

# Property

Sunday, September 27, 2015 11:26 PM

## A. Non-Freehold Estates

### a. Right to Exclude (Private Property)

i. "bundle of sticks"

ii. Extension of the individual

iii. Trespass

1. Real Property

a. Punitive damages allowed even if only nominal compensatory damages awarded

2. Chattel

a. **Must** show:

i. Actual damage **OR**

ii. Nuisance

1. Interference that causes inoperability

### b. LL-T: Right of Exclusive Physical Possession

i. Lease v. License

	<b>Lease</b>	<b>License</b>
	EXCLUSIVE right to physical possession, <i>all</i> the time	NO right to exclusive physical possession
	No "specific purpose" for use	Authorization to <b>use land</b> in possession of another for a specific reason
1.	NOT revocable at will	May be terminated at will
	CONTRACT + CONVEYANCE = LEASE	
	"tenant", "lease", "rent", "demised premises", prohibition against assignment w/o consent of lessor (BUT not automatic), rental payment, "good tenantable condition"	No particular space, Licensor retains control over Licensee's operations, "license", strategic drafting

2. **Intent**

- a. Look to intent of the parties when unclear

ii. Interference at Commencement of Lease Term

1. **Responsibility to ensure possession**

	LL	Burglar	Bank
Beginning of term	LL	LL	LL
During term	LL	T (more control over possession of property)	LL

- a. ALL courts hold that the tenant is excused from paying rent for the period during which she is unable to obtain the actual physical possession of the premise.

2. **Covenant of Quiet Enjoyment** - promises tenant the right to enjoy possession of premises in peace & w/o disturbance

- a. Can occur when there is NOT constructive eviction
- b. Protects T from deprivation of **beneficial use of property**

3. **Partial Actual Eviction** - part of premise that tenant can no longer use (LL must *do* something that has a *physical effect* on the land)

- a. T can withhold rent if significant encroachment
- b. LL cannot sue for rent

4. **Constructive Eviction** - LL infringes upon beneficial use and enjoyment by doing or failing to do something that is **tantamount to a physical eviction**

- a. Higher standard than covenant of quiet enjoyment
- b. T may repair and deduct
- c. If seeking to assert a claim, T **must** leave immediately and cease rent payments

c. LL's Implied Duties/T's Implied Conditions

i. LL's Implied Duties

1. **Efficient repair**

- a. Who is in better position?

2. **Residential Leases:** Implied warranty of habitability in most residential leases
    - a. Habitability - basic living conditions, usually, **water** (plumbing), **electricity, temperature control** (situational)
    - b. T's knowledge - public policy: basic right of LIVABLE condition
  3. **Commercial Leases:** Implied warranty of suitability or warranty of fitness
    - a. Suitable - for prescribed purpose
- ii. T Remedies for Breach of LL Covenants
1. **Continue to pay rent, subject to later damages \$\$**
    - a. Repair & Deduct
      - i. T repairs item & deducts cost from rent
      - ii. CANNOT exceed monthly rent!
    - b. Percent Diminution
      - i. Rent - % enjoyment of the premise has been reduced b/c of breach
    - c. Fair Rental Value
      - i. Fair market value of rent in lease
    - d. K Rent
      - i. K rental amount - "current state"
  2. **Temporary Withholding of Rent**
    - a. May w/hold rent until breach is addressed
    - b. Rent may be placed in escrow for LL
    - c. Rent may be abated
  3. **Outright Lease Termination**
    - a. Highest "threshold" of T remedies
      - i. E.g., If T is wrongfully evicted
    - b. Vacate premises & cease paying all rent
  4. **Waiver**
    - a. CANNOT waive W of H by remaining on premises
- iii. **Common Law Tenancies**
1. "Tenancy for Years"
    - a. Any fixed or computable period of time
      - i. Begins at K; Ends automatically
  2. Periodic Tenancy
    - a. Continues for successive periods until it's terminated. Can be week-to-week, month to month, year to year.
    - b. Begins at K or inferred from facts (paying rent); Ends with notice

3. Tenancy at Will
    - a. No period of time
    - b. Begins at K or is inferred from facts/payment of periodic rent; Ends at will of either
  4. Tenancy at Sufferance
    - a. Hold over T
    - b. Begins with originally "rightful" T not leaving; Ends with LL asserting right or the "American Rule"
- d. LL: Selection or Removal of Ts
- i. Scope of Duties & Rights Upon *Termination of Lease*
    1. **Common Law**: LL has "legal right" to be bigoted or unreasonable
      - a. This includes refusing to renew the lease for a number of arbitrary reasons.
    2. **Fair Housing Act**
      - a. "Unlawful to discriminate in the sale or rental of most housing on the grounds of '**race, color, religion, sex, familial status, or national origin.**'"
      - b. Unlawful to discriminate based on T's **physical or mental handicap**
        - i. State law may also bar discrimination in the sale or rental of housing
        - ii. *Marina Point* barred discrimination against children.
    3. **Retaliatory eviction prohibited**
      - a. Ts who leave premises b/c of threat of retaliatory eviction **are entitled to damages.**
    4. **Racial quotas**
      - a. Always violate Fair Housing Act, and are therefore, a federally prohibited practice.
    5. **Occupation**
      - a. Majority of jurisdictions allow
    6. **Adult-only policies**
      - a. Permissible if "housing for older persons"
    7. **Marital status**
      - a. Prohibited in many states
      - b. RE: gay couples --> likely protected
    8. **Source of Income**
      - a. Majority rule: LLs cannot use source of income as factor to screen out housing subsidy recipients

e. Assignments & Subleases

i. **Assignment v. Sublease**

	Assignment	LL	T	A
1.	Privity of K	Tenant Assignee	LL Assignee	Tenant LL
	Privity of Estate	<del>Tenant</del> Assignee	<del>LL</del>	LL

	Sublease	LL	T	S
2.	Privity of K	Tenant	LL Sublessee	Tenant
	Privity of Estate	Tenant	LL Sublessee	Tenant

	<b>Assignment</b>	<b>Sublease</b>
3.	Payment to LL	Payment to T
	Terminates T's Liability & Rights of Repossession	Possibility of Repossession

4. **Intent**

- a. Look to intent of the parties if unclear

5. **Privity of Estate not required in equity**

- a. Sublessee does NOT have to comply with obligations under original lease unless expressly assumed such obligations
- b. LL may be able to pursue EQUITY REMEDIES against sublessee
- c. Avoid litigation through proper planning and drafting

ii. T's Right to Assign or Sublease

1. **Absence of restricting lease provision**

- a. MAJORITY rule: T may assign or sublet **w/o LL's permission.**
  - i. Policy: Free alienability of estates in land.
- b. Specific terms in lease are STRICTLY construed

2. **Prohibited w/o LL's consent**

- a. MAJORITY rule: LLs may w/hold consent arbitrarily.
- b. Restatement: LL may not w/hold consent unreasonably.

- i. Unless expressed provision in lease reserving right

- i. Unexpressed provision in lease reserving right
  - c. Ct. will not read in provision of reasonable w/holding
    - i. **Policy:** LL's control to protect reversionary interest
- 3. **Hinky Dinky**
  - a. Absence of provision that consent not w/held unreasonably
  - b. Must be good faith & reasonable
- 4. **Terms and types of lease**
  - a. Longer term leases have a greater necessity for assignment b/c circumstances change over time.
  - b. Commercial leases - lessor may only be interested in the financial strength of prospective assignee.
- 5. **Arbitrariness Factors** - FLONNNS
  - a. Financial responsibility
  - b. Legality of proposed use
  - c. **Other options:**
    - i. T has poor references
    - ii. Criminal record
  - d. **Need for alteration of premises**
  - e. **Nature of occupancy**
  - f. **Suitability for property**

f. T's Breach: LL's Remedies

- i. LL remedies for T's breach
  - 1. **"Doctrine of Surrender"**: LL who attempted to mitigate by re-entering and re-leasing might find that he had destroyed all his rights to a recovery against T
    - a. If LL re-entered premises, they essentially "accepted" T's "offer" to surrender --> LL waived her rights to additional damages
    - b. Traditional View
    - c. **Policy AGAINST traditional view:** encourages LLs to not mitigate damages!
  - 2. **Restatement**: opposes requiring LLs to mitigate damages
  - 3. **Modern View**: LLs required to mitigate damages upon T's default
    - a. **ALL STATES:** defaulting T may offset amount he owes LL by any amounts collected by LL as rent from 3rd parties during term of lease
    - b. **Policy:** LL shouldn't be paid twice by two Ts --> results in a windfall to LL

### iii a violation to LL

- i. **Moving from "ancient law of agricultural leases**  
...growing seasons driven...now more productive  
to force lessor to mitigate damages based  
primarily on productivity...when you leave  
premise unoccupied, possibility for vandalism"
- ii. Calculating LL's Damages
  1. **Multiple cause of action approach** (MCAA)
    - a. \*2ND CHOICE\*
    - b. Can only recover rents that have accrued through time of trial
    - c. LL must initiate new suit to recover those accrued after trial
    - d. LL still has duty to mitigate but can only recover up until that point of trial
    - e. Encourages LLs to wait until lease expires
  2. **Anticipatory Breach Doctrine**
    - a. Calculate loss LL would endure over rest of term
    - b. LL gets present value of rents due under lease that exceed fair market value of lease or actual rentals of any subsequent lease
    - c. *Problems*: this is **SPECULATIVE** (changing market value)
  3. **Retained Jurisdiction**
    - a. \*MAJORITY\*
    - b. LL returns to court to show damages EVERY MONTH
    - c. LL can obtain judgment soon after T's breach
    - d. *Rationale*: just b/c T didn't pay in month 3, doesn't mean T won't pay in month 4
  4. **Summary Possession**
    - a. Allows LL to regain physical possession of leased premises and (many jurisdictions) recover rent due when:
      - i. T wrongfully occupying premise OR hasn't paid rent
      - ii. T's counter arguments = breach WOH or retaliatory eviction
      - iii. Importance of Drafting: Abandonment Clause (for LL) --> once breach of K, all rent payments become due as a way to minimize likelihood of litigation after T's breach
    - b. **Public policy against**: don't want people living on the streets

5. **Burden of Proof**

- a. **Lessor should have burden of proof (JG's opinion)**, b/c easier for lessor to prove this info than T
- b. Good faith efforts relative to facts
  - i. Realtor not always necessary

**B. Freehold Estates**

a. **Present & Future Estates**

Present Estate	Future Interest Retained by Grantor	Future Interest Created by 3rd Party
Fee Simple Absolute	None	None
Fee Simple Defeasible:		
Fee Simple Determinable*	Possibility of Reverter	Executory Interest
i. Fee Simple Subject to Condition Subsequent**	Power of Termination	Executory Interest
Life Estate <i>pur autre vie</i> (for the life of another)	Reversion	Remainder
Defeasible Life Estate	Reversion, Power of Termination	Remainder, Executory Interest

\*FSD: "while", "during", "until", "for so long as"

\*\*FSSTCS: "provided, however", "but if", "on condition that", "if, however"

Subject to RAP

Sometimes subject to RAP

ii. **Types of Remainders:**

1. Vested remainders
2. Vested remainders subject to open
3. Executory interests
4. Contingent Remainders



## b. Rule Against Perpetuities

### i. RAP

1. No interest is good unless it must **vest**, if at all, not later than 21 years after some life in being at the **creation** of the **interest**

### ii. Process:

1. What are the parties' interests?
2. Which of these interests are subject to the rule?
  - a. Vested remainders subject to open
  - b. Executory interests
  - c. Contingent remainders - if/provided/on the condition that/but if
3. Determine what has to happen before the interest vests.
  - a. "the thing" that has to happen
4. Measuring Life: *TIP* - Look as far down the line as possible for someone who is ALIVE & ASCERTAINABLE
5. ASK:
  - a. Is "the thing" DEFINITELY going to happen?
    - i. **IN** the measuring life person's lifetime?
    - ii. Within 21 years after measuring life person's death?

### iii. Rule of Convenience

1. Two conditions met
  - a. A member of the class qualifies for the gift
  - b. Gift is available for distribution

### iv. All or Nothing

1. Class gifts
  - a. If the interest of one potential member of the class can violate the rule, the *entire* class gift is invalid.
  - b. Determine who qualifies for membership in the class

## c. Waste

### i. Life Estates: need to determine rights and liabilities for:

1. *Present Interest (i.e., the life tenant)*
  - a. Generally entitled to receipts constituting ordinary and recurring items of income earned by the property
    - i. Ex: Rents, interest, dividends
  - b. Expenditures for life tenants
    - i. Ordinary maintenance & expenditures
    - ii. NOT for major, permanent improvements
2. *Remainderman (i.e., the individual owning the future interest)*

- ii. **Waste**: proactive claim by remainderman wanting to preserve future interest
  - (LT may wish to exploit property in various ways that may infringe on the rights of the remainderman)
  - 1. **Permissive** --> occurs when LT **fails** to preserve and protect property by exercising ordinary, prudent care (allows waste to occur)
    - a. Includes paying all normal maintenance expenses, such as taxes
      - i. NOTE: LT is not required to spend more than he or she receives from property
  - 2. **Commissive** --> occurs when LT damages property in such a way that property's value is **permanently reduced** (actively damages property)
    - a. Sometimes certain acts may be justified as reasonable exercise of LT's right of enjoyment, even if acts do reduce value of remainderman's future interest
    - b. *"A new mine or lumber operation cannot be opened, but an old one can be continued."*
- iii. **LTs' Typical Duties**:
  - 1. Maintain property
  - 2. Pay taxes
  - 3. NOT expected to make massive/permanent improvement
    - a. E.g., constructing new roof
  - 4. Make minimal kind of repairs
  - 5. Preserve property as it is
- iv. **Melms**
  - 1. Complete *change in circumstances* (e.g., drastic neighborhood change), excuses T from committing waste if he/she destroys the building to make property more valuable to remainderman
- v. **Open mine doctrine**:
  - 1. Exception to common law prohibition of waste
  - 2. Allows LT to continue to exploit any natural resource on property as long as the exploitation began before the LT.
- vi. **Remedies**
  - 1. **Damages** - monetary damages get money for LT to correct damage
  - 2. **Remedy in EQUITY** - obtained through an injunction.
    - a. Equitable relief that requires positive action to get a court order for LT to *do something* to cease committing waste

Committing waste

3. Appoint a receiver - an impartial third party to oversee property and supervise repairs
  - a. Like an equitable relief, but instead of LT, a third party oversees

d. Concurrent Estates: Creation

- i. Concurrent Estate: occurs when two or more people own the same interest in the same property at the same time

**\*\*DRAFTING IS KEY\*\***

	<b>Tenancy in Common *</b>	<b>Joint Tenancy**</b>	<b>Tenancy by the Entirety***</b>	<b>Community Property**</b>
Proper Drafting	<i>"To A and B as tenants in common."</i>	<i>"To A and B as joint tenants, and not as tenants in common."</i>	<i>"To A and B, husband and wife, as tenants by the entirety."</i>	<i>"To A and B, husband and wife, as community property."</i>
1. Right of survivorship?	<b>NO</b>	YES	YES	At least 1/2 goes to surviving spouse
Equality of shares	Not necessarily	YES	YES	N/A
Partition?	<b>YES</b>	<b>YES</b>	<b>NO</b>	<b>NO</b>
Creditors reach?	YES	YES	<b>NO</b>	YES

\*Favored by law and **presumed in absence of specific language**

\*\*May be converted to a TIC by the unilateral activity of one tenant

\*\*\*Severed by divorce

\*\*\*\*Derived from earnings of either spouse while married  
ALL include undivided interests in the property

ii. **Four Unities of JT:**

1. Time - take interest at the same time
2. Title - take their interest **from the same source**
  - a. I.e., deed, will, or intestate
3. Interest - have an equal and identical interest in property
4. Possession - have possessory interest in the whole

iii. **Partitioning:** exceptions to where undivided interests may be divided

1. Voluntary - if all co-tenants agree to divide
2. By Judicial Proceeding - JT or TIC has right to demand partition
3. In kind - preferred method (not always practical) - *physically* divides up property between co-tenants
4. By sale - property can be ordered to be sold. Each co-tenant takes a share of the proceeds. (split based on each co-tenant's interest)

iv. **Unmarried "husbands and wives"**

1. If parties believe they are married, courts more likely to find right of survivorship.
2. If clearly now married (ex. siblings), courts likely to find TIC.
3. Divorce
  - a. Changes tenancy by entirety to TIC
  - b. Does not necessarily sever JT

v. **Murder**

1. Cases in conflict as to whether killer of fellow JT(s) takes portion of estate
2. Modern trend - killer takes 1/2 interest or no interest

e. Concurrent Estates: Administration

i. **Ouster**

1. Necessarily excluded
2. Cotenant may sue for rents and profits if ousted

ii. **Clear demand**

1. Out of possession cotenant must make clear demand for use & in possession cotenant refuses to allow

iii. **Offset**

1. If OP cotenant seeks accounting of rents --> IP cotenant may offset w/repairs
2. If IP cotenant seeks contribution for repairs --> OP cotenant may offset w/accounting of rents

iv. **Rents:**

1. *Statute of Anne* (1704) --> requires a cotenant who receives rent from a third party to account for it to the other cotenants
  - a. MAJORITY - cotenant, absent of an ouster, need not account for rental value of *own* possession
  - b. MINORITY - requires cotenant to account for both rent derived from third party and own possession

v. **Profits:**

1. When one cotenant ousts his fellow cotenants, liability for profits generally ensues.
2. MAJORITY - absent an ouster, law does not require a cotenant to account for any benefits accruing from person use as long as use doesn't reduce value of land
3. MINORITY - require accounting whenever one cotenant takes profits or benefits in a greater proportion than his interest, even if no ouster has occurred

vi. **Remedy**

1. **Action in ejectment:** demands right to join possession w/ D and an accounting of profits representing "reasonable value of use and occupation"
  - a. If cotenant fails to bring action, risks losing title to property through adverse possession.

vii. **Repairs:**

1. Cotenant in sole possession who makes necessary repairs upon property generally is **not entitled to seek contribution from his other cotenants.**
  - a. However, in actions for rents and profits, and in the accounting component of a partition action, a cotenant who has expended funds for reasonably necessary repairs will be credited with such expenditures

viii. **Improvements:**

1. Cotenant can neither compel contribution from the other cotenants nor receive credit for improvement expenses.
  - a. But cotenant who made improvements generally will receive full monetary value of any improvements in action of partition
    - i. Through a physical division of property
    - ii. If sold, cotenant paying for improvements will receive an additional amount representing the increase in value.

f. Joint Tenancies: Termination (Severance)

i. **Conveyance**

1. One party's interest to a third party

ii. **Unilateral actions**

1. By one JT that are short of an outright conveyance

iii. **Harms**

1. Mortgage does not sever JT
2. Lien on property extinguished upon death of mortgaging JT

iv. **Conditional severance:**

1. JT is severed during period of lease but it's revived at end of lease *if both JTs still alive.*
  - a. If one tenant dies during lease, interest would be TIC

v. **Partial severance:**

1. JT continues notwithstanding lease, but surviving JT's interest in property is subject to lease
  - a. JT remains intact.
  - b. RoS survives, but JT must SHARE w/lessee for period of lease
  - c. \*MAJORITY\*
    - i. Fair in the sense that it recognizes interest of the party w/mortgage or lease

vi. **4 Unities Approach**

1. Black letter law...does not look to parties' intent
2. NOT PREFERRED

g. Marital Property

i. **Professional license or degree**

1. MAJORITY
  - a. Not marital property
  - b. Favors spousal maintenance instead
2. MINORITY
  - a. Marital property subject to equitable distribution