

12<sup>E</sup>

# REAL ESTATE LAW



MARIANNE M. JENNINGS

12E

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MARIANNE M. JENNINGS



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# PREFACE

Since the time that the eleventh edition of *Real Estate Law* was published, the traditionally dull, old area of real estate law has once again been growing and evolving. Even though the real estate market collapse was a dozen years ago, the courts, legislatures, Congress, and administrative agencies are still working to finish out foreclosures and adopt and implement the laws and regulations put in place to curb the abuses of that era. Everything has changed, from the mortgage application to the requirements for obtaining a mortgage, to required disclosures about mortgages, and to foreclosure processes for mortgages.

Despite the number of new regulations, developments and projects exploded until 2020. Homeowners' associations (HOAs) and Covenants, Conditions, and Restrictions (CC&Rs) became even more important. Then the gig economy brought us vacation/weekend rentals and HOAs, city councils, and neighbors trying to curb the traffic and noise that resulted from companies such as Airbnb. The litigation in that area has resulted in constitutional issues and questions about the power of local governments to tax short-term rentals.

With the coming of the economic effects of the COVID-19 lockdowns, commercial tenants were turning to act of God clauses to avoid paying rent, and buyers were using the same strategy to terminate construction of centers, homes, and buildings.

During the cycles of the past 12 years, there was more regulation and litigation surrounding solar energy rights, and fracking took us on a legal tour of the EPA, Department of Interior, and the federal courts.

This textbook has always been at the forefront of covering current and potential issues in real estate law. As long ago as the eighth edition, this textbook covered the potential issues of subprime lending as well as the conduct of the flippers who were buying, selling, and turning over multiple properties at a time, often using the proceeds from the sale of one property for the down payments on several new houses that were closing simultaneously. The eighth edition was ahead of its time, sounding a warning about what might happen as the frenzied market continued to climb on a tenuous foundation. The ninth edition dealt with the cleanup of those problems. The tenth edition focused on the fallout, and the eleventh edition dealt with the detailed laws and regulations on lending, closing, and foreclosure. The twelfth edition is straddling the issues of another real estate boom and a simultaneous market downturn that is focused on contracts and their enforceability when an act of God shuts down economies.

It feels as if muddling old real estate law has become the topic on the tip of everyone's tongues. The conversations bring questions: What happens if I just can't pay my rent? My mortgage? At the local level, the questions are: How much power do owners' associations have? Can the city really take my property from me in order

to put in a Bass Pro Shop? And the vacation renters are ruining my neighborhood—do I have any rights? How do I exercise them? There are market pressures, fast-moving transactions, and even some who would take advantage of a crisis. There are new laws and regulations affecting everything from loan applications to closings to owners' associations to economic development and takings. Concerns about money laundering continue to affect real estate transactions via the Patriot Act and required disclosures on the transfer of property via escrow agents. (See Chapter 16 for more information.)

*Real Estate Law* has been a practical and hands-on study of the laws affecting real property since the time of the first edition in 1984. However, now in its 36th year and twelfth edition, *Real Estate Law* charts new territory with its clear and cutting-edge coverage of everything from the basics to the new issues and laws that were passed to grapple with the problems the previous editions noted as percolating into systemic issues.

This edition continues its focus on the three-step approach to understanding the laws that affect real estate:

1. A clear explanation of the applicable laws
2. An example, a case, or a Consider... question to help the reader see the application of the law in a particular circumstance
3. Review materials for self-testing on the concepts presented, such as more Consider... questions and Chapter Problems

You find no feudal land systems or archaic terms as a focus of this text. Brokers faced with dual-representation issues need clear discussions of the law and how to apply it. Partners, couples, and putative spouses continue to have their disputes over property with new categories of rights in those relationships. Home buyers faced with questions about their owners' association need simple explanations of their rights (see Chapter 11). What the twelfth edition continues to offer is a format for learning and understanding.

Most real estate books favor a black-letter law approach in which the laws, rules, and terms are presented, but few or no cases and examples help students and professionals grasp the concept and understand how it affects their decisions, rights, and planning.

*Real Estate Law* is a book that continues to address the real-life situations that those involved in real property transactions encounter. The problems and cases in this and previous editions have been developed through classroom use and experience from 43 years of teaching. This teaching approach allows students to really understand and grasp the material, and they are able to use their problem-solving skills in their professional and personal real estate transactions. If there ever was a remark I dreaded to hear from a student, it was, "I'll never use this." Each chapter shows students how they will use the material.

*Real Estate Law* has long been an innovative book that showed that the law of real property need not be a boring subject. Within the pages of the twelfth edition the reader will find cases on bedbugs and the landlord's responsibility for them under the warranty of habitability; a case in which a luxury homeowner on the shores of Lake Coeur d'Alene stripped the property clean prior to the foreclosure sale; a case in which a mortgagor got a house free and clear after a down and three monthly payments; a case that finds a law professor without the property her father promised her after leaving her job to help him with the ranch; and a case that deals with the physician wife of her ex-physician husband having him sign over

his property to her on the eve of his death. The twelfth edition has cases that involve regulations against college students living in homes near campus, smelly hog farms in the Carolinas, and the liability of landowners when a skateboarder hits a manhole cover and is injured. These cases illustrate how easy it can be to get into serious legal difficulty in a real estate transaction when the parties do not know the basics of the law.

Readers can study what happens when buyers try to avoid a real estate agent in order to escape paying the agent's commission. They can also learn whether HOAs can enforce a no-smoking policy and whether tenants can be evicted for drug use. And what happens when a group of sisters run through confusing deeds and quit-claim transactions so furiously that no one can determine who owns what?

*Real Estate Law* does not turn its readers into real estate lawyers; however, it does train the layperson to spot legal issues and important areas in which extra caution and perhaps legal advice are warranted. The reader will understand the material, but the ghosts, the baseball players, and the eccentric nude tenant will help make the principles learned endure.

## THE REVISED EDITION

As the saying goes, “If it ain’t broke, don’t fix it.” The first through eleventh editions of *Real Estate Law* were well received by students and instructors. Indeed, many brokers, agents, developers, and lawyers have found it to be a useful handbook. It has proved to be a successful textbook as well as a practical guide for those in the industry. The twelfth edition continues the successful and unique features of previous editions.

However, we do listen to feedback, and the complexion of the real estate industry has changed over the 36 years of this book’s publication. This edition has the most recent case updates. So many cases are available, particularly from 2015 to 2020, that incorporating their drama was needed. The cases chosen for this edition are edited, easy to read, and memorable. The chapter on the extent of land interests offers a full overview of the fracking issue. And a new surprise in land ownership: Are the bones of dinosaurs surface property or minerals and subsurface property? Finding a T-Rex bone has real estate law implications.

The issue of unpaid HOA fees in foreclosure and their priorities is covered because of the owners walking away from their properties and those fees. There are also the liability issues: Who is liable when properties that borrowers have abandoned fall into disrepair? The chapter on land development has, once again, been reorganized and revamped to reflect new issues and the effects of the downturn in real estate development. Impact fees are not the issue they once were because development has slowed, but whether a city can force a developer to finish a project is a big legal issue. The chapter on commercial leases shows that tenants have to worry about the condition of their properties when they first move in, as renovation is undertaken, who pays, and what they can remove from the property without having to pay for damage to the property. This edition continues its coverage of current social issues related to real estate ownership, including group homes, social-issue zoning, issues related to the Americans with Disabilities Act, Section 8 housing, environmental issues and sustainability, short-term rentals, and the evolving law on disclosures on so-called meth houses and other property use and location issues.

*Real Estate Law*, twelfth edition, has new materials, updated content, and some reorganization, but the color, excitement, and interest levels of the first eleven editions have only increased, bringing even more real life to the study of real estate law.

## ORGANIZATION

The twelfth edition carries through the four-part organization from earlier editions.

Part 1 covers the basics of real estate law: the nature of real estate and real estate interests, included to provide the students with a richer backdrop earlier in the text. “Land Interests: Present and Future” (Chapter 2) gives students the big picture of the types of ownership and land interests before delving into specific issues related to land ownership, such as easements and liens. Chapter 2 gives us new hope on reducing the confusion in that old Rule Against Perpetuity. But, those antiquated rules have not gone away, and the cases in Chapter 2 illustrate the risks in not knowing these ancient rules. Chapter 3 includes updates on solar energy, wind power, fracking, and the problems with nuisance issues related to these developing technologies. The issue of a landowner’s liability when others are on her or his property continues to be source of litigation, and a new case illustrates that sometimes we have more than one landowner involved in injuries to invitees.

Part 2 focuses exclusively on legal issues related to the types of land ownership. Chapter 8 includes new cases and discussions that are the result of the expansion of marital status and property rights. Courts continue to struggle with property rights before, during, and after marriage or just cohabitation, and there are landmark cases to reflect the trends in this area of real estate law. The issue of unmarried cohabitants emerged in the first edition and has not yet been fully resolved by the twelfth edition. There are tensions in landlord and tenant relationships over everything from Americans with Disabilities Act (ADA) tenants affecting other tenants’ use and enjoyment of their property to the continuing struggles on tenant deposits and property conditions. The warranty of habitability continues to create problems for tenants, as well as issues of repair, eviction, and forcible detainer. The issues with HOAs are increasing as the number of HOA communities grows exponentially. New sections in this chapter cover the types of rules and relationship litigation that HOAs are experiencing in trying to manage community rules and architectural controls as well as the continuing problems of owners not paying their fees.

Part 3 remains a collection of all the legal issues involved in all types of transfers of title to property. It takes the transfer of property from listing agreement to financing to closing of escrow. The role of brokers and agents has never been so fluid. Thanks to the Internet, property owners and buyers meet there regularly, and those who assist with real estate transactions must adjust to new and more limited roles and commissions. Brokers and agents still face litigation and ethical issues regarding their obligations to disclose psychological factors on properties, such as when a home has been the site of a murder or suicide, and Chapter 12 includes updates and new cases and situations on this evolving issue. Contracts for the sale of property will always cause contention that ripens into litigation, particularly when the simple rule of following the statute of frauds is not followed. A law-professor daughter suing her father makes the vivid point of the need for written and clear contracts. A new case reminds us of the simple need to be sure the land description in a deed is complete and accurate because the description in this case resulted in



litigation that brought witnesses who all had different views of the boundaries. The Bureau of Consumer Protection has its bearings and is pursuing strict enforcement of disclosure requirements. Lenders are losing mortgages for the failure to follow three-day rescission rights disclosure requirements.

Part 4 continues to cover the issues related to land use and development such as zoning, environmental concerns and sustainability, and constitutional rights and constraints. Both Chapters 18 and 19 have new U.S. Supreme Court decisions on land use, eminent domain, and that ever important coastal property. The use of disparate impact under the Fair Housing Act is covered along with a discussion of its impact on developers and local governments and zoning boards. Thanks to insights from text users on their experiences in real estate development, Chapter 21 has new cases with the problems that result when the developers get over their skis subdividing and doing engineering studies before the local authorities have signed off.

The structure of the twelfth edition still allows instructors to cover chapters as they see fit and even reorder the coverage. Cross-references in all chapters help with such restructuring and can show students how the chapter pieces fit together to supply them with an understanding of all the laws and regulations affecting real property.

## TEXT FEATURES

### Cases

Very few real estate law books have the benefit of reported cases. Colorful and instructive cases were retained, but this edition has new cases with even more colorful illustrations of points covered in the descriptive materials. Each case has a one-line, pithy summary to help students remember what the case was about and retain its significance. The facts of the cases have been rewritten in order to simplify the court's language and help students attain a clear grasp of the facts before they begin to read and understand the judicial opinion. After the judge's name is listed, the language of the court begins. However, the opinions chosen have also been carefully edited and reduced in length in order to ensure students understand the meaning and the court's analysis. There are numerous new cases throughout this edition, many of them with 2019 and 2020 dates.

### Case Questions

The restatement of case facts and significant editing help students grasp even the most complex judicial decisions on real property law. However, to be sure that the students understand the case decisions, each case is followed by Case Questions. Many of the case questions have been refocused in this edition to require students to think about application and what the case decisions mean going forward. These questions ensure that the readers understand both the facts of the case and the conclusion of the court, while encouraging students to think about what they have read and how to apply it. Some questions ask students to think more about how the problems in the case could have been prevented or what steps would help as they move forward. One new approach asks students to think about what advice they would give, for example, to a developer, an HOA, or the owner of a short-term rental property based on what they learn from the case.

## Practical Tips

These highlighted suggestions for avoiding legal problems and litigation in real estate (Practical Tips) have been updated and appear in each chapter. Practical Tips include lists, questions, and ways to avoid the problems that caused the litigation as described in the chapter cases and Consider ... questions. These Practical Tips provide yet another practical component to the text and increase its value as a handbook.

## Consider ... Questions

Numbered Consider ... questions, appearing immediately after their applicable text material, help readers grasp the segments of each chapter as they read along. These questions refine reading habits as well as improve comprehension. There are new Consider ... questions throughout the twelfth edition.

## Ethical Issues

Continuing this popular feature, this edition includes updated Ethical Issues for each chapter. These real and hypothetical problems allow students to discuss and debate real-world dilemmas that real estate professionals face regularly. With some cases, the ethical issue follows directly because the reaction to the case is that the law was not on a harmed party's side and asks the students to think about the ethical obligations of the other party.

## Charts, Diagrams, and Illustrations

Throughout the book, charts, diagrams, and illustrations aid readers' understanding of lengthy and complex topics. For example, charts and diagrams depict the relationships of land interests, Article 9 security interests, easements, the relationships between and among contractors and subcontractors, and how mortgage transfers affect the rights of parties. In Chapter 21, there is a summary of the types of entities used for financing development projects to offer a one-page look at the liability, tax, and management issues in both. The cases that involve easements and descriptions include diagrams to help readers visualize boundaries and placement.

## Cautions and Conclusions

Each chapter concludes with Cautions and Conclusions, a feature that wraps up the issues addressed in the chapter. In some chapters, there are precautions, recommendations, or points critical for real estate transactions and professionals in the real world. In other chapters, these are conclusions to be drawn from reading the material covered.

## Chapter Problems

Appearing at the end of each chapter, most of the Chapter Problems are actual cases, with case citations. They are short enough to spark interest and yet detailed enough to allow discussion and review of the chapter concepts. Many Chapter Problems were taken from cases in previous editions, and some of the full cases

that provide the answers to those problems are included in the Instructor's Manual. Each chapter includes at least one new Chapter Problem. Answers to the Chapter Problems are provided in the Instructor's Manual.

## Glossary

The glossary of key terms appears at the end of the text and provides short definitions of the terms that are boldfaced in the text.

## Supplemental Items

Additional instructor resources for this product are available online. Instructor assets include an Instructor's Manual, PowerPoint® slides, and a test bank powered by Cognero®. Sign up or sign in at [www.cengage.com](http://www.cengage.com) to search for and access this product and its online resources.

## Instructor's Manual

The Instructor's Manual for *Real Estate Law*, prepared by the author, is written by the author and is designed to help in lecture preparation. Each chapter is outlined in detail, with examples and illustrations of each of the chapter points. The cases from the book are briefed within the outline as they appear in the chapter. Answers to all Case Questions, Consider ... questions, and Chapter Problems are provided in the Instructor's Manual. Also included are discussion suggestions and resolutions for the Ethical Issues features. For many of the cases, there is supplemental information not included in the case to share with the students.

Each chapter in the Instructor's Manual has a Resources section, which lists books and law review articles that have been updated for this edition. These Resource materials provide further information on the chapter contents and can be used to enhance the instructor's understanding of a topic.

Some cases that were eliminated from previous editions have been added to the Instructor's Manual to provide supplemental readings or for in-class use. Interactive learning exercises for each chapter, called In-Class Exercises, are again provided in this edition.

## Test Bank

The Test Bank for *Real Estate Law* assists instructors with test preparation by providing sample examination questions. There is a generous selection of true/false, multiple-choice, and essay questions for every chapter. The true/false questions are easier and can be used for a quick review quiz. The multiple-choice and essay questions require the students not only to know the laws and materials covered but to think and apply them to various scenarios that differ from any presented in the Case Questions, Consider ... questions, and Chapter Problems within the chapter. The Test Bank is available through Cognero.

Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to:

- author, edit, and manage test bank content from multiple Cengage Learning solutions;
- create multiple test versions in an instant; and
- deliver tests from your LMS, your classroom, or wherever you want.

## PowerPoint® Slides

A comprehensive set of PowerPoint® Slides for *Real Estate Law*, prepared by the author, will fast-track class preparation by providing ready-made lecture materials. This edition also offers even more PowerPoint® slides for instructors to use that include the figures from the chapters as well as additional diagrams, problems, illustrations, and charts to help with teaching. These valuable learning aids also enable students to better synthesize key concepts.

## DEBTS OF GRATITUDE

Although only my name appears on this book, I cannot claim it as my book alone. As with all achievements in my life, my finished work is the result of the cooperation, work, and sacrifice of many. I cannot name everyone who has helped me in my continuing evolution as an author, but there are those who warrant special note for their efforts in bringing this work to publication:

- Dick Crews, my original editor, who had the educational foresight to see the need for this book and who has been proven correct through the success of ten previous editions. In 1983, Dick said, “Your book will be around for a long time.” Thirty-six years and counting.
- My late father, James Moody a never-ending source of stories, fodder, and the right thing to do when buying and selling real estate.
- My patient and tolerant Content Developer Jennifer Ziegler and editor, Abbie Schultheis, who followed along closely as they provided feedback and encouragement. Their rapid responses and scheduling made this edition a pleasure to do because of the freedom to use so many cases with color, charm, and the best instructive qualities. MPS provided prompt copyedit, page proofs, and lots of patience with the author.
- My students, who continue to teach me how to improve *Real Estate Law*.
- The many students around the country and the world who use this book and write to me with questions, suggestions, and insights. It is reassuring to know that there are students who study so hard that they can have a discussion with an author who enjoys seeing their mastery of the material. As one student put it, “I just wanted to thank you for writing this book. I have looked at other real estate law material online, and it can get very complicated and confusing. However, your book has made the content so much easier to learn.”
- Kris Tabor, my long-suffering friend and assistant, who handles the unenviable tasks of word-processing my scribbles into a polished Instructor’s Manual, Test Bank, and PowerPoint® slides.
- The instructors who use *Real Estate Law* and communicate with me via e-mail to update me, correct me, and offer their insights on teaching.
- The reviewers for this edition who have been willing to share their experiences and expertise in offering improvements and suggestions.
- All of the Realtors, developers, lenders, lawyers, and companies that have taken the time to answer questions for me and direct me to resources. Their dedication to education and professionalism is inspiring.
- Last, but certainly not least, I am grateful to my husband, Terry, and our children, Sarah, Sam, and John, who sacrifice some of their quality time with me as I hover over the computer. Their “How many chapters do you have left?” keeps

me going. During the entire COVID lockdown, they cheered me on, from near and far, personally and via text or Facetime. I am grateful that they care and are involved. Their presence with me in my office has changed over the years. From the moment they were born until today, they understood the world of textbooks and the law. Two of them actually used mom's books in class. I cherish the time we spent together working toward all of our deadlines. I continue to be grateful for their grounding force in my life. Were it not for my family, I would not be as efficient or as organized. Love and structure are wonderful gifts.

## A WORD FOR STUDENTS

In using this book, read the material that describes the law first. Follow that by reading the cases that appear in each section. Answer the Case Questions after each case to make sure that you understood the case and that you grasped the issues and principles of law. Try to solve the Consider ... questions and Chapter Problems on your own before the instructor gives you the answers. If you can solve them all, then you understand the chapter material. Then move into those CPA questions—the final step in full understanding and application. The figures in chart form are designed to streamline ideas and summarize lengthy topics so that you can commit the concepts to memory. The charts are an excellent form of review for examinations and quizzes.

If you would like to consult the Uniform Commercial Code, especially Article 9 on secured transactions, you can go to <http://www.uniformlaws.org> or to <http://www.law.cornell.edu/ucc/ucc.table.html>.

Finally, remember to apply what you have learned when your course is over. Application is the true test of learning. Good luck with the book and its application. Enjoy the color and flavor of real estate law—it is abundant in this book. And I am always happy to hear from you at [marianne.jennings@asu.edu](mailto:marianne.jennings@asu.edu).

**Marianne M. Jennings**





# 1

## INTRODUCTION AND SOURCES OF REAL ESTATE LAW

*Possession is eleven points in law, and they say there are but twelve.*

Scottish Expression in the 1600s, Albert M. Martin, *The Chatauquan*, Chatauqua Literary and Scientific Circle, 3 (October 1882)

*There are nine writs of possession granted by the king in awarding title to real property.*

English Common Law (1616)

*Possession is nine points of the Law.*

Thomas Draxe, *Adages*, p. 163, *Bibliotheca Scholastica*, (1616). Codified English Common Law

*Possession is eleven points in the law.*

Colley Cibber, *Women's Wit* (1697)

*Possession is nine points of the law.*

Current version

As the above quotes and variations on the role of possession in owning real property indicate, laws on real estate do evolve and shift over time. The quotes also show that there are different sources for real estate law and its development. This chapter explains where real estate law can be found. One distinguishing feature of real estate law is that its problems are not solved by turning to a single statute or ordinance: A zoning issue cannot be resolved by examining only city ordinances, and a question on adverse possession is not always answered by turning to a statute.

As its name implies, real estate law is not one simple body of law. Rather, it is made up of different types of laws that have been passed by different bodies at all levels of government. No single governmental body issues laws that are complete or exclusive sources of real estate law. Those who are involved with real estate

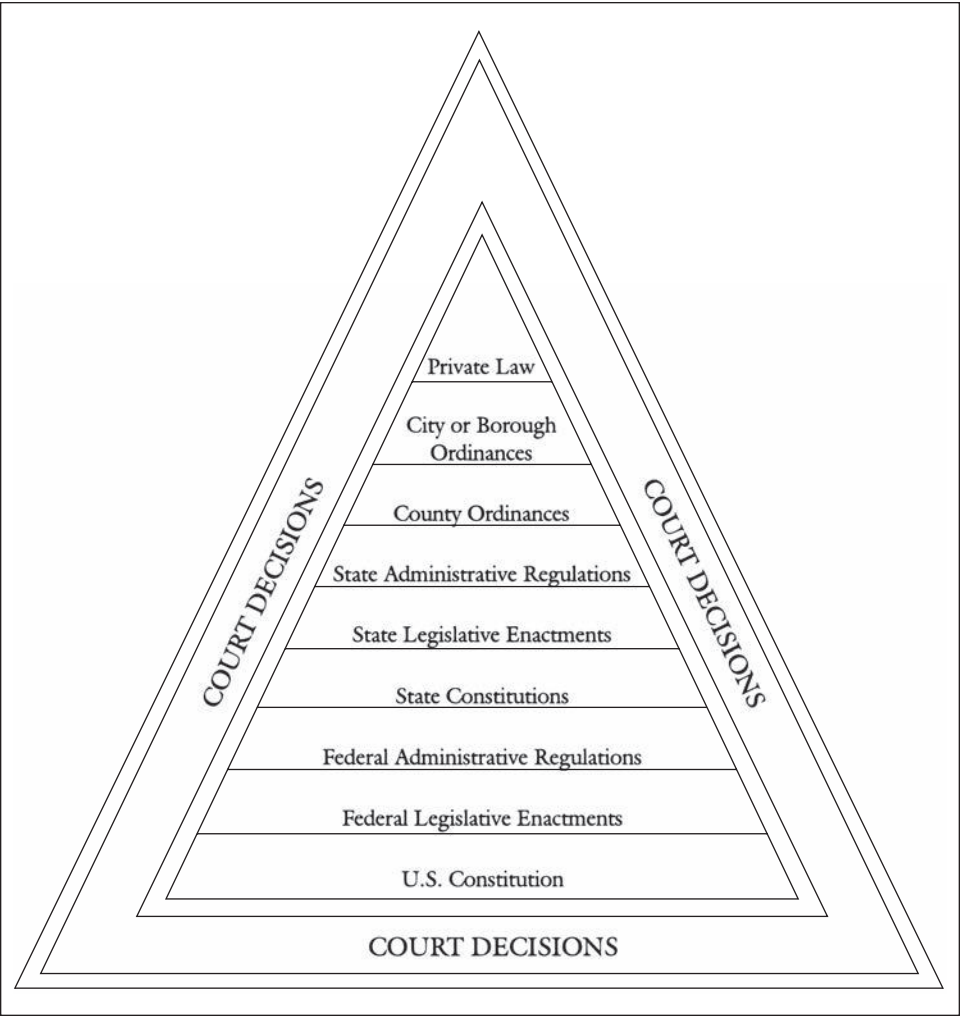
should be familiar with who and what are involved in the making of real estate law. Knowing the laws that affect real estate helps to ensure that those involved in real estate transactions do not overlook legal issues, rights, or processes. Knowing the legal issues involved in real estate transactions helps prevent major problems, dissatisfaction, and perhaps even litigation.

**1-1   SOURCES OF REAL ESTATE LAW**

If all the sources of real estate law were diagrammed in a scheme depicting their relationships, such a scheme would probably take the pyramidal form depicted in Figure 1.1.

The discussion of these sources of law will begin at the bottom of the pyramid with the United States Constitution. All other sources of real estate law must be consistent with the constitutional rights depicted as the foundation of this pyramid. Court decisions, the final area of discussion, have their surrounding position in the

**FIGURE 1.1** Sources of Real Estate Law



pyramid because court decisions deal with the interpretation and application of all the laws in the pyramid.

## 1-1a The United States Constitution

The **United States Constitution** has several provisions that affect real estate transfers and ownership. The Fourth Amendment affords property owners the right to be secure in their “houses,” and from this language has sprung a long series of cases on property owners’ privacy rights, rights that are now at issue in many cases because of evolving technologies that provide access to our once impenetrable home space.

The provisions of the Constitution most relevant to real estate law are two similar clauses found in the Fifth and Fourteenth Amendments. The **Fifth Amendment** prohibits the federal government from depriving any person of “property without due process of law” and from taking private property for public use “without just compensation.” The due process provisions have resulted in many cases that deal with obtaining judgments against a person’s property and foreclosing on a security interest or mortgage in real property. (See Chapters 5, 15, and 19.) For example, during the 2008 economic crisis, mortgage foreclosure rights were front and center because homeowners/debtors challenged the right of a lender to foreclose on a mortgage that had been sold and transferred so many times. (See Chapter 15 for more details and examples.) Such challenges are grounded in the due process provisions of the U.S. Constitution.

The just compensation portion of the Fifth Amendment provides land owners with rights when the government is taking their property for public purposes. This practice, referred to as **eminent domain**, has resulted in a long series of litigated cases involving questions such as: When is the government actually taking property? What constitutes just compensation? What is a public purpose? For example, one issue that the U.S. Supreme Court continues to grapple with is whether a local government has sufficient public purpose for taking private land when the reason for the taking is economic development. This area of constitutional law has proven to be a controversial and emotional one as the court decides cases that involve local governments taking private property just for purposes of putting that land to a different use. (See Chapter 19.)

The **Fourteenth Amendment**’s language is almost identical to the Fifth Amendment, but it applies to state governments. The Fourteenth Amendment provides that no state may “deprive any person of ... property, without due process of law.” The amendment puts further restrictions on state laws by making it unconstitutional for any state law to interfere with any rights given to citizens in the U.S. Constitution. The Fourteenth Amendment includes the **Equal Protection Clause**, which requires the states to apply their laws equally so that all citizens enjoy the same protections, rights, and equal opportunities related to land ownership and possession. Racial discrimination in leasing, lending, and purchasing and selling land has its grounding in the Fourteenth Amendment.

The constitutional foundation of the pyramid sets the parameters for minimum rights that cannot be violated by the laws enacted at other levels of government. Constitutional provisions seem broad and general, but they protect basic and critical rights in real estate ownership, transactions, and processes.

## 1-1b Federal Legislative Enactments

The United States Constitution established a legislative branch of the federal government, which passes laws to carry out the objectives of the Constitution and for the operation of the federal government. Congress, as the legislative branch created in the Constitution, can pass statutes, some of which regulate real estate transactions. All Congressional enactments are printed in a series of volumes called the **United States Code (USC)**. The major Congressional enactments affecting real estate transactions are discussed in great detail in subsequent chapters, but the following examples illustrate the types of laws found in the United States Code.

- The **Mortgage Reform and Anti-Predatory Lending Act** is part of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act. Details on the act's protections for mortgagors, including appraisals and subprime mortgage loans, can be found at 12 U.S.C. §§ 1715 *et seq.* and 15 U.S.C. §§ 1629 *et seq.* and are covered in Chapter 15.
- The **Real Estate Settlement Procedures Act (RESPA)** deals with maximum closing costs and good-faith estimates of closing costs (12 U.S.C. §§ 2601 *et seq.* [discussed in Chapter 16]).
- The **American Recovery and Reinvestment Act of 2009 (ARRA)** provides federal funds to stimulate the economy, including financial assistance for residential mortgagors (26 U.S.C. §§ 1 *et seq.* [discussed in Chapter 15]).
- The **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)** is a federal act that authorizes the cleanup of disposal sites for hazardous waste and permits the government to collect cleanup costs from current and former property owners. 42 U.S.C. §§ 9601 *et seq.* (discussed in Chapter 20).

Notice that each of the statutes includes an abbreviation such as “26 U.S.C. § 1” after its name. This abbreviation is referred to as a **citation** (or **cite**) with the number preceding “U.S.C.” being the title or volume number of the United States Code where the statute may be found. The symbol § (or §§ for multiple sections) after “U.S.C.” means “section”; it is followed by the section number, which represents the location of the statute within the particular volume. For example, “12 U.S.C. § 2603” would be a cite for a statute that could be found in the 26th volume of the U.S.C., where Section 2603 appears. This particular section describes what is required for a Uniform Settlement Statement for close of escrow. A cite with “U.S.C.” in it tells you that some federal law applies in that case, contract, or notice of rights. Using the citation system, you can find the exact language of the statute cited.

## 1-1c Federal Administrative Regulations

For each federal legislative enactment passed by Congress, a new agency is created, or an existing agency is assigned to implement and enforce the law. For example, the new laws on mortgage lending and disclosures are enforced by the **Bureau of Consumer Financial Protection** (now known as the **Consumer Financial Protection Bureau [CFPB]**), which is located within the Federal Reserve. The CFPB is required to develop regulations on credit counseling as well as new disclosure forms for consumer mortgage lending. Like all agencies, the CFPB will be filling in the details for general statutory provisions with procedures, forms, and enforcement.

The Restoring American Financial Stability Act of 2010 was passed by Congress in a general form and was intended to regulate the serious problems that had developed in mortgage lending, particularly in terms of required disclosures in creating the mortgage relationship and in foreclosure processes should the debtor default. The CFPB has now developed the required disclosures to consumers as well as the forms lenders must use (see Chapter 15). The regulations of an administrative agency fill in the details on the Congressional statute's skeletal purpose.

Another example of a federal regulatory scheme is that created by the Environmental Protection Agency (EPA) under authority granted by Congress in CERCLA. CERCLA authorized the EPA to clean up sites contaminated by toxic wastes (42 U.S.C. §§ 9601 *et seq.*; see Chapter 20). The federal regulations fill in the details with a list of 700 substances that are considered toxic wastes that require cleanup and result in liability for the failure to perform the cleanup to rid the land of any of the toxic substances (40 C.F.R. § 302). Congress established the statutory authority, and the EPA handles the details and enforcement.

All federal regulations appear in a series of volumes referred to as the **Code of Federal Regulations (CFR)**. When an abbreviation, citation (or cite) such as "12 C.F.R. § 226" appears in a case, book, or document, you know that a federal regulation applies, and, using the cite, you can find the regulation. In the example, 12 is the volume number within the CFR, and 226 is the section number of the regulation within that particular volume.

The CFR is a series of paperback volumes that is reprinted every year because of the many changes in administrative agency regulations. In addition, an update to the CFR, called the *Federal Register*, is published each working day and includes changes and proposed changes in existing regulations.

## 1-1d State Constitutions

State constitutions are similar to the U.S. Constitution in that they provide a framework for state legislative bodies and agencies, as well as their authority and limits. However, most state constitutions tend to be more detailed than the U.S. Constitution, which emphasizes government structure and powers. For example, California's state constitution has a provision covering *usury*, or charging in excess of a certain maximum interest rate in a credit transaction (Cal. Const. Art. 15, § 1) (see Chapter 15). Five additional examples of provisions from state constitutions are as follows:

1. California—has an entire article in its constitution that covers the water rights of landowners (Cal. Const. Art. 10, § 3).
2. Arizona—allows any person who holds a real estate broker's or salesperson's license to draft and fill out any forms related to the sale or leasing of real property, including earnest money receipts, purchase agreements, deeds, mortgages, leases, bills of sale, and other necessary documents (Ariz. Const. Art. 26, §§ 1–3).
3. Most states—exempt real property used exclusively for religious, educational, charitable, or cemetery purposes from taxation (NJ. Const. Art. VIII, § 1, Paragraph 2; Nebraska State Constitution Article VIII-2).
4. Minnesota—makes leases of agricultural lands for longer than 21 years void (Minn. Const. Art. I, § 15; actually part of the Bill of Rights).
5. Georgia—covers the requirements for an easement by necessity (Ga. Const. Art. 1, § 3).



These examples illustrate that state constitutions tend to be more specific than the U.S. Constitution and are sources for real estate law in the states.

## 1-1e State Legislative Enactments

Just as at the federal level, the legislative bodies in each state enact laws that affect property rights and transactions, including procedures for obtaining licenses for selling real estate, methods of financing real estate purchases, time periods for adverse possession, and provisions for creating a will or probating an estate. The details of real estate law are found largely in state legislation.

State legislation also contains the so-called uniform laws, a great many of which are important in real estate transactions. Uniform laws are drafted by representatives of industry, academia, and the legal professions. Examples of uniform laws adopted by states that affect real estate transactions include the Uniform Marital Property Act, the Uniform Probate Code, the Uniform Commercial Code, the Revised Uniform Partnership Act, and the Model Residential Landlord/Tenant Act.

These state legislative enactments are found in volumes for each state. In Texas, the legislative enactments are found in *Vernon's Texas Codes, Annotated* (for example, V.T.C.A., *Water Code*, § 1.001). In Illinois, the state statutes are found in *Smith-Hurd's Annotated Illinois Statutes* (for example, S.H.A. Ch. 96, § 4601). Maine's statutes are called *Maine Revised Statutes* (for example, 1 M.R.S. § 2).

## 1-1f State Administrative Regulations

Again as at the federal level, state legislative bodies create or assign administrative agencies to enforce legislation. These state agencies also provide the details, forms, and procedures necessary for compliance with state laws. For example, all states have laws on the licensing of real estate agents and brokers. In each state, an agency is responsible for collecting licensing fees, administering exams, and disciplining agents and brokers who violate laws and regulations (see Chapter 12).

### PRACTICAL TIP

Know how and where to find your state statutes and regulations along with your city and county ordinances. Learn the names of your statutes, regulations, and ordinances and how they are organized. Request to be placed on mailing lists of state administrative agencies so that you are aware of enforcement actions and proposed rule changes. Check the agendas for city council meetings. When zoning issues appear, you can attend and provide input. Follow legislative sessions and proposed laws through the media or through professional organizations such as the National Association of Realtors.

## 1-1g County, City, and Borough Ordinances

A great deal of real estate law can be found in the smallest and most local entities, such as counties, cities, and boroughs. For example, most of the laws relating to zoning can be found in the laws passed by local entities and are referred to as **ordinances**. (The zoning discussion appears in Chapter 18). Most the regulation of homeowners doing short-term leases of their properties through services such as Airbnb has been at these local levels. (Chapters 9–11 address this complex issue.) Other topics covered by ordinances on a local level include building permits, building inspections, fire codes, building-height restrictions, noise regulations, and curfews. Many of the battles over economic development, the location of power plants, and even whether a new Walmart store can be built are grounded in the application and interpretation of these local laws. (Chapter 21 includes a discussion of economic development issues.)

## 1-1h Private Law

One type of law in the pyramid comes from individuals and landowners: **private law**. Private law consists of those rules and regulations created by landowners. For example, landlords can create and post regulations on tenants' use of common facilities such as pools, laundry areas, parking lots, and walkways. (Chapter 9 includes a complete discussion of residential landlord–tenant relationships.) In some instances, private developers have restrictions and covenants on the use of property in their developments. Some residential developments permit only those above the age of 55 years to live as residents in the area. (See Chapter 19 for a complete discussion.) One area of private law that continues to evolve significantly is that of homeowners' associations. Litigation by homeowners against their associations almost always involves a question of whether the private rules of the association violate rights given by laws and constitutions (see Chapter 11 for more discussion).

Private law is also created through contracts for the purchase, sale, lease, or mortgage of real estate. The parties who enter into valid contractual obligations are bound by the terms of the contract as a form of private law. Contractual obligations can be enforced, like public laws, through the courts.

All private law is still subject to the boundaries and rights established in constitutional and statutory sources. A private law related to real estate may not abridge constitutional rights and freedoms. (See Chapter 19 for a full discussion of constitutional rights.)

## 1-1i Court Decisions

The prior discussions of the various sources of law seem complete, and it would be difficult to imagine that much more detail could exist in real estate law. However, constitutions, statutes, and ordinances are only general statements of the law that leave many terms undefined and also result in questions of application and interpretation. To whom does the law apply? When does the law apply, and how is it to be applied? Finding the answers to these questions requires the interpretation of law from all levels, a process that is carried out by various courts in state and federal judicial systems. The role of the courts is to answer the questions of application and to clarify ambiguities in statutes, ordinances, and contracts.

For example, the city council of Bowling Green, Ohio, found that houses being leased to the fraternities of Bowling Green State students had more code violations, more disorderly conduct, and more nuisance parties than other areas of the city. With property values declining, the council passed an ordinance that prohibited the use of R-1 (residential family or single-family housing) from being occupied by anyone other than a family and two renters.<sup>1</sup>

A family was defined as those “related by blood or marriage (or adoption, in the case of children).” Three fraternity brothers brought suit challenging the narrow definition of a family. They argued that their familial-type relationships require a common home. The brothers also raised a constitutional issue: How does a group living together in any single-family home cause more problems than an equal number of blood relations living in a single home would create (parking issues,

<sup>1</sup>*Yoder v. City of Bowling Green*, 2019 WL 415254 (N.D. Ohio 2019), at p. 2.



activities, noise, trash)? The court held that the nuisance and noise issues would not necessarily be solved with the restrictive definition of family. The numbers of persons residing in single-family homes caused the problems, not necessarily the nonfamilial relationships.

Because court interpretations of statutes and regulations are law, permanent records of courts' decisions are published in books that far exceed in number the volumes devoted to statutes. These opinions are part of the law because they give the complete meaning of a statute or ordinance.

In addition to their roles of defining terms and clarifying the intent of laws, the courts also have the responsibility of making, applying, and analyzing **common law**. Common law is law that is not found in any code or statute. Common law originated in England and continues to exist within case law, and it is changing and growing on a case-by-case basis. Common law develops through court decisions and is part of what is known as case law. For example, the laws of nuisance (see Chapter 4) were developed in a case-by-case manner by the courts. Because of that case law, we have protections that prevent others from interfering with our use and enjoyment of our property. The law on nuisance comes largely from the courts, not from statutes, as courts continue to determine what is considered a nuisance.

Because most American real property concepts can be traced to the English rules on real estate ownership and transfer, common law remains an important source of real estate law.

Another term for the reliance on common law and prior court opinions in resolving disputes is **case precedent**. Precedent can be used as a guideline for contracts and transactions that occur after the judicial decision. Once a court has interpreted a particular statute or contract, other parties can use and rely upon the court's interpretation. In the following case, you will be able to see how the court used precedent from earlier cases to resolve similar questions in this later case with different facts.

## IN RE NORTH CAROLINA SWINE FARM NUISANCE LITIGATION

2017 WL 5178038 (E.D.N.C. 2017)

### A Hog-Wild Decision on Nuisance Claims

#### FACTS

Twenty-six individuals (plaintiffs) who lived near hog-farming operations in eastern North Carolina brought suit against Murphy-Brown, LLC, the owner and operator of the hog operations (Defendant). Their nuisance claims related to the large operations that raised hogs for slaughter and included the following:

- A smell like rotten eggs and ammonia
- Wet livestock waste that is stored in lagoons and waste lagoons breaching during hurricanes
- The sound of animals squealing
- Flies and buzzards
- Truck traffic because of the need for transporting hogs from the 14,000-hog facilities

The court consolidated the cases into one suit for purposes of addressing many of the same legal issues in all of the cases prior to each case proceeding to trial. The issue addressed in this decision on 26 cases is what type of land interest a plaintiff must have in order to bring a nuisance suit.

The plaintiffs in the cases were not actually property owners but were adults related to the property owners who lived on the properties near the hog-farming operations either in the actual owners' residences or in trailers parked on the properties. The plaintiffs do not have rental agreements for their use of the homes or the space for their trailers and have not paid rent.

The defendant moved for summary judgment because the plaintiffs are "licensees, tenants-at-will, mere occupants, or squatters" and lack sufficient property interests to maintain their nuisance claims.

## JUDICIAL OPINION

### W. Earl Britt, Senior U.S. District Judge

The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another. As a consequence, a private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor. Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of the deplorable tendency of the courts to call everything a nuisance, and let it go at that. The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance; that the invasion which subjects a person to liability for private nuisance may be either intentional or unintentional; that a person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case; and that a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous.

Defendant accurately points out that certain cases do refer to the plaintiff's "property interest" in the context of nuisance. See *Kent v. Humphries*, 281 S.E.2d 43, 45 (N.C. 1981) (framing one element in the nuisance inquiry as "[D]id plaintiff have sufficient property interest in the rented space to maintain a nuisance action?"); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 437 (N.C. Ct. App. 2001) ("Once plaintiff establishes that the invasion or intrusion is unreasonable, plaintiff must prove the invasion caused substantial injury to its property interest." However, the court does not read these cases to mean that the plaintiff must hold fee simple title or another possessory interest (more than a tenancy at will) to recover in nuisance in every instance. For example, in *Kent v. Humphries*, the North Carolina Supreme Court was faced with the plaintiff-tenant claiming the defendants' (the landlord and his corporation) operation of a plastics plant constituted a nuisance, resulting in the constructive eviction of the beauty salon she operated

in the defendants' shopping center. The defendants argued that the plaintiff occupied the premises under a void lease, and therefore, as a tenant at will, she could be evicted at any time and there was no violation of her limited property rights. Relying on the *Restatement (Second) of Property, Landlord and Tenant*, overruling prior inconsistent authority, and opting for a fairer rule, the court held that the tenancy created was actually a month-to-month tenancy. As such, the court found that the plaintiff had a sufficient property interest in the rented space to maintain a nuisance claim. *Kent* is more about landlord-tenant law than it is about nuisance law. Because of the nature of what the plaintiff was claiming—constructive eviction—the parties' relationship was particularly relevant. Under the circumstances here, the real property relationship between the owners and individuals who reside on their properties has no bearing on defendant's liability for a nuisance. The rule defendant asks the court to impose would permit a wife who owns the affected property to recover, but her husband who resides with her could not recover unless his name is on the deed to the property or he has entered into a formal rental arrangement with his wife. There is no indication in North Carolina case law that its courts would so restrict nuisance claims. It is enough that a plaintiff lawfully occupies the affected property with a relative. See *Restatement (Second) of Torts* § 821E (Am. Law Inst. 1979) ("For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including (a) possessors of the land. ..."); ("Possession" is not limited to occupancy under a claim of some other interest in the land, but occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land."). Defendant additionally contends that two plaintiffs, Gertie Jacobs and Eddie Nicholson, Jr., have not even occupied any affected property. In support of this contention, defendant relies on the fact that Jacobs' voter registration and driver's license and Nicholson's voter registration, driver's license, and medical records reflect addresses different from the affected properties at which they claim to live. Defendant urges the court to disregard these plaintiffs' deposition testimony regarding the discrepancies on the ground that the testimony is "self-serving." The court declines to do so. It is true that a court should not "find a genuine dispute of material fact based solely on [the non-movant's] self-serving testimony." However, here, both plaintiffs' testimony about where they live is corroborated by sworn testimony from other witnesses.

Of course, at trial defendant is free to cross-examine plaintiffs and the other witnesses about the discrepancies, but the credibility determination will be left to the jury. In sum, plaintiffs have come forward with evidence that they lawfully occupy the affected properties. That interest is sufficient to support a claim for private nuisance. Accordingly, defendant's motion for partial summary judgment on this ground will be denied.

### CASE QUESTIONS

1. What are the differences between the plaintiffs in this case and the owner of the beauty shop owner in the *Kent v. Humphries* case?
2. What effect will the court's finding on the standing required for plaintiffs in nuisance cases have on nuisance claims?
3. Does the court's use of the precedent change the nature of nuisance recovery?

#### CONSIDER... 1.1

Determine whether each of the following types of plaintiffs in nuisance cases would have standing to bring a nuisance suit based on what you have learned from the hog-farming operations case.

- a. A farmer leasing property for purposes of growing crops who does not live on the property
- b. A child who does not live on the property but will inherit the land from his parents
- c. A mortgage lender on the property
- d. A parent living with a child who owns the property
- e. Employees who work daily on the property
- f. A co-owner who does not live on the property

#### ETHICAL ISSUES 1.1

The 26 hog-farming cases have been an emotional issue in North Carolina. One of the plaintiffs described the smell as follows: "If you ever had a sick child that had diarrhea and you accidentally left the Pampers in a hot car and you got in the car two days later—that impact."<sup>2</sup>

The plaintiffs in the cases did not seek injunctions to close the hog farms. Rather, they sought actual and punitive damages. In addition, their discovery in the cases revealed how the hog-farming operations are run, and the issue of the treatment of the hogs became one of intense public interest and media coverage.

In the cases, the juries awarded significant punitive damages, with the result being that many of the hog farmers (including family farmers) were driven out of business because of the extent of the liability. Some of the large verdicts have been appealed. However, the effect of the litigation has affected public opinion.

Those on the properties complain that the hog farmers could use other systems for disposing of the wet livestock waste but refuse to spend the money to do so. A lawyer for Smithfield, the largest pork producer in the state, has called the suits "a money grab by a big litigation machine."<sup>3</sup>

Discuss the issues ethical issues in this situation. Consider how the parties might develop a compromise to balance economics with the social impact.

<sup>2</sup>Barry Yeoman, "Here Are the Rural Residents Who Sued the World's Largest Hog Producer over Waste and Odors—and Won," *Food & Environment Reporting Network*, December 20, 2019, <https://thefern.org/2019/12/rural-north-carolinians-won-multimillion-dollar-judgments-against-the-worlds-largest-hog-producer-will-those-cases-now-be-overturned/> (Last visited February 1, 2020).

<sup>3</sup>*Id.*

## JUSTIFICATION FOR STUDYING REAL ESTATE LAW: SOME CAUTIONS AND CONCLUSIONS



Real estate is an industry in which small investments can yield high returns; property appreciation alone exemplifies this profitability. Knowing your rights if property values decline is a critical piece of information for purposes of determining the value of a real estate investment. Investment profits are lost if legal difficulties arise with the property or a real estate transaction. A piece of property that doubles in value in two years is not worth much if there is a defect in the title that prevents the owner from selling the property to realize that profit. A new home purchased at a bargain price is a comfort and achievement for a young couple until the announcement that a feed lot is to be constructed only 200 feet from their front door. The purchase of an apartment complex by an overextended corporation is a good tax write-off and cash producer until the corporation learns that the furniture, refrigerators, and stoves did not transfer with the property.

All the errors made in these transactions involve legal issues that could have been avoided if the parties had a basic knowledge of real estate law. The remainder of this book is devoted to providing such knowledge.

As you proceed through this book, think about the questions in the following section. Pay close attention to the Cautions and Conclusions sections in each chapter as you look for answers.

### The Most Frequently Asked Real Estate Questions

1. If I move out of my apartment before the lease expires, do I still owe the rent? What if the landlord re-rents the apartment? Will I still owe rent?
2. If a seller backs out of the sale of property, does she still owe the broker the commission?
3. If a buyer backs out of the purchase of property, does the broker still get his commission? What happens to the earnest money deposit?
4. Do all real estate contracts have to be in writing?
5. What if I buy a home and the general contractor has not paid all the subcontractors? Will I have to pay them?
6. If I die without a will, does my property go to the state?
7. If I own a house before I am married, does my spouse own it after we are married?
8. What happens if the value of my property falls below my mortgage amount? Can I walk away?
9. How long does it take to foreclose on a property mortgage?
10. If people cut across my property for a path, am I liable if they are hurt? Can they claim any interest in my property?
11. If the fence on my property is in the wrong place, do I own the property that was accidentally included?
12. Can the EPA require me to clean up or pay for the cleanup of toxic waste on land that I just bought?
13. Is my broker working for me or for the buyer?
14. What happens if my property deed is not recorded?
15. If a property has two mortgages, which mortgage has priority?
16. If I do not pay my HOA fees, what can happen to me and my property?
17. Am I permitted to rent my house out for a weekend?

#### CONSIDER... 1.2

For each of the frequently asked questions, list the sources of law from the pyramid shown in Figure 1.1 that would be consulted for answers.

## KEY TERMS

American Recovery and Reinvestment Act of 2009 (ARRA), 4	Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 4	Mortgage Reform and Anti-Predatory Lending Act, 4
case precedent, 8	Consumer Financial Protection Bureau (CFPB), 4	ordinance, 6
citation, 4	eminent domain, 3	private law, 7
cite, 4	Equal Protection Clause, 3	Real Estate Settlement Procedures Act (RESPA), 4
Code of Federal Regulations (CFR), 5	Fifth Amendment, 3	United States Code (USC), 4
common law, 8	Fourteenth Amendment, 3	United States Constitution, 3

## CHAPTER PROBLEMS

- Where would a home buyer turn to find out about rights related to mortgage disclosure terms and foreclosures?
- Mr. and Mrs. Ralph Williams of Montana purchased an acre of land in a new Florida development called Sunnydale. When the Williamses arrived at Sunnydale, they did not find the green, lush parcels of which they were told; instead, they found property resembling the moon's surface. In determining their rights, to which sources of law should Mr. and Mrs. Williams turn?
- "Wait a minute," Ella objected. "How can the city take my property to build a Bass Pro Shop? I was here first!" Discuss Ella's rights by helping her with a list of the types of laws that will be involved in answering her questions.
- When Tom Button purchased his home, the builder promised that the neighborhood would consist of single-family dwellings. Tom has just learned that because of economic conditions, the builder will be constructing duplex houses on Tom's street. What sources of law will be helpful to Tom in determining his rights?
- Jane Jenkins, a licensed real estate agent in New York, will be moving to California. To what sources of law can Jane turn to find the requirements for becoming licensed in California?
- A deed restriction requires every house in a subdivision to have a "minimum of 2,000 square feet of living space." Although the restriction seems clear, consider the following interpretive problems:
  - Is a garage part of the 2,000 square feet?
  - Are porches part of the 2,000 square feet?
  - Is an unfinished basement part of the square footage?
- What sources of law would be helpful in determining what is considered to be included in the term "living space"?
- Ralph and Lillian Palmer owned a dump site in a wooded area in the northern part of Arizona. Cabin owners in the area used the dump site for their trash, and commercial trucks often would bring their loads of trash to the site for a fee. The site has had old batteries, medical refuse, and oil discarded from auto repair shops. The EPA maintains that substances from the site are leaking into the surrounding soil and water supply. What sources of law provide the EPA with its authority?
- Some isolated parcels within national forests are privately owned. Often, the United States Forest Service will try to arrange exchanges with landowners. With an exchange, the Forest Service will then have a clean parcel, and the landowner is given property in an area with development potential near a city or small town. Discuss the types of laws and government agencies that would be involved in such an exchange.
- Susan Hewitt is a licensed broker in Arizona. She is confused and concerned about her role as an agent for sellers when she lists properties. For example, prospective buyers will often ask her questions about the sellers, their cash needs, their reasons for selling their property, and whether their circumstances require them to sell quickly. What sources of law would help Susan clarify her role with both sellers and buyers?
- Charles and Shirley McClure bought a condominium in the Villa Parke condominium community and became members of the homeowners' association (VPHOA). Mort Simpson was president of the HOA at the time. Simpson also owned a condominium

located in the same complex. After the McClures purchased the condominium and moved in, the VPHOA raised its monthly dues. The McClures did not pay the increased dues and incurred late fees as a result.

The VPHOA was also responsible for having trees cut on some property behind the McClures' condominium. The McClures filed suit against Simpson and the VPHOA when the VPHOA attempted to collect the amounts past due and the late fees and

also sought damages for the replacement value of the trees.

The McClures then filed a lien on Simpson's condominium to collect for the loss of the trees as well as for the resulting decline in value of their condominium from the tree removal. Would the McClures have the right to place such a lien on Mr. Simpson's condominium? [*McClure v. Fisher Attached Homes*, 882 N.E.2d 61 (Ohio 2007).]







# 2

## LAND INTERESTS: PRESENT AND FUTURE

*Those hours when happy hours were my estate,—Entailed, as proper, for the next  
in line, Yet mine the harvest, and the title mine— ...*

Edna St. Vincent Millay, *Mine the Harvest: A Collection of New Poems* 121 (1954)

*The late Senator Burton K. Wheeler of Montana, a leading isolationist of the  
World War II era, gave [the following answer] when asked in a University of  
Michigan Law School class in the early 1900s: What is the rule in Shelley's Case?  
After a moment of thought, Wheeler is said to have responded, "Sir, the Rule in  
Shelley's case is the same as the rule in any other man's case!  
The law brooks no favorites!"*

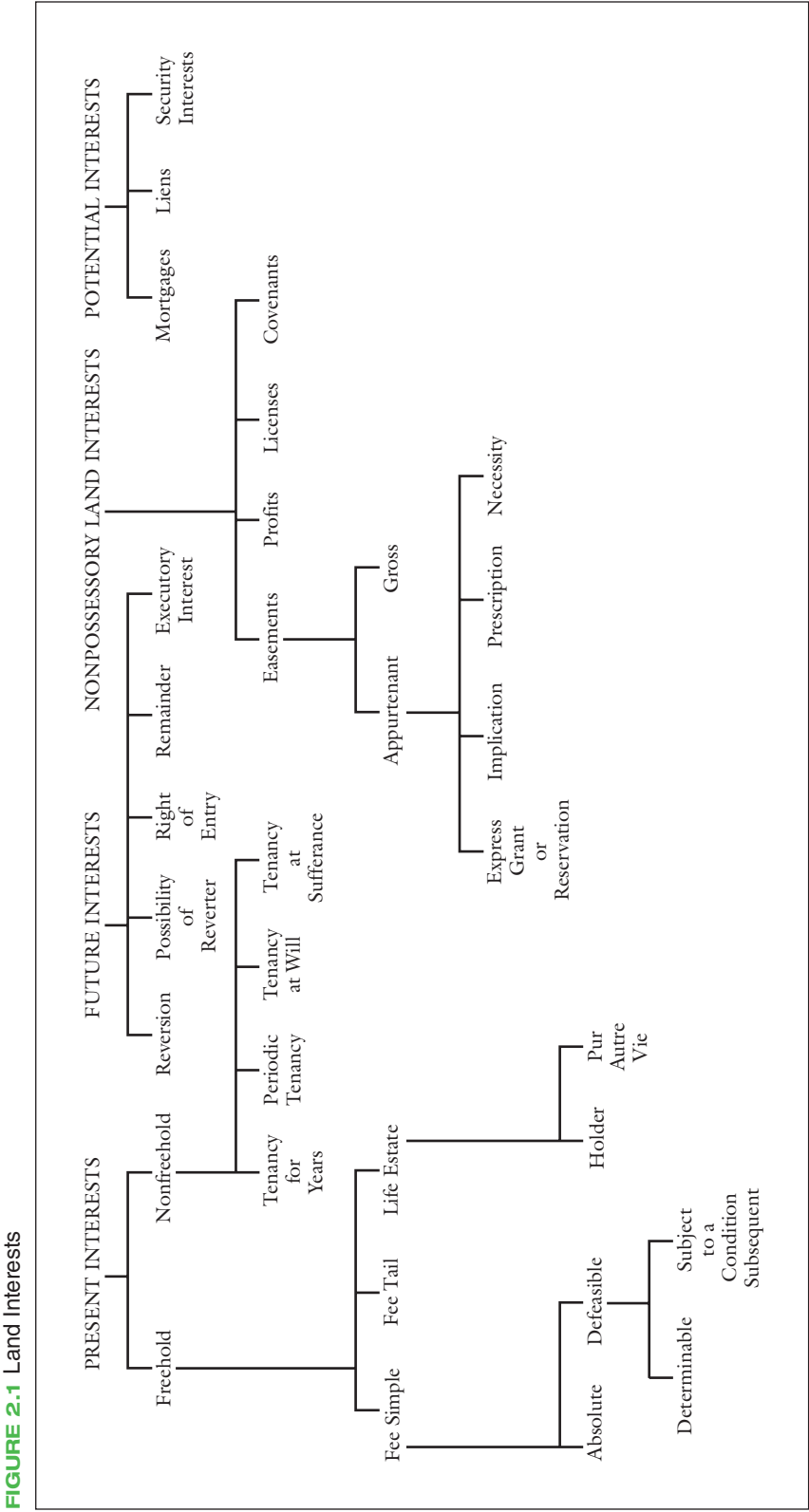
Shelley's Tourist Attraction, 7 *GREENBAG* 175 (2004)

*There is no knowing how estates will go when once they come to be entailed.*

Jane Austen, *Pride and Prejudice*

There are different levels and types of property ownership or title. Because of land's permanent nature, title can exist in the present or in the future. Land ownership can also be in the form of a partial interest. Because it is possible to create land interests in the future, those rights can be transferred by document without an accompanying physical transfer of title. This chapter explains these types of present and future interests.

The colorful opening quotes show that land interests' complexity has affected real and literary life. This chapter answers one overarching question: How can an owner hold title to property? That large question includes two subparts: How long can an interest be held? Can interests be transferred? This chapter covers the degree and extent of land ownership. Figure 2.1 summarizes the extent and interrelationships of land interests.



## 2-1 LAND INTERESTS: FREEHOLD ESTATES AND ACCOMPANYING FUTURE INTERESTS

### 2-1a Freehold Estates

The terms **freehold** and **fee**, adopted from English common law, are significant terms in the methods of land ownership. *Freehold* means that an interest in land is uncertain or unlimited in duration. *Fee* means that an interest in land is inheritable. Fee freehold estates are both uncertain or unlimited in duration and inheritable by others when the interest holder dies.

### 2-1b Fee Simple Absolute Ownership

A **fee simple absolute**, often called simply a **fee simple**, is the greatest type of interest in property ownership available. In lay terms, the fee simple absolute estate would be described as absolute ownership. The owners of fee simples are free to transfer their interests to others at any time, including upon death.

At common law, a fee simple estate was created when the transfer or grant made by the owner or grantor read, “To A and his heirs,” with “and his heirs” used to indicate the inheritability of the interest. However, in most states, the language requirement of “and his heirs” has been eliminated by statute so that a fee simple can be created simply by using “To A” language.

### 2-1c Fee Simple Defeasible

A **fee simple defeasible** is an interest in land that is uncertain or unlimited in length because it has the potential of being terminated. There are two types of fee simple defeasible estates: the **fee simple determinable** and the **fee simple subject to a condition subsequent**.

#### *Fee Simple Determinable and Possibility of Reverter*

This land interest is uncertain in length and inheritable. In a *fee simple determinable*, the grantor is giving the grantee full title and right to the property so long as the grantee complies with an attached restriction. A fee simple determinable is created with language such as the following: “To A so long as the premises are used for school purposes.” The distinguishing characteristic of a fee simple determinable is that A’s interest will terminate if the property is not used for school purposes. If A does not comply with the school-use restriction, title to the property reverts to the grantor.

#### *Possibility of Reverter: The Matching Fee Simple Determinable Future Interest*

Suppose a grant of real property is made as follows: “To A so long as the property is used for residential purposes.” A builds a factory on that land. What happens to the land interest? The rule for fee simple determinable is that, if A violates the grantor’s restriction, A’s interest terminates, and title to the property reverts back to the grantor. The present interest of a fee simple determinable also carries with it a future interest called the **possibility of reverter**. The grantor and the grantor’s

heirs could regain full title to property that was transferred to a third party when the fee simple determinable was granted.

Those who hold possibilities of reverter still have some present land ownership rights. At common law, grantors are free to transfer their possibilities of reverter any time while alive (*inter vivos*). If they have not transferred their possibilities of reverter while still alive, their reverters pass upon their death (**testamentary**) to their heirs or devisees.

Many states have now passed statutes regulating the possibility of reverter land interest. In some states, this future interest cannot be transferred or inherited. In others, statutes restrict the possibility of reverter by placing a time limit on the validity of the interest—in many states, the maximum is 40 years.<sup>1</sup> Still other states require the grantor or holder of the interest to periodically rerecord a notice that the interest exists. All of these state-enacted statutes are notice systems, which are tremendous helps in land title histories and transfers because future interests affecting titles can be determined without having to examine the granting language in each deed that transferred title to the property. The constitutionality of these title-limiting statutes has been questioned in some court cases but has been generally upheld.

### ***Fee Simple Subject to a Condition Subsequent***

The second form of fee simple defeasible title is a fee simple subject to a condition subsequent. This interest is created with slightly different language, such as, “To A on the condition that the land be used for school purposes, and if the land is ever not used for school purposes, [the grantor] may re-enter and repossess the land.” The fee simple subject to a condition subsequent is similar to a fee simple determinable in that A loses the interest if A violates the restriction. The difference between the two is that the violation of a fee simple determinable restriction terminates A’s interest automatically and immediately, whereas violation of a condition subsequent grant requires some action on the part of the grantor before the interest of A terminates. The grantor must take steps, generally through a quiet title action, to show a violation of the restriction and thereby regain title to the property.

#### **PRACTICAL TIP**

*Restrictions on land use are enforceable. If a restriction is part of a land transfer, have it drafted carefully to reflect intent and all the constraints. If property is being sold, listed, or purchased, verify the existence of restrictions, compare property use, and clarify ambiguities.*

### ***Right of Entry/Power of Termination: The Other Matching Future Interest***

A fee simple subject to a condition subsequent in the grantee also creates a future interest in the grantor: “To my niece Sally on the condition that liquor never be served on the premises, and should liquor ever be served, I reserve the right to re-enter and take possession of and title to the property.” Sally holds the present interest of a fee simple subject to a condition subsequent, but the grantor/uncle holds a future interest called a **right of entry** or **power of termination**. As discussed earlier, the grantor’s future interest does not become a present interest automatically. The grantor must take steps to gain title and possession of the property.

<sup>1</sup>For a discussion of the types of state statutes and their validity (such as statutes that cancel, destroy, nullify, or limit enforcement of possibilities of reverter or rights of reentry), see Bruce R. Huber, “The Durability of Private Claims to Public Property,” 102 *Geo. L.J.* 991 (2014); D. Benjamin Barros, “Toward a Model Law of Estates and Future Interests,” 66 *Wash. & Lee L. Rev.* 3 (2009).

At common law and in most states, the grantor can transfer the right of entry to the present interest holder of the fee simple subject to a condition subsequent. Such a transfer merges the present and future interests, and the present holder of the fee simple subject to a condition subsequent then holds a fee simple interest. Future interests coupled with present interest are like a math problem: Right of entry + fee simple subject to a condition subsequent = fee simple. In the example, if Sally's uncle conveyed his interest to her, Sally would then have a fee simple. Many states have also passed time limitations and recording requirements for the continuing validity of the future right of entry interest. The restrictions and recording requirements are similar or identical to those described for possibilities of reverter.

Sometimes it is difficult to distinguish between a possibility of reverter and a right of entry because the language used is so similar. When the granting language includes a phrase such as "grantor shall have the right to re-enter and reclaim the property," the type of future interest created is clear. However, without such clear language, the distinction is a fine one, and several judicial rules for interpretation have been developed. First, the courts will examine the entire document to determine the grantor's intent. They will also look for certain phrases and words that are key in determining the type of interest. For example, language such as "until," "so long as," or "for so long" indicates a possibility of reverter. Language such as "but," "provided that," or "on the condition that" indicates a right of entry. Many states resolve the issue of which type of interest is created through a presumption in favor of the right of entry because rights of entry interests require some action on the part of the parties to change title to the property. These statutes eliminate the automatic transfers of a possibility of reverter.

In the *Prelaz v. Canton* case, the court deals with a question about a fee simple determinable interest and whether the grantee had violated the conditional and restrictive use limitations.

## PRELAZ V. TOWN OF CANTON

760 S.E.2d 389 (N.C. App. 2014)

### Losing Title Through a Weight-Loss Camp

#### FACTS

On May 4, 1992, Champion International Corporation conveyed title to the Camp Hope property (a 110-tract of land) to the Trustees of the Robertson Memorial Young Men's Christian Association (YMCA) by a deed that granted "a fee simple determinable estate in the lands" known as the Camp Hope property.

The fee simple determinable estate would last so long as the YMCA did not violate any of the 17 conditions in the deed, which included:

1. The property will be used for active recreational purposes.
2. The use the property [only] for active recreational purposes such as camping for scout troops, organized camping programs for other organizations, picnicking, social and political gatherings,

games such as shuffleboard, baseball, softball, tennis, football, hiking, etc. but will not permit the land to be used solely in a passive manner such as reverting to its nature state with the sole recreational use being hiking.

Another clause in the deed provided that whatever camp was operated on the property would be "primarily for the benefit of residents and not for those from other areas and states." This clause in the deed is not part of the list of 17 conditions.

In 1996, following a YMCA violation, the deed provided that the town of Canton would then hold title to the property. If Canton failed to comply with the deed conditions, title then reverted automatically to Champion.

In 2005, Canton negotiated a five-year lease with Wellspring Adventure Camp LLC to operate a



weight-loss and fitness summer camp at Camp Hope. Wellspring operates weight-loss camps around the country, and, of the 978 campers who came to Camp Hope, only 20 were from the Canton area.

In 2006, John and Deborah Prelaz (plaintiffs) purchased a tract of land adjacent to Camp Hope. In April 2006, International Paper Company (which had merged with Champion) conveyed its reversionary interest in Camp Hope to the Prelazes.

Following the Wellspring leases and activities, the Prelazes filed suit to have title to the Camp Hope property declared in their name. The jury found that title rested with Canton, and the Prelazes appealed.

## JUDICIAL OPINION

### Elmore, Judge

*For a reversionary interest to be recognized, the deed must “contain express and unambiguous language of reversion or termination upon condition broken.” “[A] mere expression of the purpose for which the property is to be used without provision for forfeiture or re[-]entry is insufficient to create an estate on condition[.]”*

Applying this law to the Deed in the present case, we note that the document does, in fact, contain language of reversion or termination. However, the reversionary language is in reference to the seventeen enumerated conditions, not the clause on which plaintiffs rely. The Deed provides, should the Town

cease “to use said property for said purposes” or “violate any of the conditions placed upon [the Town],” title to the property “shall, without re-entry or suit, automatically revert to. [sic] Champion ... or its successor corporation.” Taken as a whole, it is apparent that the grantor intended to trigger reverter only if one of the enumerated conditions was broken. Further, condition # 4 serves as a restraint on use, providing that the Town must use the property for recreational purposes. Arguably, if the grantor intended to further restrain the Town’s use of the property by prohibiting it from operating a summer camp that primarily benefited residents of other states, it would have done so in an enumerated paragraph.

Thus, nowhere in the paragraph or in the Deed itself is it “clearly manifested” that title to the property is to revert to Champion, or its successor, upon the Town’s violation of the clause.

As a matter of law, the language relied upon by plaintiffs . . . could not trigger plaintiffs’ reversionary interest in the Camp Hope property.

Reversed and remanded.

## CASE QUESTIONS

1. Draw a diagram of what was conveyed and to whom.
2. What is the difference between a clause and a condition in a fee simple determinable deed?
3. What should Champion have put in the deed if it wanted Camp Hope property use to benefit local residents?

### CONSIDER... 2.1

By a warranty deed dated November 8, 1954, Thelma Ator, and her husband M.D. Ator, made a gift of property to the Owasso School District (School District). The warranty deed contains the following:

*PROVIDED, That this conveyance to [School District] is solely for **the construction and maintenance on said real property of a football playing field and stadium for the use and benefit of the students of said School District, for so long as said real property shall be used for such purposes as a part of a regularly organized and fully scheduled program of football practice and playing** [emphasis in original] and provided further that if at any time after the date hereof, [School District] shall fail to comply fully with the terms of this deed or said agreement or observe the spirit thereof, this grant shall become null and void and the full fee simple title to said property shall revert to and vest in [Thelma and M.D. Ator], their heirs and assigns forever.*

Following this conveyance, the School District constructed a stadium and practice field in 1954, which became known as Ator Field. For 40 years, the School District used the property for all Owasso high school football games and practices. In 1994, the School District constructed a new football stadium, known as Owasso Stadium, and the team switched play to that stadium. The last School District football game

was played in September 2001. The Superintendent of the School District testified at deposition that School District does not have any plans ever to use the Subject Property again for its high school football stadium.

The School District has permitted a private organization known as the Future Owasso Rams (FOR) to use the property for both football practice and home games. FOR is a private, parent-sponsored, youth sports organization for children in grades three through seven who live within the Owasso School District. To be eligible to participate in FOR youth sports, children must live within the Owasso School District but do not have to attend school within the district. FOR assists the School District with repairs and maintenance of the Subject Property and carries its own liability insurance.

Reul Wesley Ator (an heir of the Ators) filed suit to quiet title in the property for the incorrect use of the field. The trial court granted summary judgment in favor of Mr. Ator, and the School District appealed. What should the court decide and why? [*Ator v. Unknown Heirs, Personal Representatives, Devisees, Trustees, Successors and Assigns of Ator*, 146 P. 3d 821 (Ok. App. 2006).]

#### CONSIDER... 2.2

Determine what types of future and present interests are created by the following language:

- a. "To A so long as the premises are used for church purposes"
- b. "To A and his heirs provided that the premises never be used for commercial purposes"
- c. "To Cal Trans so long as the land is used for the construction of an off-ramp for access to Harrah's Club Casino"
- d. "To Wyndham Development so long as the property is never used for the construction or operation of a Wal-Mart store"

## 2-1d Fee Tail Ownership

The position of **fee tail** interest in Figure 2.1 establishes it as an uncertain or unlimited estate that is inheritable. However, the distinction between fee simple and fee tail is that fee tail is inheritable only by lineal descendants or direct descendants of the grantee. Lineal descendants are children, grandchildren, great grandchildren, and so on.

Fee tail interests present substantial problems because of the transfer restrictions and because finding lineal heirs can be cumbersome and confusing. To alleviate the problems of fee tail, many states have passed statutes that convert fee tail grants into fee simple absolutes. Thomas Jefferson considered the abolition of the fee tail in Virginia one of his finest accomplishments, something that lessened the "proportion of idle proprietors."<sup>2</sup> Delaware, Maine, and Massachusetts allow fee tail property to be transferred by sale and/or deed. Fee tail restrictions are recognized only in transfer by will in some states. Rhode Island treats the fee tail as a life estate with the remainder in the heirs of the grantor.

<sup>2</sup>Matthew J. Festa, "Property and Republicanism in the Northwest Ordinance," 45 *Ariz. State L.J.* 409 (2013).



Disentailing, the process of converting a fee tail to a fee simple, is available in these four states. Creditors are not subject to fee tail restrictions; they can treat the interest like a fee simple.<sup>3</sup> Fee tails created prior to legislative changes in the states are still valid.

## 2-1e Life Estate Ownership

### *Creation*

Another type of freehold estate is the **life estate**, which is an interest in land valid only for the life of the holder or for some other measured life. A life estate is uncertain because it terminates when the person whose life is used as the measure dies. The first type of life estate, a conventional life estate, is created with the language “To A for his life.” A’s interest will automatically terminate at death. A second type of life estate, measured by a life other than that of the holder, is created by language such as “To A for the life of B” and is called a life estate.

The life estate appears to be an odd method of land ownership, but it is used as an estate planning tool so that estate taxes may be postponed or reduced. For example, a wife who predeceases her husband might have a will granting her husband a life estate in some property with the provision that the property be given to the children at the termination of the husband’s life interest, such as “To my husband for his life, and then to my children in equal shares.” The husband holds only a lesser interest for life and will be taxed less, if at all, on his inheritance of the life estate. The distribution will be taxed in full at the time of the children’s receipt of the property.

### *Rights of Life Tenants*

Those who hold life estates, referred to as **life tenants**, have the right of undisturbed possession during the time of their estate. However, life tenants cannot commit waste or destroy the property interest so that the rights of future interest holders are diminished (noted below). For example, cutting timber on the life estate property for the purpose of building fences or for fuel is appropriate conduct for a life tenant; however, cutting timber for commercial sale would be inappropriate because there is a dissipation of the value of the property and the interests of the future holders of title.

While alive, life tenants can transfer their interests, but a transferee’s interest lasts only as long as the tenant/transferor is alive. An attempt by a life tenant to convey an interest at death is invalid. Similarly, creditors of the life tenant can have security in the property only until the life tenant’s death. States have differing rules for tax liability between and among life tenants and those granted the future interest upon termination of the measuring life.

## 2-1f Reversions

A **reversion** is a future interest in the grantor that is created when the grantor has given someone else a lesser estate. For example, when the grantor makes the grant

<sup>3</sup>Marianne M. Jennings, “Real Property Could Use Some Updating,” 24 *Real Est. L.J.* 103, 107–108 (1995).

“To A for life,” the present life estate of A will terminate upon A’s death. At that point, the land must be transferred to someone, and in this case it will transfer back or revert to the grantor. Throughout A’s life estate, the grantor has a future interest called a *reversion*. Other types of conveyances that would give the grantor a reversion include fee tails and the nonfreehold estates. For example, at the termination of any type of tenancy, the land reverts to the grantor.

## 2-1g Remainders

A **remainder** is a future interest created in someone other than the grantor. A remainder also follows a life estate or a fee tail. An example of language creating a remainder would be “To A for life, then to B.” B holds the remainder interest, which is a future interest, because the interest becomes possessory only upon the death of A. In this example, the grantor has given to another what would have been a reversion, thereby creating a remainder. There are two types of remainders: vested and contingent.

### *Vested Remainders*

A **vested remainder** is one given to someone identified and in existence who has the immediate right to the land interest upon termination of the freehold estate. In the example “To A for life, then to B,” B holds a vested remainder because (1) B is identified and alive at the time of the grant, and (2) B will have the immediate right to the estate upon A’s death. B’s remainder is an example of one that is absolutely vested.

Two other types of vested remainders that may be created are **vested remainder subject to partial divestment** and **vested remainder subject to complete divestment**. “To A for life, then to the children of B” is a sample grant that can be used to illustrate the types of remainders. This example is one of a vested remainder if B is dead and has one child. However, if B is alive, there is the possibility that B will have additional children during A’s life estate. B’s child holds a vested interest but could be divested of one-half or two-thirds of the interest should B have one or two more children before A’s death. If A dies when B has three children, each child would receive a one-third interest. If A dies when B has one child, that child would receive the full interest. The potential for loss of part of the interest is referred to as *divestment*. The vested remainder created in the example when B is still alive is a vested remainder subject to partial divestment because B stands to lose part of his or her interest.

“To A for life, then to B, but if B is not married, then to C” is an example of a vested remainder subject to complete divestment. At the termination of A’s life interest, B, ascertained and in existence at the time of the grant, will have a possessory interest. However, B could lose the interest by not marrying prior to A’s death. In this instance, B loses the entire interest if the marriage requirement is not fulfilled at the time of A’s death. This type of remainder in B is a vested remainder subject to complete divestment.

### *Contingent Remainders*

A **contingent remainder** is the opposite of a vested remainder. That is, a contingent remainder is one in which the taker of the interest is unascertained or the interest has a condition precedent to its existence and will not pass automatically.