**Real Property**

**Waste** – The life tenant must maintain the estate by continuing the normal use of the land and not committing waste.

**Voluntary waste** - Voluntary waste occurs when the life tenant takes any affirmative action beyond the right of maintenance that causes harm to the premises. Depletion of natural resources constitutes waste unless consumption of such resources constituted the normal use of the land under the open mines doctrine.

**Permissive waste** – Permissive waste involves the failure to maintain. The life tenant must make ordinary repairs but not replacement. The repair obligation is limited by the amount of rents and profits received from the land. If there are no rents and profits, then the repair obligation is limited to reasonable rental value of the land if the life tenant is using the land. If the life tenant is receiving no income from the property and not otherwise using the property, then the life tenant has no repair obligation. The life tenant must also pay all taxes on the property, subject to the same limitations as repairs. A tax sale will eliminate the future interest. The life tenant must also pay interest on any mortgage indebtedness on the property but is not required to make any principal payments, subject to the limitation above.

**Ameliorative waste** – Occurs when life tenant alters property substantially but activity actually increases the value. If changed conditions have made the property relatively worthless, then the life tenant can commit ameliorative waste without liability to the future interest holder.

**Joint tenancy** – A joint tenancy is an estate in land held concurrently by two or more co-tenants. To form a joint tenancy the four unities must be present at the outset: (1) unity of time (interests must have vested at the same time), (2) unity of title (grant to all joint tenants must be by the same instrument), (3) unity of interest (all joint tenants must take the same kind and amount of interest), and (4) unity of possession (all joint tenants must have identical rights of possession. The language of the conveyance must clearly reflect the grantor’s intent to create a joint tenancy. The right of survivorship must be expressly stated, which means that the surviving joint tenants take automatically on the death of a joint tenant. The modern rule will presume that a tenancy in common is created if there is any uncertainty.

**Termination of Joint tenancy** – A joint tenancy can be terminated by the acts of one co-tenant. For example, a joint tenant’s inter vivos conveyance of his undivided interest destroys the joint tenancy and the transferee takes as a tenant in common. The effect of one co-tenant mortgaging her interest varies depending on how mortgages are characterized in that jurisdiction. In the majority of states, a mortgage is regarded as lien on title; thus one joint tenant’s execution of a mortgage on her interest does not by itself cause a severance. However, in the minority of states, a mortgage is regarded as a transfer of title which destroys the unity of title and severs the joint tenancy.

**Partition** - A joint tenant may seek a partition to own a portion of the land outright and no longer be a joint tenant.

**Ouster** – The unity of possession means that each co-tenant has the right to possess and enjoy all portions of the property, subject to the equal right of her co-tenant. An ouster occurs if one tenant wrongfully excludes another from possession of the premises. An ousted co-tenant is entitled to receive his share of the fair rental value of the property for the time he was wrongfully deprived of possession.

**Accounting to co-tenant** – (1) Repairs – a co-tenant who pays more than her pro rata share of the cost of necessary repairs is entitled to contribution from the other co-tenants in actions for accounting or partition. (2) Taxes – Each co-tenant has a duty to pay her share of taxes and payments due on mortgages on the entire property. A tenant who is not in sole possession can pay the taxes and then compel contribution from the other co-tenants. However, a co-tenant in sole possession will receive reimbursement only for the amount that exceeds the rental value of the property. (3) Rent payments – A co-tenant out of possession has a right to share in rents from third parties.

**Severance** – Severance is the involuntary termination of a joint tenancy. It occurs when any of the four unities is disturbed. Typically this occurs due to a sale, mortgage, contract of sale, or creditor’s sale. For mortgages, the majority follows the lien theory which says there is no severance of the joint tenancy. When the mortgage is executed, a lien attaches to the title, but title is not transferred. The minority rule follows the title theory of mortgages, which says that there is a severance of the joint tenancy when the mortgage is created because title passes from mortgagor to mortgagee.

**Leasehold estate** – A lease is an estate in land in which the tenant has a present possessory interest in the leased premises and the landlord has a future interest.

**Tenancy in common** – No unities are required except unity of possession, which means each co-tenant is entitled to possess the whole property. This is the default tenancy and it is freely alienable. Any tenant in common can force a partition and there is no right of survivorship.

**Tenancy by the entirety** – Occurs when the four unities plus the unity of marriage are present. At common law, there was a right of survivorship and the tenancy could not be terminated by unilateral action. Termination of the tenancy by the entirety occurs when there is death, mutual agreement in writing divorce, or execution by a joint creditor.

**Tenancy for years** – A tenancy for years is one that is to continue for any fixed period of time, with a definite beginning date and a definite ending date. Any tenancy for years over one year must be in writing to satisfy the statute of frauds. A one-year tenancy may be oral. No notice is required between landlord and tenant to terminate the tenancy for years.

**Periodic tenancy** – A tenancy that keeps repeating for the period specified until one party gives proper notice. Period tenancy can be created by express agreement, by implication if the lease does not specify how long the lease is to last, or by operation of law such as if an oral lease violates the statute of frauds or a holdover tenant. Either party can terminate the periodic tenancy by giving proper notice, which must be given before an amount of time equal to the length of the period of tenancy except in a year-to-year tenancy, which requires 6 months notice. The notice must specify the effective date and must be at the end of the period of the tenancy.

**Tenancy at will** – Either party can terminate a tenancy at will at any time by giving the other party notice of termination and a reasonable time to vacate the premises. This estate can also be terminated by death of either party, waste by tenant, assignment by tenant, transfer of title by landlord, or lease by landlord to third party.

**Tenancy at sufferance** – Only occurs where tenant has bare possession of the property when tenant wrongfully holds over. The landlord can sue to evict under trespass and recover damages for the holdover, or impose a new periodic tenancy. The new tenancy will be measured by the period covered by the rent payment, usually month-to-month in a residential property, or for year-to-year for a commercial property.

**Assignment of lease** – Absent any express restrictions in a lease, a lessee may freely transfer her leasehold in whole or in part. If she completely transfers the entire estate for the remainder of the term, she has made an assignment. Any transfer of a lesser estate will result in a sublease. An assignment destroys the privity of estate between the lessor and the original lessee. The assignee steps into the shoes of the original lessee and creates privity of estate with the lessor for so long as she remains in possession of the property. This privity of estate creates in the assignee the obligation for all covenants which run with the land.

**Tenant’s duties** – The tenant owes the landlord a duty to pay rent and a duty to maintain the premises, which includes the tenant’s covenant to make ordinary repairs. The modern view is that once the tenant covenants to repair, the tenant is liable for everything including ordinary wear and tear unless the parties’ agreement expressly excludes this responsibility.

**Landlord’s remedies for tenant’s breach of duties** – If the tenant fails to pay rent, the landlord can sue for damages and terminate the lease, thereby evicting the tenant from the property. If the tenant unjustifiably abandons the property, the landlord has two options: (1) the landlord may elect to accept the tenant’s offer of abandonment and terminate the lease, which means the tenant has no further rent obligation, or (2) the landlord relets the premises holding the tenant liable for any deficiency.

**Landlord’s duties** – (1) The landlord owes the tenant a duty to deliver possession of the leased premises when the lease begins. If the landlord cannot deliver actual possession, then he is in total breach. (2) Residential property also comes with an implied warranty of fitness or habitability, which obligates the landlord to provide leased premises that are reasonably suited for residential use. If the landlord breaches the implied warranty of habitability, the tenant can move out and end the lease OR the tenant can stay on the property and sue for damages. (3) Every lease includes the landlord’s implied covenant of quiet enjoyment, which is breached if there is a total eviction, partial eviction, or constructive eviction. Partial eviction occurs where the landlord physically excludes the tenant from only some portion of the leased property, in which case the tenant can stay on what’s left and stay for free. A constructive eviction occurs where the landlord fails to provide some service that the landlord is obligated to provide and that failure makes the property uninhabitable. A landlord has no common law duty to repair or maintain the premises.

**Implied Warranty of Habitability** – At common law, the duty to repair was solely the lessee’s responsibility. Today however courts look to the lease itself for any express provisions and, where the parties fail to allocate the duty, imply a covenant of habitability into residential leases. This warranty cannot be waived and typically ties the lessor’s duty to standards of local housing codes. The court will look at whether the conditions are reasonably suitable for human residence. In the event of a breach, the lessee may (1) move out and terminate the lease, (2) make repairs and offset the cost against future rent, (3) abate the rent to an amount equal to the fair rental value in view of the defects, or (4) remain in full possession, pay full rent, and sue for damages.

**Implied Covenant of Quiet Use and Enjoyment** – Every lease contains an implied covenant that neither the lessor nor a paramount titleholder will interfere with the lessee’s quiet use and enjoyment of the premises. This covenant may be breached by an actual, partial or constructive conviction.

**Constructive eviction** - A constructive eviction occurs where the landlord does something or fails to do something he has a legal duty to do that renders the property uninhabitable and the lessee vacates the premises within a reasonable time. The tenant can claim constructive eviction only if (1) landlord’s failure to provide some service, (2) there must be a substantial interference with the tenant’s quiet enjoyment, (3) the tenant must give the landlord notice and a reasonable time to repair, and (4) the tenant must vacate within a reasonable time.

**Fixtures** – General rule is that fixtures become part of the real property and cannot be removed by sellers or tenants. Whether an item is a fixture turns on intent. In the absence of an agreement between the parties, the intent is based on (1) the degree of attachment, (2) general custom, (3) degree of harm to premises on removal, and (4) trade fixtures are not fixtures and therefore can always be removed. If the item is not a fixture, the tenant must remove it before the tenant vacates at the end of the lease.

**Easement** – An easement is a non-possessory interest in land involving a right to use the land. An easement appurtenant occurs any time the easement directly benefits the use and enjoyment of a specific parcel of land. The burdened property is the servient estate and the benefited property is the dominant estate.

**Easement in gross** - An easement in gross occurs where there is no dominant estate because there is only one parcel of land involved, which is the property burdened by the easement referred to as the servient estate.

**Express easement** – Arises from express grant of an easement or express reservation of an easement when land is sold. Must be in writing signed by the holder of the servient estate and satisfy all the deed formalities to satisfy the statute of frauds. Easements of a year or less do not have to be in writing.

**Implied easement** – Occurs where (1) previous use by a common grantor or (2) easement by necessity based on the absolute right of access. For an implied easement by a common grantor, there must be a previous use by a common owner and this previous use must be (1) apparent, (2) continuous, and (3) reasonably necessary.

**Easement by prescription** – Arise very much like acquiring title by adverse possession. (1) the use must be hostile to the true owner, (2) the use must be continuous and uninterrupted and must last for the specified statutory period, (3) the use must be visible and notorious or the use is made with the owner’s knowledge, and (4) the use must be without the owner’s permission.

**Transfer of benefit of easement** – The benefit of an easement appurtenant is transferred automatically along with the dominant estate, whether or not the easement is mentioned in the deed of conveyance. The easement appurtenant cannot be transferred separately from the dominant estate.

**Transfer of the servient estate / burden of the easement** – Easements are always binding on subsequent holders of servient estates even if not specifically mentioned in the deed of conveyance provide the subsequent holder had notice of the easement. Notice can be through (1) actual knowledge or notice, (2) constructive notice which arises from the fact that the document creating the easement is duly recorded in the buyer’s direct chain of title, or (3) inquiry notice, which arises from buyer’s physical inspection of the land and visible appearance of the easement on the land or from inspection of the public records contained in the direct chain of title.

**Scope of use of easement** – The specific terms of the easement control on questions of use. Unless otherwise specified, an easement is presumed to be perpetual. Reasonable development of the dominant estate is also allowed, which is that development which most likely would have been contemplated by the parties at the time the easement was granted. The remedy for excessive use is to enjoin the excessive use.

**Termination of easement** – Termination of an easement occurs through merger, deed of release, abandonment (which must be manifested by the holder of the dominant estate taking some physical action that shows intent to abandon), termination by estoppel, by prescription, or end of necessity.

**Covenant running with the land – benefit** – The benefit will run with the land thus inure to successors in interest if (1) the original parties so intended, (2) there is vertical privity, and (3) the covenant touches and concerns the benefited property.

**Covenant running with the land – burden** – The burden will run with the land and be enforced against a successor in interest of the burdened property only if (1) the original parties so intended; (2) the successor in interest of the land burdened by the covenant had actual or constructive notice of it when she acquired the property; (3) there is both horizontal and vertical privity; and (4) the covenant touches and concerns the burdened property.

**Mortgage** – A mortgage is a security interest in real estate, usually securing a promise to repay a loan. If the loan is not paid when due, the mortgagee can either take title to the real estate or have it sold and use the proceeds to pay the debt.

**General Warranty Deed** – A general warranty deed is one in which the grantor covenants against title defects created by himself and all prior titleholders. It typically contains three present covenants (1) of seisin, (2) of right to convey, and (3) against future encumbrances and three future covenants (1) for quiet enjoyment, (2) of warranty, and (3) for further assurances. The covenant against encumbrances ensures that there are neither visible encumbrances such easements nor invisible encumbrances such as mortgages against the title or interest conveyed. The future covenant of warranty is where the grantor agrees to defend on behalf of the grantee any lawful or reasonable claims of title by a third party and to compensate the grantee for any loss sustained by the claim or superior title.