

## EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. Chad's claim to a property interest in Lena's pathway by adverse possession, likely would not be successful. Adverse possession is a method of acquiring property that is based on the Michigan statute of limitations proscription that a property owner must file an action to recover possession of that property from another within 15 years from the date of accrual of the claim. MCL 600.5801(4). In other words, Chad would be required to show that Lena as the property owner, had a claim against him that accrued over 15 years ago to recover possession of the pathway, and that she let that claim lapse. As explained by the Michigan Court of Appeals in *Wengel v Wengel*, 270 Mich App 86, 92 (2006), quoting *Kipka v Fountain*, 198 Mich App 435, 438 (1993):

"A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership."

The *Wengel* court further explained that there is case law support for a requirement that a person's possession of the property must also be "hostile" to successfully sustain a cause for adverse possession. In this sense the term hostile means possession "which is 'inconsistent with the right of the owner, without permission asked or given,' and which 'would entitle the owner to a cause of action against the intruder.'" *Id* at 92, quoting *MUMrow v Riddle*, 67 Mich App 693, 698 (1976).

While Chad used the property pathway continuously for 20 years, his use was not exclusive and did not interfere with

Lena's possessory and ownership rights. Chad's use did not displace Lena from the pathway. The facts state that Lena often used the pathway herself during that same relevant time period. Moreover, the facts suggest that Lena was aware of Chad's routine use of the pathway, was not bothered by it, and at least passively permitted it. Thus, a claim to recover possession of the pathway from Chad never accrued and therefore the 15-year statute of limitations for filing such action has never expired. As such, there is no basis for Chad's claim that he acquired the pathway by adverse possession.

2. Michigan is a "race notice" state with respect to determining disputes regarding multiple conveyances of the same parcel of property. Michigan's race notice statute (the "statute") provides in relevant part that:

"Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. MCL 565.29. A good faith purchaser under the statute is one who buys property without notice that title to the property is compromised. *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410 (1992). Notice of a title defect may be actual or constructive. *Richards v Tibaldi*, 272 Mich App 522, 539 (2006). Thus, even though a person may have been the first to purchase a parcel of property, if he fails to record his interest before the recording of a subsequent purchase of the property for value and without notice of the previous purchaser's interest, the conveyance to the first purchaser is void as to that subsequent purchaser."

In the instant case, Harold would have superior rights to Carmen's in the property. While Harold did not record his interest in the property before Carmen, Carmen did not pay any consideration for her acquisition of the property since it was a gift from Lena. Moreover, Carmen had actual notice of the property sale to Harold before Lena gifted her the property. Therefore, Carmen is not considered a "subsequent purchaser in good faith and for valuable consideration" which would have otherwise entitled her to the property under the statute because she recorded her property interest before Harold.