1) 85 85

**======== Start of Answer #1 (1981 words) ========**

**Adverse Possession:**

Adverse possession is the unauthorized taking of land from the legal owner. Adverse possession arose out of society's interest in putting land to use, and not leaving it abandoned and neglected. There are two types of adverse possession. The first is known as "bow and spear" and occurs when the adverse possessor intentionally takes the land from someone else, knowing that they do not have legal title. The second form of adverse possession is known as "color of title." This occurs when the adverse possessor genuinely believes they have rightful possession of the property. In Mr. Smith's case he would be adversely possessing the property under "color of title" as he genuinely believed he purchased the property from Mr. Jones. Generally, how much of a portion of land is granted to the adverse possessor must be reasonably related to the adverse possessor's actual use of that land. However, in the case of a "color or title" possession, the adverse possessor may be entitled to the entirety of the property.

There are four elements that must be present for a successful adverse possession: (1) Exclusive use, (2) Actual and continuous use, (3) Open and notorious use, and (4) Hostility, meaning the adverse possessor does not have permission to be on the property. In California, it is also required that the adverse possessor maintain possession for five years and pay all of the relevant property taxes.

Here, Mr. Smith thought he owned the land, therefore he was probably paying the relevant taxes. Furthermore, generally when people by land they record the deed with the county which can be classified as constructive use of the land. There are no facts showing that anyone else was using the property, in fact, the land was "unimproved" indicating they were not. Mr. Smith probably meets the exclusive use requirement. Mr. Jonas eventually filed a trespass action in 2015. He would not have done so had Mr. Smith had permission to be there. The hostility element is satisfied.

Mr. Smith embarked on improving the property, though the facts are unclear as to what type of improvements he was making and how soon he began those improvements after his purchase. We know that a house was built in 2012, just before the rainy season, however, there are no facts as to when construction actually began. A house can take years to build, so if he obtained the loan early on, prior to December 2010, and only completed the house in 2012, the open and notorious use would be satisfied as you cannot hide the building of a house. This would also satisfy the five year requirement.

However, if the house was built quickly, and construction did no begin until well after 2010, Mr. Smith would need to show that he had made other improvements prior to that point, which made his presence apparent to anyone who went and looked at the land. This could be in the way of building a fence around the property, or even landscaping and cleaning up debris, which show someone is taking care of the land. The burden is on Mr. Smith meet all of the elements of the adverse possession. If he can show he has been using the property, continuously and openly, since he bought it in fall 2010, he will be successful in his action. If he did not make any improvements, Mr. Smith might argue, that by him recording his deed and paying taxes he was giving Mr. Jonas adequate notice as Mr. Jonas should have noticed that his taxes were being paid by someone else.

Mr. Jonas would argue that Mr. Smith had done nothing that would have given him adequate notice prior to 2012, when the house was built. However, it is likely that Mr. Smith's hopeful recording of the deed and the paying of the property taxes, along with any minimal improvement on the land prior to his construction on the house would be enough to secure the title, especially as "color of title" adverse possessions usually assume constructive possession and use based on the recording of title, as the possessor genuinely believe they own the land, and as is the case with Mr. Smith, embarking on putting that land to use.

Mr. Smith may also be able to add some time to his adverse possession based on the theory of "tacking." Tacking is when two parties who are in privity maintain the adverse possession by passing the interest from one party to another. Here, Mr. Smith and Mr. Jones were in privity due to their contract of sale of the land. The facts aren't clear as to what Mr. Jones actual connection to the land was, however, if he was using it and met the requirements for adverse possession prior to the sale to Mr. Smith, this would give Mr. Smith more of a time buffer so to speak, as he would assume any time put in by Mr. Jones and it would be "tacked on" to his own accumulated time.

**The Deed of Trust:**

You cannot give that which you do not have. Here, Mr. Smith did not actually have legal title to the land in 2012. Despite this he gave the bank an interest to the property in the form of a deed of trust. Since his title was fraudulent, arguably the deed of trust is not valid. Here, the bank would likely have an action against the title company, as surely they should have had the title checked prior to using it to secure the loan. This should have shown that Mr. Jonas was the legal owner of the property. The bank will probably be successful in any action against the title insurance company, assuming they used one.

Additionally, the bank will likely go after Mr. Smith, arguing that he was negligent in providing them with a fraudulent deed. They may or may not be successful depending on the details of the sale. If Mr. Smith went through full escrow, and the fraudulent nature of the deed was not shown, he will likely not be liable due to his good faith and reasonable belief he had true title. This would be especially true since his belief the title was real was likely reaffirmed as the bank should have ran a check on the title when they approved the loan. However, if Mr. Smith purchased the land in a handshake deal with Mr. Jones, without any confirmation Mr. Jones actually owned the property (which seems likely because how else could this happen), then Mr. Smith might have more of a problem and will probably be liable to the bank for not confirming he had true title prior to offering it to the bank.

However, Mr. Smith might be saved if he is successful in his adverse possession. Under the rules of adverse possession, if Mr. Smith is successful he will receive legal title which will go back to the date of his entry onto the land (fall 2010), prior to his obtaining the loan. Mr. Jonas's legal title would be extinguished. Therefore, the title would become legitimate and the loan would continue to be secured with valid title. In the alternative, should Mr. Smith legitimately buy the land from Mr. Jonas (going after Mr. Jones later), and thereby obtaining legitimate title, the after-acquired title rule will apply. Under that rule, if someone gives away an interest in land to which they do not have legal title, and then later acquire legal title, the transfer will continue as though they possessed to title to begin with. This would mean the loan would continue to be secured by a valid title. Mr. Smith may choose to do this if he is able to do so and isn't successful in the adverse possession, as he has already put in the work to build his desired home and has presumably been living there for the past three years, along with the added benefit of avoiding liability to the bank.

**Mr. Smith v. Mr. Jones:**

Anyone selling land has a duty not make any false statements of material fact. Whether or not you own land is a material fact, clearly. While the facts don't specifically state that Mr. Jones *knew* he did not own the land, assuming he did, he would be liable to Mr. Smith for fraud at the very least, and breach of contract. Mr. Smith would likely be able to recover his damages from Mr. ~~Smith~~ Jones including the costs of the new house and anything extra he might have had to pay Mr. Jonas so that he could keep the land and avoid liability to the bank for his loan.

**The Angry Wet Neighbor:** Diffuse

Surface water disputes are common among neighbors. Surface water is any water collecting on the surface of land that is not part of a river, stream, lake, or other major body of water. There are three different methods the courts apply when attempting to resolve disputes arising out of damage caused by the diversion of water from neighboring land. The first rule is the "common enemy rule." Under the common enemy rule, a landowner is allowed to divert water in any way they deem fit without liability to

neighboring landowners. Should the court follow this rule, the neighbor would be out of luck.

The second rule is the "civil rule". Under the civil rule, a landowner is always liable for any amount of damage caused to neighboring property resulting from their diversion of water, no matter how slight. Under this rule, assuming the neighbor could show that the flooding was actually caused by Mr. Smith's building on the land and was not existent beforehand, Mr. Smith would be liable.

However, most modern court's follow a compromise between these two rules known as the "reasonable use rule." Under the reasonable use rule the court compares the competing needs or the parties, the feasibility of alterative drainage methods, and the severity of the damage to determine whether the diverting party is liable. The facts are silent on whether the neighbor has made any efforts to mitigate the flow of water, or the difficulty of those efforts. Nor do the facts state how much and where the flooding is occurring, making it difficult to discuss the severity of the damage. However, assuming Mr. Smith did not build his home in anyway that was unreasonable, building a home on a hill where there was nothing before is likely always going to alter the flow of water. Assuming Mr. Smith's property did not stick a drainage ditch in the ground directed at the neighbor's living-room window, anything he did is probably reasonably related to building a house on what is presumably a residential lot. Society wants to encourage the use of land, and finding liability whenever someone builds a house on an empty lot above another house would not further that goal. The neighbor will therefore need to make some effort at mitigating the damage caused by the altered flow of water or show that Mr. Smith acted unreasonably in his diversions. If he has attempted to mitigate unsuccessfully and substantial damage was caused by the flooding, Mr. Smith could be still be liable if the damage and the construction of Mr. Smith's home was beyond what is reasonable.

It should be noted that while Mr. Smith's name was used in the above discussion, if the adverse possession action was unsuccessful, Mr. Jonas would be liable for the damage

and he would probably have to go after Mr. Smith to recover any damages assigned to him,. This is because he would be the land owner and negligently allowed someone else to build on his land in a way that caused the neighbor harm. For this reason, Mr. Jonas may want to consider selling the land to Mr. Smith to decrease his liability to the neighbor.

======== End of Answer #1 ========

**2)**

**======== Start of Answer #2 (1756 words) ========**

Dear Mr. Smith,

Congratulations on your impending move to the islands. I hear they are lovely this time of year.

Based on your letter there are several options I would like to cover with you, each of which I think will give you your desired result, with different responsibilities attached to each. I can understand why your head is still spinning from our discussion on the Rule Against Perpetuities, I promise not to do that to you again.

First, I would like to discuss your current rights as they pertain to your present estate. You have what is known as a freehold estate in the form of a fee simple absolute, which is known as the greatest estate known to man. This is because there are no conditions or limitations on alienability (transferability) and the duration is infinite. You are free to do with it as you please, including transferring, excluding, and granting access and control to the property. This means you can give away the land with your desired conditions attached to the estate.

What you are looking to create in your gift is what is known as a fee simple defeasible. This is an estate that is subject to terms and conditions which cannot be violated or the

current possessory interest in the estate is terminated. There are three types of defeasible estates which I think might fit your needs depending on how involved you want to be with the property.

The first type of estate is known as a fee simple determinable. A fee simple determinable estate includes the possibility of reverter. This means that should Johnny violate the conditions of the estate, by falling of the wagon, his current possessory interest in the estate would automatically revert to grantor, in this case, you. The reverter is automatic with no action required on your part. However, you would have a duty to reclaim the estate from Johnny after the estate reverts and he remains on the land. If you do not, Johnny may be able to maintain his interest through adverse possession should he remain on the estate for five years, use it continuously, and pay the property taxes. Should that occur, he will gain legal title to the property and any conditions attached will fall off. He will have a fee simple absolute and will be able to do as he pleases, soberly or not.

The second type of estate we could create is known as a fee simple subject to condition subsequent (FSSCS). An FSSCS grants you with the power to re-enter and retake (or terminate) the property should Johnny not live by the terms attached to the estate, should you choose to do so. However, unlike and fee simple determinable, the estate is not automatically returned to you upon Johnny's violation of your conditions. With an FSCCS, you must exercise your right to re-enter and terminate the estate within "reasonable amount of time", generally one year. Should you not exercise your right within a reasonable amount of time, and Johnny is aware that you know he has violated the conditions on the estate, he may be able argue that he assumed you were waiving your right to re-take the property and that he detrimentally relied on your waiver. Should he argue a waiver, and win, a fee simple absolute will result, and once again, you will no longer be able to enforce the conditions you have set out.

The reason I am mentioning the above estates, is that they give you a little more control as to what is happening with the estate. While Johnny would maintain his current

possessory interest as long as he abided by your rules, if he were to decide that he would rather have a beer than keep the property, the estate would revert back to you as a fee simple absolute. At that point you could either grant it to Richard (assuming his didaskaleinophobia had not gotten the better of him and he finally graduated), as planned, or if you decided that Richard makes a crummy lawyer and no longer wish to give him anything, you could give it directly to the Sonoma County Society for the Treatment of Didaskaleinophobia (SCSTD) or any other charity of your choosing. In the alternative, should you decide there is too much sunshine in Hawaii, you could return to Sonoma County and live on the property yourself. These choices would give you the option to change your mind.

However, it appears from your letter, you would like everything to flow without the headache of having to be involved. This is understandable as you will be an ocean away in Hawaii where it might difficult to enforce the estate's terms. I believe the third option will be best suit to your needs.

This option is known as a Fee Simple Subject to Executory Interest (FSSEI). This estate would grant Richard and the SCSTD future interests (meaning a legal interest that does not involve the right to current possession) known as a shifting executory interest, giving them the ability to cut short Johnny's possessory interest in the estate should he violate the conditions. The termination of the estate, as with a fee simple determinable, would be automatic. Therefore, the same concern as to adverse possession, mentioned above, would apply. You should also be aware that once you create an FSSEI, any interest, that you have in the estate, current or future, would be terminated. This means you could not enforce the conditions, or change your mind as to where you want the property to go.

Additionally, any interest in an estate is transferrable, including the future interests that would be held by Richard and the SCSTD. This means that should Johnny decide he does not want to be controlled, he could offer to purchase Richard's and the SCSTD's future interests in the estate. Under the Doctrine of Merger, this would create a fee

simple absolute and he would no longer be bound by the conditions on the estate. This would be especially relevant if Richard graduates law school, which will terminate any interest the SCSTD had in the estate. Richard's interest would be vested, and Johnny would only need to purchase Richard's interest.

However, despite this risk, I believe this is the best choice for you as it would limit the stress you are likely trying to escape by moving to Hawaii, leaving the duty to reclaim the property to third parties.

You should also be aware that Johnny would also have certain duties to the estate that he should be advised of, as you and Richard or the SCSTD would have a future interest. Johnny would have a duty o ensure that the property was maintained and that no "waste" occurs. Waste can come in three forms: (1) Voluntary waste, where Johnny may intentionally act in way that causes a loss in value to the property; (2) Permissive waste, where Johnny could fail to act in a way to protect the value of the property, and (3) Ameliorative waste, where Johnny makes changes to the property that might increase the value of the property, but changes the entire character. Johnny would have a right to reasonably use the land and its resources in a way that is consistent with the type of property but he may do anything that substantially changes the value.

There is one last issue I would like to discuss. Generally, conditions that terminate an estate are disfavored by the law. Courts strictly construe any conditions laid out and are quick to find the language vague or unenforceable. Here, your wording of "if he lives a clean and sober life" is vague, and will probably not withstand any legal attack that Johnny or Richard might bring in attempting to maintain possession or obtain possession of the land. Consider this, what if Johnny has one glass of wine at Christmas dinner? He might consider that maintaining sobriety, as he likely would not feel the effects. Or, what if Johnny were in an accident and unconscious and given pain killers by the doctor, without his knowledge? Would he lose his interest in the land? As you can see, we must be must more specific in the language of the deed in order to protect your wishes. I am assuming, based on your letter, that you do not want Johnny

to drink any alcohol at all, and that prescription use of medication, under a doctor's care, would be permissible. If this is not the case, please let me know and I can change the language of the deeds to fit the conditions you want to enforce.

Below is the language I would recommend for each of the options I have provided.

**Fee Simple Determinable:**
To Johnny Smith, so long as he does not knowingly drink any measurable amount of alcohol, and does not consume any controlled substance without a prescription or outside the recommended dosage of a medical doctor.

**Fee Simple Condition Subsequent:**
To Johnny Smith on the condition that he does not knowingly drink any measurable amount of alcohol, and does not consume any controlled substance without a prescription or outside the recommended dosage of a medical doctor. Grantor, John Smith, retains the right to re-entry and termination.

**Fee Simple Subject to Executory Interest:**
To Johnny Smith unless he knowingly drinks any measurable amount of alcohol, and does not consume any controlled substance without a prescription or outside the recommended dosage of a medical doctor. Then to Richard Smith, unless he has not yet graduated law school. Then to the Sonoma County Society for the Treatment of Didaskaleinophobia.

Of course, this entire letter presumes that you wish Johnny to be living a clean an sober life for his entire life here forward, in order to maintain the estate. Based on the exact reading of you letter, it is possible you just wish to ensure he is living such a life at the time of transfer as the exact time in which he needs to be living such a life is not stated. If this is the case, you should just ensure that that he is sober at the time of transfer, and then grant him an FSA. Thus, saving you any future headache as a result of his possible failure to meet the conditions. If that is the case, your deed should read as

follows: **To Johnny Smith.**

Please let me know which option you prefer and I will draft the deed for your signature immediately.

Mahalo,
Attorney

======== End of Answer #2 ========

**END OF EXAM**