
# A Short and Happy Guide to Real Property
## Law School Legends
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**Introduction**

Welcome to the start of this guide to the law of Real Property. I have been a professor of Property law for eighteen years and know that Property can be the most difficult subject in the law school's core curriculum, largely because it imposes a double hardship. First, more often than not, its rules are arcane and antiquated. In this setting, more so than in any other, an ounce of history is worth pounds of logic. Second, some of Property law's essential precepts tend to be, at first blush, counterintuitive. Notwithstanding all this, I ask you now to please take heart. This guide renders the subject matter accessible, comprehensible, and, most of all, easy to remember, mindful that so much of the learning and assimilation process in law school and for the bar exam will require that you commit to memory so many concepts and rules. The concluding portions of this guide contain strategies for successful exam preparation and exam taking.

In this series, we will use acronyms, imagery, metaphor, and humor, sometimes conjuring up a cast of characters and sometimes using song. This is all by conscious design. Over the course of the last several years, my research and scholarship has taken me into the realm of adult learning and memory. Cognitive psychology and neuroscience teach us that the assimilation and retention

of complex subject matter is enhanced immeasurably by the use of mental associations, anchoring metaphors, images, and humor. For that matter, understanding, retention, and performance are enhanced immeasurably by calm. Part of your mission, then, is to keep the fear factor at bay. Hear me now and believe me later: the task at hand is achievable. You are on your way to becoming a Property connoisseur.

Finally, by way of introduction, I would like to extend a belated word of congratulations on all that you have achieved to have earned the privilege of experiencing law school. This is a time in life when you deserve to be feeling some sense of self-satisfaction and happiness. Yet, happiness may not be the first emotion to be conjured up at this particular moment. In this regard, George Bernard Shaw said it best: "Forget about the likes and the dislikes and do what must be done. For now, this is not about happiness. This is about greatness."

## ESTATES IN LAND AND FUTURE INTERESTS

### Present Possessory Estates

We are concerned here with four categories of freehold estates, so named because they grew out of the English system of feudalism. The person that we have to thank for this entire quagmire is named, quite appropriately, William the Bastard. The year was 1066, and the legacy of his conquest of England haunts us still.

**The four categories of present possessory freehold estates are:**

**1.) the fee simple absolute;**

**2.) the fee tail;**

**3.) the defeasible fees, of which there are three species; and**

**4.) the life estate.**

Our inquiry focuses on three distinct questions. First, what language will create the estate? Second, once identified, what are the estate's distinguishing characteristics? In other words, is the estate devisable, meaning, can it pass by will? Is the estate descendible, meaning, can it pass by the statutes of intestacy if its holder dies intestate or without a will? Is the estate alienable, meaning, is it transferable inter vivos or during its holder's lifetime? Third, which future interest, if any, is the estate capable of?

**I. The Fee Simple Absolute.**

1.) Language to create: "To A," or, "To A and his/her heirs."

2.) Distinguishing characteristics: This is absolute ownership of potentially infinite duration. The fee simple absolute is freely devisable, descendible. and alienable.

3.) Accompanying future interest: None. Thus, if O conveys "to A" or "to A and his heirs," and A is alive and well, know that A's heirs apparent have nothing. Only A has absolute ownership. Remember the Sinead O'Connor rule of Property: "A living person has no [hairs] heirs." While A is alive, he has only prospective heirs. They are powerless. As a property matter, those prospective heirs or heirs apparent do not even exist. A living person has no heirs.

**II. The Fee Tail.**

1.) Language to create: " To A and the heirs of his body."

2.) Distinguishing characteristics: The fee tail is virtually abolished in the United States today. Historically, the fee tail would pass directly to grantee's lineal blood descendants,

no matter what. Today, the attempted creation of a fee tail creates instead the fee simple absolute.

3.) Accompanying future interest: Historically, in O, the grantor, it was called a reversion. In a third-party, meaning someone other than O, it was called a remainder.

**III. The Defeasible Fees.**

**1.) The Fee Simple Determinable.**

**a.)** **L**anguage to create: " To A for so long as. . .," or "To A during. . ." or "To A until. . ." Grantor must use clear durational language. If the stated condition is violated, forfeiture is automatic.

b.) Distinguishing characteristics: This estate, like all of the defeasible fees, is devisable, descendible, and alienable, but subject to the condition.

c.) Accompanying future interest: The possibility of reverter in O.

**2.) The Fee Simple Subject to Condition Subsequent.**

a.) Language to create: "To A, but if X event occurs, grantor reserves the right to reenter and retake." Grantor must use clear durational language and must carve out the right to reenter.

b.) Distinguishing characteristics: This estate is not automatically terminated upon breach of the stated condition, but can be short, at the grantor's option, in the event of a breach.

c.) Accompanying future interest: The right of entry, synonymous with the power of termination.

**3.) The Fee Simple Subject to Executory Limitation.**

a.) Language to create: "To A, but if X event occurs, then to B."

b.) Distinguishing characteristics: If the stated condition is breached, forfeiture is automatic, but this time in favor of someone other than grantor.

c.) Accompanying future interest: The entity who takes if grantee violates the stated

condition has a shifting executory interest.

**IV. The Life Estate.**

1.) Language to create: "To A for life," or, "To A for the life of B," in which case a life estate *pur autre vie* is created.

2.) Distinguishing characteristics: The life tenant must not commit any of the three forms of waste:

a.) affirmative waste, or willful acts of destructiveness that work a decrease to the premises' value;

b.) permissive waste, which is synonymous with neglect; and

c.) ameliorative waste, or those renovations or transformations of the property that work an increase to the premises' value.

3.) Accompanying future interest: In O, the grantor, it is called a reversion. In a third party, it is a remainder.

**Future Interests**.

There are six categories of future interests. We classify them based upon whether they are retained by the grantor O, or instead by someone other than O.

**1.) Future Interests Capable of Creation in O, the Grantor:**

**a.) The possibility of reverter,** which accompanies only the fee simple determinable.

**b.) The right of entry, synonymous with the power of termination**, which accompanies only the fee simple subject to condition subsequent.

**c.) The reversion**, defined as the future interest that arises in a grantor who transfers an estate of lessor quantum or magnitude than she started with, other than the fee simple determinable, which is accompanied by the possibility of reverter, or the fee simple subject to condition subsequent, which is accompanied by the right of entry

or power of termination.

**2.) Future Interests in Transferees, or Entities Other Than O, the Grantor:**

If the future interest is held by someone other than O, the grantor, it has got to be either:

**a.) a vested remainder, of which there are three species:**

**i.) the indefeasibly vested remainder,**

**ii.) the vested remainder subject to complete defeasance, which is sometimes called the vested remainder subject to total divestment; or**

**iii.) the vested remainder subject to open; or**

**b.) a contingent remainder; or**

**c.) an executory interest, of which there are two species:**

**i.) the shifting executory interest and**

**ii.) the springing executory interest.**

Apply a three-step methodology to the task of assessing future interests in transferees. First, be able to distinguish all vested remainders from contingent remainders. Second, distinguish the three kinds of vested remainders from each other. Third, distinguish all remainders from executory interests.

**STEP I: The difference between vested remainders and contingent remainders.**

A remainder is a future interest created in a grantee that is capable of becoming possessory on the expiration of a prior possessory estate created by the same conveyance in which the remainder is created. Typically, a remainder is a future interest that becomes possessory at the

natural conclusion of a preceding life estate or term of years. Remember that a remainder is always patient and always polite, meaning that **a remainder never follows a defeasible fee.** The holder of a remainder cannot cut short or divest a prior transferee. Thus, if your present estate is a defeasible fee, your future interest is not a remainder. Instead, it will be an executory interest, as we will see, if held by someone other than grantor.

Remainders are either vested or contingent. A remainder is vested if it is both created in an ascertained person and not subject to what we will come to know as a condition precedent. By contrast, a remainder is deemed contingent if it is created in an unascertained or unknown person or is subject to a condition precedent or both.

*Examples of the remainder that is contingent because it is created in as yet unknown or unborn takers*: "To A for life, then to B's first child." A is alive, and B, as yet, has no children. Or, "To A for life, then to those children of B who survive A." A is alive. We do not yet know which, if any, of B's children will survive A.

*Examples of the remainder that is contingent because its taker is subject to a condition precedent:* A condition is a condition precedent when it appears **before** the language creating the remainder or is woven into the fabric of the grant to remainderman. For example, "To A for life, then, if B graduates from college, to B." A is alive. B is still in high school. Before B can take, he must graduate from college. He has not yet satisfied this condition precedent. Think of a condition precedent as a prerequisite to the holder of the remainder's admission onto Blackacre. It is something that the holder of the remainder must do before attaining admission onto Blackacre.

When you have an as yet unmet condition precedent to the remainder's taking, you have a contingent remainder.

### *Historical Rules Limiting Contingent Remainders*

Contingent remainders were despised at common law. They were thought to be the weakest link in the future interests family. As a disincentive to their very creation, several limiting rules were established. The first of these limiting rules created to make life difficult for certain species of contingent remainders is called ***the rule of destructibility of contingent remainders.*** Historically, it provided that a contingent remainder would be destroyed if it was still contingent at the time the preceding estate ended. For example, O conveys "To A for life, and if B has reached the age of 21, to B." Suppose that A died, leaving behind B, who at the time of A's death was still under 21. Historically, B's contingent remainder would be destroyed and O or O's heirs would take in fee simple absolute. Today, the destructibility rule has been abolished. Thus, if B is under 21 when A dies, today O or O's heirs would hold the estate subject to something we will come to know as B's springing executory interest. Once B reaches 21, B takes.

The second limiting rule that grew up to make life difficult for certain species of contingent remainders is called ***the rule in Shelley's case.*** At common law, the rule in Shelley's case would apply in one setting only: O conveys "To A for life, and then, on A's death, to A's heirs." A is alive. Historically, the present and future interests would merge, giving A a fee simple absolute. The rule in Shelley's case endeavored to promote the alienability of land. By giving A a fee simple absolute today, rather than waiting for A's as yet unknown heirs, the prospects for the free, unfettered

transfer of land would be enhanced.

The rule in Shelley's case is a rule of law and not a rule of construction, meaning that the rule would apply even in the face of contrary grantor intent. This arrogance led ultimately to the rule's demise. Today, the rule in Shelley's case has been virtually abolished. Thus, today, when O conveys "To A for life, then to A's heirs," A has a life estate and A's as yet unknown heirs have a contingent remainder. O has a reversion, since A could die without heirs.

The third rule that grew up to make life difficult for certain species of contingent remainders is called ***the doctrine of worthier title***. This is sometimes referred to as the rule against a remainder in grantor's heirs. This doctrine is still viable in most states today. It applies when O, who is alive, endeavors to create a future interest in his heirs. For example, O, who is alive, conveys "To A for life, then to O's heirs." If the doctrine of worthier title did not apply, A would have a life estate and O's as yet unknown heirs would have a contingent remainder. After all, O is still alive, and a living person has no heirs. Instead, because of the doctrine of worthier title, the contingent remainder in O's heirs is void. Thus, A has a life estate and O has a reversion. The doctrine endeavors to promote the free transfer of land. O and A, both alive, can team up today and sell outright in fee simple absolute, if they are so inclined. We do not have to wait for O to die to accomplish that result.

The doctrine of worthier title survives today because it is a rule of construction, and not a rule of law. Grantor's intent controls. If grantor clearly intends to create a contingent remainder in his heirs, that intent is binding.

**STEP TWO: Distinguishing the Three Kinds of Vested Remainders**

1.) **The indefeasibly vested remainder.** The holder of this remainder is certain to acquire an estate in the future, with no conditions attached.

> *Example:* O conveys "To A for life, remainder to B." A is alive and B is alive. A has a life estate and B has an indefeasibly vested remainder. B is known. There are no conditions attached to his taking.

2.) **The vested remainder subject to complete defeasance, also known as the vested remainder subject to total divestment.** Here, the holder of the remainder exists. Further, the remainder is not subject to any condition precedent. However, remainderman's right to possession could be cut short because of a condition subsequent. When conditional language in a transfer follows language that taken alone and set off by commas would create a vested remainder, the condition is a condition subsequent, creating the vested remainder subject to complete defeasance.

> *Example:* O conveys "To A for life, remainder to B, but if B dies under the age of 25, to C." A is alive and B is 20 years old. A has a life estate. B has a vested remainder subject to complete defeasance, because of the condition subsequent. C has a shifting executory interest, something that we will define shortly. In this conveyance, if B is under 25 at the time of A's death, B still takes. Remember, the age requirement is not a prerequisite or condition precedent to B's taking. It is, however, a condition subsequent, meaning that B must live to the age of 25 for his estate to retain his interest. Otherwise, B's heirs will lose it all, and C or C's heirs will take.

3.) **The vested remainder subject to open.** Here, a remainder is vested in a group, category, or class of takers, at least one of whom is qualified to take possession. However, each class-member's share is subject to partial diminution, or partial decrease, because additional takers, not yet ascertained, can still qualify as class members.

> *Example:* O conveys "To A for life, then to B's children." A is alive and B has two children, C and D. C and D have vested remainders subject to open. Their respective shares will be decreased if B has another child.

In this context, a class is either open or closed. A class is open if it is possible for others to enter. A class is closed when its maximum membership has been set, so that persons born thereafter are shut out. The common law rule of convenience provides that the class closes

whenever any member can demand possession.

Thus, in the preceding example, "To A for life, then to B's children," when does the class close? At B's death, and also, according to the rule of convenience, at A's death, no matter that B is still alive. Why? Because that is when C and D, the present class members, can demand possession. We call it a rule of convenience because it establishes a clear, bright line that is easy to administer.

The one exception to the rule of convenience is called the womb rule. It tells us that a child of B in the womb at A's death will share with C and D.

**STEP THREE: Distinguishing Remainders from Executory Interests**

Recall that the remainder is the future interest that follows a preceding estate of known, fixed duration. Remainderman patiently waits his turn to take. By contrast, we now turn to the executory interest, a future interest which takes effect by cutting short another transferee, in which case we call it a shifting executory interest, or by cutting short the grantor, in which case we call it a springing executory interest.

1.) **The shifting executory interest**. For example, "To A and his heirs, but if B returns from Europe within the next year, then to B." Notice that B is in a position to interrupt, or cut short, A and A's heirs otherwise limitless time with the land. B is not a remainder. Remainders wait patiently for the preceding estate to run its fixed, limited course. Rather, B accompanies a defeasible fee. Remainders never follow defeasible fees. Executory interests do. A has a fee simple subject to B's shifting executory interest.

2.) **The springing executory interest**. For example, O conveys "To A, if and when he marries." A is unmarried. If and when A marries, A cuts short O's otherwise limitless time with the land. O has a fee simple subject to A's springing executory interest.

## FUTURE INTERESTS AND THE RULE AGAINST PERPETUITIES

In the context of assessing future interests, we must reckon with the rule against perpetuities (RAP). The rule tells us that certain kinds of future interests are void if there is any possibility, however remote, that the given interest may vest more than 21 years after the death of a measuring life. This notoriously elusive construct is best understood as a compromise. Just imagine that centuries ago, two diametrically opposed factions were at odds. One group, the new guard, favored freedom from conditions and restrictions and the specter of dead hand control. The opposing group, the old guard, long appreciated that land is power, and that by subjecting the land to conditions and restrictions, they could maintain a certain modicum of control indefinitely.

Into this great divide entered a mediator. The mediator said, "We will allow some form of restriction and uncertainty to accompany land conveyancing. After all, freedom of encumbrancing is an important norm. However, we will no longer allow land to be tied up indefinitely, into perpetuity. Thus, land may be tied up with conditions and some uncertainty, but only for so long. Specifically, only for a period of time measured by some relevant life in being plus an additional grace period of 21 years." If the period of uncertainty is destined to persist beyond then, then the future interest will be voided by the rule against perpetuities.

**Embrace a four-step technique for tackling rule against perpetuities challenges:**

***Step One:*** **Determine which future interests have been created by your conveyance.** The rule against perpetuities is potentially applicable only to contingent remainders, executory interests and certain vested remainders subject to open. The rule simply does not apply to any future interest

created in O, the grantor. Nor will it apply to indefeasibly vested remainders or to vested remainders subject to complete defeasance.

For example, O conveys "To A for life, then to A's children." The as yet unborn children have a contingent remainder. We are, therefore, on rule against perpetuities alert. We proceed to step two.

***Step Two:*** **Identify the conditions precedent to the vesting of the suspect future interest**. Put plainly, what has to happen before a future interest holder can take? In our preceding example, A must die, leaving a child. That leads to step three.

***Step Three:*** **Find a measuring life.** Look for a person alive at the date of the conveyance and ask whether that person's life or death is relevant to the condition's occurrence. In the preceding example, who qualifies as a measuring life? A does. Finally, we get to step four.

***Step Four:*** **Ask, will we know with certainty, within 21 years of the death of our measuring life, if our future interest holder can or cannot take?** If so, the conveyance is good. If not, if there is any possibility, however remote, that the condition precedent could or could not occur more than 21 years after the death of the measuring life, the future interest is void.

With that as the relevant standard, the preceding conveyance is good. We will know at the instant of A's death if A has left behind a child or not.

We now take up a more difficult example. O conveys, "To A for life, then to the first of her children to reach the age of 30." A is 70 years old. Her only child, B, is 29 years old.

Apply the four-step technique. Step one, classify the future interest. We have a contingent

remainder. Step two, what are the conditions precedent to the vesting of that future interest? The answer, A must die, and have a child who reaches 30. Step three, find a measuring life. A's life and death are relevant. By contrast, B is not a measuring life because the conveyance "to the first of A's children to reach the age of 30" is not B-specific. In other words, it does not state "then to B if B reaches 30," or "then to A's firstborn, if he reaches 30." Instead, B is merely one of several potential takers. Step four, will we know, with certainty, within 21 years of the death of our measuring life if the future interest holder can take? In other words, is there any possibility, however remote, that A would not have a child to reach 30 until more than 21 years after A's death? Yes. The common law RAP presumes that anything is possible. It encourages us to invent a parade of horribles that were they to manifest would succeed in invalidating the suspect future interest. Here, B, who is 29 and so close to the 30-year age contingency, could die tomorrow. Thereafter, A could have another child, no matter that A is 70. The RAP, with its fertile octogenarian principle, presumes that a person is fertile no matter his or her age. A could die in labor. Alternatively, A could live. We just do not know for sure today whether the condition precedent to any potential newborn's taking – that child's turning 30 – will be satisfied within 21 years of A's death. Thus, the offensive future interest is stricken, and we are left with a life estate in A and a reversion in O.

**Two Bright Line RAP Rules**

Mindful that the common law RAP can be a terribly elusive concept, hold tight to two significant bright line rules.

1.) **A gift to an open class that is conditioned on the members surviving to an age beyond 21 will violate the common law RAP, because of the principle known as "bad as to one, bad as to all."** This principle tells us that to be valid, it must be shown that the condition precedent to every class member's taking will occur within the perpetuities period. If it is possible that a disposition might vest too remotely or too far into the future with respect to any member of the class, the entire class gift is void.

   For example, O conveys "To A for life, then to such of A's children as live to attain the age of 30." A has two children, B and C. B is 35 and C is 40. A is alive. This is an example of a gift to an open class, conditioned on the members surviving to an age beyond 21. B and C's vested remainders subject to open are voided by the common law RAP and its bad as to one, bad as to all principle. Why is this conveyance bad as to one? A, our measuring life, could have another baby tomorrow and then die in labor. That potential newborn's interest would not vest until more than 21 years after A's death. Because this conveyance is bad as to that hypothetical infant, it is bad as to all. No matter that B and C have satisfied the requisite age contingency, their future interests are invalidated. Thus, under the common law RAP, we are left with a life estate in A and a reversion in O.

2.) **Many shifting executory interests will violate the RAP.** An executory interest with no limit on the time within which it must vest will violate the common law RAP. For example, O conveys "To A and his heirs, so long as the land is used for farm purposes, and if the land ceases to be so used, to B and his heirs." Step one: classify the future interest. B has a shifting executory interest. Step two: what are the conditions that will trigger B's entitlement? The land must cease to be used for farm purposes. Step three: find a measuring life. A's life qualifies, insofar as A has the power, while alive, to abide by the condition or to breach the condition. Step four: will we know with certainty, within 21 years of the death of our measuring life, if a future interest holder can take? No. Our measuring life, A, might abide by the condition during her lifetime. The condition may not be breached, if ever, until hundreds of years have passed. Thus, the future interest is void.

   Once the offensive future interest is stricken, we are left with "To A and his heirs, so long as the land is used for farm purposes." A now has a fee simple determinable and O has the possibility of reverter. Is there a RAP problem? No. The RAP simply will not apply to future interests created in O, the grantor. That is another exasperating feature of the RAP. In this conveyance, the stated condition could persist into perpetuity. The RAP, however, is not troubled by that possibility. Rather arbitrarily, it declines to assert itself against future interests capable of creation in O, the grantor.

Here we make an important point of comparison. Compare the preceding example to, "To A and

his heirs, but if the land ceases to be used for farm purposes, then to B and his heirs." We get to the same result as in the preceding example, except that now, once the offensive future interest "to B and his heirs" is stricken, the conveyance is no longer grammatically sound. As a result, the entire conditional clause is stricken and we are left with "To A and his heirs." A has a fee simple absolute. A reaps this favorable result because of the simple inclusion in the original conveyance of those two little words "but if."

**Reform of the Common Law RAP**

Thankfully, the harsh common law rule against perpetuities has been the subject of significant reform efforts. The first of these is called the **"wait and see"** or **"second look doctrine."** Under this reform effort, in place in the majority of states, the validity of any suspect future interest is determined on the basis of the facts as they exist at the conclusion of our measuring life. This eliminates the "what if" or "anything is possible line of inquiry." In other words, rather than conjuring up some hypothetical parade of horribles to endeavor to invalidate a suspect future interest, we simply wait and see until the measuring life has run its course, and then we take a second look to gauge the integrity or validity of any previously suspect future interest.

The second reform effort is called **USRAP, the Uniform Statutory Rule Against Perpetuities.** It codifies the common law rule against perpetuities and also affords an alternative 90-year vesting period within which to gauge the integrity of a suspect future interest. Thus, under USRAP, one can apply the traditional perpetuities period, measured by a relevant life in being plus 21 years, or apply an alternative 90-year bright line vesting period.

Both the wait and see and USRAP reforms embrace two important notions. First, **the cy pres doctrine**. Cy pres means "as near as possible." If a given disposition violates the RAP, cy pres empowers the court to reform the grant in a way that most closely matches grantor's intent while still complying with the RAP. Second, both reform efforts will **reduce an offensive age contingency to 21 years.** Thus, if the problem complained of is attributable to someone's having to attain an age in excess of 21, the age contingency will be knocked down automatically to 21 years, thereby saving the grant.

## CONCURRENT ESTATES

There are three forms of concurrent or co-ownership. **The first is called the joint tenancy.** Here, two or more people own Blackacre, with the right of survivorship. **The second form of co-ownership is called the tenancy by the entirety**. This form of co-ownership, recognized today only in a minority of states, is a marital estate. It can only exist between H and W, as husband and wife, with the right of survivorship. **The third last and form of co-ownership is called the tenancy in common.** Here, two or more own Blackacre, with no right of survivorship.

We examine each of these three forms of co-ownership in turn.

### I. The Joint Tenancy

1.) **Joint tenants share the right of survivorship.** This means that when one tenant dies, his or her interest passes automatically to the surviving joint tenants. Therein resides the beauty of the joint tenancy. It allows its holders to escape the costly and time-consuming administrative procedure known as probate. Probate is avoided because when a joint tenant dies, his or her share passes automatically, without the need for a will, to the surviving joint tenants.

2.) **A joint tenant's interest is transferable inter vivos.** A joint tenant may sell or transfer her interest during her lifetime. She may even do so secretly, without the other's knowledge or consent**. A joint tenant's interest is not, however, devisable or descendible, because of the right of survivorship. When a joint tenant dies, her interest passes automatically to the surviving joint tenants.**

3.) **To create a joint tenancy, there must be the four unities**. Remember this T-TIP: Joint tenants must take their interest –

**T** – at the same **time;**

**T** – by the same **title,** meaning, in the same instrument or deed;

**I** – with **identical,** equal shares; and

**P** – with identical rights to **possess** the whole.

In addition to the four unities, to create a joint tenancy the language of the grant must contain **a clear expression of the right of survivorship.** The joint tenancy arises only if the right of survivorship is clearly expressed. It must be clearly communicated and it must coexist with the presence of those four unities. For example, O conveys "To A, B and C as joint tenants with the right of survivorship." .

4.) **How to terminate a joint tenancy**

a.) **The first way to terminate a joint tenancy is by inter vivos sale or conveyance.** Recall that a joint tenant can sell or transfer her interest during her lifetime. One joint tenant's sale of her share will sever the joint tenancy as to that selling joint tenant's interest, because as to that sale, the four unities are disrupted. Thus, the person who buys from the selling joint tenant is a tenant in common. To the extent that we started with more than two joint tenants in the first place, the joint tenancy remains intact as between the other, non-transferring joint tenants.

**For example: O conveys Blackacre, "To Phoebe, Ross and Monica as joint tenants with the right of survivorship."**

First, each owns a presumptive one-third share, with the right of survivorship.

**Now you are told that Phoebe has sold her interest to Chandler. What result?**

Phoebe's sale to Chandler severs the joint tenancy as to Phoebe's interest because it disrupts the four unities**.** Thus, Chandler, our buyer, holds one-third as a tenant in common with Ross and Monica, who still own two-thirds as joint tenants.

**Later, Ross dies, leaving behind his heir, Rachel. What result?**

Monica takes Ross's share. Remember that Ross and Monica, vis-à-vis each other, enjoyed the joint tenancy with the right of survivorship. A joint tenant's interest is neither devisable nor descendible. Thus, Monica takes Ross's share, and Rachel takes nothing.

**The final result**: Monica holds two-thirds with Chandler, who holds one-third. Monica and Chandler are tenants in common.

b.) **The second way to terminate a joint tenancy (or tenancy in common) is by partition. There are three variations on the partition theme:**

1) **voluntary agreement;**

2) **partition in kind; and**

3) **forced sale.**

Voluntary agreement represents an amicable, peaceful way to dissolve the co-tenancy. The parties may voluntarily agree to partition the land or to sell the land, with the sale proceeds distributed appropriately. By contrast, partition in kind is a judicial action, where the court orders physical division of the property, if in the best interests of all parties. It tends to work best when Blackacre is a rural tract, or sprawling acreage. The third variation on the partition theme is the court-ordered forced sale. If in the best interests of all, the court may order a forced sale of the property, with the proceeds divided appropriately. This tends to work best when Blackacre is a building.

## II. Tenancy by the Entirety

1.) **Defined.** The second form of co-ownership is known as the tenancy by the entirety. It is

recognized only in a minority of states. The tenancy by the entirety is a marital estate. It can only be created in husband and wife, or H and W, who share the right of survivorship. In those states to recognize the tenancy by the entirety, it will arise presumptively in any conveyance to husband and wife, unless the grantor clearly states otherwise.

2.) **The tenancy by the entirety is a specially protected form of co-ownership.** First, creditors of only one spouse cannot reach the tenancy. Second, a unilateral conveyance by only one of the spouses is a nullity. For example, Carmella and Tony, husband and wife, own Blackacre as tenants by the entirety. Tony then unilaterally transfers his interest to Uncle Junior. What does Uncle Junior have? Nothing. A unilateral conveyance by one tenant by the entirety of his or her share is a nullity. We will not allow a tenant by the entirety to disrupt or sever the relationship unilaterally.

**III. Tenancy in Common**

1.) **Each co-tenant owns an individual part, with the right to possess the whole.**

2.) **Each co-tenant's interest is descendible, devisible, and transferable inter vivos. There are no survivorship rights amongst tenants in common.**

3.) **The presumption favors the tenancy in common.** When in doubt, know that courts will construe in favor of the tenancy in common, because, as we discussed earlier, unlike the joint tenancy, the tenancy in common does not avoid probate.

**IV. Rights and Duties of Co-Owners**

We assess the rights and duties of co-tenants in the context of those teen idols of long ago, Greg and Marcia Brady. Suppose that Greg contributed 90 percent of Blackacre's purchase price, and Marcia a mere 10 percent. What do we know on this basis? That they must be tenants in common. How do we know that? In order to be joint tenants, they would have to have equal, identical shares. (Recall the four unities.) Here, insofar as Greg is vested with a 90 percent undivided share, and Marcia a mere 10 percent, we know that they are tenants in common. They have unequal shares. That fact helps to reinforce several points, but it is important to note that the rules that we

are about to explore apply to all forms of co-ownership, unless noted otherwise.

1.) **Possession**. Let's assume that one morning Greg takes out a can of white paint and divides up the premises. "Marcia," he says, "You can use and enjoy that 10 percent on that side of the line, and only that." Are Greg's action permissible? No. **Each co-tenant is entitled to possess and enjoy the whole.** It doesn't matter that Marcia contributed a mere 10 percent to the purchase price. She is entitled to use and enjoy the whole. Each co-tenant is entitled to possess and enjoy the whole. If one co-tenant wrongfully excludes another, he or she has committed actionable ouster.

2.) **Rent from a co-tenant in exclusive possession. A co-tenant in exclusive possession is not liable to the others for rent, unless he has ousted the others.**

For example, suppose that Marcia leaves Blackacre voluntarily for a three-month tour of Europe with her cheerleading squad. Upon her return, she says, "Greg Brady, you owe me rent, for the time during which you enjoyed exclusive possession of Blackacre." Greg looks up incredulously and replies, "But Marcia, you left of your own freewill. I don't owe you any rent for the time during which you surrendered possession." Greg is correct. Absent ouster, a co-tenant in exclusive possession is not liable to the others for rent.

3.) **Rent from third parties. A co-tenant who leases all or part of the premises to a third party must account to his co-tenants, providing them their fair share of the rental income.**

For example, suppose now that Greg leases Blackacre's basement apartment to Alice, a third party. Greg must account to Marcia, providing her with her fair share of the rental income. Marcia is entitled to as much rental income as is equal to her undivided interest in the whole. Thus, insofar as Greg owns a 90 percent interest and Marcia 10 percent, Marcia is entitled to 10 percent of the rental income.

4.) **Adverse possession. Unless he has ousted the others, a co-tenant in exclusive possession cannot acquire to the whole to the exclusion of the others through adverse possession.**

For example, suppose that Marcia, so taken by that family trip to the Grand Canyon, decides to stay there for the next 20 years. In her absence, Greg will not be able to acquire title to the whole to Marcia's exclusion through adverse possession. Why not? There was never any ouster. Marcia left voluntarily. Thus, one of the elements of adverse possession doctrine – the hostility element – is missing. There will never be hostility when a co-tenant is voluntarily out of possession.

5.) **Carrying costs. Each co-tenant is responsible for his or her fair share of the premises carrying costs, such as taxes or mortgage interest payments.** Thus, Marcia would be responsible for 10 percent of the premises carrying costs, and Greg would be responsible for 90 percent.

6.) **Repairs. During the life of the co-tenancy, the repairing co-tenant enjoys an affirmative right to contribution for any reasonably necessary repairs that she makes, provided that she has notified the others of the need for the repairs.**

For example, suppose that a football is thrown in Marcia's direction. This time it escapes her nose, and instead goes through Blackacre's front window. Marcia tells Greg of the need for the repairs, and then engages in reasonable repairs. She enjoys an affirmative right to contribution from Greg. Greg is going to have to contribute 90 percent of the costs of those repairs, equal to his undivided share, and Marcia must contribute 10 percent of the cost of those repairs, equal to her undivided share.

7.) **Improvements**. Let's assume now that Greg arrives home from a hard day at the recording studio, as his alter ego, Johnny Bravo. Marcia greets him by exclaiming, "Oh Greg, you'll never believe it, but the grooviest thing happened today. My absolute idol Davy Jones came to visit, and look, he left behind 12 dozen, life size posters of himself. I've wallpapered the den with them. Oh, and Greg Brady, you owe me for your fair share of the costs of these improvements." Greg is beside himself. He asks, "Will she succeed?" We answer: "No." ***One co-tenant's "improvement" could be another's nightmare.*** **Thus, during the life of the co-tenancy the "improver" enjoys no affirmative right to contribution for so-called "improvements."** However, at partition, when it comes time to dissolve the co-tenancy, the improver gets a credit, equal to any increase in value caused by her efforts. Therefore, if the Davy Jones wallpapering, for some bizarre reason, causes an increase to the premises' value, Marcia gets the full benefit of that increase in value. Attendantly, at partition the so-called improver bears full liability for any decrease in value caused by her efforts. This is sometimes referred to in Property law as the upside-downside doctrine. The so-called improver bears the full upside of her efforts, as well as the full downside.

8.) **Waste. A co-tenant must not commit waste.** Remember the three species of waste recounted previously in the context of the life tenancy. There is ameliorative waste, or acts which work to increase to the premises value. There is permissive waste, synonymous with neglect. There is voluntary waste, which represents overt destruction. **A co-tenant may bring an action for waste during the life of the co-tenancy.**

For example, Marcia's actions in wallpapering the den with those life-size Davy Jones

posters arguably is tantamount to voluntary waste, likely to work a decrease to the premises' value. Even if Marcia's actions somehow work an increase in value, her efforts represent ameliorative waste. Greg does not have to wait until partition to proceed against Marcia for waste. A co-tenant is entitled to bring an action for waste during the life of the co-tenancy.

9.) **Partition**. A joint tenant or tenant in common always has the right to bring a judicial action for partition.

## LANDLORD/TENANT LAW

We are concerned now with four leasehold interests: 1) the tenancy for years, sometimes called the term of years; 2) the periodic tenancy; 3) the tenancy at will and; 4) the tenancy at sufferance.

### I. The Tenancy for Years.

There are three important features of the tenancy for years or term of years.

1.) **This is a lease for a fixed, determined period of time.** That amount of time could be, for example, one day, or two months, or 50 years. Do not be fooled into thinking that because this leasehold is called a term of years that it must endure for a year or more. As long as you know your termination date from the start, you have a term of years.

2.) **There is no need for notice to terminate a tenancy for years.** Why not? Because the tenancy for years indicates from the outset when it will end.

3.) **A term of years greater than one year must be in writing to be enforceable.** This is because of the statute of frauds.

### II. The Periodic Tenancy.

1.) **This is a leasehold interest which continues for successive or continuous periods or intervals, until either landlord or tenant give proper notice of termination.** This leasehold is successive or open-ended. We do not know from the outset when it will end. It concludes only when either Landlord or Tenant give proper notice of termination.

2.) **The periodic tenancy can be created expressly.** For example, "To T from week to week,"

"To T from year to year" or "To T from month to month."

3.) **The periodic tenancy can also arise by implication, in one of three ways.**

a.) **First, land is leased with no mention of duration, but provision is made for the payment of rent at regular intervals.** For example, L leases to T, but the parties do not explicitly talk about duration. However, provision is made for the payment of rent at designated intervals. An implied periodic tenancy has been created, with the intervals determined based upon the way in which rent is tendered.

b.) **The second way to create a periodic tenancy by implication arises in the context of an oral term of years that violates the statute of frauds. An oral term of years in violation of the statute of frauds will create an implied periodic tenancy.** For example, L and T negotiate over the telephone for a five-year lease of a commercial office building. That oral agreement is unenforceable because of the statute of frauds. However, T begins paying rent on a monthly basis. What result? An implied month-to-month periodic tenancy has been created. An oral term of years in violation of the statute of frauds creates instead an implied periodic tenancy, with the intervals determined based upon the way in which rent is tendered.

c.) **The third way to create a periodic tenancy by implication arises in the context of the holdover doctrine.** The holdover doctrine tells us that in a residential lease, if L decides to holdover a tenant who, for instance, has wrongfully stayed on past the conclusion of the original lease, the result is an implied periodic tenancy. For example, suppose that our tenant is a holdover. Her lease has expired, and she is still in possession of the premises. If the landlord chooses to allow her to remain, then in the absence of an agreement to the contrary, she becomes an implied periodic tenant. The periods or intervals will be set based on how rent is now tendered.

4.) **To terminate a periodic tenancy, notice must be given.** How much notice? At least equal to the length of the period or interval itself. Thus, in a month-to-month periodic tenancy, one month's notice to terminate is necessary. In a week-to-week periodic tenancy, one week's notice is needed. The one exception: if the periodic tenancy runs in intervals from year to year or more, only six months notice is needed to terminate.

**Keep in mind that freedom of contract is an important norm in the context of the modern-day leasehold. Thus, by private agreement, the parties may lengthen or shorten any of these common law provisions.**

**III. The Tenancy at Will.**

1.) **This is a tenancy for no fixed period or duration. It lasts as long as either L or T desire.**

For example, "To T for as long as L or T desire." At least in theory, both parties have the right to terminate at any time. By statute, however, most states require that reasonable notice to quit or vacate the premises be given.

**IV. The Tenancy at Sufferance.**

1.) **This tenancy is created when a tenant has wrongfully held over, past the conclusion of the original lease.** The law gives this wrongdoer a legal designation – she is called a tenant at sufferance – in order to permit the landlord to continue to recover rent. Typically, the tenancy at sufferance is short-lived. It endures only until the landlord either evicts the tenant or elects to hold her to a new leasehold.

In the context of landlord/tenant law, in addition to being able to identify all four of the leasehold interests, you need to know something about the landlord/tenant relationship. We begin with tenant's duties.

**TENANT'S DUTIES**

1.) **Tenant's duty to repair: Tenant is responsible for keeping the premises in reasonably good repair. Maintenance is the relevant hallmark.** Tenant must maintain the premises in reasonably good repair. This means that T must not commit waste. Recall the three species of waste, discussed earlier in the context of the life estate and concurrent ownership. T must not commit ameliorative waste, meaning that T must not transform the premises, no matter that the transformation works to increase the value. T will be liable for her permissive waste, synonymous with neglect. T must not commit voluntary waste, meaning those overt, willful acts of destructiveness to the premises.

**To observe that Tenant must not commit waste to invoke the law of fixtures. When a tenant removes a fixture, she commits voluntary waste**. That is the essential nexus between waste and the law of fixtures. To make sense out of this, we need to ascertain first: what is a fixture? **A fixture is a once moveable item, that by virtue of its attachment to realty, objectively manifests the intention to permanently improve that realty**. FIXTURES PASS WITH OWNERSHIP OF THE LAND. Common examples include

heating systems, custom-made storm windows, lighting installations, or a furnace.

**Tenant must not remove a fixture, no matter that she was the one who installed it in the first place. Again, fixtures pass with ownership of the land.**

For example, suppose that Janet Jackson, in town for an extended tour, leases an apartment. To feel more at home, she installs a beautiful crystal chandelier in the dining room. It is a family heirloom, valued at $100,000. At the conclusion of the leasehold, as she and her people are disassembling the chandelier, the landlord happens by and says, "Excuse me, but in my estimation, this installation qualifies as a fixture. If I'm correct in that characterization, it must stay put. Fixtures pass with ownership of the land."

Janet Jackson is upset. She doesn't want to lose face (like her brother, Michael). She says, "How do you know whether this or any other tenant installation qualifies as a fixture?" Landlord answers: "Return to your Property lecture."

There are two ways to tell whether a tenant installation qualifies as a fixture:

a.) **The parties' express agreement controls**. The agreement between Landlord and Tenant on the matter is binding. Hopefully, Tenant had the wisdom to reach an agreement with Landlord prior to installing the item. That private agreement controls.

b.) **In the absence of agreement, Tenant may remove an item that she has installed, so long as removal does not cause substantial damage to the premises**. This is a very significant point. **If removal will cause substantial harm to the premises, then, in objective judgment, Tenant has installed a fixture, and the fixture must stay put**. Note that this is an objective test. It does not matter what Tenant, in subjective judgment, was thinking at the time. It does not matter, for example, that Janet Jackson fully intended to take that chandelier with her at the conclusion of the leasehold. If its removal will cause substantial damage, then it must stay put. Fixtures pass with ownership of the land.

2.) **Tenant's duty to pay rent**.

If Tenant fails to pay rent, what are Landlord's options? The answer depends on whether Tenant is in or out of possession of the premises at the time of the breach.

Our first context: **Tenant fails to pay rent and is in possession of the premises**. Landlord comes to you and says: "Counselor, help me. I have a tenant who hasn't paid rent for the past two months. She's still living there. What are my options?" You say, "Landlord, this is going to be a short conversation. You have only two options."

**Landlord's two options when Tenant fails to pay rent and is in possession:**

**a.) Landlord can move to evict through appropriate judicial proceeding and sue for the rent owed; or**

**b.) Landlord can choose to continue the relationship and sue for the rent owed.**

**LANDLORD MUST NOT ENGAGE IN SELF-HELP.**

Even in the face of the most recalcitrant tenant, such as the tenant who has failed, even repeatedly, to pay rent, Landlord must never resort to self help by, for example, changing the locks, forcibly removing Tenant or removing any of Tenant's possessions. Self-help is flatly outlawed. It is punishable by civil as well as criminal penalties.

We're still thinking about the second of our tenant's duties: The duty to pay rent. In the first paradigm, tenant is still in possession while breaching this duty. Now, suppose that **Tenant fails to pay rent, but is out of possession of the premises.** For example, Tenant has wrongfully vacated with time left on a term of years lease. Here, **Landlord has three options, reducible to the acronym SIR. S - SURRENDER, I - IGNORE, R - RE-LET.**

1.) **SURRENDER.** Landlord could choose to treat Tenant's vacating the premises as an implicit offer of surrender. **Surrender is a term of art in Property law. It means that Tenant has demonstrated, by her words or conduct, the intention to relinquish the leasehold interest**. If Landlord chooses to accept the Tenant's explicit or tacit offer of surrender, the lease is dissolved amicably. If the unexpired term is in excess of one year, any acceptance of surrender must be in writing to satisfy the statute of frauds.

2.) **IGNORE THE ABANDONMENT**. This option is available only in a minority of states. Here, Landlord decides to ignore the abandonment and hold T responsible for rent, just as if Tenant were still there.

3.) **RE-LET.** The majority of courts today tell us that Landlord cannot simply ignore the abandonment. **Instead, Landlord must at least try to re-let the premises on the wrongdoer Tenant's behalf.** This is a mitigation principle. The law says: "Landlord, you don't have to actually find a substitute tenant, but as a mitigation principle, you must at least make a reasonable effort to attempt to find a substitute tenant."

The landlord could re-let the premises on the wrongdoer Tenant's behalf, and hold him or her liable for any deficiency. Again, the majority rule requires that Landlord at least try to do that. Landlord does not have to actually succeed in finding a substitute tenant, but must at least show that he or she made a reasonable, good faith effort to do so.

## LANDLORD'S DUTIES

**There are four principal Landlord responsibilities**.

1.) **Landlord's duty to deliver possession.** The overwhelming majority rule (referred to, incongruously, as the English rule), requires that Landlord put tenant in legal as well as actual physical possession of the premises at the start of the lease. For example, at the start of her leasehold Tenant arrives to assume possession of the premises, only to find that a prior holdover tenant is still in possession. The new tenant is entitled to proceed against Landlord for damages attributable to Landlord's breach of the duty to put Tenant in physical possession of the premises.

2.) **Landlord's duty to satisfy the implied covenant of quiet enjoyment in both residential and commercial leases.** This is an implicit promise that Landlord makes in every residential and commercial lease. It tells us that Tenant has a right to quiet use and enjoyment of the premises, without interference from Landlord**.**

There are two ways that the implied covenant of quiet enjoyment can be breached.

a.) **First, Landlord can breach the covenant by actually and wrongfully excluding Tenant from possession of the whole or any part of the premises.**

b.) **The second way to breach the covenant of quiet enjoyment is implicitly, through constructive eviction.** The covenant of quiet enjoyment is breached when Landlord

commits constructive eviction. For example, suppose that Tenant comes to you, her lawyer, and says, "Every time it rains, water floods my apartment." You reply, "Tenant, you have a claim for constructive eviction if three elements are met, reducible to the acronym **SING.**

**SI – SUBSTANTIAL INTERFERENCE.** Tenant's use and enjoyment must be substantially interfered with because of some act or failure to act attributable to landlord. Substantial interference does not necessarily mean permanent interference. The standard is satisfied in the presence of a chronic problem, fundamentally incompatible with Tenant's quiet use and enjoyment. Thus, in our example, if every time it rains, water floods Tenant's apartment, the standard is met, no matter that it may not be raining today, no matter that it may not rain every week. If, every time it does rain, water floods the apartment, **Tenant is faced with a recurrent and chronic interference that is fundamentally incompatible with Tenant's quiet use and enjoyment.**

**N – NOTICE.** Prior to claiming constructive eviction, Tenant must give NOTICE to Landlord of the problem. This is a mitigation principle. **Tenant must give NOTICE to Landlord of the problem, and Landlord must fail to correct it within a reasonable time**.

**G – GOODBYE.** To claim constructive eviction, **Tenant must vacate the premises within a reasonable time after Landlord fails to remedy the problem.** Tenant CANNOT remain in possession and still claim that she has been constructively forced out.

There is one lingering question in the context of the covenant of quiet enjoyment. **Is Landlord liable for the bothersome conduct of other tenants?** The common law rule is **NO**. Even the harsh common law, however, recognizes two exceptions. **First, Landlord has a duty not to permit a nuisance on the premises.** For example, suppose that Landlord leases the apartment upstairs from you to Riverdance. Their practice sessions are driving you crazy. Landlord is responsible. Landlord has a duty not to permit a nuisance on the premises. **Second, Landlord has a duty to control common areas.** Thus, if the problem occurred in a common area, such as a community room or stairwell, Landlord is responsible.

3.) **Landlord's duty to satisfy the implied warranty of habitability in residential leases.** This implicit promise pertains only to residential leases. The implied warranty of habitability does not apply to commercial leases. In the residential setting, this promise is deemed so

fundamental that it is non-waivable. Any attempted **disclaimer** in the lease is a nullity.

**The implied warranty of habitability means simply that bare living requirements will be met, and that the leased premises are fit for basic human habitation.** The standard is by no means rooted in perfection. It does not mean luxury. It does not even mean that the premises must be nice. It means simply that the most basic living requirements will be met. The appropriate standard may be supplied by housing code or independent judicial conclusion. The sorts of problems to routinely trigger a breach of the implied warranty of habitability include, for example, the failure to provide running water, adequate plumbing, or heat in the winter.

**A tenant alleging breach of the implied warranty of habitability does not necessarily have to vacate the premises. Instead, the aggrieved tenant has four options available, remembered by MR3. M - MOVE OUT; R - REPAIR; R - REDUCE; and R - REMAIN.**

**M – MOVE OUT.** First, Tenant can MOVE OUT and terminate the lease.

**R – REPAIR AND DEDUCT.** By statute, many states allow Tenant to make the repairs herself, and then deduct their costs from future rent.

**R – REDUCE**. Tenant may reduce rent to an amount equal to the fair rental value of the premises in view of their defects, or withhold all rent until the court determines fair rental value in view of the problems. A tenant who chooses to exercise this option typically must place withheld rent into an escrow account, to show her good faith.

**R – REMAIN**. Fourth, REMAIN, meaning that Tenant may remain in possession and then affirmatively sue Landlord for damages.

4.) **Landlord must refrain from committing acts tantamount to retaliatory eviction.** If Tenant lawfully reports Landlord for housing code violations, Landlord is barred from penalizing tenant. The doctrine of retaliatory eviction tells us that Landlord must not take any retaliatory measures against the good faith whistleblower Tenant. For example, Landlord must not harass that Tenant. Further, Landlord must not terminate Tenant's lease or raise Tenant's rent until the presumption of a retaliatory purpose has dissipated. (This period is usually set by statute.)

## THE ASSIGNMENT AND THE SUBLEASE.

First, in the absence of some prohibition in the lease, Tenant is permitted to transfer her leasehold interest in whole or in part. **When T1, our original tenant, transfers her entire leasehold interest to T2, she has accomplished an assignment.** T2 is called the assignee. For example, T1 transfers all of the remaining ten months on her term of years lease to T2. The result: T1 has accomplished an assignment.

**If the transfer is an assignment, Landlord and T2, our assignee, come into what is called privity of estate.** This means that Landlord and T2 are liable to each other for all covenants or promises in the original lease that "run with the land." Most, if not all, promises in the original lease "run with the land," meaning that they concern the leased premises. Common examples include the promise to pay rent, the promise to paint the apartment, and the promise to insure the premises. **Landlord and T2, however, are not in privity of contract, unless T2 has expressly assumed the performance of all promises contained in the original lease.**

**Now, as a result of an assignment, what about the relationship between Landlord and T1, our original tenant? Landlord and T1 are no longer in privity of estate. Landlord and T1 are, however, in privity of contract.** Landlord and T1 remain in privity of contract because they exchanged those original promissory words of contract that established the leasehold in the first place. Because Landlord and T1 remain in privity of contract, they will always be secondarily liable to each other.

For example, suppose that Landlord leases Blackacre to T1. Thereafter, T1 assigns to T2.

Later, T2 assigns to T3. T3 engages in flagrant abuse to the premises. First, can Landlord proceed successfully against T3, the direct wrongdoer? Yes. Landlord wins, under privity of estate. Second, can Landlord proceed against T1, the original tenant? Yes, Landlord wins under privity of contract. Landlord and T1 are no longer in privity of estate. Privity of estate ended between Landlord and T1 when T1 assigned to T2. However, privity of contract persists between Landlord and T1. Landlord and T1 will always be secondarily liable to each other, because they exchanged those original promissory words of contract. Thus, as a practical matter, if the direct wrongdoer T3 has fled the jurisdiction, or if T3 is unable to pay (perhaps she is insolvent or bankrupt), T1 is liable. Third, can Landlord proceed successfully against T2? No. This time, Landlord loses. Privity of estate ended between Landlord and T2 once T2 assigned to T3. For that matter, there was never privity of contract between Landlord and T2 unless T2 had expressly undertaken all obligations in the original lease.

**In contrast to the assignment, the sublease arises when T1 transfers less than her entire leasehold interest to T2.** For example, T1 has a two-year term of years lease. She transfers three months of that interest to T2. A sublease arises. T2 is called the sublessee. **L and T2, the sublessee, share no privity. L and T2 are in neither privity of estate nor privity of contract. The relationship between L and T1 remains intact. In addition, as a result of the sublease, our sublessee, T2, is responsible to T1, and vice-versa.**

## SERVITUDES

**The term "servitudes" refers generically to a family of five nonpossessory interests in land: 1.) the easement; 2.) the license; 3.) the profit; 4.) the covenant; and 5.) the equitable servitude.**

### I. The Easement

1.) **Defined** The easement is defined as the grant of a non-possessory property interest in land. In easement parlance, the parcel that derives the benefit as a consequence of the easement is called the dominant tenement. The parcel that bears the burden of the easement is called the servient tenement.

2.) **Easements can be affirmative or negative. Most easements are affirmative.**

a.) **An affirmative easement gives its holder the right to do something on another's land, called the servient tenement.** Common examples of affirmative easements include the right to cut across a neighbor's land, the right to water one's cattle at another's pond, or the local power company's right to lay a power line on another's tract. In all of these instances, the easement holder has the right to go out and do some affirmative thing on another's parcel, called the servient land.

b.) **The negative easement entitles it holder to compel the servient landowner to refrain from doing something on that servient land that would otherwise, but for the negative easement, be permissible.** Historically, negative easements were disfavored. Still today, they are recognized only in four narrow categories, remembered by the acronym LASS. One may acquire a negative easement for Light, Air, Support, and Streamwater from an artificial flow. A minority of states, led by California, recognize the negative easement in a fifth category, the right to a scenic view.

The holder of the negative easement is entitled to compel the servient landowner to refrain from doing something that would otherwise be permissible. For example, if I have a negative easement for light, I am entitled to compel the servient landowner to refrain from building on his land in such a way as would impede my premise's access to sunlight. If I have a negative easement for air, I am entitled to compel the servient landowner to refrain from placing any sort of edifice or structure on his land that would impede my building's access to the free flow of air. If I have a

negative easement for support, I am entitled to compel the servient landowner to refrain from excavating on his land in such a way as would compromise my land's subjacent support. If I have a negative easement for streamwater coming from an artificial flow, I have the right to compel the servient owner to refrain from doing anything on his land that would interrupt or impede my premises access to that streamwater.

Hold tight to the premise that **there is no natural or automatic right to a negative easement. The negative easement must be created expressly, in a signed writing**. That is the one and only way to create a negative easement. So while it may seem that I ought to have some sort of a natural or absolute right to compel another from engaging in such conduct on his parcel as would compromise my parcel's access to such essentials as sunlight, or air flow, or support, or streamwater from an artificial flow, I do not. There is no natural or automatic right to a negative easement.

Last summer, my children and I toured Boston. We took a guided Trolley Tour to see the sights. We got to the Back Bay area, Copley Place, and came upon the new John Hancock building. Our tour guide Sam said, "And here, ladies and gentlemen, you'll see that the new John Hancock building's exterior is made up of thousands of mirrored glass panels. This is because the Trinity Church, located across the street, has a negative easement for light over the John Hancock building." I jumped up and exclaimed, "Sam, children, fellow tourists - did you hear that? We're talking Property law. The Trinity Church has a negative easement for light over the John Hancock building, known as the servient tenement. The John Hancock building must refrain from blocking and impeding the Church's access to sunlight. Hence, its mirrored facade is ingenious, insofar as it is aimed at reflecting light back onto the Church and enhancing the Church's access to the sun. This is incredible. Property law on the Trolley Tour!" Somehow, no one seemed to care.

3.) **An easement is either appurtenant to land or it is held in gross.** How will you know the difference? **The easement is appurtenant when it benefits the easement holder in his physical use or enjoyment of his land. Here, remember the slogan, "It Takes Two." To have an easement appurtenant, two parcels of land must be involved:**

a.) **there must be a benefited parcel, known as the dominant tenement, and**

b.) **there must be a burdened parcel, known as the servient tenement.**

For example, A grants B a right of way across A's land so that B can more readily reach B's land. B's land is benefited because of the easement. B's land is called the dominant

tenement. A's land is serving B. It is called the servient tenement. Notice that two parcels of land are involved. B is deriving a benefit linked to B's use and enjoyment of B's dominant tenement. B has an easement appurtenant to his dominant tenement. **Remember, to have an easement appurtenant, two parcels must be involved. "It Takes Two." The easement holder derives a benefit linked to his use and enjoyment of his dominant tenement. (There it is, parcel 1.) The servient land is subject to the easement. (There it is, parcel 2.)**

By contrast, easements can also exist in gross. **An easement is in gross when it confers upon its holder only a personal or commercial gain, not linked to the use and enjoyment of his land.** Here, only one parcel is involved, and it is the servient tenement. There is no accompanying dominant tenement, because the easement holder is deriving only a personal or commercial gain from the easement, and not a gain linked to his use and enjoyment of any dominant tenement.

For example, suppose that the Bean Grower's Association of America acquires the entitlement to place a billboard on your front lawn. It says, "Eat Beans and You'll Never Have to Stop For Gas." You say, "That is gross." I say, "Precisely." That is an easement in gross. There is only one involved parcel of land involved, and it is your servient land. The Bean Grower's Association is deriving a purely personal or commercial gain because of the easement. There is no dominant parcel. Their right to place a billboard on your front lawn is not giving them a benefit linked to their land. Instead, they are deriving a mere personal or commercial gain. When only one parcel is involved, and it is the servient land, the easement holder has an easement in gross. **Common examples of the easement in gross include the power company's right to place power lines on another's land; the right to fish in another's pond and the right to place a billboard on another's lot. In each of these examples, servient land is burdened, but there is no accompanying dominant tenement. Instead, the easement holder is deriving a mere personal or pecuniary gain because of the easement.**

Why does the law make so much of the distinction between the easement appurtenant and the easement in gross? The answer has everything to do with our next point, transferability of an easement.

**4.) The easement appurtenant is transferred automatically with the dominant tenement, regardless of whether it is even mentioned in the transfer**.

For example, A has an easement entitling her to cut across B's land to get more easily to her land. You're given that one sentence – and you're given everything. You notice first that two parcels are involved. B's parcel is servient and A's parcel is dominant. It is

deriving a benefit because of the easement. Remember our slogan, "It takes two." We have an easement appurtenant. The easement appurtenant passes automatically with the dominant tenement, regardless of whether it is even mentioned in the instrument of transfer. So, suppose that A, the owner of the dominant tenement, sells that dominant tenement to Mr. X, with no mention of the easement over B's parcel. The easement nonetheless persists. The easement appurtenant passes automatically with the dominant tenement. Mr. X continues to enjoy the easement. The easement appurtenant is transferred automatically with the dominant tenement.

For that matter, the burden of the easement appurtenant will also pass with the servient land, unless the new owner is a bonafide purchaser without notice of the easement. Thus, when B, the servient owner sells his burdened land, the burden of that easement appurtenant will also pass with B's servient land, unless the transferee is a bonafide purchaser without any form of notice of the easement.

In contrast to the ease with which the easement appurtenant is transferred, **the easement in gross is not transferable unless it is for commercial purposes.**

For example, A has an easement in gross, entitling her to swim in Mr. Smith's pond. That personal advantage, conferred upon A, is non-transferable. A will not be able to assign or transfer her personal easement in gross to Ozzy Osborne or anyone else. Easements in gross are considered personal to their holder. They are not transferable, unless they are for commercial purposes. For example, suppose now that A has the entitlement to fish for bait in Mr. Smith's pond, for A's Starkist Tuna Company. This time the easement in gross is of a commercial or pecuniary nature. It's business, not personal. A is entitled to assign or transfer this commercial easement in gross. She could, for example, sell it to the Bumble Bee Corporation. COMMERCIAL EASEMENTS IN GROSS ARE ASSIGNABLE.

**5.) How to create an easement: First, negative easements can only be created expressly, in a signed writing. By contrast, there are four ways to create an affirmative easement, remembered by the acronym PING: Prescription, Implication, Necessity and Grant.**

**G – GRANT.** We take these up in reverse order, starting with **GRANT.** An easement is considered a property interest in land. Therefore, the statute of frauds applies. AN EASEMENT THAT COULD ENDURE FOR GREATER THAN ONE YEAR MUST BE IN WRITING TO BE ENFORCEABLE. That writing is typically a formal document, called a deed of easement**.**

**N – NECESSITY.** The second way to create an affirmative easement is by

**NECESSITY.** This is the landlocked setting. An easement of right of way will be implied by necessity if grantor conveys a portion of his land with no way out, except over some part of grantor's remaining land. For example, A has a 100-acre tract. She conveys a 5 acre parcel to B, smack in the middle of her remaining acres. B has no way out, except over some portion of A's remaining land. The court will award B an easement of necessity to traverse some portion of A's land as a means of egress from and ingress to his parcel. Otherwise, B is rendered landlocked.

I – **IMPLICATION**. The third way for an affirmative easement to arise is by **IMPLICATION.** This is sometimes called the easement implied from existing use. For example, A owns two lots. Lot 1 is hooked up to a sewage drain that is located on lot 2. Later, A sells lot 1 to B, with no mention of B's entitlement to continue to use that sewage drain, located on A's remaining lot 2. The court may nonetheless imply an easement on B's behalf, if two elements are met: 1) the previous use was readily apparent, and 2) the parties reasonably expected the use to survive division because it is reasonably necessary to B's continued use and enjoyment of his lot.

P – **PRESCRIPTION.** The fourth way to create an affirmative easement is by **PRESCRIPTION.** An affirmative easement may be acquired by satisfying the elements of adverse possession. Here, remember the acronym COAH. To acquire an easement by prescription, the use must be:

**C – CONTINUOUS** for the given statutory period;

**O – OPEN AND NOTORIOUS**

**A – ACTUAL**; and

**H – HOSTILE.**

For example, every day A cuts across B's lawn to get to A's parcel. A is a trespasser. Over time, however, she may well be transformed into an easement holder, by satisfying the COAH elements.

Note that permission defeats the acquisition of an easement by prescription. An easement by prescription requires that the use be hostile.

**6.) The scope of an easement.** The scope of an easement is set by the terms or conditions that

created it. Unilateral expansion of an easement is not allowed. For example, A grants B an easement to use A's private road to get to and from B's parcel, Blackacre. If B later buys another lot, Greenacre, B may not unilaterally expand the scope of his easement to benefit Greenacre.

## II. The License

1.) **Defined**. The license is a freely revocable, mere privilege to enter another's land for some narrow purpose. Common examples of licensees include the newspaper carrier, the ticket holder and the parking garage patron.

2.) **Licenses are not subject to the statute of frauds.** There is no need for a writing to create an enforceable license. Oral agreements are sufficient to create licenses.

3.) **Licenses are freely revocable, at the will of the licensor, unless estoppel applies to bar revocation.** Here, it is helpful to keep in mind two classic license cases, to apply the conclusion of revocability.

   a.) **First, the ticket cases. Tickets create freely revocable licenses**. For instance, suppose that you purchase tickets to a Broadway show. Much to your dismay, all of the other ticket holders are admitted into the theater, all except you. Is this permissible? Yes. Licenses are freely revocable, at the will of the licensor. Thus, while you should have a cause of action against your seller and management for breach of contract, you are not entitled to see the show.

   b.) **The second classic license case we'll call "neighbors talking by the fence."** Keep in mind that nothing good comes when neighbors talk by the fence. For example, suppose that neighbor A, talking by the fence with neighbor B, says "B, you can have that easement of right of way across my land." This seemingly oral easement is unenforceable. It violates the statute of frauds. **The oral easement creates instead the freely revocable license.** Thus, two days later, when neighbor A says to B, "You know, I've had a change of heart. I am taking back any entitlement that you thought I gave you," A is within her rights. The license is freely revocable at the will and whim of the licensor. Too bad, so sad for neighbor B, but nothing good comes when neighbors talk by the fence.

4.) **When estoppel applies to bar revocation.** The only time that licenses are not freely revocable is when estoppel applies. Estoppel will apply to bar revocation when the licensee

has invested substantial money or labor or both in reasonable reliance on the license's continuation. Thus, if your facts suggest to you that the licensee has invested considerable sums, and/or considerable efforts, in reasonable reliance on the expectation that the license would endure, then in equity estoppel should apply to bar revocation.

For example, suppose that A has a license to use B's roadway to facilitate A's construction of A's new home. A invests considerable sums and labors in that pursuit, and reasonably relies on the license's continuation to bring her efforts to fruition. In equity, B should be estopped from precipitously revoking the license.

## III. The Profit

1.) **The profit defined.** The profit entitles its holder to enter servient land and take from it the soil or some other resource, such as minerals, timber, oil, fish or wildlife.

For example, Moses has the right to go to Mt. Sinai and take minerals from the land. That makes sense, because he is a prophet. I mean, he has a profit. ☺

2.) **The profit shares all of the rules of easements**. Theoretically and practically, the profit is very closely aligned to the easement. The argument has been made that the profit should in fact be subsumed by the easement category. Change in the realm of Property law, however, tends to be more evolutionary than revolutionary. Thus, the profit persists, as a category unto itself, nonetheless sharing the rules that pertain to easements.

## IV. The Real Covenant

1.) **The covenant defined**. The covenant is a promise to do or to not do something related to land, that is capable of binding successors to the originally covenanting parties. The covenant is unlike the easement because it is not the grant of a property interest. Instead, the covenant starts out as a mere contractual limitation, or promise, regarding land.

2.) **Covenants can be negative**. The negative covenant, known as the restrictive covenant, is a promise to refrain from doing something related to land. For example, "I promise not to build for commercial purposes," "I promise not to paint my shutters brown," or "I promise not to place a petting zoo on my land." The possibilities are endless. In this setting, an ounce of history is worth pounds of logic. The restrictive covenant came to be because of the law's insistence that negative easements be limited in scope to those four "LASS" categories (for Light, Air, Support, and Streamwater). Some other restrictive device had to

enter the fray to allow neighbors to avoid potentially incompatible land uses. Hence, the restrictive covenant emerged.

3.) **Covenants can also be affirmative.** The affirmative covenant is a promise to do something related to land. For example, "I promise to maintain in good repair our common fence," or "I promise to tend to our common garden," or "I promise to pay annual dues to our Homeowners' Association." Here too, the possibilities are endless**.**

4.) **The difference between real covenants and equitable servitudes.** On exams and in the practice, there is tremendous factual overlap between the real covenant on the one hand and the equitable servitude on the other. We have not yet defined the equitable servitude. For now, suffice it to say that the equitable servitude, the last member of the servitudes family, is a promise regarding land that is enforceable in equity. Therein resides the principal litmus test for purposes of determining how to construe the given promise presented on your facts. If plaintiff seeks money damages because of the violation of a promise regarding land, construe that promise as a covenant. The covenant is a legal device. It takes its remedy at law. By contrast, if plaintiff seeks injunctive relief (for example, plaintiff wishes to enjoin the offender from going forward in defiance of the given restriction concerning land), construe the promise as an equitable servitude. The equitable servitude, as an equitable device, takes its remedies in equity. It is accompanied by injunctive relief.

5.) **How a covenant runs with the land**. In covenant parlance, one tract is burdened by the promise, and another is benefited. You must be able to answer the question: **When will the covenant run with the land?** The short answer: **When it is capable of binding successors**.

For example, suppose that neighbor A promises neighbor B that A will not build for commercial purposes on A's land. A's parcel is burdened by the promise and B's parcel is benefited. Later, A sells her burdened land to A-1. B sells his benefited land to B-1. Now, A-1 begins to build a steak sauce factory on his premises. B-1 wishes to sue A-1 for money damages. Will B-1 succeed? It depends on whether the facts can support the conclusion that the original burden and benefit run. In this regard, two separate contests must be resolved.

First, does the burden of A's promise to B run from A to A-1? Always resolve as an initial matter whether the burden side of the equation runs. Why? It is much harder for the burden of a covenant to run than it is for the benefit to run. For the burden of A's original promise to B to be capable of running from A to A-1, five elements must be met. To remember them, go "WITHN." The five elements required for the burden to

run from A to A1:

**W – WRITING**. THE ORIGINAL PROMISE BETWEEN A AND B MUST HAVE BEEN IN WRITING.

**I – INTENT**. The original parties must have INTENDED that the promise would bind successors. Courts are generous in finding the requisite intent.

**T – TOUCH AND CONCERN.** The promise must touch and concern the land, meaning that it must affect the parties' legal relations as landowners, and not simply as members of the public at large. Covenants to pay money to be used in connection with the land, such as annual Homeowners' Association dues, and covenants not to compete do touch and concern the land.

**H – HORIZONTAL AND VERTICAL PRIVITY**. For the burden to run from A to A-1, we need both horizontal and vertical privity. Horizontal privity is the sticking point. It is difficult to establish. Horizontal privity refers to the nexus between our original parties, A and B. It requires that A and B had to be in what is called succession of estate, meaning that at the time this promise was made, they were in a grantor-grantee relationship, a landlord-tenant relationship, or a mortgagor-mortgagee relationship, or that they shared some other servitude in common, in addition to the covenant now in question.

It is difficult to satisfy the horizontal privity requirement. At the time that the covenant is made, it is not likely that A, the promisor, happened to buy her burdened parcel from promisee B, or vice-versa. It is even less likely that the two shared a landlord-tenant or debtor- creditor relationship, or that they share in common some servitude in addition to the covenant now at issue.

If you do have horizontal privity on your facts (if, in other words, you are able to ascertain that A and B are in succession of estate), in addition, for the burden of the original promise to run from A to A-1, there must be vertical privity. Vertical privity is much easier to establish. Vertical privity refers to the nexus between A and A-1. It simply requires some non-hostile relationship between A and A-1, such as contract, blood relation, or devise. The only time that vertical privity will be absent is if A-1 acquired her interest through adverse possession.

**N – NOTICE**. A-1 must have had some notice of the promise when she took.

Once you have resolved the burden side of the equation, turn next to the benefit side. Will the benefit of the original promise made to B run from B to B-1? Essentially, what we are asking is, does B-1 have standing to make this claim? B-1 will have standing if the benefit of the original promise made to B is capable of running to B-1. It is much easier for the benefit to run than for the burden to run.

For the benefit to run from B to B-1, remember "WITV".

**W – WRITING**. The original promise between A and B must have been in writing.

**I – INTENT**. The original parties intended that the benefit would run. Courts are liberal in imputing the requisite intent to the parties.

**T – TOUCH AND CONCERN**. The promise must affect the parties in their legal relations as landowners.

**V – VERTICAL PRIVITY**. There must be some non-hostile nexus between B and B-1.

Horizontal privity is not needed for the benefit to run. That is why it is much easier for the benefit to run than it is for the burden to run.

## V. The Equitable Servitude

1.) **Defined.** The equitable servitude is a promise that equity will enforce against successors. It is accompanied by injunctive relief.

2.) **To create an equitable servitude that will bind successors**: Remember "WITNES."

**W – A WRITING**. In general, but not always, the promise must be in writing.

**I – INTENT**. The originally promising parties must have intended that the promise would bind successors. Courts are generous in finding the requisite intent.

**T – TOUCH AND CONCERN**. The promise must affect the parties in their legal relations as landowners.

**N – NOTICE**. The assignees or successors of the originally promising parties must have had some form of notice of the promise.

**ES –** Simply a reminder that we are within the realm of the **EQUITABLE SERVITUDE**.

**Note: Privity is not required to bind successors.**

3.) **The implied equitable servitude or common scheme doctrine**. Equitable servitudes will typically be created in a writing. However, the vast majority of courts also recognize the implied equitable servitude. The implied equitable servitude arises in the context of what is called the general or common scheme doctrine.

For example, A, a subdivider, subdivides her land into 50 lots. She sells lots 1 thorough 45 through deeds that contain covenants restricting use to residential purposes. Later, A sells one of the remaining lots to B, a commercial entity, with a deed that contains no such restriction. B now seeks to build a convenience store on his lot. Can he be <u>enjoined</u> from doing so? (Notice that equitable relief is being sought. Thus, you must construe the promise equitably, within the rubric of the equitable servitude.)

Yes, if the two elements of the general or common scheme doctrine apply. Under the common scheme doctrine, the majority of courts will imply a reciprocal negative servitude to hold B, our unrestricted lot holder, to the restriction.

The two elements of the common scheme doctrine:

a.) When the sales began, our subdivider, A, had a general scheme of residential development which included the defendant lot now in question.

b.) Our defendant, B, must have had some form of notice of the restriction. There are three potential forms of notice. Remember AIR: Actual, Inquiry and Record Notice.

i.) The first form of notice is **actual notice**, meaning that defendant had actual, literal knowledge of the restriction.

ii.) The second form of notice is called **inquiry notice**. Inquiry notice is synonymous with "the lay of the land," meaning that a routine

inspection would reveal that this neighborhood appears to conform to some common residential restriction.

iii.) The last form of notice is **record notice**, meaning the form of notice sometimes imputed to buyers on the basis of the public records. The majority of courts tell us that a subsequent buyer is not on record notice of the contents of prior deeds transferred to others by a common grantor. This is the more reasonable approach, as it is less burdensome to the title searcher. By contrast, the minority view tells us that a subsequent buyer is on record notice of the contents of prior deeds transferred to others by a common grantor. This imposes a considerable burden on our defendant B's title searcher.

Note that a minority of states, led by Massachusetts, refuse to recognize the common scheme doctrine. These states strictly construe the statute of frauds to require that any servitude be in writing to be enforceable.

**4.) The changed circumstances doctrine**. This is a narrow defense to enforcement of an equitable servitude. Sometimes an entity bound by, for example, an equitable servitude restricting its land use to residential purposes, will plead to the courts, "Please release me from this residential restriction. It no longer makes sense, because the neighborhood has changed. It is now commercial in character." When a party seeks to be released from the terms of an equitable servitude because of changed conditions, he or she must convince the court that the change complained of is so pervasive that the entire area's essential character has been altered. Piecemeal or borderlot change is never sufficient.

## ADVERSE POSSESSION

**1.) The basis concept.** Possession, for a statutorily prescribed period of time can, if certain elements are met, ripen into title.

**2.) The elements of adverse possession.** Remember "COAH."

For possession to ripen into title, it must be:

**C – CONTINUOUS**, meaning, uninterrupted for the appropriate statutory period, which is anywhere from 10 - 30 years, depending on the jurisdiction.

**O – OPEN AND NOTORIOUS**, meaning the sort of possession that the true

owner would be expected to make under the circumstances. The open and notorious requirement demands that the possessor's occupation be visible. It must not be clandestine or covert. Why not? Because the law endeavors to give the true owner every opportunity to reassert his claim to the property in the face of another's adverse occupation.

**A –** **ACTUAL**, meaning that the possessor must make an actual physical entry onto the premises, to start the appropriate statute of limitations. That entry cannot be symbolic, fictitious, or hypothetical. It won't do, for example, for a claimant to merely send the true owner a letter of intent to possess adversely. There must be an actual and physical entry onto Blackacre.

**H –** **HOSTILITY**, meaning that the possessor must not have the true owner's permission to be there. Permission always defeats adverse possession. Thus, one of the best ways for an owner to ensure that an adverse claim will not accrue against him is for the owner to give the possessor permission to be there.

**3.)** **Tacking**. To satisfy the given statutory period, one adverse possessor may tack on to his time with the land his predecessor's time, so long as there is privity, which is satisfied by any non-hostile nexus between our possessors, such as blood, contract, deed, or will. The only time that tacking is not allowed is when there has been an ouster. Ouster defeats privity.

For example, suppose that A is a possessor on his way to satisfying the COAH elements of adverse possession when Mr. X, a bully, comes along and says, "Move it or lose it," thereby ousting A and assuming possession himself. This bully will not be afforded the benefit of tacking. The law will not reward his wrong. Ouster defeats privity. Therefore, tacking is not allowed.

**4.)** **Disabilities.** The statute of limitations will not run against a true owner who is afflicted by a disability at the inception of the adverse possession. Common disabilities, usually prescribed by statute, include infancy, insanity and imprisonment. Thus, if O, the true owner of Blackacre, is a minor at the inception of the adverse possession, or insane, or in prison, or in a coma, the statute of limitations will not run against him or her. Here is the most essential point: To benefit from disabilities protection, the true owner must be afflicted at the inception of the adverse possession. A belated affliction will not inure to the benefit of the true owner.

## LAND TRANSACTIONS: THE PURCHASE AND SALE OF REAL ESTATE

Every conveyance of real estate consists of a two-step process.

Step I: The land contract, which endures until step II.

Step II: The closing, where the deed becomes the operative document.

### I. The Land Contract

1.) **The land contract and the statute of frauds.** Typically, the land contract must be in writing, signed by the party to be bound, describing the land and reciting some consideration. There is one exception to the statute of frauds, and it is a narrow one, known as the doctrine of part performance. The doctrine of part performance is satisfied if any two of the following three circumstances is present:

a.) Buyer takes physical possession of the land;

b.) Buyer pays all or a substantial part of the purchase price; and /or

c.) Buyer makes substantial improvements. When the doctrine is met, equity will intervene and decree specific performance of an oral contract for the sale of land.

2.) **Marketable title.** In every land contract, seller implicitly promises to provide marketable title. Marketable title is title free from reasonable doubt. It is title free from lawsuits or the threat of litigation. **Three circumstances will render title unmarketable.**

**a.) Adverse Possession.** The majority rule provides that title acquired by adverse possession is unmarketable. The minority view, led by New Jersey, provides that the acquisition of title through adverse possession is not an impediment to seller's establishing marketable title.

**b.) Encumbrances.** Marketable title means an unencumbered fee simple. Thus, servitudes or liens on the property render title unmarketable, unless the buyer has waived them.

**c.) Zoning Violations.** If Blackacre is in violation of an applicable zoning ordinance(s), title is unmarketable.

3.) **Seller's duty to disclose.** In every land contract, seller implicitly promises not to make any false statements of material fact. The majority of states now also hold seller liable for failing to disclose latent, material problems. Thus, seller is responsible for his material lies as well as his material omissions.

The land contract endures until we get to step II of the modern day land transaction, the closing.

## II. The Closing

1.) **The deed.** Once we get to the closing, our controlling document becomes the deed. The deed passes legal title from seller to buyer if it is lawfully executed and delivered.

2.) **Lawful execution of a deed:** The deed has to be in writing, signed by the grantor, lawfully executed in accordance with the given jurisdiction's formal statutory requirements.

3.) **Delivery of a deed:** In addition to being lawfully executed, the deed must be delivered. The standard for delivery is a legal standard, not a literal one. It is satisfied when grantor manifests the present intent to be immediately bound and to part with legal control, regardless of whether the deed instrument itself is actually or literally transferred to grantee.

For example, suppose that Mike Piazza's dad says to him, "Son, today is the day. Your mother and I want you to have Blackacre. Blackacre is now yours." Mike says, "Mom and Dad, I accept. Thank you. But do me a favor. I'm in the off-season, when I tend to be most absent-minded (trying to forget the regular season). Don't be handing me any legal documents right now." Mom and Dad oblige the request and put the deed in Mom and Dad's safe deposit box. Has delivery to Mike nonetheless been accomplished? Yes. Mom and Dad showed the intent to be immediately bound and to part with legal control. Thus, delivery is deemed accomplished, no matter that Mike's parents put the deed away for safe-keeping, or no matter that the deed perhaps stays in the very same drawer in Mom and Dad's home in which it always resided.

4.) **The three types of deed and covenants for title.**

a.) The first type of deed is the **QUITCLAIM**. This is the worst deed a buyer could hope for. The quitclaim deed contains no covenants. Grantor is not even promising that he has good title to convey.

b.) The second member of the deed family is called the **GENERAL WARRANTY DEED**. The general warranty deed is the best deed a buyer could hope for. It

contains six promises or covenants that grantor makes not only on behalf of herself, but also on behalf of her predecessors in interest. Our grantor voluntarily takes on the transgressions, if any, of her predecessors.

c.) The first three of the six covenants contained in the general warranty deed are called present covenants. A present covenant is breached, if ever, at the instant of delivery. Thus, the statute of limitations for breach of a present covenant begins to run from the instant of delivery of the deed.

What are the three present covenants?

i.) **The covenant of seisin**. Grantor promises that he owns the land that he now claims to convey.

ii.) **The covenant of right to convey**. Grantor promises that he has the power to make this transfer. In other words, he is under no temporary restraints or disability that would compromise his capacity to make this transfer.

iii.) **The covenant against encumbrances**. Grantor promises that there are no servitudes or liens on the property.

The next three covenants contained in the general warranty deed are called future covenants. A future covenant is not breached, if ever, until some future date, when grantee is disturbed in possession. This means that the appropriate statute of limitations will not begin to run until that future date.

What are the three future covenants?

i.) The first of our future covenants and the fourth of our covenants overall is **the covenant for quiet enjoyment**. Grantor promises that grantee will not be disturbed in possession because of someone else's lawful claim of title. Grantor is promising grantee: "Look, there is no one else out there with a claim to this land that is superior to your claim. I'm not a dirty double dealer. I didn't convey to you yesterday, and then to Mr. X today. No one else is going to come knocking on your door with paramount legal title, to thereby usurp or deprive you of your rights."

ii.) The second future covenant, and the fifth of our covenants overall is **the covenant of warranty**. Here, grantor promises to defend grantee against anyone else's lawful claim of title. This is very similar to the covenant of

warranty, only now grantor is saying, "Grantee, I just promised that no one else has a claim superior to yours. Now I add that in case someone else with superior title does materialize, and I'm telling you, that won't happen, but if it does, I promise to step up to the plate. I promise to defend you against anyone else's claim of paramount title."

iii.) The last of our future covenants, and the sixth of our covenants overall is **the covenant for further assurances**. Grantor promises to do whatever future acts are reasonably necessary to perfect grantee's title, if it later turns out to be imperfect. Grantor is saying, "Look, if I need to authenticate my signature at some future date, so be it, I'll help you out. Whatever administrative or ministerial things I need to do to perfect your title if it later turns out to be imperfect, I promise to do."

c.) The third type of deed is called the **STATUTORY SPECIAL WARRANTY DEED.** It is provided for by statute in most states. The statutory special warranty deed, sometimes called the bargain and sale deed, has grantor making two promises, but only on behalf of himself. Grantor is not making any promises on behalf of his predecessors. The two promises:

i.) Grantor promises that he has not conveyed this property to another. He promises, in other words, that he is not a dirty double dealer.

ii.) Grantor promises that the property is free from encumbrances created by the grantor.

## THE RECORDING SYSTEM

**1.) The essential model.** Every recording system question comes down to one essential model: The case of the dirty double dealer:

**O conveys Blackacre to A. Later, O conveys Blackacre, the same parcel, to B. O, our double dealer, has skipped town. In the battle of A vs. B, who wins?**

**Remember two bright line rules:**

**a.) If B is a bona fide purchaser, and we are in a notice jurisdiction, B wins, regardless of whether or not he records before A does.**

**b.) If B is a bona fide purchaser and we are in a race-notice jurisdiction, B wins if he**

**records properly before A does.**

To make sense of these two bright lines, it is important to appreciate first that recording statutes exist to protect only bonafide purchasers and mortgagees (or creditors). More about mortgagees in your upper-course electives. For now, our focus is on the bonafide purchaser. Let's think about B in our model, the case of the dirty double dealer. (Recall that O conveyed to A, and later, O conveyed the very same parcel to B.) Now B, who got there last, comes to us. We are the recording system. We are elitist. We will not protect just anyone. To be worthy of our potential protection, B must first prove himself worthy. He must demonstrate that he is a bona fide purchaser.

2.) **Bona fide purchaser status.** To qualify as a bona fide purchaser:

a.) B must have purchased for value; and

b.) B must not have had notice of A's existence at the time that B took.

First, to purchase for value, B must have remitted substantial pecuniary consideration for Blackacre. Second, B must have taken without actual, inquiry or record notice of A's existence. Actual notice means what it says. Prior to B's closing, B actually and literally learns that O is a double dealer, having already conveyed the same parcel to A.

Inquiry notice means that whether B looks or not, he is on notice of whatever a routine inspection of Blackacre would reveal. Buyers of land have a duty to inspect before closing. Thus, if A is in possession of Blackacre, B is on inquiry notice of that fact, regardless of whether B bothers to examine the premises or not. B is on record notice of A's deed if, at the time B takes, A's deed was properly recorded, within what is called the chain of title. Thus, if A properly records her deed before B takes, she will always defeat B.

3.) **Notice and race-notice recording statutes.** In our model, suppose that B has demonstrated that he is a bonafide purchaser. He asks, "Am I now victorious over A?" Our answer: "It depends on which recording statute your jurisdiction has enacted."

a.) **Roughly half the states have a notice statute in place. In a notice state, B wins as long as he is a bonafide purchaser at the instant he takes.** In a notice state, in the contest of A v. B it does not matter that B never records. In that contest, it does not matter that A ultimately records first. However, as counsel to B, even in a notice state, you advise your client to record promptly and properly, to close the door to any potential C's or D's that might be looming out there, to the extent that O is a triple or even a quadruple dirty dealer. Still, in a notice state, in the contest of A v.

B, B wins as long as he is a BFP at the time B takes.

**b.) Race-notice statutes are in place in roughly the other half of the states. In a race-notice state, B wins if he accomplishes two things:**

**i.) B must be a BFP; and**

**ii.) B must win the race to record.**

Thus, in a race-notice state, it is not enough for B to prove that he is a bonafide purchaser. In addition, he must win the race to record. He must be the first to record properly.

**4.) Proper recordation and the chain of title.** To put the world on record notice of its existence, the deed must be recorded properly, meaning, within the chain of title. The chain of title refers to that series or sequence of documents capable of giving record notice to subsequent takers. Typically, the chain of title is arrived at through a title search. In most jurisdictions, the buyer retains a title searcher or title insurer, who does an appropriate search of the public records, or what is called the grantor/grantee index.

**5.) The problem of the wild deed.** Sometimes a deed is in fact recorded, but recorded improperly. An improperly recorded deed cannot give record notice of its contents, because it is not hooked up to the chain of title and therefore will not be discovered by an interested title searcher. This scenario arises first in the context of what is known as the problem of the wild deed.

**For example: O sells Blackacre to A, who does not record. Then, A sells to B. B records the A to B deed.**

We pause here to note that the A to B deed is called a wild deed. The A to B deed, although recorded, is not connected to the chain of title. Why not? Because it contains a missing grantor. The O to A link is missing from the public records. **Hence, the rule of the wild deed: If a deed entered on the records (that's the A to B instrument in our example) has a grantor unconnected to the chain of title (that's the O to A missing link), the deed is a nullity. It is incapable of giving record notice of its contents to anyone. It will not be found in a routine title search.**

**Our example continues: Suppose that later, O, our dirty double dealer, sells the very same parcel again, to C. C records. Assume that C has no inquiry or actual notice of B's existence. In the battle of B v. C, who wins?**

The answer: C wins, as long as C is a bona fide purchaser. C will not be on record notice of B's existence. Why not? The A to B deed is a wild deed. It will not be uncovered by C's title searcher. It is as if that wild deed had never been recorded at all. C wins, in both a notice and race-notice state. In a notice state, C wins because C is a bonafide purchaser at the time C takes. In a race-notice state, C wins as a bona fide purchaser who presumptively wins the race to record because B's recordation is a nullity.

**6.) The rule of estoppel by deed.**

**For example, in 1950, O owns Blackacre. He is thinking about selling it to X, but for now decides against it. In 1950, X, who does not yet own Blackacre, decides to sell it anyway, to A. In 1950, A records. In 1960, O finally does sell Blackacre to X. In 1960, X records. Finally, in 1970, X, our dirty double dealer, sells Blackacre again, to B. B records in 1970. This leads to a two-part inquiry:**

a.) As between X and A, who owned Blackacre from 1960-1969? The answer: A, thanks to estoppel by deed. **The estoppel by deed rule tells us that one who conveys realty in which he has no interest (in our example, that would be X, who back in 1950 purported to sell Blackacre, which he did not yet own), is estopped from denying the validity of that transfer if he subsequently acquires the interest that he had previously purported to convey**. In other words, estoppel by deed tells us that in 1960, when X ultimately acquired title from O, that after-acquired title shot back in time to benefit A.

b.) Who owns Blackacre in 1970, when B enters? **As long as B is a bonafide purchaser, wins in both a notice and race-notice jurisdiction.** Why is that? A's recordation in 1950 is a nullity. It is another variation on the wild deed theme. Why? Because A recorded too early.

B's title searcher would never locate A's deed. Why not? A recorded before her grantor X actually had title to convey. The title searcher is entitled to assume that no one sells land until they first own it. Thus, the title searcher would have no reason to discover X's 1950 pre-ownership transfer to A. Because A recorded too early (and was not as diligent as she should have been in conducting an appropriate title search on her own behalf), A ultimately loses to B.

## WATER RIGHTS

There are two major systems for determining the allocation of water rights from water courses, such as streams, rivers or lakes: the riparian doctrine and the prior appropriation doctrine.

1.) **The riparian doctrine:** The riparian doctrine provides that the water belongs to those who own the land bordering the watercourse. These people are called riparians. Riparians share the right of reasonable use of the water. Riparians must not be unduly exploitative. Riparians must not commit waste. Reasonable use is the relevant hallmark here.

2.) **The prior appropriation doctrine:** Here, the water belongs initially to the state. However, the right to use it can be acquired by an individual, regardless of whether she happens to be a riparian owner. This is a more egalitarian system than the riparian model. Here, rights are allocated according to what is called priority of beneficial use. This means that a person can acquire the right to divert and to use water merely by being amongst the first to put the water to some beneficial or productive use. The norm for distribution of the water rights is first in time, first in right.

## POSSESSOR'S RIGHTS

The possessor of land has the right to be free from trespass and nuisance.

1.) **Trespass.** Trespass is the invasion of land by tangible, physical object. To remove a trespasser, one brings an action for ejectment.

2.) **Nuisance.** Nuisance is the substantial and unreasonable interference with another's use and enjoyment of land. While trespass requires actual physical invasion, nuisance does not. Thus, for example, odors and noise could give rise to a nuisance, but not a trespass. The picketers across the street could give rise to a nuisance, but not a trespass.

3.) **Nuisance and the hypersensitive plaintiff.** For a nuisance claim to be actionable, the problem complained of has to be offensive to the average person in the community. If the problem instead is attributable to plaintiff's hypersensitivity, or ultra sensitive use, plaintiff will lose.

> For example, A operates a dog kennel that is located near a power plant. A notices that some of her dogs are becoming increasingly agitated. It is because the power plant sometimes emits a high-pitched frequency heard by animals but not humans. If A sues

the plant for nuisance, A will lose, because the problem that she complains of is attributable A's ultrasensitive or hypersensitive use.

## EMINENT DOMAIN

1.) **Defined.** Eminent domain is the government's Fifth Amendment power to take private property for public use in exchange for just compensation.

2.) **Explicit takings.** Explicit takings are overt acts of governmental condemnation. For example, government comes knocking on your door and says, "We're sorry. But we must condemn your beloved Blackacre to make way for a public highway." If, after notice and an opportunity to be heard, the taking is deemed constitutionally permissible, the government must pay you just compensation.

3.) **Implicit or regulatory takings.** Here a private landowner claims that a government regulation, although never intended to be a taking, nonetheless has the same effect. The given regulation has significantly compromised that property owner's reasonable, investment-backed expectations. For example, the private landowner sues the government, alleging that its new zoning ordinance, or moratorium on development, or designation of landowner's premises as a landmark leaves landowner with no reasonable return on his or her investment. If the regulation is found to have gone too far, so that it is indeed a regulatory or implicit taking, there are several remedies available.

4.) **Remedies for regulatory takings.** Landowner may seek an injunction to invalidate the ordinance. Landowner may sue for money damages, in a suit known as an inverse condemnation action, so named because now it is not the government suing landowner to condemn her land. Inversely, it is landowner who is suing the government, claiming that a taking has occurred.

## ZONING

1.) **Defined.** Zoning is an inherit power of the state, derivative of its police powers. We allow government to enact zoning ordinances to reasonably control land use, for the protection of general health, safety and welfare.

2.) **The variance.** The variance is the principal means to achieve flexibility in zoning. A variance is permission to depart from the literal requirements of a zoning ordinance. There are two species of variances: the area variance and the use variance.

**a.) The area variance:** The area variance deals with problems of ill-fit.

For example, A has a home in a zone relegated to residential purposes. Her child has developed respiratory maladies. Her pediatrician indicates that the construction of a glass-enclosed front porch on A's premises will help to allay those problems. A's proposal for construction presents a problem of ill-fit. If she builds the extension as planned, the premises will be in violation of the zoning ordinance's minimum setback requirements. A must petition the township's Zoning Board of Adjustment for an area variance. To succeed, A must demonstrate:

**i.) Undue hardship that has not been self-imposed; and**

**ii.) That granting the variance will not work a detriment to neighboring property values.**

b.) **The use variance.** The use variance is harder to obtain than the area variance. The use variance has its proponent seeking to depart from the list of permissible uses in a given zone. For example, A wishes to build a convenience store in a district zoned exclusively for residential purposes. To succeed, A must obtain a use variance from the Zoning Board of Adjustment. The use variance is granted only in the presence of very exacting "special circumstances."

3.) **The nonconforming use.** The nonconforming use is a once lawful, existing use that is now rendered nonconforming because of a new zoning ordinance. This now nonconforming use cannot be eliminated all at once unless just compensation is paid. Otherwise, the action would be tantamount to an unconstitutional governmental taking.

For example, A has operated a brickyard for generations. Today, the township enacts an ordinance prohibiting the operation of all junkyards. The township's application of that ordinance against A all at once would be a taking, warranting that the town pay A just compensation. To escape the takings conclusion, some jurisdictions provide for **amortization.** Defined by statute, amortization is the gradual elimination, or the gradual phasing-out, of the now nonconforming use. Amortization might allow A, for example, three years within which to gradually phase-out the junkyard, thereby affording A the opportunity to cut her losses.

In some jurisdictions, amortization is deemed constitutional. Other jurisdictions have ruled that the gradual elimination of a nonconforming use is no less a taking because it is gradual.

## EXAM PREPARATION

Law school, and especially exam time, can do strange things to ordinarily kind, decent people. Competition can be fostered among some. Others retreat, feeling alienated. Some become aggressive, others cranky, and still others fatalistic. Right about this time you might be feeling that no matter how cynical you get, you just can't keep up.

Anxiety and nervousness is natural. But you can rise above it. For that matter, you can let it bring out the very best in you. It was Hemingway who defined guts as grace under pressure. Be generous to the people in your midst. Help them. Let a spirit of cooperation characterize all of your efforts, especially now. Reject any limited view of success. Success is infinite and it is contagious. There is plenty to go around.

Be kind, compassionate, and dignified, mindful that your classmates today will be your colleagues tomorrow. This legal community of ours is a small one, and people's memories are long. Know that one year from now, indeed, twenty years from now, your classmates won't remember you as the person who got two As or two Cs first semester. What they will remember is how you conducted yourself in the process. It is who you are, and how you got there, that they will remember.

For guidance on how to conduct yourself, think about what you would want said about you at your eulogy. (No, exams won't kill you. But this exercise is actually a helpful one.) Our lives are shaped most, not by what we take with us, but by what we leave behind. When all is said and done, how would you want to be remembered? More immediately, at the conclusion of your law school

years, what will you have left behind? What will be your legacy? Will they be saying, "What a competitive, win at all costs kind of guy he was. I'll never forget the time he hid that outline from his study group." Or will you be remembered as a decent, honest, hard-working person, always willing to help when you could? Memories die hard. The professional associations that you are forging now will outlive the challenges of the next few months.

Yogi Berra could have said that exam-taking is 10% mental and 90% emotional. (He didn't, but the point remains.) So much of success in this context depends on your maintaining a healthy, positive state of mind. Exams, and especially the first set of law school exams, can cause even the most capable people to doubt themselves. Recognize that to the extent that you are feeling uneasy, anxious, maybe even terrified, it is not you. The entire system, which leaves much to be desired, has built into it features destined to inspire panic. A whole semester or year's worth of work comes down to performance on a two or three or four hour exam. The law school exam itself – a series of hypotheticals – enjoys a certain mystique, asking you to apply what you have learned to an unfamiliar context.

For that matter, there is an infectious contagiousness to pre-exam anxiety. You can catch it in the halls, the library, before and after class. You may walk into school on a Monday morning after a great weekend only to hear from a classmate, "I just finished all of my outlines and synthesized Contracts. What a relief!" Indeed. At that point, your uneasiness may be compounded by the questions, what is an outline? What is a synthesis? (They, by the way, are just fancy names appended to efforts that you have already applied and mastered. More about that shortly.)

To maintain some peace of mind during this crazy time, try to remember the following:

1) **Be sure to yourself**. You know what has worked for you in the past. While the law school exam is different in form, it requires that you apply the same skills that got you into law school in the first place – good writing, reasoning, and analytical abilities. Do not abandon your own tried and true techniques for studying.

2) **Go within for strength**. Do not look for it from sources outside of yourself. For that matter, if you keep looking over your shoulder, you will be sure to trip over what is in front of you.

3) **Avoid overkill**. The temptation, especially first year, is to get your hands on every possible hornbook, study aid, and outline that you can find. Resist this temptation. Simplify. All you need is your casebook, classnotes, perhaps one good sample outline, copies of past exams, and, if appropriate, a good commercial study aid or outline.

4) **Abandon any perfectionistic tendencies that you may have**. Many lawyers and lawyers-to-be suffer from the perfectionist syndrome. Strive for excellence, not perfection. Better still, keep reminding yourself that your aim is to survive. In the semesters ahead there will be many opportunities apart from exams for you to distinguish yourself. You will take advantage of those, thereby diminishing the significance of grades.

5) **Relax**. Cognitive learning specialists tell us that retention, understanding, and performance are enhanced immeasurably by calm. There are many hours in a day, and you have the time that you need. Keep matters in perspective. When all is said and done, you will be a lawyer. Not an A or B or C lawyer, but a lawyer.

6) **Embrace the process and the methodology of all of your study efforts**. No matter the result, the studying itself is important. You are learning for the sake of your life's craft. To think that you are studying simply for the sake of an exam is akin to a medical student's thinking that she needs to learn anatomy only to get through the final. Just as the future doctor had better know a pancreas from a gallbladder, the future lawyer will need to know a covenant from an easement.

7) **Take the offensive**. So much of the anxiety that accompanies law school exam-taking resides in the sense that you are no longer in control, with forces beyond you now calling the shots. Accept your power and take back control. You can take matters into your own hands in several ways.

    a.) First, before the semester ends, be sure that you have run through your notes for each class. Jot down any questions or sources of confusion. Clear those up before

the reading period, so that when you actually get down to the business of studying you won't be in the burdensome position of having to learn raw material from scratch. The study period should be spent reviewing, reducing the subject matter to an accessible format, and doing practice questions.

b.) Second, for each subject think offensively about what is likely to be asked. By paying attention in class, you should get a good idea as to which topics have been stressed and which matters seem of particular interest to your professor. The student-teacher exchange should provide clues as to which sorts of answers the professor values. Ask each professor if he or she has any advice on exam-preparation and exam-taking. Listen carefully to the response.

c.) Third, go to the library and get copies of all available past exams for each of your courses. Try to simulate exam conditions and take those past exams. If you are able to do this before the end of the semester, ask your respective professors to comment on or critique your efforts. If the professor is unavailable, seek out the input of a legal writing specialist or tutor.

d.) Fourth, retain a sense of control by carefully reviewing the exam schedule and setting up a study timetable for yourself. Budget and regiment your time. Schedule in study breaks and things to look forward to.

**EXAM-TAKING: Nine Quick Tips to Avoid Common Pitfalls**

Exam-taking is a skill that improves with time and practice. To enhance your performance, keep in mind these tips, intended to help you to avoid common, easily-remedied mistakes.

1) Be sure to answer the call of the question. The call of the question is what the exam is asking you to do with the given fact pattern. It typically appears at the bottom of the hypothetical, often in bold print. For example, "Determine Jane's rights and remedies as against Jake." Answer the question(s) asked. Do not answer questions that are not asked. Do not waste precious time on tangents. Often, a student will lose points simply because he or she overlooked part of the call of the question, and failed to respond to one or more points asked.

2) Be issue inclusive. Spot as many relevant issues as you can. For each issue presented, note the relevant facts as well as any countervailing or competing considerations. For example, on a Property exam, if you are analyzing a restriction on land as an easement, also consider whether that same restriction could or could not be construed as a real covenant, or perhaps an equitable servitude, or maybe a mere license.

3) Follow through and define relevant legal doctrine. Be sure to articulate the elements of all relevant causes of action. Define pertinent doctrines or concepts. For example, if the exam presents a nuisance issue, in answering, first define the nuisance. There, you might begin by noting that "Jane should proceed against Jake for nuisance. Private nuisance is the substantial and unreasonable interference with another's interest in land." Proceed to apply the exam's facts to the legal standard. You are being tested in considerable measure on your ability to apply salient legal doctrine to facts. Be sure to link your statement of the law, then, to the relevant facts presented. A helpful way to remember to do this is by resorting frequently to the word "here." For example, "The elements of adverse possession doctrine require that the possessor's use be continuous. *Here*, Jill's possession was interrupted for six months."

4) Organize your response. Take time to outline and organize our answer. The use of headings can be very effective. Ultimately, the substance of your answer is far more important than its form. But a cogent, orderly, and organized form is a great plus. For that matter, be sure to write legibly. To enhance overall readability, skip lines and write on every other page.

5) Do not restate the fact pattern. Instead, be sure to apply the law to the facts. Do not recount, summarize or restate the facts for their own sake. Your professor knows the fact pattern. He or she wrote it. Rather, incorporate selectively the relevant facts, connecting them to applicable theory and doctrine.

6) Do not present vague, run-on kitchen sink narratives of the law. Unlike many college exams, you are not being asked to provide a treatise-like recitation of a whole body of theory. Avoid any generalized discussion. You are being tested on your ability to spot the relevant issues and apply the law to the pertinent facts in an organized and concise manner.

7) Be a good lawyer. A good lawyer must make value judgments, sift the relevant facts from the irrelevant, and respond ethically and professionally.

8) Do not surrender your common sense. Think about and note the common sense implications of the result that you are exploring.

9) Budget your time and do not exceed the recommended time limit for each question. This is perhaps most important of all. Carefully establish a time budget for each exam and honor that budget. You will be penalized for failure to get to a question. Force yourself to move on once the allotted time for a given question has run out.

## ON GRADES

Law school modes of evaluation leave much to be desired. In a context where there is so little feedback, how one happens to do on a particular day on a three or four hour test tends to take on an undeserved importance and magnitude. Some even construe their grades as the final word on their abilities and opportunities as a future lawyer. Nothing could be further from the truth.

Your grades, whatever they happen to be, are an indication of how well you fared for a few hours in applying your learning to a narrow, often peculiar format, as determined by someone else's sometimes arbitrary, usually subjective judgment. In this imperfect system, injustices are inevitable. People who hardly studied may excel. The course that you thought you aced could represent your worst grade. The exam that you thought you bombed could come back as your best grade. And so on.

Let your grades inform your life, not define, diminish, or even exalt it. They are a means of feedback, letting you know whether you have figured out how to play the exam-taking game. If your grades are not what they should be, take the offensive, seeking out people and resources to help you to improve your exam skills. Consult with each of your professors. Find a tutor. Speak with upper-class students who have done well in the given courses you are now preparing for. Take practice exams. Ask your professors for feedback on your practice runs.

For that matter, you have the power to dilute the significance of grades by demonstrating your excellence in other contexts. Write on to a journal. Participate in moot court competitions. Intern for a judge. Become a research assistant to a member of the faculty. Participate in a clinic. These are among the ways for you to create value, establish yourself as a capable prospective

practitioner, and shine.

As you do everything you can to enhance your performance, try to keep matters in perspective. Remember that the race is long, and that to finish the race is to win the race. Pace yourself, and know that time is on your side. Be appreciative and grateful for the strides that you are making. Know that every step, however small, puts you that much closer to realizing your goal.

Further, I promise you that on the occasion of your first real estate closing, no one around that conference room table will turn to you and ask, "By the way, what did you get in Property?" At your first oral argument on, for example, a products liability case, the judge won't interrupt to inquire, "So, how did you do in Torts?" In life, what counts is who you are. You are not your grades, or, for that matter, your resume, law journal placement, or summer job.

Only you create the reality that your grades represent. No one else can do that. Throughout, keep you head high. Hold tight to your dignity, integrity, and belief in yourself. You are precisely where you should be. You have succeeded before. You are succeeding now.

Think, act, and react as a successful, prosperous, and intelligent person would. Remember that what you think about most expands. What you think about most is what you move towards. Success is more attitude than it is aptitude. With your thoughts and attitudes, you are shaping the quality of your life.