

This outline was created for the July 2006 Oregon bar exam. The law changes over time, so use with caution. If you would like an editable version of this outline, go to www.barexammind.com/outlines.

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. **voluntary waste**
 - a. affirmative action beyond maintenance/*normal use* causing harm to premises
 - b. liability to holder of future interest
 - 3. **permissive waste**
 - a. tenant must do 3 things to avoid permissive waste:
 - i. ordinary repairs
 - ii. pay taxes
 - iii. pay interest on a mortgage
 - 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]

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 durational estate
 - 2. Possibility of reverter
 - a. Give away entire interest
 - b. Fee simple determinable; automatically returns to grantor when condition satisfied
 - 3. Right of entry
 - a. Give away entire interest; *expressly* reserves right of entry
 - b. Fee simple on a condition subsequent
 - ii. To Grantee
 - 1. Remainder
 - a. Vested remainder: nothing stands in way of taking
 - b. Vested remainder subject to open
 - c. 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 contingent remainders, executory interests, and vested remainders subject to open
 - 2. Determine validity *at time of creation* of interest
 - 3. NB: perpetuity saving clause
 - 4. Class gifts: watch for age contingency
 - 5. watch for fertile octogenarian
 - 6. Unborn spouse
 - ii. Options and Rights of First Refusal subject
 - iii. Charity to Charity EXCEPTION

III. CONCURRENT OWNERSHIP

- a. JTWRORS
 - i. Characteristics:
 - 1. right to survivorship
 - 2. right to partition
 - 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 JTWRORS

1. Partition
 2. severance: conveyance; mortgage; 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
 - 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. Subject to SF if over one year
 - c. Periodic tenancy**
 - i. Repeating for a certain period until one party gives notice
 - ii. Creation:
 1. express agreement
 2. implication
 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 tenancy 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
 - 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. Landlord's remedies for T's breach:
 - 1. failure to pay rent: both sue for damages and evict
 - 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. Deliver *residential* premises in habitable condition
 - 1. implied warranty of habitability
 - 2. T's remedies here:
 - a. Move out and end lease; OR
 - b. Stay and sue for damages
 - iii. Implied covenant of quiet enjoyment. 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
- b. Assignments
 - i. Lease is both a conveyance and a contract
 - 1. Thus, 2 different sources of liability
 - ii. Privity of Estate: exists only between L and present T
 - iii. Privity of Contract: exists where there is an agreement between the parties; OR assignee "expressly assumes" lease obligations

- iv. Covenants in lease *run with the land* if the **touch and concern** the land
 - 1. Touch & Concern Test: if performance of covenant makes land more valuable or more useful, then it T&C the land.

c. Subleases

- i. Sublessee not liable to L because no POC or POE

d. Non-Assignment clauses:

- i. Valid and enforceable, but
- ii. Don'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 trade fixture?
 - 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. Easement appurtenant:
 - i. Directly benefits the dominant estate and burdens the servient estate
- c. Easement in gross
 - i. There is no dominant estate (eg, utility line easement)
- 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 choose any reasonable location
 - iii. By Prescription
 - 1. adverse
 - 2. continuous and uninterrupted (seasonal use satisfies)
 - a. 20 years at CL
 - 3. visible/notorious OR with owner's knowledge
 - 4. without owner's permission
 - a. NB: any grant of permission, even oral, destroys hostility
- 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
- 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)
 - ii. Equitable servitude (when enforcing at equity)
- c. **Covenants running with the land at LAW**
 - i. Four reqs 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. Three reqs 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 PRIVACY 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

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