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Real Property Outline

I. Estates: possessory estates and future interests
   a. Fee Simple Absolute
      i. Forever and fully alienable
      ii. Direct restraint on alienation is void
         1. conditions on exercise of FS are permitted
            a. eg, right of first refusal
      iii. FS is the default estate
   b. Life Estate
      i. Measured by life, NEVER by time
      ii. Formed by
         1. express intent
         2. implication
         3. pur autre vie
      iii. forfeiture restrictions permitted on LE
      iv. Rights and Duties of Life Tenant: Waste
         1. life tenant must maintain the estate: ie, continue the normal use of the land in the present condition
         2. **affirmative/voluntary waste**
            a. affirmative action beyond maintenance/*normal use* causing harm to premises (often re: natural resources exploitation)
               i. exception: open mines doctrine
            b. liability to holder of future interest
         3. **permissive waste**
            a. tenant must do 4 things to avoid permissive waste:
               i. ordinary repairs
               ii. pay taxes
               iii. pay interest on a mortgage
               iv. pay special assessments of *short duration*
            b. tenant's max liability:
               i. income received from property; OR
               ii. reasonable rental value of the land
         4. **ameliorative waste**
            a. affirmative act that alters property substantially and increases value of it
            b. permitted if *changed conditions* have made property *relatively worthless* in current state
   c. Class Gifts
      i. Lapse if member predeceases testator
      ii. Open until testator dies and will is probated

iii. *Rule of Convenience:* class closes when any one of class entitled to distribution [a rule of construction only; T's intent can override]
    1. NB: persons in gestation when class closes included in class

II. FUTURE INTERESTS
    a. Def: the interest exists now, but possession will come later, if at all
    b. Classification:
        i. To Grantor
            1. Reversion
                a. Grantor gives less than durantional estate
            2. Possibility of reverter
                a. Give away entire interest
                b. <u>Fee simple determinable</u>; automatically returns to grantor when condition satisfied
            3. Right of entry
                a. Give away entire interest; *expressly* reserves right of entry
                b. <u>Fee simple on a condition subsequent</u>
        ii. To Grantee
            1. Remainder
                a. Vested remainder: nothing stands in way of taking
                b. Vested remainder subject to open
                c. Vested remainder subject to complete divestment
                d. Contingent remainder
            2. Executory Interest
                a. Cuts short the estate coming before it
                b. Shifting: between grantees
                c. Springing: from grantor to grantee
    c. Rule Against Perpetuities
        i. "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest."
            1. Applies ONLY to <u>contingent remainders, executory interests, and vested remainders subject to open</u>
                a. All grantor interests (reverter, reversions, and rights of entry) are safe from RAP
            2. Determine validity *at time of creation* of interest
            3. NB: perpetuity saving clause
            4. Class gifts: watch for age contingency ("those attaining 25 years")
            5. watch for fertile octogenarian
            6. Unborn widow
                a. Only an issue where T leaves life estate to A and then life estate to A's widow, and then to A's issue.
                    i. If life estate to T's widow, then to T's issue, no problem
        ii. Options and Rights of First Refusal subject
            1. Exception: RAP doesn't apply to options to purchase held by *current lessee*
        iii. Charity to Charity EXCEPTION

iv. *For essay test*: wait and see; statutory alternate vesting period, cy pres doctrine

III. CONCURRENT OWNERSHIP

a. JTWROS

i. Characteristics:

1. right to survivorship
2. right to partition
3. equal shares in ownership[1]

ii. Creation if the four unities: TTIP

1. time, title, interest, possession

iii. failure to use proper creation language

1. default to TIC

iv. destruction of JTWROS

1. Partition
2. severance: conveyance; mortgage in title theory states; contract of sale; creditor's sale

b. Tenancy in common

i. Characteristics:

1. NO right to survivorship
2. right to partition

ii. Creation

1. only 1 unity required: possession

iii. Rights of tenants in common:

1. possession
2. accountability if
   a. ouster
   b. agreement to share
   c. lease of property by co-tenant to 3rd party
   d. depletion of natural resources
3. contribution for ownership expenses:
   a. necessary repairs[2]
   b. taxes
   c. mortgage payments, if co-tenant signed note

IV. NON-FREEHOLD ESTATES (ie, landlord-tenant)

a. Tenancy for years; periodic tenancy; tenancy at will; tenancy at sufferance

b. Tenancy for years

i. Lease agreement has a specified fixed time

ii. Automatically terminates at end of stated period without notice

iii. Subject to SF if <u>over</u> one year

c. Periodic tenancy

i. Repeating for a certain period until one party gives notice

ii. Creation:

1. express agreement
2. implication

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[1] NB: with TIC, equal shares are presumed, but not required, but equal shares are required under JTWROS

[2] but NO contribution where co-tenant makes improvements, unless tenancy is partitioned

3. operation of law
    a. oral lease over one year plus performance; or
    b. hold-over tenant

iii. Proper *termination notice* requires 2 things:
1. time equal to the period ; and
    a. if year to year, then only 6 months
2. correct effective date – end of period

d. Tenancy at will

i. Either party can terminate at any time *without notice*
ii. 5 other ways to terminate
1. death; waste by tenant; assignment by tenant; transfer of title by landlord; or lease by landlord to another person

e. Tenancy at sufferance

i. Tenant is a holdover; L has 2 options
1. sue T for trespass, eject and collect damages; OR
2. impose new periodic tenancy on T:
    a. residential: always month-to-month
    b. commercial:
        i. if old tenancy for year or more, new tenacy is year-to-year
        ii. if for less than a year, new tenancy measured by rent period of old tenancy
    c. NB: imposition of new tenancy must be reasonable

V. DUTIES OF LANDLORD AND TENANT

a. Tenant's duties

i. Pay rent
ii. Do not commit waste (see above for three types)
1. NB: if lease says T is liable for all damages, then includes ordinary wear and tear, unless specifically excluded
2. EXCEPTION:
    a. T can terminate if premises destroyed without T's fault

iii. <u>Landlord's remedies for T's breach:</u>
1. failure to pay rent: both sue for rent due or evict using unlawful detainer statute
2. T unjustifiably abandons: 2 choices
    a. Accept offer of T's *surrender* of property; OR
    b. Re-rent and hold T liable for any deficiency

b. Landlord's duties

i. Give T possession of premises
ii. <u>General RULE</u>: L has no duty to repair or maintain premises.
1. commercial: altered by affirmative covenants in lease
2. residential: altered by implied warranty of habitability

iii. Deliver *residential* premises in habitable condition
1. implied warranty of habitability
2. <u>T's remedies here:</u>
    a. Move out and end lease;

b. Stay and sue for damages;
c. Make repairs and offset the rent; or
d. Abate rent in light of fair rental value of defective premises

iv. *Implied covenant of quiet enjoyment* that L will not interfere with T's use and enjoyment of premises. L can breach in 3 ways:
1. total eviction: T need no longer pay rent
2. partial eviction: T can stay and pay no rent
a. if partial eviction by someone with better title, then *apportion* rent payment
3. constructive eviction: T excused if
a. L performs the act;
b. Is a substantial interference with covenant of quiet enjoyment; and
c. T abandons within a reasonable time of breach

VI. ASSIGNMENTS AND SUBLEASES

a. Definitions:
i. Assignment: T transfers everything, holding nothing back
ii. Sublease: T transfers only a portion of the lease period
iii. Lease covenants:
1. with the exception of the covenant to pay rent, at CL all convents in leases are **independent** of one another
a. a breach gives rise to a claim for damages, but the other party must still perform
b. Modern trend: covenants are mutually dependent on each other

b. Assignments
i. Lease is both a conveyance and a contract
1. Thus, 2 different sources of liability
ii. <u>Privity of Estate</u>: exists only between L and present T (including an assignee)
iii. <u>Privity of Contract</u>: exists where there is an agreement between the parties; assignee T is NOT in POC with L
1. assignor T therefore still liable for rent payments to L under contract law, though assignee should pay L directly
iv. Covenants in lease *run with the land* if they **touch and concern** the land
1. <u>Touch & Concern Test:</u> if performance of covenant makes land more valuable or more useful, then it T&C the land.
a. Assignee T is liable for covenants that run with land

c. Subleases
i. Sublessee not liable to L because no POC or POE
ii. Sublessee has no rights against L except a residential sublessee can enforce warranty of habitability

d. Non-Assignment clauses:
i. Valid and enforceable, but strictly construed and
ii. Won't prohibit subleases
iii. Voidable at option of L

iv. Waived forever if L gives permission for assignment, OR accepts rent from assignee
    1. Unless L puts time limit on permission

VII. CONDEMNATION OF LEASEHOLD
- a. Partial taking
    - i. Does not excuse payment of rent
    - ii. T gets lump sum from condemnation proceeds equal to diminished rental value of property
- b. Full taking
    - i. T excused from paying rent
    - ii. T shares in proceeds to extent that
        1. *fair rental value* of lease exceeds rent due under lease

VIII. LANDLORD'S TORT LIABILITY
- a. General Rule: No duty of L to T or T's invitees for injuries on premises during life of lease
- b. 5 EXCEPTIONS
    - i. latent (not discoverable by T) defects: must disclose known or reason to know defects
    - ii. short-term (3 mo) lease of *furnished* dwelling: fully liable
    - iii. common areas under L's control: reasonable care
    - iv. negligent repairs: liable even if use all due care
    - v. public use exception: liable if
        1. L knows or should have known of major defect;
        2. L knows or should know T will not fix the defect; and
        3. L must know or should know the public will use the premises

IX. FIXTURES
- a. Is it a fixture? Look to intent of installer.
- b. **If an express agreement, that controls**, otherwise look to four factors:
    - i. Degree of attachment
    - ii. General custom re: the item
    - iii. Degree of harm caused by removal
        1. NB: if T can remove without substantial damage, courts normally favor T
    - iv. Is it a <u>trade fixture</u>?
        1. If yes, can remove because they are never Fixtures
- c. Timing of removal
    - i. T: before end of lease
    - ii. Owner: before closing of sale

X. EASEMENTS
- a. Def: an easement is a non-possessory interest in land involving the right of use
- b. <u>Easement appurtenant</u>:
    - i. Directly benefits the dominant estate and burdens the servient estate
- c. <u>Easement in gross</u>
    - i. There is no dominant estate (eg, utility line easement; easement to swim in a pond)
- d. **Creation of easements**

i. Express agreement
    1. b/c it is an interest in land, must conform to SF (except those for one year or less)
ii. By Implication
    1. previous use by a common owner if previous use is:
        a. continuous
        b. apparent; AND
        c. reasonably necessary
    2. implied easement by necessity (usually landlocked)
        a. owner of servient estate can chose any reasonable location
iii. By Prescription
    1. adverse (ie, without owner's permission)
        a. NB: any grant of permission, even oral, destroys hostility
    2. continuous and uninterrupted (seasonal use satisfies)
    3. open and notorious OR with owner's knowledge
    4. For the statutory period
        a. 20 years at CL

e. **Transfer of Easements**
    i. Transferring the benefit
        1. easement appurtenant: automatically goes with dominant estate
        2. easement in gross:
            a. commercial: always transferable
            b. personal: cannot be transferred
    ii. Transferring the burden
        1. binding on subsequent holders of servient estate as long as they had knowledge
            a. ie, BFP with no actual or constructive knowledge takes free

f. **Use of easements**
    i. Terms control, but if silent, presume 2 things:
        1. easement is perpetual
        2. use presumed is that of *reasonable development* of dominant estate (ie, what would have been reasonably contemplated at time parties created the easement)
    ii. NB: easement can be used to benefit ONLY the dominant estate, not other property

g. **Repair of Easements**
    i. Holder must keep in repair
    ii. H can enter servient estate to repair; must make reasonable restoration

h. **Termination of Easements**
    i. Unity of ownership (aka, "merger")
    ii. A valid release complying with SF and deed formalities
    iii. Abandonment (intent manifested by physical act)
    iv. By estoppel – 2 elements
        1. representation of relinquishment by dominant estate holder
        2. change of position in reliance by servient estate holder
    v. By prescription

vi. End of necessity

XI. LICENSES & PROFITS

a. License

i. A limited privilege of use; not a property interest; only a revocable at-will contract right

1. NB: if easement attempted but fails for SF, it is a license

ii. Examples:

1. tickets
2. irrevocable license

a. license PLUS
b. money spent on property furthering license
c. enforced by estoppel principles

b. Profits

i. Right to go onto land and remove a natural resource
ii. Thus, implied easement to go on land also

XII. RESTRICTIVE COVENANTS

a. Def: right to restrict someone else's use of their land.
b. Ask: how is this right being enforced? To determine exact name:

i. Covenants at law (when enforcing at law → damages)
ii. Equitable servitude (when enforcing at equity → injunction)

1. NB: typical situation for this would be Condo CC&Rs or restrictions in deeds

c. **Covenants running with the land at LAW**

i. <u>Four reqs</u> for a covenant to run with the land at law:

1. intent that it so run
2. notice to person against whom enforcement sought
3. must *touch and concern* the land

a. NB: covenant not to compete T&C!

4. privity

a. horizontal: between original parties only (created by conveyance)
b. vertical: those who subsequently obtain the property (must take full estate)

ii. What kind of privity needed to enforce?

1. to enforce BURDEN, must have both horizontal and vertical privity
2. to enforce BENEFIT, need only vertical privity

d. **Equitable Servitudes**

i. <u>Three reqs</u> to enforce equitable servitude:

1. intent that it be enforceable against successors in interest
2. notice to subsequent purchaser; and
3. T&C the land
4. NO PRIVITY NEEDED

ii. ES's in subdivisions (aka reciprocal negative servitudes)

1. need two requirements to enforce:

a. intent to create servitude on all subdivision land

            i. usually in common building plan
        b. notice
            i. actual, record, or inquiry
    iii. Equitable defenses to enforcement
        1. unclean hands
        2. acquiescence
        3. laches
        4. estoppel
    iv. Termination of ES
        1. by *changed conditions*
        2. but must be "all or nothing," can't remove it from only a portion of the subdivision

XIII. ADVERSE POSSESSION

a. Elements: possession must be
    i. Open and notorious
    ii. Actual and exclusive
        1. occupation of a portion of land but under *color of title* normally sufficient for constructive possession of the entire parcel
    iii. Continuous
        1. tacking permitted as long as tackers in privity
    iv. Hostile (ie, without owner's permission)
    v. For the statutory period
b. Constructive adverse possession
c. AP against cotenants
    i. Not possible except after ouster and explicit declaration that co-tenant is claiming exclusive dominion of land
d. Future interest issues
    i. The SOL does not run against a holder of a future interest until the interest becomes possessory
e. Tacking
f. Disability
    i. SOL does not run against true owner if he was under some disability to sue when the cause of action first accrued (eg, minority imprisonment, insanity)

XIV. CONVEYANCING

a. **Contract of sale**
    i. SF applies
        1. EXCEPTION: part performance removes SF req if 2 of 3:
            a. Buyer is in possession;
            b. Has made substantial improvements; and
            c. Has paid the purchase price
    ii. equitable conversion
        1. buyer has equitable title
        2. seller has bare legal title
        3. Death
            a. Heirs must consummate the deal

4. Risk of Loss
    a. At CL, buyer has risk
    b. Modern: Uniform Vendor and Purchaser Risk Act keeps risk with seller until close

iii. <u>implied warranty of Marketable title</u>
1. marketable title is a "title reasonably free from doubt"
2. title is unmarketable where:
    a. defects in chain of title
    b. acquired by adverse possession (for MBE purposes)
    c. future interest holder unborn or unascertained
    d. encumbrances
    e. existing violation of zoning ordinance
3. title is marketable
    a. existence of zoning restrictions
    b. if marketable on date of closing
4. Remedy for unmarketable title
    a. Notice and time to cure
    b. If no cure:
        i. Recission, damages, specific performance with abatement on price; or quiet title suit

iv. Time for performance
1. courts presume it is not of the essence

v. Remedies for defects on property
1. Warranty of fitness or quality (new construction only)
2. negligence suit against builder (often requires privity)
3. existing buildings
    a. misrepresentation/fraud
    b. active concealment
    c. failure to disclose

b. **Deed**

i. Execution of Deed
1. Required Formalities
    a. In writing;
    b. Signed by grantor[3]; and
    c. Reasonably identifies the parties[4] and land
        i. Description of land must give a good lead as to identity of property
            1. If too indefinite, grantor retains land, but reformation of deed a possible remedy
        ii. Slow border changes
            1. <u>accretion</u>: slow deposit of soil on land abutting water goes to abutting land owner

[3] forged deeds are void. NB: if one grantor signs but forges names of other grantors, then the transfer is valid as to his interest, but void as to the remaining interests
[4] for example, "the leaders of all Protestant churches in Smyth County" is too indefinate

2. avulsion: quick change in water course does not change ownership rights

ii. Delivery and Acceptance of Deed
   1. delivery requires a grantor's
      a. intent to
      b. make a deed presently effective
   2. delivery to third party
      a. if delivered with instructions to give to grantee, then valid delivery (cf, escrow arrangement)
      b. if delivered with no instructions, then if third party is grantor's agent, then invalid delivery
   3. Acceptance
      a. States presume acceptance, and it will "relate-back" to date deed delivered into escrow

iii. Estoppel by deed (aka "doctrine of after-acquired title")
   1. if grantor conveys title to an estate that he doesn't own, the grantor's subsequent acquisition of that estate inures to the prior grantee
   2. however, if grantor transfers after-acquired title to a BFP, the BFP prevails against original grantee
      a. [if no recording act, then look to notice by chain of title]

iv. Deed to dead person
   1. invalid

XV. COVENANTS OF TITLE

a. Present covenants: personal to grantee; don't run with land
   i. **Seisin:** grantor has estate he purports to convey
   ii. **Right to convey:** grantor has authority to make the grant
   iii. **Against encumbrances:** no encroachments or mortgages, etc

b. Future covenants: arise when grantee disturbed in possession; run with land
   i. **Quiet enjoyment:** grantee will not be disturbed in possession by a 3rd party's lawful claim of title
   ii. **Warranty:** defend against reasonable 3rd party claims to title and compensate grantee for any loss sustained by the claim of superior title
   iii. **Further assurances:** will perform reasonable acts to perfect title conveyed

c. Damages for breach of covenants
   i. May sue anyone in chain of title
   ii. Recovers:
      1. consideration received by defendant-covenantor; or
      2. the lesser of what he paid or D-C received

XVI. RECORDING OF INTERESTS

a. CL RULE: first in time, first in right (recording irrelevant)
b. Recording Statutes[5]

[5] NB: recording acts have no effect on VALIDITY of document recorded; eg, if record a false release of mortgage, then BFP will lose to bank who seeks to set aside conveyance in order to foreclose on mortgage

i. **Notice**: if BFP gives value and takes without notice, it is BFP's land and no need to record
ii. **Race-Notice**: BFP without notice AND first to record
iii. **Pure Race**: Notice irrelevant; record first and you win

c. Shelter Rule Exception
i. Grantee who takes from BFP will prevail against any interest the transferor-BFP would have prevailed against.

d. Forms of notice:
i. Actual
ii. Record
1. tract index vs
2. grantor-grantee index
iii. Inquiry

XVII. SECURITY INTERESTS

a. Mortgage:
i. Debtor/notemaker is the mortgagor who grants a mortgage to the lender/mortgagee. On default, lender must have judicial foreclosure sale conducted by sheriff
ii. Other arrangements that are effectively mortgages:
1. *absolute deed* with promise to reconvey
2. *sale/leaseback* with option to repurchase

b. Deed of trust
i. Debtor is the trustor, who gives a deed of trust to a 3rd-party trustee who is normally closely connected to the lender (ie, the beneficiary). On default, lender instructs trustee to foreclose the deed of trust by sale

c. Installment land K
i. Purchaser obtains legal title only when full contract price has been paid
ii. Forfeiture clauses permit vendor upon default to cancel the contract, retake possession, and keep all monies paid
iii. Methods used by courts to avoid harshness of forfeiture clauses
1. Equity of Redemption: grace period for purchaser to pay accelerated full balance and keep land
2. Restitution: return money exceeding actual damages to vendee
3. Treat as Mortgage: require judicial foreclosure
4. Waiver: vendor waived right to forfeiture by repeated accepting late payments

d. Theories of Title
i. Lien theory
1. mortgagee is deemed holder of a security interest
2. mortgagor is deemed owner of land until foreclosure
a. mortgagee can't have possession until foreclosure
ii. Title theory
1. mortgagee has legal title to property until mortgage satisfied or foreclosed
2. therefore, mortgagee entitled to possession upon demand at any time

e. Redemption in equity
    i. Any time prior to foreclosure sale, mortgagor can redeem property by paying amount due
        1. look out for acceleration clauses
f. Multiple mortgages
    i. Priorities
        1. first in time has priority
        2. purchase money mortgage
            a. mortgage given in exchange for funds used to purchase property
    ii. Foreclosure effects
        1. foreclosure of a junior interest will not destroy a senior interest
        2. all holders with interests junior to foreclosing party must be notified prior to foreclosure or interest not extinguished
        3. Proceeds:
            a. Pay costs of sale, attorneys' fees, and court costs, then principal and interest, then junior interest holders, finally the mortgagor gets remaining
g. Transfers of Security Interests
    i. Holder in Due Course Rule
        1. if promissory note is indorsed and delivered to transferee, then transferee becomes holder in due course.
        2. The specific requirements are:
            a. Note must be negotiable in form
            b. Must be indorsed and signed by named payee
            c. Must be delivered to transferee
            d. Transferee must take in good faith and must pay value
        3. HDC takes note
            a. Free of any personal defense of the maker of the note, but still subject to any real defenses [CMR, p. 57]

XVIII. SPECIAL RIGHTS

a. Right of Support
    i. Lateral support
        1. land in natural state
            a. landowner *strictly liable* if excavation causes adjacent land to subside
        2. land with buildings
            a. strictly liable for building damage *if* shown land would have collapsed in natural state;
            b. otherwise, liable if excavation was done negligently
    ii. Subjacent support
        1. strict liability to support land and buildings existing prior to subterranean digging
        2. liability for subsequently erected buildings requires negligence
b. Water rights
    i. Rivers and Lakes

1. Riparian
    a. Natural flow
        i. Use resulting in substantial or material diminution of quality, quantity or flow in enjoinable
    b. Reasonable use
        i. Multifactor test to determine if use reasonable
    c. Natural vs. Artificial use
        i. Human uses (consumption, garndening) prevail over artificial uses (irrigation, manufacturing)
2. Prior appropriation
    a. Rights determined by priority of beneficial use

ii. Underground water
1. absolute ownership
    a. eastern states: can take all water owner wishes for any purpose, including export
2. Reasonable use
    a. Same as absolute ownership, but exporting only allowed if it does not harm other owners with rights to same aquifer
3. Correlative Rights doctrine
    a. California: owners of overlying land own the underground water basin as joint tenants and each is allowed a reasonable amount for his own use
4. Appropriative rights doctrine
    a. Priority of use, not ownership of overlying land, is determinative

iii. Surface water
1. natural flow
    a. alteration of drainage patterns prohibited
2. common enemy
    a. owner can take any protective measures to get rid of water
3. Reasonable use theory
    a. Balance utility of use vs gravity of harm

XIX. Zoning
a. State may reasonably control use of land for the protection[6] of
    i. Health;
    ii. Safety;
    iii. Morals; and
    iv. Welfare of its citizens
b. Nonconforming use
    i. Use existing at time of passage of zoning act that does not conform *cannot* be eliminated at once
c. Special use permit
    i. Must be obtained even though zoning is proper for intended use (eg, hospitals, funeral homes, drive-ins, etc)
d. Variance

[6] Use of state's police power

        i. A departure from the literal restrictions of a zoning ordinance granted by administrative action
    e. Exactions
        i. Landowner must give up some land for a public purpose in exchange for approval of a project
        ii. These are unconstitutional where
            1. there is no **essential nexus** (ie, demands are not *rationally connected* to the burden the project will place on society); and
            2. there is no **rough proportionality** (ie, the exaction is not reasonably related in *nature and extent* to the impact of the proposed development)

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