I. Adverse Possession

A. A system whereby a wrongdoer, a trespasser, may obtain title to land owned by another

B. Requirements of possession
   1. Actual
   2. Open and notorious (same possession as a usual owner would make)
   3. Hostile (Non-permissive)
      a. Occupying the land with the intent to possess it as his own and not in subservience to a recognized, superior claim of another
   4. Exclusive
   5. Continuous
      a. Must be used as often as a typical owner would use the parcel of land
   6. Must meet statute of limitations (varies by jurisdiction)
   7. Some states require other elements
      a. Claim of right
      b. Good faith or bad faith
      c. Color of title (ie a tax deed)
      d. Payment of property taxes

C. An adverse possessor is not liable for trespass occurring (or damages) during the period of adverse possession

D. Common scenarios
   1. Possessor believes he or she owns the land, but there’s a defect in the chain of title
   2. Possessor is encroaching on the neighbor’s boundary
   3. Possessor is trying to steal someone’s land (lease common)

E. People excluded from losing their land to an adverse possessor
   1. Infants
   2. Insane
   3. Imprisoned
   4. The government
   5. If such disabilities occur after the adverse possessor comes onto the property, the person is not excluded from losing his land

F. It’s possible to lose your adverse possession claim if someone else is adversely possessing the same area

G. Adversely possessing land above ground does not entitle you to the land and minerals beneath the ground

H. Adverse possessor is not entitled to land guaranteed by future interest

I. Ouster, Tacking
   1. When two tenants are sharing a common land, an ousting of one needs to take place to claim adverse possession over the land
   2. Conduct that communicates to a cotenant that the other doesn’t acknowledge any kind of ownership over the land from the cotenant
   3. It’s possible to “tack on” adverse possession years from one party to another as long as there is privity (deed, will, intestate succession, oral conveyance)
Monroe v. Rawlings—Court held that adverse possessors need not enclose, cultivate, improve or build upon the land. It was enough that the acts of ownership are such a character as to openly and publicly indicate an assumed control or use.

Nome 2000 v. Fagerstrom—Court held that adverse possessors may acquire only the exact portion of land they proved to adversely possess.

Wright v. Wright—Case involving one surviving cotenant adversely possessing the entire tract of land. Court required an “ouster,” stating that the adverse possessor retained exclusive possession after demand or gives his cotenant express notice of adverse possession.

Porter v. Posey—Driveway turnaround case. Court held that holding title to property acquired by adverse possession may be transferred by a deed which did not contain a description of that property.

II. Transferring Property

A. Definitions
   1. Heir—an inheritor of real property from a decedent intestate
   2. Devisee—an inheritor of real property from a decedent testate
   3. Next of kin—an inheritor of personal property from a decedent intestate
   4. Legatee—an inheritor of personal property from a decedent testate
   5. Escheat—no inheritor exists so the property passes to the state
   6. Per Stirpes—dividing property by fractions of fractions (1/3 of 1/2)

B. Inter Vivos Transfer
   1. Most commonly used method of real estate transfer is a deed
   2. A deed is not a contract—it’s a conveyance
   3. Sometimes can be involuntary
   4. Can include leases, adverse possessions, or government eminent domain actions

C. Intestate Succession (no will)
   1. Most intestate statues make no distinction between personal property and realty
   2. Heirs are the persons who are entitled to property of one who dies intestate

D. Testamentary Disposition (will)
   1. A will is defined as a person’s declaration of what is to be done with his property after death, which declaration is revocable during his lifetime, and applicable to the situation which exists at his death
   2. Most states require two witnesses for a will, but some require three

E. Passage of property to minors
   1. Can own, but can’t sell
   2. Need property guardian (not personal guardian)
3. Guardian must post bond
4. Property sales must be approved by court
5. Guardian must make annual accounting to the court

F. Formalities of valid wills
   1. 2 disinterested witnesses
   2. See testator sign
   3. Sign in presence of testator
   4. Sign in presence of each other

III. Estates in Land

A. Fee Simple Absolute
   1. Creation: To A, To A and his heirs
   2. Typical in a sale of residential property from seller to buyer
   3. Largest estate known to the law
   4. Lasts forever and is devisable, descendable, and alienable
   5. Does not create a future interest

B. Defeasible Fee Estates
   1. Fee Simple Determinable
      a. Creation: To A so long as…, To A during…, To A until… (clear durational language)
      b. Automatically reverts to grantor upon the happening of a specified event
      c. Creates a future interest (possibility of reverter)
      d. Fully devisable, descendable, and alienable
   2. Fee simple subject to Condition Subsequent
      a. Creation: To A but if X event occurs grantor reserves the right to reenter and retake (clear durational language, clear right of entry generally required)
      b. Only becomes vulnerable on being terminated at grantor’s election
      c. Creates a future interest (right of entry)
      d. Fully devisable, descendable, and alienable
   3. Fee simple subject to executory interest
      a. Creation: To A but if X event occurs, then to B
      b. Automatically reverts to B upon happening of event
      c. Creates future interest (shifting executory interest)
   4. Words of mere hope, desire, or intention are insufficient to create

Wood v. Board of County Commissioners of Fremont County—Hospital case. Court held that the language in a deed did not constitute a defeasible fee estate.

In Re .88 Acres of Property—Town hall case. Court held that a determinable estate existed, and once the specific event occurred, the town could begin adversely possessing the parcel of land.
C. Fee Tail
   1. Future Interest- Reversion in conveyor, his heirs or devisees, or remainder in a grantee or devisee other than the taker of the fee tail
   2. Language Creating- to “A and the heirs of his body,” to “A and the heirs of his body, remainder to B”
   3. Duration- For the life of the first taker (tenant) in tail and thereafter through succeeding generations so long as there are any living lineal descendants of the first tenant in tail
   4. Transferability- By deed, but the transferee acquired an estate which would end at the transferor’s death in favor the latter’s bodily heirs. Descent limited to heirs of body. Not devisable by will.
   5. Originally used to keep land within a family for many successive generations
   6. Legislation largely renders the traditional fee tail obsolete in the US today
   7. If attempted, the person is given a fee simple absolute

D. Life Estate
   2. Duration- For the life or lives of the person or persons indicated by the conveyor as the measuring life or lives
   3. Transferability- By deed only
   4. Future Interests created
      a. Reversion in grantor, his heirs, or devisees
      b. Remainder in grantee or devisee other than the life tenant
   5. An essential part of plans by which persons who have accumulated substantial property distribute their wealth among the desired objects of their bounty
   6. May be implemented through the use of a trust
   7. Tenant is entitled to all ordinary uses and profits from the land, but must not commit waste

IV. Future Estates

A. Important questions to ask
   a. What type of future interest?
   b. What type of estate will it be when it becomes possessory?

B. Possibility of Reverter
   a. Created in grantor
   b. Accompanies fee simple determinable

C. Right of Entry
   a. Created in grantor
   b. Accompanies fee simple subject to condition subsequent

D. Reversion
   a. Created in grantor
   b. Transfer of less than grantor owns
c. The “leftover” is called the reversion
d. Cannot follow a defeasible fee

E. Remainder
   a. Created in 3rd party (can be an unascertained person)
   b. Becomes possessory at the natural conclusion of a preceding life estate or term of years
   c. Requirements
      i. Must be created at the same time and by the same document that creates the prior estate or estates
      ii. Must follow a freehold estate, and not a defeasible fee
      iii. Must never cut short the prior estates
      iv. Must be no built-in time gap between the termination of the prior estate and the remainder’s taking of possession

F. Executory Interest
   a. Created in 3rd party (can be an unascertained person)
   b. Anything that does not qualify as a remainder
   c. Shifting
      i. Cuts short some interest in another person
      ii. Allows follows a defeasible fee
      iii. Creation language: To A and his heirs, but if B returns from Canada sometime next year, to B and his heirs (A has fee simple subject to B’s shifting executory interest)
   d. Springing
      i. Cuts short an interest in the grantor or his heirs
      ii. Creation language: To A if and when he marries (O has fee simple subject to A’s springing executory interest)

G. Protection of future interests
   a. Waste- Unreasonable use of the property by the owner of the possessory estate which reduces the value of a future estate
      i. A life tenant may not commit acts which will decrease the value of the future estate (voluntary waste)
      ii. A life tenant may also not permit the property as a whole to decrease in value for want of those day-to-day repairs a reasonable person would make to maintain the property (permissive waste)
      iii. An owner of a defeasible fee estate is chargeable for waste only in limited circumstances, including conduct deemed “unconscionable” and that a reasonable probability exists that the future interest will become a present interest

Brokaw v. Fairchild—New York Mansion house wanted to be turned into an apartment building. Court held that the person who held a life estate in the building did not have a right to demolish it.

Baker v. Weedon—Old lady wanted to sell land in which she had a life estate. Court held that she could not because it would not produce an overall benefit for all the parties involved.
a. Alienation
   a. Disabling Restraint
      a. Purports to make transfer of the land literally impossible
      b. Almost always void
      c. Example: O conveys to A on the condition that neither A nor any of her children shall have the right to transfer the land or any interest therein
   b. Forfeiture Restraint
      a. Grantor seeks to create an estate in the grantee which either automatically terminates upon an attempt to alienate or which is subject to a power of termination held by the grantor in such event
      b. Void in fee estates
      c. Valid on life and leasehold estates
      d. Example: O conveys to A on the condition that if A shall attempt to transfer the land or any interest therein during her lifetime, her estate shall cease, and title therein shall vest in B
   c. Promissory Restraint
      C. Grantor seeks to create a contractual promise by a grantee not to convey an interest in land which the grantee is receiving
      D. Void on fee estates
      E. Valid on life and leasehold estates
      F. Example: O conveys to A on the condition that A hereby covenants that she will not transfer the land or any interest therein without the transferor’s prior written consent

b. Waste
   a. Voluntary—intentional acts
   b. Permissive—lack of action to preserve the property
   c. Financial—failure to pay taxes or mortgage interest
   d. Ameliorative—Improves value of property that cannot be feasibly used “as-is” (allowed)
   e. Types of Plaintiffs in Waste lawsuits
      C. Holders of future interests
      D. Holders of mortgages on the property
      E. Sellers under long-term real estate sale contracts
   f. Open Mine Doctrine
      C. If an extractive process is going on at the time of the grant, it may continue in a reasonable manner

V. Concurrent Estates

A. Joint Tenancy
a. To A and B, not as tenants in common, but as joint tenants with right of survivorship (this must be clearly expressed on most jurisdictions)
b. Interest cannot be devised by will or passed by descent (but is alienable as a T/C)
c. Depends upon 4 unities
   i. Unity of Time—The interest of the joint tenants must arise at the same time
   ii. Unity of Title—Interests must be acquired by the same instrument
   iii. Unity of Interest—Tenants must acquire identical interests in the land
   iv. Unity of Possession—Tenants must have a common right of possession and enjoyment
   v. Lack of any of the 4 unities results in a tenancy in common
   vi. Severance
      1. Applies only to J/T with right of survivorship
      2. One joint tenancy conveys his or her interest to an outsider (other joint tenants still have right of survivorship for remaining portion)
      3. That interest is converted into a T/C interest
      4. Irrelevant factors: Non-severing J/T doesn’t consent, non-severing J/T does not have notice of severance, deed that causes severance is not recorded, divorce
      5. A mortgage generally will not sever a joint tenancy (only in a title theory it will)
      6. Issuing of estates that won’t sever: judgment lien, life estate, lease
   vii. Actions cotenants may bring against another cotenant
      1. Contribution (I spend some money on this place, and you should reimburse me for part of it)
      2. Accounting (You made some money on this place and you should give part of it to me)
      3. Partition (Let’s have the court divide up the property and its value between us)

B. Tenancy in Common
   a. To A and B
   b. No right of survivorship
   c. Each tenant gets possession of the whole (regardless of % interest)
   d. Interest of a tenant is freely alienable inter vivos, and if not conveyed in his lifetime, passes at his death to his devisees or heirs
   e. Only unity of possession is required
   f. One cotenant cannot acquire the whole by adverse possession (unless there is an ouster)
   g. Modern statutes prefer it over other types of concurrent estates
   h. Cotenant must not commit waste
   i. Liability of cotenants for rent in most jurisdictions
      i. Rental (net) from 3rd parties? (Yes)
Use for business purposes? (no)
Personal Occupation? (No, unless there is an ouster)

Duty of out-cotenant to contribute to expenses
  Property taxes? (Yes)
  Mortgage payments? (Yes)
  Repairs and maintenance? (Generally yes)
  Improvements? (No)

Partitioning
  Courts typically prefer partition in kind rather than by sale

*Delfino v. Valencis*—Garbage hauling business case. Court held that the interests of all tenants should be considered when deciding how to partition land.

C. Tenancy by the Entirety
   a. Creation: To A and B, as husband and wife
   b. Can only exist between husband and wife
   c. Requires the four unities, but is only severable by divorce
   d. Decisions on what constitutes this estate varies widely state-to-state
   e. Contains right of survivorship (unless severed by divorce)
   f. At divorce, becomes tenancy in common (unless court orders otherwise)
   g. Creditors of an individual spouse cannot reach it as an asset

*Estate of Phillips v. Nyhus*—Court held that mere execution of an earnest money agreement for the sale of real property held in joint tenancy does not sever the joint tenancy or right of survivorship.

*Porter v. Porter*—Court held that a divorce does not necessarily, by itself, sever a joint tenancy.

*Brant v. Hargrove*—Court held that an execution of a deed of trust does not sever a joint tenancy.

IV. Landlord/Tenant

*Friend v. Gem International, inc.*—Employee slip and fall case. Court found a landlord-tenant relationship between an employee and a landlord even though the space held by the employer was not always consistent, because both parties knew where it began.

A. Classification of leasehold estates
   1. The expressed intention of the parties respecting the identity of the tenancy or its duration or terminability
   2. The agreement of the parties concerning the periodic payment of rent
   3. The acts of the parties, such as by a tenant’s merely taking possession of land with consent of the owner

B. The Several Tenancies
   1. Fixed-term
a. Duration- For a fixed time in units of one year or multiples or divisions thereof
b. Creation- By agreement (i.e., lease), oral or written, subject to the requirements of the applicable statute of frauds
c. Termination- By expiration of the stated period of time, by happening of a stated limitation or contingency if such occurs within the specified term, by surrender of the unexpired portion of the term (conveyance by tenant to landlord of the tenant’s interest), release (conveyance by landlord to tenant of the landlord’s interest) or condemnation (expiration of the landlord’s estate)
d. In the event of a hold-over, the landlord may treat the tenant as a trespasser and use judicial action to remove him or treat the tenant as a periodic tenant
e. Landlord may not raise the rent

2. Periodic
   a. Duration- Indefinite and seamless (not a series of successively repeating periods)
   b. Creation- By agreement (express terms of an oral or written lease), by the landlord giving possession to the tenant for an indefinite 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
   c. Termination- By written notice delivered by landlord or tenant six months prior to the end of the current period if the tenancy is of a year to year. If it’s less than a year, notice is required for a full period prior to the end of the current period. Must cause a termination at the end of a regular lease period
   d. Landlord may raise the rent
   e. If lease reserves an annual rent, payable monthly, majority view says that the period is for a year, not a month (if non-residential)

3. At-will
   a. Duration- Continues only so long as both landlord and tenant refrain from taking any action inconsistent with its continuation
   b. Creation- By agreement of the parties, by the taking of possession with the consent of the owner without more, by entry into possession under a void lease prior to making periodic rental payments
   c. Termination- By either party without formal notice of termination

4. Sufferance
   a. Duration- Until demand for possession by landlord or until landlord elects to have a tenancy other than tenancy at sufferance
   b. Creation- By one entering into possession rightfully and retaining possession wrongfully (holdover tenant)
c. Termination- There is none because there is no real tenancy to terminate

C. Premises of Liability in Missouri
   1. Trespasser- no duty of care
   2. Licensee- owner liable if owner knows of the condition and realizes that it involves an unreasonable risk to the licensee and has reason to believe that the licensee will not discover the condition or realize the risk
   3. Invitee- owner has duty to exercise reasonable care
   4. Tenant- same as to invitee with respect to portions of the premises over which landlord retains control

D. Important differences between leases and licenses
   1. Taxation statutes may apply to one but not the other
   2. A court won’t give equitable remedies (injunction, specific performance) to protect a license
   3. A license is always revocable, though the landowner who revokes it may be liable in damages

E. Duties to repair and maintained leased premises
   1. A material breach by one party does not discharge the other party from the duty of performance (a tenant can stay in the lease even if it violates a provision of it)
   2. Landlords address the above problem through statutes and express language in the lease (“lessor has the right to terminate the lease upon breach”)

Service Oil Co. v. White—Service station case. Court found fraudulent misrepresentation involving a property when there was a defect or undesirable condition, known to the lessor and unknown to the lessee, and the lessee could not discover it using reasonable diligence

3. Tenant has duty to avoid waste (no intentional damage, must prevent damage by weather, must not remove fixtures, etc.)
4. A lease may impose a duty to repair on the tenant
   a. Lease provisions: Tenant will want the lease to say it doesn’t cover ordinary wear and tear, repairs necessitated by casualty losses that are not the tenant’s fault
   b. Tenant has option to terminate lease if casualty loss (fire, earthquake, etc.) makes continued possession impractical
   c. If tenant does not terminate, landlord will repair (at least to the extent of insurance proceeds)
   d. Rent will cease during repair period

F. Implied Covenant of Quiet Enjoyment
   1. Landlord has title or the right to lease the premises
   2. The premises will be free of prior tenants
   3. Landlord will not deprive tenant of any of the space during the lease
   4. Landlord will not unreasonably interfere with tenant’s possession
   5. Applies to commercial and residential leases
G. Partial, Actual, and Constructive Eviction
1. Elements of Constructive Eviction
   a. Wrongful act (or failure to act) by landlord
   b. Very bad conditions (untenable)
   c. Tenant must give landlord notice of the problem, and landlord fails to resolve
   d. Tenant must vacate the premises
   e. Remedies include lease termination, damages, injunction
2. Partial Actual Eviction
   a. Part of the tenant’s space has become inaccessible
   b. Tenant can remain in the space that’s accessible
   c. Tenant can remain rent-free
3. Actual Eviction
   a. Eviction from the entire premises by the landlord
   b. Act terminates the lease (and any liability to pay rent)

*Barash v. Pennsylvania Terminal Real Estate Corp.*—Law firm air-conditioning case. Court held that no partial actual eviction occurred because the tenant was still on the premises, and nothing in the lease established a right to 24-hour ventilation.

H. General Merger Clause
1. All prior agreements and promises, oral and written, are superseded by this written lease
2. Landlord had made no representations or promises with respect to said building except as herein expressly set forth
3. Tenant accepts the premises ‘as-is’ and agrees that they are in good and satisfactory

J. Implied Warranty of Habitability
1. Applies only to residential property (in some states only multi-family housing)
2. Remedies for violations
   a. Terminate the lease and move out
   b. Damages (prior rent paid)
   c. Reduce/withhold rent
   d. “Repair and reduct”
   e. Injunction or specific performance of lease (not common)
3. Measure of damages
   a. Fair market rent minus “as-is” value
   b. Consequential damages
   c. Harm to personal property
   d. Emotional distress
   e. Punitive damages
5. Generally, defects that violate the housing code are not automatic grounds for uninhabitability (although they are persuasive)
6. There are two different kinds of rent withholding
a. True Rent Withholding- Allows tenant to deny rent to the landlord by refusing to pay it, or by paying into an escrow account or some public officer (not generally allowed by judicial decision)

b. Offset Rent Withholding- Refusal to pay rent, and when landlord attempts to oust in a statutory summary eviction action based upon nonpayment of rent, tenant will seek to offset against the unpaid rent on a claim for damages for the breach of warranty

K. Statutory Warranties of Habitability
   1. Landlord obligations
      a. Keep common areas clean and safe
      b. Maintain plumbing, electrical, heating, ventilating, etc. facilities
      c. Arrange for trash and garbage removal
      d. Supply hot and cold water except where the premises are not required by law to have it

   2. Tenant Remedies for violations
      a. Termination
      b. Damages
      c. Injunction
      d. Damages
      e. Attorney’s fees
      f. Repair and Reduct (to a limited extent)

L. Security Deposits
   1. Usually applies only to residential tenancies
   2. Limits size of deposit
   3. Sets time limit for giving refund
   4. May make landlord pay attorneys’ fees
   5. Doesn’t require landlord to pay interest

M. Tort liability of landlords
   1. In general, landlords are not liable for injuries to tenants or others on the premises
   2. Grounds for liability
      a. Landlord has expressly covenanted to repair (and fails to do so)
      b. Landlord attempts to repair, and does so negligently
   3. Exculpatory Clauses
      a. Designed to relieve the landlord of the liability he or she would otherwise have for personal injuries or property damage caused by tenants by defective conditions on the premises or on common areas
      b. Essentially is a waiver of liability
      c. Largely deemed void in residential leases but can be enforceable in commercial leases
      d. Factors influencing the court’s enforcement of exculpatory clauses
         1. Disparity of bargaining power
         2. Standardized preprinted contract
3. No actual negotiation over the clause
4. No opportunity for tenant to purchase greater protection at a higher price
5. Varies too greatly from the standard duty

N. Lease Termination

*Davidson v. Kenney*—Wrong date on letter termination case. Court held that landlord did not give tenant adequate notice to terminate the lease (date did not “roll-over”)

1. Remedies for a landlord to remove a tenant whose lease has terminated
   a. Change the locks and put tenant’s goods on the sidewalk
   b. Turn off the utilities
   c. Bring an action under an “unlawful detainer” or similar statute

*Lindsey v. Normet*—Court held that the Oregon FED statute provision that mandated a speedy trial was not unconstitutional.

2. Well-drafted lease provisions
   a. Tenant covenants (waste, compliance with civil and criminal law, pets, number of occupants, noise, etc.)
   b. A right of entry or power of termination

3. Mitigation of damages upon abandonment
   a. Some courts require “surrenders” of a lease to be in writing, even if the lease was carried out orally
   b. Abandonment- When the tenant quits the premises before the end of the term without the intent to return
   c. Landlord then has the choice to accept the offered surrender by taking back the premises for the landlord’s own account, do nothing and not accept the offered surrender, or re-enter and re-let the premises for the tenant’s account (mitigation)
   d. Mitigation- the landlord will advertise the premises and enter into a rental agreement with a new tenant (any difference in rent will be covered by the original tenant)
   e. Since mitigation is beneficial to the tenant, courts tend to give the landlord considerable leeway in fixing up and re-letting the premises

O. Assignments and Subleases

1. An assignment is a tenant’s transfer of the entire remaining time of the term, while a subletting is the transfer of any less time (doesn’t need to be full interest, just time)
2. An assignment creates privity of estate between landlord and 2nd tenant (and thus they’re responsible for all promises that run with the land), but not in privity of contract
3. Landlord and original tenant no longer have privity of estate, but they do have privity of contract (secondarily liable to each other)
4. No privity occurs between a landlord and a subletter (so no covenants run)
Kendall v. Ernest Pestana, Inc.—Landlord refused to consent to proposed assignee. Court held that consent may be withheld only where the landlord has a commercially reasonable objection to the assignment, even in the absence of a provision in the lease stating that consent to assignment will not be unreasonably withheld.

5. Reasons why landlords refuse to consent to assignments and subleases
   a. The proposed tenant is commercially undesirable (financially irresponsible, proposed use of premises is detrimental, proposed use is illegal, proposed tenant wants to make alterations)
   b. Landlord has idiosyncratic objections
   c. Landlord wants to capture the increased rental value of the premises (most common)
   d. If consent is unreasonably refused, tenant may obtain an injunction or declaratory judgment against landlord

6. To protect from a subletter charging more for rent, a landlord could include a profit-sharing clause or recapture clause in their lease to the tenant
   a. Sample profit-sharing clause: “In the event tenant assigns or subleases for a higher rent or for a lump sum payment, landlord is entitled to receive X% of an equivalent sum from tenant

V. Covenants

A. Restrictions on the use of land

B. Covenants Running with the Land
   a. Must explicitly state the exact benefit that is meant to run with the land, as well as the burden
   b. Landlord’s benefited interests are rents and reversion
   c. Tenant’s benefited interest is usually its leasehold estate
   d. Test of whether a covenants burden runs with the land
      i. Intent
      ii. Touch and concern
         a. Are legal interests as owner made more or less valuable?
         b. Are promises intimately bound up with the land?
         c. Would an average person assume the covenant runs?
         d. Generally prohibitions of specific businesses and providing utilities to land satisfy this
      iii. Horizontal and vertical privity
   iv. Notice of the burden
   e. Test of whether a benefit runs with the land
      i. Intent
      ii. Touch and concern the land
      iii. Vertical privity only
   f. Horizontal Privity
a. Relationship that exists at the time the covenants are entered into
b. General fulfilled by a transfer of full interest
c. Landlord-tenant relationship always qualifies

g. Vertical Privity
a. Relationship between an original party to the covenants and a transferee from that party
b. Entire estate of the party is transferred to a new party
c. Exists only with an assignment, and not a sublease
d. Issues that can break up vertical privity
   a. Transfer of less than full fee simple
   b. Adverse possessor
   c. 3rd party beneficiary (someone who purchased land from covenantee before the covenant was created)

Gerber v. Pecht—Court held that a lessee can be held liable for damages from an assignment of an assignment to which he did not consent (as long as the assignment did not alter the original terms of the lease).

Neal v. Craig Brown—Court held that a subletter cannot exercise an option to renew the lease (but an assignee can).

C. Covenants Among Fee Simple Owners
   a. Covenant in Gross
      i. Owner of a burdened parcel of land covenants to benefited persons who are not landowners
      ii. Covenant to use a specific contractor for grading of the land
      iii. Covenant to buy water from a specific water company that owns no nearby land
   b. If you sell your house, you’re not liable for breaches of covenants by the new owner

D. Covenants among Subdivisions and Owners’ Associations
   a. Factors to consider in determining whether a covenant to pay dues to a recreational facility touches and concerns the land
      i. Part of common scheme of development
      ii. Close proximity to the residential area
      iii. Grants the right of common use of the recreational facility to all property owners
   b. Major types of owners’ associations
      i. Planned Unit Developments (PUDs)- Each owner holds title to his dwelling unit, the title to the common areas is held by owners’ association, and easement of use is granted to benefit each dwelling unit
      ii. Condominium- Each owner holds title to his dwelling unit, and holds an undivided fractional share of the common areas as tenant in common
iii. Cooperative Apartment- Owners’ association holds title to the entire project, and each individual dwelling unit owner holds a share of stock in the association along with a “proprietary lease”

c. Provisions typically included
   i. Creation of an owner’s association
   ii. Delegation to it of power to enforce the covenants (though individuals can still enforce as well)
   iii. A procedure for amending the covenants
   iv. A covenant to pay dues or assessments to the association
   v. A lien on each lot to aid the association in collecting the dues
d. Original developer of a subdivision generally only has enforcement power as long as he still has unsold lots in the subdivision

E. Equitable Servitude
   a. Utilize if a plaintiff wants an injunction
   b. Requirements for burden to run
      i. Intent
      ii. Touch and concern
      iii. Notice
         a. Actual knowledge (informing the buyer before closing)
         b. Evident from appearance of property (i.e. a “common scheme” on many lots)
            a. Group of lots
            b. Clustered together
            c. Must have similar covenants
   c. Requirements for benefit to run
      i. Intent
      ii. Touch and Concern

F. The Common Plan and Implied Covenants
   a. Most covenants do not contain the benefited land-only the burdened land
   b. When no express statement is made and the party imposing the covenant continues to own some adjacent or nearby land, only that land is treated by the courts as benefited
   c. Prior purchaser in a common plan are generally permitted to enforce covenants on benefited land, even though they bought their lot before others
   d. Critical time for determining whether there was notice sufficient to burden a purchaser with restrictions is the time of purchase
   e. Major uses
      i. Defines the extent of the benefited land
      ii. Allows courts to include lots that had already been transferred by the developer to other owners at the time the covenant was imposed on the burdened lot in question
      iii. Allows courts to imply a covenant on a lot which had no express covenant imposed upon it by the developer
iv. Gives notice of implied covenants to persons who buy lots burdened by such covenants

f. Forms of notice
   i. Actual
   ii. Inquiry (neighborhood seems to conform to common restrictions)
   iii. Record

G. Discrimination in Covenants
   a. Illegal to discriminate in the sale or rental a dwelling to any buyer or renter because of a handicap of (a) that buyer or renter, (b) a person residing in or intending to reside in that dwelling after it is sold or rented, or (c) any person associated with that buyer or renter
   b. Many courts have found covenant enforcement against group homes for the handicapped to violate the act
   c. Illegal to discriminate on the basis of familial status (except for older persons)
   d. Reasonableness Standards
      i. Two approaches to unreasonably restrictive covenants: “Reasonableness Test” and “Business Judgment Rule”
      ii. Courts are reluctant to overturn covenants and association rules if they are procedurally valid
      iii. Courts often will not interfere if the provision does not broadly affect the entire group

I. Termination
   1. Release (in writing)
   2. Merger (of landowner)
   3. Condemnation of burdened property
   4. Defenses to enforcement
      a. Unclean hands (the other person is doing something equally as bad)
      b. Waiver (Nobody enforces the covenants)
      c. Abandonment (same as waiver)
      d. Laches (unreasonable delay in bringing suit)
      e. Changed neighborhood conditions (Large number of violations means the purpose of covenant is no longer possible)
         1. Fundamental character of the residential neighborhood must already be lost
         2. Changes must have occurred within the area affected by the covenants (not merely adjacent land)
   5. Amendment requirements (assuming covenants okay them)
      a. Not a total destruction or fundamental change
      b. Not against public policy
      c. Reasonableness test or business judgment test
      d. Uniformity in application

VI. Easements
A. Nature and Division of Ownership
   a. Easements allow some use to be made of the burdened land (but not possession)
   b. Profits allow some substance to be severed and removed from the burdened land
   c. Typical easements are for driveways, roads, rail lines walkways, pipe, and other utility lines
   d. The right to exclude others extends only so far as to prevent their interference with the servitude’s particular purpose
   e. Differ from licenses because they are rights that exist for a definite period of time (not privileges revocable at will)
   f. Factors used to identify an easement
      i. Specified time
      ii. Designated area
      iii. Substantial consideration paid
      iv. Holder is allowed to make improvements and repairs
   g. Benefited parcel is the dominant tenement; Burdened parcel is the servient tenement
   h. Possible durations
      i. In fee simple absolute
      ii. In fee simple defeasible (so long as a train uses the track every month, etc.)
      iii. For life
      iv. For a fixed term

B. Easements in Gross
   a. Gives its holder only a personal or commercial gain not related to his use or enjoyment of his land
   b. There is no dominant tenement
   c. Common examples: Right to place a billboard on servient land, right to lay power lines on another’s land, right to fish in another’s lake
   d. Transferable only for commercial purposes

C. Appurtenant Easements
   a. 2 parcels of land are involved
   b. Passes automatically with the dominant (benefited) tenement
   c. Notice is required for it to pass with servient (burdened) tenement
   d. can be assigned or divided only by transferring or subdividing the dominant land

D. Methods of Creation
   a. Can only be reserved by the person who will be using it (developer may not reserve an easement for a future buyer)
   b. Most created expressly by an instrument in writing (deed)
   c. Language should include “right of use” “easement” or “profit”
   d. 4 main methods
      i. Express
      ii. Implied
      iii. Necessity
iv. Prescription

e. How to grant an easement
   i. State that it is an easement
   ii. Identify location (describe both the dominant land and the easement itself)
   iii. State the scope of the use
   iv. State the duration
   v. Decide upon maintenance responsibility
   vi. Appurtenant or in gross?
   vii. If appurtenant, to what dominant land?

f. How to obtain notice of easements
   i. Actual knowledge
   ii. Appearance of easement
   iii. Recording in public records

E. Scope
   a. Expanding use
      i. Must have been reasonably contemplated by original parties
      ii. Reasonable changes in the technology of the use are ok
      iii. Reasonable increases in use due to normal development of the dominant land are ok (anticipated, foreseeable)
      iv. Different types of use, not covered by the original easement’s scope, is not allowed
      v. Adding a parcel to the dominant estate and attempting to extend its benefit is not ok if it increases the burden on the servient land

_Cameron v. Barton_—Deed granted for “right of passway” to a slaughterhouse. After slaughterhouse burned down, road was used to haul machinery in and out. Court held that machinery could continue to be hauled out because general rights of passway were given and the use was part of the “normal development” of the land.

b. Expanding intensity
   i. Begin with the use during the prescriptive period
   ii. Reasonable increases in intensity are permitted
   iii. To determine whether a prescriptive easement is overburdened courts balance the prior use of the right of way against any later changes in the method of use that unreasonably or unforeseeably interfere with the enjoyment of the servient estate

F. Division of Easements
   a. Appurtenant easement can be assigned or divided only by transferring or subdividing the dominant land
   b. Courts must first determine whether the original grant of an easement in gross is exclusive
   c. Exclusive grant of an easement gives the holder complete control of the easement interest
   d. Nonexclusive grant of an easement retains for the owner of the underlying land a right to use the easement simultaneously with the easement holder
e. Easement holder can divide his interest only if the original grant was exclusive
f. Courts must determine whether the exercise of the divided easement complies with the terms of the original grant
g. Surcharge—Occurs when the holder’s use of the easement exceeds the terms of the original grant and interferes unreasonably with the fee owner’s rightful use
h. The burden that the division places on the servient owner must not exceed the burden that the parties contemplated in the original grant
i. Duty to repair
   i. If exclusive, dominant land is responsible to repair
   ii. If nonexclusive, both parties contribute equally

G. Easements by Estoppel

*Ricenbaw v. Kraus*—Neighbor A held a license to use Neighbor B’s property for drainage. After neighbor A thought neighbor B orally granted an easement, neighbor A made significant improvements based on the granting. Court held that although an easement was not created orally, it was created by way of estoppel, as neighbor A relied on the neighbor B’s granting to make the improvements.

H. Implied Easements
   a. Created only when land is broken up into smaller tracts of land or a necessity arises (landlocked)
   b. 3 main types of easements by implication
      i. Easement implied from prior use (quasi-easement)
      ii. Easement implied from necessity (way of necessity)
      iii. Easement implied from a plat (a map describing pieces of real property by plot number)
   c. Elements
      i. Common
      ii. Quasi-easement (continuous or permanent use)
         1. Some courts have said that a pre-existing quasi-easement must be continuous as well as apparent; others have said that it must have been so long continued as to indicate that it was intended to be permanent
      iii. Apparent/obvious/visible
         1. Apparentness of use does not necessarily mean actual visibility, but rather susceptibility of ascertainment on reasonable inspection by persons ordinarily conversant with the subject
      iv. Necessary (typically “reasonably” necessary)
         1. A wide range of views exist as to whether an easement is a necessity (ranges from convenience to strict necessity)
   d. Easements of Necessity
      i. Elements
         1. Landlocked parcel
2. Prior Common ownership
3. Scope of easement includes access (pedestrian and vehicular) and utility lines
4. Common ownership does not have to exist immediately before the present lots were created (but shortly before)
   ii. Right to select the location of the easement belongs initially to the owner of the servient estate at the time the dominant estate is created
   iii. Terminates once reasonable access to a public road becomes available

I. Prescriptive Easements
   a. Elements
      i. Open & notorious
      ii. Actual
      iii. Continuous (uninterrupted)
      iv. Non-permissive (in some jurisdictions)
      v. Exclusive (in some jurisdictions)
   b. Presumptions of Permissiveness
      i. Open, unfenced, and unimproved land (mostly in western states)
      ii. Use by a relative
      iii. “neighborly accommodation”
      iv. Use of a road that doesn’t interfere with servient owner’s possession or use
   c. Methods of preventing a prescriptive easement from arising
      i. Block it off
      ii. Sue before the statute runs
      iii. Give permission
   d. Most common is the use of a driveway
   e. Acquisition of public prescriptive easements
      i. Long-continued public use (doesn’t need to be the same individuals)
      ii. Easement is acquired by the local government
      iii. Sometimes called “implied dedication” which may be for a lesser time than the adverse possession statute

J. Relocation of Easements
   a. If location not specified, owner of servient tenement gets to choose
   b. Location must be reasonable

K. Termination of easements
   a. Release (writing or estoppel)
   b. Merger (of land owners)
   c. Abandonment (physical act usually required—blocking off easement by holder, mere words or non-use insufficient)
   d. Prescription
   e. Cessation of necessity (in the case of an easement of necessity)
   f. When servient land is taken under the power of eminent domain for a purpose inconsistent with the continued exercise of the easement
g. Minor ways of terminating easements
   i. Tax sale of servient land
   ii. Mortgage foreclosure of servient land
   iii. Condemnation of servient land
   iv. Destruction of servient building
   v. Expiration of easement by its terms (stated conditions)

h. Neither surcharge nor non-use will terminate
i. Easement cannot be terminated orally

VII. Deeds

A. Transfers legal title
B. Is a conveyance and not a contract
C. Sellers typically create a new deed to give to new buyers (not the same deed passed down from generation to generation)
D. Elements
   a. Grantor’s name and signature
   b. Grantee’s names and an indication of the manner in which they are taking title
   c. Description of the real estate
   d. Statement of exceptions (if necessary)
   e. Language evincing an intent to make a conveyance (words of grant)
   f. Stamp of public official (not generally required)

E. In MO, the real estate must be free of encumbrances suffered by grantor or any person under whom he claims (or notice given)
   a. Mortgages and liens
   b. Easements
   c. Covenants
   d. Encroachments

F. Warranty Deed
   a. Covenants of seisin (title and possession)
   b. Right to convey
   c. Freedom from encumbrances
   d. Quiet enjoyment

G. Quitclaim Deed
   a. A release of whatever interest the grantor has in the property
   b. Does not contain any warranties

H. No difference (in terms of title) between a full warranty, special warranty, or quitclaim deed (but there is a difference in terms of remedy for damages if the deed fails)
I. Estoppel by Deed
   a. If X has no title, and conveys a deed to A, but later the true owner conveys a deed to X, then A will get title

J. Delivery
   a. Title does not pass until a deed is signed and delivered
b. If multiple deeds are conveyed, the person who received the deed first owns title to the land
c. Elements
   i. Some act done with intent to make the deed pass title at present
   ii. May not intend to pass title at a later time, or with a power to revoke it
d. Once a deed has been delivered, it cannot be modified (but can be reissued)

K. Canons of Construction
   a. The construction prevails which is most favorable to the grantee
   b. If the deed contains two descriptions, one ambiguous and the other unambiguous, the latter prevails in order to sustain the deed
   c. Extrinsic evidence will be allowed to explain a latent ambiguity but a patent ambiguity must be resolved within the four corners of the deed
d. Monuments control courses; courses control distances; and quantity is the least reliable guide of all
e. Useless or contradictory words may be disregarded as mere surplusage
f. Particular descriptions control over general descriptions
g. A description, insufficient in itself, may be made certain through incorporation by reference

L. Land Description
   a. 3 basic methods
      i. Government Survey System
         1. Principal Meridian lines run North-South and Base lines run East-West
         2. Spaced out parallel to the Principal Meridian line are lines that divide the land called Ranges
         3. Spaced out parallel to the Base line are lines that divide the land called Townships
         4. Each township is divided into 36 sections of 1 mi² each
         5. Number system begins in the NE corner and loops back and forth until 36 is in the SE corner
      ii. Metes and bounds
         1. Described by Successive Bounds
         2. Strip Conveyances and Stationing
         3. Conveyed by a Division Line
         4. Land Conveyed by Distance
         5. Proportional Conveyances
         6. Land Conveyed by Exception
         7. Described by Acreage
         8. “Of” Descriptions
         9. Direction of Travel
         10. Monuments
      iii. Platted subdivision