Types of Estates

I. Creation of estates
   a. Inter Vivos transfer = no tax
   b. Will or devise = tax
   c. Inheritance = tax
   d. As long as estates are created inter vivos, there is no tax
      i. Some states will make transfer an inheritance if IV transfer is close enough to a devise
         1. Transfer near death
         2. Transfer to oneself for life and then to another
      ii. If a new interest arises by will then tax, if arises by IV then no tax

II. Fee Simple Absolute
   a. A person cannot transfer a greater estate than they have!
   b. Default type of interest created, A to B creates FSA as well as A to B and his heirs.
   c. Will ‘escheat’ back to state if the owner dies intestate and without heirs
      i. State is original and ultimate proprietor of land
      ii. State has sovereignty over all land, a permanent non-possessory interest
   d. Heirs have expected interest but no future interest
   e. Doctrine of private nuisance – adjoining landowners may take steps to curb uses by a landowner which unreasonable interfere with their enjoyment
   f. May be encumbered by non-possessory interests: mortgage, easements
   g. Largest estate inheritable by land – state still have police power over land, and may restrict use which offend or jeopardize the health, safety, morals and general welfare of the public

III. Marketability of title
   a. Title = history of ownership, title abstract = reconstruction of that history from public records. Apply laws to state to title abstract to determine title.
   b. Courts want a title to be free from reasonable doubt as to its status in order to make enforce a transfer
      i. What sort of elements make a document free from defects? Written instrument, manifestation of assent on parties
      ii. Things extraneous to the title record do not improve marketability
      iii. Cole v Steinlauf – party should not have to gamble on certainty of title. Reality of situation is irrelevant, only reasonable perception matters
   c. Spectrum of certainty [quitclaim deed from seller, merchantable abstract, satisfactory to lawyer, satisfactory to buyer]
      i. Sufficient description of land
      ii. Price, terms of payment, parties of agreement
      iii. Satisfaction of statute of frauds – mutual assent
   d. Tension between promoting marketability and allowing people freedom to restrict their property as they wish
e. **A man cannot create a new kind of inheritance** – we allow only certain types of inheritances to make for predictability in the law

f. Recording Acts
   i. Protect parties from fraud by party trying to convey more than he has
   ii. Promoting marketability and alienability of land (Hiddleston) – primary goal
      1. Limit the depth of title search required
      2. Time period where possession of land eventually implies right to ownership

g. Title recording act - Constitutionality of statutes that extinguish possibilities of reverter or right of re-entry
   i. Must be justified under the police power – that is uphold the morals, health and welfare of the community
   ii. Constitutionality depends on reasonableness of statute
      1. Nature and strength of public interest
      2. Extent of modification of asserted pre-enactment right
      3. Nature of right altered by statute
      4. *Balance between benefit to community and benefit to owner*
   iii. Does the statute promote marketability?
   iv. Tension between goal and methodology of statute.
      1. Goal determines latitude allowed in methodology. Core safety allows greater latitude than marketability.
      2. Extinguishment of interest by a statute may be criticized more than regulating or moderating an interest
      3. If increase in marketability is high, and value of interests destroyed is slight, recording act may be constitutional
   v. Prevention of fraud
      1. Pure notice – You only need to be a bona fide purchaser to claim possession. If you don’t record, subsequent bona fide purchasers have claim to possession. Allocates costs of frauds to those who do not record.
      2. Pure race – whichever party records the property first is the possessor, subsequent need not be bona fide, only to record before prior purchaser
      3. Race notice – Must be a bona fide purchaser, and record first, encourages research of title.
### Summary of Transferability

<table>
<thead>
<tr>
<th>Present Interests</th>
<th>Alienable Inter Vivos</th>
<th>Devisable</th>
<th>Inheritable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee Simple Absolute</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Fee Tail</td>
<td>limited</td>
<td>no</td>
<td>modified</td>
</tr>
<tr>
<td>Life Estate</td>
<td>yes</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Fee Simple Determinable</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Fee Simple on Cond Sub</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Fee Simple on Exec Lim</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
</tbody>
</table>

### Future Interests

<table>
<thead>
<tr>
<th>Future Interests</th>
<th>Alienable Inter Vivos</th>
<th>Devisable</th>
<th>Inheritable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reversion</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Possibility of Reverter</td>
<td>maybe</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Right of Reentry</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Vested</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Contingent</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Executory Interest</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
</tr>
</tbody>
</table>

### Fee simple Defeasible

a. Owner of defeasible fee can only transfer what he or she has
b. Fee simple determinable
   i. Freely alienable by owner
   ii. Possibility of reverter left in the grantor
      1. Alienability by inter vivos transfer – not so much
      2. Alienability by will – more likely
      3. Reasonable expiration
      4. Deemed unwelcome in charitable trusts, must be set forth expressly in will
   iii. Words of special limitation are *words of duration* – “so long, unless, during” (language of special limitation); then a condition; then an automatic reversion
   iv. Common law did not allow alienability of PoR IV, but today almost all states have enacted statutes allowing this.
c. Fee simple on condition subsequent
   i. Freely alienable by owner
   ii. Courts will usually find this type of estate if it is unclear what grantor intended
   iii. Right-of-re-entry
       1. Deemed more harmful to marketability than reverter
       2. *Right of re-entry at common law was not alienable inter vivos.* Some states took the position that attempted alienation of an RoR would lead to its destruction. Today, some states have enacted statutes to allow alienation of RoR. Also, RoR may be transferred if incident to a reversion.
   iv. Words of special limitation – “if, when, on the condition, provided that” (conditional language); then some condition; then an optional reversion
       1. Must be accompanied by express right of reentry (or some other strong evidence, such as a lowered purchase price) otherwise language may be held as precatory.
   v. Usually what a landlord has when renting property as well as a reversion

d. Non-payment of rent does not terminate a defeasible estate absent a provision in the title that says so

e. Fee simple subject to executory limitation
   i. Can be either of the above two, but estate goes to a third party instead of the grantor

f. Reasons to have alienability (right of transfer) or indestructibility (expiration) of power of termination or possibility of reverter
   i. Maintain charitable interest
   ii. Maintain integrity of surrounding lands
   iii. Against – Denigrates marketability
   iv. *Right of re-entry less alienable than possibility of reverter*
       1. Must ask when breach of condition occurred, and if so, was the right-of-reentry exercised in a reasonable time
   v. Difference between alienability by devise and alienation by inter vivos transfer
   vi. If inalienable & destructible, destruction may occur on attempted transfer of interest or upon some statutory temporal limit

g. Economic waste – owner of defeasible has more power to create waste than a life tenant – courts will look at the possibility of estate becoming possessory in the part with an interest, the degree of waste

h. There must be specific wording that terminates the estate in the grantee in case condition is breached – majority positions holds that words of condition alone will create either a fee simple, treating the language as a statement of purpose, or a covenant that will be enforced by awarding damages or injunction instead of forfeiture
i. Defeasible estates are not favored in law. Unless it is unequivocally clear that grantor intended such an estate to be created, a fee simple absolute will be found.

j. Real estate developer hypothetical – courts may find that the right-of-reentry exists in the community rather than the grantor who created the estate

k. Cy Pres - "as close as possible", when it becomes impossible for the purpose or instructions of a trust to be fulfilled then the trust must be amended to fulfill the wishes of the grantor as closely as possible

l. If a subsequently enacted statute or decision renders a defeasible property no longer capable of fulfillment it will revert back to grantor

m. Tension between rights of grantor to establish a condition upon which reversion occurs and constitutionality of that condition (segregation for ex)

n. Expiration of RoR’s and PoT’s
   i. Statutory limits on them
   ii. Disregard any condition which has become nominal and is no substantial benefit to those in favor it be enforced
   iii. May be held there was “substantial compliance” with the w/ the condition, voiding its efficacy

o. Tension between rights of holder in DFS and FSA
   i. Determinable fee holder has power to encroach principle
   ii. Unconscionable waste not allowed where there is a reasonable probability that reverter or re-entry will take place
   iii. Relative rights of the future estate and possessory estate owners is tied to the relative strength and value of their interests.
   iv. Equitable waste – court disallows waste to the holder of a fee simple defeasible if it is unfair to the holder of reverter – “that which a prudent man would not do with his own property”
      1. What does waste consist of?
      2. Likelihood of breach of defeasible condition
      3. Public policy – if “waste” is harmful to the public, maybe we should put a stop to it. Also affects a holder of a FSA.
      4.

V. Fee Tail
   a. Largely abolished, now it creates different types of estates based on the common law of the state
   b. At common law, transferee only acquires life estate pur autre vie of the tenant terminating in favor of the bodily heirs of the tenant, statutes now allow IV transfer of FS
   c. Definite (when Anna dies, if; and only if, at her death) v Indefinite failure of issue (to annay and her decedents many many generations…)
      i. If we have a will that leaves a fee simple to someone subject to their “leaving issue”:
      ii. Definite creates a fee simple subject to executory interest in another party and the issue if there is one (default)
         1. Survivorship of issue – usually required, but sometimes simply having a child at some point is enough.
2. Preferred to courts because a FSD is better than a FT
   iii. Indefinite creates a fee tail and a remainder in fee simple in a 3rd party
   iv. Most states have a preference for definite failure of issue construction, unless evidence indicates to the contrary. However, if an indefinite failure of issue is found remember that if there is a statutory substitute for it, to use it.

d. To B and his children
   i. B gets a fee tail
   ii. B gets a life estate remainder in children
   iii. B and his children get a tenancy in common
e. State interpretations
   i. If you don’t devise the fee tail during lifetime, it will go to heirs of body, IV takers get fee simple
   ii. Automatically creates a fee simple absolute
   iii. Life estate to grantee, remainder to bodily heirs in FSA
   iv. Allow one to convey a fee simple absolute to their child, when born
   v. Life estate w/ contingent remainder in bodily heirs
f. Barring the fee tail – action where a holder of fee tail converts it into a fee simple by some sort of legal action. Done using a “straw man”
g. Bodily heirs – words of purchase or words of limitation
   i. If bodily heirs cannot be determined until death then they are words of limitation. Common law will presume this is the case unless there is some reason to believe grantor meant to convey joint estates to all grantee and children concurrently.

VI. Types of Tenancy
a. Tenancy at will – “A to B as long as either party wills it”
   i. Some courts have said that “A to B so that B can use it” creates one
   ii. Indefiniteness of duration
   iii. Creation: by agreement of parties, by taking possession with consent of owner, by entry into possession under a void lease
   iv. Termination: death of LL, T has reasonable time to vacate when LL terminates, no formal termination necessary
   v. Right of either party to terminate at either time
   vi. Coke said: if one party has the right to terminate the other shall also have, but this is not black letter, it is more the minority view… based on ancient law… defeats intention of the parties. Instead, Many courts hold right of tenant to terminate results in a determinable life estate.
   vii. Ways for estate to end
      1. Either party dies
      2. Either party attempts to transfer interest
      3. Either party wills it
   viii. Distinction between a tenancy at will and a defeasible life estate is by what defeats the estate or, if common law allows it, if the express intent of the parties was to limit the right to terminate in the tenant.
1. Should we allow a life estate defeasible only be the grantee only if he wills it to continue? Or should there be some additional requirement? Today, at common law yes! English law, no.

b. Tenancy at sufferance – when a tenant wrongfully extends his stay. Evolves out of a tenancy at will / periodic tenancy
   i. Creation – by entering into possession rightfully and retaining possession wrongfully
   ii. No tenancy to terminate
   iii. LL may elect to change into a different type of tenancy
c. Periodic tenancy – A lease of continuous duration that endures from period to period until one party gives proper notice of termination.
   i. No predictable duration, but differs from tenancy at will because it can only be terminated on anniversary of period
   ii. Termination (Becker’s version) - Must be a timely notice to terminate – up to six months, it must be a full period in advance, if period is 36 days notice must be 36days in advance – if period is over six months then that is all that is needed to terminate – remember for exam.
   iii. Termination (books version) – Notice of 6 mo if tenancy is from yr to yr. If period is less than six mo, the notice required full period prior to the end of the current period. States have abrogated these common law limits.
   iv. Maximum period is 1 year
   v. Creation by landlord giving possession to the tenant for an indefinite or unspecified period of time with an agreement that rent will be paid periodically, by a tenant’s remaining in possession with consent of the landlord subsequent to termination of a prior tenancy. Periodic rent is not conclusive of a PT, especially if there is an express wish to override this (TAW)
d. Estate for years – for a fixed term in units of one year or multiples or divisions thereof.
   i. Must have a specific ending date
   ii. An ineffective creation commonly creates a tenancy at will
   iii. May be subject to a PoR, RR, or exec lim
   iv. “For a term of 5 years commencing 1/2/03, but on condition that if default be made lessor may declare term ended and re-enter”
   v. Termination
      1. Expiration of the stated period of time
      2. Happening of contingency
      3. Surrender – Unexpired term of tenancy from T to L
      4. Release – Remainder of LL’s estate from L to T
      5. Condemnation
      6. Expiration of LL estate
   vi. When an estate for years is unenforceable (SoF), but the lessee enters into possession and pays rent on a periodic basis in
accordance with the terms of the lease, a periodic tenancy arises. Rest of lease terms are applicable to government of parties behavior.

a. Leaseholds Distinguished from Other Relationships
   i. Every leasehold includes the following elements:
      1. An estate in the tenant
      2. A reversion in the landlord
      3. Exclusive possession and control of the land in the tenant, and
      4. Generally, a contract between the parties.
   ii. Privity of estate arises whenever (1), (2), and (3) are present. Privity of contract requires a contract between the parties.
   iii. Thus, the usual lease serves a dual function. It is both a conveyance of real property interests and a contract. In recent years, there has been a shift in emphasis away from the property aspects and towards the contract aspects.
   iv. However, the limits that courts have recently put upon a landlord’s ability to dictate the contractual terms of residential leases, indicate a shift beyond both property and contract to something that is neither of these.
   v. Licenses, easements, and profits a pendre involve use of land instead of possession. Common examples of licenses and easements are roadways and utility lines over another’s land. Profits a pendre are rights to remove a substance, such as sand or minerals, from another’s land.
   vi. A lease is conceptually different from a license. Whereas in a lease, exclusive possession of the real property must lodge in the tenant, in a license the possession remains in the licensor and the licensee has a mere privilege of being on the land without being treated as a trespasser.
   vii. In contrast, both the mortgagee in possession and the contract purchaser in possession truly have possession, but they are not regarded as holding a leasehold or any estate in the land. These are special legal categories.

b. Statute of frauds
   i. Originally, limited parol leases to a period of three years
   ii. Modern application may limit to one year
   iii. Lease barred by statute of frauds will become a tenancy at will, upon payment of rent may become a periodic tenancy.

VII. Landlord / Tenant Relationship
   a. Difference between right to use and right to possession
i. Signs/buildings, lodgers in hotels, Easements
b. Modern law - Tenant not only has right to possession at lease commencement, but has right to delivery of possession. Common law view was tenant had only the right to claim of possession
c. Tenant has right to quiet enjoyment of land
d. Tenants duty to occupy
   i. Portion of rent tied to tenant’s income derived from premises
e. Rent control
   i. Fall under police power
   ii. Have been held constitutional, initially used during rapid pop influx
f. Regulations against discrimination in housing
   i. Prohibit discrimination on basis of: race color, religion, sex or national origin
   ii. Fair housing act prohibits discrimination for familial status, handicaps
g. Assignments – When the transfer is for the whole balance of the unexpired term, with respect to all the original terms of the main lease
   i. Right of re-entry may still be maintained by first tenant for an assignment, majority opinion
h. Sublease – when transfer is for a shorter period than the original lease or its terms are materially different
i. Restrictions on alienability of sublease or assignments, two views
   i. Can be withheld at will by LL
   ii. Can only be withheld if there is a commercially reasonable reason not to allow assignment, or if there is an express clause prohibiting alienability
j. It is very important for tenant to follow prescribed procedure for termination of lease, at common law:
   i. Termination must be of an irrevocable nature
   ii. Be in writing
   iii. Give proper date
   iv. Modern statutes take a more liberal view
k. Illegality & Unconscionability – lease is void if parties entered into it for the purpose of using it for illegal or unconscionable purposes
l. Tenant surrenders premises
   i. Accept surrender and take back premises
   ii. Do nothing and reject the surrender – tenant liable for rent
   iii. Mitigate by finding another tenant
m. Fixtures – Tenants right to remove things that have become part of the land, must repair damage caused by removal of fixture
n. Holdover tenancy – tenancy created by law and not by parties
   i. Arises out of default of tenant to release possession
   ii. LL may choose to bind to new tenancy, but not to create its terms
   iii. Rent amt is same as original rent amount – perhaps make an exception if the lease contained escalating rent, would be unfair for tenant to holdover to avoid increase
iv. Ways to determine term of holdover tenancy
   1. Most courts hold a periodic tenancy
   2. Term of periodic tenancy is from year to year if original lease was for one year or more
   3. Otherwise term is for whatever original lease was
   4. Some courts look to rent installment period
  o. English Rule – it must be the intention of both LL and T, either express or implied that they wish to create a holdover tenancy
     i. Silence as assent – to what extent do we ignore words of parties and take actions into account
     ii. Irresponsibly holding over (too busy) amounts to assent to holdover
  p. American Rule – Holdover by tenant creates an irrebuttable presumption that tenant wishes to create a new lease and allows LL to convert tenancy at sufferance into a periodic tenancy
     i. Maximizes rental income from property, which benefits community
     ii. Benefits new tenants by ensuring a smooth transition from tenant to tenant. Counter-argument is that LL will only exercise right when new tenants aren’t ready to move in. LL usually only exercises right when market is in decline.
     iii. Main difference between English and American rules is that w/ the American rule, LL has right to renew the lease even though tenant held over and then abandoned property. T is still liable for rent.
     iv. Impossibility due to an act of god, estoppel by LL admitting holdover was okay, and quarantine all preclude enforcement of a holdover lease by the LL
  v. Double rent
     1. When calculating it is important to note whether a tenancy of sufferance is created or a periodic tenancy is created: if sufferance, then only for double the extra holdover; if periodic then double the amount until tenancy actually terminated.
     2. Two views on double rent provision in K:
        a. Gives LL a choice between charging double rent and creating a holdover tenancy
        b. Precludes LL from creating holdover
     3. Double rent is only charged for the time the holdover party actually remained in possession
     4. Security deposits held wrongfully be LL are doubled for tenant
  vi. Possible limitations on American rule
     1. Whether holdover was voluntary or involuntary
     2. Whether tenant was still in physical possession
  q. Retaliatory eviction doctrine
     i. Public health standards thwarted if a tenant were afraid to report conditions to police authority
ii. Usually occurs in a month to month periodic tenancy b/c that is
where you have shitty conditions

iii. Proposed MO residential LL act in “packet” 441.920

iv. How long is tenant allowed to remain before the LL can evict again?
   1. Until he can show ulterior motives
   2. Generous time for tenant to find other housing
   3. Found in URA, page 478

   o Implied Covenant of Quiet Enjoyment
     ▪ Landlord covenants to refrain from physical interference with
       tenant’s possession (i.e. a covenant against actual eviction).
     ▪ Tenant covenants (i.e. agrees) to pay rent.
     ▪ These covenants are mutually dependent. However, all others are
       independent of the obligation to pay rent.

2) Constructive Eviction
   o Landlord does not physically interfere with possession (actual eviction).
     However, the premises are made uninhabitable by action of the landlord
     (constructive eviction).
   o If there is an express covenant of habitability, then tenant can either (1)
     sue for damages or (2) vacate premises and cease paying rent.
   o Option (2) is the remedy of constructive eviction.
   o Tenant must vacate premises

3) Housing Codes
   o Landlord and tenant obligated to meet standards for the public good.
     Violation involves payment of fines, etc. to government bodies.

4) Implied Covenant of Habitability (Lemle, Javins)
   o Landlord is obligated to tenant in a positive, affirmative way to maintain
     premises.
   o All lease covenants mutually dependent.
   o Therefore, remedies additional to constructive eviction became available,
     e.g., rent abatement, repair and deduct, damages, termination

5) Uniform Residential Landlord and Tenant Act – influences most state statutes
   o Exceptions: prisons, hospitals, schools, fraternal orgs, hotels, residence as
     employee, condominiums, farm homes
   o Imposes upon LL to keep premises in fit and habitable condition
     ▪ Keep common areas clean and safe
     ▪ Maintain plumbing, electrical, heating, vent
     ▪ Arrange for trash/garbage removal
     ▪ Supply hot and cold water
     ▪ Can shift these duties to tenant in “good faith”
   o Tenant has duty to maintain dwelling in a reasonable fashion
   o Tenant remedies if LL is in material non-compliance
     ▪ Tenant may give notice to LL in writing
     ▪ If LL does not fix in 14 days, tenancy will terminate at time
       specifies in notice, not less than 30 days
     ▪ Repair and deduct
Tenant may also recover damages in attorneys fees
  These implied warranties have been implied into almost every lease and cannot be modified under most circumstances – violation of implied warranty leads to constructive eviction, but this time led to an affirmative duty in LL – tenant did not have to vacate to terminate or receive damages

Survey of Caselaw:

* Mitchell v. Weiss (Texas, 1930)—The covenant of the landlord to repair and the tenant’s covenant to pay rent are regarded as independent covenants unless the contract between the parties evidences the contrary.

* Hughes v. Westchester Dev. Corp (D.C., 1935)—Upon a demise, there is no implied contract that the property is fit for the use of which the lessee requires it, whether that is habitation, occupation, or cultivation.

* Pines v. Perssion (Wis, 1961)—The covenant to pay rent and the covenant to provide a habitable house are mutually dependent, and thus a breach of the latter by the landlord relieves the tenant of any liability under the former.

* Brown v. Southall Realty (D.C., 1968)—A lease for premises that do not meet local housing codes for safety and health may be declared illegal and void.

* Edwards v. Habib (D.C., 1968)—A landlord may evict a month-to-month tenant for any legal reason or for no reason at all, but he is not free to evict in retaliation for his tenant’s report of housing code violations to the authorities.

* Lemie v. Breedon (Hawaii, 1969)—The doctrine of constructive eviction no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available. It is a decided advantage of the implied warranty doctrine that there are a number of remedies available. They are the basic contract remedies of damages, reformation, and rescission. The doctrine of constructive eviction, on the other hand, requires that the tenant abandon the premises within a reasonable time after giving notice that the premises are uninhabitable or unfit for his purposes.

* East Haven Associates v. Gurian (NY, 1970)—The concept of partial constructive eviction is sound in principle, is supported by compelling considerations of social policy and fairness, and is in no way precluded by controlling precedent. From the time of the partial constructive eviction, the tenant had a right to stop paying rent.

* Javins v. National Realty Corp (D.C., 1970)—The old common law rule imposing an obligation upon the lessee to repair was never really intended to apply to residential urban leaseholds. Contract principles provide a more rational framework for the apportionment of landlord-tenant responsibilities. They strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings. Housing regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing they cover. Under contract principles, the tenant’s obligation to pay rent is dependent upon the landlord’s performance of his obligations, including his warranty to maintain the premises in habitable condition.

* Atult v. Trusdell (Hawaii, 1971)—When a court awards possession to a landlord, even if the landlord is motivated by his disagreement with the actions and speech of the tenant he is evicting, no state action is involved which denies or infringes the tenant’s rights to exercise his 1st Amendment rights.

* Robinson v. Diamond Housing Corp (D.C., 1972)—An eviction grounded on a desire to punish a tenant’s exercise of a right to report housing code violations is plainly illegal, and its illicit status remains unchanged even if it is accompanied by withdrawal of the unit from the housing market. The mere desire to take a unit off the market is by itself not a legitimate business reason which will justify an eviction.

* Interstate Restaurants v. Halsa Corp (D.C., 1973)—Javins does not extend to commercial leases. Therefore, unless a contrary intention is expressed, the covenants in a commercial lease are independent and nonperformance by one party does not excuse the other party from obligations.
Berzito v. Gambtio (N.J., 1973)—In any residential lease, not only will there be implied on the part of the landlord a covenant of habitability to be extended during the term of the demise, but also the covenant and the tenant’s covenant to pay rent will be treated as mutually dependent.

City of St. Louis v. Brune (Mo, 1974)—A local housing code may be deemed unconstitutional in certain situations with respect to certain landlords, i.e., if the cost to the landlord so far exceeds the benefit the society that it is not justifiable under the police power.

McKenna v. Begin (Mass, 1975)—Damages to the tenant for a violation of the implied covenant of habitability are the difference between rent for premises as warranted (actual rent paid) and fair market value in defective condition. No notice of damages are required from tenant to the landlord if they existed from the outset.

Puritan Holding v. Holloschutz (NY, 1975)—When a building is abandoned and allowed to become a nuisance, damages may be recovered from adjacent owners for the difference in property values before and after the existence of the nuisance.

Kipsborough Realty Corp v. Goldbetter (NY, 1975)—When a landlord exhibits “malicious, wanton, and reckless disregard and indifference for the law” in refusing to repair premises to make them habitable, then punitive damages equal to the rent claimed may be awarded as a set-off.

Ragin v. Schwartz (Penn, 1975)—Pennsylvania’s distraint statute is unconstitutional as violative of due process, primarily because confiscation by state officials occurs before hearings, etc.

Timber Ridge Town House v. Dietz (NJ, 1975)—Under some circumstances, such as a townhouse, the implied covenant of habitability will be extended to the exterior of the physical structure, but only with respect to those things that affect the tenant(s) individually.

Blackwell v. Del Bosco (Col, 1977)—No implied warranty of habitability is recognized at common law in Colorado. It may be a good idea, but is more properly left to the legislature.

J.B. Stein v. Sandberg (Ill, 1981)—Exculpatory clauses were valid at common law. Where a lease is “extended,” a pro-active statute (invalidating exculpatory clauses) will not act on the extension if the original lease was agreed to prior to its enactment. The implied warranty of habitability is not applicable to commercial leases.

40 Associates v. Katz (NY, 1981)—The implied warranty of fitness for use is recognized in New York. This implied warranty cannot be waived by a lease provision.

Gottdiener v. Mailhot (NJ, 1981)—Constructive eviction is available as a remedy in cases of excessively noisy neighbors.

Barela v. Superior Court of Orange County (1981)—In an unlawful detainer action, a renter may raise as an affirmative defense the claim that a landlord seeks to evict in retaliation for the tenant’s complaint to the police that the landlord has committed a crime.

Lowery v. Robinson (Mass, 1982)—A landlord’s failure to provide heat during the heating season seriously impairs the character and value of the (blah blah) enjoyment.

Nash v. City of Santa Monica (Cali, 1984)—Demolition control provisions in a rent control statute are constitutional because they are reasonably related to legitimate public goals, and they do not constitute “involuntary servitude.”

Lloyd v. Service Corp of Alabama (Ala, 1984)—Enforcement of “unbargained for” exculpatory clauses in residential leases is against the best interests of the citizens of Alabama and contrary to public policy.

Van Buren Apts v. Adams (Ariz, 1984)—The retaliatory eviction defense extends to summary proceedings instituted at the expiration of a fixed term lease.

Glasoe v. Trinkle (III, 1985)—The implied warranty of habitability applies to all leases of residential real estate regardless of the existence of housing or building codes. In order to constitute a breach of the implied warranty, the defect must be of such substantial nature as to render premises unsafe or unsanitary, although the landlord is not required to insure that the dwelling is in a perfect or aesthetically pleasing condition.
Leardi v. Brown (Mass, 1985)—Tenants may be injured by the use of deceptive and illegal clauses in a standard apartment lease, despite the fact that the tenant was unaware of, and the landlord has never attempted to enforce, these illegal proceedings.

Tedder v. Raskin, (Tenn, 1987)—Notice of a parking problem and mere uncorroborated suspicion of illegal activity was insufficient as a matter of law to give notice of a dangerous condition to the landlord, triggering the duty of the landlord to act.

Downtown Realty v. 509 Tremont Building (Tex, 1988)—Constructive eviction is applicable to commercial leases. Failure to repair heating and air-conditioning is sufficient. Constructive eviction absolves the tenant of all responsibilities under the lease.

Visco v. Cody (Conn, 1988)—A tenant cannot claim constructive eviction due to a failure to make minor repairs.

Brower v. Village of Bolingbrook (ND, 1990)—An ordinance that requires landlords and property managers to consent to and pay for an inspection whenever they rent to new residential tenants and, further, that prospective tenants procure a “Rent/Lease Permit” before they may occupy a dwelling. Even though a rule or regulation limits the occupancy of a residential unit, tenants are not bound to that limitation when the family unit is increased by natural means.

Sobet v. Higgins (NY, 1991)—A rent control statute and its regulations did not facially violate any constitutional right to go out of business of being a landlord. It did not amount to a physical or regulatory taking of private property. It did not violate the landlord’s 13th Amendment right to be free from involuntary servitude. It did not violate substantive due process.

A landlord has no absolute Constitutional right which allows her to evict her existing rent-controlled tenants in order to withdraw her property from the housing market. Such a right is regulated by the state under its police power, to ensure that a party’s act in ceasing her business does not injure the public or a substantial group of people. This does not compel the landlord to maintain a rental business or continue being a landlord. She is free to go out of business by selling her property.

Solow v. Wellner (NY, 1991)—Landlord of a luxury apartment building was found in breach of the implied warranty of habitability.

Wagoner v. Bennett (Okla, 1991)—Tenant could not recover punitive damages in addition to damages allowed by RLTA for wrongful eviction. Tenant could not elect to pursue a common law claim for wrongful eviction, but tenant could pursue a common law claim for conversion or injury to personal property and could seek punitive damages in connection with that claim.

City Wide Assoc v. Penfield (Mass, 1991)—Eviction of a tenant who suffered from serious mental disability manifested by auditory hallucinations and struck back at apartment walls would be discriminatory and violative of the Federal Rehabilitation Act which prohibits discrimination on the basis of handicap.

Jacqueline v. City of NY (NY, 1992)—The housing authority had no statutory responsibility to place self-closing and self-locking doors in the lobby of the apartment building where a majority of the tenants had rejected such locks and doors just three months before the assault. And…..the assault was not foreseeable, even if there had been reports of forcible rapes and robberies in other buildings within the housing project.

Holland v. Liedel (Mich, 1992)—A genuine issue of material fact existed as to whether a landlord breached a duty to protect a tenant from criminal activity of a third person in common area of leased premises; and…blah blah blah assaults upon tenants if it found that the apartment building was located in a high-crime area.

Reed v. Burns (Ill, 1992)—A Chicago ordinance governing retaliatory evictions superceded state law on forcible entry and detainer actions against holdover tenants.

VIII. Life estate
   a. Originally, the default estate at common law, now FSA
   b. A to B with no limitation at any point in time creates a life estate.
c. If the estate is defeated by an event, the life estate is defeasible.
d. Obviously you cannot transfer a regular life estate by will, but you can transfer a life estate pur autre vie by will or intestacy.
e. Trust company has legal ownership of property, then distributes income to the equitable owners of the life estate.
f. Tension between a life estate with the power to consume and a fee simple. How much consumption can be given to a life tenant before the estate becomes a fee simple? Intent to restrict the estate should be made clear.
   i. If the life estate is in an object whose only benefit can be derived from consumption that right can be implied.
   ii. What constitutes an act of consumption, scope of consumption, who takes the left over remains of consumption at death?
   iii. No right of life tenant to devise by gift or to recklessly squander the estate.
   iv. If there is a power to consume and the intent for the remainder transfer is CLEAR and mandatory then it will transfer, if the intent is precatory or only the wish of the grantor then holder has a fee simple.
g. Rights of Life tenant under the holder in fee.

h. Curtesy and Dower
   i. Married Womens Property act
   ii. If spouse is omitted from a will, the spouse is permitted an intestate share of the estate
   iii. If spouse is in will, they are permitted to take against the will by renouncing the terms of the will.
   iv. If dower or curtesy are still around spouse can elect that and take a life estate in the estate.
   v. Augmentation is a one third value of the ENTIRE estate not just land.

i. Disentailment

j. Life estate pur autre vie – life estate for the life of another
   i. Unlike a regular life estate, these are inheritable and devisable.

k. Tension between tenant of life estate and holder of reversion in fee simple
   i. Life tenant is allowed to use land as if it is a sum of money which is invested and they are allowed to feed off the principle.
   ii. Permissive waste – allowing ordinary day-to-day repairs to subtract from the value of the property.
   iii. Voluntary waste – causing injury to the property.
   iv. Limits to doctrine of waste
      1. Tenant is not the insurer.
      2. Tenant is not responsible for ordinary wear and tear, except for depreciation from neglect of maintenance.
      3. Limitation to repair is limited to the income generated from property.
   v. Doctrine of estovers – cutting of timber allowed.
   vi. In sale of principle, use the time value of money to calculate the relative distribution to the life tenant/reversion holder.
vii. Mortgage principle costs – tenant and fee simple holder share the costs

I. Determining when waste is committed, competing views (!) – can apply to estates for years, periodic tenancies, etc… as well
   i. Waste is a function of changing the character of the property, diminishing the value of inheritance, increasing its burdens, impairing evidence of title
      1. Strengthened if testator intentions place no small importance on property’s character
   ii. Doctrine of meliorating waste: Waste is a function of whether benefit to life tenant > detriment to remainderman * probability their interest will become present
      1. Although it may be considered technical waste, it will not be enjoined
   iii. If tenant wants to commit ameliorating acts
      1. FS holder must have vested interest
      2. Intention of granting party concerning residence, see(i)(1)
      3. Where the future interest is contingent or vested subject to complete divestment the holder of future estate may be able to enjoin threatened waste unless the probability of the future estate vesting is extremely remote. Damages may not be awarded until estate is certain to become possessory.
   iv. If surrounding circumstances have changed as alter the original identity of the property, an act normally considered waste may no longer be, Melms v Pabst
   v. If sale of property is considered necessary for preservation of all interests therein, equity courts have the power to order a sale in fee simple, with the proceeds of sale to be held in trust for the benefit of all persons with interests in the property. Divided according to time value of $$$.

m. Remedies for fee simple holder when waste is committed
   i. Injunction to stop waste if it has not already happened
   ii. Double damages in some jurisdictions if damage is voluntary
   iii. If damage is malicious some jurisdictions may allow for forfeiture of possession
   iv. A tenant who has a remainder for life may be entitled to whatever benefit he would have derived from the estate principle. However if the waste was to something he could have not benefited from anyway (sale of oil), he is entitled to nothing.
   v. If B commits waste, and C has a contingent remainder fee simple, and A is the holder of the reversion, should it be A or C who is allowed to sue and recover damages for the waste? May be base the reasoning on the same as in equitable waste doctrine.

IX. Concurrent Estates
   a. Joint Tenancy
   b. Tenancy by the entirety
c. Tenancy in Common

d. Community Property

X. Rule in Shelly’s Case – if a life estate to A then to the heirs of A, creates a life estate in A with a vested remainder in A’s heirs. Doctrine of merger combines to form a FS. If a life estate to A, then to the heirs of A’s body. Creates a Fee Tail in A. W/o rule in Shelly’s case, A would have an estate for life with a contingent remainder A’s heirs, reverter in the grantor.

a. Applies when:
   i. The ancestor had a freehold estate (for life, most likely)
   ii. Remainder in the heirs of the ancestor or heirs of the body
   iii. Estates must have been created in same gift or conveyance
   iv. Must have been either both legal or both equitable
   v. Must have meant heirs as words of limitation and not words of purchase

b. Abolished in all but a few states, but it is not retroactive so use it to construe an old will before a statute abolished it

c. Examples
   i. To A and B as tenants in common remainder to the heirs of B = remainder to B in fee simple OR remainder of one-half of estate in fee simple
   ii. IV to A remainder to A’s heirs… then A predeceases grantor. A’s heirs may or may not take.

d. Doctrine of Merger does not apply when there is a vested or contingent remainder interposed between the life estate and the remainder to the heirs
   i. A to B for life, then to C in fee tail, then to B’s heirs = A to B for life, then to C in fee tail, then to B in fee simple
   ii. A to B for life, then to C if she marries, then to B’s heirs, if C dies then merger applies and B gets a FSA

XI. Doctrine of Worthier Title – To A for life, then to my heirs. The last part is ignored and a reversion is created in the grantor and not a remainder in the grantor’s heirs.

   a. Modern law says grantor may express a ‘clear intent’ to transfer to his heirs, in which case he may do so

XII. Future interest

   a. Reversion
      i. Reversion subject to divestment – A to B for life but if C pays B $100 before B’s death, to C in FSA
      ii. 

   b. Possibility of Reverter
      i. Generally held to be alienable, devisable and descendible. At common law it was considered inalienable when standing alone.
      ii. Not subject to RAP since it is vested
      iii. Is not mutually exclusive to a reversion

   c. Right of Re-entry
      i. Failure to exercise a right of re-entry after an unreasonable long time, or acceptance of rent after a known breach, may be viewed as waiver of that right
ii. Must be expressly created, if not, court may find a covenant giving cause to damages for grantor and not forfeiture of premises

d. Remainder
   i. Follows a freehold estate that is not a fee simple
   ii. Is created at the same time and by the same instrument that creates the prior estates
   iii. Does not cut short or divest the prior estate
   iv. There is not built in time gap between the prior estate and the remainder
   v. Vested remainder – the remainderman is a presently identifiable person and the remainder is not subject to a condition precedent. Does not depend on probability of estate becoming possessory.
      1. Owner has right to possession whenever previous estates come to an end
      2. Remainders Absolutely vested
      3. Remainders subject to partial divestment – amount of estate is subject to diminution
      4. Remainders subject to complete divestment – person is identifiable but interest is subject to a condition
   vi. Contingent remainder – afforded less protection in law than a vested remainder
      1. Rule against perpetuities applies to it
      2. Created in unascertained person or subject to condition precedent
         a. Remember remainder to the “heirs” of someone is a contingent remainder since ‘no one is an heir of the living’.
   vii. If at its creation an interest can be a remainder, then it is a remainder
   viii. Destructibility of remainders
      1. A to B for life then to the heirs of C – if B dies when C is still alive the remainder is destroyed
   ix. Cannot follow defeasible fee!
e. Executory interest – future interest in a third-party that is not a remainder
   i. Springing interest – estate becomes possessory upon the occurrence of some event
      1. Divests the transferor of a vested interest or possessory estate upon the happening of some event
   ii. Shifting interest – cuts off a prior estate
      1. Must divest the present interest of another transferee or a vested future interest of another transferee
      2. Must happen upon a condition, not a limitation
   iii. Executory interests are indestructible
      1. Use them to avoid destructibility of contingent remainders. Instead of ‘to A for life then to B if he reaches the age of 21’ use ‘to A for life then to B if B reaches 21 no sooner than one day after the death of A’
2. Use to avoid Rule in Shelly’s case. To A for 200 years if he should so long live, then to A’s heirs.
   iv. Executory interests must take effect in someone other than the grantor, and must do so by way of automatically divesting either a possessory estate or a vested future estate. Also created after the natural expiration of a fee simple defeasible estate

XIII. Vested vs. Contingent Remainders
   a. Contingent remainders
      i. Taker of the remainder is unascertainable
      ii. The remainder is subject to an unfulfilled condition precedent
   b. Some jurisdictions prohibit the transfer of contingent remainders. At common law they were inalienable inter vivos.
   c. Consequences if a remainder is contingent
      i. Inalienability inter vivos
      ii. Inability to sue for waste
      iii. Destructibility
      iv. Rule against perpetuities
   d. Even if two alternate contingent remainders exhaust the full fee simple estate, there is still a reversion left in grantor because of destructibility
   e. If an interest follows a vested interest remember that it is not a remainder, but an executory interest
   f. If a condition is such that the condition can only take away once possession has commenced, or both before and after possession has commenced, the interest is vested subject to a divestment by a contingent executory interest
   g. Early vesting – When a grantor gives provides a description of a person (to B’s eldest son) instead of a name, there can be two outcomes;
      i. The person interest can vest immediately
      ii. The person interest is contingent until it cannot be changed
   h. Gifts to classes – When a grantor gives to A’s children
      i. The interest may vest subject to open in subsequently born children
      ii. The interest may vest only upon the death of A
      iii. The interest may vest and only vest in the children alive at the time of the transfer
      iv. Absent language otherwise we assume grantor meant option (i)
      v. When courts distribute an estate they will usually close the class first regardless of its possibility of changing
   i. Destructibility – Unless a remainder shall be vested at or before the termination of all estates prior to it in possession, it shall be destroyed. Mostly abolished.
      i. Whenever a conveyance leaves a contingent remainder in fee in the as the final disposition, there is always a reversion in the grantor and that reversion persists until the condition precedent is satisfied.
      ii. Also, common law held Contingent remainders not destroyed if they were in trust
   j. Merger to destroy a contingent remainder
      i. To A for life, remainder to the children of B who survive A
ii. If the grantor, who holds a reversion conveys to X, and then X conveys to A, the reversion merges with the life estate and destroys the contingent remainder in the children of B.

k. When conditional language in a transfer follows language which, taken alone, would be said to create a vested remainder, the condition created is a condition subsequent (“but if”). If, however, the conditional language appears before the language created the remainder, or the conditional language appears to be part of the description of the person receiving the remainder, the condition created thereby is a condition precedent.
   i. If, however it appears that the grantor intended to create a condition precedent, even though the language is subsequent to the words of purchase, it might be construed as such by the court.
   ii. When there is substantial doubt → vested remainder

l. Remember vested remainders are alienable inter vivos and contingent remainders may not be!

m. To A for life, remainder to A’s children
   i. Contingent until A has first child

n. Devisable v non-devisable contingent remainders
   i. Contingent interest that can only be satisfied when the holder is alive are not devisable
   ii. Contingent interest that are unrelated to the holder surviving someone else, or the holder doing something while he is alive, the interest is devisable
   iii. Common law also prohibit transfers (IV or by will) of contingent interests that are very uncertain on their terms.

o. At the common law contingent remainders were inalienable IV, but this rule is still alive in only a few states

XIV. Direct restraints on alienability

a. Disabling - simply purports to make alienation impossible
   i. Says attempted transfer is void
   ii. Almost always held to be VOID in court
   iii. May be valid w/r/t trusts if they are reasonable
   iv. There is no one to exploit the restraint in case of default

b. Forfeiture
   i. Based on theory that a direct forfeiture restraint is valid if there is someone to take control of the estate in case of default
   ii. Valid for estates less than FS
   iii. Estate terminates upon an attempt to terminate, creating reverter in grantor
   iv. One can find limited support in courts for this as long as the restraint is limited in time (smaller the better)
   v. Valid in leasehold estates if they can be interpreted as promissory restraint

c. Promissory
   i. Grantor seeks to enter into contractual promise not to alienate land
   ii. More valid the more it restricts the time and scope of the restraint
d. Reasons against restraints on alienability
   i. Land cannot be used as collateral for loan b/c default would not allow forfeiture of land
   ii. “Dead hand” control
   iii. Results in concentration of wealth
   iv. Importance of someone to take advantage of violation – why we allow restraints on lesser estates

e. What types of situations allow restraints
   i. Estates lesser than a fee simple – Forfeiture allowed, but not disabling. Landlord has a valid interest in the integrity of the tenant
   ii. Economic inefficiency is already built into lesser estates because doctrine of waste prohibits freedom of action. Does not further restrict marketability.

f. Restraint requiring to occupy can be held to be tantamount to a restraint on alienability – “when two different terms generate the same ultimate legal result, they should be treated alike”
   i. What test can we use to determine whether restraint on use amount to restraint on alienability?
   ii. ‘How may use’ vs. ‘Who may use’ – latter is must more restrictive of marketability and may amount to restraint on alienation.

g. Rule for allowing for direct restraints on alienability, different permutations
   i. Subject to independent uncertainty (vested or non-vested)
      1. Problem with this rule is that it impedes marketability if the uncertainty of future possession is small
      2. Note that a condition that relies on the holder of the estate not having attempted to alienate his estate is not an independent uncertainty
   ii. Subject to independent uncertainty & non-possessory
   iii. Non-possessory
   iv. Also, do we void the entire restraint if it fails our test, or only invalidate it for the time during which it fails?
   v. Restatements view – uphold a direct restraint on alienation only when the affect of that restraint on marketability is insubstantial, of which two elements are important
      1. non-possession
      2. Uncertainty as to future possession
      3. Hard to implement on the “pure” rule since too complex are the are all the variables

XV. Marital Estates

1. Marital Life Estates at Common Law
   a. Estate by the Marital Right
      i. At common law, the husband had, by right of marriage, a LE in all lands of which his wife was seized of a freehold estate at any time during the marriage and prior to the birth of issue.
The estate was not measured by the life of the husband, but was one that continued until the marriage was dissolved by death or divorce, or until issue was born alive of the marriage.

In 19th Century, legislation abolished the husband’s estate by the marital right. These statutes generally gave to married women the same property rights as if they were unmarried, subject in some jurisdictions to the husband’s estate by the curtesy consummate or to a requirement that the husband must join in a conveyance of the wife’s lands to make the transfer fully effective.

b. Tenancy by the Curtesy

A tenancy by the Curtesy was, at common law, a LE to which the husband was entitled in all lands of which his wife was seized in FS or in FT at any time during the marriage, provided that there was issue born alive capable of inheriting the estate.

On the birth of such qualified issue, the husband’s tenancy by the marital right was enlarged to an estate for his own life which he held “by curtesy of the law of England.” The husband’s estate for life was called curtesy initiate prior to his wife’s death and curtesy consummate after her death, but he had a present life estate in both situations and there was no substantial difference between the two types.

In modern American law, curtesy is obsolescent as a source of life estates. Curtesy has been abolished in most of the states. Generally, the husband is given instead a statutory distributive share in the wife’s estate.

At the present time, there are statutes in most states allowing the surviving spouse, whether it be the husband or the wife, to waive the provisions of the will of the deceased spouse and take a specified share of the decedent’s estate (usually 1/3) instead of a curtesy or dower.

c. Dower

At common law, a widow was entitled on the death of her husband to a life estate in one-third of the lands of which he had been seized at any time during the marriage of an estate in FS or FT, provided that the estate was one capable of being inherited by issue of the marriage.

During the husband’s lifetime, the wife had a protected expectancy, called inchoate dower. On the husband’s death, the widow was entitled to have assigned or set-off to her the specific lands to be held in dower and she was said to have dower consummate. Once dower had become consummate, her status was the same as that of any other life tenant.

In the 20th Century, common law dower has been abolished in most states. The statutes frequently give to the widow, as a substitute for dower, a fractional share in FS in the realty owned by the husband at his death.

Further protection is given to the widow by making her a forced heir, that is, allowing her to take a distributive share in her husband’s estate despite the provisions of the will.
• In other states, the widow may elect to take in lieu of dower a distributive share in the husband’s estate. This distributive share, since it is absolute rather than a life interest in the assets, and extends to personalty too, is usually more valuable than a dower estate.

• In most situations, both dower and curtesy are treated as derivative estates and therefore, the interest of the surviving spouse cannot outlast the basic estate from which the dower or curtesy derived.

2. Homestead Rights

• The right of homestead, sometimes established by a state constitution and sometimes by statute, is intended to protect certain property from the claims of various creditors and from alienation by the owner without the consent of his or her spouse. The purpose is to assure the home for the family both during the lifetime of the [x] and for the lifetime of the surviving spouse.

XVI. Concurrent Estates

a. Joint Tenancy – to A and B, not as tenants in common, but as joint tenants with rights of survivorship
   i. Right of survivorship – upon death of one tenant the other tenant inherits his interest
   ii. Four unities
      1. Time – interest must arise at the same time
      2. Title – arise from the same instrument
      3. interest – same division of interest
      4. Possession – must be possessory estates
   iii. If one tenant alienates, the joint tenancy is severed, creating a tenancy in common
   iv. Joint tenancy with full rights of survivorship cannot be destroyed by alienation
   v. Cannot be created in personal property
   vi. Joint tenancy in a bank acct. may function as a ‘poor man’s will’
   vii. If intention of parties is to give one tenant a right to survivorship then a lien by a 3rd party may be ineffective
   viii. Joint tenancy in a bank acct. may function as a ‘poor man’s will’
      1. If intention of parties is to give one tenant a right to survivorship then a lien by a 3rd party may be ineffective

b. Tenancy be the Entirety – To H & W, husband and wife
   i. Just like joint tenancy, requires four unities, has right of survivorship
   ii. Not severable, as a joint tenancy is
   iii. If owner tries to create in himself
      1. It is allowed
      2. Creates tenancy in common with remainder in the survivor
   iv. Divorce creates either a joint tenancy or tenancy in common

c. Tenancy in Common – “to A and B”
   i. No right of survivorship
   ii. Interest is freely alienable, if not conveyed in life time, passes to heirs
iii. Unity of possession required
iv. Preferred & default of common law
v. Only entitled to reimburse for unfair amount of upkeep if property is sold
vi. Right to occupancy. No need for assent of other tenants for sublet
vii. Partition by kind – physically separate the property
viii. Partition by sale – sell land and split proceeds
d. Community Property
i. Eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington) follow a system of marital property called Community Property.
ii. Starts with the theory that property acquired during the marriage results from the joint efforts of husband and wife, which entitles each to equal ownership, and that such equal ownership is to be recognized immediately when the property comes into the marriage.
iii. At the death of one spouse, one-half of the community property, subject to taxes and creditors and stuff like that, passes to the surviving spouse.

XVII. Rule Against Perpetuities - No interest is good unless it must vest, or FAIL, not later than twenty-one years after some life in being at the creation of the interest”
a. Meant to eliminate “dead hand”
b. What kinds of interests does it affect
i. Class gifts subject to open
ii. Contingent remainders
iii. Contingent Executory Interests
c. Does not affect:
   i. Vested remainders subject to complete divestment
   ii. Possibilities of reverter & rights of re-entry
d. If it is possible at the time of the creation of the contingent future interest, under any imaginable set of facts, that the future interest will neither vest or fail within the stated period, its void.
e. When interests is void
   i. Strike from the conveyance
      1. To A for so long as it is used for church purposes, if not, then to B… B’s interest is void, A would get a determinable fee with a remainder left in the grantor
      2. Another option is to give A a fee simple
      3. To A for life remainder to first son to become a clergyman, normally would be void, but if destructibility doctrine applies the contingent interest would destruct on the death of A so it is valid
      4. Infectious invalidity - If intestacy is closer to the intent of the grantor than the striking of the invalid interest, the court may strike the entire transfer.
f. Probate of will is held to be something that may never occur and therefore will violate the rule against perpetuities
i. There may be a statute that requires probate in a certain amount of time

ii. Some courts will say it is implied that probate will occur in a reasonable time and will not render the interest to contingent

  g. Scenarios that render the interest contingent, but that, if true, would undermine the entire meaning of the transfer are not enough to invalidate the remainder… earth will still exist, private property will still be around

h.

Marketable title – free and clear of any other claims, a possessory fee simple absolute beyond a reasonable doubt

Earnest Money Contract – The contract that is used to stabilize the contract for a sale of land for the relatively short period between agreement of terms of sale and closing

Statute of Frauds – there must be a be reasonable certainty as to the identity of the parties, the description of the land, the price, and the terms of payment. May consist of one or several writings, formal or informal. Part performance proof of a writing, but it does not exclude proof of a contract itself.

Conveyance – An act by which it is intended to create one or more property interests, irrespective of whether the act is effective to create such interests

Deed – the document that conveys the interest in land from one party to another

Seisen – Possession of a freehold estate

Estate – is or may become possessory, ownership measured in terms of duration

  1. Legal consequences – rights, privileges, interests of holder
  2. Operational consequences – what happens, when it happens

Property law has an inherent preference, in the name of marketability, for:

  1. Fee simple over lesser estates
  2. FSCS over FDS
  3. Rule of Shellys Case
  4. Destructibility Doctrine
  5. Rule against Perpetuities
  6. Non-defeasance over defeasance
  7. Vested over contingent interests
  8. Alienability over non-alienability
  9. General legislative disfavor for PofR, RR, and FT

Homestead exception – does not create any type of estate, only a protection from debt

Words of purchase – designate the taker of the estate
1. A to B and her children... children may be either by the takers after Bs death or a synonym for heirs, in which case they would be words of limitation. Words of limitation – designate the duration or the estate conveyed.

Cy Pres doctrine – Evans v Abney

Allodial possession – land held without estate as “sovereign,” when land passes to state through intestacy, inheritance taxes apply.