REAL PROPERTY

RULE-STATEMENT CHECKLIST

I. OWNERSHIP OF REAL PROPERTY

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A. PRESENT ESTATES

GENERAL RULE A present estate is a currently possessory interest in land; the fee simple absolute is the largest and most complete estate, while defeasible fees and life estates are limited in duration and are always followed by a future interest.

- ☐ **Fee simple absolute.** A fee simple absolute is absolute ownership of potentially infinite duration with no accompanying future interest; it is created by a grant 'to A' or 'to A and his heirs' and is freely devisable, descendible, and alienable.
- ☐ **Fee simple determinable.** A fee simple determinable is created by durational language such as 'so long as,' 'while,' 'during,' or 'until,' and automatically terminates upon the stated event, whereupon the estate reverts to the grantor who holds a possibility of reverter.
- ☐ **Fee simple subject to condition subsequent.** A fee simple subject to condition subsequent is created by conditional language such as 'but if,' 'provided that,' or 'on condition that' coupled with an express right of reentry, and does not end automatically; the grantor's retained right of entry (power of termination) must be exercised to cut short the estate.
- ☐ **Fee simple subject to executory limitation.** A fee simple subject to executory limitation automatically divests to a third party, rather than reverting to the grantor, upon the happening of the stated condition; the third party's interest is an executory interest.
- ☐ **Life estate.** A life estate is an estate measured by the life of a person, usually the grantee, and is followed by either a reversion in the grantor or a remainder in a third party; a life estate pur autre vie is measured by the life of someone other than the holder.
- ☐ **Doctrine of waste.** A life tenant may take the ordinary uses and profits of the land but must not commit waste that harms the future interest holders; affirmative (voluntary) waste is overt destruction, permissive waste is neglect such as failing to repair or pay taxes, and ameliorative waste is a change that increases value, which is generally actionable only if it defeats the future holder's reasonable expectations.

B. FUTURE INTERESTS

GENERAL RULE Future interests give the holder the right to possession at a later time; those retained by the grantor are the reversion, possibility of reverter, and right of entry, while those created in a third party are remainders and executory interests.

- ☐ **Reversion.** A reversion is the future interest retained by a grantor who transfers an estate of lesser duration than the grantor holds, other than a fee simple determinable or fee simple subject to condition subsequent; reversions are vested and are not subject to the Rule Against Perpetuities.
- ☐ **Possibility of reverter and right of entry.** A possibility of reverter follows a fee simple determinable and arises automatically, while a right of entry (power of termination) follows a fee simple subject to condition subsequent and must be expressly reserved and affirmatively exercised.
- ☐ **Vested remainder.** A remainder is a future interest in a third party that becomes possessory naturally upon the expiration of the prior estate; it is vested when it is created in an ascertained person and is not subject to any condition precedent.
- ☐ **Vested remainder subject to open.** A vested remainder subject to open is a remainder in a class of persons, at least one of whom is ascertained and qualified to take, where the class remains open to admit additional members; it is subject to the Rule Against Perpetuities.
- ☐ **Contingent remainder.** A remainder is contingent if it is created in an unascertained person or is subject to a condition precedent, or both; contingent remainders are subject to the Rule Against Perpetuities.
- ☐ **Executory interest.** An executory interest is a future interest in a third party that cuts short or divests a prior estate before its natural termination; a shifting executory interest divests a prior grantee, and a springing executory interest divests the grantor.
- ☐ **Rule Against Perpetuities statement.** No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest; an interest that might possibly vest too remotely is void from the outset.
- ☐ **Interests subject to RAP.** The Rule Against Perpetuities applies only to contingent remainders, executory interests, vested remainders subject to open, options to purchase not incident to a lease, and rights of first refusal; it does not apply to interests retained by the grantor or to fully vested remainders.
- ☐ **Common RAP traps.** Classic RAP violations include the fertile octogenarian (any person is conclusively presumed capable of having children), the unborn widow, and the slothful executor or open-ended gift conditioned on an event that may occur beyond twenty-one years after all lives in being; many states apply wait-and-see or the Uniform Statutory Rule with a ninety-year vesting period to cure such gifts.

C. CONCURRENT ESTATES

GENERAL RULE Concurrent ownership means two or more persons hold undivided possessory interests in the same property at the same time; the principal forms are the tenancy in common, joint tenancy, and tenancy by the entirety.

- ☐ **Tenancy in common.** A tenancy in common is the default concurrent estate in which each cotenant holds a separate, undivided, and freely alienable, devisable, and descendible interest with no right of survivorship; each has an equal right to possess the whole regardless of the size of the share.
- ☐ **Joint tenancy and the four unities.** A joint tenancy carries a right of survivorship, so on the death of one joint tenant the surviving joint tenants take automatically; its creation requires the four unities of time, title, interest, and possession, plus a clear expression of the right of survivorship.

- ☐ **Severance of joint tenancy.** A joint tenant may unilaterally sever the joint tenancy as to the conveyed share by an inter vivos transfer, which destroys the unities and converts that share to a tenancy in common; in most states a mortgage in a lien-theory state does not sever, but in a title-theory state it may, and a lease or contract of sale may sever depending on the jurisdiction.
- ☐ **Tenancy by the entirety.** A tenancy by the entirety is a joint tenancy between married spouses with a right of survivorship that can be created only by married persons; neither spouse acting alone can convey or encumber the property or defeat the other's survivorship right, and creditors of only one spouse generally cannot reach it.
- ☐ **Rights and duties of cotenants.** Each cotenant may possess the whole and is not liable for rent to the others absent ouster; a cotenant is entitled to a share of rents from third parties and net profits, may seek contribution for taxes, mortgage payments, and necessary repairs, but generally not for improvements, and any cotenant may seek partition in kind or by sale.

D. LANDLORD-TENANT LAW

> **GENERAL RULE** A leasehold is a nonfreehold possessory estate in which the tenant holds present possession and the landlord retains a reversion; the leasehold types are the tenancy for years, periodic tenancy, tenancy at will, and tenancy at sufferance.

- ☐ **Tenancy for years.** A tenancy for years is an estate that lasts for a fixed, determined period and ends automatically at the stated time with no notice required; a lease for more than one year must satisfy the Statute of Frauds.
- ☐ **Periodic tenancy.** A periodic tenancy continues for successive intervals until properly terminated by notice; at common law termination requires notice equal to one full period, with a maximum of six months for a year-to-year tenancy, effective at the end of a period.
- ☐ **Tenancy at will and at sufferance.** A tenancy at will continues until either party terminates and may end without notice at common law, though many states require reasonable notice; a tenancy at sufferance arises when a tenant wrongfully holds over after the lease ends and lasts until the landlord evicts or elects to hold the tenant to a new tenancy.
- ☐ **Tenant's duties.** The tenant must pay rent and avoid waste; a tenant who commits voluntary waste, or who abandons, remains liable, and the landlord in most jurisdictions must make reasonable efforts to mitigate damages by re-renting.
- ☐ **Implied warranty of habitability.** In residential leases the implied warranty of habitability requires the landlord to maintain the premises in a condition fit for human habitation; it is nonwaivable, and on breach the tenant may move out and terminate, repair and deduct, reduce or withhold rent, or remain and seek damages.
- ☐ **Covenant of quiet enjoyment and constructive eviction.** Every lease contains an implied covenant of quiet enjoyment; it is breached by actual eviction or by constructive eviction, which requires substantial interference caused by the landlord, notice to the landlord who fails to cure, and the tenant's vacating the premises within a reasonable time.
- ☐ **Assignment and sublease.** An assignment transfers the tenant's entire remaining interest, placing the assignee in privity of estate with the landlord and liable for rent, while a sublease transfers less than the entire remaining term and creates no privity between sublessee and landlord; absent an express provision the original tenant remains liable on the lease covenants through privity of contract.
- ☐ **Restraints on assignment.** A lease provision barring assignment or sublease without the landlord's consent is enforceable but strictly construed; under the Rule in Dumpor's Case, once the landlord consents to one transfer without reservation, the covenant against transfer is waived as to future transfers in many jurisdictions.

II. RIGHTS IN REAL PROPERTY

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A. EASEMENTS, PROFITS, AND LICENSES

> **GENERAL RULE** An easement is a nonpossessory right to use another's land for a specific purpose; it may be affirmative or negative, and appurtenant (benefiting a dominant parcel) or in gross (benefiting a person), and it is presumed appurtenant when ambiguous.

- ☐ **Express easement.** An express easement is created by a writing that satisfies the Statute of Frauds, whether by grant (conveying the easement) or by reservation (retaining an easement when the servient land is conveyed); it should be recorded to bind subsequent purchasers.
- ☐ **Easement by implication.** An easement implied from prior existing use requires that the land was originally one parcel under common ownership, that before severance an apparent and continuous use existed on one part for the benefit of another, and that the use is reasonably necessary for the enjoyment of the dominant parcel.
- ☐ **Easement by necessity.** An easement by necessity arises when a single parcel is divided and the division leaves one part with no legal access to a public road, causing strict necessity; the easement lasts only as long as the necessity exists.
- ☐ **Easement by prescription.** An easement by prescription requires use that is open and notorious, adverse (hostile) under a claim of right, and continuous and uninterrupted for the statutory period; permission defeats the claim, and the exclusivity element required for adverse possession is not required.
- ☐ **Scope, transfer, and termination.** The scope of an easement is set by its terms or the purpose of its creation and may not be unreasonably expanded; an appurtenant easement passes automatically with the dominant estate, and easements terminate by release, merger, abandonment shown by conduct, prescription, estoppel, end of necessity, or destruction of the servient land.
- ☐ **Profits.** A profit is the nonpossessory right to enter another's land and remove a natural resource such as minerals, timber, or game; it is governed by the same rules of creation and transfer as easements.
- ☐ **Licenses.** A license is a revocable privilege to enter another's land, is not subject to the Statute of Frauds, and is freely revocable at the licensor's will; a license becomes irrevocable (an easement by estoppel) when the licensee reasonably and detrimentally relies on it, or when it is coupled with an interest.

B. REAL COVENANTS AND EQUITABLE SERVITUDES

GENERAL RULE A promise concerning land may be enforced at law as a real covenant, yielding money damages, or in equity as an equitable servitude, yielding an injunction; the two doctrines differ chiefly in their remedies and in the elements required to bind successors.

- ☐ **Real covenant, burden to run.** For the burden of a real covenant to run with the land and bind successors at law, there must be a writing, intent for the covenant to run, touch and concern the land, horizontal privity (a nexus such as a grantor-grantee relationship between the original parties), vertical privity (the successor takes the entire estate), and notice.
- ☐ **Real covenant, benefit to run.** For the benefit of a real covenant to run at law, there must be a writing, intent, touch and concern, and vertical privity; horizontal privity and notice are not required for the benefit to run.
- ☐ **Equitable servitude.** To enforce a promise as an equitable servitude by injunction, there must be a writing (subject to the common-scheme exception), intent for the servitude to bind successors, touch and concern, and notice (actual, inquiry, or record) to the burdened party; privity is not required.
- ☐ **Common scheme (implied reciprocal servitude).** An equitable servitude may be implied without a writing where a developer had a common scheme or plan of restriction for all lots at the time sales began, and the party against whom enforcement is sought had notice of it; notice may be actual, inquiry from the neighborhood's appearance, or record.
- ☐ **Termination of covenants and servitudes.** Covenants and equitable servitudes may terminate by written release, merger of the benefited and burdened estates, abandonment, changed conditions in the neighborhood so pervasive that the original purpose can no longer be achieved, or by the equitable defenses of unclean hands, acquiescence, laches, or estoppel.

C. FIXTURES

- ☐ **Fixture doctrine.** A fixture is a chattel that has been so affixed to real property that it is treated as part of the realty and passes with the land; whether an item is a fixture turns on the objective intent of the annexor as shown by the degree of attachment, adaptation to the property's use, and the harm removal would cause.
- ☐ **Trade fixtures.** A tenant may remove trade fixtures installed for business purposes before the end of the lease, provided removal does not cause substantial damage to the premises; items not removed by the end of the term are deemed abandoned to the landlord.

D. ZONING

- ☐ **Zoning power.** Under the police power a government may enact zoning ordinances to protect the public health, safety, morals, and general welfare; a zoning regulation that goes too far and deprives an owner of all economically viable use of the land may constitute a regulatory taking requiring just compensation.
- ☐ **Nonconforming use and variances.** A use that lawfully existed before a zoning change becomes a valid nonconforming use that generally may continue, though it may not be expanded and may be phased out by reasonable amortization; a landowner may obtain a variance by showing unnecessary hardship (for a use variance) or practical difficulty (for an area variance) that is not self-created and that will not harm the surrounding area.

III. REAL ESTATE CONTRACTS

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A. THE CONTRACT OF SALE AND THE STATUTE OF FRAUDS

GENERAL RULE A land sale transaction has two stages: the contract of sale, which governs the parties from signing until closing, and the closing, at which the deed passes title; the contract stage is dominated by the Statute of Frauds and the doctrine of equitable conversion.

- ☐ **Statute of Frauds.** A contract for the sale of an interest in land must be in a writing signed by the party to be charged that identifies the parties, describes the property, and states the price or a means of determining it; without such a writing the contract is unenforceable.
- ☐ **Part performance exception.** Part performance may take an oral land sale contract out of the Statute of Frauds where the acts unequivocally evidence a contract; courts typically require two of the following three: payment of all or part of the price, possession by the buyer, and substantial improvements by the buyer.
- ☐ **Detrimental reliance exception.** In many jurisdictions an oral land sale contract may be enforced despite the Statute of Frauds where a party has reasonably and detrimentally relied on the contract and injustice can be avoided only by enforcement.

B. MARKETABLE TITLE AND CLOSING OBLIGATIONS

- ☐ **Implied covenant of marketable title.** Every land sale contract contains an implied covenant that the seller will deliver marketable title at closing, meaning title reasonably free from doubt and the threat of litigation; defects such as a significant encumbrance, an outstanding mortgage or lien not to be satisfied at closing, a defect in the chain of title, or title acquired by adverse possession not yet quieted render title unmarketable.
- ☐ **Time of performance and remedy.** Time is not of the essence in a land sale contract unless the contract so states, the circumstances indicate, or a party gives notice; if a seller cannot convey marketable title by closing, the buyer may rescind, sue for damages, or seek specific performance with an abatement of the price, and the covenant of marketable title merges into the deed at closing.

C. EQUITABLE CONVERSION AND RISK OF LOSS

- ☐ **Equitable conversion.** Under equitable conversion, once a land sale contract is signed the buyer is regarded in equity as the owner of the land (holding real property) and the seller holds the purchase money (personal property) and retains legal title as security; the buyer's interest is devisable and descendible as realty.
- ☐ **Risk of loss.** In most states, under equitable conversion the risk of loss during the executory period falls on the buyer, who must pay the full price even if the property is damaged or destroyed through no fault of the seller; the Uniform Vendor and Purchaser Risk Act, adopted in a minority of states, places the risk on the seller until possession or legal title passes.

D. OPTIONS, RIGHTS OF FIRST REFUSAL, AND WARRANTY OF FITNESS

- ☐ **Options and rights of first refusal.** An option is an irrevocable offer to sell land supported by consideration that gives the holder the power to purchase within a set time; a right of first refusal gives the holder the preemptive right to buy on the same terms if the owner decides to sell, and both may be subject to the Rule Against Perpetuities if not incident to a lease.
- ☐ **Implied warranty of fitness for new homes.** The sale of a newly constructed residence by a builder-vendor carries an implied warranty of fitness or quality (workmanlike construction and habitability); most jurisdictions extend this warranty to subsequent purchasers within a reasonable time for latent defects.
- ☐ **Duty to disclose defects.** In most jurisdictions a seller of residential real estate must disclose known latent material defects that are not readily discoverable by the buyer; general disclaimers such as 'as is' do not excuse a failure to disclose known material defects or active concealment.

IV. MORTGAGES AND SECURITY DEVICES ~20% tested

A. TYPES OF SECURITY INTERESTS

> **GENERAL RULE** A mortgage is the conveyance of a security interest in land to secure the payment of a debt; the borrower (mortgagor) gives the security and the lender (mortgagee) holds it, and the mortgage follows the debt it secures.

- ☐ **Mortgage and note.** A mortgage transaction involves a promissory note evidencing the debt and a mortgage giving the creditor a security interest in the land; the mortgage must generally be in writing to satisfy the Statute of Frauds and should be recorded to protect against later purchasers and lienholders.
- ☐ **Equitable mortgage and deed of trust.** An equitable mortgage arises when a deed absolute on its face is in fact given to secure a debt, which parol evidence may show; a deed of trust operates like a mortgage but conveys title to a third-party trustee who may sell the land on default, and an installment land contract lets the seller retain title until the price is fully paid.
- ☐ **Lien theory versus title theory.** In a lien-theory state, which is the majority, the mortgagee holds only a lien and the mortgagor retains title and the right to possession until foreclosure; in a title-theory state the mortgagee holds legal title and the theoretical right to possess before default, which affects whether one cotenant's mortgage severs a joint tenancy.

B. TRANSFERS BY MORTGAGOR AND MORTGAGEE

- ☐ **Transfer by the mortgagor.** A mortgagor may transfer the mortgaged land, and the mortgage remains on it if recorded; a grantee who takes subject to the mortgage is not personally liable on the debt, whereas a grantee who assumes the mortgage becomes primarily liable and the original mortgagor becomes a surety, and a due-on-sale clause lets the lender demand full payment upon transfer.
- ☐ **Transfer by the mortgagee.** The mortgagee may transfer the note and mortgage together, and the mortgage automatically follows a properly transferred note; a holder in due course of a negotiable note takes free of most personal defenses the maker could raise, provided the note was negotiated, endorsed, and taken for value in good faith without notice of defenses.

C. FORECLOSURE, DEFICIENCY, SURPLUS, AND REDEMPTION

- ☐ **Foreclosure.** Foreclosure is the process by which the mortgaged land is sold to satisfy the debt, most commonly by judicial sale; foreclosure terminates all interests junior to the mortgage being foreclosed but does not affect senior interests, and all junior lienholders must be joined as necessary parties or their interests survive.
- ☐ **Priority of interests.** Foreclosure proceeds are distributed first to the costs of sale, then to the foreclosing mortgage and other liens in order of priority, generally set by the recording acts on a first-in-time basis; a purchase-money mortgage has priority over other liens against the buyer arising at or about the same time, even if recorded later.
- ☐ **Deficiency and surplus.** If the foreclosure sale brings less than the debt, the mortgagee may seek a deficiency judgment against the mortgagor for the shortfall, subject to anti-deficiency statutes in some states; if the sale brings more than the debt and senior claims, the surplus goes to junior lienholders in order of priority and then to the mortgagor.
- ☐ **Redemption.** Under the equity of redemption, the mortgagor may redeem the land and defeat foreclosure at any time before the sale by paying the amount due, a right that cannot be waived in the mortgage itself (no clogging the equity of redemption); many states also grant a statutory right of redemption for a set period after the foreclosure sale.

V. TITLES ~20% tested

A. ADVERSE POSSESSION

- ☐ **Elements of adverse possession.** Title by adverse possession requires possession that is actual and exclusive, open and notorious, hostile (without the owner's permission), and continuous for the statutory period; the possession must be of a kind that gives the true owner notice of the trespass.
- ☐ **Tacking and disabilities.** Successive adverse possessors may tack their periods of possession together to satisfy the statutory period if they are in privity, such as by deed or descent; the statutory period is tolled (does not run) while the true owner is under a disability such as minority, insanity, or imprisonment existing at the time the cause of action accrued.
- ☐ **Scope and effect.** An adverse possessor gains title only to the land actually possessed, except that one who enters under color of title (a defective written instrument) may gain constructive possession of the entire described parcel if some part is actually possessed; adverse possession does not run against government land.

B. TRANSFER BY DEED

> **GENERAL RULE** A deed is the instrument that passes legal title to real property; to be effective a deed must be lawfully executed and delivered, and title assurance to the grantee depends on the covenants the deed contains.

- ☐ **Requirements of a valid deed.** A valid deed must be in writing, identify the grantor and grantee, contain words of transfer, describe the land with sufficient certainty, and be signed by the grantor; consideration is not required to make a deed effective between the parties.
- ☐ **Delivery and acceptance.** A deed passes title only upon delivery, which requires the grantor's present intent to make the deed presently operative, judged by conduct and words rather than by physical transfer alone; acceptance by the grantee is required but is presumed when the conveyance is beneficial, and a condition on delivery not stated in the deed itself is generally disregarded.
- ☐ **General warranty deed.** A general warranty deed warrants against all title defects arising before and during the grantor's ownership and contains six covenants: the present covenants of seisin, right to convey, and against encumbrances, and the future covenants of quiet enjoyment, warranty, and further assurances.
- ☐ **Present and future covenants.** The three present covenants (seisin, right to convey, against encumbrances) are breached, if at all, at the moment of conveyance and do not run to later grantees, while the three future covenants (quiet enjoyment, warranty, further assurances) are breached only upon a later disturbance of possession and run with the land to subsequent grantees.
- ☐ **Special warranty and quitclaim deeds.** A special (limited) warranty deed warrants only against defects arising during the grantor's own period of ownership, not those arising before; a quitclaim deed contains no covenants of title and conveys only whatever interest the grantor actually holds, though the implied covenant of marketable title still governs the underlying contract.

C. TITLE ASSURANCE AND RECORDING ACTS

GENERAL RULE At common law priority is determined by first in time, first in right; the recording acts modify this rule to protect certain subsequent bona fide purchasers who record, encouraging recordation and giving constructive notice through the public records.

- ☐ **Bona fide purchaser.** A bona fide purchaser is one who takes an interest in land for valuable consideration and without notice (actual, record, or inquiry) of a prior conflicting claim; recording acts other than pure race statutes protect only bona fide purchasers, and donees, heirs, and devisees who give no value do not qualify.
- ☐ **Race statute.** Under a race statute, the first to record prevails regardless of notice; a subsequent purchaser who records first defeats a prior grantee even if the subsequent purchaser knew of the earlier unrecorded conveyance.
- ☐ **Notice statute.** Under a notice statute, a subsequent bona fide purchaser who takes for value and without notice of a prior interest prevails over that prior grantee, whether or not the subsequent purchaser records first; the last bona fide purchaser without notice wins.
- ☐ **Race-notice statute.** Under a race-notice statute, a subsequent purchaser prevails over a prior interest only if the subsequent purchaser takes for value and without notice of the prior interest and records before the prior grantee records; both no-notice and first-to-record are required.
- ☐ **Types of notice.** Notice may be actual (real knowledge of a prior claim), record (constructive notice from a properly recorded instrument in the chain of title), or inquiry (notice of facts that would lead a reasonable person to investigate, such as a party in possession or a reference to an unrecorded instrument in a recorded document).
- ☐ **Chain of title.** The recording of an instrument gives constructive notice only if it is within the searchable chain of title; a wild deed (one recorded outside the chain because a prior link was not recorded), a deed recorded too early or too late (estoppel by deed and the shelter-of-the-record problem), and the doctrine of the shelter rule, under which a person who takes from a bona fide purchaser succeeds to that protected status, govern who may rely on the records.