

Real Property Fall 2012

Outline Issue Question 1

Question one did not require any discussion of RAP.

O

Freehold Estate

Free Simple Absolute Divisible Alienable Descendible

Potential restrictions: easements, reservations of mineral rights, covenants, zoning

Right to reject the estate

A

Freehold Estate

Current possessory right

Life Estate

Lease, Give away.

Waste permissive voluntary ameliorative

Duty to rebuild?

Children

Vested remainder subject to open

Current interest in a future possessory estate

To bring legal action

Rule of Convenience

Joint tenancy Tenancy at common

Escheatment

Rights

Riparian: natural flow, prior apportionment

Surface water: common enemy, civil law, reasonable

Model Answer Question 2

Dear Mr. Client,

Provided for your review and consideration: the nature, legal terms, options, rights and obligations concerning the leasing of property. It is limited in scope based on the amount of information provided and the time constraint imposed.

To start off with, a lease is both a contract and a conveyance of an estate in land. As such, it gives rise to two sets of rights and obligations. First are those arising from the landlord tenant relationship, by virtue of the transfer of an estate in land to your child. The legal term for this mutual interest between the parties is privity of estate. Second, are those rights and obligations existing by virtue of the parties' express agreements in the lease. This mutual interest is privity of contract. The lease will provide your child the present possessory interest in land, as this estate in land will not last and must end at some point in time in the future it is called a nonfreehold estate.

The lease will provide your child with the exclusive possession of the premises for the term of the lease. Although it was not always the law, the landlord must place your child into actual physical possession of the apartment. There are many types of leases; the two your child will be looking at will be: term for years and periodic term. There are pros and cons for both of these.

The term for years has a fixed start and end date. It can be for any defined period; such as a day, week, month, year or years or any fraction thereof. The definite period will provide secure housing and known costs, which is balanced against the lack of flexibility and continuing obligations. Should your child's plans change and there is the need to move before the expiration of the lease, there are legal consequences. In the absence of an express provision in the lease to the contrary, the lease would automatically terminate upon your child's breach of the lease and abandonment of the apartment. The landlord would have a duty to mitigate the damage suffered by leasing the property again. But, your child would be financially responsible of the costs incurred by the landlord such as advertising and lost rent while the apartment stands vacant. A better option is to make sure the lease permits, or does not prohibit your child's right to sublet the property, assign the lease, or both. Most leases will provide that the tenant can sublet the property, assign the lease, or both, with the landlord's consent that will not be withheld unreasonably, or if the lease is silent on this issue it is a standard implied by law that consent shall not be unreasonably withheld. While the lease may expressly prohibit an assignment or sublease by the tenant or give the landlord the right to act unreasonably in prohibiting any transfer of the tenant's interest in the lease, the landlord's remedies in such circumstances will be limited to a termination of the lease on the tenant's default and the recovery of damages that are permitted on a termination as noted above.

Should your child decide to stay after the expiration of the fixed term the tenancy terminates, and the possession of the tenant is as tenant at sufferance or a trespasser. As a trespasser the landlord can commence an unlawful detainer action and evict your child and seek a judgment for

any financial loss suffered. If the landlord accepts rent from your child after the fixed term has expired, a periodic tenancy is created.

A periodic tenancy differs from a tenancy for a fixed term in that a periodic tenancy is created to continue for successive periods of the same length, unless terminated by proper notice. Periodic tenancies are tenancies from month to month or year to year. The periodic tenancy has no fixed term and is terminable at the will of either party.

The leasing of an apartment for an unspecified term is presumed to be for the length of time that the parties adopt for the payment of rent. If the rent is paid monthly, it is presumed that the tenancy is for month to month, or if the rent is paid weekly or annually, the tenancy is presumed to be week to week, or year to year, respectively.

The most important difference between a periodic tenancy and a tenancy for a fixed term is that the estate created by a periodic tenancy does not terminate by the mere lapse of time. The lease of real property for an unspecified term is deemed to be renewed at the end of the term implied by law unless one party gives written notice to the other of his intention to terminate the lease. Neither party may terminate the tenancy without giving notice in advance in the manner and for the time prescribed by statute. This provides flexibility but not long term security.

I cannot tell you which of these two leases will better meet your child's needs. That decision will flow from a discussion of long term security vs. flexibility. Regardless of the type of lease the landlord will have certain rights and responsibilities.

A deposit will be required. A deposit is the advance payment of money by the tenant other than for current rent. Because the landlord's remedies upon the tenant's breach of the lease are relatively cumbersome, the lease often provides for some consideration to the landlord to secure the tenant's performance of the lease. A security deposit is any sum received by the landlord other than for current rent regardless of the name or title placed on the funds and regardless of the purpose of the payment. The advance payment includes any payment, fee, deposit, or charge; however it may be labeled, including an advance payment of rent, to be used as compensation for the tenant's nonpayment of rent, the repair injury to the premises caused by the tenant or his or her guest or licensee, the cleaning of the premises on termination of the tenancy, or to remedy other defaults by the tenant, including future defaults by the tenant of any of the obligations under the rental agreement to repair or replace, or return personal property or appurtenances, exclusive of ordinary wear and tear which includes ordinary wear and tear, whether it occurred prior to or during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during one or more tenancies. The maximum deposit for the lease of residential premises for any purpose, including prepaid rent, cannot exceed two months' rent in the case of unfurnished property, and three months' rent in the case of furnished property, in addition to the first month's rent

It is a somewhat common practice and your child should look out for fees or charges such as "administrative fees," consideration for execution of the lease, or other types of fees or charges for any purpose other than the payment of rent as consideration for the use and occupancy of the premises, are still subject to the landlord's obligation to refund these amounts to the tenant, less

there are permissible deductions. The right of a residential tenant to receive a refund cannot be altered or modified by any agreement between the parties

The landlord must give the tenant notice in writing of the tenant's option to request an initial inspection of the premises for items to be deducted from the security deposit and of the tenant's right to be present at the inspection. The purpose of the inspection is to give the tenant an opportunity to make repairs before vacating the unit. If the tenant requests an initial inspection, the landlord must conduct the inspection prior to the final inspection, but no earlier than two weeks before the end of the tenancy, and provide the tenant with an itemized list of potential deductions from the security deposit, as specified by statute. The itemized list is to be given to the tenant if present at the inspection or left in the premises. The landlord must give the tenant at least 48 hours' notice prior to the inspection date. The tenant shall have the period between the initial inspection and moving out to perform repairs. Allowable damages for certain violations of the security-deposit rules are twice the amount of the security deposit in addition to actual damages. The landlord must deliver, by personal service or first-class mail postage prepaid and within three weeks after the tenant vacates the premises, a written itemized statement of the amount of the deposit, its disposition, and the balance due the tenant. The balance due must be paid to the tenant within the same three-week period

The landlord has the duty to provide a premises that is fit for human habitation. There is a common-law implied warranty of habitability that the premises must be fit and proper for human habitation. There is a breach of this warranty if conditions on the premises are such as to make them unsafe and unsuitable for habitation. Therefore, the landlord must make the premises suitable for habitation and must repair all subsequent dilapidations that render it untenantable.

If the condition of the premises is so serious and unsafe as to render them unfit for habitation, there is a breach of the landlord's statutory obligations and the common-law implied warranty of habitability. In such case, your child has three alternative remedies: have the unsafe conditions repaired; abandon the premises because of a constructive eviction and be relieved of any further obligation to pay rent; or remain in possession until the repairs are completed, in which case the rental obligation is reduced because of the landlord's breach of warranty. The amount of the rent reduction depends on the seriousness of the condition. The obligation of the landlord to maintain residential premises in a habitable condition may not be waived by the terms of the lease.

Upon the nearing of the end of the lease your child needs to be aware that the landlord must give notice in writing of the tenant's option to request an initial inspection of the premises for items to be deducted from the security deposit and of the tenant's right to be present at the inspection. The purpose of the inspection is to give the tenant an opportunity to make repairs before vacating the unit. If the tenant requests an initial inspection, the landlord must conduct the inspection prior to the final inspection, but no earlier than two weeks before the end of the tenancy, and provide the tenant with an itemized list of potential deductions from the security deposit, as specified by statute. The itemized list is to be given to the tenant if present at the inspection or left in the premises. The landlord must give the tenant at least 48 hours' notice prior to the inspection date. The tenant shall have the period between the initial inspection and moving out to perform repairs. Allowable damages for certain violations of the security-deposit rules are

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In every lease, the landlord impliedly covenants that the tenant will have quiet possession and enjoyment of the premises during the lease term, except as otherwise provided in the lease. This will protect your child from any act or omission of the landlord, or anyone claiming under the landlord, that interferes with the right to use and enjoy the premises for the purposes contemplated by the tenancy. The covenant means that the landlord shall not unlawfully interfere with the tenant's possession and that no third person will lawfully claim the right to possess the demised premises. The lease will provide for the landlord's opportunity with notice to inspect the premises, or to enter if there is a perceived emergency. But, harassment, unlawful entry, or uninhabitable conditions would be grounds for a lawsuit.

In closing, should you have additional questions or concerns I am available.

Truly yours,
Attorney at Law