EXAMINERS' ANALYSIS OF QUESTION NO. 13

(1) Claims against Porter and Mark: The Bank can proceed against Porter for the full amount of the mortgage loan but cannot proceed against Mark.

A mortgage is a lien on real property securing performance of a debt. See *McKeighan v Citizens Commercial & Saving Bank,* 302 Mich 666 (1942). That debt may continue to exist even if the mortgagor no longer retains an interest in the property. See *In re Estate of Goodwin,* 362 Mich 456 (1961). ("The taking of a mortgage to secure the payment of a debt is, of course, a commonplace, the mortgage being mere security therefor, and only an incident or accessory to the principal debt." *Goodwin* at 458-59.) Finally, an individual who purchases an interest in mortgaged real property is not personally obligated to pay the debt unless he specifically agrees to assume the mortgage debt. See *Petz v Gaines,* 286 Mich 450, 453 (1938).

In this case, Porter received a $100,000 loan from the Bank. He is therefore liable for that $100,000. That Porter has since sold his interest in the property securing that debt does not shield him from liability. Further, the Bank cannot proceed against Mark personally for the debt because Mark purchased Porter's interest in the property without explicitly assuming the mortgage debt as he was unaware that the property was mortgaged.

(2) Transfer of Interest: Mark is now a tenant in common with Randy and Zeke. A tenancy in common is the default tenancy in Michigan involving co-owners, unless the conveyance explicitly states that it creates a joint tenancy, MCL 554.44, or the conveyance is to a married couple, which creates a tenancy by the entirety. *Tamplin v Tamplin,* 163 Mich App 1, 5 (1987). Each co-owner in a tenancy in common owns an undivided share of the entire property. *Kay Investment Company, LLC v Brody Reality No 1,* LLC, 273 Mich App 432, 441-442 (2006). A co-owner in a tenancy in common may freely transfer his interest without breaking the tenancy, and the new owner succeeds to the former owner's interest. See *Pellow v Arctic Mining Co,* 164 Mich 87 (1910).

In this case, Randy, Zeke, and Porter took the property as "equal co-owners" as described in the deed. The facts do not indicate that the deed's language explicitly created a joint tenancy, and this conveyance involved three friends, not a married couple. Randy, Zeke, and Porter thus took as tenants in common under MCL 554.44 and each had a freely transferable and equal undivided interest in the property. Porter sold his interest to Mark, who succeeded to Porter's interest and is now a tenant in common with Zeke and Randy.

(3) Foreclosure: Even though the Bank can proceed against Porter for the full amount of the mortgage, the Bank cannot foreclose on the property. First, if a mortgagor defaults on a mortgage loan, the mortgagee may foreclose only on the interest in the property securing the mortgage. See *Union Guardian Trust Co v Rood,* 261 Mich 188, 193 (1933). A mortgage given by one tenant in common on his individual interest does not affect the interests of the other tenants in common, because a tenant in common can only unilaterally encumber his own interest. See Wright v *Kayner,* 150 Mich 7, 14-15 (1884); *Moreland v Strong,* 115 Mich 211, 217-218 (1897).

Second, while an unrecorded mortgage is enforceable between the parties to the mortgage, it is not enforceable between the mortgagee and a third party that purchased the property for value and did not have either actual or constructive notice of the mortgage. See MCL 565.29, MCL 565.35; *Michigan Fire & Marine Ins Co v Hamilton,* 284 Mich 417, 419 (1938).

Here, the mortgagee, the Bank, had a mortgage loan secured explicitly by only *Porter's* interest in the property. Porter's interest in the property was that of a tenant in common, and a mortgage on only his interest in the property cannot encumber Randy's and Zeke's interests. Thus, the Bank cannot foreclose on Zeke or Randy's interests in the property because its lien never secured their interests.

Additionally, Mark purchased Porter's interest in the property for value, $30,000. He never had actual or constructive notice of the Bank's interest, because the Bank did not record its interest in the property and Porter did not tell Mark about the mortgage. Therefore, while the Bank can pursue

Porter for the full balance on the loan, it cannot foreclose on the property.