INSTRUCTIONS

1. Many, if not all, of the problems on your Final Examination will refer to the following Factual Information, consisting of seven pages excluding this page of instructions, but including the "Rules of Law" referred to in paragraph 2 of these instructions. Some additional facts will be included with some of the problems, but the Factual Information gives you general background and numerous clues as to problems that might be presented in the Examination. For reference purposes, the paragraphs in the Factual Information are numbered from 1 to 15. Paragraphs 10-15 are substantially the same as the "Examination Facts" used in the Practice Examination earlier this semester.

2. Included in the attached materials are "Rules of Law." In responding to the problems on the Examination you are to assume that these Rules are in force in all jurisdictions and, except as qualified in the rules themselves, at all pertinent times. Except as modified by these Rules of Law, you are to assume that the general common law of property, as studied in class, is in force at all times.

3. Prior to taking the Examination, you are allowed to get assistance from any and all resources, including the assigned problems and readings, your notes, and your colleagues, in studying and reviewing the Factual Information. You are encouraged to study the Factual Information thoroughly, individually and, if you desire, in groups, and to analyze questions you anticipate from reviewing the course.

4. During the three-hour Examination period, you will be allowed to use any printed or written material you wish, including the text, your notes and your outlines. You are advised, however, that this allowance will not necessarily help you. Undue reliance on the fact that this is an "open-book" examination, either before or during the Examination, will almost certainly hamper your performance. You are not allowed, of course, to get help from other persons during the Examination period and your responses to the problems must be your own work, composed and written during the Examination period.
INSTRUCTIONS

1. There are six problems on the following two pages. Problem #6 is actually four separate, short problems. You will have three hours in which to complete the examination. Times suggested for each problem total two hours and fifty minutes.

2. Problems 1-5 are based on a document labeled "Factual Information"; a document labeled "Rules of Law" applies to all six problems. These two documents, consisting of seven pages and one page of instructions, were distributed during the last two weeks of class, and are not included here. Additional information is included with some of the problems. Please adhere to the following assumptions:
   a. All persons indicated by name or letter are alive unless otherwise indicated.
   b. Additional information included with individual problems pertains only to the problem in which that information appears.

3. You are allowed to use any printed or written material you wish, including the text, your notes and your outlines. You are not allowed, of course, to get help from other persons during the Examination; your responses to the Examination problems must be your own work, composed and written during the Examination period. Your answers will be graded according to how well you recognize and how thoroughly you analyze the issues of Property I raised by the problems. Conclusions are sometimes important; your recognition of the questions to be asked is always important.

4. St. Mary's University School of Law prohibits the disclosure of information that might aid a professor in identifying the author of an examination. Any attempt by a student to identify herself or himself in an examination is a violation of this policy and of the Code of Student Conduct.

5. When you have finished with the examination, no later than the end of the examination period, turn in the examination and your responses.

6. After reading the oath, place your exam number in the space below. If you are prevented by the oath from placing your exam number in the space below, notify the student proctor of your reason when you turn in the examination.

   I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

EXAM NUMBER
[1] Alice Gore died in 1989 at the age of 75. She was a wealthy woman and left a substantial amount of property to relatives and friends. Her will established a trust fund in favor of her children and grandchildren. Last National Trust Company was named in the will as trustee and assets placed in the trust included $500,000 in cash and a residential apartment building which Alice had owned since her husband's death. The dispositive provisions of the trust created by the will state that "income from the trust is to be paid to my children, Grace and Gary, as long as they are living; and upon the death of my last surviving child, income from the trust is to be paid to my grandchildren until such time as my youngest grandchild living at my death reaches age 21 or dies, whichever comes first; when the youngest grandchild of mine living at my death reaches age 21 or dies, this trust shall terminate and the trustee shall transfer all remaining trust property in equal shares to such of my grandchildren who have successfully completed at least two years of college."

[2] At the time of Alice's death, she had two children, Grace and Gary, who were then age 42 and 37 respectively. Grace then had three children, Mark, Mary and Morton (then age 20, 16 and 12, respectively) and Gary then had two children, Hillary and Horace (then age 15 and 11, respectively). Alice's grandchildren and children are all still alive but of course all parties are three years older than they were at Alice's death.
[3] Grace and Gary and the Last National Trust Company have received numerous complaints from residents of the apartment building that is a part of the trust created by Alice’s will. Gary and Grace have also been receiving little or no income from that apartment building because tenants have not been renewing their leases and very few new tenants are moving in. The trustee has informed Grace and Gary that before long they will find it necessary to invade other trust property or income just to maintain the apartment complex. Many of the problems stem from an amusement center that was built near the apartment building about one year ago. The amusement center offers patrons miniature golf, bumper boats, a video arcade, a miniature automobile race track and bungee jumping. The things complained about by residents of the apartment building include bright lights, excessive noise both day and night, and teenage gangs congregating at the amusement center and around the neighborhood.

[4] Alice Gore’s will also devised several parcels of real property, which she had owned in fee simple absolute, to various individuals, as follows:

[5] Parcel A: "to my good friend Mario Olivares, as long as he lives, and then to such of his children as have graduated from college as long as they shall live; upon the death of the last of Mario’s children to graduate from college, to my then living descendants who were alive at my death."
[6] Parcel B: "to my niece, Julia Morgan, for life, and upon her death in equal shares to Julia's then living children; provided, however, that if Julia dies without children surviving her, to my friend Nancy Newsome."

[7] Parcel C: "to my children as long as they live, and then to my grandchildren until the youngest grandchild reaches age 21; at that time, parcel C is to be divided equally among my grandchildren."

[8] Alice Gore’s husband, George, died in December of 1988. During the later years of his lifetime, George had been involved in a business partnership with Tom Teeter. The activities of the business involved real estate development. Among the assets in George’s estate at death were fairly expensive furnishings used to decorate the office used by Teeter and George in their real estate business. Included among these assets are office furniture and two expensive paintings. Tom Teeter continued to use the office after George’s death until his death last year. Since that time, the office has been vacant, and the furnishings are still there.

[9] Soon after the commencement of his partnership with Tom Teeter, in 1972, George Gore transferred to Tom Teeter "all of my interest" in a large tract of land in the town of Seaside. Gore had inherited this land from his father who had purchased it in 1955 from a religious group. The deed transferring the property to Gore's father had the following language in it: "to Horace Gore and his heirs, provided, however, that if any
alcoholic beverages are ever sold on the premises, grantors reserve the right to reenter and terminate the estate granted hereby." Horace Gore (George’s father) had executed a will during his lifetime, but it was determined to be invalid after his death; as a result of this, Horace died intestate (without a legally effective will).

[10] This Seaside property transferred by George Gore to Tom Teeter has become the centerpiece of a controversy in that little community. Nora and Nick Nance own a fee simple absolute in a tract of land ("Lot A") located in Seaside. For seven years they have operated a patio cafe ("Nora’s Niche") on the property. It had become a very popular eating place for tourists and townspeople alike, but its popularity and business took a rather precipitous downturn several months ago. If the Nances are unable to reverse this alarming trend in the near future, they will be forced out of business at that location and will have no immediate prospects of starting a similar operation elsewhere.

[11] About one month before the business at Nora’s Niche started to fall off, a new fish processing plant commenced operations on a nearby tract of land ("Lot B"), which is a part of the property conveyed by Gore to Teeter. There are several city lots between the cafe and the plant, but foul and powerful odors emanating from the plant frequently reach the cafe. Customers of the cafe began to complain about the odors as soon as the plant started to operate. The Nances are convinced that their business woes are entirely attributable to the operations of the fish processing plant. Their conviction may be well-founded, inasmuch as (1) their business operations have not changed; (2) the decline was
[12] Lot B is in the possession of Seafood Extraordinaire, Inc., a firm that processes, packages and sells fish products for human consumption throughout the United States. They have a ten-year lease on the property, granted by Eric Esquivel, with an option to renew the lease for another ten years. The commencement date of the lease was June 1, 1991, and between that date and the spring of 1992, when the plant started operations, a construction company (Seaside Contractors) employed by Seafood Extraordinaire was engaged in building a large building on the property to accommodate Seafood’s operations.

[13] During the excavation involved with the construction of the fish processing plant, one of the employees of Seaside Contractors discovered a buried trunk. The trunk appeared to be very old and it contained some potentially valuable items. The employee put the trunk and its contents into the trunk of his automobile and stored it in his garage.

[14] Until the construction by Seaside, there were no improvements on Lot B. For some years prior to 1991, Lot B was "owned" by Marie Esquivel, mother of Eric Esquivel. In December of 1990, however, Marie died, survived by Eric, her only child, and his family. Eric was then and is now married to Judy Esquivel and they have three children. A check of the land records pertinent to Marie Esquivel’s title to Lot B show the connection between
Marie and Tom Teeter. In 1975, Marie received from Tom and Teri Teeter, a deed to Lot B, part of the larger tract of land transferred to Teeter by George Gore in 1972. In 1975, the Teeters had plans to develop the land retained by them as a small subdivision of rather expensive residences. Several parcels, including the one conveyed to Marie, were sold in 1975. Those parcels were closer to the sea than the land retained by the Teeters, and each of the deeds to the parcels sold, including the conveyance of Lot B to Marie, contain the following language:

... to [grantee’s name is inserted here] and her heirs, successors and assigns, provided that said grantee, her heirs, successors and assigns, agree not to construct on the premises any structure that will significantly impair the view of the sea from land retained by the grantor, described as follows: [a legal description of that part of the tract retained by the Teeters (Lots C and D) is inserted here]. In the event this condition is breached, title to said property shall revert to grantors.

[15] After the 1975 transactions, the Teeters experienced financial difficulties and they have never proceeded with their plans to develop Lots C and D. In 1984, they sold Lot D to a group of doctors who planned to hold the property for investment purposes. The doctors still own Lot D and record title to Lot C is still in the name of Tom Teeter. In 1991, however, Tom Teeter was killed in an automobile accident, survived by his wife Teri and two children. Tom did not have a will.
Rules of Law

a. Any transfer by an owner is presumed effective to convey the owner’s complete interest in the subject matter of the transfer. This is a rule of construction; it raises a presumption that can be rebutted by evidence of contrary intent on the part of the grantor.

b. All estates and future interests are presumptively fully alienable, and those that have a potential duration beyond the lifetime of the owner are inheritable and devisable. This includes all presently possessory estates and all future interests (reversions, rights of re-entry, possibilities of reverter, all vested and contingent remainders, and executory interests) and all interests that are subject to complete or partial divestment. This rule also includes equitable interests (beneficial interests in trusts) as well as legal interests.

c. Any estate that would have been a fee simple conditional or fee tail estate under the "common law" is deemed to be a fee simple absolute, regardless of grantor’s intent.

d. Executory interests are valid legal estates and therefore can be created either as legal interests or as beneficial interests under a trust (equitable interests).

e. Contingent remainders are not subject to the common law "rule of destructability."

f. The following statute has been in force since 1950:

Possibilities of reverter and rights of re-entry for breach of condition subsequent created after the effective date of this act, where the condition has not been broken, shall not be valid for a longer period than fifty years from the date of the creation of the condition or possibility of reverter. This rule shall be effective regardless of the intention of the grantor.

g. As to transfers taking effect on or after January 1, 1964, the "Rule in Shelley’s Case" and the "Doctrine of Worthier Title" have been abolished.

h. The common law Rule Against Perpetuities is in force.

i. Actions to recover possession or title to real property must be commenced within 15 years of the time the claim accrues. Actions to recover possession or title to personal property must be commenced within four years of the time the claim accrues.

j. At death, all property owned by the decedent, not disposed of by will, passes as follows: 1/3 to the surviving spouse (if any) and 2/3 to lineal descendants of the decedent (if any), by right of representation; if there are no surviving descendants of the decedent, 100% to the surviving spouse; if there is no surviving spouse but one or more surviving descendants, 100% to the descendants, by right of representation.
Property I Final Examination

Problems

Fall Semester 1992

Problem #1
(Suggested Time: 75 minutes)

Assume that you are a lawyer and that you represent three individuals (Joe, Carrie and Surly) who have decided to establish a very nice seafood restaurant in the town of Seaside. They have found a location which they consider ideal for their plans; the location is Lot D, referred to in paragraphs 14 and 15 of the Factual Information. Lot D is part of the large tract of land referred to in paragraph 9 of the Factual Information. Joe, Carrie and Surly have not taken any steps other than identifying what they hope will be the future location of "Cajosu's Seafood Grotto." They wish to begin construction of the restaurant within a few months, and are seeking your advice and assistance in matters of property that are pertinent to their plans. Based on what you know from the Factual Information, and what we've read and discussed in Property I, write a memorandum exploring all the issues of property you think ought to be addressed, and advising Joe, Carrie and Surly concerning the steps that should be taken to accomplish their objective.

Problem #2
(Suggested Time: 20 minutes)

As between the Teeters (Teri and her two children) and other possible claimants, who is entitled to possession of the paintings referred to in paragraph 8? Discuss. For purposes of this question, assume George Gore died intestate (without an effective will).

Problem #3
(Suggested Time: 40 minutes)

Nora and Nick Nance (¶¶ 10 & 11 of the Factual Information) have sued Seafood Extraordinaire, Inc., asking for (a) an injunction against further operation of Seafood's plant or, in the alternative, (b) damages. The amount of damages Nances seek is $200,000, which is the sum they calculate will be necessary to relocate Nora's Niche to a suitable spot unaffected by Seafood's operations. That figure includes the purchase price of another parcel of land and the cost of construction of a new restaurant. Also included is the expense of moving equipment from the present location to the new location. Evidence at trial indicates that Seafood could reduce substantially the escape of odors caused by its operation through installation of new equipment, at a cost of $150,000. Assume you are a law clerk for the trial judge deciding this case. She has informed you that she wants to decide the case in favor of the Nances. Write a short memorandum advising the judge as to whether she should grant an injunction or award damages. Include the reasons for your conclusions.
Problem #4
(Suggested Time: 5 minutes)

How would you describe the interests in Parcel B, referred to in Alice Gore's will (¶6 of the Factual Information), assuming the following facts. Julia Morgan is alive and has two children who are living. A third child died last year. Briefly explain your answer.

Problem #5
(Suggested Time: 10 minutes)

Explain why the interests of Alice's grandchildren in the trust referred to in paragraph 1 of the Factual Information do not violate the rule against perpetuities. Would elimination of the phrase, "living at my death," from both places where it appears, affect your response?

Problem #6
(Suggested Time: 20 minutes)

The following problems are not based on the Factual Information distributed during the last two weeks of class, but the "Rules of Law" distributed with the Factual Information do apply to these problems. Describe the interests created in each case in light of the transactions and facts indicated. In each case, assume that O owned a fee simple absolute before the transaction described and that the transfers described have taken place during O's lifetime.

a. O transfers property "to A for life, then to B if she joins the Catholic Church, and if not, to X and her heirs." O, A, B and X are all living. B has not joined the Catholic Church. Briefly explain your conclusions.

b. O transfers property "to A for life, then to B, but if B does not join the Catholic Church, to X and her heirs. O, A, B and X are all living. B has not joined the Catholic Church. Briefly explain your conclusions.

c. O transfers property "to my husband for life, then to my children, provided that if any of my children fail to graduate from college, his or her share shall terminate." O is married to H, and O and H have three children, X, Y and Z, none of whom has graduated from college. O, H, X, Y and Z are all living. Briefly explain your conclusions.

d. Assume now the same facts as in Problem #6c except that X has graduated from college. Briefly explain how your conclusions in Problem #6c would be affected by this change in facts.
ANALYSIS OF PROBLEMS

Problem #1

The plans of Joe, Carrie and Surly involve use of Lot D. We are not told whether they would prefer to purchase an absolute title (fee simple) in Lot D or to lease the property for a term of years. This would be one business decision, presumably based on additional information we don't have, that awaits decision. In any event, our clients are necessarily interested in the status of title to Lot D.

We are told in paragraph 9 that Horace Gore received this property, as part of a larger tract, in 1955 from a religious group. Assuming that group owned a fee simple absolute at that time, Horace Gore received a fee simple subject to a condition subsequent and the religious group retained a right to re-enter for breach of the condition. The language, "and his heirs, provided, however, that if any alcoholic beverages are ever sold on the premises, grantors reserve the right to reenter and terminate the estate granted hereby," quite clearly sets forth a fee simple ("and his heirs") but it also imposes an additional limitation with the condition following "provided," making Horace Gore's estate in the land defeasible. We learned that defeasible estates are classified into two categories, depending upon whether termination of the estate was intended to be automatic upon breach of the condition (fee simple determinable, for example), or merely subject to a power retained by grantor to terminated the granted estate (fee simple subject to condition subsequent). In this case, the language of limitation is quite clear and would almost certainly be construed as creating a fee simple subject to a condition subsequent.

The interest of Horace Gore in Lot D was apparently inherited by George Gore, who in turn transferred it to Tom Teeter. (See paragraph 9.) According to ¶15, Lot D was sold by the Teeters to a group of doctors, who still own the property and "who planned to hold the property for investment purposes." As current owners of the possessory estate in Lot D, this group of doctors will be essential parties to any negotiation to obtain presently possessory rights for Joe, Carrie and Surly. (This would not necessarily be true if alcohol had been sold on the property, but this is apparently undeveloped land and the condition has probably not been breached.) We are told that the doctors purchased Lot D for investment, and it will be advisable to analyze the property from their perspective. If they view this as a long-term investment, they may not be willing to transfer an absolute fee simple. If this is the case, they may nevertheless be interested in the possibility of leasing the property, since this would allow them to earn some income off the property. If they are unwilling to sell the property in fee, or lease it, for an amount our clients are willing to pay, we are apparently out of luck. In that case, the doctors value the property more for their own use (or non-use) than our clients do.
The religious group that was the grantor in that 1955 transaction retained a right of re-entry in Lot D. As the defeasible estate discussed above passed from Horace to George to Tom Teeter and finally to the doctors, the right of re-entry persisted in the religious group, unless they have somehow transferred it to another party. This is a potentially significant problem for Joe, Carrie and Surly. The condition imposed was that no alcoholic beverages be sold on the premises. I assume it is somewhat customary for some alcoholic beverages to be sold in a "nice seafood restaurant," and it would be necessary to determine whether our clients wish to serve alcohol in Cajosu's Seafood Grotto. If they purchase only the doctors' interest in Lot D, and then sell alcohol on the premises, there is a serious risk that they will forfeit their estate and their rights of possession. The religious group, or its successor in interest, would be entitled to enforce their right of re-entry and terminate our clients' interest for breach of the condition imposed in 1955.

It will be necessary to do some research to discover whether the religious group still exists, whether they still own the right of re-entry, and whether, if not, who does own the interest. Rule f quotes an applicable statute that would terminate such a property right 50 years after its creation, but that period does not elapse until the year 2005, and therefore I would assume that it is still a viable interest. And because of our clients' plans to open a restaurant on the premises, the substance of the condition is probably a serious problem. In some jurisdictions, "obsolete" conditions are not enforced, but there is no assurance that that argument will work in this jurisdiction or with this particular condition. We can solve the problem of the right of re-entry if we can identify the present owner of the interest and persuade them to convey it to our clients. This may be easier said than done; if the religious group still owns the right of re-entry, it is somewhat likely that they will not be willing to relinquish their interest and the control it gives them over Lot D. This may depend on whether the condition is a matter of religious conviction. The fact that the right to re-enter will expire by law in only 13 years might influence its owner to sell now; each year, that interest will presumably be less and less valuable.

There are still other concerns about the condition forbidding the sale of alcohol. Lot D is part of a larger tract that was conveyed with the condition in 1955. It would therefore appear that even if alcohol will not be served at Cajosu's Seafood Grotto, there is a risk that any possessory rights purchased to Lot D from the doctors might be terminated as a result of the sale of alcohol on other parts of the tract transferred to Horace Gore in 1955. In other words, our clients would not have complete control over whether the condition on which their estate hinges would be breached.

We are also faced with an interesting dilemma concerning the right to re-enter. If we contact the religious group, and explain the situation to them, there is a fairly good possibility that they will either refuse to sell their interest or demand an exorbitant price. If either of these events happen, Joe, Carrie and Surly can, of course, look for other property. In any event, contacting the religious group (or its successor in interest) will raise the question of their ownership interest in Lot D. Depending on the strength of our clients'
desire to have Lot D, and the price demanded by the doctors for their interest, and the present composition and inclinations of the religious group, we might consider not contacting the religious group, in the hope that they will not know about, or at least will not enforce, their rights.

Another question that should be addressed to Joe, Carrie and Surly is whether the view from Lot D entered into their decision that this was the ideal place for the restaurant. In several transactions in 1975, described in ¶14, the Teeters sold property between Lot D and the sea. In those transfers, the Teeters apparently retained either a right of re-entry or a possibility of reverter for breach of a condition prohibiting construction "that will significantly impair the view of the sea from land retained by the grantor," which land included Lot D. If view is important to our clients, and there is a chance that it will be adversely affected by construction on any of the lots transferred by the Teeters in 1975, we ought to consider involving the current owners of that right of re-entry or possibility of reverter in our negotiations. We are told that Tom Teeter did not have a will when he died in 1991 (¶ 15) and under ¶i of the Rules of Law, Teri Teeter and Tom's two children have each inherited a 1/3 interest in his estate, which would include his interest in the future interest in the lots which were the subject matter of the 1975 transfers. [There may be some dispute about the shares of Teri and the two children. On the surface, it appears that the transfer of the large tract from George Gore in 1972 was to Tom Teeter alone (¶9). But language in the 1975 conveyances apparently named both Tom and Teri as grantors, refers to the view "from the land retained by the grantor," and then closed by stating that "title to said property shall revert to grantors." If Tom and Teri each owned a 50% interest in the future interest at Tom's death, Teri would now own that 50% plus a 33% interest in the 50% owned by Tom at his death.]

Another, somewhat complex, concern related to neighboring property is the problem that Nora's Niche is having with Seafood Extraordinaire, and concerns about neighboring land use in general. One restauranter is already having difficulty in the neighborhood because of the odors emanating from the operations of Seafood Extraordinaire. We ought to explore whether our clients have addressed the possible problem of odors from the Seafood plant. In this regard there are numerous possibilities. Perhaps Joe, Carrie and Surly are aware of the issue but it does not pose a problem for them for some reason. Or it may be a problem which they intend to solve by offering indoor dining only and installing a very effective air filtering system in the restaurant. It may, however, be a problem which would inject serious risks into their proposed venture and for which they have no solution.

If the operations of Seafood Extraordinaire do create a problem for our clients, whether they have a solution for the problem or not, we might well include Seafood Extraordinaire in our negotiations. It is quite possible that they are conducting their operations in a way that unreasonably interferes with the use and enjoyment of neighboring parcels of land. This is essentially the definition of nuisance. We have learned that nuisances have traditionally been enjoinable (stoppable) by the wronged parties, in this case
our clients. The problems here are several. For one thing, Seafood is already operating and we now propose to bring in a land use that may conflict with some of the existing land uses in the neighborhood. It will not be perfectly clear, therefore, that our clients are the wronged parties or that Seafood's activities constitute an actionable nuisance. Also, courts in recent years have tended to weigh benefits and harms of conflicting land use and have been reluctant to shut down productive and valuable uses of property. Even so, there are reasons for exploring in advance a resolution of the potential problem with Seafood.

A key to understanding property and many property problems is economic analysis. This approach is particularly useful in disputes about conflicting land uses and allegations of nuisance. We may be able to persuade Seafood Extraordinaire, and if necessary a court, that Seafood is at least responsible for "damages" that will be inflicted upon our clients. The offensive odors from Seafood's property, that may affect our clients' use of a neighboring parcel of land, are arguably "externalities," meaning costs of production imposed on neighbors. Economists tell us that it is more efficient to require a landowner to "internalize" all costs of production. This can be accomplished in various ways, including payment of damages by the inefficient producer to the parties upon which the producer's costs are projected, i.e., those bearing the external effects of production. Even though a court may be reluctant to shut down a beneficial operation, they may be quite receptive to this economic argument of efficiency. And if we can persuade Seafood that a court might listen to our argument, they will presumably be willing to consider it without any legal process and its attendant expense. This would involve a more detailed exploration of the nature of the odor problem and means of solving it.

More specifically, we want to know whether there are measures Seafood could employ to reduce or eliminate the odors reaching Lot D, and if so, how expensive would those measures be. Likewise, as discussed above, our clients may have some plan for dealing with the problem, and we should ascertain the costs of that plan. Assuming there are two or more reasonably effective ways of solving the problem, it makes some economic sense to choose the least expensive solution, since that would best maximize wealth. Suppose, for example, that our clients' plan to solve the odor problem is less expensive than the solution Seafood proposes. On the surface, then, that may seem to be the best approach to the problem, i.e., for our clients to install an effective air filtering system. This does not necessarily mean that Joe, Carrie and Surly should be required to pay for the system; that would depend on the allocation of the legal right: Does Seafood have the right to emit the odors or do our clients have the right to air free of the odors? If the latter rule is applied, we could presumably force Seafood to pay for our clients' solution of the problem.

There are problems, however, related to the likelihood of getting the benefit of either an injunction or a liability rule in favor of our clients. In the Spur Industries case, for example, the incoming party complaining of a "nuisance" that was already in place was forced to pay for the move of the neighboring feedlot. This same approach could be applied here on the ground that our clients are in the best position to avoid the conflict over land...
uses, since they can consider compatibility with existing land uses before investing in Lot D and the restaurant operation. Also, if the air filtering system is indeed the least expensive solution to the problem, they are in that sense the "best cost avoider" and it might make economic sense not to fashion a liability rule against Seafood.

Another interesting twist, however, concerns Nora's Niche. Because Seafood's operations have already created problems for Nick and Nora similar to those that might affect our clients, there may be some advantage in numbers. For example, air filtering systems for both Nora's Niche and Cajosu's Seafood Grotto might be more expensive than a solution on the premises of Seafood. If that is the case, we could argue that Seafood is the "best cost avoider" after all, and justify the imposition of liability on that basis. Nick and Nora have the advantage of having been there first, and Joe, Carrie and Surly might be able to join together with them for the advantages their claim might bring.

Finally, a related issue is whether Cajosu's operation will have adverse effects on neighbors similar to what Nick and Nora are already complaining about. Quite apart from the possibility of joining with Nick and Nora is the prospect that Cajosu's might be pitted against Nick and Nora and/or other neighbors because of external effects caused by Cajosu's. Any full analysis of this issue would require additional information.

This all begins to sound rather complicated, of course, and that itself is another problem affected by economics. Some of the approaches discussed here involve numerous parties, and the presence of numerous parties create high transaction costs and the possibility of "free rider" problems. It is possible that our clients could themselves have the benefit of "free riding" in this case if there existed a realistic probability that Nick and Nora could and would, on their own, force a solution to the problem caused by Seafood Extraordinaire. In any event, the complexity of the problem, and the fact that serious roadblocks seem to frustrate the prospect of getting unfettered rights of possession and use, suggest that Joe, Carrie and Surly should probably proceed with their efforts to establish Cajosu's on Lot D only if no other land will do.

**Problem #2**

We are told that the paintings were "among the assets in George's estate" when he died in December of 1988. We are also to assume that he died without a will, meaning that the owners of the paintings after George's death under rule of law "j" were Alice (½ as surviving spouse) and George's two children (½ each) -- assuming Grace and Gary are George's children as well as Alice's. Alice is now deceased and her interest has passed to someone else, either by her will or by inheritance to her children.

There appears to be no reason to suggest that anyone other than the Gores, or their successors in interest, are entitled to possession, except for the fact that the paintings have
been hanging in the office used by Gore and Tom since Gore’s death four years ago. We are not told who owns the office but Teeter "used the office after George’s death until his death last year." Tom Teeter was probably in possession of the paintings during the time he was using the office, and his wife and children (his heirs) may make a claim to the paintings as a result of adverse possession. If the office is "owned" by someone else, that person is not likely to succeed at this point in any claim of adverse possession because she or he has been in possession for only one year at the most.

The statutory period for acquiring title by adverse possession (rule "i") is four years. Probably the earliest the claim by Tom Teeter could have accrued is the date of George Gore’s death. Before that time, George and Tom both possessed the office in which the paintings hung, making Tom’s possession, if any, non-exclusive and presumably non-hostile. From the time of George’s death to the time of Tom’s death, however, Tom arguably had actual and exclusive possession of the paintings. Under the law of adverse possession, however, simple possession is not sufficient to divest ownership. The possession must be not only actual and exclusive, but also adverse (or "hostile"), continuous and uninterrupted, and open and notorious. Here the possession was probably open and notorious, since the paintings were hanging in an office, displayed in a normal way. The possession was also continuous and uninterrupted for three years, until the death of Tom Teeter. Tom died one year before the four-year period could have run, and the fact that the office has been vacant since Tom’s death may be a serious problem for any claim Teri Teeter and her children might make. They may have "inherited" Tom’s years of adverse possession but have they continued actual possession with the office sitting vacant?

Another problem for any claim Teeters make to the paintings is the element of "adverse" or "hostile" possession." This case is similar to the Redmond case and, just as in that case, it is not clear that Tom Teeter’s possession ever became hostile or adverse to the rights of the true owners. Certainly the Teeters could claim that the period started running upon George’s death, but under the circumstances, the continuing possession by Teeter in the office will more likely be seen as permissive. It is not essential that the Gore’s make a demand for the return of the paintings, but it is necessary that the possession be adverse to the interests of the Gores, and not permissive.

For these reasons, I would conclude that the Gore children, and Alice’s successor in interest, if not the children, are entitled to possession of the paintings because the Teeters’ possession has not been actual and adverse for the required four years.
The following are two equally good student responses to problem #3.

**Problem #3**

Response A

Either choice brings its own set of what-ifs. To grant the injunction presents this what-if: What if shutting the plant causes major economic hardship for Seaside? How much does the community already rely on this new industry for taxes and jobs? Other issues to think about -- Do we want a total shut-down right away or do we want to give the industry the option to fix the problem in a reasonable time? Then if the time limit is not met the plant gets shut down. The down side to this is the effect it will have on the remaining Nance business. Would damages and injunction be effective? If the new equipment is installed will it reduce the odors enough to prevent further nuisance to the Nances? Is a move in the Nances' best interest -- aren't they known by this location as much as the quality of food and service? How to address these questions.

If the injunction is granted to be effective immediately the employees will be out of work. This could have a dominoe effect on other businesses in the town. In addition, the publicity from these hostile employees won't help the Nances recoup business from townspeople.

On the other hand, awarding damages may not be effective either. First, the company will have no requirement to stop the odors. Second, the Nances are not guaranteed that a new location will be more advantageous. Part of their business has to do with their location near the town and near the ocean.

Requiring the plant to correct the odor problem can be an unrewarding choice as well because it is not known how long the installation of new equipment will take. A reasonable time limit must be set that is fair to both parties. The Nances could totally be out of business if a time limit is unreasonably long. On the other hand, Seafood may not have control over the time required.

The best choice appears to be a combination of injunction and damages. Once it is determined how long installation should take then the injunction would take effect immediately if the installation is not complete. This puts Seafood on notice that their best efforts are required. In addition, the Nances' average daily gross earnings for each day of the week should be computed and for any day they are open when their gross is less than that day's computed average gross, Seafood would pay the difference. To make this a little clearer -- an average gross for each individual day of the week would be determined. Let's say the Sunday average gross is $600 but this Sunday the gross is $450 -- Seafood would pay $150 to cover the loss. This would continue until the time limit expires or the installation is complete -- whichever is first.
Reasons for this choice --

Seafood is forced to take measures but they are given a reasonable time to correct. The Nances don’t have to move from a location they have had for seven years. The Nances can stay in business until corrections are made and then work to rebuild their business. Depending on how quickly the installation can be completed the cost could be less than the $200,000 to move but more than $150,000 to install equipment and possibly put the Nances out of business anyway.

The key questions to answer -- How significant is the change to the odor situation after adding new equipment and what are the average gross receipts for individual days of the week for the Nances?

Response B

In this question the issue is whether the court should award the Nances (1) an injunction against further operation by Seafood, (2) an injunction against further operation by Seafood that causes smells, (3) damages in the amount requested of $200,000, or (4) damages in an amount less than, or different from, the requested amount. Seafood can substantially reduce (but not necessarily eliminate) the production of smells at their plant for a cost of $150,000. The court could require the plant to install the equipment but there may still be a problem for the Nances if the smells still cause them problems in their restaurant. If the court awards the Nances the $200,000 they request as damages, then while they may be made whole, it comes at an additional cost of $50,000 if the equipment installation would have been sufficient. (Also note, the facts do not indicate if this $200,000 included the cost of a new lot location less the value of the existing lot, which the Nances could sell.) Since the plant only has a 20 year (10 year + 10 year option) lease, they could argue that the purchase of an alternate site is unreasonably costly, and in fact the Nances only should receive 20 years damages, not permanent damages. While the judge may have decided to hold in favor of the Nances, she nonetheless still has several options available.

In the Barnes and Stout text, page 73, several considerations are listed to be taken into account when determining the best remedy in a nuisance situation:

1. Which is the most valuable use? Here we do not have an answer to that question, although it is doubtful that in outlay costs the Nances have the more valuable property in terms of building, jobs, community benefit;

2. Which party is in the best position to evaluate the costs and benefits and act accordingly? Here the Seafood plant certainly was in the best position initially, since they entered an area with pre-existing uses and made the initial choice not to install the smell-eliminating (or -decreasing) equipment;
3. What is the magnitude of costs associated with an incorrect damages calculation? At most $50,000, between the Naces’ requested $200,000 and the plants’ equipment cost estimate of $150,000; UNLESS the plant cannot afford to do either, in which case they may shut down rather than suffer such a cost;

4. Whether costs or damages calculating are likely to be more of a problem for one party rather than the other? Given the disparity of size, and the lack of information in the facts, it can be presumed that the factory is more able to absorb the cost\damages than the Nances, who have indicated they have not other "immediate prospects"; and

5. What distributional concerns are present? Clearly the loss of each use affects the owners; the loss also affects employees and citizens by the loss of local business and tax income; since the factory is larger, it presumably has a greater impact on the community and if lost will cause a greater burden on the community. However, as it is larger, it may be better able to distribute the losses under a damages award than the Nances.

Also of importance are the equity questions of (a) who is causing the problem, and (b) are these problems the external costs of one party only which should be borne by that party? The answer to both of these questions go against the factory and in favor of the Nances. Since the difference between the equipment cost and the damages requested by the Nances is $50,000 (% higher than the equipment cost) and since the equipment may not prove to be an adequate solution (in which case the expenditure of $150,000 to benefit the Nances is pointless and wasted), the court could elect to split the difference, and award the Nances $175,000. This is in between a possibly permanent solution (equipment) and the permanent solution of moving the Nances. Since we do not know if the Nances can reduce their $200,000 estimated cost by the sale of their current location, a reduction is fair. Since the factory had the opportunity to argue it could not afford either the equipment or the damages requested, but they (apparently, from the facts) did not, they cannot argue the fairness of the solution here. Their external costs should be internalized.

Problem #4

The following is the most likely description of the interests in Parcel B (paragraph 6). Julia Morgan has a life estate because "for life" is included as a phrase of limitation. Her two living children have a contingent remainder in fee simple; it is contingent because of the requirement that they survive Julia ("then living children"), this requirement being a "condition precedent." Nancy owns an alternative contingent remainder in fee simple which will become possessory if Julia dies without children surviving her. (Both remainders are fee simple interests because of the presumption favoring full transfer and because of the facts that there are no express words of limitation and the gifts are stated in alternative form, rather than as successive estates.) Because both remainders are contingent, and no vested fee simple otherwise appears, Alice’s estate (or presumably her residuary legatee or, if the will has not disposed of this interest, her heirs) owns a reversion in fee simple absolute.
Problem #5

This question asks us to explain why the interests of Alice’s grandchildren in the trust referred to in paragraph 1 of the Factual Information do not violate the rule against perpetuities. The grandchildren are given an interest in income until the youngest grandchild living at Alice’s death reaches age 21 or dies, whichever comes first. They also are given another future interest limited to the those grandchildren who have completed two years of college at the time the youngest grandchild living at Alice’s death reaches age 21 or dies. Alice had five grandchildren at her death. Their future interests are difficult to categorize in terms of duration (fee simple determinable, life estate determinable, etc.) but we do know that they are either remainders or executory interests. The first future interest appears to be a vested remainder subject to open -- vested because there is no condition precedent to the grandchildren’s entitlement to income, other than termination of prior estates; and subject to open because more grandchildren could be born. Depending on how that interest is described (in durational terms), the interest in favor of grandchildren who have completed two years of college is either a contingent remainder or an executory interest.

Because both of these future interests are "contingent," they are subject to the rule against perpetuities. As a product of Alice’s will, they came into existence at her death. That being the case, Alice’s children (a "closed class" at the time the interests were created) can be used as lives in being. According to the wording in the trust, there are actually two ways to demonstrate that these future interests do not violate the rule against perpetuities. (This is not to say that the trust was a model of good drafting; it is simply awful and there are a number of serious problems with the language used, quite apart from perpetuities.) On the one hand, the instrument purports to terminate the trust "when the youngest grandchild of mine living at my death reaches age 21 or dies." With this language, we can actually use Alice’s grandchildren who were alive at her death as lives in being; the interests will either vest fully or fail during the lifetime of those grandchildren (plus 21 years), i.e., when the youngest of that group reaches 21 or dies. Thus the grandchildren are validating lives in being. If the phrase "living at my death" is removed, we can not use grandchildren as validating lives, since the class is not limited to those alive when the interests were created (at Alice’s death). Even so, this does not change the conclusion that the interests do not violate the rule against perpetuities. As noted above, Alice’s children is a closed class and all of the children’s children (Alice’s grandchildren) will reach 21 or die no later than 21 years after the death of Alice’s children (the grandchildren’s parents, the validating lives in being); thus, the interests will still either vest or fail within the period allowed by the rule against perpetuities.