Property Overview

Video on YouTube

- https://www.youtube.com/watch?v=5epSdjSAkBo
  - 3 hours of good videos
- RAP (creepy)

https://www.youtube.com/watch?v=iqr9E-YrrKQ

Property Topics (5-6 questions each)

- Ownership (present and future interests, landlord tenant, cotenant, RAP)
- Rights in real property (easements, covenants, equitable servitudes, license, profits, fixtures, zoning)
- Real estate contracts
- Mortgages
- Titles (AP, recording)

Recording System (VERY IMPORTANT)

- Recording statutes protect bona fide purchasers ("BFP") <u>for value</u> and <u>without notice</u> as well as mortgagees (bank/creditors)
- You are <u>not</u> a BFP if you got it as a gift or will or intestate! Or you took w/ any notice- AIR – actual, inquiry or record!
- <u>Example</u>: O conveys Blackacre to A. Later, O conveys Blackacre to B. O is a dirty double dealer, and has now skipped town. Who owns Blackacre? Recording statutes sort this out. Default rule is first in time, first in right, but recording act changes this presumption.
- <u>Two main rules:</u>
  1. If B is a BFP for value and without notice of earlier transaction, and we are in a <u>notice</u> jurisdiction, B wins regardless of whether B records before A does.
  2. If B is a BFP for value and without notice of earlier transaction, and we are in a <u>race-notice</u> jurisdiction, B wins if B records properly before A does

Bona Fide Purchaser

- To be a bona fide purchaser, B must 1) **purchase for value**; and 2) at the time of purchase, B had to be **without notice** that another (like A) got there first
- Value: Means substantial pecuniary consideration; <u>if get by devise (will), descent (intestate), or gift, B is NOT protected b/c he is not a BFP</u>; Consideration need not be fair market value of property but most courts say it must be more than nominal consideration, i.e., O conveys to A. O <u>gifts</u> to B. B records. A still wins b/c B is not BFP; ***HEAVILY TESTED on Bar exam***
- **Notice: Three forms of notice**: AIR: **Actual, inquiry from inspection of property, record notice within proper chain of title** (i.e., if A properly records deed before B, A always wins because B is not a BFP b/c had notice)
- **Also to give record notice, it is not enough to just record but must record PROPERLY WITHIN THE CHAIN OF TITLE, usually through a title search of the grantor-grantee index.**
- Only protected from the time consideration paid; if deed recorded before consideration paid, BFP does not prevail over deeds recorded later but before consideration paid

Recording Statutes (VERY IMPORTANT)

- **First in time, first in right** (Default common law rule): One who takes interest first has priority over any later taker, i.e., O borrows $100K from Bank and gets mortgage. O then sells to A for fair market value who has no idea of mortgage. Bank's mortgage has priority because earlier in time over A's interest
- **Race statute** (obsolete): First to record wins, irrespective of BFP. Does not matter if took with notice of another's claim. Those with notice can win here.
- **Notice statute**: B wins as long as last BFP to take; does not matter that A records first after B takes and does not matter if B ever records; but always wise for B to record to prevent C from being BFP. **BFP does not need to record to win over a prior interest, but DOES need to record to prevail against subsequent purchaser**
  - Ex: O conveys to A, a BFP who does not record. Then O conveys to B, a BFP who does not record. Then A records. B wins.
- **Race-notice statute**: B wins if they are BFP and win race to record before A. NYS is race-notice
  - Ex: O conveys to A, a BFP who does not record. Then O conveys to B, a BFP who does not record. Then A records. A wins here because she was BFP who recorded first.

Recording Statutes- Identify the Statute

- **On bar exam they will not tell you directly it's notice or race-notice; rather they will give you the statute and you have to deduct which one it is. Memorize the wording below. Race-notice is most common on bar exam; it's almost never a pure race statute. Look for words RECORD**
- **Notice statute**: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to him."
- **Race-notice statute**: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice, who shall first record."
- **Look for words "first duly recorded" or "who shall first record" – that means it's race-notice; also look for "and" to signal it'**
- Example: In 2005, O conveys to A; in 2006, O conveys to B; in 2007, B records. In 2008, A records.
  - *Race*: B wins automatically without regard to notice; B records before A
  - *Notice*: B wins even if never record or recorded after A – mere fact that B as BFP took after A sufficient. If B took by gift, intestate, then he is not BFP
  - *Race-notice*: B will win only if took without notice of A's interest; If B had recorded after A, B loses due to late recording even if he took without notice of A's interest.

Chain of Title Issues: Shelter Rule: KNOW!!

- **Shelter rule provides that one who takes from BFP will prevail against any entity that the transferor-BFP would have prevailed against**; transferree “takes shelter” in the status of transferor, and steps into shoes of prior BFP, even if she may not meet the other requirements of BFP (like if she got it by gift, will, or intestacy, or got it with actual or inquiry notice)
- <u>Example</u>: O is a dirty double dealer and conveys to A, who does not record. Later O conveys to B, a BFP who records. B then gives it by gift to C. C is not a BFP under our definition because she got it by gift. C here is a mere donee. In battle between A and C, C wins in both notice and race-notice state because the shelter rule provides that C steps into the shoes of our BFP B who recorded first even though C, as donee, is not BFP
- Same rule would also apply if C had actual or inquiry notice of earlier A trx. C can take place of B as a BFP even though she did not satisfy definition and even if have notice.
- **Shelter rule is designed to protect our BFP and to make it easier for B to transfer land without being penalized for O’s dirty double dealing**. By giving C, who is not worthy of B’s BFP status b/c it was a gift or C had notice of A trx, the benefit of B’s BFP status, the system gives incentive for C to close the deal.

Chain of Title Issues: Wild Deed

- Deed may be recorded but improperly so can't give record notice because it is not hooked up to the chain of title.
  - Ex: A owns Blackacre (BA). A conveys to B and records. B conveys to C and C does not record. B conveys a second time to D and D records. C conveys to E and E records his own deed, but not B to C deed. D now wants to sell to F.
  - F will find the B to D and A to B if he searches the chain of title. But won't see B to C trx and he won't find C to E deed even though it was recorded. this is a "wild deed"; although it is recorded, it is not connected back to the chain of title
- ***Rule: If there is a wild deed and it has a grantor unconnected to the chain of title, the deed is incapable of giving record notice; it's as if wild deed was never recorded at all***.
  - Ex: Now suppose O sells parcel to BFP, C. C records and has no actual or inquiry notice. BFP wins in both notice and race-notice states because they are not on record notice; there is a wild deed so BFP would never find it because he would just be searching for what O recorded. In notice state, C wins b/c C is a BFP; in race-notice state, C wins b/c C is a BFP and wins race to record, because wild deed's recording is a nullity
  - Ex: Y conveys to O who records. O conveys to A, who does not record. A conveys to B who records. O conveys to X who records. X wins as BFP; no notice b/c A to B is a wild deed; X cannot see B has claim without first seeing O to A which is not recorded.

Chain of Title Issues: Deed Recorded Too Late

- Some deeds recorded too late to give record notice when doing search in grantor index.
- Example: Y conveys to O who records. O deeds to A who does not record. O deeds to X, who knows of earlier O to A and records. A records too late. Then X deeds to Z who records.
- X is not a BFP because they had notice. Z does not have record notice and is a BFP against A. Z will not find A's recording because once Z sees the O to Z transfer he will stop looking under O as grantor and will look under X.
- Law does not require owner to search for grantor transfers after they are no longer record owner. **You treat a deed recorded too late as invisible**. If A had recorded before X, it would have been found.

Chain of Title Issues: Estoppel by Deed

- **Estoppel by deed occurs when grantor purports to sell Blackacre without first owning Blackacre. If that grantor does subsequently acquire the title that he purported to transfer, the later-acquired title shoots back in time to the benefit of the earlier grantee. <u>Grantor is estopped from denying validity of his earlier pre-acquisition of title transfer to another, now that the grantor has succeeded in obtaining that title</u>**. Only applies when warrant have title (does not apply to quitclaim deed)
- <u>Example</u>: In 2000, O owns Blackacre. Also in 2000, X who does not own Blackacre purports to sell it to A. In 2000, A records the X to A transfer. In 2010, O decides to actually sell Blackacre to X. In 2010, X records. Then in 2020, X, our dirty double dealer, sells Blackacre again to B, who records.
- Between X and A: A owns Blackacre between 2010—2019. X's 2010 acquisition of title from O shoots back in time to benefit A. X, who back in 2000 conveyed property to A which he did not actually own, is estopped from denying the validity of the transfer if he subsequently acquires the interest that he previously purported to convey. In 2010, when X ultimately got title from O, that after-acquired title actually benefits A.

Chain of Title Issues: Estoppel by Deed and BFP

- When B enters the picture in 2020, B now owns Blackacre: If B is a BFP, B wins in both notice and race-notice jxns. B wins in notice as long as BFP; and in race-notice he wins if BFP and records first.
- Why has B won race to record even though A recorded earlier? A recorded back in 2000 but that record is a nullity; a deed recorded too early, before her grantor X actually acquired title to the property. So A's deed is not recorded within the chain of title. B's title searcher would never locate the A deed because the title searcher can assume that no one sells land until they legally own it. Title records would show that X acquired his ownership from O in 2010. Thus B's title searcher would have no reason to discover X's 2000 pre-ownership transfer to A. Because A recorded too early (and was not diligent in doing her own title search), A loses to B.
- B would lose however if they got the land by gift or will or had actual notice (i.e., if they are not BFP)
- **Even though estoppel by deed applies to original grantor and grantee, doctrine is NOT binding against later good faith purchaser, the BFP**. So title searcher does not need to search until the date on which the person is known to have been record owner.

Mortgages: Know Difference b/w Equity of Redemption and Statutory Right of Redemption

- Lien v. title theory states
  - In title states, mortgage severs joint tenancy; also bank can get possession before foreclosure; in lien states, mortgage is not severed
- **Equity of redemption v. statutory right of redemption**:
  - **<u>Equity of redemption</u>**: If fall behind in mortgage you have a right to redeem the property and stop foreclosure by 1) paying entire amount due on the loan; or 2) in some states, catching up with past due payments. This is called the equity of redemption. **Only PRIOR TO foreclosure sale**; Not waiveable
  - **<u>Statutory right of redemption</u>**: Mortgagors have right to redeem the property **after foreclosure**; allow defaulting borrower to buy back the property by paying the price paid at the foreclosure sale. NY does <u>not</u> have statutory right of redemption (50% of states have this law). You are given 6 months-1 year to exercise right and can stay in home;
  - **<u>Distinguish statutory right of redemption (right to pay off AFTER foreclosure) vs. equity of redemption (right to pay off loan arrears BEFORE foreclosure) ; Do not confuse these two concepts.</u>**

- **Deed in lieu of foreclosure**: In lieu of foreclosure, a mortgagor may convey their interest to the Bank. This permits the Bank to take immediate possession, but requires both to consent.
- Acceleration clause: Pay mortgage in total if one missed payment vs. Due on sale clause: Entire mortgage due when sell

Rights in Foreclosure

- Purchaser of property takes free and clear of junior mortgage and subject to any senior mortgage. Also subject to statutory right of redemption for limited time if state law allows. Purchaser has first priority provided they recorded. They do not need to be the first recorder.
  - Exception: PMM and any super priority like mechanics lien takes precedence
- Order then goes in line w/ recording act. Unsecured goes last in order of time.
- Senior interests: foreclosure has no effect
- Junior interests: Destroyed by foreclosure if given notice; debt is not terminated as lienholder can sue in personal action

Foreclosures Are Not Binding on Senior Mortgagee; Foreclosures DESTROY Junior Interests provided notice

- **No foreclosure is ever binding on a mortgagee whose interest is senior to the foreclosing creditor's interest**; if a junior creditor forecloses, the foreclosure proceeding can only wipe out the equity junior to the foreclosing creditor.
- Ex: Bank1 lends O $100K and records. Bank2 lends O $200K and records. Bank3 lends O $50K and records. O falls behind on Bank2, but not Bank1 and Bank3. Bank2 starts foreclosure and joins Bank1 and Bank2 as creditors.
- Bank1 will be entitled to have the action dismissed against it since Bank1 is senior. What will be foreclosed is O's equity, plus any interest junior to Bank2, like Bank3's interest since Bank3 happened AFTER Bank2.
- If X purchases at foreclosure sale, X will own the property but subject to Bank1's mortgage since Bank1 is senior. Any amount paid by X will be used to pay off Bank2, then Bank3, then O, assuming Bank1 wants to keep mortgage on property.
- If Bank3 is not paid off, they can contain a separate personal action against O to get their money

Priority of Title at Foreclosure

- <u>**Default**</u>: **First in time, first in right (FTFR); but when BFP purchases for value and without notice they have priority over earlier unrecorded interests.**
  - Ex: A borrows $100K from Bank1 and records. Then A borrows $50K from Bank2 and records. At foreclosure, sold for $120K. Bank2 took with notice, so Bank1 gets paid first. Bank2 only gets $20K. If sold for $100K, Bank2 gets nothing.
  - If allowed under state law, Bank2 could get deficiency judgment against A for personal liability for $30K, but the mortgage on the property itself is extinguished so new buyer can take free and clear.
- **Interests junior in time to interest being foreclosed on are terminated by foreclosure, but interests senior in time remain in force.**
- Leases can often be junior, so if a lease is created after a recorded mortgage, lease is extinguished after foreclosure and you can be kicked out of your apartment; while interests senior to mortgage will survive foreclosure

Super Priority for Purchase Money Mortgages

- **Purchase money mortgages are super-priority interests so they have better priority even over those recorded earlier in time**
- Why? No one could get a mortgage if they had any outstanding liens against them
- PMM secures the loan given to the mortgagor to buy the property; it's a mortgage given in exchange for money to buy property
- PMM has priority over mortgage claims and liens that arise 1) out of obligations of the buyer; 2) prior to the buyer's acquisition of the property.
- Between two PMMs, seller's mortgage has priority over third party; if two third party PMM, chronological
- If buyer has secured creditors with interest that exist before purchase of property that may reach the property, these are junior to PMM.
- PMM in some states gets super-priority status even if PMM is not recorded and even if mortgagee knows about earlier claims against title.
- PMM priority defeated by subsequent mortgages or liens; there goes by normal recording statutes

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Mechanics Liens and Super Priority

- **Mechanics liens re construction on house may take priority over earlier recorded interests, as they are effective not from date of recording but from date the construction began or was completed** (with the recording shooting back in time).
- Example: O expanded home, built new master bedroom, and hired a contractor. O, however, only paid the contractor 50%. Mechanics liens protect the contractor from non-payment and can get lien against property for improvements. **Mechanics liens have to be perfected by notice to property owner and recording the claim**.
- So new buyer to home may search record and not find mechanics lien but would still be bound because **mechanics lien has super priority.**
- Mechanics lien, however, doesn’t have priority over PMM

Sale or Transfer of Mortgaged Premises

- When sell the house, you remain personally liable for the mortgage
- When sell property, usually mortgage paid off at closing; as many mortgages have a “due on sale” or “acceleration clause” that requires full amount of obligation when sell house unless Bank gives written permission; but sometimes mortgage not paid off: 1) when sale “subject to” mortgage,” or 2) buyer “assumes” the mortgage
- **”Subject to”: If buyer takes “subject to” they are not personally liable for payment of mortgage debt**; but if they do not make payments, won’t be able to keep equity; if Bank forecloses, and does not yield price to pay off, Bank can’t sue buyer. If buyer makes a few payments, this does not change things; “due on sale” clause also does not make a difference; **original mortgagor still liable for debt; if deed silent, assume they took “subject to” mortgage**
- **“Assumes”: Must be express; lender wants new buyer to assume mortgage so they will be personally liable if sale price does not exceed mortgage amount**. Buyer is deemed to assume mortgage if accept a deed that contains such a statement, even if buyer does not sign the deed b/c agreements to assume a debt are not within Statute of Frauds; but buyer only liable if intended to assume debt or if she can show not aware of clause in deed; Original mortgagor is secondarily liable if mortgage is not paid.
- Sometimes Mortgagor will get Bank to substitute new purchaser for original purchaser’s personal liability; new purchaser is personally liable and old owner is off the hook. This is called a novation.

Real Estate Transactions

1. **Pre-contract**: When look to buy the home, real estate agents involved; once want to buy, enter into purchase agreement; purchase price specified and sets forth obligations and duties of both parties; buyer gives deposit
2. **Executory Period**: Trx contingent on inspections such as bad foundation or termites; and seller's ability to give marketable title; also oftentimes buyer getting mortgage or buyer selling another property
3. **Closing (post-closing)**: on closing date, deed governs which includes warranties and other terms

Statute of Frauds

Real estate transactions must be:

1) In **written** contract or memo;
2) Include **essential terms of contract** – **parties, price, and description of real estate**; and
3) **Signed by the party to be charged (seller)**, meaning party who transfers the property and resists enforcement of contract
   - Can be e-signed

- Does not have to be in the same instrument; could be a check; need not show “true” buyer; some states require material terms; violation makes it voidable (not unenforceable); if parties perform will not undo the contract

Marketable Title: Before Closing ONLY

- **Most provide that sellers give marketable title expressly**; buyer gets good title to property that is clear and transferable.
    - “Title free from reasonable doubt” so that buyer does not have to face risky litigation; reasonable person standard applied
    - Lack of marketable title is different from legal claims re: condition of property, like if something is wrong w/ the property
- **If seller cannot provide marketable title *by time of closing***, buyer can sue for rescission and breach; must occur during executory phrase because <u>**once closing occurs, buyer can no longer argue title is not marketable**</u>.
- <u>Examples of violation of marketable title</u>: Seller lacks ownership, i.e., seller sells fee but only has life estate or if seller does not have title at all or only owns part of property like if forged deed in chain of title or flaws in deed record or if deed mistakenly describes property or substantial variation of names or defectively executed (unless curative act apply); encumbrances also prevent marketable title, such as conflicting claims to ownerships (i.e., encroachments), easements (if prevent full use and enjoyment), covenants, mortgages, use restrictions, or other liens;
- **Most contracts say title marketable if free of encumbrances “not of public record.”** Also visible encumbrances like utility poles and wires, does not mean lack of marketable title. Mere existence of zoning law is not a problem; it is the violation that is the issue. Building code violations are related to condition, not title.
- Adverse possession: **on bar exam, AP is unmarketable;**
- Fact that title company will insure does not mean it’s marketable
- **Can do quitclaim deed and give less than marketable title**
- **Marketable title becomes irrelevant once the deed happens; after deed happens, you sue on the deed covenants, not marketable title; if the deed happened, it is NEVER a correct answer to say that marketable title was violated**

Remedies for Breach of Marketable Title

- Remedies include **rescission, specific performance, money damages, or return of deposit**. Injunction often given b/c real estate is unique and money damages inadequate.
- If seller can't give marketable title, buyer can ask for specific performance anyway with abatement for price or rescind the contract; but if buyer is in breach, courts reluctant to make them buy it
- Court can award nominal out of pocket damages (i.e., closing, settlement costs) or loss of bargain damages which is amount equal to the difference between fair market value at time of breach and the agreed contract price.
- Most give loss of bargain damages when seller acts in bad faith; split when seller acts in good faith; only worth it to seller to get loss of bargain if value declines
- Can also get consequential damages that would be foreseeable such as lost profits or lost rents; not given consequential though if deny loss of bargain if seller acted in good faith

Equitable Conversion/ Risk of Loss Before Close

- **Default rule is that risk of loss *falls on buyer* prior to closing. It is based on theory of equitable conversion which treats buyer as owner once contract signed. If seller were to back out, buyer could insist on specific performance and could force sale by injunction**.
- It is counterintuitive for buyer to bear risk of loss as seller is usually in better position to care for the property; most contracts override the default rule and assign risk of loss to the seller. Uniform Vendor and Purchase Risk Act adopted in 13 states places risk on seller unless buyer takes possession (minority rule)
- If buyer bears risk of loss and seller is entitled to purchase price and to insurance proceeds, buyer could prevent double recovery by claiming unjust enrichment.
- **<u>Also comes up with inheritances</u>. If X agrees to sell to Y in contract, Y the buyer is treated as equitable owner. If X dies before closing, those who inherit from X now own what X owned, a property right to collect proceeds from the sale; right to take real property is owned by Y who still must pay purchase price. <u>If equitable conversion applies, seller owns personal property not real property, even though seller still record owner</u>**

Condition of Property

- **Used to be case caveat emptor** – let buyer beware; seller could stay silent and any loss to buyer. Even when caveat, still liable for intentional misrepresentations and affirmative acts to conceal to mislead re: material facts; may also be liable for negligent misrepresentation
- Modern law assigns to seller to **disclose certain defects**; but this <u>does not</u> equate to warranty or promise of quality; the only exception to this is an implied warranty or promise of habitability re: workmanship only. This applies only to residential new residences or commercially renovated used homes; does not apply to used residences by noncommercial owners or commercial buildings.
    - Applies to original buyer; some states extend warranty to successor buyer if buyer within 1-2 years
- **Misrepresentation and Fraudulent Disclosure**: Fraud is a false statement of material fact, known to be false, that is intended to induce detrimental reliance. If owner lies about property, there is a tort and maybe even criminal fraud. Half truths and concealment are also lies. Also possibly liable if fraudulent non-disclosure where omission and seller has duty to speak.
- In most states, sellers must also disclose 1) known; 2) latent (hidden/not discoverable upon reasonable inspection); 3) defects that 4) materially affect value or desirability of property. Mostly physical issues, or in some states off-site (like hazardous waste nearby) or non-physical (ghosts). Apply especially if seller caused the condition (markets house as haunted). You also can't outright lie to buyer.
- In most states duty to disclose latent defects applies to residential properties only, though in commercial still liable for intentional misrepresentations
- In most states, patent visible defects do not need to be disclosed, though in some states also have statutes that require disclosure of known material defects – whether they are hard to discover (latent) or obvious.
- Statutes also often require written disclosure statements; must disclose lead pain if house built before 1978. May have to disclose things like if have noisy neighbors, murder at house, toxic waste nearby
- Disclosure law concerned with current defects and not past problems that were resolved
- These duties may also apply to broker as well as seller

Types of Deeds

- **Quitclaim**: Worst deed for buyer; contains no covenants and does not have promise to convey marketable title; doesn't let seller off the hook for violation of marketable title just b/c planning quitclaim deed. Often a tax deed used by the govt when selling properties for nonpayment of taxes. Grantee receives no better title than seller.
- **General Warranty**: Contains 6 promises/covenants that grantor makes <u>on behalf of himself as well as his predecessors</u>. Grantor assumes sins of predecessors and will be be held accountable
  - **First 3 = present covenants: breached at time of delivery; SOL runs when deed delivered**
  - **Last 3 = future covenants: breached in future when grantee is disturbed once they are in possession; SOL does not begin until future date**
- **Special Warranty**: Grantor promises that he has not conveyed the property to another and that land is free from any encumbrances created by the grantor himself; grantor only makes it on behalf of himself; <u>there are no promises on behalf of predecessors unlike a general warranty deed</u>

Legal Requirements for a Deed

- **Doctrine of Merger**: The deed replaces the contract and most obligations by contract of sale are discharged unless they are repeated in deed; thus if contract calls for marketable title, and buyer accepts quitclaim deed, buyer can't sue for lack of marketable title; if conflict, deed controls (i.e., purchase agreement has no covenants but deed does, deed controls)
- **Promises re: physical condition/latent defects fall outside merger**; repairs are a separate contract; also buyer can bring claim for breach of warranty of quality of habitability if new construction
- **Lawful Execution**: Identify parties, price, description. Writing to satisfy Statute of Frauds, signed by grantor (grantee not needed), lawfully executed in accordance with statutory requirements like notary, Does not need to be recorded to be valid. Can be a gift.
- **Delivery of Deed**: Did the grantor have the present intent to be immediately bound, irrespective of whether or not deed literally handed over? Delivery happens when grantor relinquishes legal control, regardless of whether literally given to grantee. If deliver and record at later date OK. If deliver to agent of grantee, OK, but if agent of grantor, can still revoke. Promise by grantor of later delivery means no delivery is meant until that time. For delivery to occur there must be single moment where there is a physical transfer and present intent to make deed immediately effective. So if physical transfer and intent occur at different times it is not delivered
- **VOID OR VOIDABLE Deed**: Set aside even if pass to BFP: if deed forged, never delivered, or by fraud (grantor deceived in execution) or given to dead person; Voidable deeds only set aside if NOT given to BFP (those executed by minors or incapacitated or induced by fraud in inducement or undue influence or mistake or duress); may be set aside by creditors if try to hide assets. Ex: Joint owner forges another's signature; valid for interest of that owner but void as to other owner. Joint tenant works a severance if have forged deed; buyer holds as TIC with JT whose signature forged

Three Present Covenants: Only present buyer can sue

1. Covenant of Seisin: Grantor promises that he owns the land he conveys; title and possession

Ex: in 2010, O sells 100 acres of Blackacre by general warranty deed; but A learns that O only owns 90 acres so A can bring claim for breach of covenant of seisin; SOL starts in 2010.

- Might also be breached if conveyance for fee simple but third party has outstanding remainder; or tenant in common with 1/2 interest conveyed whole; or if try to convey property that is adversely possessed in part; or if fail to convey specific land in deed

2. Covenant of Right to Convey: Title only; Grantor promises he has the power to make the transfer and that he is under no temporary restraints on alienation or disability, i.e., life tenant tries to convey or if owner has record title but lost due to adverse possession, or grantor is not authorized officer to sign deed; or covenant on restraint on alienation in deed

3. Covenant Against Encumbrances: Grantor promises there are no servitudes or liens on the property except as disclosed in deed. Examples are mortgages, easements, housing code, taxes, liens, restrictive covenants, outstanding leases. If buyer unaware then breach, but most courts say also a breach even if buyer aware of encumbrance (unless waive)

- Similar to marketable title but timing different: If before closing, then it’s breach of marketable title; if after closing, then sue for breach of covenant re: encumbrances
- While violation of zoning ordinance during pre-closing would violate marketable title, courts may not find this an encumbrance after closing; hard to undo sales transaction

Three Future Covenants

1. **Covenant for Quiet Enjoyment**: Grantor promises that the grantee will not be disturbed in possession by a third party's *lawful* claims of title; O is not dirty double dealer; SOL begins when and if grantee is disturbed in possession; same as warranty; if breach present covenant, then breach this
2. **Covenant of Warranty**: Grantor promises to defend grantee against any *lawful* claims of title asserted by third parties; not a dirty double dealer and no one has superior title to me but if I was a dirty double dealer, I promise I will indemnify the buyer; general warranty protects against any claims (even predecessors) while special warranty protects against claims only during seller's period of ownership; mere existence of paramount title not enough; need eviction, ouster, lawsuit; if breach present covenant, also breach of warranty; same as quiet enjoyment
3. **Covenant for Further Assurances**: Grantor promises to do whatever future acts are reasonably necessary to perfect grantee's title; i.e., if there is a mistake in signing deed grantor promises to fix the problem; seller has obligation to act, not just to pay losses; requires demand by grantee that grantor execute needed documents; arises when defect in deed re: signature or grantor may have delivered before they acquired it; this is the only covenant that is enforced by specific performance

Covenant and Equitable Servitude

- Promise to do or not do something related to the land; not a grant of a property interest; **it is more a contractual limitation or promise regarding land**.
- Real covenant if it "runs with the land," meaning it will bind successors to original contracting parties.
- Can be negative (restrictive covenants): Promise NOT to do something, like NOT build or NOT paint shutters red; came about because law strictly construes negative easements to LASS.
- Can be affirmative too like promise to do something with land.
- **If P seeks money damages it is a covenant, if seeking injunctive relief, equitable servitude.**
- **On Bar exam, they will ask you whether the covenant or ES can be enforced against people who acquire the property later (successive buyers). If it is against original buyers, it's just a contract. If it is against subsequent owners, those are where the interesting covenants/ES issues come in.**

Covenants: Running of the Burden: <u>WITHN</u>

- **Writing**: To satisfy Statute of Frauds, original promise between A and B must be in writing.
- **Intent to run**: Intent for burden to run; A and B intend to bind successors; it may say this in the deed to bind "successors and assigns" or for the "burden and benefit to run"
- **Touch and concern the land**: Must affect legal relationship as landowners and not simply as public at large; occupancy, use, enjoyment, or affect property value, i.e., a promise to buy gas from certain company would not touch and concern the land
- **Privity**
  - **Horizontal**: Horizontal relationship between <u>grantor and grantee</u> (A1 and B1) at time promise made, that they be in succession of estate, i.e., transfer (sale), mutual interest like landlord-tenant, easement, co-ownership, mortgagor-debtor, or shared a servitude in common; if stranger to title no privity
    - Hard to satisfy; not likely A would have bought her burdened parcel from B or that in some other relationship like landlord-tenant.
    - This often comes up when people are just neighbors. If you are just neighbors you can't enforce the burden of a covenant.
  - **Vertical**: Vertical relationship between original owner and successor (A1 and A2): Ask whether A1 and A2 have a non-hostile relationship, like through blood, contract, or devise.
- **Notice**: Actual, constructive, record
- More wary of affirmative covenants binding successors than negative ones, as well as covenants that are costly or open-ended
- Original contracting parties can always enforce since it's just a contract. <u>**These requirements are only needed if want to bind *successors* to original contracting parties**</u>

Covenants: Running of the Benefit: <u>WITV</u>

- Easier to show than running of burden since don't need to show horizontal privity
- **Writing**: To satisfy SOF, original promise between A and B must be in writing.
- **Intent to run**: Intent for benefit to run; A and B intend to bind successors; deed will often state; sometimes rebuttable presumption that benefit run if neighboring property; at same time, sometimes benefit is personal to that person (even if burden the land) if B has no land nearby. If subdividing land, presumption that benefit runs with all properties in subdivision
- **Touch and concern the land**: Must affect legal relationship as landowners
- **Privity**
  - ***No Horizontal Privity required for benefit to run***
  - **Vertical**: Vertical relationship between original owner and successor (B1 and B2)
    - If B1 is still owner, then need only consider if burden run

Horizontal Privity Example

1. Bob owns two lots, side by side. He sells one of the lots to Oscar. As part of the sale, the parties agree to a covenant that guarantees that Oscar will not allow garbage to pile up on his land. **Horizontal privity** since Bob owned both estates and granted one of them to Oscar at the time that the covenant was made, Thus, if Oscar later sells his lot to Sam, Sam could also be bound by the terms of the covenant.
2. Suppose Bob leases to Oscar and as part of the lease agreement, the parties agree to a covenant that guarantees that Oscar will not allow garbage to pile up on his land. **Horizontal privity** since the two parties had a landlord-tenant relationship at the time that the covenant was made. Thus, if Oscar later assigns his interest in the land to Sam, Sam could also be bound by the terms of the covenant.
3. Bob and Oscar are **neighbors**. Bob is frustrated by the amount of garbage that piles up on Oscar's property. He and Oscar strike a deal under which Oscar guarantees that he will not allow garbage to pile up on his land. **NO horizontal privity**. This burden cannot run with the land because there is no privity between Oscar and Bob. Bob has no ownership interest in the servient estate at all. Thus, if Oscar later sells his lot to Sam, Sam would not be bound by the terms of the covenant.
4. In above example, what if Bob transferred to Rory (and no transfer from Oscar to Sam)? No horizontal privity required for BENEFIT to run so can be enforced.

Vertical Privity Example

- Bob owns two lots, side by side. He sells one of the lots to Oscar. As part of the sale, the parties agree to a covenant that guarantees that Oscar will not allow garbage to pile up on his land. Later, Sam acquires the land from Oscar via adverse possession. **NO vertical privity** between Oscar and Sam because Oscar never transferred the property to Sam. Sam took it via adverse possession. Covenant between Bob and Oscar cannot be enforced against Sam.

Touch and Concern Land

- Examples: covenants re: limit to single family residences, prohibiting improvements from being built near property lines, maintain insurance of improvements
- Also even though does not really concern land, HOA dues or covenants not to compete are often considered to touch and concern; HOAs ok because need to maintain common areas and each has an undivided interest in that even if does not directly affect their own property
- Examples that do NOT touch and concern land: covenant for payment of money such as requiring a certain management company owned by the seller, or requiring a certain gas company or plumber, covenant that seller would deliver water, covenant promising to support or not support rezoning application.
  - **Courts won't enforce it when it seems like it is a way for the seller to enrich himself**. Courts don't like tying arrangements that will burden future successors.
  - Racially restrictive covenants can also never be enforced
- Analyze whether <u>both</u> burden and benefit touch and concern the land

Equitable Servitudes: WITNES

- A suit at common law on covenants only gives money damages. **To get injunction, need to have equitable servitude**; most enforce if have actual or constructive notice whether or not agreement is a covenant running with the land
- Most are negative in nature but can also be affirmative.
- **Writing**: Must still satisfy SOF; restrictions on building included in plat of subdivision may count
- **Intent**: Original parties must show intent to be bound.
- **Touch and Concern the Land**: Burden must touch and concern, but benefit need not; could be binding if it concerns any landowner in neighborhood not just those next door especially in common scheme
- **Notice**: Notice is easier to establish than for covenants because successor owner of the burdened property must be the one with actual, inquiry, or record notice.
- ***Does not require horizontal or vertical privity since it is an equitable device.***

Equitable Servitude Example

- Lisa lives in a house that is part of a complex of houses. One day, all the owners of houses in the complex get together and agree, in writing, that henceforth, to increase the quality of life for all the people that live in the complex, no pets will be allowed in any of the apartments. Furthermore, they agree that any party who violates this agreement can be enjoined from continuing to do so by an action brought in court by the other parties to the agreement. Clearly, this constitutes an equitable servitude.
- Maureen, who knows of this restriction, nevertheless covets a house in this complex. So, she acquires Lisa's house **via adverse possession**. Maureen then brings her 17 cats into the house.
- The other parties to the agreement can enforce the equitable servitude against Maureen. Although there is no horizontal privity (the other house owners had no ownership interest in Lisa's house) or vertical privity (she acquired Lisa's house via adverse possession), the other elements are satisfied. The agreement was in **writing**. The parties clearly **intended** that everyone who shall live in the complex would be bound by the agreement. The agreement did **"touch and concern"** the land because it was meant to improve the quality of life for homeowners in the area. In addition, Maureen had **notice** of the servitude.
- **Maureen is bound by its terms and if she violates them, the other owners can bring an action against her to enforce the terms of the agreement via an injunction from the court. They can't get money damages since there is no privity but they can get an injunction.**

Implied Equitable Servitude

- **Arise often with developer and there is a common deed or restriction**. For example, developer builds 25 homes with covenants all in the same area. But new Home #26 in same development does not have covenant in the deed. Most courts will find implied covenant and will enforce equitable servitude on house #26 based on a common scheme
- Need **1) common grantor; 2) common scheme of development** such as numerous conveyances with same restriction, map, or community plan; representations about community as residential; whether parts are bound and other parts not bound; *and* 3) burdened property **must have had notice** of restriction when he took
- No actual notice because nothing recorded. **But you are bound under inquiry notice**. If you buy house #26, you see every other house has a fence. That puts you on at least inquiry notice to find out if you have to have a fence too.

Reasonableness/Public Policy

- **Covenants will not be enforced if 1) do not touch and concern land; 2) unreasonable; or 3) violate public policy**
- To determine reasonableness, weigh benefits against burdens, see if covenant is arbitrary or discriminatory; and consider whether violates public policy; majority rule looks at impact on entire community while minority rule looks just at impact on particular parcel
- i.e., reasonable to have covenant paint house white but maybe unreasonable to require certain paint color in area that can't be seen
- More deferential if included in original CCRs rather than in a revision because all buyers on notice
- Some courts adopt business judgement rule instead which defers to decisions made by Board or HOA; challenged if no legitimate relationship to welfare of community or are arbitrary or discriminatory

Termination of Covenants/Equitable Servitudes

- **Abandonment**: Requires conduct to relinquish benefit, i.e., tolerating violations of covenant; must have intent to abandon+act an abandonment. Common scheme abandonment happens when a large number in scheme violate. Courts find abandonment when changed conditions that original purpose no longer can be served
- **Estoppel**: Benefited may be estopped from enforcing if act in way that she does not intend to enforce and owner in reasonable reliance substantially changes position, such as by buying property or violating
- **Merger**: Once common owner acquires benefited and burdened, terminates through merger; if ownership ends covenant not revived.
- **Release Under Statute of Frauds**: Benefited property can give release to burdened. Can also do rescission which is mutual release by all landowners who have right to enforce covenant.
- **Express Terms** (like last for 5 years)
- **Prescription** (adverse possession): Openly violates, COAH
- **Relative Hardship**: Neighbors have to give consent to build home and refuse b/c violate building density; court held hardship; also where build home short distance from set back
- **Changed Conditions**: Covenant can no longer be realized because changes are so pervasive that the servitude should no longer be enforced; piecemeal changes are not sufficient. Covenant no longer serves its intended purpose.
- **Unclean Hands**: Not allow benefited owner to violate a covenant and at same time enjoin another landowner from violating it.
- **Acquiescence**: Intentional toleration of another’s violation when benefitted property passively endures multiple violations of the covenant. Similar to estoppel but envisions pattern of violations; if acquiesce too much approach abandonment; can still enforce other covenants
- **Laches**: Benefited owner waits so long to bring suit to enjoin covenant’s violation that burdened owner is unduly harmed by delay itself. Laches does not automatically terminate, it just prohibits enforcement; benefited can still enforce against others.
- **Recording Acts**: BFP for value and without notice is not bound. Also marketable title acts
- **Eminent Domain**: Extinguished and Govt pays FMV for taking; some courts say taking does not apply to covenants
- Notably, if zoning conflicts with servitude, more restrictive prevails

Appurtenant or Gross Easement

- Appurtenant (2 pieces of land) or gross (personal/1 once of land) easements: If gross, can't enforce against future people; not transferable unless commercial
  - Gross: needs to be in writing
  - Example: Bean Grower's Assn has easement to put billboard on front loan. "EAT BEANS AND YOU'LL NEVER HAVE TO STOP FOR GAS"; that's GROSS; Bean Growers here is deriving purely a personal or commercial gain; no dominant property; right to place billboard is not giving Growers any benefit to their OWN land;
- **Transferability is key difference between them and main thing they ask on bar exam: Do they bind successors? If A1 sells to A2, is A2 bound?**
- **Easement appurtenant is transferred AUTOMATICALLY** with the dominant tenement, regardless of whether it is mentioned in transfer instrument (i.e., deed);
  - <u>Example</u>: A1 has easement to cut across land; 2 PARCELS; If A1, easement holder, sells her dominant tenement to A2, with no mention of easement, the easement still persists for A2.
  - Burden of easement also passes with servient land, unless the owner is a bona fide purchaser without notice of easement. If B1, servient property owner, sells his burdened land, the burden of that easement appurtenant passes to B2, unless the B2 is a BFP who took without notice and for value (go to real estate lecture)
- **Easement in gross is NOT transferable unless it is for commercial purposes.**
  - <u>Example</u>: "A" has an easement in gross to swim in pond. That is a personal advantage to A and is not transferable. But if easement to fish in pond, that is a commercial easement in gross so A can assign or transfer commercial easement in gross
  - <u>Example</u>: O deeds to next door neighbor A right to park in the parking lot. A then sells to B. Easement is in gross if under terms A can continue parking; easement is appurtenant if deed provided that any new owner succeeded to right to park

Affirmative Easement: How Create

Creation **PINGE** (reverse order)

- **GRANT**: Express grant in writing; Statute of Frauds applies
- **NECESSITY**: i.e., landlocked setting; easement by necessity if convey portion of land with no way out, except over grantor's remaining land.
  - Some states require a showing of reasonable necessity; other states like in TX, MA require strict necessity: if there is ANY way out, even if inconvenient, will not imply easement. If become landlocked later too bad.
- **IMPLICATION:**
  - **1) Prior Use; or 2) Necessity**
  - Sometimes there is a particular use that occurs on a parcel that ought to survive division of parcel. Courts imply easement from prior or existing use if the use was apparent at time of division and if parties expected that use would survive division b/c it was reasonably necessary to the dominant tenement's use and enjoyment;
  - If A owns 2 lots, and lot 1 is hooked up to sewer on lot 2. A sells lot 1 to B, with no mention of continuance of use of sewage drain located on lot 2. Court may imply easement if 1) previous use readily apparent; and 2) parties expected the use to survive division b/c necessary to B's continued use of lot. B has easement appurtenant;
  - Exception to SOF, so no writing required
  - **<u>Three requirements:</u> 1) land is being severed from common owner (divided up); 2) use of implied easement existed prior to severance; 3) and easement is reasonably necessary for enjoyment**
- **PRESCRIPTION**: Adverse Possession: COAH
- **Estoppel:** Easement may arise by estopped where A allows B to use A's land where A should reasonably foresee that B will substantially change position believing that permission will not be revoked and B in fact changes position
  - <u>Example</u>: O owns BA which has access to public road. A owns WA next door which is vacant. O orally grants A permission to use road. O knows that A plans to build house on WA. Easement by estoppel

Does Easement Bind Successor? WIN

- **Writing**: Statute of Frauds
- **Intent to Run**: include words like ”to successor owners” or “bind all heirs and assigns”; Intent can be implied by asking if easement is most useful if it binds anyone who owns the land. If easement is for egress and ingress it would be useful to landowner; If personal use (gross), not intended to bind successors
- **Notice to Servient Estate Holder (Burdened)**
  - Actual
  - Inquiry: visible signs of easement, like roads or pathway
  - Record: recorded in registry of deeds; can be imputed even if not do search by constructive notice

Termination of Easements

- **Estoppel:** Easement holder consents to servient's use of the easement in a manner inconsistent with the easement's use; the easement holder knows or should know that the servient owner, believing consent will not be revoked, will materially change position; and the servient substantially changes position in reliance by constructing improvements over the easement
- **Destruction of servient tenement**
- **Condemnation of servient tenement:** Govt can take the whole property and easement is extinguished; govt pays just compensation
- **Release** in writing given by easement holder to servient landowner
- **Abandonment**: 1) intent to abandon; and 2) subsequent nonuse. Must have identifiable and unambiguous act that would be inconsistent with continued use. Mere nonuse is not enough to show abandonment, though nonuse for a long time may give credence to representations that intend to abandon. Best evidence is a release.
- **Merger**: Someone becomes owner of both the dominant and servient estate so easement ceases.
- **Prescription**: Servient must use easement in a manner adverse to easement holder's right. Servient must prove her use of the property was inconsistent with use of easement. A fence blocking the easement might not be enough, but if a fence blocks the easement holder's anticipated use, that would be considered adverse.
- **Recording acts**: A BFP who takes without notice and for value is not bound by the easement. If creditor records before easement is recorded, they can foreclose. Buyer at foreclosure sale is protected under shelter rule and would not be bound by easement. If a state has a marketable title act, an easement recorded before the "root of title" would take land without the easement. Easement not terminated but not enforceable against BFP.
- **Terms of Grant**: Easement could be for a set number of years
- **Purpose for Easement Ends**: Often used to terminate easements implied by necessity when necessity ends such as there being an alternative way to enter the property
- **Forfeiture for misuse:** Extreme remedy; in most cases, if misuse, remedy is an injunction preventing misuse
- **Frustration of Purpose**: Law in most states is that easements are modified rather than terminated if circumstances changes, unlike covenants

Easement vs. License

- **Freely revocable**, privilege to enter land for certain purpose unless estoppel;
    - Examples: right to park, a ticket, right to post sign, right to Broadway show
- **Not subject to Statute of Frauds so no writing required**
    - Oral agreements can create licenses, i.e., if neighbor tells you that you have easement of right of way - that is really a license. Neighbor can revoke at any time
- Estoppel applies when licensee invested lots of money or labor and reliance on continuation.
- Terminates when licensor dies or servient estate transferred
- <u>Different from lease</u>: A license is non-exclusive right to "use" the premises whereas lease gives EXCLUSIVE possession; look to whether person is getting non-exclusive right limited to particular use or given right to occupy premises

Easement vs. Profit

- Entitles holder to enter servient tenement and take soil or other resources like minerals, timber, etc.
- Same rules as easements; can be appurtenant or gross
- Most are non-exclusive and often limited in quantity, number, time
- If exclusive may be assigned or apportioned
- If non-exclusive, may be assigned but not apportioned
- Similar to easements but can’t be created by necessity

Nonfreehold Estates - 1

- **Term of years tenancy:** tenancy for fixed duration that is agreed to in advance. Terminates automatically. *Estate liable* and must pay rent for rest of term. <u>If longer than 1 year, must be in writing to comply with Statute of Frauds</u>.
  - Example: **"***to T for ten years, starting March 1, 2021*."
- **Periodic tenancy:** Statute of fraud does not apply if less than 1 year. tenancy for set period that is automatically renewed for successive periods unless one party ends it by giving notice. Oral leases that provide for monthly rent are periodic. If term of years tenancy ends but tenant continues paying month to month rent, it converts into a periodic tenancy. *Estate liable if die*.
  - Time required to give notice depends on term of lease so 1 month notice for monthly lease; if year to year, then 6 months notice to terminate. If do not give notice, lease renews for another month.
  - Can arise by implication where 1) lease with no mention of duration but rent is at regular intervals; 2) oral term of years violates SOF and creates periodic tenancy; or 3) holdover tenant in residential lease.
  - Example: "*to T from month to month, starting March 1, 2021*."
  - Late notice is ineffective till next period, i.e., lease from Jan 1 to March 31, if give notice on March 5, lease not terminate until April 6.

Nonfreehold Estates - 2

- **Tenancy at will:** tenancy that lasts as long as both parties desire. Landlords must also give "reasonable notice" if want to end (often 30 days similar to periodic). *Death of party terminates the lease*. Unless parties expressly agree to at will, regular payment of rent will give implied periodic tenancy not tenancy at will.
  - Example: "*to T for as long as we both desire*."
- **Tenancy at sufferance (holdover tenant):** tenancy created when a person who rightfully took possession continues in possession after that right ends. Holdover tenant is really a legal designation so landlord can collect rent. These are usually short-lived and an implied periodic tenancy (month to month since not in writing) begins if start paying rent. *Terminates at death*.
  - Example*:* T remains in possession after his term of years tenancy ends. Landlord can renew for additional year even if one day over, though modern courts more lenient. If landlord refuses rent, then landlord can begin eviction proceedings.

Tenant's Duty to Pay Rent

What are landlord's options if tenant does not pay rent?

1) **If tenant still in possession**, landlord can 1) move to evict through judicial process and can recover rent until the tenant, who is now a tenant at sufferance, vacates; or 2) Landlord can continue relationship and sue for rent owed

Landlord can NEVER do self-help and change locks, etc.

2) **If tenant fails to pay rent and is out of possession**, tenant has wrongfully vacated with time left on lease. **Landlord has 3 options: SIR**

   1) <u>Surrender:</u> Landlord can choose to treat as implicit offer of surrender and lease is dissolved; if term is more than 1 year, acceptance of surrender must be in writing to satisfy SOF
   2) <u>Ignore:</u> Ignore the abandonment and hold tenant responsible for unpaid rent. This is minority position as most states require landlord to mitigate damages.
   3) <u>Re-Let:</u> Landlord can mitigate damages by reletting the premises and hold tenant liable for deficiency. Landlord does not actually have to find a substitute but at least must try.

At common law, tenant also had duty to make minor repairs, but most do not impose this duty.

Tenant’s Restrictions on Use

- **Illegal Uses**: Implied covenant not to use for illegal purposes (i.e., meth lab)
- **Duty not to commit waste**: Leave property intact with exception for normal wear and tear. If cause hole in the wall landlord can demand repair or ask for damages.
- **No removal of fixtures, except trade fixtures**: A fixture is an item of personal property permanently attached to a building or land. ***Fixtures becomes property of landlord*** even if tenant puts it there like if tenant builds a bookcase or puts in storm windows. If item can be removed easily without damage it is not a fixture. Tenant can contract around this or make claim for unjust enrichment.
- **How to know if it’s a fixture**: 1) Parties agreement; or 2) Tenant may remove if install so long as does not cause substantial damage to premises. This is an objective test. Fixtures are often construction materials incorporated into structure, electrical wiring and plumbing, and built-in bookcases. Lease can also control.
- ***Trade fixtures are an exception and used in commercial space such as kitchen appliances in a restaurant. These belong to the renter***. Strong presumption that trade fixtures are removeable and tenant will restore to original condition.
- **Duty not to cause a nuisance**
- **Covenants with a lease**: like covenant only to use for residential purpose

Landlord’s Duties

1) **Duty to deliver premises**

   American rule v. English rule: **Most states follow the English rule that requires landlord to give legal and actual possession at start of leasehold**. Thus if there is a holdover tenant there, landlord is in breach and tenant can sue for damages. Under the minority American rule, landlord only needs to give legal possession so if holdover tenant there, too bad for tenant.

2) **Duty to satisfy implied covenant of quiet enjoyment in both residential and commercial leases**; Breach by actually and wrongfully excluding the tenant from possession from all or part of premises; OR constructive eviction.

3) **Implied duty of habitability in residential leases only**

4) **Repair: In most states, residential leases, landlord has duty of repair even if lease puts it on tenant except for damages by tenant.** For commercial depends on lease.

5) **Landlord is not responsible for conduct of third parties**. But can be liable if attributable to landlord and if it interferes with quiet enjoyment. If conduct can be legally controlled by the landlord, then the landlord is liable. **If other renters are violating their leases and landlord could evict them, then landlord may be liable**. This is the modern trend; at common law, landlord is not responsible.

6) **Landlord can’t permit a nuisance on the property**. If upstairs apartment has music at all hours of night, it could be a nuisance.

7) **Landlord also must control common areas**.

8) **Landlord’s duty to refrain from violating doctrine of retaliatory eviction**

   If whistleblower tenant, landlord can’t raise rent, end lease, harass tenant, etc. States set by statute the period of time during which the presumption of retaliation applies (usually 6 months-2 years from date of complaint).

Landlord Tort Liability

Landlords are not generally held liable for personal injuries occurring on the premises. But exceptions:

1) **Concealment**: Liable if fail to disclose what L is aware of; if should have known of defect, not just actual knowledge; L has no duty to inspect however. Liable not only to T but also to those on premises with T's consent.
2) **Common areas**: Must prevent unauthorized entrance to common areas, like liable if mugging in elevator.
3) **Repairs negligently performed: If negligent AND lull T into false security or make condition worse**. If not make condition worse or lull T, then courts split.
4) **Repair clause**: If clause in lease requires L to make repairs, then L liable if fail to exercise reasonable care to T if injured as well as third parties who are on premises with T's consent
5) **Breach of building codes and the like**
6) **Admission to the public**: If L has reason to believe that T will hold open to public, and L knows of dangerous condition, then L liable

Also some courts reject exceptions and just have to show L failed to use reasonable care, and that L's failure proximately caused the injury.

Most states refuse to enforce exculpatory clauses that relieve L of liability for negligence.

Implied Warranty of Habitability

Standard

- The property must meet “bare living requirements” and be “fit for human occupation.”
- “Substantial compliance with building and housing code standards” may be enough. But a code violation is not necessary to establish a breach if the defect impacts “health or safety.”
- “Minor deficiencies” do not breach the warranty.
- Residential only; does NOT apply to commercial leases

Procedure

- Give **notice** to the landlord.
- Wait a reasonable time for the landlord to **fix** the problem.
- **Don’t have to move out**.

Tenant's Remedies for Breach of Warranty of Habitability

MR3

M: **Move out** and terminate after putting L on notice and L not making repairs.

R: **Repair and deduct** from future rent. Must give L notice and give time for cure.

R: **Reduce rent or withhold rent until cure**: Reduce rent to fair market value in view of defects or withhold rent until court determines. Should place in escrow account.

R: **Remain** and sue for damages.

How is this different from quiet enjoyment? Applies only to residential. Also for quiet enjoyment, tenant has to move out; this is not a requirement for breach of warranty of habitability

Constructive Eviction/Quiet Enjoyment

Three elements: SING

SI: Substantial Interference: Tenant's use and enjoyment is substantially interfered with by the landlord. It does not mean permanent interference. Standard is satisfied if chronic or recurrent problem that is incompatible with tenant's possession and enjoyment.

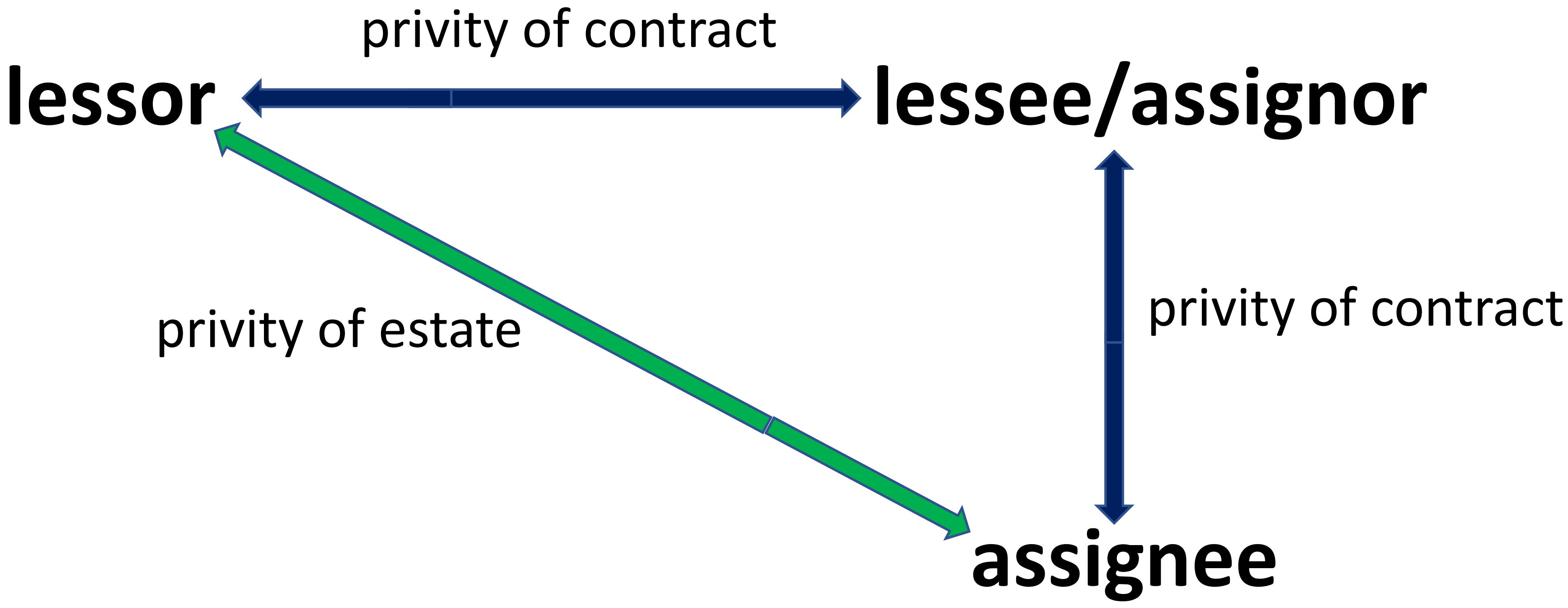
N: Notice: Tenant must give notice to landlord and give reasonable time.

G: Goodbye: Usually tenant must vacate within reasonable time.

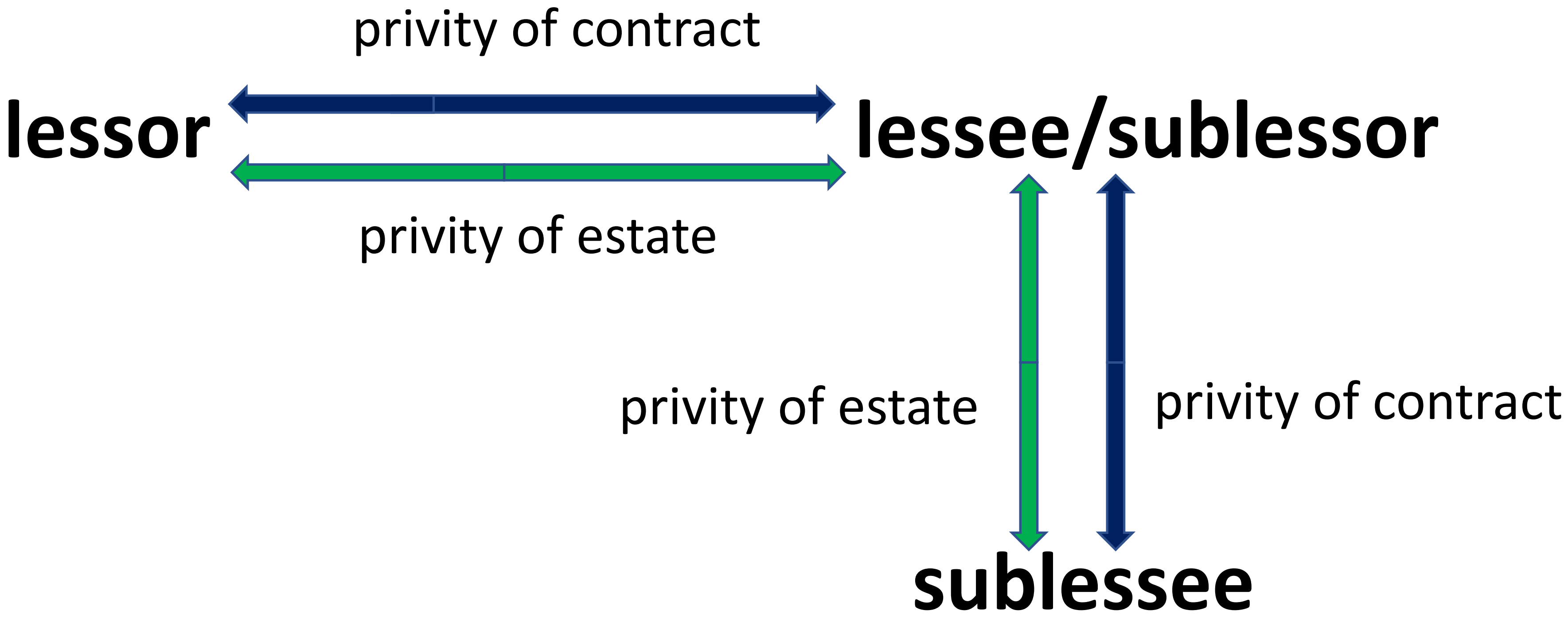
- Applies to BOTH commercial and residential leases unlike habitability which is just residential

- MUST VACATE

Assignment


privity of contract
lessor
lessee/assignor
privity of estate
privity of contract
assignee

Sublease


privity of contract
lessor
lessee/sublessor
privity of estate
privity of estate
privity of contract
sublessee

Assignments -1

- **In assignment (T1 assigns to T2), if T2 does not pay rent, Landlord can come after both T1 and T2. If this were a sublease instead of an assignment, Landlord could only go after T1 if T2 does not pay rent.**
- **Original tenant is bound to keep promise both by privity of contract and privity of estate with original L**. If T1 assigns his interest to T2, privity of estate terminates but privity of contract remains so L may still sue him if promise to pay rent is not kept. Mere fact that L accepts rent from T2 is not enough to release T from contractual liability.
- The tenant essentially is a surety to the new tenant and while T2 is primarily responsible, T1 is secondarily liable. If L sues T1, T1 can seek to sue T2 for damages. This is true even if T2 does not expressly assume lease duties.
- T2's liability to L is based on privity of estate; during the time he is in possession of the premises, he is liable for performances of promises made by L whose burden runs with the land, i.e., L leases to T1. When T2 is in possession, he is liable to L for rent, even if he did not promise anyone. T2 must honor so long as in privity of estate with L. But that liability only applies for the period when T1 is actually in possession. T2 has no liability if T1 breaches or prior assignees, and no liability for T3, T4, etc., i.e., L leases to T1. After 1 year, T1 assigns to T2. T2 has no dealings with L and makes no promise to anyone. T2 lives for 6 months there, then assigns to T3, who holds for remainder of lease. T2 is liable only for back rent during 6 months he was in possession, not the time T3 was in possession.

Assignments -2

- Same principles apply when L1 assigns to L2. L1 rents to T1 then sells to L2. T1 must pay rent to new landlord L2. This occurs even if L1 did not expressly assign his rights to collect rent to L2 as it stems from privity of estate between L2 and T1. L1 loses his right to sue for rents after the sale because privity of contract after sale is between T1 and L2.
- After assignment, L2 is liable for performance of any promises made by L1 whose burden runs with the land. So if L1 promised T1 to make repairs, L2 is liable for that promise. This is true even if premises were in disrepair at time of sale. So have repair application, implied warranty of habitability. If L1 made a promise to T1 that did not concern the land, then L2 does not need to keep that promise.

Sublease

- **Landlord can only go after original tenant, not the sublessee if sublessee fails to pay rent.**
- **Subleases do not create contractual relationship between parties**. L and T1 enter into 2 year lease, privity of estate and privity of contract. T1 subleases to T2 for 6 months and T1 keeps 6 months. L and T1 remain in privity of estate and there is no privity of estate between L and T2. If T2 fails to pay rent and therefore T1 fails to pay rent, L can sue T1 but not T2.
- **If this was an assignment, then L could sue T2 for rent.**
- L can always sue for injunction to get T2 out of premises; L can always sue T1 for unpaid rent regardless; with assignment, L can sue BOTH T1 and T2; with sublease, can only sue T1

Limitations on Assignment and Sublease

- **If lease prohibits, tenant can still do, but landlord can terminate lease.**
- **Landlord permission:** Standard is that landlord can only ***withhold permission for commercially reasonable grounds*** (majority rule). Some states (minority) say can withhold at landlord's discretion
- **Waiver by landlord:** Landlord knows of assignment/sublease and does not object. ***When landlord consents or waives, then she cannot object to a subsequent assignment. This prohibition on subsequent assignment does NOT apply to subsequent subleases***. The landlord can object to a second sublease even if they approved the first one.

Concurrent Estates

- **Joint tenancy**: Need express words, 4 unities, not severed in lien state while in title states mortgage severs and they become TIC; if one dies, the other gets without a will; terminate via inter vivos transfer, mortgage (title state only), foreclosure
- **TIC**: No right to collect rent (unless ousted where have to demand access), right to possession, can't oust, each responsible for pro rata share of carrying costs, can seek contribution for repairs, pro rata for carrying costs, no waste, no right to seek money for improvements
- **Tenancy by entirety**: Same as joint tenancy but for married; also 1) creditors of one spouse cannot reach the tenancy so long as other spouse remains alive; 2) a unilateral conveyance by one spouse is null (can't convey without permission)
  - <u>Example</u>: if Gordon and Jane are married and have land as TBE, if Gordon transfers to Bob, it is a nullity because you can't disrupt or sever the marital estate - at all. With a JTWRS, you can sever by conveyance. Suppose now Gordon gets in car accident and injured person tries to come after the married couple's property. Creditors can't get if it is held as TBE.

Concurrent Ownership Basics

	Tenancy in common	Joint tenancy	Tenancy by the entirety
Traditional requirements	Transfer to two or more persons creates a tenancy in common, unless instrument shows different intent	Intent to create a joint tenancy shown in instrument and the "four unities" "joint tenant w/ right of survivorship"	Intent to create a tenancy by the entirety shown in instrument, the "four unities," and a valid marriage
Right of survivorship?	No	Yes	Yes
Termination	Partition; agreement of owners	Transfer by any owner severs joint tenancy; partition; agreement of owners; death; murder; foreclosure sale, mortgage (title	Death; divorce; agreement of spouses

Example

Example: O conveys Blackacre to A and B as TIC, each owning 50%. A dies, devising his interest to C. **C now owns a 50% interest with B as TIC.**

Now suppose A dies without a will with 2 children, D and E. D and E take A's interest under the intestacy laws; **B owns 50%, D owns 25% and E owns 25%.**

By contrast, if this was a JTWRS, then B gets it, not A's heirs.

Terminating the Joint Tenancy: *Inter Vivos* Conveyance

- <u>*Inter vivos* sale or conveyance (before death):</u> One joint tenancy's sale severs the 4 unities. The person who buys from the selling joint tenant then becomes a tenant-in-common ("TIC"). This can be done without knowledge of the other joint tenants.

Example: O conveys Blackacre to "Abby, Lauren, and Ted as JTWRS." Each owns 1/3 share plus right to enjoy and use the whole. Now if Ted sells to Lily, this sale would partially severs the joint tenancy. Lily gets Ted's 1/3 interest and becomes TIC with Abby and Lauren. Abby and Lauren still retain 1/3 each as JTWRS between each other.

If Abby dies and leaves behind heir Lincoln, Abby's 1/3 interest still goes automatically to Lauren without probate and vice versa. In essence, Lauren takes Lincoln's share because a JTWRS is neither devisable nor descendible; it passes automatically to the surviving joint tenant. Then Lauren holds 2/3 with Lily, who owns 1/3, as TIC w/ each other.

But if Lily dies, Lily's 1/3 interest goes to Lily's heirs because Lily is a TIC.

Suppose Lauren dies. Now suppose Abby, Ted and Lily survive. Abby sells to Mary. Mary, Ted, and Lily are now all TIC; in order to have a joint tenancy, you need more than 1 person.

Terminating the Joint Tenancy: Mortgage & Foreclosure

Mortgage: Does one tenant's grant of a mortgage to a third party sever the joint tenancy? If debtor fails to pay, the creditor can foreclose on property. Answer depends on jurisdiction

- ***Lien theory*** (majority, NY): **Mortgage *does not sever* the joint tenancy**; only when the interest is sold following foreclosure proceedings does a severance occur**. If the mortgaging joint tenant dies, mortgage is extinguished (goes away)**. If the mortgaging joint tenant is the survivor the mortgage extends and the bank can collect at a foreclosure sale.

Example: A and B joint tenants. A gets mortgage; this does not sever the joint tenancy in a lien state; B has right of survivorship. Now suppose A dies. B owns it free and clear in a lien state; in other words, B owns the land w/ no mortgage on it.

- ***Title theory*** (minority): **the mortgage *severs* the joint tenancy and it is transitioned to a TIC**.

Above Example: Now suppose A dies. What happens to the mortgage? In lien states, depends on which joint tenant dies (see above); if a title state, joint tenancy is severed, so death has no effect on the mortgage which remains as an encumbrance on the mortgagor's TIC share.

Example: A and B joint tenants. A borrows $5K and gives bank mortgage on land. Joint tenancy severed under title theory and A and B own as TIC. A pays off his debt and discharges the mortgage. A dies without a will. A's interest passes to her heirs; B has no right of survivorship, he only gets his ½ interest.

Party that acquires property through foreclosure (i.e., like the bank) acquires the joint tenant's interest as a TIC.

- If real estate held in JTWRS, **foreclosure severs the debtor's joint tenancy**. Purchaser at foreclosure sale acquires debtors' interest as TIC. Foreclosure of mortgaging joint tenant's interest severs the JTWRS and converts mortgagor's interest into a TIC; foreclosing joint tenant can get sale proceeds from TIC interest; interest of remaining joint tenants not affected

Example: O conveys land to "A, B, and C as JTWRS." X, creditor of A, obtains a judgment lien against A. Purchaser of A's undivided 1/3 share at the foreclosure sale would acquire A's 1/3 share as a TIC with the joint tenants, B and C. B and C remain joint tenants against each other with 1/3 undivided interest.

Terminating the Joint Tenancy: Mortgage AND Foreclosure

Example: Joanne and Joe hold Blackacre as JTWRS. Joanne executes a mortgage in a lien theory state and defaults. The creditor brings a foreclosure action and the court orders Blackacre be sold. Joanne bids on property at auction and gets title in fee simple. Joe comes forward and says he has a claim too in Blackacre. Joanne sues Joe in quiet title. Who wins?

Joe wins. The mortgage does not sever the joint tenancy in a lien state. However, when the property went into foreclosure, a severance occurred and Joe and Joanne become TIC. Only Joanne's interest was auctioned.

What if third party buys at auction? Same result. Only Joanne's interest is sold at auction. Sale severed joint tenancy. After the sale, the third party becomes TIC with Joe.

Adverse Possession

- COAH: Continuous (as owner would use it normally), Open, Adverse, Hostile-no permission
- <u>On bar exam, read the statute; they will always give you a statute for statutory period, usually 5 or 10 years</u>
  - Stops clock if true owner interrupts
- Objective test (good faith is minority rule)
- Can tack if in privity (can't tack if just neighbors) (see next slide)
- Disabilities toll if disability exists at time AP begins; can't be tacked if multiple disabilities or if disability arises later; disability must exist at start of AP period
- Defective deeds and AP: If defective deed, get title to whole lot described in deed even if only actually AP one acre (color of title); If AP did not enter under color of title w/ proper deed, her claim only normally extends to the land actually occupied or controlled so long as COAH met. But with "color of title" or constructive AP, if there is a defective deed she is AP of ENTIRE land described in the instrument provided it is recognized as one piece of land. She has "constructive AP" on part of land she does not actually occupy. See problem 2 slides.
- Not subject to recording acts; AP wins in first in time, first in right
- Prescriptive easement: Can arise when longstanding non-permissive use, but conduct not enough for AP for ownership; prescriptive easement gives trespasser the right to use property of another in way way used before without interference. Same requirements as AP but two exceptions: 1) Not possession but use of land; 2) Not exclusive possession strictly; AP of easement may use the land at same time as true owner

“Tacking” by Successive AP Problem

- To establish continuous possession, **can tack own period to a predecessor in interest so long as there *is privity of estate***
- Privity of estate: Any trx where there is voluntary transfer either an estate in land or physical possession (i.e., will, deed, contract, blood); If there is an OUTSTER there is no privity of estate
- Example: O owns BA. In 1981 “A” enters adversely. In 1994 “A” sells her interest to “B” who holds adversely to O. In 1998, “B” dies and son “C” who possesses and holds adversely. SOL is 20 years in this state.
- In 2001, “C” gets title by AP – 13 years of ”A” + 4 years of “B” + 3 years of “C” are tacked. Privity b/w A and B b/c sale. Privity b/w B and C b/c blood.
- Comes up most often when there are neighbors who try to tack on. **Random neighbors cannot be tacked w/o privity.**

Forged or Defective Deeds and AP Problem

- “A” believes the signature is genuine. Deed describes BA, which is 30 acres. ”A” builds farmhouse on 5 acres of BA and COAH elements only on 5 acres. They do nothing on the remaining 25 acres.
- ”A” has actual adverse possession of BA and constructive possession of the rest of BA.
- “A” does not own the land by deed b/c deed forged. So if there is later an action to quiet title by original O or someone else, ”A” can get ALL of BA by AP even though they really only adversely 5 acres under color of title due to the defective deed. “A” would thus get all 30 acres. But if true owner remained on portion of BA (suppose O remained on one acre), then that one acre would be excluded from “A’s” share (”A” would get 29 acres). This is all assuming land is contiguous.

Adverse Possession and Future Interests

- **AP operates only against present interests, not future ones**
- Clock starts when become possessory ; AP does not run against future interests that exist at time AP begins, but it does apply to future interests created from a fee simple absolute after the AP has begun.
- Ex: O owns BA. In 1989, O conveys BA to Child for life, remainder to Grandchild (future interest). In 1990 A enters adversely. SOL is 10 years. In 2007, Child dies. Grandchild gets possession and has until 2017 (10 years from 2007) to eject A. SOL counts for A only against Child, not Grandchild. SOL has to start anew for Grandchild when it becomes possessory.
- But suppose A entered BA in 1988, *before* O created the remainder, then the SOL would start to run in 1988 against O and his successors and A would get title in 1998. Grandchild never had chance to evict A, but Grandchild is a successor in interest to O and AP began *before* remainder created. Grandchild still has options. She can ask Child to bring ejectment action against A. If Child refuses, Grandchild can bring action for waste against Child.
- **If automatic reverter (like with fee simple determinable), clock starts to run when triggering event happens (to A so long as use as a church; as soon as it is used as a church, SOL can start if there is an AP).**
- **If fee simple subject to condition subsequent clock does not run until O exercises right to reenter. (to A, but only if used as a Church; there, SOL does not start until O tries to reenter if it is not used as a Church).**
- Harder to get stuff by AP if FSSCS than FSD since longer SOL for FSSCS since O has to affirmatively act for AP to start

Future Interests

- Grantor vs. grantee
- If grantor, consider whether it is a reversion following a life estate/term of years, a possibility of reverter following fee simple determinable (magic words/condition before the comma/period- words of duration); or right of reentry after fee simple subject to condition subsequent (magic words/condition AFTER the comma/period)
  - O to A so long as A marries. A has FSD, O has possibility of reverter. Happens automatically upon condition.
  - O to A, but if A drinks, then O has a right to reenter: A has a FSSCS, O has right to reenter. O has option whether to retake the land when condition happens.
  - O to A for life. A has life estate, O has a reversion.
  - O to A, but if A drinks, then to B. A has a fee subject to B having an executory interest.
  - O to A for life, then to B. A has life estate, B has vested remainder (certain to take).
  - O to A for life, then to B if B graduates college. A has life estate, B has contingent remainder.
- If grantee, on right side, consider whether it is the first interest or the second
  - If first, it's a fee simple absolute, FSD, FSSCS, life estate, term of years.
  - If second, then it's a remainder (could be subject to open and be contingent if in a class) or an executory interest. It's a remainder if it follows a life estate or term of years and will definitely happen when that term ends. It's an executory interest if it cuts short prior interest

Rule Against Perpetuities

- No interest is good unless it must vest, if at all, no latter than 21 years after some life in being at the time of the creation of the interest
- We want to give people only about 2 generations to tie up wealth; if it is more than 2 generations, it starts to look like a dynasty
- Does not apply to interests to grantor and corresponding interests to A (first grantee on right side) (life estate or term of years or life estate/reversion, possibility of reverter/fee simple determinable, right of reentry/fee simple subject to condition subsequent)
- Only applies to contingent remainders, executory interests, and open classes
- Be on the lookout when have open class especially when combined w/ age limit greater than 21, gifts to T's own grandchildren more than 21 years in future (up to 21 years for own grandchildren is OK), or gifts to someone else's children more than 21 years in the future, or open class concerning someone else's grandchildren even if less than 21, or old woman giving birth, unnamed widows, lazy executors, or executory interests that have vague or undefined time conditions
- If everyone in the gift has an actual name and the name is in the gift itself it is valid
- <u>Know what happens once you strike the violated interests</u>. Oftentimes, you strike the interest and are left w/ O having a reversion if the only interest left is a life estate. If the only interest left is a FSD, then O has a possibility of reverter.
- If have to guess, it's more likely than not that grantor has a reversion.

What Property Interests are Subject to RAP

- Property interest created in a grantee only : 1) contingent remainder that is not vested; or 2) executory interests; or 3) vested remainders subject to open (like to a class like "all my grandchildren")
- **Thus RAP does NOT apply to future interest of grantor such as reversion, possibility of reverter, right of reentry. Does not apply to fee simple determinable or fee simple subject to condition subsequent or life estate.**
- If you have identified that's a FSD or FSSCD then the answer won't be anything to do with RAP. On July 2022 bar they confused people by referring in question to RAP but it was an interest in grantor so RAP did not even apply.

“Lives in Being”

- **Lives must be alive at time of creation of the instrument+21 years**; measuring lives need not be given a beneficial interest in the property and they may not even be referred to in instrument, but there must be a connection between the vesting or failure of the interest
- To find the measuring life, look at the contingency, and ask “If this interest is to vest, what must happen?” Then ask “Who could affect this?”
- Use the contingency to find the measuring life.
- “To A for life, then to such of A’s children that attain age 21.” Measuring life is A. All of A’s children are going to attain age 21, if at all, within 21 years of A’s death.

“Lives in Being”

- **Measuring lives are often listed in the grant. Look there first and see if any of them affects vesting.**
- “To A for life, then to B’s children whenever born.” Ask can you prove the remainder to B’s children will happen within life of A or B? It will vest within B’s lifetime because by end of B’s life we will know all their children, so B is the validating life.
- **Sometimes validating life is not one of the people listed**. T >>”to such of my grandchildren that shall attain age 21.” Validating lives are T’s children as you can prove within 21 after the deaths of T’s children whether gift good so this one is valid.

How Analyze RAP: Only for CR especially that can be opened (like to grandchildren) or EI

- **Move 1: Assume there could be an afterborn child born after the effective date (like after T dies).**
- **Move 2: Assume everyone else alive on the effective date who can affect the contingency are killed off. This eliminates all people alive on effective date who can affect the contingency**
- **Move 3: 21 years? Then ask whether the contingency MUST be resolved within 21 years.** Many times it can't. Our afterborn child can satisfy the contingency but we can't use them as a measuring life since they were not alive at the effective date.
- ***Key is Move 1. If it can be made, then Move 2 is a given, and it's invalid under RAP.***
- We also assume any person alive no matter how old can always have more children (fertile octogenarian) and we also assume the slaughter of the innocents – everyone alive on the effective date can all die together at any time. We also assume there is no fertility treatments- can't freeze eggs/sperm
- What probably might happen, what did in fact happen, what a normal person would do is irrelevant; all that matters is ***what might happen however remote***
- ***Most likely to be an issue when there are grandchildren or when the problem talks about things happening more than 21 years in future***
- ***Don't just focus on whether it violates the rule. Maybe it violates it, but the question is asking what happens. When the RAP is violated, the interest is struck entirely (draw line through it). Then interpret the rest of the conveyance. Oftentimes interest is struck out and goes back to O as a reversion.***
- **Short and Happy Guide to RAP on West describes this in detail**
- **Got this from Short and Happy Guide to RAP (West)**

How to Analyze RAP

- **Is there a person named that the contingency applies to? If so, it’s valid because that person is named. If there are actual names to all the people for all the gifts, it does not violate the RAP.**
- **Is it more than 2 generations or does it fit the fact pattern of one of the classic traps?**
  - When there are 3 generations in the problem and no names are listed (i.e., gifts to grandchildren of a person now alive)
  - Age Contingency in excess of 21 years
  - When there is a class (like “my grandchildren) and the grandchildren are not directly named
  - Fertile octogenarian
  - Unborn widow
  - Slothful executor
  - Executory interests w/ no or vague time limits or conditions

Seven Classic Traps

- Age Contingency in excess of 21 years
- When there is a class (like “my grandchildren) and the grandchildren are not directly named
- Fertile octogenarian
- Unborn widow
- Slothful executor
- Executory interests w/ no or vague time limits

#1: Age Contingency in Excess of 21 Years to Grandchildren

- Any gift to second generation must be resolved within 21 years. So OK to give to grandchildren in a will or children in an irrevocable trust.
- Ok to give gift to child for 25 or 30 years because obviously you gave birth to the child so the child is alive when you wrote the will
- But can't give gifts to grandchildren for ages greater than 21; Also if it not YOUR grandchild, but someone else's, that also probably violates.
- A bequeaths "To my children, then to my grandchildren who reach the age of 25."
    - It is a will, so effective date is A's death.
    - Move 1: Assume on that date A has one child B and grandchild C who is born after effective date. C is the afterborn child.
    - Move 2: Kill off B the child
    - Move 3: Not be able to resolve contingency of C reaching 25 years within 21 years of any lives in being. B was killed off so C reaching age 25 will occur after everyone who was alive at the time of the will execution is already dead
    - If problem said 21 instead of 25 would be valid; there, the contingency of C reaching age 21 would have been resolved w/in 21 years of B's death.
    - Also would be valid if it mentioned the grandchild by name because then they would not be an afterborn child. "to my grandchild Sue when they reach 90" is valid
    - If open terms like "grandchild" are used, there can be afterborn grandchildren where contingency resolved more than 21 years after lives in in being

#2: Age Contingency Beyond Age 21 in Open Class

- Gift talks about your grandchildren or other people’s children or grandchildren
- “To A for life, then to such of A’s children to live to attain age 25”
- A has 2 children, X and Y.
- A has a life estate, there is a contingent remainder in A’s children who attain age 25 and a reversion in O if no child reaches 25
- Violates RAP; A might have another child Z; before this child reaches age 4, A, X, and Y may die; Z may live to age 25 more than 21 years after the lives in being

Grandchildren of a Person Now Alive

- OK to give in a will to your own grandchildren who reach 21; but if giving to another person's grandchildren, invalid
- "To the children of A for their life, then to the grandchildren of A who reach the age of 21." A is your friend and is alive on effective date.
- Three generations. Move 1- Assume C is an afterborn child of A. Then Move 2, assume A dies as well as any other children A had that were alive on effective date; then Move 3, assume C has a child (a grandchild of A) more than 21 years later. Invalid.
- Now if A was dead on effective date, then it's valid since then we have only 2 generations and no afterborn child. A's children are validating lives and we will know during the life of A's children whether or not they have children.
- Also would be valid if we listed the children and grandchildren by name. Using open-ended "grandchildren" is what is causing the issue

#3: Fertile Octogenarian

- Assume that person can have children so long as they are alive even if 80 years old or have hysterectomy or vasectomy
- Suppose irrevocable trust “life estate in A, then to children of A, then to the grandchildren of A who reach 22.” A is 80 years old.
- Move 1: Even though A is 80 we presume she can have more children so there is a possibility of an afterborn child. Then Move 2- kill off A and all her children and grandchildren born before effective date; then Move 3, ask whether our afterborn child will reach age 21 within 21 years.

#4: Unborn Widow/Widower

- A gives bequest ”to my son, A, for life, then to my son’s widow for life, then to BU.” Assume son is married to B.
- Move 1: Even though A is married to B, it is possible the “widow” is a second person who is not alive now and is thus born after the effective date. While this is unlikely because there would be a large age difference it is still possible. So assume A’s widow is actually a second person C who was born after the effective date. We assume B dies and A marries C.
- Move 2: Then kill off A, leaving C as the widow.
- Move 3: C, the unborn widow, may die more than 21 years after the effective date. So the interest to BU is stricken, C the widow gets a life estate, and it reverts back to T’s estate. Remainder to BU is what is struck out. Interest to C the widow is ok since her interest vests within the life of her husband A.
- This can all be avoided if we just name the widow or widower and this would make them the measuring life. If we instead said my son’s widow Wendy, then there would be no RAP issue.

#4: Unborn Widow/Widower

- “To A for life, then to his widow for life, and on the death of A’s widow to such of A’s descendants then living.”
- A has a life estate; contingent remainder in life estate for widow; contingent remainder in fee simple for A’s descendants; O has a reversion.
- Widow remainder violates RAP. Although A is now married he could divorce or current wife may die and he may marry a new women who is now NOT alive+21 years. The widow might live for more than 21 years after the death of all lives in being, then die.

#5: Slothful Executor

- T>> “To A upon the distribution of my estate”
- It’s possible that the estate won’t be administered for a very long time, so it may not happen within 21 years of lives in being. There is no validating life here
- Will may not be probated for many years or later than lives in being+21 years; no person’s lifetime is connected to the transfer, so we can’t use a life in being; we use the period in gross of 21 years. The fact that will is probated 3 wills after death does not matter. It matters what COULD happen not what DOES happen.
- Wars that never end “When WWII ends”; fact that WWII ended is irrelevant. It might have gone on for 100 years.
- Other examples that would also be void: “upon the probate of the will,” “when a trust is formed,”
- You can avoid the problem by tying the event to a particular person

#7: Executory Interest w/ No or Vague Conditions or Time Limits

- **Executory interests following defeasible fee violates the Rule**; If executory interests with no time limit within which it must vest. Effect on remaining estate depends on if it is a determinable fee or condition subsequent. If defeasible will terminate upon happening of event and grantor gets possibility of reverter; while if condition subsequent, the condition is stricken and becomes fee simple absolute
- “To J for so long as no pot is smoked on premises; and if pot is smoked, to C”: C has an executory interest in fee simple, it violates the RAP. This leaves a fee simple determinable in J and possibility of reverter in O.
- “To J, provided, however that if pot is smoked, then to C.” J has fee simple subject to executory interest; C violates the RAP. J has a fee simple absolute here. When condition subsequent is used, O does not have a right of reentry unless specifically created.

Interests Exempt under Rule

- **Gifts to MULTIPLE Charities** – "To Charity A, but if alcohol is served, then to Charity B"
  - Normally B would be an executory interest void under RAP
  - But because **<u>BOTH A and B are charities</u>**, it is not void;
  - If **<u>either</u>** is a private person, then the rule is violated; So the following would violate: "to A, but if alcohol is served, then to Charity B" OR "to Charity A, but if alcohol is served, to B."; it's only when BOTH are charities that it is OK
- **Vested Interests**
- **Reversionary Interests** (goes back to Grantor); see slide before nothing that if reversion, possibility of reverter, right of reenty, FSD, or FSSCS no RAP issue

If violate the Rule interest is strictly entirely. Then analyze who gets. Often it goes back to O as a reversion. If have to guess and you have one of the 6 traps, choose O gets a reversion.

Class Gifts: Bad as to One, Bad as to All

- When does the class close? Can close physiologically or can close as a matter of "convenience"
- Could be all members resolved are saved or can be "bad as to one, bad as to all." Common law adopts "bad as to one bad as to all" meaning unless all members are valid under RAP no one is valid.
- Ex: "To A for life, then to A's children for their lives, then to A's grandchildren who reach the age of 25." Assume there are 2 grandchildren B and C. B is 24 and C is 21. Since B and C are alive now their fate is resolved within perpetuities period. If that's all it took then entire class gift would be valid. But other grandchildren could still be born later, so for these afterborn children the gift would be invalid.
- Rule not applied to save gift for B and C; instead it's an "all or nothing" approach where since there is a possibility of an afterborn grandchild the gift to grandchildren gets struck out. So it reads "to A for life, then to A's children for their lives." After that it goes back to T's heirs as a reversion.

Class Gifts: Bad as to One, Bad as to All

- **Vested remainders subject to open often violate the Rule**. All or nothing class gift rule requires that 1) class must close within RAP period; and 2) all conditions precedent for EVERY member of the class must be satisfied within RAP period. If it is possible that a disposition may vest remotely for ANY member of the class it is void under RAP
- Why? Class gift is not vested until all members known and have vested interests because only at this point is title marketable.
- “to A for life, then to such of A’s children to live to attain age 35.” A has two children B and C, age 33 and 38. A has a life estate, C has a vested remainder subject to open. A’s other children have a contingent remainder. The CR violates the RAP. Entire class gift is void to children since bad as to one, bad to all. A might have another child Z. O has a reversion instead and class gift is stricken entirely.

Other Property Concepts Covered in Other Subjects

- Zoning: Local and state can regulate subject to Constitution (i.e., due process, equal protection clauses)
- Eminent domain: Congress has the power to take private property for public use (Takings Clause); need nexus b/w legitimate state interest and conditions on property owner; government must provide just compensation
- Nuisance (tort law)
- Trespass (tort and criminal law)
- Water rights (riparian, waterways, groundwater, support)
- Wills (heavy on essay)
- Trusts (heavy on essay)

Nuisance

- Private nuisance: A substantial and unreasonable interference with an individual’s use and enjoyment of their land
  - Balancing test to determine substantial/unreasonable interference:
    - Value of D’s activity
    - Whether there are alternatives
    - Nature of locality
    - Extent of P’s injury
    - Who was there first
  - Remedy: Injunction; P must prove that suffering or will suffer irreparable harm and damages are inadequate
- Public nuisance: An unreasonable interference with a right common to the general public (i.e., health, safety)
  - For a private individual to recover damages, they must have suffered harm different from that suffered by other members of the public

Zoning

- If not compliant with zoning ordinance:
  - Nonconforming use
  - Variance: Permission by the local zoning authorities to use property in a manner forbidden by the zoning ordinance in order to alleviate conditions peculiar to a particular parcel of property
    - Two types: Area restriction, use restriction
  - Special Use Permit: Required for uses in an area not zoned for those uses, but which would be beneficial to the public welfare and compatible with the area
  - Conditional Use Permit: Required for uses in an area not zoned for those uses, but which would be beneficial to the public welfare and compatible with the area if certain conditions are met

Trespass

- Trespass to land: Intentional act that causes a physical invasion of P’s land and interferes with P’s possessory interest in the land
- Trespass to chattels: Intentional interference with P’s chattel, causing damages
  - Unlike trespass to land, P must prove <u>actual damages</u>

Support Rights

- Lateral Support
  - General rule: A landowner has an absolute right to lateral support, and the adjoining landowner will be strictly liable for any damages suffered (i.e., subsidence)
  - But if the land has been <u>improved</u>, the landowner may only be liable if there was negligence
- Subjacent Support: Underground landowner liable for damages to subsequently erected buildings only if they were negligent

Water Rights

- Riparian View (majority): Anyone who is within the watershed has a right to make reasonable use of the water
- Prior Appropriation/Use View (minority): Right to use the water awarded to the first person to take the water for beneficial purposes
- Diffuse Surface Water:
    - Common Enemy Rule (Eastern states): Flood water can be diverted by any method onto another's land
    - Civil Law Rule (Western states): Not allowed to interfere with any surface water
    - Reasonable Use Rule: Surface water can be diverted onto another's land if use reasonable means

Trusts

- A fiduciary relationship where one party (i.e., the trustee) holds legal title to property for the benefit of another (i.e., the beneficiary) who holds equitable title
- Parties: Settlor, trustee, beneficiaries (i.e., income, remainder)
- Types: *Inter vivos*, testamentary, Totten, charitable (*cy pres* doctrine), implied

Wills

- Intestacy: Per capita by representation/per stirpes v. per capita by generation
- Ademption, lapse and anti-lapse statute: Anti-lapse only applies to save a gift to blood relatives who left issue; also exoneration
- Requirements for valid will: Over 18, signed by testator in front of 2 witnesses; if not meet, holographic will possible or if miss one minor requirement can try to argue it’s still valid
- Will revocation: Codicil/new will, tear up, dependent relative revocation (if mistaken about will 1)
- Will substitutes (what can be given outside will): Joint tenancy/TBE, causa mortis gifts
- Will challenges

What is a Will

- Testate v. intestate
  - ”Devisees” take real property under a will; “heirs” inherit property not disposed of by will through intestacy statute (heirs can be spouse, children, not just lineal descendants)
  - A living people have no heirs – only heirs apparent
  - Adopted children counted same as other children
- To ”bequeath” is to leave personal property under a will; those who are bequeathed personal property are legatees
- “Issue” is the lineal descendants
- “Escheat”: property goes to the state when have no heirs or devisees
- Wills last forever unless changed or cancelled when living
- Can amend a will by a codicil or by making new will
- Holographic (handwritten) will, nuncupative (oral) will
- In non-community property states, can’t disinherit your spouse; they can take an **elective share**
- Many assets are not disposed of by will or estate process/probate
  - Joint tenancy
  - Held in trust
  - Named Beneficiaries of retirement, life insurance
  - Joint Bank accounts, payable on death
  - Gift causa mortis: gift given if death imminent and made in contemplation of death and you die of that disease

Key Parts of Will

- Testamentary Intent Statement – “This is my Last Will and Testament and revokes all prior wills”
- Identify Beneficiaries (devisees)
  - List of relatives
- Identify Executor and Contingent Executor
  - Executor duties – give broadest rights, no bond required, pay taxes out of the estate, identify assets
  - Executor handles the paperwork; files form to be appointed executor, obtain employee ID number from IRS, open estate bank account, give notice to beneficiaries, sell or transfer real estate, complete inventory of estate within time limit, file inheritance/estate taxes, pay bills, settlement with beneficiaries, write checks.
- Signature (at end of will, each page in some states) of testator; T must be 18 or over
- Witnesses (2 in most states) (though need not sign at same time so long as witness T sign)
- Self-proving affidavit (notarized signature recommended; avoids need to later find witnesses during probate)
- Bond: Better to say no bond required for executor
- Residuary estate: after specific gifts, what is left over
- Issuance of Letters Testamentary: document that permits Executor to act on behalf of estate
- Holographic wills are unwitnessed wills allowable in some states if main parts are there in T’s handwriting and signed by T.
- Under Uniform Probate Code, can save an invalid will if there is clear and convincing evidence that T intended it to be their will

Requirements of Valid Will

- Over 18 signed by T in presence of 2 witnesses who also sign; must have intent that this is his will
- Analyze whether invalid will. Even if invalid, analyze whether it’s OK as a holographic will or whether UPC can “save” the will even if not meet all formalities

Intestacy (Die Without a Will)

- Administrator appointed as Personal Representative (similar to executor)
- Goes to family members as defined by state law, must prove relation
- Assets distributed by family tree
  - **Per stirpes (per capita by representation)**: If a named beneficiary precedes you in death, then the benefits pass on to that person's children in equal parts. Divides into equal parts at first generation. ***Heirs receive the representative share of their parents***
    - T has 3 children: A, B, and C. A died before T survived by F and G. B also died before T but had no children. C (the child) receives ½ of the estate, F and G (the grandchildren) receive ¼ (splitting the ½ that would have went to parent A). No one takes under B's estate.
  - **Per capita at each generation**: All members of group receive equal share of distribution. The share of any beneficiary that precedes you in death is shared equally among the remaining beneficiaries. **Those in the same generation receive the same amount**
    - T has 2 children, A and B. A dies before T and survived by C and D. B also dies before T and is survived by E.
    - C received 1/3, D receives 1/3 and E receives 1/3; all members of grandchildren take equal shares.
    - Example: T has 4 children: Arthur, Brenda, Charles, and Doris. Arthur and Brenda are dead. Arthur's kid is Edward. Brenda's kid is Fran and George. Charles and Doris have no children. Charles receives ¼, Doris receives ¼; Arthur and Brenda's share (they are dead) are divided among their children. Arthur's share goes to his kid Edward (1/4). Brenda's share gets divided up by her kids (Fran and George 1/8 each).

Another Example

- You have 3 children, Ann, Bart, and Carl. Ann has 2 children, Drew and Eve. Bart, Carl, Drew and Eve have no descendants.
- Per Stipes: If Ann, Bart, Carl, Drew and Eve all survived you: Ann, Bart, and Carl get 1/3. Drew and Eve get nothing. If Per Capita, then each receive 1/5.
- If Ann dead, Bart and Carl get 1/3 if per stirpes. Ann's kids Drew and Eve get her 1/3 divided (1/6). They take their mother's share. If it were per capita, then all living get ¼ (Bart, Carl, Drew, and Eve).
- If Ann and Drew dead, but Bart, Carl, Eve alive: if per stirpes, Bart and Carl get 1/3; Eve gets 1/3; she takes by representation from her mother. Drew has no children; if per capita then Bart, Carl, Eve get 1/3

Conveyancing by Will

Ademption: Testator makes devise of specific property and that property is no longer part of the estate at time of death; ademption means that the bequest fails and legatee gets nothing. If real property is under a contract to be sold, then by equitable conversion, the purchase price is personal property and it will go to the person who was suppose to get the personal property under the will

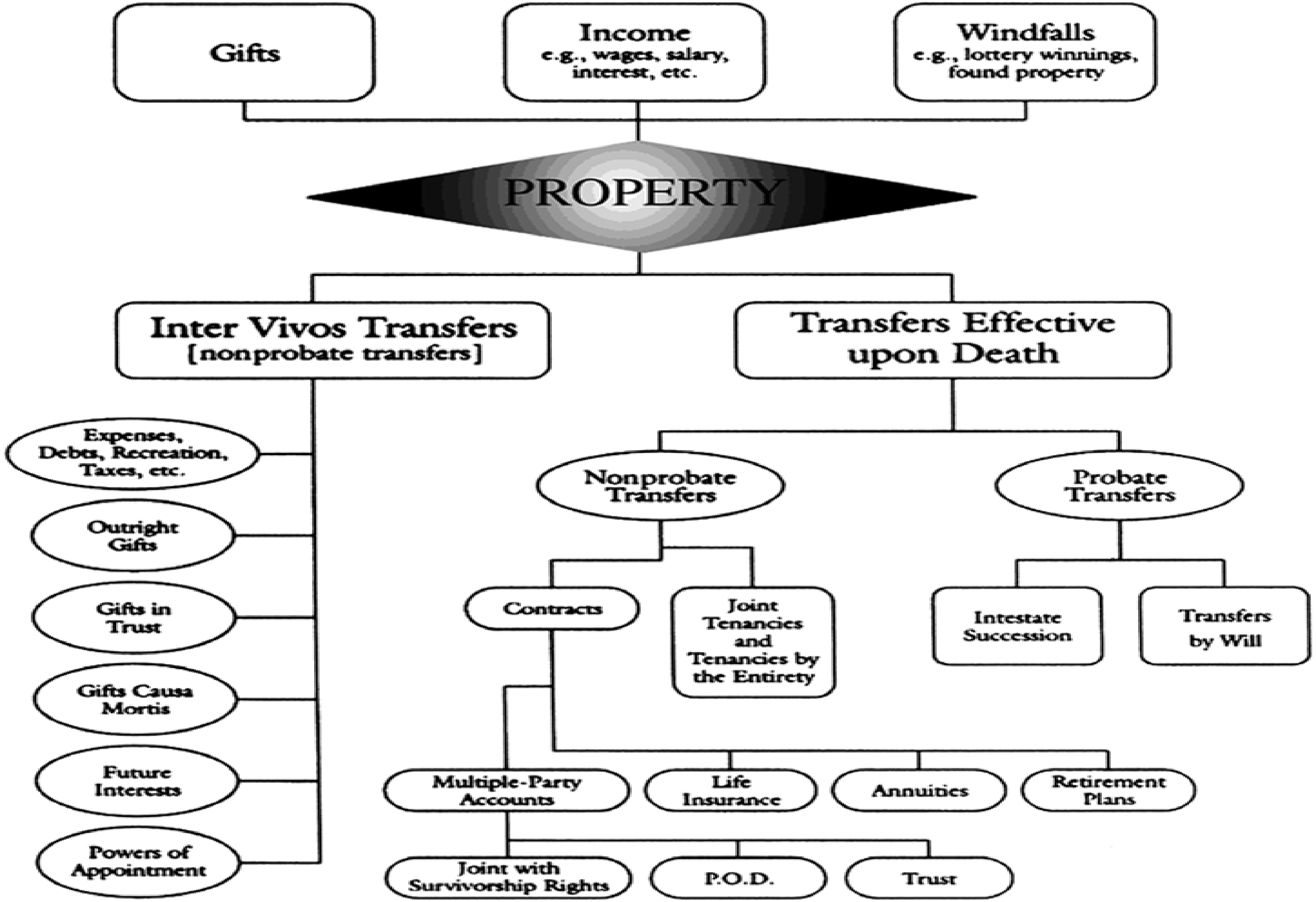
Exoneration: A person who receives a bequest subject to a lien or mortgage can get it free and clear if there is no evidence that testator intended a contrary result. When exoneration applies, the personal property is used to pay off mortgage; but some states have statutes altering this.

Lapse: If beneficiary dies before testator, then bequests fails and goes to residuary estate; Most states now have anti-lapse statutes so that dead beneficiary's heirs take instead; may limit it to only certain relatives such as if descendant of testator; does not save gift for dead person's estate (like their spouse); only substitutes beneficiary's descendants for the beneficiary

NOTE: In most states anti-lapse statute only applies to BLOOD relatives. If gift is given to spouse or non-blood relative or to a blood relative w/ no children, then gift lapses.

I.e., Suppose anti-lapse statute is per capita by representation; X is mother. A, B and C are siblings. A has 2 kids A1 and A2. A is dead. X dies. When probate X estate in per capita state, B takes 1/3, C takes 1/3 and A1 and A1 split A's 1/3 share (so 1/6 for A1 and 1/6 for A2)

Probate v. Nonprobate



Gifts as Estate Planning

- Lifetime gifts not part of probate
- May want to transfer during lifetime before death
  - Give donor immediate enjoyment, tac reduction (first $15,000 each year escapes taxation), creditor protection, reduce elective share of spouse
  - But disadvantages: gifts are irrevocable, donor no longer has control, tax consequences if over $15K
  - Can give gifts in trust; legal interest held by trustee with equitable interest in beneficiary
- Some assets fall outside probate estate such as joint tenancy, life insurance, gifts done prior to death

Will Contests

- Defective execution (such as only one witness)
- Lack of testamentary compacity (if under 18, mental capacity)
- Undue influence
- Fraud
- Must usually be contested within 6 months

Revoking a Will

- Execution of a new will or codicil to existing will w/ all formalities
- Physical act like tearing up will or other writings done w/ intent to revoke the will
- Either T or someone at his direction may revoke will
- Dependent relative revocation: First will is not revoked if a later will is found invalid. If the T revokes a will based on mistaken assumptions of fact or law, the revocation of the will is ineffective if it appears that T would not have revoked if mistakes were not made
- Divorce revokes gift to ex spouse
- Slayer statute: if you murder T, you can’t get gift. Must be felony and intentionally kill so involuntary manslaughter does not count