from the area. And, particularly if the absence of powerboats is so unusual that it ought to put Acme on inquiry notice about a possible covenant, it is also a relatively common use. Other than Jim's inability to trap squirrels, Barb cannot point to tangible harms she is suffering as a result of the noise. Cleveland-Cliffs. A Keeble claim will fail, as Acme is not purposefully interfering with Jim's trapping; it is merely a side effect of actions Acme is taking for legitimate purposes.

Theory 6: The Property Use Restriction Prohibits Powerboats

The Property Use Restriction (Restriction) is unenforceable. Although it was intended to bind successors, it will not bind Acme. Publica has a pure-notice recording act: any instrument that should be recorded but is not does not bind future good faith purchasers who do not have notice of it. The Restriction is an "instrument … encumbering … the title to real property," but it is not properly recorded where Acme could and should have found it. Ingqvist did not record it. His will, although it refers to both parcels and although it was recorded before Acme's purchase, does not mention the Restriction. The deed from Lefty to Barb does mention the Restriction, but it is a deed for the *upper* parcel; a title search on the *lower* parcel would not discover it; nothing in the records that Acme would check to research its own title would point to the existence of the Restriction.

Barb could argue that Acme is on inquiry notice, as in Sanborn, and therefore should check the titles of neighboring parcels, But thee is no indication that any lakefront owner recorded the Restriction (Barb is not a lakefront owner). Nor is it clear that the absence of powerboats on a lake would suggest to a reasonable purchaser that there is a covenant prohibiting their use.

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* [*The quitclaim deed and inadequate consideration were red herrings. -Ed.*]

Moreover, any private agreement purporting to prohibit public use of the lake may be invalid as a violation of the public's rights to use navigable waters.

Theory 7: Fitzgergald Could Downzone the Lake Area

The town of Fitzgerald has the constitutional power to prohibit non-residential uses in the vicinity of Lake Wobegon. Euclid. If the town zoned the entire area, including all forty-five lots, it would likely not be an example of problematic spot zoning. But the town would have a regulatory takings problem under Penn Central: Acme's substantial investment in the marina would become worth much less overnight. To avoid the need to compensate Acme, the town might have to treat the marina as an existing non-conforming use, and provide it a substantial amortization period. Harbison. Thus, downzoning would probably not achieve Barb's objective of stopping the noise in the near future.

Advice

Barb has few good options, if her goal is to shut down the marina. The most likely case is that she is a tenant in common; she can obtain substantial compensation but does not have a right to veto Acme's uses of the lakefront. None of her other theories—POEM's interest, a possible joint tenancy, the nuisance claim, the Restriction, or downzoning—are likely winners. Her best bet is therefore to enter into negotiations with Acme, using her rights as a tenant in common to obtain concessions about operating hours, landscaping the road to shield her house, or other steps to reduce the impact of the marina on her peace and quiet.

Also, Barb should be careful about asserting claims that would amount to encumbrances on the lower parcel—her tenancy in common, the Restriction, etc.—because to the extent that she establishes that Guy's warranty to Acme was violated, she is setting up her cousin for a lawsuit by Acme.