1)

Date: Today
To: Senior Partner
From: New Associate
Re: Information For Your class on Property Tansactions

Dear Senior Partner:

Property is referred to as estates and we refer to the interest in the estate.
One who has dominion and control is said to have a present possessory interest.
Present Interests are those that are currently possessory in nature. Future Interests are those that may become possessory at some future time.

To begin a refesher course on property transactions let's first start with the ways property is transferred - Property is said to be alienable, deviseable and descendable.
Alienability refers to the conveyance by a gift or by deed and is done inter-vivos, or while the grantor is alive.
Deviseable property is transferred in a will, and **descendable** property is transferred when a person dies without a will by descent called intestate succession governed by state statutes as to who (of the heirs) will take.

A Grantor is one who is transferring the property. A Grantee is one who is the taker of the transfer. These can also be called Transferor and Transferee.
In discussing transactions concerning property, we often refer to O as the Owner who is making the transfer.

Next it would be good to review the types of estates that are involved in the transactions starting with the Freehold Estates:
Fee Simple Absolute: The owner of a fee simple has the highest or best type of ownership in a freehold estate because it is absolute (not subject to any conditions) and has the capability of enduring indefinitely; the owner is said to have seisen of this type of property. This type of estate can be tansfered as such: O to A and his heirs. Remember that the words "to A" are words of purchase and "to his heirs" are words of limitation. At common law this was thought to be a life estate in A which I'll discuss soon, but modernly we say this type of conveyance is a fee simple in A.
The FSA is alienable, deviseable and descendable. A can give it away, sell it, will it or if he dies intestate it will go to his estate. The only way this type of estate can be taken from A or his heirs is if there are no descendants in the table of consanguinity, no next of kin, then the property will escheat - which means it will pass to the state and the state will take.

Fee Simple Defeasible Estates: These are less than a fee simple - when a transaction of a fee simple defeasible estate takes place, there are conditions or

happenings of events that may eventually void the transaction. There are three types:
1. **Fee Simple Determinable:** FSD - This is a conveyance that has words of duration - and upon the happening of an event, the interest will **automatically** revert back to the Grantor. For instance, O To A, so long as she uses the property for residential purposes. We say the the Owner has a possibility of reverter and if A begins to use the property for a commercial purpose, then the interest will cease in A and revert to O. The words of duration like so long as, until, during, show this is a FSD.
2. **Fee Simple Subject to Condition Subsequent**: FSSCP - This is a conveyance that rests upon a condition, and if the condition is not met, then the Grantor will reserve the right to re-enter and take the property. To A, but if the property is changed from residential to commercial use, O reserves the right to re-enter and take the property. This is called the Right of Entry or Power of Termination in the Grantor. This type of transaction requires the language of the right to re-enter to be in the conveyance. Remember: if there is any amibuity in the language whether it is a FSC or a FSSCP - then your default will be the latter, as modernly we tend to use the FSSCP because the court will prefer to avoid forfeiture and with the FSD, forfeiture is automatic.
3. **Fee Simple Subject to Executory Limitation:** This is when the interest in the estate, instead of reverting back to the Grantor, will instead vest to a third party. Example: same scenario as FSSCP, but then it would replace the re-entry language with, "then to B". B would be the thrid party who would take the interest upon the broken condition.

These interests are alienable, deviseable and can be inherited.

Life Estate: a life estate is for the life of the present possessory interest holder or for the life of another which is then referred to as a Life Estate Pur Autre Vie. The Life Estate holder has all the rights of any present possessory holder except that he cannot will his interest and it will not flow into intestate because upon the termination of the life, the estate then will go somewhere else - where the grantor intended, either back to him or to another. A life estate tenant has the duty to not commit WASTE.

- Voluntary Waste is the intentional destruction of the property -
- Permissive waste is similar to neglect; he must keep up on repairs and not allow the property to fall become less valuable - and
- Ameliorative Waste is the opposite in that he is not allowed to do such improvements that will substantially increase the value unless all the future interest holders agree. Even doing something that will increase the value can be a detriment to the future interest holders.

Future Interests: are those that may become possessory at some point in the future. They are present estates in their value, but the future estate holder lacks the present possessory interest.

Future interests in the Grantor are either:
1. Possibility of Reverter (follwing a FSD)
2. Right of Entry (following the FSSCP)
3. A reversion - when the estate terminates with no future interest holder it reverts back to grantor. O to A for Life, - when A dies it reverts back to O

Future Interests in a Grantee are
Remainders that are either:

Vested or Contingent
Vested remainders are either indefeasibly vested, vested subject to complete difeasance, vested subject to open (meaning subject to a class that is still open, like "children").
Remainders are vested when we can ascertain who the take is and if there is no condition precedent.
Contingent Remainders are those in which either the remaiderman is not yet ascertainable or there is a condition precedent or both.

Executory interests are those which are not remainders - either there is a gap in seisen or they have the ability to cut short the prior estate.
They are either Springing executory interests which divest the grantor, or shifting which divest the grantee or transferee.

Keep in mind that fantastic Rule AGainst perpetutites that says some interests may be void if it is possible that they will not vest within 21 years after the death of a measuring life. This is to keep land alienable and not tie it up indefinitely.
The RAP rule applies to contingent remainder, executory interests and vested remainders subject to open.

There are three types of Co-Tenancies
1. Joint Tenancy which has the right of survivorship meaning upon the death of one it passes outside probate to the surviving holder
2. Tenancy by the entirety which is non-severable and the co-tenants must be married.
3. Tenency in Common: each own an undivided share and can sell it, will it or it can be distributed by intestacy.

Joint Tenancies can be severed by agreement of parties, the selling by one or by partition.
TBE cannot be severed by sale of one, right of survivorship cannot be destroyed and creditor of one spouse cannot reach the property.
TIC: both have the same rights to

Other property transactions involve non-freehold estates. We typically think of these as leases modernly.
There are 4 types of non-freehold estates
1. Term of years - this has a fixed duration with a starting date and and ending date. No notice is needed to terminate as it's controlled by the instrument creating the lease.
2. Periodic Tenancy - this one is for a defined period of time, like month to month, week to week. There is a commencement date but no fixed end date. Notice is required to terminate this leasehold which is a full "period" prior - if month to month, it would be a month's notice required etc.
3. Tenancy at Will - no beginning and no end; no notice is required but modernly state statutes would probably require at least 30 days.
4. Tenancy at Sufferance - this is the holdover tenant situation where the lease has ended and the tenant holds over. The landlord can proceed to evict; can agree on a new term (which is implied when he accepts rent and a periodic tenancy is then created).

Dear Client,

2)

We have several areas of property law to cover so let's start with the problem of too much rain and the resulting standing water.

Landlord/Tenant rights and duties:

As a Landlord - L - you have certain rights and duties as does your tenant. One of the rights your tenant - T - has, is the right to quiet use and enjoyment of the property. One way a L can breach that right is by interferring with the quiet use and enjoyment through eviction. Too much water and flooding that result in standing water can be termed an eviction of sorts. A partial actual eviction is when the tenant is not dispossed of the entire property, but actual space is overtaken by the landlord in some way that it denies the T the ability to use the space. The standing water may be seen as actually occupying the basement and therefore partially evicting the tenant from that area. This is a problem. The tenant may be able to withold the rent until the space is cleared and her use is restored.

Another way you might be in breach is through Constructive Eviction. Constructive eviction results when something has made the place absolutely unbearable, it is more like an unacceptable condition rather than an actual occupation of space. If the rain is an event that happens frequently, your tenant may complain that the condition has made the place unbearale to tolerate and she has been constructively evicted. In this case she must prove that there was **substantial interference - the L must have notice (which it seems you do) and most importantly, to claim this she must move out.** Although I don't know if she even uses the basement, if not the interference may not be substantial. At any rate you realize you need to fix the problem.

There is also a tort liability issue that could arise if someone is injured due to the water. As the L, you have a duty to repair and to do so without negligence. Here, you know about the water. At common law none of this would be of your concern - it would fall to the T, but in the modern world, if you KNOW or SHOULD HAVE KNOWN about a defective condition and fail to repair, you can be liable for harm caused by the dangerous condition. Depending on how deep the water is, you could be liable if someone drowns or is otherwise harmed by the standing water. Your T has the duty to warn others on the premises, but still, I find it likely you could be liable.

Lack of water in the summer: IF the well is only close to running dry you may not be breaching your T's implied warranty of habitability. This implied warranty is inherent in any lease and you cannot waive it. It guarantees the T a place that is habitable for humans. One requirement would be WATER. If your water ever does run out, be assured you will be breaching this implied duty and the T can complain to the housing authorities. If she does so, you may not retaliate in any way - no raising the rent, no eviction, no harrassment. Your T may be able to stop paying rent and sue you for damages without moving out.

Let's talk about the repairs since you seem to be on notice about them:

As a L you have the duty to repair and to do so without negligence. Your problems also have the common denominator of water so we have to discuss water rights and possibly ground support both lateral and subjacent.

Gutters: Installilng gutters will divert water - this is an area of surface water rights. Surface water is the kind you don't want like rainwater, seeage, snow melt-off etc. In your case gutters would prevent the water from flooding the basement but if your gutters divert the water in such a way as to harm other landowners either adjacent, or below, you may be liable.
At common law surface water rights were a) natural flow doctrine which basically said you can't divert water in any way as to disrupt the natural flow and there was also b) the common enemy rule meaning that water was the common enemy and you could get rid of it in any manner you wished regardless of the effect on others. Our jurisdiction is more likely to follow the reasonable use rule whereby you are allowed to divert the flow of surface water as long as you do it reasonalby. I don't have any additional facts on where the water goes after it passes through the gutter pipes, but it seems like your French Drain idea is the answer.
Keep in mind when installing the gutters - do it right - negligence in doing so will create liability in you if someone is harmed by the negligence. Please be sure that they are properly installed and water does not run onto steps or walkways that can freeze in the winter and cause someone to slip and fall. I remember some cases in law school about ice on steps and landlords being sued. Even if your tenant knows and probably should warn others, those negligent repairs will cause you to be liable for the injuries of your tenant or guests (licensees) on the property.

French Drain: this too affects the surface water - it becomes ground water and is then diverted. The same rules apply for the French Drain - when installing it must be reasonable in its diversion and not harm nearby landowners. If the drain effects the ground water that results in harm to others you may be liable. If your use of the French Drain is reasonable in the way it effects the undergound water you should be fine.
If the underground water is an underground watercourse then Riparian Rights will come into play. Riparian landowners are those that own land that fronts or otherwise touches water like lakes, rivers and streams. Underground streams are in this catagory. If the Natural Flow doctrine is applied, you will be able to use the water for domestic uses but not alter its natural flow so the French drain might be an offense to that theory. However, it is more likely that a Reasonable Use doctrine will apply and will balance the use against the harm. I believe the elaborate and careful nature of the French Drain Construction lends itself to being reasonable as it not only redirects but allows for seepage type absorbtion as well.

Drilling the Well deeper: Now we are talking about Subsurface water called percolating water or ground water, and the rights therein. This is underground water that does not necessarily flow as a water course and inlcudes springs and wells. As the owner of the land above the water you have certain rights. Some of this depends on if you are surrounded by other landowners who use the well water. By increasing the usage of your well you may be free and clear to do so if we apply the Absolute Ownership standared which means as the surface owner you can use as much of the water for whatever purpose you wish regardless of the detriment it might be to others. More likely you will be held again to a reasonable use doctrine - you can use the water, increase your usage etc. as long as it is reasonable (and for ground water just about any use is reasonable on the land above). If you think drilling it deeper will affect any other users of the well, I suggest you get back to me so we can balance out the use and make sure you are not left open to a law suit. I don't know if I learned this in law school yet, but as a practical matter you should obtain the proper permits and check with the local water board.

Drilling a well can be noisey. This may become a nuisance for your neighbors if you have

them. Nuisance is the non-trespassory substantial interference with anothers' use and enjoyment of their proeprty. I realilze it is a temporary nuisance and those who complain will probably not have the right to enjoin you from doing so as it is a necessity. The court will look at the character of the neighborhood, the necessity, the frequency, the effect it has on the neighbors quiet use and enjoyment, they type of activity and balance the utility versus the harm. Since the water is a necessity that seems to be an imminent threat to your property, the neighbors will likely have to tolerate it for a week or so.

Drilling can also cause the ground to become unstable. The owners of adjacent land have a right to Lateral and Subjacent Support. Lateral support is the maintanance of the land next to another parcel that keeps that parcel from slipping, becoming unstable etc. Subjacent support is maintaining the sub-surface so that the surface land is not damaged by sinking in. If the well is close to the property line, you have an absolute duty to not threaten the support of the neighbor's land in its natural state. If by drilling this well deeper you create a condition that causes the adjacent land to slide or collapse you will be strictly liable even if you used the utmost care. If there are buildings on that land, and the land would have slipped anyway, even without the weight of the buildings, then you are liable, but not for the buildings. However if you act negligently, then you might be liable for the land and the buildings. As for the subjacent support - creatig a bigger well could create unstable land either on your parcel or possibly even on adjacent land. Drilling usually removes rock and if there is a collapse it is called Aquifer Compaction - and could cause sink holes in the neighboring land. You are liable for changing the natural structureof the rock and causing damage as a result. Again I don't think an injuction would be granted, but you can be sued for damages that result in all of the above actions.

END OF EXAM