CONCEPT OF PRIVATE PROPERTY

I. Private property: to the world: keep off X, unless you have my permission which I may grant of withhold, signed by citizen, endorsed by the state. Must involve real property (land and any attachment to it)
   a. Elements:
      i. *Exclusionary powers*: private property must involve the capacity to exclude with the government supporting your assertion of that right (must be perceived fairness and stability –
      ii. *Capacity for choice*: for the relationship between gov’t and citizen to be meaningful, there must be element of choice. Gov’t can’t take away all decisions you get to make (i.e. Police power, immanent domain, restrictions on dev’t)
      iii. *Special Use rule*: although special use rule is not essential to private property, there is usually an element of scarcity and special use. (i.e. selling air or using the law school library)
      iv. *Transfer/Escheat*: generally to have private property must have ability to transfer that property freely.
      v. *Relationship with society*: requires society to recognize those rights. Don’t have private property until society recognizes it is there (i.e. gorilla island example)
      vi. *Value*: The private property relationship can exist with a thing that has little or no commercial value, like a child’s attempt at a musical composition. However, things that have commercial value are generally the subjects of the private property relationship. This is because commercial value is related to scarcity. Scarcity is important to the relationship because if supplies are unlimited and freely available to all, there is no need for exclusivity and hence, no need for private property.
   b. Judicial Remedies for Protection of Property: The key to the private property relationship is the capacity to exclude others; however, exclusivity and other property interests must be supported and protected by law, and those laws must be generally predictable. Laws society employs to protect property interests must possess generally the following qualities:
      i. Certainty, which implies: consistency, clarity, convenience
      ii. Feasibility, i.e., must stand up to cost/benefit tests
      iii. Civility, i.e., must lend itself to peaceful resolution, thus avoiding costs associated with strife
      iv. Fairness
   c. *Police power*: Law limits the scope of exclusionary interests in its exercise of the police power to protect public interests. I.e. eminent domain (or the power to condemn), zoning, and anti-discrimination laws. This police power is generally recognized, but it does not appear in the U.S. Constitution. It relates to the power of a government to act in protecting public health, safety, and general welfare. Justified if legitimate purpose, reasonable, and gives deference to legislative purpose.
II. Escheat: The right of escheat derives from the States permanent, non-possessory interest, or ownership of, all lands within its borders. All private owners are tenants, but this ownership is concurrent with the States.

FREEHOLD ESTATES

estate: One does not own Blackacre, you own an estate in Blackacre. Ownership measured in terms of time. Owner of a fee simple absolute can carve out lesser estates, but aggregate must always add up to the fsa. The estate concept merely requires a \textit{POTENTIAL} for the interest to become possessory, not actual possession.

I. Fee simple

a. Creation: To B and his heirs; to B; to B, his heirs and assigns forever. Words of general inheritance no longer required. Although at common law life estate was the fall back estate, the fsa, by statute is now the fall back estate.
b. Future Interest: none
c. Transferability: by will, deed or intestacy

   i. Three hallmarks of a fee simple:

   1. alienable

   a. Statute Quia Emptores: lifted restraints on ability to alienate land and cemented this first characteristic of an estate

   2. devisable

   a. Statute of Wills: enabled property owners to dispose of their land freely, therefore when A transfers to B and heirs, B’s heirs were no longer assured that they would take the property. This statute cemented this characteristic of the estate.

   b. If B’s heirs take because B died intestate, the take no as purchasers but as successors.

   3. descendible

   a. \textit{Words of purchase}: define who takes an estate

   b. \textit{Words of limitation}: define the estate taken.

   c. \textit{Words of inheritance}: “and his heirs” dually words of limitation and inheritance. They describe an inheritable estate, inheritability is a primary characteristic in any estate in fee simple.

ii. \textit{Cole v. Steinlauf}

   1. In order to convey a fsa, you should explicitly convey property from: A to B and heirs.” --for clarity: heirs do NOT take from A but from B. Here “heirs” not included, so not exactly a freely marketable title.

   2. A marketable title (or perfect title) is one that is free and clear of defects, i.e., it is an unrestricted possessory fee simple absolute without reasonable doubts.

iii. Restraints on alienation generally struck down. Strong policy in favoring free alienability of land.

d. Duration: unlimited
e. \textit{Problems of construction}: absent words of general inheritance (which convey a fsa) intent is determined by construction.
1. Husband gives estate to wife with power to use and enjoy as she wishes, remaining property to children – wife take a fsa? or life estate? Courts have generally held that she takes a life estate
   a. Rule of repugnancy: if fee simple in land given to one person, together with power to dispose by deed or will, plus gift over to another person whatever remains: that gift over to the third part is void and inconsistent with the interest of the first taker. (has been criticized as frustrating donor intent)

f. Creation on Interest and Taxation (O’Conor): inheritance tax only occurs only upon a death that creates a new interest. Hypos in notes ***look at those***
   i. Events that trigger the tax:
      1. Someone dies with a will, heirs take land, tax
      2. Upon succession of interests at death
      3. Upon a transfer in contemplation of death
   ii. Court has made clear that there is no tax in O’C not because of sovereignty of the state but because of the true nature of escheat = a reversion, a falling back to the overlord, a letting go. The state’s interest has pre-existed all along; NOT a succession of an interest, which is the requirement for the application of the inheritance tax.
   iii. The Bottom Line: O’Connor case served as a vehicle through which to introduce the concept of estate – specifically, when the interest is created, how it can be transferred, and the notion that the state is the overlord.

g. Misc. Notes
   i. Many types of fee simples, but all have the potential for infinite durations (i.e. fsa, fsd and fsucs). The word “absolute” evidences that no limitations like the fsd or fsucs are subject to the fee.
   ii. Fee simple absolute: Represents unitary undivided ownership
   iii. To A and his heirs: at this moment the heirs have no interest in the estate because A can sell the land or give it away before they have interest in the estate.
   iv. Fact the someone owns a fee simple does not mean that others don’t have right to same property (right to use land or easements)

II. Fee simple determinable - Determinable because it will expire if the occurrence of a stated limitation occurs. Forfeiture is automatic. Desirable, descendible, alienable.
   a. Language creating: language of duration (so long as, until, while, during that time) and will specifically provide for automatic termination upon the happening of the stated contingency and revesting in the grantor. That language is called language of special limitation.
      i. “To A so long as the premises are not used for commercial purposes, and if so used the estate will terminate and automatically revest in the grantor and his heirs.”
      ii. It is not generally necessary for the possibility of reverter to be specified if there is language of special limitation
      iii. Grantor must use clear durational language
   b. Future Interest: Possibility of reverter: interest held by the remaindernen. Generally held to be alienable in most jurisdictions (at common law was not), always devisable and descendible
   c. Transferability: by will, deed or intestacy
d. Collette v. Town of Charlotte: Language when said Town fails to use land for school purposes, it shall revert to said Scofield, his heirs, or assigns creates a fee simple determinable. Consequently, Scofield retained a possibility of reverter, which they hold to be alienable. Therefore, plaintiff, who purchased the encompassing farm from successor of Scofield, holds the p.o.r. When Town ceased to use for school purposes in 1936, possibility of reverter automatically became a possessory FSA.

i. Is an inalienable possibility of reverter destructible when land is conveyed?

e. Hiddleston: The deed conveyed a fee simple determinable. However, the possibility of reverter was extinguished by the retroactive statute. The statute, which extinguishes possibilities of reverter and rights of reentry after thirty years, is constitutional as a valid exercise of the police power because (1) the value of the interests destroyed is slight, and (2) the value to society is high due to the increase in land utility and the marketability of titles.

III. Fees simple upon condition subsequent - Subject to a stated condition subsequent (rather than a limitation) which it if occurs, invokes a power in the grantor to terminate the estate on the happening of the condition, if the grantor so chooses. The estate continues effectively until the remainderman exercises his right of re-entry

a. Language Creating: “upon express condition that,” “provided that,” “if” or “but if”. Language of condition (on condition that, provided that) and must expressly provide for a right of reentry upon breach of that condition. (must specifically include consequence for breach.)

i. If there is sufficient evidence that a defeasible estate is intended, a court may so find even in the absence of an express right of reentry, but the evidence of intent must be convincing beyond a reasonable doubt. For example, a diminished purchase price reflective of a lesser estate with a restricted use (also outright gifts).

ii. To a but if x event occurs, grantor reserves the right to re-enter and retake.”

b. Future Interest: Power of termination (right of re-entry): interest held by the remainderman, in many states inalienable, in others statutes make it alienable.

i. Limitations on future interests with qualified fees: many states have statutes that require holds of these future interests to either (1) periodically file with the local land records office a statement of intent to enforce the interest (2) or limit the time in which a holder of a future interest can enforce it.

ii. Historically, possibilities of reverter have been inalienable and destructible. i.e., an attempt to transfer destroyed the interest. The policy underlying this rule was that inalienability made these interests less attractive and thus discouraged their creation, which promoted marketability of fee simple estates. Today, most jurisdictions they are alienable, descendible and devisable.

iii. Board of Education v. Miles: Townsend donates land to be used as an academy. In 1962, academy sold to Board of Ed, and Townsend’s heirs want land back. They’d get it except for §345…

1. No problem with the deed; heirs would get the land back, but §345 retroactively required grantors to record their ongoing intentions in the land, and Townsends didn’t record in time

2. Court finds the retroactive part of the statute unconstitutional, because it would penalize people who didn’t know about the statute (especially those who inherit possibilities of reverter who aren’t born yet) for not recording, and it would extinguish their interests
3. Court says this isn’t in scope of police power because it doesn’t affect third parties

c. **Duration** – potentially infinite, so long as the condition is not breached, and, thereafter, until the holder of the right of reentry timely exercises the power of termination.
d. Transferability – by deed, will, or intestacy
e. **Difference between fsd and fsucs:** fsd expires automatically, while fsucs continues despite the breach.

   i. Cause of action for possession begins immediately upon breach for holder of the possibility of reverter.
   ii. Conceptually the cause of action for possession of the holder of a power of termination does not begin until the power is exercised. But by statute and court decision, many state make causes of action for both estates run from the moment the breach occurs.

   f. There is a strong presumption against forfeitures and defeasible estates. When forced to recognize defeasible estates, there is a preference for optional forfeitures such as conditions subsequent, rather than automatic ones such as determinable estates.

IV. **Fee simple subject to an executory interest** - Same as the fsd only now if the condition is breached the estate is automatically forfeited in favor of someone other than the grantor.

   a. **Language creating:** to A but if X event occurs to B (forfeiture works in favor of B)
   b. **Future interest** – Shifting executory interest
c. **Duration** – potentially infinite, so long as stated contingency does not occur
d. **Transferability** – by deed, will, or intestacy

   Two important rules of construction relevant to all defeasible fees:
   - Words of mere desire or hope: these are insufficient to create a defeasible fee.
     o Courts disfavor restrictions on free unfettered use of land. With that policy, court will avoid a defeasible fee unless clear durational language is used. None below.
       - To A with the hope that he becomes an attorney – fsa
       - To A for the purpose of creating a daycare center – fsa
       - To A with the expectation that premise used for a video store – fsa
     - Absolute restraints on alienation are void.
       o Absolute restraint on alienation – absolute ban on power to sell or transfer
         - To A so long as she never attempts to sell – void.

V. **Fee Tail**

   a. **Language creating** – words of inheritance and words of procreation, to “A and the heirs of his body;” or “A and the heirs of his body, remainder to B.” KEY WORD is body.

      i. Fee tail is an estate inheritance and cannot be created by an inter vivos transfers without the use of word “heirs” in the limitation. Limitations did not apply to those fee tails created from a will. There, the intent of the grantor could create fee tail despite proper construction.

      ii. **Johnson v Whiton** (1893) – Court decided Whiton had a fsa NOT a fee tail. Court determined that “heirs on her father’s side” were words of limitation, i.e. they specify duration not who takes. But NOTE: this is dicta not the holding of the case. Holding was that Whiton had a marketable title.

   b. **Future Interests:** Reversion in conveyor, his heirs or devisees, or remainder in a grantee or devisee other than the taker of the fee tail
c. **Duration:** “Gift to A and the heirs of his body” for the life of A (tenant in tail) and thereafter succeeding generations so long as there are any living lineal descendants of A.

d. **Transferability:** To B and the heirs of his body. B could convey land to a third person, but B’s grantee only acquired an estate for the life of B, De Donis prohibited conveyances cutting off the right of donee’s issue.

e. **Construction Problems:** phrase die without issue raises problems. A to B and his heirs, but if B dies without issue then to C and his heirs”

   i. **Indefinite failure of issue:** If adopted, B has a fee tail and C has a remainder in fee simple. B’s fee tail lasts as long as B has lineal descendants. Same legal effect as saying “to B and the heirs of his body, then to C and his heirs”

   ii. **Definite failure of issue:** If adopted, B has a fee simple subject to a shifting executory interest in B. C will take only in the event that B dies leaving no lineal descendants surviving him at the time of his death. If B dies leaving B1, C takes nothing, even if B1 dies one month after death with no issue.

   iii. About 30 states establish a preference for the definite failure of issue (through statute or cases)

   iv. **Caccamo:** Potter devised estate to Anna Caccamo in FSA, but in case she should die without issue, then to Potter. Caccamo contended she took a fee tail with a vested remainder in the children of Potter. (Why a vested remainder and not contingent)

   f. **History:** historically, language above was a fee simple conditional where a gift to A and the heirs of her body translated to: A and her heirs on the condition that A have an heir of his body. Upon the birth of an heir, although A did not acquire a fee simple, the condition was fulfilled and A could freely alienate the land. This frustrated intent of donors. Donee could defeat he rights of issue and donor by conveying land to a strawman and having land conveyed back to him so he eventually held a fsa.

   i. Passed the Statute De Donis – abolished the fee simple conditional and created the estate in fee fail. A gift to A and the heirs of his body created an estate that lasted as long as there were descendants of B and upon failure of such issue the land would revert back to the donor and his heirs. B’s estate could end at his death or centuries later.

g. **Fee tail today:** Statutory provisions in most states now prohibit the fee tail. Provisions look like the following

   i. **Convert fee tail at common law to fee simple.** “To b and his heirs” B holds a fee simple. (27 states)

   ii. **Substitute fee tail to life estate in grantee and remainder in fee simple to issue.** B has a life estate and B’s issue which will be a fee simple when it becomes possessory. (8 states)

   iii. **Fee tail is an estate in fee simple to the issue of the donee.** B receives an estate in fee tail for life, and no his death his children take the fee simple. Since B holds the fee tail for life, should be able to defeat rights of B’s heirs by conveying property to third person but in most states also have statute that prohibit that, and only allow B to convey estate no larger than his life.
VI. **Life estate** - Estate which is not terminable at any fixed or computable period of time and has duration measured by the life or lives of one or more persons. Romantic estate – I will love you for the rest of your life, not I will love you for 30 years.

   a. **Language Creating:** No words of art are necessary, “to B for life”, “to B until his death”, “to B and at his death to his children.” Intent can create as well.

   b. **Future interest:** Reversion for the grantor and his heirs, or a remainder in grantee or devisee other than the life tenant

   c. **Duration:** For the life or lives of the person or persons indicated by the conveyor as the measuring life or lives. Usually the estate will be created for the life of the transferee

      i. **Estate pur autre vie:** Life estate measured by the lives of one or more people other than the grantee.

         1. “To b to have and hold during the life of C” – if B dies in C’s lifetime, B’s estate passes to successors or heirs. If C dies in B’s lifetime, then B’s estate ends.

         2. “To B for life. B in turn conveys to C for life.” – C’s estate ends if B dies in C’s lifetime (C can not hold a bigger estate than B had.) If C dies in B’s life time, C’s estate ends and B takes the reversion.

   d. **Transferability:** life estate is alienable, but can’t transfer any estate bigger than the duration of the life estate.

      i. Restraints on alienation: courts have allowed some restraints on alienation because life estate not important to have on the free market.

      ii. disabling restraints largely void, while forfeiture and promissory restraints not.

      iii. While not an estate of inheritance, if duration of life estate is measured by D life, and B predeceases D, the remaining years of his estate can pass to heirs or successors named in the will.

   e. **Construction problems:**

      i. To B with the right to dispose of Blackacre as he see fits – could be held to have a fee simple if no other intent expressed in will

      ii. To B with power to sell or mortgage if B finds necessary – the restricted power of distribution is inconsistent with a fee simple, and probable demonstrates testator’s intent for a life estate.

         1. If estate is given and expressed to be for life, with the power to convey in fee – this does not enlarge the estate to a fee simple. Life estate with power to sell or mortgage. Not a fee simple because life estater has no power to devise land and it is not inheritable.

   f. **Dower:** at common law widow entitled to 1/3 lands which husband was siesed of at the time of his death. No conveyance, even to a bona fide purchaser will defeat the wife’s right to dower, nor could creditors impair her right.

      i. This is a derivative estate and the interest of the surviving spouse could not outlast the basic estate which the dower derived. i.e. if condition breached on a fsd.

   g. **Law of Wastes:** Tenant on a life estate entitled to undisturbed possession and to the income and profits thereof. Use and enjoyment is limited by the law of wastes.

      i. Life tenant is entitled to all ordinary and profits of the land.

      ii. If life tenant voluntarily makes improvements, can’t ask for reimbursement from the remainder.
iii. Life tenant must pay interest, but not principle of mortgages. Life tenant must pay taxes. Obligation is assessed within reasonable amount of income from the land.

iv. Special assessments if temp are responsibility of life tenant, if quasi-perm or perm, division of costs between tenant and remainderman.

v. **Affirmative waste:** actual overt conduct that causes a decrease in value
   1. Duty to refrain from any act which will diminish the value of the reversion or the remainder (the future interest holders), if such act is an unreasonable

vi. **Permissive waste:** neglect. Life tenant maintains premises.
   1. Life tenant obligated to preserve the land and structures in a reasonable state. However not under a duty to make extraordinary repairs, rebuild structures damaged without fault or make improvements.

vii. **Ameliorative waste:** not engage in acts that will enhance the property’s value unless all of the future interest holders are known and consent.
   1. exception: land has not value at all.

viii. **Questions to ask in determining if waste or not:**
   1. Actions of a holder of lesser estate, ask yourself: “Has the estate principal been infringed upon by the temporary holder?”
      a. Has the estate’s nature been changed?
      b. Is the injury of a permanent and lasting character?
   2. Actions of a holder in fee, ask:
      a. Would a reasonable person do x, y, or z on their land? If no, then waste.
      b. Is the destructive act extravagant, humorous in nature? If yes, then waste.
      c. Does the act work against/promote the public good? This one is tricky because we want to deter destructive acts but we want to simultaneously promote productive acts.
      d. Consider the likelihood that subsequent taker will take?

ix. **Melms Rule of Law:** WI court says because the property was valueless, ameliorating changes do not constitute waste as a matter of law. But this is only because the starting point was zero; property was worthless before life tenant Pabst (d) made changes to it

x. **Gannon Rule of Law:** P is not guilty of waste because he holds a possessory, vested defeasible fee. P has an estate of potentially infinite duration.

VII. **Title Recording Acts**

a. **Pure notice:** The bona fide purchaser is protected. Previous purchasers protect their interest and give notice to subsequent purchasers by recording their deed.
   i. Recording not required, if they fail to record prior to a subsequent sale, their interest can be extinguished in favor of any subsequent purchasers.
   ii. Costs of the grantors fraud are allocated to those who do not record their deeds.
   iii. Bona fide subsequent purchaser is protected if previous guy has not recorded at the time of purchase.

b. **Pure race:** Whoever records first is protected. Initial grace period during which a prior purchaser can secure his interest in recording. Afterwards, the first purchaser to record title gets the interest. Therefore, unlike the pure notice statutes, a prior purchaser may prevail even though they do not record prior to a subsequent sale. Moreover, the subsequent
purchaser need not be a bona fide purchaser for value to take the title if he records first; he can also take if he has notice of the prior sale.

i. provides most incentive to record and the harshest consequence of not recording

ii. subsequent purchaser has to record first, even if he has notice of another purchaser.

Race/notice: They operate as a pure notice statute (protecting bona fide subsequent purchasers for value) but also require that the subsequent purchaser record first. Subsequent purchaser is protected if he records first and takes without notice of the earlier convenience.

CONCURRENT ESTATES

I. Joint tenancy: principle characteristic is right of survivorship – upon the death of one of 2 or more joint tenants, ownership of the survivors is increased proportionately and does not descend to heirs. The last survivor owns the whole.

a. Creation:

i. Four unities to create a joint tenancy
   1. time: interests of joint tenants arise the same time
   2. title: interests acquired by the same instrument
   3. interests: joint tenants acquire the exact same interest
   4. possession: common right of possession and enjoyment, right to possess the whole, even though both have individual property rights

ii. never created by descent operation of law, always by act of parties

iii. at common law preference for JT, no longer. Now must be clear intention to create joint tenancy with the right of survivorship express and uses the term “joint tenancy”

iv. 

b. Sever a joint tenancy:

i. sale – sell or transfer her interest during her lifetime (can do so without other tenant’s knowledge or consent). Result – one joint tenant’s sale severs the joint tenancy as to the seller’s interest. It disrupts the four unities. Buyer now is a tenant in common for his share, and others hold their share as joint tenants. If joint tenant dies, other joint tenant takes that share regardless of transfer.

   1. If we started with more than two joint tenants in the first place, the joint tenancy remains in place as between the other non transferring joint tenants.

ii. Partition –

   1. voluntary agreement: peaceful to end relationship.
   2. partition in kind: judicial action, physical dividing of Blackacre, if best interest of all
   3. forced sale: judicial action, land is sold, and sale proceeds dividing up proportionally.

c. Now, courts prefer tenancy in common. If want to create JT, must be expressly done with mention of right of survivorship.

d. Sole owner can’t convey to himself and another person to create JT—would usually result in tenancy in common. So, use straw man.

II. Tenancy by the entirety: only created in husband and wife. Who take as fictitious of one person with the right of survivorship. Unlike joint tenancy, each don’t take a part…but unity take the whole
a. Arises presumptively in any conveyance to husband and wife unless indicated otherwise. Need 4 unities.
b. Highly protected form of co-ownership – can’t touch this. Creditors of only one spouse can’t touch the tenancy
c. Neither tenant acting alone can defeat the right of survivorship by a unilateral conveyance to a third party
d. If there’s a divorce, converted into either joint tenancy or tenancy in common
e. Today: mix reception in US. 21 states accept it but exists in modified form.

III. Tenancy in common: the three important features -
   a. Each co-tenant an individual part, each has a right to possess the whole
   b. Each interest is descendible, devisable, and alienable – there are no survivorship rights between tenants in common.
   c. Presumption favors the tenancy in common.
   d. Only unity of possession is required.

IV. Rights and duties of co-owners: Hypo: A and B own Blackacre as co-owners. A contributes 90% to the purchase price, and B contributes 10%. Tenants in common because unequal shares but rules relevant to joint tenancy as well.
   a. Each co-tenant to possess and enjoy the whole – so A can’t limit B’s enjoyment.
      i. If one cotenant wrongfully excludes another he has committed wrongful ouster.
      ii. Sole possession does not constitute an ouster, must be repudiation of rights and claim of sole ownership. Can have adverse possession but must be hostile takeover.
   b. Rent from a cotenant in exclusive possession – suppose B leaves Blackacre voluntarily for three months. On return she demands rent from B for the months of exclusive possession. Not going to be successful.
      i. Rule: absent ouster, a cotenant in exclusive possession is not liable to the others for rent. B left voluntarily.
   c. Rent from third parties – Cotenant who leases all or part of the premises to a third party must account to his cotenant(s) providing them their fair share of rental income. Here B is entitled to 10%.
   d. Adverse Possession - Unless someone has ousted other cotenants, cotenant in exclusive possession for the statutory adverse possession period cannot acquire title to the exclusion of the others.
   e. Carrying costs – each cotenant is responsible for her fair share of carrying costs (taxes, mortgage interest) based on her undivided share. A for 90% and B for 10%
   f. Repairs – repairing cotenant enjoys a right to contribution for necessary repairs, provided that she has told the other cotenant of the need for the repairs. Amount based on undivided shares
   g. Improvements – one cotenant’s “improvement” could be another’s nightmare. During the life of the co-tenancy there is no right to contribution for improvements. However at partition, the improver gets a credit equal to any increase in value caused by her efforts. So called improver bears full liability for any decrease in value as a result of the efforts. (upside/downside doctrine)
   h. Waste – Cotenant can bring action during life of co-tenancy for waste.
      i. Partition – right to bring action for partition.

V. Community Property: Husband and wife are co-owners of all real and personal property acquired by either during marriage other than by gift, inheritance, devise or bequest. Only relevant in 8 states.
When one spouse dies, other gets ½ of that spouses community property interest; the other ½, the deceased spouse can devise.

**LANDLORD/TENANTS**

I. **Tenancy for years** (estate for years, term of years): requirement of definiteness of duration.
   a. **Creation:** Lease for fixed, determined of time – could be one day, or 50 years. When you know termination date from the start, you have the tenancy for years.
      i. Requirement of definiteness of duration satisfied if estate has fixed ending date, even if start depends on the happening of a specific event. (i.e. completion of a building)
   b. **Termination:** Because term of years tells us from the start when it will end, no notice is necessary to terminate.
   c. **Misc. Notes**
      i. Term of years greater than one year must be in writing to be enforceable (statute of frauds)
         1. usually only agreement as to duration held invalid if not in writing.
      ii. Under URLTA – if landlord does not sign or deliver lease, but accepts rent it is as if lease was signed and delivered
      iii. Can be defeasible, in fact most are…provision in lease that allow L to re-enter if no rent or other breaches.

II. **Periodic tenancy** (tenancy from month to month or year to year): No definite time is agreed upon. Successive or continuous intervals, until L or T gives proper notice. Cannot exist where the lessee or contract prescribes a fixed time.
   a. **Creation:** To T from week to week, year to year, month to month
      i. Created by express agreement, letting for indefinite time period with rent due at periodic intervals, by holding over with the assent of L after expiration of an estate for years, by entry into posses under an invalid lease
   b. **Termination:** Notice must be given to terminate periodic tenancy, at common law at lease equal to the length of the period itself, unless otherwise agreed.
      i. On exception: if tenancy is from year to year or greater: only 6 months required.
      ii. Notice must terminate the state at the end of a period, not intermediate date
      iii. Statutes in most states require termination in writing
   c. **Misc. Notes:**
      i. Interest of the tenant is assignable, T liable for permissive waste, and death of either T or L does not terminate lease.

III. **Tenancy at will:** Lease without fixed terms. Can determine expressly or implied, but must have (1) uncertainty with respect to the terms and (2) right of either party to terminate at any time by proper notice.
   a. **Creation:** “to T for as long as L or T desires”
   b. **Termination:** Technically, no formal notice of a prescribed length is required for termination. By statute in most states require in writing a notice to terminate within a specified period of time.
   c. **Coke rule:** when the lease is terminable without notice by T, that is implied of L also.
   d. **Misc. Notes:**
      i. since this relation assumes assent by both parties, death terminates the lease.
Assignment by the tenant ends the estate, but a sublease is effective between tenant and assignee.

**IV. Tenancy at sufferance:** created when T has wrongfully held over past the expiration of the lease. Created this as a tenancy so L has a right to recover rent.

a. L has option to either (1) evicts tenant or (2) elects to hold tenant to a new term.
   1. Tenancies resulting from holdover:

**V. Holdovers:** landlord has two options (1) terminate and sue for damages or (2) hold tenant to a new term.

a. New tenancy for year to year created if estate for years was for one year or longer. Some courts say new periodic tenancy governed by manner in which rent was payable before. Thus if monthly...then month to month (rest.)

b. To terminate you must specify the precise lawful date you are going to terminate, and if you don’t it is not allowed. Ineffective notice, does become effective for the next lawful date.

c. When double rent statute exists it eliminates the landlord’s right to bind the tenant to a new term.

d. Should be some grace period.

e. If holdover involuntary, tenant should not be bound.

f. Rent: Landlord does not have the right to set new terms of tenancy. Tenancy created by operation of law and not by act of parties. Tenancy arises in fault of agreement not because of it.

g. Some courts say new periodic tenancy governed by manner in which rent was payable before. Thus if monthly...then month to month (rest.)

h. Some courts say new tenancy for year to year created if estate for years was for one year or longer.

i. Consent: landlord has unilateral option, no mattering if tenant agrees, to bind holdover tenant to a new lease (American rule)

**VI. Tenant duties**

a. **Duty to repair**
   i. Reasonably good repair (relevant standard).
   ii. Must not commit waste (any of three variations: voluntary, permissive, and ameliorative).
      1. Permissive waste not as applicable with rise of implied warranty of habitability.
      2. Ameliorative waste in commercial leases bit shady – where do you draw the line? Case by cases basis depending needs of tenant, change in neighborhood, etc...
   iii. Law of fixtures – when a tenant removes a fixture (heating systems, customized storm windows, furnace) he commits voluntary waste – even if he installed it (some exceptions)

b. **Duty to pay rent**
   i. T is in breach of duty but still in possession – L could (1) evict through the courts and sue for rent or (2) continue the relationship and sue for the rent owed.
   ii. T breaches duty but is out of possession – T vacates with time left on a term of years lease. SIR (S) Surrender. L could choose to treat abandonment as an implicit offer of surrender (T demonstrates by word or conduct that she wishes to give up the leasehold) which L accepts. (I) Ignore. Ignore the abandonment and hold T responsible for rent as if T was still there – only available in a
minority of states (R) Relet. the premises on wrongdoers behalf and hold T liable for any deficiency. Majority of courts tell us L must at lease try to re-let

VII. Landlord Duties - principles of mutual dependency not historically applied to leases. Thus if L failed to provide heat, T could not fail to pay rent. Exception was wrongful eviction.

a. Duty to deliver possession – majority rule requires that L put T in actual physical possession of the premises.
   i. If at start of T lease, T finds that previous holdover tenant is in possession, L is responsible to new tenant. Landlord is liable
   ii. Some courts don’t follow this duty and give T only the legal right to possession, not actual possession.

b. Implied covenant of quiet enjoyment – applies to both residential and commercial leases. T has right to quiet use and enjoyment of the premises without interference from L.
   i. If L wrongfully evicts or excludes T from the premises, L has breached implied covenant of quiet enjoyment.
      1. Remedy: Tenant can sue to recover possession or treat lease as terminated and sue or damages for breach of this covenant. If eviction partial only, tenant may still enjoy possession without paying rent, but is bound by other covenants of the lease.
   ii. Breach by constructive eviction: i.e. refusal to make necessary repairs that don’t allow quiet use and enjoyment Irrelevant that there is no ouster.
      1. Elements: SiNG (Si) Substantial interference attributable to L’s actions or failure to act. Chronic problem. (N) Notice. T must give L notice of the problem and L must fail to respond meaningfully. (G) Goodbye or Get out. T must vacate within reasonable time after L fails to correct issue. (not really in effect anymore – considered Draconian)
      2. Remedy: T can terminate lease and extinguish liability for future rent, T can recover for damages for breach of this covenant, T can obtain equitable relief by an injunction or specific performance.
      3. is L responsible for bothersome conduct of other tenants? General answer is no. two exceptions:
         a. L has duty not to permit a nuisance on the premises
         b. L must control common areas

c. Implied warranty of habitability: Not present at common law until late 20th century. Applies only to residential leases. Non-waivable in a lease (t takes apt as is – void).
   i. Relevant standard: premises must be fit for basic human habitation, bear living requirements must be met, not asking for “nice,” modest standard.
      1. Standard satisfied by the local housing code or independent judicial conclusion
      2. Common problems to trigger this: failure to provide heat in winter, lack of running water, lack of plumbing
   ii. Remedy: T’s entitlements: MRRR (M) Move-out and terminate the lease (R) Repair and deduct (R) Reduce rent, or withhold all rent until court determines fair rental value – T has to place withheld money into escrow account to show good faith (R) Remain in possession, pay rent and affirmatively sue for money damages.

d. Retaliatory eviction – if T lawfully reports L for housing code violation, L is barred from penalizing T (raise rent, harassment, eviction)
e. Commercial tenancy: generally the tenant takes the premises on the condition as they actually exist and law will not imply warranty that they are fit for intended use.

VIII. Issues with termination
   a. Surrender: premature ending of the relationship by mutual agreement of the parties.
      i. Landlord subsequent conduct can manifest acceptance of surrender i.e. landlord resumes possession fully of premises for his benefit.
   b. Duty to mitigate? Generally no. (rest.) Abandonment should not be encouraged. Other courts though old that landlord must make reasonable effort (current trend)

IX. Determining type of tenancy
   a. Ask yourself: “What is being conveyed here?”
      i. Consider established language formats/existing legal interpretations/precedent
      ii. Look to intent of the grantor
      iii. Consider what promotes marketability
      iv. Look to issues of fairness and justice
   b. Hints:
      i. The payment of periodic rent is the distinguishing feature btw. taw and pt when
         (1) we have an indefinite term when and (2)either party can terminate unilaterally.
         1. BUT this payment does not ever conclusively establish that it is one of the other.
         2. Leaseholds can be agreed upon orally but freeholds must be conveyed in writing.

X. Cases
   a. Thompson v. Baxter
   b. Will: to have -rented premises while he shall wish to live in Albert Lea
      Holding: life estate created because no language to create the tenancies (at will, periodic or sufferance) requested by the plaintiff. Not tenancy at will or periodic because there is a specification as to when the tenancy will end
   c. Critique: As long as he wishes to live in albert lea is a definite time period (and rule out taw, pt because you need an indefinite period and the time is definite period.) But then decide life estate because has an indefinite characteristic.
   d. Foley v. Gamester
   e. Will: could rent the land in question for as many years as he desired, and additionally that he could erect a building on land, and remove it once the lease expired.
   f. Holding: when a lessee is not bound for any definite period and is at liberty to terminate at any time, the lessor is not prevented from ending the relationship (therefore no life estate.) This is so because a lease at the will of one party must be terminable by both – Cooke doctrine (at will by one party, means at will of both parties)
   g. Garner v. Garrish
   h. Will: “for an during the term of quiet enjoyment from May, 1977, T has the right of termination.”
   i. Holding: Coke doctrine antiquated, must look at grantor’s intent. A lease that grants the tenant the right to terminate the agreement at a date of his choice creates a determinable life tenancy on behalf of the tenant.

MARITAL ESTATES
Dower – at common law, wife is entitled to a life estate in 1/3 lands the husband is seized of. Inchoate dower (interest during her lifetime), consummate dower (interest during her life estate).

- Inchoate dower can now be defeated by will or intervivos transfer, although that was not the case before 1833. It can be barred by a prenup or post settlement. In post settlement the wife usually had to pick between the settlement or the dower.
- Wife only entitled to lands in which husband had present estate. Also had to have sole seisen, so could take a tenancy in common, but not a joint tenancy.
- Derivative estate – wife’s estate could not last longer than husbands, even defeasible fees.
  - Except fee tail when subject to EL. So if husband dies without issue, wife is usually still given the life estate.
  - Rule: dower rights superior to rights of the remainderman and reversioners.
- Divorce of annulment extinguishes the dower.

**HOMESTEAD RIGHTS**

- Sometimes created by state constitution and sometimes by statute.
- To protect certain property from the claims of various creditors and from alienation be the owner without the consent of his or her spouse. To assure a home for the family both during the lifetime of the owner and for the lifetime of the surviving spouse.
- Common factors: Usually required that the owner have a family. Homestead shall consist of dwelling and the land upon which it is situated. Homestead rights are usually limited to stated value or area or both.
- Upon death of owner, rights continue until the death of surviving spouse. Upon death, spouse’s interest can not be defeated by decedent’s will, but they may be able to choose whether to take under homestead rights or will. Subject to these rights, homestead property passes by will or descent like other property.

**FUTURE INTERESTS**

Future estates are only future only in the sense that they will become possessory in the future. Someone who owns a future estate owns the interest in land now. Whenever a person has a present possessory estate that is less than a FSA, somebody else must have a future interest.

- Hints
  - Classify the present estate
  - Look at who has the future interest (if it’s the grantor, 3 choices)
  - Think about how the future interest will become possessory
  - Determine whether the interest is vested or contingent
  - If contingent, apply the following rules
    - Destructibility of CR
    - RSC
    - Doctrine of Worthier Title
    - RAP

I. **Creation in “O” the grantor**
   - Possibility of Reverter: created only by fee simple determinable.
   - Right of re-entry (power of termination): accompanies the fee simple subject to condition subsequent.
c. **Reversion**: arises in “O” the grantor who transfers less than he has, other than a defeasible fee. His leftover is the reversion.
   
   i. Can have reversion even if not possessory
   
   ii. Reversions are freely transferable by will, deed, and intestate succession

**II. Vested Remainders v. Contingent Remainders**

a. **What is a remainder?** A future interest created in a grantee that becomes possessory at the natural expiration of a proceeding life estate or term of years created simultaneously (or fee tail in previous years)

b. **Requirements:**
   
   i. Must be created at the same time as, and by the same instrument that creates, the prior estate or estates.
   
   ii. May never follow a fee simple defeasible. Must either follow nonfreehold estates or life estates.
   
   iii. Must not have the capacity to cut short the prior estate. Must take in possession only upon the natural termination of the prior estate.
   
   iv. There must be no built in time gap between the termination of the prior estate and the remainder’s taking of possession.

c. **Vested**: vested if (1) it is both created in an ascertained person and (2) no subject to any condition precedent.

d. **Contingent**: contingent if (1) created in an unascertained person, or (2) subject to a condition precedent or (3) both. CR may not be alienable inter vivos in a few states. All VR are fully alienable.
   
   i. **Unascertained persons**: to a for life, then to b’s first child. A is alive, B has no children. Interest is dependant on being born
   
   ii. **Subject to condition precedent**: prerequisite to the remainderman taking. To A for life, and if B has reached the age of 21 to B. B must satisfy a condition precedent before B takes. B has a contingent remainder.
   
   iii. **Alternative Contingent Remainder** – express condition precedent for both possible takers and this leaves reversion in the grantor. (To A for life, remainder to such of A’s children as survive A, and if none survive A then to the children of B.)

e. Historically law detests contingent remainder – weaklings of future interests. As a disincentive to the creation of contingent remainders, law made doctrines that made these remainders crappy to have.
   
   i. **Rule of destructibility** of contingent remainders: at common law a contingent remainder was destroyed if it was still contingent at the time the preceding estate ended.
      
      1. To A for life and if B has reached the age of 21, to B. A has died, leaving behind B who is 19 years old. Assess state of the title:
         
         a. Historically at common law, B contingent remainder is destroyed. Interest still contingent when life estate ended. Grantor or grantor heirs take fsa.
         
         b. Today destructibility rule has been abolished. Therefore if B is still under 21 when A dies, grantor or grantor heir’s take subject to B’s springing executory interest. Once B reaches 21, he takes
   
   ii. **Rule in Shelley’s case**: at common law rule applies only to a freehold in A (always life) and a remainder in A’s heirs. (contingent because a living person...
has no heirs). (only context that is ripe for this rule). Simply gives A two estates, life estate and FSA.

iii. Gift to “to A for life, remainder to the heirs of A” would create: a life estate in A and a vested remainder in A in FSA
1. the two successive estates would then merge, leaving with A a present FSA. If the language describing the remainder was to the heirs of the body of A, A’s future estate would be a remainder in fee tail, which again (by merger) would leave A with an estate in fee tail.

iv. In order for it to apply:
1. There must have been an estate of freehold in the ancestor (e.g. “To A for life”)
2. There must have been a remainder in the heirs or the heirs of the body of the ancestor (e.g. “To A for life, remainder to the heirs (or heirs of the body) of A)
3. The estates must have been created in the same gift or conveyance.
4. The interests to the heir and the ancestor must have been either both legal or both equitable (in trust).
5. The grantor must have used the word “heirs” in the technical sense—that is, to refer to those who would take A’s land upon A’s death by intestate succession. If the grantor really meant children or issue, RSC would not operate.

v. Rule of law, not of construction. This meant that it would apply even in the face of contrary grantor intention.

vi. Intervening life estate A to life B to life and to A’s heirs. Doctrine of mergers does not apply.

vii. Today this rule is abolished. Therefore, today A takes a life estate, A’s as yet unknown heirs have a contingent remainder, and grantor has a reversion. RSC still applicable to old deeds or will executed before the statutes were adopted.

viii. Doctrine of Worthier Title: Applies when grantor, who is still alive (**), tries to create future interest in his heirs. To A for life, then to grantor’s heirs.
1. If doctrine did not apply, you would conclude that A has a life estate and grantor’s heirs have a contingent remainder.
2. Doctrine makes contingent remainder void. Therefore, A has a life estate, and grantor has a reversion. Motivation to promote alienability. Don’t have to wait for grantor to die to convey fsa.
   a. Why this doctrine alive today and not rule in shelley’s case? Because doctrine is a rule of construction and not a rule of law. Grantor’s intent controls, and he can avoid the doctrine.

III. Distinguish kinds of vested remainders
a. Indefeasibly remainder: holder of this remainder is certain to acquire an estate in the future, with not conditions attached. To A for life remainder to B. A is alive, B is alive. A as a life estate, B has a indefeasibly vested remainder.
   i. B is known and no strings attached to B’s taking.

b. Vested remainder subject to total divestment: holder of the remainder is not subject to any condition precedent, however his right to possession could be cut short because of a condition subsequent.
i. **Condition subsequent v. condition precedent:** Mechanically, if the conditional language comes in a later clause than the language granting the remainder itself, it will likely be a condition subsequent (usually “but if”).

ii. If the conditional language comes before the language creating the remainder, or if it appears to be part of the description of the taker, it will likely be said to be a condition precedent.

iii. When there is doubt, the courts express preference for a vested construction.

c. **Vested remainder subject to open:** remainder vested in a group of takers, at least one of whom is qualified to take possession. However, each class member’s share is subject to partial diminution because additional takers not yet ascertained can still qualify as class members.

i. To A for life then to B’s children. A is alive, B has 2 children (C and D). C and D have a vested remainders subject to open. Their share might be decreased if B has another child.

ii. A class is either open or closed. Open if possible for others to enter. Closed if maximum membership has been set so that persons born thereafter are shut-out. How do you know?

1. apply *common rule of convenience:* class closes whenever any member can demand possession. To A for life, then to B’s children. Class closes at B’s death and also according to this rule at A’s death, no matter that B is still alive. C and D can demand possession at A’s death. Once A dies, a child born after will not share in the gift.

   a. Exception – the womb rule – child of B in the womb at A’s death will share with C and D.

   b. B’s children do not have to survive A (hence it is vested)

   c. B’s children interest is subject to partial divestment until gift is totally vested.

**IV. Distinguish all remainders from the executory interest**

a. **What is an executory interest?** Future interest created in a transferee which is not a remainder and which takes effect by either cutting short some interest in another person (shifting executory interest) or in the grantor or his heirs (springing executory interest).

b. **Shifting executory interest:** always follows a defeasible fee and cuts short someone other than the grantor.

i. To A and his heirs, but if B returns from Canada sometime next year, to B and his heirs. A has a fee simple subject to B’s shifting executory interest

1. Why doesn’t B have a remainder? Because remainders never follow defeasible fees. Remainders wait for estates to run it’s natural course, if third party stands to take as a result of another’s divestiture – the future interest holder has to be an executory interest holder.

2. Does not violate RAP because of one year limit on B’s power.

ii. To A, (potentially limitless time with land), but if A uses the land for non residential purposes at anytime during the next 20 years then to B. A has fee simple subject to B’s shifting executory interest.

1. Does this conveyance violate RAP? No because of the 20 year limit on B’s potential power.

iii. **Springing executory interest:** cuts shorts grantors interest.
i. To A if and when he marries. A is unmarried. Grantor has an fsa subject to A’s springing executory interest.
   1. No violation of RAP. We will know by the end of A’s life whether the condition is met or not.

ii. To A, if and when he becomes a lawyer. A is in high school. Grantor holds a fsa subject to A’s springing executory interest.
   1. No violation of RAP, we will know by the end of A’s life whether condition met or not.

V. **Rule Against Perpetuities:** 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.

   a. Interests covered: Contingent remainders, executory interests (because most are contingent), class gifts even if technically vested because they’re subject to open, and options and rights of first refusal to buy land.
      i. Not applicable to reversion, nor to vested remainders even if they are subject to complete defeasance.
   b. CR are subject to the RAP; VR (unless to a class of persons) are not.
   c. Motivation: free alienable title still considering intent of grantor.
   d. Four step technique analyzing problems: To A for life, then to A’s children. A is alive and she has no children.
      i. **Determine which future interests by your conveyance:** applies only to contingent remainders, executory interests and certain vested remainders subject to open.
         1. Does not apply to any future interest created in the grantor (***), therefore won’t apply to reversion, por or right of re-entry.
         2. Not apply to indefeasibly vested remainders, or vested remainders subject to complete defeasance.
         3. A’s unborn children have contingent remainder, so RAP
      ii. **Identify conditions precedent of that future interest:** in your example what has to happen before the future interest holder can take?
         1. To simply make an implicit condition explicit should not be enough to make a remainder contingent.
         2. A must die leaving a child.
      iii. **Find a measuring life:** look for a person alive at the date of the conveyance and ask whether that persons life or death is relevant to the conditions occurrence. Not just any life, it must be relevant to conditions occurrence.
         1. if no measuring life, then must vest or not vest within 21 years of conveyance
         2. A is a measuring life.
      iv. **Will we know with certainty within 21 years of the death of measuring life if future interest hold can or cannot take?** If so, the conveyance is good. If not, the future interest is void.
         1. This conveyance passes muster. We will know at instant of A’s death if A has left child or not.
   e. **Hypos:** To A for life, then to the first of her children to reach the age of 30. A is 70, her only child to date is B. B is 29.
      i. Future interest: contingent remainder because we have an interest created in a yet unknown taker.
ii. Conditions precedent to vesting: A must die, and must have a child to reach 30.

iii. Measuring life: A is a measuring life. Her life and death are relevant.
   1. why not B? because conveyance to A’s children is not B specific. If it was B specific, he would qualify.

iv. Will we know for sure within 21 years of death of measuring life if future interest can take? No, future contingent remainder void. We just don’t know for sure whether condition precedent to any newborn’s taking will be satisfied within 21 years of A’s death. A has a life estate, O has a reversion.

f. Life in being: If we can find anyone within whose life, or within 21 years after whose life, the future interest is certain to vest or fail, then the future interest is valid; otherwise it’s void.
   i. Only persons who we can be certain are already born at the time of the conveyance can be used as measuring lives.

g. Effect of a violation: Courts only strike the provision that violates the rule. But only when grammatically and schematically separable.
   i. When no separation possible
      1. infectious invalidity - Any time you have violation the entire interest must fail (Penn)
      2. Most courts however use it as a principle to invalidate other things only when they believe that the violating provision is so essential to the estate design that nothing else remaining makes sense alone.
      3. Cy pres: see below.

h. One brightline premise: many shifting executory interest will violate RAP. An executory interest with no limit on the time within which it must vest, you will violate RAP. Most common basis for RAP.
   i. To A and his heirs so long as the land is used for farm purposes, and if not to B and his heirs.
      1. future interest: b has a shifting executory interest
      2. conditions precedent to taking: A or heirs do not use land for farm
      3. measuring life: A
      4. know for sure w/i 21 years: no we will not, therefore future interest is void. Once the offensive future interest in B is stricken, we are left with to A and his heirs so long as land is used for farm purposes. A has a fee simple determinable, with possibility of reverter to grantor. Is their a RAP problem now? No, because RAP does not apply to future interests created in the grantor. (***)

i. Common law RAP has been reformed by statue in vast majorities in states. Two principle reform efforts
   i. Wait and see (second look doctrine): majority. Validity of any suspect future interest is determined on the basis of the facts as they exist at the conclusion of the measuring life. This eliminates the what if, or anything is possible line of inquiry.
   ii. USRAP (Uniform Statutory Rule Against Perp.): codifies the common law RAP and provides an alternative 90 year vesting year period. Use common law RAP period plus measuring life plus 21 year, or alternative 90 vesting period.
   iii. Both reforms embrace cy pres (as near as possible)
1. *cy pres:* if given condition violates RAP, court may reform in a way that most closely matches grantors intent while still complying with the RAP.

   iv. Both reforms will reduce any offensive age contingency to 21 years.

### RESTRAINTS ON ALIENATION

High priority on freedom of alienation—owners of land should, in general, be able to transfer land without regard to limitations imposed by their predecessors.

I. **Disabling Restraints** – one that purports to make transfer of the land literally impossible. These are almost always held to be void where imposed on fee estate or life estate.
   a. *To A and her heirs, but A shall have no power to transfer said estate without the grantor’s prior consent, and any attempted transfer shall be ineffective.*

II. **Forfeiture** – grantor seeks to create an estate in the grantee which either automatically terminates upon an attempt to alienate or which is subject to a POT held by the grantor in such event. VOID when imposed on a fee estate. But where it is limited in time or scope (for a term of years or a transfer to a small number of people), one can find authority for upholding it. Sometimes held to be valid when imposed on a life estate. Valid on leasehold estates.
   a. *To A and her heirs, but if A attempts to transfer said estate without the prior consent of the grantor, it shall immediately revert to the grantor*

III. **Promissory** – grantor seeks to create a contractual promise by a grantee not to convey an interest in land which the grantee is receiving. Upheld in same ways as forfeiture restraint.
   a. *To A and her heirs, but A covenants for herself, her heirs and assigns that no transfer of said estate shall be made without the grantor’s prior consent.*

IV. **Spendthrift trust** – provision of a trust that prohibits the beneficiary from transferring the beneficial interest in the trust voluntarily, and also prevents the beneficiary’s creditors from attaching or executing on it. Upheld in most states.

V. **Restraints on FS**
   b. *Partial restraint* – one that purports to restrict the power to transfer to specific persons or by a specific method or until a specific time. Mainly held void, but some exceptions:
      i. *reasonable restraints doctrine:* partial restraints are valid if reasonable. Restraint must have a reasonable purpose and be limited in duration.
   c. *Cotentants:* agreements by tenants in common or joint tenants that they will not partition the property is valid if reasonable in purpose and limited in time.
   d. *Restraint on use:* almost always been upheld.
   e. *Racial restraints:* restraints prohibiting the transfer or use of the property to or by a person of a specified racial, religious or ethnic group are not enforceable.

VI. **Restraints on a LE**
   a. Restraint on a LE may add little practical inalienability because it’s not marketable since the life tenant may die at any time. Disabling restraints have been struck down, but forfeiture and promissory restraints have often been upheld.
   b. *Rules for when direct forfeiture restraints are enforceable*
      i. Direct forfeiture restraints enforceable if by its terms it cannot last longer than the time in which the interest restrained is both non-possessory and subject to an independent uncertainty (separate from the uncertainty caused by the forfeiture restraint).
ii. Direct forfeiture restraints enforceable during time in which interest restrained is both non-possessory and subject to independent uncertainty.

iii. In both can focus either on non-possessory or independent uncertainty.

c. Restatement says enforceable where reasonable. Insubstantial impact is one of factors to consider.

d. Direct forfeiture restraints enforceable if by its terms it can’t last longer than the time in which the interest restrained is unmarketable and is therefore insubstantial. Problem with this is that you’d constantly need more information to determine whether the interest was insubstantial.