REAL PROPERTY MNEMONICS AND
FUTURE INTERESTS MNEMONICS

1) Freehold estates are LEFTS:
   LE – LIFE ESTATES
   FT – FEE TAILS
   S – Fee SIMPLE (SAD)

2) The 3 types of fee simple estates are SAD:
   S – Fee Simple SUBJECT to a Condition Subsequent or Precedent
      - You’ll recognize these interests when they BOP you on the head
         o B – “BUT”, if liquor is ever sold on the land, then to G
         o O – “ON condition that” the land is used only for residential purposes
         o P – “PROVIDED” the land is not used for commercial purposes
   A – Fee Simple ABSOLUTE
   D – Fee Simple DETERMINABLE
      - These interests can be recognized by SUD language
         o S – “SO long as” liquor is not sold on the land
         o U – “UNTIL” the land is not used for religious purposes
         o D – “DURING” this period, the land is used only for residential purposes

3) Joint Tenancies are created in the PITT, and require unity of:
   P – POSSESSION
   I – INTEREST
   T – TIME
   T – TITLE

4) 4-D’s defeats a tenancy by the entirety:
   D – DEATH of one spouse automatically vests title in surviving spouse
   D – If one spouse becomes a DEBTOR in bankruptcy, Fed law allows the trustee in bankruptcy to sell TE & divide proceeds (½ to trustee in bankruptcy & other ½ to non-bankrupt spouse)
   D – DUAL transfer of TE, in which both H & W take part
   D – DIVORCE, annulment, or, in NY, a separation judgment
5) A COW partitions realty:
   C – COURT decree
   O – ORAL agreement between all (100%) of the co-tenants provided they all (100%) go into possession
   W – Signed WRITING voluntarily partitioning property by exchange of deeds signed by all co-tenants

6) A broker earns a commission when he or she procures a RAW buyer:
   R – READY
   A – ABLE
   W – WILLING

7) A PIP may enforce an oral real property contract:
   P – Buyer who has PAID the purchase price, in whole or in part
   I – Buyer making valuable IMPROVEMENTS on realty
   P – Buyer taking POSSESSION

8) A donative transfer requires AID:
   A – ACCEPTANCE by donee
   I – INTENT to make immediate gift
   D – Proper DELIVERY of a signed & acknowledged deed

9) SEC FEW are in warranty deeds:
   S – Covenant of SEISIN
   E – Covenant against ENCUMBERANCES
   C – Covenant of the right to CONVEY
   F – Covenant of FURTHER Assurances
   E – Covenant of Quiet ENJOYMENT
   W – Covenant of WARRANTY

10) The CIA gives notice to a real property buyer:
    C – CONSTRUCTIVE notice
    I – INQUIRY notice
    A – ACTUAL notice

11) PINTS for real covenants, but TINS for equitable servitudes:
    P – PRIVITY of estate
    I – INTENT by original contracting parties that covenant attach to land & run to future assignees (Horizontal Privity)
    N – CIA NOTICE of Restrictive Covenant
    T – Must TOUCH & concern the land
    S – Must satisfy the SOF

12) PINTS can come in CANS:
    C – Imposed by COMMON owner to protect lands retained
    A – Covenants agreed to by ADJOINING landowners/neighbors
    N – Imposed for the benefit of NEIGHBORING lands
    S – To carry out common plan or SCHEME
13) In granting or denying an area variance, the court considers **ACES**:
   A – are there **ALTERNATIVES** available that don’t violate zoning law?
   C – would the proposed variance alter the **CHARACTER** of the neighborhood?
   E – would it adversely affect the **ENVIRONMENT**?
   S – is the problem the owner is attempting to resolve **SELF-CREATED**, or did he buy w/ notice of the problem, or create the problem & build w/o a permit?
   S – was the variance insubstantial or **SUBSTANTIAL**?

14) A **EUNUCH** establishes adverse possession:
   E – **EXCLUSIVE** possession (not shared w/ owner)
   U – Owner was **UNDER** no disability (infancy or mental incompetency) when AP began!
   N – **NOTORIOUS** & open possession, which would put the true owner on notice that a trespasser was possessing his land & he should bring an ejectment action.
   U – (New York) **UNDER** a good faith belief of a claim of right.
   C – **CONTINUOUS**/ uninterrupted actual possession
   H – **HOSTILE** possession

15) The hostility prong of AP is negated if, during 10 yr period, AP calls the owner **OPA**:
   O – **OFFERS** to buy land from true owner
   P – Asks **PERMISSION** of true owner to use land
   A – **ACKNOWLEDGES** title in true owner

16) Negative easements are limited to **LAWS**:
   L – **LIGHT** easements
   A – Easements of **AIR**
   W – Easements regarding **WATER** use
   S – Easements of **SUPPORT**

17) **PIGS** create easements:
   P – Easements by **PRESCRIPTION**
   I – Easements by **IMPLICATION** (a.k.a., quasi-easements)
   G – Easements by **GRANT**
   S – Easements by **STRICT** Necessity

18) You get an implied easement if you find a **CRAB**:
   C – Both dominant & servient estates were formerly held by a **COMMON** owner
   R – Use of an implied easement is **REASONABLY** necessary for reasonable use of the dominant estate
   A – Use of the easement was plainly & physically **APPARENT** from reasonable inspection of the land (exception: implied easement for underground water pipes)
   B – Former use of the land subordinated one part of the land for the **BENEFIT** of another part

© 2015 Pieper Bar Review
19) A FRAME will extinguish an easement:
   A – ABANDONMENT
   F – FORECLOSURE of a mortgage that was recorded prior to the easement
   R – Signed writing, RELEASING the easement
   A – ADVERSE Possession of a servient estate in a hostile manner, preventing use of the easement
   *M – MERGER by common ownership of all (100%) of dominant & servient estates, because one can’t possess an easement, covenant, or profit on her own property
   E – EMINENT DOMAIN

20) TIP a chattel, and it becomes a fixture:
   T – TYPE of chattel that generally becomes part of real estate
   I – INTENT of person installing chattel (whether it was intended to be permanently installed, or the person intended to subsequently remove it)
   P – The PARTIES’ relationship

21) Courts will consider whether it’s reasonable to throw SPUD in the water, based on:
   S – SIZE of waterway
   P – PURPOSE for using water & resulting harm from that use
   U – Extent of USE (how much water will be used)
   D – DURATION of use by property owner.

22) Even if a lease is silent on these topics, a landlord HEARS these implied covenants:
   H – HABITABILITY
   E – Quiet ENJOYMENT
   A – ASSIGNABILITY of the lease
   R – Good REPAIR (this covenant is made by commercial tenants)
   S – Minimal SECURITY precautions

23) The NY grantee is not personally liable on an assumed mortgage, unless the NY deed to the buyer expressly contains these TIPS:
   T – TIME remaining on the mortgage
   I – INTEREST rate
   P – PRINCIPAL amount of debt assumed
   S – SIGNED by the grantee
   *Note - The MBE grantee of a deed that contains a mortgage assumption clause IS personally liable on the mortgage, even though the grantee did not sign the deed.

24) An out-of-possession landlord is liable in tort to the POLICE for injuries:
   P – Where the property was leased for a PUBLIC purpose, and LL failed to inspect and repair dangerous conditions before turning over the land to tenant
   O – Arising OUTSIDE the premises, proximately caused by a dangerous condition on the premises, which LL should have known about when he turned over the land
   L – Caused by LATENT defects that LL should have known about, where tenant has not had reasonable time to discover and repair that condition
   I – Where tenant’s INTENDED use of the premises created an unreasonable risk of harm to others, and LL was aware of this intended use
   C – Where LL has multiple leases in the same building, and the injury occurred in a COMMON passageway
   E – Where LL EXPRESSLY covenants to make repairs, and fails to do so, causing injury
FUTURE INTERESTS MNEMONICS

1) Vesting is as easy as ABC:
   A – X must definitely be ASCertainable w/in RAP period.
   B – X must be a life in BEing at the time of conveyance, or in being w/in RAP period
   C – X’s future interest must be CERTAIN to happen

2) RAP doesn’t apply to a future interest w/ a C\textsuperscript{4}\textsubscript{ROUP}:
   C – COVENANTS running with the land (PINTS & CANS)
   C – A remainder interest passing from one CHARITY to another charity, but RAP may be
       violated if the future charitable interest is preceded or followed by a non-charity
   R – a REVISIONARY interest retained by the grantor (a Possibility of Reverter, Right of
       Entry, or a reversionary interest on a long term lease (99 year lease))
   O – A tenant’s OPTION to buy or to renew contained in a long term lease
   U – A future interest in trust benefiting the U.S. government
   P – In MBE, PREEMPTIVE rights of first refusal to buy, but in NY, only first refusals of a
       commercial nature (business) or involving government rights are exempt from RAP; thus, a
       right of first refusal on NY residential realty (between neighbors or among family
       members) must be fully and finally exercisable w/in the RAP period

3) RAP applies to CORE future interests:
   C – CONTINGENT Remainders
   O – OPTIONS to Purchase retained in a deed by a grantor that possibly could be exercisable
       beyond the RAP period
   R – REMAINDER Interests that either follow a life estate or follow some event
   E – EXECUTORY Interests (remainders that follow a conditional fee i.e., fee simple
       determinable or fee simple subject to a condition subsequent)

4) A FURS cures a Perpetuities violation:
   A – ADMINISTRATION of the estate Contingency
   F – FERTILE Octogenarian exception
   U – UNBORN Widow exception
   R – REDUCING an age contingency to 21 years
   S – The perpetuities SAVINGS Clause
   *Note, in MBE, A FURS converts to SAW FUR by adding the wait-and-see doctrine.

TRUSTS

5) A trustee’s investments are prudent based on a TIN DAD:
   T – TRUST TERMS restricting trustee investments
   I – INFLATION
   N – NEEDS of beneficiaries
   D – DIVERSIFICATION of investments
   A – The total AMOUNT of the trust
   D – DURATION of the trust
6) **SENATE** is not bound by the spendthrift rules:

10 – **10%** of distributed trust income can be seized by the trust beneficiary’s judgment creditor.

10 – Trust Income in excess of **$10,000** can be assigned away by the beneficiary prior to its receipt, but only if assignment was gratuitous (no consideration received) AND assignee is a close family relative, not more distant than Aunt, Uncle, Nephew or Niece of the beneficiary.

**S** – **SELF-SETTLED** trusts, where the settlor and beneficiary are the same person, trust can be attached by creditors for up to 100% of the settlor’s interest. If settlor retained only a life estate, his creditors can only seize 100% of the life estate, not the remainder interest.

**E** – Trusts that are **EXPRESSLY** made non-spendthrift

**N** – If **NECESSARIES** are furnished to a beneficiary, the creditor is allowed to recover their fair value from the beneficiary’s trust income.

**A** – **ALIMONY** & child support obligations

**T** – Federal income **TAXES** owed by the beneficiary

**E** – **EXCESS** trust income that is not reasonably needed for maintenance & education of beneficiary or his family

7) If you try to **TIP** a trust, that means litigation:

**T** – **TERMINATE** the trust

**I** – Invade accumulated **INCOME**

**P** – Invade trust **PRINCIPAL**
In-Class Multistate Questions:
Real Property

Ownership (20%)
What Concepts Do They Expect You to Know?

A. Present estates
   1. Fees simple
   2. Defeasible fees simple
   3. Life estates
B. Future interests
   1. Reversions
   2. Remainders, vested and contingent
   3. Executory interests
   4. Possibilities of reverter, powers of
termination
   5. Rules affecting these interests
C. Cotenancy
   1. Types
      a. Tenancy in common
      b. Joint tenancy
   2. Severance
   3. Partition
   4. Relations among cotenants
   5. Alienability, descendability, devisability
D. The law of landlord and tenant
   1. Types of holdings: creation and
termination
      a. Terms for years
      b. Tenancies at will
      c. Holdovers and other tenancies at
         sufferance
      d. Periodic tenancies
   2. Possession and rent
   3. Assignment and subletting
   4. Termination (surrender, mitigation of
damages, and anticipatory breach)
   5. Habitability and suitability
E. Special problems
   1. Rule Against Perpetuities: common law
      and as modified
   2. Alienability, descendability, and
      Devisability
   3. Fair housing/discrimination
Rights in Land (20%)
What Concepts Do They Expect You to Know?

A. Covenants at law and in equity
   1. Nature and type
   2. Creation
   3. Scope
   4. Termination
B. Easements, profits, and licenses
   1. Nature and type
   2. Methods of creation
      a. Express
      b. Implied
         i. Quasi-use
         ii. Necessity
         iii. Plat
      c. Prescription
   3. Scope
   4. Termination
C. Fixtures (including relevant application of Article 9, UCC)
D. Zoning (fundamentals other than regulatory taking)

Contracts (20%)
What Concepts Do They Expect You to Know?

A. Real estate brokerage
B. Creation and construction
   1. Statute of frauds and exceptions
   2. Essential terms
   3. Time for performance
   4. Remedies for breach
C. Marketability of title
D. Equitable conversion (including risk of loss)
E. Options and rights of first refusal
F. Fitness and suitability
G. Merger

Mortgages/Security Devices (20%)
What Concepts Do They Expect You to Know?

A. Types of security devices
   1. Mortgages (including deeds of trust)
      a. In general
      b. Purchase-money mortgages
      c. Future-advance mortgages
   2. Land contracts
   3. Absolute deeds as security
B. Some security relationships
   1. Necessity and nature of obligation
   2. Theories: title, lien, and intermediate
   3. Rights and duties prior to foreclosure
   4. Right to redeem and clogging equity of redemption
C. Transfers by mortgagor
D. Transfers by mortgagee
E. Payment, discharges, and defenses
F. Foreclosure
   1. Types
   2. Rights of omitted parties
   3. Deficiency and surplus
   4. Redemption after foreclosure
   5. Deed in lieu of foreclosure

Titles (20%)
What Concepts Do They Expect You to Know?

A. Adverse possession
B. Transfer by deed
   1. Warranty and nonwarranty deeds (including covenants for title)
   2. Necessity for a grantee and other deed requirements
   3. Delivery (including escrows)
C. Transfer by operation of law and by will
   1. In general
   2. Ademption
   3. Exoneration
   4. Lapse
   5. Abatement
D. Title assurance systems
   1. Recording acts (race, notice, and race-notice)
   a. Indexes
   b. Chain of title
   c. Protected parties
   d. Priorities
   e. Notice
   2. Title insurance
E. Special problems
   1. After-acquired title (including estoppel by deed)
   2. Forged instruments and undelivered deeds
   3. Purchase-money mortgages
   4. Judgment and tax liens
1. Three sisters took title to a house as joint tenants with a right of survivorship. Six months later, the oldest sister conveyed her interest in the house to the youngest sister for $175,000. One year later, the youngest sister died with a will leaving everything to her niece. The oldest and middle sisters are still alive.

Who holds title to the house?

(A) The middle sister only.
(B) The middle sister and the oldest sister as joint tenants.
(C) The niece and the middle sister as 50/50 owners.
(D) The niece as a 1/3 owner and the middle sister as a 2/3 owner as tenants in common.

1. Knowing the “four unities” (possession, interest, time and title) is essential to reaching the best choice in this problem.

“[A] conveyance to two or more persons, without additional qualifying language, is presumed in all American jurisdictions to create a tenancy in common.” Stoeckel, The Law of Property § 5.3 at n.183 (3d ed. 2000). Here, however, the facts stated that the three sisters took title as joint tenants with a right of survivorship.

When the oldest sister conveyed away her title, she destroyed the unities as to her one-third interest. When the youngest sister died, her one-third interest passed to the middle sister under her survivorship interest of the joint tenancy, but the youngest sister’s one-third tenant in common interest purchased from the oldest sister that lacked the “four unities” with the middle sister passed down to the niece in intestacy. Thus, the youngest sister took that one-third in the house as a tenant in common with the two-thirds title held as joint tenants by herself and the middle sister. Thus, (D) is correct. Pattelli v. Bell, 187 Misc. 2d 275, 278-79 (Sup. Ct. Richmond County 2001); Real Property Law § 240-c.
2. A seller entered into a signed written agreement with a broker in which the seller agreed to pay the broker a commission of 5% if, within sixty days, the broker found a buyer ready, willing and able to purchase a tract of land for $100,000. On the thirtieth day, a potential buyer procured by the broker offered to buy the land for $99,000. The seller wrote the buyer a letter rejecting the offer. On the sixtieth day, the buyer raised the offer to purchase to $100,000 and the seller orally rejected it. An appropriate action was brought by the buyer against the seller.

In such action, is the buyer likely to prevail?

(A) Yes, and the buyer would obtain specific performance because he has satisfied the Statute of Frauds.

(B) Yes, but his remedy would be limited to damages.

(C) No, because his counter-offer operated as a rejection of seller’s offer.

(D) No, because of the Statute of Frauds.

2. To be enforceable, a contract for the sale of land must have a memorandum of the agreement, signed by the party to be charged, which includes a description of the land. Here, the seller did not sign a memorandum with the buyer and the written listing agreement with the broker does not qualify. Therefore, the seller will prevail because of the Statute of Frauds and (D) is correct. (A) is incorrect because the buyer did not satisfy the Statute of Frauds.

(C) is incorrect because the seller, by his listing agreement with the broker, kept open the offer to sell for $100,000.

(B) is incorrect because the Statute of Frauds will prevent the buyer from obtaining either damages or specific performance.

Note: In New York, even if the seller had put a clause in the broker’s contract indicating that “no commission is earned except for the seller’s willful default,” the seller would not have to pay a commission for rejecting a “RAW” buyer produced by the broker, and refusing to sign a contract with the “RAW” buyer. The New York Court of Appeals has construed “willful default” to mean a default by the seller of a contract entered into with a buyer. Here, since the real property contract was never executed, there could be no “willful default” by the seller. Graff v. Billet, 64 N.Y.2d 899 (1985); Pieper, NYAA at 632 (2014).
3. On December 1, a seller orally agreed to sell real property to a buyer. The next day, the buyer forwarded the down payment to the seller together with a signed letter which contained the terms. On January 1, the seller’s neighbor told the seller that a geologist advised him that there was a strong likelihood of oil reserves under both his and the seller’s properties, which prospect would substantially increase the value of the property. The seller informed the buyer that she no longer intended to sell the property. The buyer commenced an action against the seller to specifically enforce the contract.

In such action, will the buyer prevail?

(A) Yes, because the seller did not return the buyer’s money or object to the memorandum within a reasonable period.

(B) Yes, because the buyer’s part payment was sufficient performance to take the contract out of the Statute of Frauds.

(C) No, because a contract for the sale of land must be in writing and signed by both parties.

(D) No, because there was no memorandum in writing signed by the seller.

3. A contract for the sale of land falls within the Statute of Frauds, requiring a writing signed by the party to be charged with the contract’s breach. It is not necessary that the writing be signed by both parties, so (D), the correct answer, is more precise than (C).

The buyer’s partial payment is not enough to take the contract out of the Statute of Frauds, because the money can be returned to him and he does not already have possession of the property. Therefore, (B) is incorrect.

The fact that the seller did not object to the buyer’s letter and payment has no effect on the enforceability of a contract. This contract is for the sale of land, and thus it does not fall under Article 2 of the UCC. Therefore, (A) is incorrect.
4. An old man owned a large tract of land on which he lived and operated a kennel. Due to his advanced age, he asked his niece to live and take care of him, and help him operate the kennel for the rest of his life. He orally promised to pay her $100 a week, and to give her his real property when he died if she performed her part of the bargain. The niece sold her home, moved in with the old man and worked faithfully for him until he died intestate six years later. After the old man’s death, his daughter and only heir brought an action to oust the niece from possession, and the niece brought a counterclaim demanding specific performance of her agreement with the old man.

Which of the following arguments is the daughter’s strongest?

(A) The Statute of Frauds does not recognize part performance unless failure to enforce the contract will result in irreparable hardship.

(B) The Statute of Frauds does not recognize part performance unless the part performance itself unequivocally refers to the contract.

(C) The niece’s use and occupation of the premises and salary will be presumed to be adequate consideration for the services rendered, absent an affirmative showing to the contrary.

(D) The Statute of Frauds requires a signed writing for a contract not to be performed within one year.

4. There are two different theories under which a court will allow part performance to take an agreement to convey land out of the Statute of Frauds. Some courts have enforced an oral agreement to convey where failure to do so will result in undue hardship to the performing party (the “equitable fraud” theory). Some courts have enforced an oral agreement where the performance itself unequivocally demonstrates that an agreement to convey existed. The niece may argue that she will suffer undue hardship if the oral promise to convey is not enforced, since she has given up her own home. Therefore, because the question asks for the daughter’s strongest argument, (A) is an incorrect answer. On the other hand, the daughter has a good argument that this performance does not unequivocally refer to a contract to convey the land. The parties’ conduct is as consistent with an employment contract as it is with a contract to convey. The niece worked for the old man, but the old man paid her for her services. Under these facts, there is no demonstrable intent to convey. Therefore, (B) is the strongest argument for the daughter to defeat the niece’s claim and thus, (B) is the correct answer.

(C) is not a correct statement, as there is no such presumption in real property law. To the degree that such an argument is valid, it supports the daughter’s argument that the performance does not unequivocally refer to a contract to convey. Thus, at best, (B) is a better answer than (C), making (C) an incorrect answer.

Because the contract was one that could have been performed within one year (the old man could have died within the year), the contract is not within the one year Statute of Frauds provision. Thus, (D) is incorrect.
5. A buyer entered into a properly executed purchase and sale agreement with a seller for property containing a residence. The agreed purchase price was $1,000,000, payable by $250,000 in cash at the closing plus a purchase money promissory note in the amount of $750,000, carrying interest at the rate of 12%, payable in equal monthly installments for a period of 10 years. Prepayment of the note was prohibited. At the specified closing, the buyer tendered $1,000,000 by bank check, but the seller refused to tender a deed. The buyer then sued the seller for specific performance.

For whom will the court find?

(A) For the seller, because the buyer’s tender did not comply with the terms of the contract.
(B) For the seller, unless a change in the buyer’s financial condition caused him to produce cash instead of a signed promissory note.
(C) For the buyer, because he has made a valid tender.
(D) For the buyer, because $1,000,000 in cash is the equivalent of $250,000 in cash and a $750,000 note secured by a mortgage.

5. The seller may refuse to perform under the contract if the buyer commits any material breach of the purchase and sale agreement. The purchase and sale agreement clearly established the method of payment, a material term of the agreement contemplated and bargained for by the parties. The buyer’s tendered payment violated that provision of the agreement.

The seller cannot be forced to perform obligations materially different from those contained in the agreement, thus (A) is the correct answer. For the same reasons (C) is an incorrect answer. Likewise, (D) is incorrect because the buyer’s tendered cash payment was not the equivalent of the tender as expressly provided for in the contract. The buyer must perform as agreed, or he cannot force the seller to convey.

(B) is not correct because the buyer is not allowed to change unilaterally the terms of the contract to suit his financial situation.
6. A seller owned a twenty-unit apartment building. The city where the apartment building was located had a building code which required that every apartment building that had more than 10 units to have wired smoke and fire detectors in each apartment and in all common areas.

The seller’s apartment building did not comply with the code. The cost of installing approved fire and smoke detectors was $15,000.

A buyer entered into a binding written purchase and sale agreement with the seller to buy the apartment building for $140,000 and paid the seller a 10% deposit. When the buyer thereafter learned that the building was in violation of the city ordinance, he rescinded the contract and requested a return of his deposit. The seller refused and sued the buyer for specific performance. The buyer counterclaimed for the return of his deposit.

Other than the above-described building code, there are no applicable statutes.

In this suit, how will the court find?

(A) The seller will not obtain specific performance, but will be allowed to retain the deposit as liquidated damages.

(B) The seller will obtain a decree for specific performance and will be entitled to receive the entire purchase price upon tender of a deed.

(C) The buyer will be entitled to rescind the contract but will not be entitled to obtain the return of his deposit.

(D) The buyer will be entitled to rescind the contract and to obtain the return of his deposit.

6. (B) is the correct answer. The prevailing view concerning the effect of existing building code violations holds that, because such defects relate to the condition of the structure rather than the quality of title, such violations do not render title unmarketable. Powell, Real Property §925[4]; Stoebuck, The Law of Property §10.12 at 782 n.42 (3d ed. 2000).

Because existing building code violations do not render title unmarketable, the buyer cannot rescind the contract and as such both (C) and (D) are incorrect.

“If one owns a car with headlights that do not work, an illegal exhaust system and no license plates, the car cannot legally be operated in New York. Nevertheless, the owner retains good title to the car and that title can be transferred to anyone else. The illegalities of the car’s condition, do not affect the quality of its owner’s title. Similarly, if defects exist on, or improvements are made to, a residence that does not comply with building or municipal codes, the marketability of the owner’s title is not impaired. Holding to the contrary would elevate the status of municipal and building code violations to that of encumbrances and encroachments, which do render title unmarketable; a theory our courts have rejected.” Kraker & Weinstock, Title Insurers Sink in the Pool of Unmarketability, N.Y.L.J. 11-26-04 p. 4, col. 3.

(A) is also incorrect because, absent damages, a seller may not retain the buyer’s down payment (the New York view of allowing a seller to retain 100% of the deposit is the minority view).

Note that if the facts stated that an existing violation of a zoning ordinance was at issue, then title would be rendered unmarketable. (New York’s contrary view is the minority view). Powell, Real Property §925[4] n.153; Voorheesville Rod & Gun Club v. E.W. Tompkins Co., 82 N.Y.2d 564 1993: Pieper, NYAA at 672 (2014). If, however, zoning laws are changed between the date of contracting and closing, and the change prohibits the buyer’s intended use, the risk is on the buyer and title would not be rendered unmarketable.
7. A buyer desired to purchase real property from a seller for the purpose of opening a nursery school. When the buyer and the seller signed the contract of sale, they both assumed that a nursery school was a permitted use of the property under the local zoning ordinance. In fact, as the seller informed the buyer, the property across the street was formerly operated as a nursery school.

Subsequently, the buyer discovered that the zoning laws prohibited the operation of a nursery school on the property, and she brought an appropriate action for rescission of the contract.

Which of the following represents the buyer’s best theory for rescission of the contract?

(A) Illegality.
(B) Impossibility of performance.
(C) Mutual mistake.
(D) Frustration of purpose.

7. (A) is incorrect because the subject matter of the contract was not illegal, i.e., the seller’s transfer of the realty to the buyer would not violate the law. The contract to buy does not violate any law or public policy; only the buyer’s intended use of the property would be illegal.

(B) is incorrect because it is still possible for a seller to convey marketable title even though the zoning laws have been amended.

(D) is incorrect because frustration speaks of supervening events. Restatement (Second) of Contracts § 265; Perillo, Calamari & Perillo on Contracts § 13.12 at 537 (5th ed. 2003). Here, the zoning laws were in place prior to contracting, so the buyer cannot point to the occurrence an unexpected subsequent event that arose to frustrate her purpose in entering the contract. Because the defense is not recognized widely in the US, frustration of purpose will rarely be the best answer choice on the MBE.

Although the buyer would likely be unsuccessful in avoiding the contract under these facts, her best choice is (C), mutual mistake.
8. A buyer and a seller entered into the following written purchase and sale agreement for a small piece of real property which the seller owned in fee simple:

The seller agrees to convey to the buyer on June 25, by general warranty deed, free of all encumbrances, the seller’s parcel of land.

The closing shall take place at the appropriate Registry of Deeds on June 25. Time is of the essence.

The purchase price is $250,000, $50,000 of which shall be paid as a deposit today, and the balance of which shall be paid in cash at the time of delivery of the deed. In the event of the buyer’s default, the seller’s sole remedy shall be to retain all deposits as liquidated damages.

Witness our hands and seals this fifth day of June.

Signed by buyer
Signed by seller

The seller died on June 15, ten days after signing the contract. His will left all of his personal property to his son and all his real property to his daughter. The state in which property is located follows the doctrine of equitable conversion.

Which of the following statements is correct?

(A) The agreement is binding on all parties and the daughter will receive the proceeds of the sale, including the $50,000 deposit.
(B) The agreement is binding on all parties and the son will receive the proceeds of the sale, including the $50,000 deposit.
(C) The agreement is terminable at the option of the executor of the seller’s will.
(D) The agreement is terminable at the option of the buyer.

8. The doctrine of equitable conversion holds that a purchase and sale agreement transfers equitable title (a form of real property) to the purchaser, leaving only a personal property right in the vendor to collect the purchase price. At the seller’s death, this personal property right passed to the son by the terms of the seller’s will, and thus, the son will receive the proceeds of the sale. Therefore, (B) is the correct answer.

The daughter will not receive the proceeds of the sale because, under the doctrine of equitable conversion, the seller had no real property interest in the property at the time of his death. Thus, (A) is an incorrect answer.

In New York (EPTL § 3-4.2), if a testator enters a contract to sell realty, the contract will not revoke a prior disposition in the testator’s will. Thus, equitable conversion would not apply to a testator who enters a contract to sell realty. The realty passes to the beneficiary named in the will, subject to the executory contract.

Death does not terminate a purchase and sale agreement, nor does it give rise to an option to terminate. Thus, (C) and (D) are incorrect answers.
9. A father properly prepared and signed a deed of land to his son, a small businessman close to insolvency. After being handed the deed, the son told his father that he did not want the deed because he was sure that his creditors would get the property. The son immediately handed the deed back to his father.

One day, while a substantial creditor of the son was visiting the father, the creditor saw the deed on the father’s desk, took the deed, recorded it, and brought suit against the son, eventually obtaining the son’s interest in the land in satisfaction of his judgment.

If the father brings an action against the creditor to establish the father’s interest in the land, for whom will the court rule?

(A) The father, because the son did not accept the deed.
(B) The father, because the creditor had no right to record the deed.
(C) The creditor, because the son’s acceptance is presumed when a validly executed deed has been tendered.
(D) The creditor, because recording satisfies the condition that a deed must be delivered.

9. The father properly executed a deed to the land, but because the son refused to accept it, title did not pass. The creditor’s action of taking the deed and recording it was legally void. Title remains in the father. Therefore, (A) is the correct answer.

(B) is correct insofar as the father prevails, but its reasoning is, at best, unclear. Since there was no acceptance, there was no passage of title and recording by anyone would have no effect.

If the son had accepted the deed as a gift from the father, then the son’s interest would have vested in the land and been subject to the claims of the son’s creditors, regardless of whether or not the deed was recorded and regardless of who recorded it. Thus, (B) is an incorrect answer.

Acceptance may be presumed when there are no facts to the contrary. Here, however, the son expressly refused title. In such a case, there is no acceptance, and thus no effective conveyance. Thus, (C) is an incorrect answer.

Likewise, recording may create a presumption of acceptance, especially if the grantee was the one who recorded. However, recording does not replace the requirement of acceptance or delivery, and thus a recorded deed can fail for want of either. Thus, (D) is an incorrect answer.
10. A purchaser was interested in purchasing a lot from an owner of a large subdivision, but could not decide between lots 40 and lot 41, both of which had a price and fair market value of $50,000. The purchaser paid the owner $50,000, which the owner accepted. The owner delivered a deed to the purchaser which was properly executed, complete, and ready for recording in every detail except that the space in the deed for the lot number was left blank. The owner told the purchaser to fill in either lot 40 or lot 41 according to his decision, and then to record the deed. The purchaser visited the development the next day and completely changed his mind, selecting lot 25, which had a price and fair market value of $75,000. The purchaser filled in lot 25 and duly recorded the deed.

Before the owner learned of the purchaser’s actions, the purchaser sold lot 25 to a buyer for $60,000 by a properly executed, delivered, and recorded warranty deed. The buyer knew that the owner had put a price of $75,000 on lot 25, but he was unaware of any other facts regarding the owner/purchaser transaction. The buyer’s attorney accurately reported the purchaser’s record title to be good, marketable, and free of encumbrances. Neither the buyer nor his attorney made any further investigation outside the record. The owner commenced an appropriate action against the buyer to recover title to lot 25.

If the owner loses, what is the most likely reason?

(A) The Statute of Frauds prevents the introduction of any evidence of the owner’s and the purchaser’s agreement.
(B) The recording of the deed from the owner to the purchaser precludes any question of its genuineness.
(C) As between the owner and a bona fide purchaser, the owner is estopped.
(D) The clean hands doctrine bars the owner from relief.

10. In this question, the rights of a third party who purchased the property are challenged by the seller. Here, the seller’s actions in permitting the purchaser to fill in the deed enabled the third party reasonably to believe that the purchaser was the legal owner of that lot. The owner/seller is therefore estopped from denying the validity of the deed in a contest with the third party, and (C) is therefore correct.

(A) is incorrect because the Statute of Frauds never prevents the introduction of evidence of fraud. That is the function of the parol evidence rule. Even the parol evidence rule is inapplicable here because the issue is whether the third party had a right to rely on the deed.

(B) is incorrect because the issue is not the genuineness of the deed, since the owner, the seller of the property, signed it. By leaving the lot number blank, the owner authorized the purchaser to fill it in. When the purchaser exceeds his authority, the seller must bear the loss. If the deed were a forgery, recording the deed would not preclude an attack on its genuineness. A forged deed, even though recorded, does not convey title, and the third party who relies on record title created by a forged deed bears the loss.

Neither the owner (the seller) nor the buyer have unclean hands. They were both defrauded by the purchaser. Therefore, the clean hands doctrine is inapplicable, and (D) is incorrect.
11. Before he set out on a transatlantic balloon flight, a grantor executed a deed of his property to his friend. He handed the deed to his friend just before he took off, and told his friend that he wanted the deed back if he returned alive. As the balloon started to ascend, the friend said to the grantor, “I hope this is the last I’ll ever see of you.” The grantor wished that he had never handed over the deed, but was so far off the ground that he could not retrieve it. Days later, the balloon crashed killing the grantor, and the friend recorded the deed.

The friend commenced an action against the grantor’s son, his only heir, to quiet title to the property.

Who will prevail?

(A) The son will prevail because delivery of the deed was conditioned on the grantor’s death.
(B) The son will prevail because the friend cannot profit from his own wrongdoing.
(C) The friend will prevail because he recorded the deed.
(D) The friend will prevail because there was a conditional delivery.

11. “The traditional view is that a direct delivery to a grantee cannot pass title conditionally: if the grantor delivers the deed to the grantee but states that no title shall pass unless or until some future event occurs, the condition is not legally binding. As it is sometimes put, the grantee cannot be his or her own escrow holder. But the courts are divided as to where this leaves the deed itself. Where the condition is simply the grantor’s death, the deed is usually held void because the underlying intent is testamentary.” Stoebuck, The Law of Property § 11.3 at 830 (3d ed. 2000); Raim v. Stancel, 339 N.Y.S.2d 621 (1983); 43 N.Y. Juris., Deeds § 65; Wipfler v. Wipfler, 153 Mich. 18 (1908); Matter of Jordan, 199 A.D.2d 998 (4th Dep’t 1993).

A deed that is not to become operative until the death of the grantor, is void since it fails to comply with the requirements of a will. Butler v. Sherwood, 196 A.D. 603 (3d Dep’t 1921) aff’d, 233 N.Y. 655 (1922); Hom v. Hom, 101 A.D.3d 816, 817 (2d Dep’t. 2012) Accordingly, there can be no gift causa mortis of real property. N.Y. Juris., Gifts § 3 n.11; § 41. Choice (A) is correct.

(B) is incorrect because the friend’s act was not the type of wrongdoing that would prevent him from taking the property. He did not kill the grantor, but merely made an unkind remark.

(C) is incorrect because the mere act of recording is not sufficient to give title to the friend. If the friend had recorded the deed and the grantor had survived, the grantor would have been able to get the property back due to the conditional nature of the delivery. Therefore, the mere act of recording is not controlling here.

(D) is incorrect because it is overly broad. Real property law allows an escrow conditional delivery of a deed to an independent third person, who can deliver it to the grantee when the condition occurs or is satisfied.
12. A lawyer had a $50,000 legal malpractice judgment recorded against her at a time when she owned no realty. A statute in the jurisdiction dictates that recorded judgments are automatic liens on realty owned or after-acquired by the judgment debtor.

Subsequently, the lawyer obtained a $40,000 loan secured by a mortgage on land he sought to purchase. At the closing, the $40,000 mortgage paid $30,000 of the purchase price to the seller, and gave the lawyer the right to obtain $10,000 more during the ensuing twelve months. Four months after taking title, the lawyer demanded and received another $10,000, which she used in operating her law practice. Soon thereafter, the $40,000 mortgage went into default and the property went into foreclosure.

Who will take priority when the foreclosure referee distributes the foreclosure sale proceeds?

(A) $40,000 to the mortgagee.
(B) $50,000 to the judgment creditor who was first to record.
(C) $30,000 to the mortgagee.
(D) 50% to the judgment creditor and 50% to the mortgagee.

12. (C) is the correct choice. The key to answering this question is the rule that grants the purchase money mortgagee priority over existing liens recorded against the purchaser before the purchaser acquired title to real property.

A purchase money mortgage taken by the real property vendor or by a third party (a bank) in order for the buyer to purchase title to the property, has priority over recorded judgments previously filed and existing against the mortgagor-purchaser even though they were prior in time. 55 C.J.S. (Mortgages) §§ 231 & 348; 78 N.Y. Jur.2d (Mortgages) §217; Siegel, New York Practice, § 517 at 877 (par. 2) (4th ed. 2005).

A purchase money mortgagee takes free from a prior recorded judgment. CPLR 5203(a)(2). Thus, a purchase money mortgage lien “given to secure the repayment of the purchase price of [the judgment debtor’s] interest in the property prevails over a prior recorded judgment against the mortgagor.” Restatement Third of Property (Mortgages) § 7.2(b) (1997); Carlson, Critique of Money Judgment Part One, 82 St. John’s Law Rev. 1291, 1330-32 (2008).

In determining whether it is a true purchase money mortgage, courts look to the use of the money and whether the proceeds were applied to the purchase price. The purchase money mortgage priority does not extend beyond the money advanced ($30,000) for buying the property, and thus, does not cover sums used ($10,000) for other purposes, such as, to operate her law practice.

As a result (C) is the correct answer and (A), (B) and (D) are incorrect.
13. A homestead was located in a county which had a grantor-grantee index and the following recording statute:

Every conveyance not recorded is void as against any subsequent purchaser or mortgagee who in good faith, without notice, and for valuable consideration ... is first to duly record.

The actual and record owner of the homestead deeded the property to his son in 2002. In 2006, in need of money, the owner sold the homestead to a buyer who promptly recorded. The buyer was unaware of the owner’s previous deed to his son. The son, unaware of the 2006 sale, finally recorded his deed in 2007.

This year, the buyer contracted to sell the property to his friend, who immediately contacted a title company to handle the closing for him. The title company maintained a tract index, and therefore, knew about the deed to the son and the deed to the buyer. Notwithstanding this knowledge, the friend paid the buyer for a deed to the homestead and recorded the deed.

If the friend brings an action to determine ownership of the homestead, is the friend likely to prevail?

(A) Yes, because the buyer was a bona fide purchaser.
(B) Yes, even if the buyer was not a bona fide purchaser, the deed from the owner to the son was recorded outside of the chain of title.
(C) Yes, because of the son’s laches.
(D) No, even if the buyer was a bona fide purchaser, the title company’s knowledge of the deed from the owner to the son is imputed to the friend, and prevents him from claiming a bona fide purchaser status.

13. In this race-notice recording statute jurisdiction, the friend had knowledge of the 2002 deed from the owner to the son because his agent, the title company, had actual knowledge of the existence of the deed. Therefore, the fact that the deed might not provide constructive notice because it was recorded out of the chain of title is irrelevant.

The friend cannot attain the status of a bona fide purchaser on his own, but he can take the status of a bona fide purchaser under the shelter doctrine because the buyer purchased for value and without notice of the son’s interest. Because the buyer’s title is protected by the recording statute, he has the ability to convey good title to anyone, even a person who knew (like the friend) of the prior deed from the owner to the son. (A) therefore is the correct answer.

(B) is incorrect because the friend cannot rely on the failure of the son to record in the proper order, since the friend had actual knowledge of the deed from the owner to the son. If the friend did not have actual knowledge of that deed, (B) would be correct because the friend, as a bona fide purchaser, would then cut off the son’s rights.

A party’s failure to promptly seek equitable relief allows the defense of laches to be asserted, provided the party asserting it can show substantial prejudice resulting from the other party’s delay. Dwyer v. Mazzola, 171 A.D.2d 726 (2nd Dep’t 1991). First, it is questionable whether the parties’ action is equitable since the ordinary action of declaratory judgment is the preferred vehicle for a court determination as to who holds title. Also, laches does not apply to the recording statutes. Thus, (C) is incorrect.

(D) is incorrect because, if the buyer is a bona fide purchaser, he can cut off the son’s rights and give good title to the friend, even if the friend knew of the owner-son deed.
14. As a wedding gift, a father deeded property to his daughter, who did not record immediately. One year later, the father died, naming his son in his will to receive the property. Thereafter, the daughter recorded the deed.

A statute in the jurisdiction provides:

No instrument affecting real estate is valid against subsequent purchasers for valuable consideration, without notice, unless it is filed in the office of the recorder before the subsequent purchaser for value takes its interest.

In an appropriate action, the daughter claims that she has the right to the property.

Will the daughter prevail?

(A) Yes, because the father’s knowledge is imputed to the son.
(B) Yes, because the father did not own the property at the time of his death.
(C) No, because the daughter did not pay consideration for the property.
(D) No, because the daughter did not record within a reasonable time.

14. A “notice” recording statute provides strong incentive for every grantee of an interest in realty to record and put the world on notice of the newly created interest. The notice statute simply states that every conveyance that is not recorded will be defeated by a subsequent bona fide purchaser or mortgagee. Under a notice statute (as opposed to a race-notice statute), the subsequent purchaser does not have to be the first to record.

The deed from the father to his daughter conveys title to the daughter, even though there is no consideration for the deed, because it is a valid gift. Under this notice recording statute, the daughter’s failure to record could cause her to lose title to a bona fide purchaser from the record owner. In this case, if the father had subsequently deeded to a bona fide purchaser, that person would prevail over the daughter’s unrecorded deed. However, the son is not a bona fide purchaser because he did not pay value for the property, and thus he cannot prevail over his sister.

(A) is incorrect because the father’s, or for that matter the son’s, knowledge of the transfer is irrelevant. The son is not a subsequent bona fide purchaser for value. Thus, the recording system does not operate to protect him. Whether or not he had knowledge of the transfer makes no difference with respect to his ownership vis-a-vis the daughter.

(B) is correct. The deed from the father to the daughter conveyed the property to the daughter. This was a perfectly valid gift. Since the daughter is now the owner of the property, the son inherits no interest in the property.

(C) is incorrect because the daughter need not pay any consideration in order to own the property. The first grantee does not have to pay consideration; only the subsequent purchaser (to qualify as a bona fide purchaser) must pay value in order to prevail over the prior unrecorded interest. Rivas v. McDonnell, 308 A.D.2d 572, 573 (2d Dep’t 2003). The father may make a gift of the property to the daughter if he so wishes.

(D) is incorrect because there is no requirement that a purchaser or grantee record within a reasonable time. He may fail to record for years, so long as there is no subsequent bona fide purchaser from the record owner of the property who would prevail over him. He is still the owner of the property.
15. A landowner owned two lots abutting a road, lot 1 and lot 2. He deeded lot 1 to a buyer and inserted in the deed the following language: “Grantee, his heirs and assigns shall not plant any shrubbery within ten feet of the boundary line.” The buyer recorded, and subsequently deeded lot 1 to his son, but did not include the language about the shrubbery in the deed. The son planted a row of shrubbery within five feet of the boundary line.

The landowner sued the buyer’s son to require him to remove the shrubbery.

Who will prevail?

(A) The landowner will prevail because there is a covenant running with the land.

(B) The landowner will prevail because the deed from the buyer to his son carried with it an implied promise not to plant shrubbery within ten feet of the common boundary with the lot.

(C) The son will prevail because the deed from the landowner to the buyer created only a personal contract between them.

(D) The son will prevail because there was no writing signed by the buyer, the son’s predecessor in title.

15. The covenant in the buyer’s deed will be enforceable against the buyer’s successor, his son, only if the covenant runs with the land, either at law or as an equitable servitude. The covenant was created by a signed writing. The buyer’s acceptance and recording of the deed containing the covenant is the legal equivalent of his signature. Therefore, the covenant is clearly enforceable between the original parties. Therefore, (D) is an incorrect answer.

The covenant clearly was intended to run with the land and bind the grantee’s successors; the covenant states that it binds the “[g]rantee, his heirs and assigns.” This is referred to as vertical privity. The covenant also clearly touches and concerns the land, since it controls the grantee’s land use (for the benefit of the grantor’s adjoining land).

Here, there is horizontal privity because the covenant was contained in the original deed between the covenantor and convenantee in which the two original parties intended that the covenant run with the land to future assignees of both lands. Also, the son is in vertical privity with the buyer, because the son purchased from the buyer and is in the chain of successive ownership. “This is commonly (though not universally) termed vertical privity because the remote party usually appears beneath the covenantor and covenantee in a diagram of the transaction such as a law teacher might draw on the blackboard.” Stoebuck, The Law of Property § 818 at 483 (3d ed. 2000). This type of privity traces the land back to a common owner who imposed the restriction. Therefore, the covenant runs at law to the buyer’s successor, his son. The fact that the covenant was recorded in the son’s chain of title would also give him constructive notice of the covenant such that it could be enforced against him as an equitable servitude. Under either theory, the landowner will prevail. Therefore, (A) is the correct answer and (C) is incorrect. (B) is an incorrect answer because it is only a poor and partial explanation of the law involved.

Because our law favors the free and unobstructed use of realty, a restrictive covenant must be strictly (narrowly) construed by courts against those seeking to enforce the covenant. Thus, a New York appellate court held out a restrictive covenant prohibiting a hedge exceeding five feet in height did not prohibit planting 54 cypress trees in a dense linear formation along the boundary line. Ford v. Fink, 84 A.D.3d 725 (2d Dept 2011).
16. An owner of a 100-acre tract prepared and duly recorded a subdivision plan which contained 90 one-acre lots and a ten-acre tract in the center that was designated as a public school. The owner published and distributed a brochure promoting the subdivision, which emphasized the proximity of the lots to the school property and indicated potential tax savings “because the school district will not have to expend tax money to acquire this property.” There was no specific statute concerning the dedication of school sites.

The owner sold 50 of the lots to one purchaser. Each deed referred to the recorded plan and also contained the following clause: “No mobile home shall be erected on any lot within the subdivision.”

Subsequently, the owner sold the remaining 40 lots and the ten-acre tract to a businessman by a deed which referred to the plan and contained the restriction relating to mobile homes. The businessman then sold the 40 lots to individual buyers and the ten-acre tract to an entrepreneur. None of the deeds from the businessman referred to the plan or contained any reference to mobile homes.

The entrepreneur announced his intention to erect a fast-food restaurant on the ten-acre tract, and the purchaser filed an action to enjoin him from doing so.

If the court rules for the purchaser, what is the reason?

(A) The purchaser has an implied reciprocal servitude running with the land concerning the use of the tract.

(B) The purchaser, as a taxpayer, has a legal interest in the use of the tract.

(C) The purchaser is an intended beneficiary of the owner’s promise with respect to the tract.

(D) The entrepreneur is not a bona fide purchaser.

16. If the purchaser is going to prevent the entrepreneur from erecting a fast food restaurant on the ten-acre tract, she must establish an interest in the tract, which she derives from her ownership of a lot in the subdivision.

If the municipality has an interest in the land through dedication, the municipality, and not the purchaser, as a taxpayer, is the appropriate person to enforce it. (B) is, therefore, incorrect.

Likewise, the issue of whether the entrepreneur took with notice of the interest of the municipality, i.e., whether or not she is a bona fide purchaser, is an issue for the competing fee owner, not a landowner in the subdivision, to litigate. Therefore, (D) is incorrect.

Even if the purchaser could be portrayed as an intended beneficiary of a promise made by the owner to some third party, the purchaser’s right to enforce such a contractual promise is the minority view and, therefore, (C) is not the best answer.

(A) is correct. When the owner conveyed a lot to the purchaser by reference to a plan showing the school site, he agreed to burden that ten-acre tract of his remaining land by restricting its use to a school site. Since the school use was permanent, there was an intention that the burden of this covenant run with the land as an implied reciprocal servitude. The entrepreneur, as the owner’s successor in title, is bound by the businessman’s promise, which can be specifically enforced in equity as an implied reciprocal servitude.
17. On January 1, 2001, an adverse possessor entered into open, notorious, hostile and exclusive possession of a tract of land and maintained that possession continuously. In the state where the land is located, the statute of limitations to recover possession of real property was ten years, and the age of majority is 18 years.

On January 1, 2008, the record owner of the property, which was being adversely possessed, died, leaving his entire estate to his son, who was born on January 1, 2000.

In 2013, the adverse possessor consulted with an attorney to determine when he would have title to the tract of land, provided that he maintains continuous, open, notorious, hostile and exclusive possession until that date.

What would the attorney’s best advice be as to when title vests by adverse possession?

(A) On January 1, 2011, 10 years after he went into possession.
(B) On January 1, 2018, when the owner’s son attains majority.
(C) On January 1, 2021, 20 years after he adversely possessed against the owner’s son.
(D) On January 1, 2028, 10 years after the owner’s attained majority.

17. The statute of limitations begins to run against the record owner of property at the time the adverse possessor goes into possession. The minority or disability of the record owner at that time will prevent the statutory period from starting to run, but once the period begins to run, the subsequent infancy or disability of the record owner will not interrupt the period. Accordingly, the minor age of the owner’s son is irrelevant, making (B) and (D) incorrect answers.

The only time that the statute of limitations period begins to run anew against a successor in title is when the possessor first entered possession during a life estate or other similarly limited estate. Then the period does not begin to run against the remainderman until the remainderman has the right of possession. When the possessor first takes possession during a fee estate, the statutory period is not interrupted by a conveyance or devise of the property. Thus, (C) is an incorrect answer.

Since the statutory period is not tolled by any of the given facts, (A) is the correct answer.
18. A brother and sister owned adjoining land, lots 1 and 2, respectively. The front of the sister’s home (lot #2) together with her driveway is on a side street, while the front of the brother’s home (lot #1) is on the main road. The brother granted an easement to his sister to use a driveway through his property in order to access the main road. Although, the easement was properly recorded in both chains of title, the sister never made use of the driveway. Subsequently, the brother and sister sold their respective lots to the same buyer. Neither deed mentioned the easement.

One year later, the buyer sold lot 2 to his friend. The deed was properly recorded and did not mention the easement.

Does the friend have a right to use the driveway across lot 1?

(A) Yes, because the recorded easement appears in the chain of title of both lots 1 and 2.
(B) Yes, because there was the benefit of a quasi-easement on the property when the friend purchased it that ripened into an easement by implication.
(C) No, because the easement was destroyed by merger.
(D) No, because the easement was destroyed because it was abandoned.

18. When the buyer became the owner of both lot 1 and lot 2 at the same time, the easement granted by the brother to the sister was destroyed by merger. It was not automatically recreated when ownership of the two parcels again became separate, and therefore (C) is correct. Simone v. Heidelberg, 9 N.Y.3d 177 (2007); Pieper, NYAA pp. 651-52 (2014).

The recording of the easement provides notice to subsequent purchasers but, in this case, notice is irrelevant because the easement was destroyed by merger. (A) is therefore incorrect.

(B) is incorrect because the presence of another driveway eliminates the reasonable necessity to support an easement by implication. Also, there are no facts demonstrated that the quasi-easement was used by the common owner; without sufficient use, an easement by implication will not arise when the property is again subdivided.

(D) is incorrect because mere non-use, without an intent to abandon, does not terminate an easement.
19. A landowner and his neighbor owned adjoining parcels of land, parcel 1 and parcel 2, respectively. Parcel 2’s only access to the street was through a driveway on parcel 1. The landowner granted his neighbor an easement, which was properly recorded, to use a driveway over parcel 1, which connected parcel 2 and the town’s main street.

Subsequently, a buyer bought both parcels. Neither deed mentioned the easement. The buyer continued to use the driveway over Parcel 1 to access Parcel 2.

The buyer owned both parcels until last year, when he sold parcel 1 to his sister, and shortly thereafter, sold parcel 2 to his brother. Again, both deeds were properly recorded and neither mentioned the easement.

Does the brother have the right to use the easement across parcel 1?

(A) Yes, because the recorded easement appears in the chain of title of both parcel 1 and parcel 2.
(B) Yes, because there was the benefit of a quasi-easement on the property when the brother purchased it, which ripened into an easement by implication.
(C) No, because the easement was destroyed by merger.
(D) No, because the deed to him failed to mention the easement.

19. The essential difference between this question and the previous one is the lack of access to parcel 2 except via the easement and the buyer’s continued use of the quasi-easement. Because the common owner continued to use the quasi-easement as the only access to Parcel 2, when the buyer conveyed to the brother, he created an easement by implication over the driveway on parcel 1, and (B) is correct.

(A) is incorrect because the earlier easement by grant was destroyed by the merger of title in the buyer and was not recreated as an easement by grant at the time of the conveyance by the buyer to the brother.

When the buyer became the owner of both parcel 2 and parcel 1 at the same time, the easement granted by the landowner to his neighbor was destroyed by merger. It was not automatically recreated when ownership of the two parcels again became separate. However, (C) is incorrect because an easement by implication was created by the deed from the buyer to the brother.

(D) is incorrect because an easement by implication is created under these circumstances without any need for express terms in the deed.
20. The owner of property in fee simple borrowed money from a bank and executed a mortgage and a promissory note for the amount secured by a mortgage on the property, which was duly recorded.

The mortgage contained the following provision:

In the event that the mortgagor shall sell or transfer the property secured by this mortgage, the entire principal balance of the mortgage shall be due and payable immediately at the option of the mortgagee.

One year later, the owner sold the property to a buyer without paying off the mortgage or notifying the bank.

Which of the following is the most accurate statement of the bank’s rights when it discovered that the owner sold the property to the buyer?

(A) The property is not alienable without the permission of the bank.
(B) The quoted mortgage provision is against public policy and unenforceable.
(C) The bank cannot object to the assumption of the mortgage by the buyer if the buyer personally endorses the mortgage note and there are no arrears on the note owed by the owner.
(D) The bank may demand payment of the mortgage note in full.

20. The provision in the mortgage is a “due-on-sale” clause. It is valid and gives the bank the right to accelerate the mortgage if the property is sold or transferred. (D) is the correct answer, and (B) and (C) are incorrect.

When a mortgage contains a due-on-sale clause, it is irrelevant that the note is not in arrears or that the note is personally assumed by the new owner. The due-on-sale clause gives the mortgagee the right to accelerate the balance of the mortgaged debt if the property is sold or transferred by the mortgagor-debtor.

The provision does not affect the alienability of the property. (A) is therefore incorrect.
21. The owner of land in fee simple borrowed $50,000 from a bank and executed a mortgage and a promissory note for the amount secured by a mortgage on his land, which was duly recorded. One year later, the owner sold the land to his friend, and gave him a quitclaim deed which did not contain any reference to the mortgage. The deed was promptly recorded. After that transfer, the owner defaulted on the mortgage loan to the bank, and the bank initiated the appropriate foreclosure proceedings. The land was sold to a buyer who paid $40,000, the fair market value of the property.

The bank brought an appropriate action against the owner for a deficiency judgment, and the friend sued the owner because the bank foreclosed on the property which the owner sold to the friend, depriving the friend of ownership of the property.

Who will prevail against the owner?

(A) The friend only.
(B) The bank only.
(C) Both the friend and the bank.
(D) Neither the friend nor the bank.

21. Since the owner signed the mortgage note to the bank, he is liable on it (unless there is a novation), even if he conveys the property. Therefore, the bank still has an action against the owner. The owner gave the friend a quitclaim deed. As such, there was no covenant against encumbrances given by the owner to the friend and therefore, the friend does not have an action against the owner. (B) is therefore the correct answer.
22. On February 1, the owner of a jewelry store in fee simple, free and clear of all encumbrances, signed a promissory note to a bank for $200,000. The note was secured by a mortgage on the property, which was duly and promptly recorded. On February 25, the owner signed a promissory note to a credit union for $50,000 secured by a mortgage on the property, which was also duly and promptly recorded.

In May and June, the store owner failed to make the required monthly payments to the bank, causing it to accelerate the note. However, the owner continued to make the required payments on the second mortgage note.

In July, the bank commenced foreclosure proceedings, sent all required notices to, and instituted legal action against the owner, but did not notify the credit union of its action. On August 5, the bank held a foreclosure sale, bid the amount of the first mortgage, and deeded the jewelry store to itself. The credit union learned of the bank’s action on August 15 when payment on its note was not made.

The credit union consulted an attorney concerning the appropriate actions it could take with a reasonable likelihood of success.

What would the attorney’s best advice be?

(A) The credit union would not be successful if it brought an action for declaratory judgment against the bank seeking a declaration that the credit union’s mortgage lien was a valid encumbrance on the property.

(B) The credit union would be successful if it sued the owner on its mortgage note.

(C) The credit union would be successful if it brought an action against the bank seeking title to the jewelry store.

(D) The credit union does not have an available remedy under these circumstances.

22. Since the first mortgagee failed to give notice of its foreclosure proceeding to the second mortgagee, the foreclosure is ineffective against the second mortgagee. As such, the second mortgagee can obtain a decree that its mortgage is still a valid lien on the property. (A) is therefore incorrect. The foreclosure does not eliminate the obligation of the issuer of the second mortgage note. Therefore (B) is correct. The second mortgagee cannot obtain title to the property merely because it was not notified of the foreclosure. Therefore, (C) is incorrect, as it is not an available remedy.

Since the credit union can bring an action for declaratory judgment against the bank seeking a declaration that the credit union’s mortgage lien is a valid encumbrance on the property (as stated in choice (A)), and choice (B) also represents a remedy available to the credit union, choice (D) is incorrect.

In New York, the answer would be the same. The absence of a necessary party in a mortgage foreclosure action simply leaves that party’s rights in the property unaffected by the judgment of foreclosure sale. Scharaga v. Schwartzberg, 149 A.D.2d 578, 579-80 (2d Dep’t 1989).

When this happens in New York, under RPAPL § 1352’s “strict foreclosure” rules, the court fixes a time period for the omitted junior mortgagee either to foreclose on her own subordinate mortgage (very rare because no one would bid on it) or to redeem the property by paying off the first mortgage within a time fixed by the court. Nelson & Whitman, Real Estate Finance Law § 7.15 at 579 (4th ed. 2001); 6820 Ridge Realty LLC v. Goldman, 263 A.D.2d 22 (1999). New Jersey also follows this strict foreclosure procedure. Citicorp Mortgage, LLC v. Pessin, 238 N.J. Super 606, cert. denied 122 N.J.213 (1990).
23. The owner of a residence worth $100,000 requested a loan of $60,000 from a lender using the residence as security. The lender agreed to the loan, on the condition that the homeowner promise to convey the residence to the lender outright by warranty deed as security for the loan’s repayment. At the same time the lender orally agreed to reconvey the residence to the homeowner once the homeowner paid the loan according to the terms. Thereafter the homeowner conveyed the residence to the lender by warranty deed, and the lender paid the owner $60,000 cash. The lender promptly and properly recorded the owner’s deed.

Subsequently, the homeowner, while in possession of the residence, defaulted with $55,000 still due on the loan.

Which of the following best states the parties’ rights in the residence?

(A) The lender’s oral agreement to reconvey is invalid under the Statute of Frauds, so the lender owns the residence outright.
(B) The homeowner, having defaulted, has no further rights in the residence, so the lender may obtain summary eviction.
(C) The attempted security arrangement is a creature unknown to the law, hence a nullity; the lender has only a personal right to $55,000 from the homeowner.
(D) The lender should bring whatever foreclosure proceeding is appropriate under the laws of the jurisdiction.

23. This arrangement is called an equitable mortgage security deed. The deed does not mention the underlying debt arrangement, but equity treats it as a mortgage requiring the mortgagor’s equity of redemption to be extinguished by a foreclosure action, judgment and sale. New York’s Real Property Law §320 is in accord: “[a] deed conveying real property, which by any other written instrument, appears to be intended only as security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage.” Booth v. Landau, 103 A.D.2d 733 (2d Dep’t 1984).

Accordingly, choice (D) is the best choice, since it’s a mortgage by operation of law. See Bank v. Kouri, 3 A.D.3d 213 (1st Dep’t 2004).
24. A buyer and seller entered into a written contract for the sale of the seller’s residence for $100,000. The agreement provided that the buyer would go into possession of the residence, but the seller would not deliver the deed until the $100,000 purchase price was fully paid off at $10,000 annually, plus 10% interest per year for ten years.

The buyer took possession and made the annual payments for six years, when he died suddenly of a heart attack. No more payments were made and the contract went into default. In his will, the buyer left the residence to his son. An appropriate action was brought to determine title to the residence.

In such action, which principles would the son want the Surrogate to consider?

(A) Equity of redemption only.
(B) Equitable conversion, equitable mortgage, and equitable exoneration only.
(C) Equitable conversion and equitable mortgage only.
(D) Equity of redemption, equitable conversion, equitable mortgage, and equitable exoneration.

24. An equitable mortgage holder must eliminate the mortgagor’s “equity of redemption” before he can claim title in the secured real estate. Thus, the son would want the Surrogate to consider equity of redemption. Regardless of the form of the transaction, “once a mortgage, always a mortgage.” Thus, the lender or creditor must commence a mortgage foreclosure action to cut off the buyer’s equity of redemption.

The signed contract gave the buyer and his heirs equitable title to the residence under the doctrine of equitable conversion. Thus, equitable conversion is applicable.

The installment sale arrangement would give rise to an equitable mortgage. Thus, equitable mortgage is also applicable.

Whether the estate should pay off the balance of the debt (equitable exoneration) when the property passed to the buyer’s son is also a relevant issue. Thus, equitable exoneration is applicable. Accordingly, choice (D) is correct since it includes all of the principles the son would want the surrogate to consider.

By statute in New York, absent contrary language in the buyer’s will, the debt would not be exonerated by the estate but the property would pass to the son “subject to” the son’s payment of the balance of the purchase price. EPTL §2-1.9; G.O.L. §5-705.
25. On June 1, a landlord entered into a written one-year residential lease with a tenant for a single-family house and surrounding land commencing July 1. The lease did not contain any provisions concerning the destruction of the leased property. The tenant entered into possession on July 1. The house was completely destroyed on September 15 by a hurricane.

Which of the following is the best description of the legal rights and obligations of the landlord and the tenant in a jurisdiction where the matter is not regulated by statute?

(A) Since the land was not destroyed, the tenant has the exclusive right to occupy it and must pay the rent required under the lease.

(B) The landlord must rebuild the building and the tenant’s rent is abated until it is rebuilt.

(C) The tenant must rebuild the premises.

(D) The destruction of the premises terminates the lease, ending the obligations of both the landlord and the tenant.

25. Although the common law rule regarding liability for rent after destruction of the leased premises has been modified by statute in most jurisdictions, the facts expressly state that there is no relevant statute in this jurisdiction. Thus, we apply the common law rule that, even though the leased premises have been destroyed, the lease is in essence a lease of land (not improvements). Because the land remains after the hurricane, the tenant is liable for the rent. Therefore, (A) is the correct answer.

Again, under the common law, a lease was primarily (if not exclusively) considered a lease of the land. Thus, the landlord has no obligation to rebuild the building, unless the lease calls for it. Thus, (B) is an incorrect answer.

The tenant would be required to rebuild the premises only if he was responsible for its destruction. As that is not the case here, (C) is an incorrect answer.

(D) would probably be the answer under most modern statutes, but that is not the question asked here.
26. An owner of property owned lot 1 and lot 2. The owner gave his agent oral authority to lease both lots. By written agreement, the agent leased lot 1 to a man for two years. The agent and a woman orally agreed to a one year lease for lot 2. The owner repudiated both leases, and the man and the woman sued the owner. The owner interposed the defense of the Statute of Frauds as to both leases.

Is the owner’s Statute of Frauds defense likely to be successful?

(A) Yes, as to the written lease of lot 1 but not as to the oral lease of lot 2.
(B) Yes, as to the oral lease of lot 2 but not as to the written lease of lot 1.
(C) Yes, as to both leases.
(D) No, as to either lease.

26. The Statute of Frauds provides that a contract for a lease period in excess of one year or for the sale of real property is voidable unless it is in a writing signed by the party to be charged or by his agent, whose authority is contained in a signed writing. Whenever the law requires a writing involving real property and the writing is signed by an agent, the agent’s authority also must be in writing. A written contract was not necessary to lease lot 2 for not more than one year; thus, the oral lease was not voidable. The lease of lot 1 was voidable, however, because a written lease was necessary and because the agent’s authority to bind his principal was not in writing. Thus, choice (A) is the best answer.
27. The owner of a farm containing 200 acres of corn fields died, and, by his will, left the farm to his second wife, for life, remainder to his son by his first marriage. In the fall, the second wife was told by her doctor that she had six months to live. In the spring, she hired workers who planted, tended to and fertilized the corn fields. The second wife died intestate in July before the corn was harvested, survived by her only heir, her daughter. After his stepmother’s death, the son took possession of the farm, and the daughter asked the son for permission to go on the land and harvest the corn crop.

When the son refused, the daughter commenced an appropriate action to order the son to permit her to harvest the corn.

In such an action, what will the court decide?

(A) The daughter has a right to harvest the corn and keep it.

(B) The daughter has a right to harvest the corn, but she must account to the son for that portion of the growing season when the son owned the farm.

(C) The son is entitled to the corn, because the second wife should have realized that her life tenancy would end during the growing season.

(D) The son is entitled to the corn, because it is real property passing to the son at the second wife’s death.

27. Generally, crops are classified as personal property rather than real property. Thus, (D) is an incorrect statement of the law because, under the law of emblements, the life tenant’s estate can harvest and remove crops planted during the life tenant’s lifetime. Stoebuck, The Law of Real Property § 4.9 at 168 (3d ed. 2000).

Remember, UCC § 2-107 treats the “sale” of crops as the sale of goods regardless of whether they are to be severed from the land by the seller or the buyer.

More specifically, under the doctrine of emblements, if a life tenancy is terminated before the annual crops planted by the tenant are ready to harvest, the life tenant (or the life tenant’s estate) owns the crops and has the right to enter the land to harvest them at the appropriate time. Thus, the second wife’s right to the crops passed to her daughter as her only heir, and she has the right to enter the land to harvest them, despite the son’s right to possess the land. Thus, (A) is the correct answer. The law of emblements applies to any tenancy of indefinite duration (life estate, tenancy at will, or periodic tenancy) that is not voluntarily terminated by the tenant or caused by the tenant’s breach of the lease. Stoebuck, The Law of Real Property § 4.9 at 168 (3d ed. 2000).

(B) is an incorrect statement of the law. The daughter does not owe any share of the crop to the son.

(C) is an incorrect statement of the facts and the law. The second wife is not required to guess when her life might end, nor are we allowed to use hindsight to say she should have known. To hold otherwise would discourage life tenants from making full use of the property.
28. A mother owned a tract of land in fee simple and, by her will, specifically devised it as follows:

To my daughter, her heirs and assigns, but if my daughter dies survived by a husband and a child or children, then to my daughter’s husband during his lifetime with the remainder to my daughter’s children, their heirs and assigns. However, if my daughter dies survived by a husband and no child, the land is specifically devised to my nephew, his heirs and assigns.

While the mother’s will was in probate, the nephew quitclaimed all his interest in the land to the daughter’s husband. Three years later, the daughter died, survived by her husband but no children. In her will, the daughter devised her interest in the land to her husband. The only applicable statute provides that any interest in land is freely alienable.

If the nephew brings an action against the husband to establish title to the land, who will prevail?

(A) The nephew, because his quitclaim deed did not transfer his after-acquired title.
(B) The nephew, because the husband took nothing under the mother’s will.
(C) The husband, because the nephew had effectively conveyed his interest to the husband.
(D) The husband, because the doctrine of after-acquired title applies to a devise by will.

28. The husband possessed an executory interest in the land as the result of the devise by the mother. If the daughter died, survived by her husband and no children, then the nephew would receive the land on the death of the daughter. This is a valid executory interest under the Rule Against Perpetuities because it will vest, if at all, at the death of the daughter. Under modern law, an executory interest is alienable even if the contingency has not occurred to make it possessory. Thus, the quitclaim deed effectively conveyed the executory interest to the husband. When the daughter died, survived by no children, her husband’s interest ripened into a fee simple interest. Therefore, (C) is correct.

(A) and (D) are incorrect because this question does not involve after-acquired title. At the time the nephew gave his quitclaim deed, he was the holder of an executory interest which he conveyed. It is this interest which later ripened into a fee simple interest.

(B) is incorrect because the husband acquired his interest from the quitclaim deed of the nephew, even if he took nothing under the mother’s will. Therefore, the nephew cannot prevail. Suffolk Business Center, Inc. v. Applied Digital Data Systems, Inc., 78 N.Y.2d 383 (1991); Pieper, NYAA at 646 (2014).
29. A grantor conveyed her only parcel of land to a grantee by a duly executed and delivered warranty deed, which provided:

To have and to hold the described tract of land in fee simple, subject to the understanding that within one year from the date of the instrument said grantee shall construct and thereafter maintain and operate on said premises a public health center.

The grantee constructed a public health center on the tract within the time specified and operated it for five years. At the end of this period, the grantee converted the structure into a senior citizens’ recreational facility. It is conceded by all parties in interest that a senior citizens’ recreational facility is not a public health center.

The grantor sought a declaration that the change in the use of the facility caused the land and structure to revert to her.

Will the grantor prevail?

(A) Yes, because the language of the deed created a determinable fee, which leaves a possibility of reverter in the grantor.

(B) Yes, because the language of the deed created a fee subject to a condition subsequent, which leaves a right of entry or power of termination in the grantor.

(C) No, because the language of the deed created only a contractual obligation and did not provide for retention of a property interest by the grantor.

(D) No, because an equitable servitude running with the land was created.

29. Courts will avoid finding that a grant creates a qualified fee estate whenever possible. Thus, since the grantor did not use the words recognized at common law as creating a fee simple determinable or fee simple subject to a condition subsequent and did not expressly reserve any future interest, a court will not find that this grant created a fee simple determinable or a fee simple subject to a condition subsequent. Because no words of re-entry or forfeiture were used in the deed, (A) and (B) are incorrect.

Here, a court would find that the language after the words of conveyance merely created a covenant. Thus, (C) is the correct answer.

Even if the grantor had a claim that the grantee’s land is subject to an equitable servitude, enforcement of an equitable servitude will never give title to the grantor; this only give rise to a claim for damages and/or injunction. All she could hope is to force the grantee to continue to use the property as a public health center. As that is not the issue here, (D) is an inapplicable answer. Suffolk Business v. Allied Digital, 78 N.Y.2d 383 (1991); see Pieper, NYAA at 646 (2014).

A covenant running with the land was not created in this fact pattern because it was the only parcel of land owned by the grantee. Thus, it did not fit into any of the three classes of covenants running with the land.
30. A grandfather died and left his land “to my son and his heirs, but if he dies without children surviving, then to my nephew and his heirs.” The land was improved by a large ranch house designed and built years earlier by the grandfather’s father with the help of the nephew’s father.

At a time when he was childless, the son informed the nephew of his plan to tear down the house on the land. The nephew brought an action to enjoin the son’s plan alleging that it constituted waste.

Who will prevail?

(A) The son will prevail, because he has a fee simple interest in the property.
(B) The son will prevail, because the nephew has no real interest in the property.
(C) The nephew will prevail, because a contingent remainderman may enjoin waste.
(D) The nephew will prevail, because he has a vested interest as long as the son has no children.

30. The conveyance from the grandfather creates a fee simple subject to an executory condition in his son and an executory interest in his nephew. The nephew’s future interest does not violate the Rule Against Perpetuities because it will vest, if at all, by the end of a life in being (the son’s life). Therefore, (B) is an incorrect answer. The nephew is not a contingent remainderman. A remainder cannot follow a fee simple. A fee simple subject to a condition subsequent can only be followed by a right of entry (if held by the grantor) or an executory condition (if held by a third party). Therefore, (C) is an incorrect answer. The nephew’s interest also is not vested until the precondition (the son’s death without children) comes to pass. Therefore, (D) is an incorrect answer.

While a life tenant is prohibited from committing waste on the property, a fee simple owner is not, even if he holds only a qualified fee simple. Therefore, (A) is the correct answer.
31. A grandfather desired to transfer his property to a trustee “to hold said property until there is no possibility of my having any more grandchildren, and at that time distribute said property to my grandchildren then surviving, in equal shares.”

In which of the following situations will such a transfer violate the common law Rule Against Perpetuities?

(A) The grandfather makes the transfer by his will.
(B) The grandfather transfers the property to the trustee in a revocable inter vivos trust.
(C) The grandfather has been given a general power of appointment by his mother’s will. It is exercisable either inter vivos or by will. The grandfather exercises that power by his will.
(D) The grandfather makes the transfer by an irrevocable inter vivos trust.

31. The transfer will not violate the Rule Against Perpetuities as long as, at the start of the perpetuity period, all of the grandfather’s children are in being or already dead, because all of the grandfather’s grandchildren must be born during the lives of his children. However, if the time for the Rule starts to run before the grandfather’s death, it is possible for him to have another child who will not be a measuring life, and who could be born later than a period measured by lives in being plus 21 years. Therefore, in those cases where the Rule starts to run at the grandfather’s death, there will be no violation.

A will is ambulatory until death, and therefore the perpetuities period does not run during the grandfather’s lifetime. (A) is therefore incorrect.

The perpetuities period does not run while a trust is revocable. It only becomes irrevocable at the grandfather’s death, at which time there will be no perpetuities violation. Therefore, (B) is incorrect.

The grandfather has complete control of property over which he has a general inter vivos power of appointment. Therefore, the period of perpetuities does not run from the creation of the power, but from its exercise, which occurred at the grandfather’s death, making (C) incorrect.

Power to control an asset is lost if it is placed in an inter vivos irrevocable trust. The period of perpetuities starts to run at the creation of the trust, which was during the grandfather’s lifetime. Therefore the Rule Against Perpetuities is violated, and (D) is correct.
32. In 1995, a grantor executed and delivered a deed conveying his tract of land as follows:

“To my friend and his heirs, but if the land is used for other than residential purposes prior to 2013, then to my neighbor. If used for other than residential purposes in the year 2013 or thereafter, it shall revert to the grantor, his heirs or assigns.”

In 2005, the grantor died, leaving a valid will which did not contain a residuary clause, in which he devised all of his real estate to his brother. The grantor was survived by his brother and by his son, who was his sole heir.

In the state where the land is located, the common law Rule Against Perpetuities applied. The state also has a statute providing that, “All future estates and interests are alienable, descendible, and devisable in the same manner as possessory estates and interests.”

This year, the friend and the brother entered into a contract to sell the tract of land to a buyer in fee simple. After examining title, the buyer refused to perform on the ground that the friend and the brother could not give good title, and an appropriate action for specific performance was brought by the friend and the brother.

In such an action, should the court grant specific performance?

(A) Yes, because the friend and the brother together own a fee simple absolute in the land.

(B) Yes, because the friend alone owns the entire interest in the land.

(C) No, because the grantor’s son has a valid interest in the land.

(D) No, because the neighbor has a valid interest in the land.

32. This question tests one’s knowledge of the Rule Against Perpetuities as applied to the neighbor’s executory interests. To be valid, such an interest must vest, if it is ever going to vest, within 21 years. Since the friend and his heirs might use the property for residential purposes indefinitely, the interest need not vest during any particular life in being. Therefore, if the interest in the neighbor is to be valid, it must vest within 21 years. In this case the interest is valid because it must vest before 2013, within 21 years of its creation, if it is ever going to vest. Since the neighbor has a valid interest in the land, the prayer of the friend and the brother for specific performance will be denied, and (D) is the correct answer.

(C) is incorrect because the interest retained by the grantor (a possibility of reverter if the property should be used by the friend for nonresidential purposes after 2013) goes to the brother, his residuary legatee, and not his son, his sole heir.

(B) is incorrect because the friend does not have an exclusive interest in the land.

(A) is incorrect because the neighbor has an interest.
Seller’s Remedies

RULE: A defaulting MBE buyer may recover money deposited to the extent it exceeds the seller's actual damages sustained as a result of the buyer's breach.

RULE: In NY, however, the seller may keep the entire deposit, and the defaulting buyer may not, in law or in equity, recover any part of the down payment even if the seller resells the realty for an amount equal to or greater than the original contract price.

RULE: The seller may alternatively seek specific performance from B.

RULE: The seller may also seek out-of-pocket expenditures in reliance on the contract such as those related to evicting an existing tenant, refurbishing the premises to meet the contract's specifications, and the broker's commission, since such expenses are customary and foreseeable consequences of the breach. Reliance damages do not include, however, the seller’s payment of mortgage interest, taxes or the cost of insuring the realty until the house is sold, since these damages are not deemed within the contemplation of the parties when the contract was entered. The prevailing view in New York is that the measure of the seller’s damages does not include a broker’s commission, mortgage interest expenses, repair costs, utilities paid, or any taxes or interest paid since the breached closing date. Di Scipio v. Sullivan, 30 A.D.3d 677 (3d Dep’t 2006).
Buyer's Remedies

1. **Specific performance** -- in the court's discretion, it is available to both a buyer or seller because equity considers all realty sales "unique" (the seller should consider the defense of laches and the buyer should consider filing a lis pendens).

   If the court grants specific performance, it may also award consequential damages that were foreseeable by the breaching seller when the K was entered, e.g., where:

   A. the seller’s breach caused the buyer to obtain a new mortgage commitment with higher interest rates, or

   B. on the sale of rental property, the seller’s breach caused the loss of net rents paid by tenants occupying the property during the time period that the buyer was denied the property's use.

2. Sue the breaching seller in equity for **rescission** of the K and for **restitution** of any down payment. In asserting restitution, a buyer can also sue to foreclose the buyer's lien on the seller's property arising from a buyer's down payment on the contract of sale (file a lis pendens).

3. Sue the seller for **reliance damages** to compensate the non-breaching party for out-of-pocket expenses incurred in preparing for the contract's performance, e.g., out-of-pocket expenses paid to third parties (title insurance, surveys, etc.).

   B's recovery for preparation expenses, such as fees paid to architects or engineers for plans to build or renovate a structure, depend on their foreseeability (did the breaching seller know of or reasonably expect the buyer's preparation expenses).

4. Sue the breaching seller for the buyer’s lost profit (**expectation damages**) which is the difference between the contract price and market value of the land on the date of the breach. If the contract price and the market value (the resale price) are the same, expectation damages are not recoverable. See *White v. Farrell*, 20 N.Y.3d 487 (2013); (sale 14 months after breach).

   **Ex:** If the value of the land under a contract of sale for $150,000 had risen to $185,000 then if the seller breaches, the buyer could recover $35,000.

   **RULE:** In New York (and nearly half of the states), this expectation, lost profit recovery is available to a buyer only if the seller's refusal or inability to convey was done in "bad faith" (e.g., the seller never had title, the seller sold it to someone else for a higher price, the seller contracted to convey a better title than he had, or the seller refused to cure a curable title defect).

   **RULE:** In **New York**, if the breaching seller acted in good faith but could not tender a marketable title, then buyer's recovery is limited to restitution **damages** (the return of the deposit) plus reliance damages to compensate the buyer for his or her out-of-pocket expenses.
**Mortgage Foreclosure and Deficiency Judgment**

**Mortgage Foreclosure Example**
$800,000 Current Fair Market Value  
$500,000 1st Mortgage B Bank 2005  
$200,000 2nd Mortgage C Bank 2010  
Easement 2011  
$50,000 3rd Mortgage Uncle 2012  
5-Year Commercial Lease 2013

All persons with interests must be notified of the foreclosure sale. An auction will be held, usually resulting in a below market value sale price. $750,000 is what the creditors are seeking from foreclosure sale, but recognize that the first $500,000 goes to B Bank, the next $200,000 to C Bank, and so on. If the bidding only reaches, e.g., $450,000, then the property will be sold free and clear of all mortgages, B Bank will be repaid only $450,000 and C Bank’s mortgage, the easement Uncle’s mortgage, and the lease will be wiped out.

Therefore, those with interests often send a representative to ensure that the price is bid up to the level that protects their interest. So, e.g., if the bidding starts at $500,000, then B Bank’s representative will leave (because B Bank will get its money back and has nothing more to gain), but C Bank and Uncle have an interest in seeing the bidding go higher. If, e.g., the last bid is $525,000, C Bank may wish to “win” the bid and take the property (with the hope of being able to sell it at a higher price later (FMV is $800K)), pay B Bank $500K rather than realize a $175,000 loss. Uncle would have the same interest, but may not be able to afford it, particularly in light of his smaller stake. Depending on the value of the lease and easement, those holders may wish to protect their interests by buying the property at the auction.

**Deficiency Judgment Example**
$900,000 FMV in 2010  
$600,000 FMV at present because of market downturn and uninsured fire damage

The bank currently holds a $750,000 mortgage on the property. The mortgagor defaults and the bank forecloses. At the auction, the property sells for $500,000. The bank, therefore, is out $250,000. It may now seek a deficiency judgment from the mortgagor. How much may the bank collect? Only $150,000 (not $250,000) because the deficiency judgment only will be for the difference between what was owed ($750,000) and the fair market value of the property at the time ($600,000). The foreclosure sale price ($500,000) is not part of the equation.