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REAL PROPERTY

BARBRI BOOK EXAMPLE

REAL PROPERTY

TABLE OF CONTENTS

I. ESTATES IN LAND 1
A. IN GENERAL 1
B. PRESENT POSSESSORY ESTATES 1
1. Fee Simple Absolute 1
2. Defeasible Fees 1
a. Fee Simple Determinable (and Possibility of Reverter) 1
1) Correlative Future Interest in Grantor—Possibility of Reverter 2
a) Possibility of Reverter Need Not Be Expressly Retained 2
b) Transferability of Possibility of Reverter 2
2) Correlative Future Interest in Third Party—Executory Interest 2
b. Fee Simple Subject to Condition Subsequent (and Right of Entry) 2
1) Correlative Future Interest in Grantor—Right of Entry 3
a) Failure to Reserve Right of Entry 3
b) Waiver of Right of Entry 3
(1) Inaction by Itself Not a Waiver 3
c) Transferability of Right of Entry 3
2) Correlative Future Interest in Third Party—Executory Interest 3
3) Compare—Fee Simple Determinable 3
a) Construction of Ambiguous Language 4
c. Fee Simple Subject to an Executory Interest 4
d. Limitations on Possibilities of Reverter and Rights of Entry 5
e. Conditions and Limitations Violating Public Policy 5
1) Restraints on Marriage 5
2) Provisions Involving Separation or Divorce 5
3. Fee Tail 5
4. Life Estate 5
a. Life Estates by Marital Right (Legal Life Estates) 5
b. Conventional Life Estate 6
1) For Life of Grantee 6
2) Life Estate Pur Autre Vie (Life of Another) 6
a) Inheritability 7
c. Rights and Duties of Life Tenant—Doctrine of Waste 7
1) Affirmative (Voluntary) Waste—Natural Resources 7
a) Open Mines Doctrine 7
2) Permissive Waste 7
a) Obligation to Repair 8
b) Obligation to Pay Interest on Encumbrances 8
c) Obligation to Pay Taxes 8
d) Special Assessments for Public Improvements 8
(1) Apportionment of Costs 8
e) No Obligation to Insure Premises 8
f) No Liability for Third Party's Torts 8
3) Ameliorative Waste 8

a) Compare—Leasehold Tenant 9
b) Compare—Worthless Property 9
d. Renunciation of Life Estates 9
5. Estates for Years, Periodic Estates, Estates at Will, Tenancies at Sufferance . . 9
C. FUTURE INTERESTS 9
1. Reversionary Interests—Future Interests in Transferor 10
a. Possibilities of Reverter and Rights of Entry 10
b. Reversions 10
c. All Reversionary Interests Are "Vested" 11
2. Remainders 11
a. Indefeasibly Vested Remainder 11
b. Vested Remainder Subject to Open 12
1) Divesting Interests Are Executory Interests 13
2) Effect on Marketability of Title 13
c. Vested Remainder Subject to Total Divestment 13
d. Contingent Remainder 14
1) Subject to Condition Precedent 14
2) Unborn or Unascertained Persons 15
3) Destructibility of Contingent Remainders 15
a) Rule Abolished 16
b) Related Doctrine of Merger 16
(1) Compare—Interests Created Simultaneously 16
e. Rule in Shelley's Case (Rule Against Remainders in Grantee's Heirs) . . . 16
f. Doctrine of Worthier Title (Rule Against Remainders in Grantor's Heirs) 17
3. Executory Interests 18
a. Shifting Executory Interest—Divests a Transferee 18
b. Springing Executory Interest—"Follows a Gap" or Divests a Transferor 18
c. Executory Interest Follows a Fee 19
d. Differences Between Executory Interests and Remainders 19
4. Importance of Classifying Interests "In Order" 19
5. Transferability of Remainders and Executory Interests 20
a. Vested Remainders Are Transferable, Devisable, and Descendible 20
b. Contingent Remainders and Executory Interests Are Transferable Inter Vivos 21
c. Contingent Remainders and Executory Interests Are Usually Devisable and Descendible 21
d. Any Transferable Future Interest Is Reachable by Creditors 21
e. Practical Ability to Transfer Marketable Title 21
6. Class Gifts 21
a. Definitional Problems 21
1) Dispositions to "Children" 21
2) Dispositions to "Heirs" 21
3) Dispositions to "Issue" or "Descendants" 22
4) Class Members in Gestation 22
b. When the Class Closes—The Rule of Convenience 22
1) Outright Gift—Class Closes at Time Gift Is Made 22

a) No Class Members Alive at Testator's Death—Class Stays Open . . . 22
2) Postponed Gift—Class Closes at Time Fixed for Distribution . . . 23
3) Dispositions Subject to Condition of Reaching Given Age . . . 23
4) Rule of Convenience Is a Rule of Construction Only . . . 24
7. Survival . . . 24
a. Express Words of Survival . . . 24
b. Implied Contingency of Survival—Gifts to "Issue," "Descendants," or "Heirs" . . . 25
D. TRUSTS . . . 25
1. Private Trust Concepts and Parties . . . 25
a. Settlor . . . 25
b. Trustee . . . 25
c. Beneficiaries . . . 25
d. Res . . . 25
e. Application of Rule Against Perpetuities . . . 25
2. Creation of Trusts . . . 26
a. Inter Vivos Conveyance . . . 26
b. Inter Vivos Declaration . . . 26
c. Testamentary Conveyance . . . 26
d. Pour-Over into Existing Trust . . . 26
3. Charitable Trusts . . . 26
a. Beneficiaries . . . 26
b. Application of Rule Against Perpetuities . . . 26
c. Cy Pres Doctrine . . . 27
d. Enforcement of Charitable Trusts . . . 27
E. THE RULE AGAINST PERPETUITIES . . . 27
1. Analysis of the Rule . . . 27
a. When the Perpetuities Period Begins to Run . . . 27
1) Wills—Date of Testator's Death . . . 27
2) Revocable Trusts—Date Trust Becomes Irrevocable . . . 27
3) Irrevocable Trusts—Date Trust Is Created . . . 27
4) Deeds—Date Deed Is Delivered with Intent to Pass Title . . . 28
b. "Must Vest" . . . 28
1) "Wait and See" Rule . . . 29
c. "If at All" . . . 29
d. "Lives in Being" . . . 29
1) Who Can Be Used as Measuring Lives . . . 30
2) Reasonable Number of Human Lives Can Be Used . . . 30
e. Interests Exempt from Rule . . . 31
1) Gift Over to Second Charity . . . 31
2) Vested Interests . . . 32
a) Compare—Class Gifts Are Subject to Rule . . . 32
3) Reversionary Interests . . . 32
a) Compare—Executory Interests Are Subject to Rule . . . 32
f. Consequence of Violating the Rule—Interest Is Stricken . . . 32
1) Exception—"Infectious Invalidity" . . . 32
2. The Rule in Operation—Common Pitfall Cases . . . 33

a. Executory Interest Following Defeasible Fee Violates the Rule 33
b. Age Contingency Beyond Age Twenty-One in Open Class 34
c. The Fertile Octogenarian 34
d. The Unborn Widow or Widower 34
e. The Administrative Contingency 35
f. Options and Rights of First Refusal 35
1) Reasonable Time Limit May Be Inferred 36
2) Options Connected to Leaseholds 36
3. Application of the Rule to Class Gifts 36
a. "Bad-as-to-One, Bad-as-to-All" Rule 36
b. Class Closing Rules May Save Disposition 37
c. "Gift to Subclass" Exception 37
d. Per Capita Gift Exception 38
4. Perpetuities Reform Legislation 38
5. Technique for Analysis of Perpetuities Problems 38
a. Determine What Interests Are Created 38
b. Apply the Rule 39
c. Apply Reform Statute 39
F. THE RULE AGAINST RESTRAINTS ON ALIENATION 39
1. Types of Restraints on Alienation 39
2. Restraints on a Fee Simple 39
a. Total Restraints 39
b. Partial Restraints 39
1) Reasonable Restraints Doctrine 40
2) Discriminatory Restraints 40
a) Fourteenth Amendment 40
b) Fair Housing Act 40
3. Restraints on a Life Estate 40
a. Legal Life Estate 40
b. Equitable Life Estate 40
4. Restraints on Future Interests 41
a. Vested Remainders in Fee Simple 41
b. Vested Remainders for Life 41
c. Contingent Remainders 41
5. Other Valid Restraints on Alienation 41
a. Reasonable Restrictions in Commercial Transactions 41
b. Right of First Refusal 41
c. Restrictions on Transferability of Leaseholds 42
G. CONCURRENT ESTATES 42
1. Joint Tenancy 42
a. Creation 42
1) Four Unities Required 42
2) Modern Law 42
3) Express Language Required 42
b. Severance 42
1) Inter Vivos Conveyance by One Joint Tenant 43
a) When More than Two Joint Tenants 43
b) Transactions that May Not Result in Severance 43

(1) Judgment Liens 43
(2) Mortgages 43
(3) Leases 44
(a) Death of Lessor 44
2) Contract to Convey by One Joint Tenant 44
a) Compare—Executory Contract by All Joint Tenants 44
(1) Common Law View—Joint Tenancy Continues 44
(2) Other Courts—Tenancy in Common 45
3) Testamentary Disposition by One Joint Tenant Has No Effect 45
a) Compare—"Secret" Deeds 45
4) Effect of One Joint Tenant's Murdering Another 45
2. Tenancy by the Entirety 45
a. Right of Survivorship 45
b. Severance Limited 45
c. Individual Spouse Cannot Convey or Encumber 46
3. Tenancy in Common 46
4. Incidents of Co-Ownership 46
a. Possession 46
b. Rents and Profits 46
c. Effect of One Concurrent Owner's Encumbering the Property 46
d. Ouster 46
e. Remedy of Partition 47
1) Restraint on Partition by Co-Tenants 47
f. Expenses for Preservation of Property—Contribution 47
1) Repairs—Contribution May Be Compelled for Necessary Repairs . . 47
2) Improvements—No Contribution or Setoff 48
3) Taxes and Mortgages—Contribution Can Be Compelled 48
g. Duty of Fair Dealing Among Co-Tenants 48

II. LANDLORD AND TENANT 48
A. NATURE OF LEASEHOLD 48
1. Tenancies for Years 48
a. Fixed Period of Time 48
b. Creation 49
c. Termination 49
1) Breach of Covenants 49
a) Failure to Pay Rent 49
2) Surrender 49
2. Periodic Tenancies 49
a. Creation 49
1) By Express Agreement 49
2) By Implication 50
3) By Operation of Law 50
a) Tenant Holds Over 50
b) Lease Invalid 50
b. Termination—Notice Required 50
3. Tenancies at Will 50
a. Creation 51

b. Termination 51
4. Tenancies at Sufferance 51
5. The Hold-Over Doctrine 51
a. Eviction 51
b. Creation of Periodic Tenancy 52
1) Terms 52
2) Altered Terms 52
c. What Does Not Constitute Holding Over 52
d. Double Rent Jeopardy 52
e. Forcible Entry Statutes 52
B. LEASES 52
C. TENANT DUTIES AND LANDLORD REMEDIES 53
1. Tenant's Duty to Repair (Doctrine of Waste) 53
a. Types of Waste 53
1) Voluntary (Affirmative) Waste 53
2) Permissive Waste 53
3) Ameliorative Waste 53
a) Liability—Cost of Restoration 54
b) Modern Exception—Value of Premises Decreasing 54
b. Destruction of the Premises Without Fault 54
1) Majority View—Tenant Can Terminate Lease 54
c. Tenant's Liability for Covenants to Repair 54
1) Rebuilding After Structural Damage or Casualty Destruction 54
2) Repairing Ordinary Wear and Tear 55
2. Duty to Not Use Premises for Illegal Purpose 55
a. Occasional Unlawful Conduct Does Not Breach Duty 55
b. Landlord Remedies—Terminate Lease, Recover Damages 55
3. Duty to Pay Rent 55
a. When Rent Accrues 55
b. Rent Deposits 55
c. Termination of Rent Liability—Surrender 56
4. Landlord Remedies 56
a. Tenant on Premises But Fails to Pay Rent—Evict or Sue for Rent 56
b. Tenant Abandons—Do Nothing or Repossess 56
1) Landlord Does Nothing—Tenant Remains Liable 56
2) Landlord Repossesses—Tenant's Liability Depends on Surrender . . 56
a) Acts that Constitute Acceptance of Surrender 56
b) Acts that Do Not Constitute Acceptance of Surrender 57
D. LANDLORD DUTIES AND TENANT REMEDIES 57
1. Duty to Deliver Possession of Premises 57
a. Landlord Duty—Must Deliver Actual Possession 57
b. Tenant Remedy—Damages 57
2. Quiet Enjoyment 57
a. Actual Eviction 57
b. Partial Actual Eviction 57
1) Partial Eviction by Landlord—Entire Rent Obligation Relieved . . . 58
2) Partial Eviction by Third Person—Rent Apportioned 58
c. Constructive Eviction 58
3. Implied Warranty of Habitability 58

a. Standard—Reasonably Suitable for Human Residence 58
b. Remedies 58
4. Retaliatory Eviction 59
5. Discrimination 59
E. ASSIGNMENTS AND SUBLEASES 59
1. Consequences of Assignment 59
a. Covenants that Run with the Land 60
b. Rent Covenant Runs with the Land 60
1) Reassignment by Assignee—Privity of Estate with Landlord Ends . . 60
a) Effect of Assignee Assuming Rent Obligation 60
2) Original Tenant Remains Liable 60
2. Consequences of Sublease 60
a. Liability of Sublessee for Rent and Other Covenants 61
1) Termination for Breach of Covenants 61
2) Distress—Landlord's Lien 61
b. Assumption by Sublessee 61
c. Rights of Sublessee 61
3. Covenants Against Assignment or Sublease 61
a. Strictly Construed Against Landlord 61
b. Waiver of Covenant 61
c. Continuing Waiver 61
d. Transfer in Violation of Lease Not Void 62
e. Reasonableness 62
4. Assignments by Landlords 62
a. Right to Assign 62
b. Rights of Assignee Against Tenants 62
c. Liabilities of Assignee to Tenants 62
F. CONDEMNATION OF LEASEHOLDS 62
1. Entire Leasehold Taken by Eminent Domain—Rent Liability Extinguished . . 62
2. Temporary or Partial Taking—Tenant Entitled to Compensation Only 62
G. TORT LIABILITY OF LANDLORD AND TENANT 63
1. Landlord's Liability 63
a. Concealed Dangerous Condition (Latent Defect) 63
b. Common Areas 63
c. Public Use 63
d. Furnished Short-Term Residence 63
e. Negligent Repairs by Landlord 63
f. Landlord Contracts to Repair 64
2. Modern Trend—General Duty of Reasonable Care 64
a. Defects Arising After Tenant Takes Possession 64
b. Legal Duty to Repair 64
c. Security 64
3. Tenant's Liability 64

III. FIXTURES 64
A. IN GENERAL 64
B. CHATTELS INCORPORATED INTO STRUCTURE ALWAYS BECOME FIXTURES 65

C. COMMON OWNERSHIP CASES 65
1. Annexor's Intent Controls in Common Ownership Cases 65
a. Constructive Annexation 65
b. Vendor-Purchaser Cases 65
c. Mortgagor-Mortgagee Cases 66
2. Effect of Fixture Classification 66
a. Conveyance 66
b. Mortgage 66
c. Agreement to Contrary 66
D. DIVIDED OWNERSHIP CASES 66
1. Landlord-Tenant 66
a. Agreement 67
b. No Intent If Removal Does Not Cause Damage 67
c. Removal Must Occur Before End of Lease Term 67
d. Tenant Has Duty to Repair Damages Resulting from Removal 67
2. Life Tenant and Remainderman 67
3. Licensee and Landowner 67
4. Trespasser and Landowner 67
a. Trespasser's Recovery Limited to Value Added to Land 67
E. THIRD-PARTY CASES 68
1. Third Person Claims Lien on Chattel Affixed to Land 68
a. U.C.C. Rules 68
b. Liability for Damages Caused by Removal 68

IV. RIGHTS IN THE LAND OF ANOTHER—EASEMENTS, PROFITS, COVENANTS, AND SERVITUDES 68
A. IN GENERAL 68
B. EASEMENTS 68
1. Introduction 68
a. Types of Easements 69
1) Affirmative Easements 69
2) Negative Easements 69
b. Easement Appurtenant 69
1) Use and Enjoyment 69
2) Benefit Attached to Possession 70
3) Transfer of Dominant and Servient Estates 70
c. Easement in Gross 70
d. Judicial Preference for Easements Appurtenant 70
2. Creation of Easements 71
a. Express Grant 71
b. Express Reservation 71
c. Implication 71
1) Easement Implied from Existing Use ("Quasi-Easement") 71
a) Existing Use at Time Tract Divided 72
b) Reasonable Necessity 72
c) Grant or Reservation 72
2) Easements Implied Without Any Existing Use 72
a) Subdivision Plat 72

b) Profit a Prendre 72
3) Easement by Necessity 72
d. Prescription 72
1) Open and Notorious 73
2) Adverse 73
3) Continuous Use 73
4) When Prescriptive Easements Cannot Be Acquired 73
3. Scope 73
a. General Rules of Construction 73
b. Absence of Location 74
c. Changes in Use 74
d. Easements by Necessity or Implication 74
e. Use of Servient Estate 74
1) Duty to Repair 75
f. Intended Beneficiaries—Subdivision of Dominant Parcel 75
g. Effect of Use Outside Scope of Easement 75
4. Termination of Easements 75
a. Stated Conditions 75
b. Unity of Ownership 76
1) Complete Unity Required 76
2) No Revival 76
c. Release 76
1) Easement Appurtenant 76
2) Easement in Gross 77
3) Statute of Frauds 77
d. Abandonment 77
1) Physical Act Required 77
2) Mere Words Insufficient 77
3) Mere Nonuse Insufficient 77
e. Estoppel 78
f. Prescription 78
g. Necessity 78
h. Condemnation 78
i. Destruction of Servient Estate 78
5. Compare—Licenses 79
a. Assignability 79
b. Revocation and Termination 79
1) Public Amusement Cases 79
2) Breach of Contract 79
c. Failure to Create an Easement 79
d. Irrevocable Licenses 80
1) Estoppel Theory 80
2) License Coupled with an Interest 80
a) Vendee of a Chattel 80
b) Termination of Tenancy 80
c) Inspection for Waste 80
C. PROFITS 80
1. Creation 81

2. Alienability 81
3. Exclusive and Nonexclusive Profits Distinguished 81
4. Scope 81
a. Apportionment of Profits Appurtenant 81
b. Apportionment of Profits in Gross 81
5. Termination 82
D. COVENANTS RUNNING WITH THE LAND AT LAW (REAL COVENANTS) . . 82
1. Requirements for Burden to Run 82
a. Intent 82
b. Notice 82
c. Horizontal Privity 82
d. Vertical Privity 83
e. Touch and Concern 83
1) Negative Covenants 83
2) Affirmative Covenants 84
2. Requirements for Benefit to Run 84
a. Intent 84
b. Vertical Privity 84
c. Touch and Concern 85
3. Modern Status of Running of Burden and Benefit 85
a. Horizontal and Vertical Privity 85
b. Touch and Concern 85
4. Specific Situations Involving Real Covenants 85
a. Promises to Pay Money 85
b. Covenants Not to Compete 86
c. Racially Restrictive Covenants 86
5. Remedies—Damages Only 86
6. Termination 86
E. EQUITABLE SERVITUDES 86
1. Creation 86
a. Servitudes Implied from Common Scheme 86
1) Common Scheme 87
2) Notice 87
2. Enforcement 87
a. Requirements for Burden to Run 87
1) Intent 87
2) Notice 88
3) Touch and Concern 88
b. Requirements for Benefit to Run 88
c. Privity Not Required 88
d. Implied Beneficiaries of Covenants—General Scheme 88
3. Equitable Defenses to Enforcement 89
a. Unclean Hands 89
b. Acquiescence 89
c. Estoppel 89
d. Changed Neighborhood Conditions 89
1) Zoning 90
2) Concept of the "Entering Wedge" 90

4. Termination 90
F. RELATIONSHIP OF COVENANTS TO ZONING ORDINANCES 90
G. PARTY WALLS AND COMMON DRIVEWAYS 91
1. Creation 91
2. Running of Covenants 91

V. ADVERSE POSSESSION 91
A. IN GENERAL 91
B. REQUIREMENTS 91
1. Running of Statute 91
2. Actual and Exclusive Possession 91
a. Actual Possession Gives Notice 91
1) Constructive Possession of Part 92
b. Exclusive Possession—No Sharing with Owner 92
3. Open and Notorious Possession 92
4. Hostile 92
a. If Possession Starts Permissively—Must Communicate Hostility 92
b. Co-Tenants—Ouster Required 93
c. If Grantor Stays in Possession—Permission Presumed 93
d. Compare—Boundary Line Agreements 93
1) Establishment Requirement 93
5. Continuous Possession 93
a. Intermittent Periods of Occupancy Not Sufficient 93
b. Tacking Permitted 93
1) "Privity" 93
2) Formalities on Transfer 94
6. Payment of Property Taxes Generally Not Required 94
C. DISABILITY 94
1. Effect of Disabilities—Statute Does Not Begin to Run 94
2. No Tacking of Disabilities 94
3. Maximum Tolling Periods 95
D. ADVERSE POSSESSION AND FUTURE INTERESTS 95
1. Possibility of Reverter—Statute of Limitations Runs on Happening of Event 95
2. Right of Entry—Happening of Event *Does Not* Trigger Statute of Limitations 95
a. Grantor Must Act Within Reasonable Time to Avoid Laches 95
E. EFFECT OF COVENANTS IN TRUE OWNER'S DEED 95
F. LAND THAT CANNOT BE ADVERSELY POSSESSED 96

VI. CONVEYANCING 96
A. LAND SALE CONTRACTS 96
1. Statute of Frauds Applicable 96
a. Doctrine of Part Performance 96
1) Theories to Support the Doctrine 96
a) Evidentiary Theory 96
b) Hardship or Estoppel Theory 96
2) Acts of Part Performance 96

3) Can Seller Obtain Specific Performance Based on Buyer's Acts? . . . 97
a) Evidentiary Theory . . . 97
b) Hardship or Estoppel Theory . . . 97
2. Doctrine of Equitable Conversion . . . 97
a. Risk of Loss . . . 97
1) Casualty Insurance . . . 97
b. Passage of Title on Death . . . 98
1) Death of Seller . . . 98
2) Death of Buyer . . . 98
3. Marketable Title . . . 98
a. "Marketability" Defined—Title Reasonably Free from Doubt . . . 98
1) Defects in Record Chain of Title . . . 98
a) Adverse Possession . . . 98
b) Future Interest Held by Unborn or Unascertained Parties . . . 99
2) Encumbrances . . . 99
a) Mortgages and Liens . . . 99
b) Easements . . . 99
c) Covenants . . . 100
d) Encroachments . . . 100
3) Zoning Restrictions . . . 100
4) Waiver . . . 100
b. Quitclaim Deed—No Effect . . . 100
c. Time of Marketability . . . 100
1) Installment Land Contract . . . 100
d. Remedy If Title Not Marketable . . . 100
1) Rescission, Damages, Specific Performance . . . 100
2) Merger . . . 101
4. Time of Performance . . . 101
a. Presumption—Time Not of the Essence . . . 101
b. When Presumption Overcome . . . 101
c. Effect of Time of the Essence Construction . . . 101
d. Liability When Time Not of the Essence . . . 101
5. Tender of Performance . . . 101
a. When Party's Tender Excused . . . 101
b. Neither Party Tenders Performance . . . 102
c. Buyer Finds Seller's Title Unmarketable . . . 102
6. Remedies for Breach of the Sales Contract . . . 102
a. Damages . . . 102
1) Liquidated Damages . . . 102
b. Specific Performance . . . 102
1) Buyer's Remedy . . . 102
2) Seller's Remedy . . . 102
c. Special Rules for Unmarketable Title . . . 102
7. Seller's Liability for Defects on Property . . . 103
a. Warranty of Fitness or Quality—New Construction Only . . . 103
b. Negligence of Builder . . . 103
c. Liability for Sale of Existing Land and Buildings . . . 103
1) Misrepresentation (Fraud) . . . 103

2) Active Concealment . . . 103
3) Failure to Disclose . . . 103
d. Disclaimers of Liability . . . 104
1) "As Is" Clauses . . . 104
2) Specific Disclaimers . . . 104
8. Real Estate Brokers . . . 104
9. Title Insurance . . . 104
B. DEEDS—FORM AND CONTENT . . . 104
1. Formalities . . . 104
a. Statute of Frauds . . . 104
b. Description of Land and Parties . . . 104
c. Words of Intent . . . 105
d. Consideration Not Required . . . 105
e. Seal Is Unnecessary . . . 105
f. Attestation and Acknowledgment Generally Unnecessary . . . 105
g. Signature . . . 105
2. Defective Deeds and Fraudulent Conveyances . . . 105
a. Void and Voidable Deeds . . . 105
1) Void Deeds . . . 105
2) Voidable Deeds . . . 106
b. Fraudulent Conveyances . . . 106
3. Description of Land Conveyed . . . 106
a. Sufficient Description Provides a Good Lead . . . 106
b. Insufficient Description—Title Remains in Grantor . . . 106
c. Parol Evidence Admissible to Clear Up Ambiguity . . . 106
1) Compare—Inadequate Description . . . 107
d. Rules of Construction . . . 107
e. Land Bounded by Right-of-Way . . . 107
1) Title Presumed to Extend to Center of Right-of-Way . . . 107
a) Evidence to Rebut Presumption . . . 107
b) Measuring from Monument . . . 108
2) Variable Boundary Line Cases . . . 108
a) Slow Change in Course Changes Property Rights . . . 108
b) Avulsion Does Not Change Property Rights . . . 108
c) Encroachment of Water Does Not Change Fixed Boundary Lines . . . 108
f. Reformation of Deeds . . . 108
C. DELIVERY AND ACCEPTANCE . . . 108
1. Delivery—In General . . . 108
a. Manual Delivery . . . 109
b. Presumptions Relating to Delivery . . . 109
c. Delivery Cannot Be Canceled . . . 109
d. Parol Evidence . . . 109
1) Admissible to Prove Grantor's Intent . . . 109
2) Not Admissible to Show Delivery to Grantee Was Conditional . . . 110
3) Admissible to Show No Delivery Intended . . . 110
a) Deed Intended as Mortgage . . . 110
b) Transfer of Deed to Bona Fide Purchaser . . . 110

(1) Estoppel in Favor of Innocent Purchaser 110
4) Comment 111
2. Retention of Interest by Grantor or Conditional Delivery 111
a. No Delivery—Title Does Not Pass 111
b. No Recording—Title Passes 111
c. Express Condition of Death of Grantor Creates Future Interest 111
d. Conditions Not Contained in Deed 111
e. Test—Relinquishment of Control 111
3. Where Grantor Gives Deed to Third Party 111
a. Transfer to Third Party with No Conditions 112
b. Transfer to Third Party with Conditions (Commercial Transaction) .. 112
1) Parol Evidence Admissible to Show Conditions 112
2) Grantor's Right to Recover Deed 112
a) Majority View—Can Recover Only If No Written Contract .. 112
b) Minority View—No Right to Recover 113
3) Breach of Escrow Conditions—Title Does Not Pass 113
a) Estoppel Cases 113
4) "Relation Back" Doctrine 113
a) Not Applied If Intervening Party Is BFP or Mortgagee 113
b) Not Applied in Favor of Escrow Grantee with Knowledge 113
c. Transfer to Third Party with Conditions (Donative Transactions) 114
1) Condition Unrelated to Grantor's Death 114
2) Where Condition Is Grantor's Death 114
a) Limitation—No Delivery If Conditioned on Survival 114
4. Acceptance 114
a. Usually Presumed 114
b. Usually "Relates Back" 114
5. Dedication 114
D. COVENANTS FOR TITLE AND ESTOPPEL BY DEED 115
1. Covenants for Title in a General Warranty Deed 115
a. Usual Covenants 115
1) Covenant of Seisin 115
2) Covenant of Right to Convey 115
3) Covenant Against Encumbrances 115
4) Covenant for Quiet Enjoyment 115
5) Covenant of Warranty 115
6) Covenant for Further Assurances 116
7) No Implied Warranties or Covenants 116
b. Breach of Covenants 116
1) Covenants of Seisin and Right to Convey 116
2) Covenant Against Encumbrances 116
3) Covenants for Quiet Enjoyment, Warranty, and Further Assurances 117
a) Covenant Runs to Successive Grantees 117
b) Requirement of Notice 117
c) Any Disturbance of Possession 117
c. Damages and Remote Grantees 117
2. Statutory Special Warranty Deed 118

3. Quitclaim Deeds 118
4. Estoppel by Deed 118
a. Applies to Warranty Deeds 118
b. Rights of Subsequent Purchasers 118
1) Effect of Recordation by Original Grantee 118
c. Remedies of Grantee 118
E. RECORDING 119
1. Recording Acts—In General 119
a. Purpose of Recordation—Notice 119
b. Requirements for Recordation 119
1) What Can Be Recorded—Instrument Affecting an Interest in Land 119
2) Grantor Must Acknowledge Deed 119
c. Mechanics of Recording 119
1) Filing Copy 119
2) Indexing 119
2. Types of Recording Acts 120
a. Notice Statutes 120
b. Race-Notice Statutes 120
c. Race Statutes 120
3. Who Is Protected by Recording Acts 121
a. Purchasers 121
1) Donees, Heirs, and Devisees Not Protected 121
2) Purchaser from Donee, Heir, or Devisee 121
3) Mortgagees 122
4) Judgment Creditors 122
5) Transferees from Bona Fide Purchaser—Shelter Rule 122
a) Rationale 123
b) Exception—No "Shipping Through" 123
6) Purchaser Under Installment Land Contract 123
a) Exception—Shelter Rule 123
b. Without Notice 123
1) Actual Notice 124
2) Record Notice—Chain of Title 124
a) "Wild Deeds" 124
b) Deeds Recorded Late 124
(1) Exception—Shelter Rule 125
(2) Lis Pendens Protection 125
c) Deeds Recorded Before Grantor Obtained Title 125
d) Deed in Chain Referring to Instrument Outside Chain 126
e) Restrictive Covenants—Deeds from Common Grantor 126
(1) Subdivision Restrictions 126
(2) Adjacent Lots 126
f) Marketable Title Acts 126
3) Inquiry Notice 126
a) Generally No Inquiry from Quitclaim Deed 127
b) Inquiry from References in Recorded Instruments 127
c) Inquiry from Unrecorded Instruments in Chain of Title 127

d) Inquiry from Possession 127
c. Valuable Consideration 128
1) Test—Substantial Pecuniary Value 128
2) Property Received as Security for Antecedent Debts Is Insufficient 128
4. Title Search 128
a. Tract Index Search 128
b. Grantor and Grantee Index Search 128
c. Other Instruments and Events Affecting Title 130
5. Effect of Recordation 130
a. Does Not Validate Invalid Deed 130
b. Does Not Protect Against Interests Arising by Operation of Law 130
1) Exception 130
c. Recorder's Mistakes 130
d. Effect of Recording Unacknowledged Instrument 130
1) No Acknowledgment—No Constructive Notice 130
2) Compare—Defective Acknowledgment 131
F. CONVEYANCE BY WILL 131
1. Ademption 131
a. Not Applicable to General Devises 131
b. Not Applicable to Land Under Executory Contract 131
1) No Ademption If Decedent Incompetent When Contract Formed . . 132
c. Other Proceeds Not Subject to Ademption 132
d. Partial Ademption 132
2. Exoneration 132
3. Lapse and Anti-Lapse Statutes 132
a. Degree of Relationship to Testator 132
1) Descendants Are Substituted 133
b. Inapplicable If Beneficiary Dead When Will Executed 133
c. Application to Class Gifts 133
d. Anti-Lapse Statute Does Not Apply If Contrary Will Provision 133
4. Abatement 133
G. CROPS (EMBLEMENTS) 133
1. Conveyance of Land Includes Crops 133
2. Exception—Harvested Crops 133
a. Ripened But Unharvested Crops 134
3. Exception—Crops Planted by Tenant 134
a. Compare—Trespasser 134

VII. SECURITY INTERESTS IN REAL ESTATE 134
A. TYPES OF SECURITY INTERESTS 134
1. Mortgage 134
2. Deed of Trust 134
3. Installment Land Contract 134
4. Absolute Deed—Equitable Mortgage 135
5. Sale-Leaseback 135
B. TRANSFERS BY MORTGAGEE AND MORTGAGOR 135
1. Transfer by Mortgagee 135

a. Transfer of Mortgage Without Note . . . 135
b. Transfer of Note Without Mortgage . . . 135
1) Methods of Transferring the Note . . . 136
a) Holder in Due Course Status . . . 136
b) Benefits of Holder in Due Course Status . . . 136
2) Effect of Payment to Original Mortgagee After Transfer of Note . . 136
2. Transfer by Mortgagor—Grantee Takes Subject to Mortgage . . . 137
a. Assumption . . . 137
b. Nonassuming Grantee . . . 137
c. Due-on-Sale Clauses . . . 137
C. DEFENSES AND DISCHARGE OF THE MORTGAGE . . . 137
1. Defenses to Underlying Obligation . . . 137
2. Discharge of the Mortgage . . . 137
a. Payment . . . 137
b. Merger . . . 138
c. Deed in Lieu of Foreclosure . . . 138
D. POSSESSION BEFORE FORECLOSURE . . . 138
1. Theories of Title . . . 138
a. The Lien Theory . . . 138
b. The Title Theory . . . 138
c. The Intermediate Theory . . . 138
2. Mortgagor Consent and Abandonment . . . 139
3. Risks of Mortgagee in Possession . . . 139
4. Receiverships . . . 139
E. FORECLOSURE . . . 139
1. Redemption . . . 139
a. Redemption in Equity . . . 139
b. Statutory Redemption . . . 139
2. Priorities . . . 140
a. Effect of Foreclosure on Various Interests . . . 140
1) Junior Interests Destroyed by Foreclosure . . . 140
2) Senior Interests Not Affected . . . 140
b. Modification of Priority . . . 140
1) Failure to Record . . . 140
2) Subordination Agreement . . . 140
3) Purchase Money Mortgages . . . 140
a) Vendor PMM vs. Third-Party PMM . . . 141
b) Third-Party PMM vs. Third-Party PMM . . . 141
4) Modification of Senior Mortgage . . . 141
5) Optional Future Advances . . . 141
3. Proceeds of Sale . . . 142
4. Deficiency Judgments . . . 142
F. INSTALLMENT LAND CONTRACTS . . . 143
1. Equity of Redemption . . . 143
2. Restitution . . . 143
3. Treat as a Mortgage . . . 144
4. Waiver . . . 144
5. Election of Remedies . . . 144

VIII. RIGHTS INCIDENTAL TO OWNERSHIP OF LAND (NATURAL RIGHTS) 144
A. IN GENERAL 144
B. RIGHT TO LATERAL AND SUBJACENT SUPPORT OF LAND 144
1. Right to Lateral Support 144
a. Support of Land in Natural State 144
b. Support of Buildings on Land 144
2. Right to Subjacent Support 145
a. Support of Land and Buildings 145
b. Interference with Underground Waters 145
C. WATER RIGHTS 145
1. Watercourses 145
a. Riparian Doctrine 145
1) What Land Is Riparian 145
a) Riparian Owner 145
b) Doctrine Applies Only to Riparian Parcel 146
2) Nature of Riparian Right 146
a) Natural Flow Theory 146
b) Reasonable Use Theory 146
(1) Factors to Consider 146
c) Natural vs. Artificial Use 146
b. Prior Appropriation Doctrine 146
1) Factors to Note for Bar Exam 147
c. Accretion and Avulsion 147
2. Groundwater 147
a. Absolute Ownership Doctrine 147
b. Reasonable Use Doctrine 147
c. Correlative Rights Doctrine 147
d. Appropriative Rights Doctrine 147
e. Restatement Approach 148
3. Surface Waters 148
a. Natural Flow Theory 148
b. Common Enemy Theory 148
c. Reasonable Use Theory 148
d. Compare—Capture of Surface Water 148
D. RIGHTS IN AIRSPACE 148
E. RIGHT TO EXCLUDE—REMEDIES OF POSSESSOR 149
1. Trespass 149
2. Private Nuisance 149
a. Compare—Public Nuisance 149
3. Continuing Trespass 149
4. Law or Equity 149
a. Ejectment 149
b. Unlawful Detainer 149

IX. COOPERATIVES, CONDOMINIUMS, AND ZONING 149
A. COOPERATIVES 149
1. Restriction on Transfer of Interests 149
2. Mortgages 150

3. Maintenance Expenses 150
B. CONDOMINIUMS 150
1. Restriction on Transfer of Interests 150
2. Mortgages 150
3. Maintenance Expenses 150
C. ZONING 150
1. Nonconforming Use 150
2. Special Use Permits 151
3. Variance 151
4. Unconstitutional Takings and Exactions 151
a. Denial of *All* Economic Value of Land—Taking 151
b. Denial of *Nearly All* Economic Value—Balancing Test 151
c. Unconstitutional Exactions 151
1) Essential Nexus 151
2) Rough Proportionality 152
3) Burden of Proof 152
d. Remedy 152

I. ESTATES IN LAND

A. IN GENERAL

"Estates in land" are ***possessory interests*** in land. These interests may be ***presently*** possessory (present estates), or they may become possessory in the ***future*** (future interests). They may be "freeholds," which give possession under some legal title or right to hold (*e.g.,* fees or life estates), or they may be "nonfreeholds," which give mere possession (*i.e.,* leases). Estates in land may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years. But whatever their characteristics, "estates in land" must be distinguished from ***nonpossessory*** interests such as easements, profits, covenants, and servitudes.

This section of the outline will examine various estates in land. It divides the interests into two classes: present interests and future interests. However, some future interests (those following defeasible fees) will be considered with the present interests to which they are attached.

B. PRESENT POSSESSORY ESTATES

1. Fee Simple Absolute

An estate in fee simple absolute is the largest estate permitted by law. It invests the holder of the fee with full possessory rights, now and in the future. The holder can sell it, divide it, or devise it; and if she dies intestate, her heirs will inherit it. The fee simple has an indefinite and potentially infinite duration. The common law rule requiring technical words of inheritance ("and his heirs") has been abolished by statute in nearly all jurisdictions. Typically, such statutes provide: "A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended."

Example: A conveyance from "O to A" is presumed to pass a fee simple interest if O owned one. At common law, absent the words of inheritance, even a conveyance "to A in fee simple" would convey only a life estate to A.

2. Defeasible Fees

Defeasible fees are fee simple estates of ***potentially*** infinite duration that can be terminated by the happening of a specified event. Because defeasible fees can result in forfeitures, courts will construe, where possible, a purported limitation as a mere declaration of the grantor's purpose or motive for making the grant (*i.e.,* as precatory language). (*See* b.1)a), *infra*.)

a. Fee Simple Determinable (and Possibility of Reverter)

A fee simple determinable, also called a determinable fee, is an estate that ***automatically terminates*** on the happening of a stated event and goes back to the grantor. (It must be distinguished from the fee simple subject to a condition subsequent, where the grantor must take affirmative steps to terminate the estate of the grantee if the stated event occurs.) It is created by the use of durational, adverbial language, such as "for so long as," "while," "during," or "until." A fee simple determinable can be conveyed by the owner thereof, but his grantee takes the land subject to the termination of the estate by the happening of the event.

Example: O conveys land "to A for so long as no alcoholic beverages are consumed on the premises." This gives A a fee simple because the estate may last forever if no one ever quaffs a brew. If A conveys his fee simple

determinable estate to B, B will own the "for so long as" estate. If A does not convey his estate, on A's death it will pass by will or intestacy to his successors, and so on. If, however, someone ever consumes an alcoholic beverage on the premises, the estate will automatically come to an end according to its own terms; and O will immediately and automatically become the owner of the fee simple, without taking any steps to terminate A's interest.

1) Correlative Future Interest in Grantor—Possibility of Reverter
Because the grantee's estate may end upon the happening of the stated event, there is a possibility that the land may revert back to the grantor. The interest that is left in a grantor who conveys an estate in fee simple determinable is called a "possibility of reverter." It is a future interest because it becomes possessory only upon the occurrence of the stated event.

a) Possibility of Reverter Need Not Be Expressly Retained
At common law and in nearly all states today, the grantor does not have to expressly retain a possibility of reverter. It arises ***automatically*** in the grantor as a consequence of his conveying a fee simple determinable estate, with its built-in time limitation.

b) Transferability of Possibility of Reverter
At early common law, the possibility of reverter could not be transferred inter vivos or devised by will. An attempted transfer of the interest was invalid; but the possibility of reverter was not extinguished by the attempted transfer and would still descend to the heirs of the owner. Today, in most jurisdictions, the possibility of reverter can be transferred inter vivos or devised by will, and descends to the owner's heirs if she dies intestate.

2) Correlative Future Interest in Third Party—Executory Interest
A possibility of reverter arises only in the grantor, not in a third party. If a comparable interest is created in a third party, it is an executory interest. (*See* C.3., *infra*.)

b. Fee Simple Subject to Condition Subsequent (and Right of Entry)
A fee simple subject to a condition subsequent is created when the grantor retains the power to terminate the estate of the grantee upon the happening of a specified event. Upon the happening of the event stated in the conveyance, the estate of the grantee ***continues until the grantor exercises her power of termination*** (right of entry) by bringing suit or making reentry. The following words are usually held to create conditions subsequent: "upon condition that," "provided that," "but if," and "if it happens that."

Example: O, owning Blackacre in fee simple, conveys it "to A and his heirs, on the express condition that the premises are never to be used by A for the sale of liquor, and in the event that they are so used, then O or her heirs may enter and terminate the estate hereby conveyed." A has a fee simple subject to a condition subsequent. O has a right of entry. If the condition is broken, O has a power to terminate the estate of A by asserting her ***right of entry***.

1) Correlative Future Interest in Grantor—Right of Entry
A right of entry (also known as "right of reentry" or "power of termination") is the future interest retained by the transferor who conveys an estate on condition subsequent. It is necessary to ***expressly*** reserve the right of entry in the grantor; this retained interest does not automatically arise as in the case of a fee simple determinable and possibility of reverter.

a) Failure to Reserve Right of Entry
Courts often hold that words of condition, standing alone, create only covenants, easements, or trusts, or are mere precatory terms.

Example: O conveys land "to A and his heirs, provided that liquor is not sold on the premises." O has not used words indicating the estate will terminate if liquor is sold on the premises. Nor has O retained a right to reenter. Because a statement of the grantor's wishes as to how the property should be used does not ordinarily imply a right retained by the grantor to enforce the purpose, a court may construe the deed as giving A a fee simple absolute. [Wood v. Board of County Commissioners, 759 P.2d 1250 (Wyo. 1988)]

b) Waiver of Right of Entry
Because the grantor can elect whether or not to terminate the grantee's estate, she may waive her right or power to enforce a forfeiture by express agreement or by her conduct. (Such is not the case with a fee simple determinable, where the forfeiture is automatic.)

(1) Inaction by Itself Not a Waiver
The general rule is that when there is a breach of the condition and the grantor simply does nothing about it, the power of termination is not waived. However, where there is any element of ***detrimental reliance*** by the fee holder, many courts treat inaction as a waiver on an estoppel or laches theory.

c) Transferability of Right of Entry
At common law, a right of entry was ***not devisable or transferable inter vivos*** to a third person. The right of entry did, however, descend to the heirs of the grantor on her death. Today, in most jurisdictions, a right of entry is still ***not*** alienable inter vivos. (Indeed, in a handful of states, an attempted transfer destroys it.) But in most states, rights of entry are devisable; and in all states, they descend to the owner's heirs.

2) Correlative Future Interest in Third Party—Executory Interest
A right of entry can be created only in favor of the grantor and her heirs. If a similar interest is created in favor of a third party, the interest is called an executory interest (*e.g.,* "if the property is ever used for other than church purposes, then to B and his heirs"). Unlike a right of entry, an executory interest is subject to the ***Rule Against Perpetuities***. (*See* E., *infra*.)

3) Compare—Fee Simple Determinable
This estate is distinguished from a determinable fee in that the breach of the


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