North Carolina Real Estate Law
For Deb, with all my love
Contents

Preface

Chapter 1  Introduction to Real Estate 3
I.  Real Property versus Personal Property 3
    A. What Makes Real Property So Unique? 4
    B. Physical Characteristics of Land 5
    C. Economic Characteristics of Land 5
II.  The Real Estate Market 6
III. Classifying Property by Use 7
    A. Unimproved Land 8
    B. Residential Property 8
        1. Single-Family Homes 8
        2. Apartments 8
    C. Condominiums and Townhouses 9
        1. Townhouses 9
        2. Cooperatives 9
    D. Mobile Homes under North Carolina Law 10
    E. Manufactured Housing and “Kit” Homes 10
    F. Commercial Property 11
        1. Retail/Wholesale 11
        2. Shopping Centers and Malls 11
    G. Industrial Property 11
        1. Industrial Parks 11
        2. Light Industry/Heavy Industry 11
    H. Farm and Rural Property 12
    I.  Recreational Property 12
    J. Government-Owned Land 12
IV.  Air and Mineral Rights 12
    A. Air Rights 12
    B. Mineral Rights 13
Chapter Summary 14
Chapter 2  Real Estate Professions  

I. Introduction to Real Estate Professions  

II. The Law of Agency  
   A. What Is an Agency Relationship?  
   B. Creating an Agency Relationship  
   C. Agent's Duty to the Principal  
      1. Obedience  
      2. Care  
      3. Loyalty  
      4. Accounting  
   D. Ratification  
   E. Agent's Duty to Third Parties  
      1. The Duty of Honesty and Fair Dealing  
      2. Duty Not to Commit Fraud  
         a. Material Facts  
            i. Salesmanship and Puffing  
      3. Duty to Avoid Negligent Misrepresentation  
   F. Principal's Duty to Agent  
      1. Duty to Compensate the Agent  
      2. Duty Not to Unfairly Injure the Agent's Reputation  
      3. Duty to Cooperate  
   G. Applying Agency Law to Real Estate Transactions  
      1. A Real Estate Agent's Duty of Care  
      2. An Agent's Responsibility to Disclose Information  

III. Real Estate Professions  
   A. Real Estate Investors  
      1. Small Investors and "Fixer-Uppers"  
      2. Real Estate Investment Trusts  
   B. Real Estate Agents  
      1. What Does a Broker Do?  
      2. The North Carolina Real Estate Commission  
      3. Becoming a Broker in North Carolina  
      4. Rules and Regulations Governing Real Estate Brokers  
      5. Sanctioning Real Estate Brokers  
         a. Ethical Duties of Real Estate Agents
CONTENTS

6. Continuing Education Requirements for Real Estate Brokers 30
7. Services Provided by Real Estate Agents 30
   a. Multiple Listing Service 30
C. Loan Officers 31
D. Appraisers 31
   1. Real Estate Valuation 32
   2. Real Estate Appraisal 32
   3. Comparative Market Analysis 33
E. Surveyors 34
F. The Legal Team 34
G. Contractors 34
H. Property Managers 35
I. Inspectors 35
   1. Real Estate Inspections 35
   2. Inspectors’ Duties 35
Relevant Case 36
Chapter Summary 39
Review Questions 39
Assignment 40
Terms and Phrases 41

Chapter 3 Legal Estates in Property in North Carolina 43
   I. What Is an Estate? 43
   II. Fee Simple Estate 44
      A. Rights, Obligations and Limitations of Fee Simple Owners 45
      B. Conditional Fee Simple Estates 45
      1. The Rules Used to Interpret Fee Simple Defeasible Estates 45
      2. Fee Simple Determinable 46
         a. Court Tests for Fee Simple Determinable 46
Relevant Case: Determining a Fee Simple Determinable Estate 47
      3. Fee Simple on a Condition Subsequent 50
   III. Life Estates 51
      A. Creating a Life Estate 51
      1. Elective Share for Spouses 52
         a. Waiver of Elective Share 52
      B. Remaindermen 53
      C. Waste 53
      D. Merger 53
      E. Rule in Shelley’s Case 54
      F. Renouncing a Life Estate 54
Chapter 4 Landlord-Tenant Law

I. Introduction

II. Freehold versus Non-Freehold Estates

III. Residential Rental Agreements Act
   A. Landlords and Tenants Have Mutual Obligations
   B. Landlord Duties under the Residential Rental Agreements Act
      1. Tenant Suits under Residential Rental Agreements Act
      2. Unfair or Deceptive Trade Practices
   C. The Tenant's Duties to the Landlord
      1. Ordinary Wear and Tear

IV. The Tenant Security Deposit Act
   A. Pet Deposits
   B. Late Fees

V. Discriminatory Practices

V. Lead-Based Disclosure

VII. Specific Types of Tenancies
   A. Tenancy for Years (Estate for a Stated Period)
      1. Termination of an Estate for a Stated Period of Time
      2. Notice of Termination
   B. Estate from Year to Year (Estate from Period to Period)
      1. Termination of an Estate from Year to Year
   C. Tenancy at Will
      1. Termination of a Tenancy at Will
   D. Tenancy at Sufferance
      1. Termination of a Tenancy at Sufferance

VIII. Real Estate Leases
   A. Types of Leases
CONTENTS

1. Fixed Rent Leases 71
2. Percent Leases 71
3. Net Leases 71
4. Ground Leases 71
5. Mineral Leases 71
6. Oil and Gas Leases 71

B. Creating the Landlord-Tenant Relationship 72
1. Required Provisions under North Carolina Law 72
2. Common Lease Clauses and Provisions 72
   a. Renewal 72
   b. Deposits 72
   c. Persons Permitted to Be on the Premises 72
   d. Fixtures 73
3. Commercial Leases 75
   a. Trade Fixtures 75

C. Lease Assignments and Sub-Letting 76

D. Statute of Frauds Concerns in Leases 76

IX. Eviction 76
   A. Eviction Procedures 77
   B. Wrongful Eviction 77
   C. Act Prohibiting Retaliatory Eviction 77
   D. Expedited Evictions 77

Relevant Case 78

Chapter Summary 82

Review Questions 83

Assignment 84

Terms and Phrases 84

Chapter 5 Buying, Selling and Transferring Interest in Real Estate 85

I. Introduction 85
   A. Voluntary Transfers 85
      1. By Sale 85
         a. A Real Estate Sale Is a Contract 86
            i. Offer 86
            ii. Acceptance 87
            iii. Consideration 87
            iv. Capacity 87
            v. Legality of Subject 87
         b. Other Legal Aspects of a Real Estate Sale 88
      2. By Will 88
a. By Intestate Succession 89
3. By Gift 89
B. Involuntary or Unwilling Title Transfers 90
1. By Foreclosure 90
a. Deeds of Trust 90
b. Foreclosing a Deed of Trust 91
i. Requirements of Foreclosure Sales 91
2. By Condemnation (Eminent Domain) 93
a. Inverse Condemnation 94
3. Partition 95
4. Accretion 95
5. Escheat 96
6. Adverse Possession 96
7. Tax Auctions 100
Relevant Case: Adverse Possession 100
Chapter Summary 103
Review Questions 104
Assignment 105
Terms and Phrases 105

Chapter 6 Deeds 107
I. Introduction to Deeds 107
A. Defining a Deed under North Carolina Law 108
1. Deeds Have a Dual Nature 108
a. Contractual Elements of Deeds 108
b. Statutory Requirements of Deeds 109
B. Types of Deeds 109
1. Gift Deeds 109
2. Quitclaim Deeds 109
3. General Warranty Deeds 110
a. Seisin 110
b. Quiet Enjoyment 110
c. Against Encumbrances 110
d. Further Assurance 111
e. Warranty Forever 111
4. Special Warranty Deeds 111
5. Deeds of Trust 111
6. Timber Deeds 111
7. Deed of Correction 111
8. Sheriff’s Deed 111
CONTENTS

A. Patent Ambiguities 129
   1. Parol Evidence Not Allowed to Correct a Patently
      Ambiguous Description 129
B. Latent Ambiguities 130
C. Metes and Bounds Descriptions 130
   1. Drawing Metes and Bounds Descriptions 132
D. Other Methods to Describe Property: Government Survey System 133
E. Other Methods to Describe Property: Reference to a Plat 133
F. Other Methods to Describe Property: Torrens Registration 133

III. Water Rights 135
A. Right to Draw Water 135
   1. Reasonable Use Test 135
B. Natural Forces That Affect Property Descriptions 136
   1. Accretion 136
   2. Erosion 136
   3. Avulsion 136
   4. Reliction 137
C. Determining Water Boundaries 137
   1. Navigable Waters 137
      a. Boundary Lines along Navigable Bodies of Water 138
   2. Non-Navigable Water 138

IV. Lateral Support 138

V. Premises Liability 139
A. Classifying Visitors to the Property 139
   1. Trespassers 139
      a. Exceptions to the General Rule of No Duty to Trespassers 139
         i. The Attractive Nuisance Doctrine 140
   2. Licensees 140
   3. Invitees 140
   4. North Carolina Has Abolished the Distinctions between
      Invitees and Licensees 140

Relevant Case 140
Chapter Summary 143
Review Questions 144
Assignment 145
Terms and Phrases 145

Chapter 8 Real Estate Contracts 147
I. Introduction to Contract Law 147
   A. Defining a Contract 147
CONTENTS

1. Offer 148
2. Acceptance 149
   a. The Power of Acceptance 149
      i. Communicating the Acceptance 150
      ii. Mailbox Rule 150
   b. Counter-Offers 150
3. Mutual Assent 150
4. Consideration 150
5. Legality of Contracts 151
6. Capacity 151

II. The Statute of Frauds 151
III. Formation Issues in Contract Law 152
   A. Mistake 152
   B. Interpreting Contract Language 153
   C. Fraud and Misrepresentation 153
      1. Two Types of Fraud Involved in Contracts 153
         a. Fraud in the Execution of a Contract 153
         b. Fraud in the Inducement 153
      2. The Effect of Fraud on a Contract 153
      3. Statements That Are Not Fraudulent 154
         a. Opinions 154
         b. Sales Statements or “Puffing” 154
   D. Duress, Coercion and Undue Influence 154
      1. Duress 154
      2. Coercion 154
      3. Undue Influence 154
   E. Unfair and Deceptive Trade Practices 155

IV. Types of Contracts 155
   A. Unilateral and Bilateral Contracts 155
      1. Bilateral Contracts 155

V. Real Estate Contracts 156
   A. Listing Agreement 156
      1. Open Listing 156
      2. Exclusive Listing 156
      3. Multiple Listing 156
   B. Offer of Purchase and Contract 157
      1. Property Description 157
      2. Purchase of Personal Property 157
      3. Purchase Price Details 157
CONTENTS

4. Conditions 157
5. Evidence of Title 158
6. Property Disclosures 158
7. Risk of Loss Provisions 158
8. Closing Provisions 158
9. Signature Provisions 158
10. Particular Clauses: Time Is of the Essence 158

C. Options 160

VI. Breach of Contract 160
A. Remedies for Breach 160
1. Remedies for the Seller 161
2. Remedies for the Buyer 161
3. Remedies for the Broker 161

Relevant Case 161
Chapter Summary 164
Review Questions 164
Assignment 165
Terms and Phrases 166

Chapter 9 Deeds of Trust, Mortgages and Financing Real Estate 167
I. Financing the Purchase of Real Estate 167
II. Mortgage Markets 167
A. Primary Mortgage Market 168
B. Secondary Mortgage Market 168
1. Federal Agencies in the Secondary Mortgage Market 169
III. Introduction to Mortgages 169
A. The Title Theory of Mortgages in North Carolina 169
B. Mortgages versus Deed of Trust 170
IV. The Basic Components of a Mortgage or Deed of Trust 170
A. Mortgages and Deeds of Trusts Are Recorded Like Deeds 170
B. Priority of Mortgages 171
1. Subordination Agreement 171
V. Deeds of Trust 172
A. Typical Deed of Trust Clauses 172
1. Acceleration Clause 172
2. Due on Sale Clause 172
3. Default Provisions 172
4. The Promissory Note Clause 173
5. Power of Sale Clause 173
VI. Foreclosure 173
CONTENTS

a. Personal Covenants 190
b. Real Covenants 190
   i. Touch and Concern the Land 190
c. Equitable Servitude 190
3. Creating a Restrictive Covenant 191
   a. Including Restrictive Covenants in a Deed 191
   b. Recording a Declaration of Restrictive Covenants 191
   c. Recording a Plat with Restrictive Covenants 191
4. Common Features Found in Restrictive Covenants 191
   a. Interpreting Restrictive Covenants 191
5. Recording Restrictive Covenants 192
6. Enforcing Restrictive Covenants 192
7. Unconstitutional or Illegal Restrictive Covenant Provisions 192
8. Removing Restrictive Covenants 192
B. Easements 193
   1. Appurtenant Easements 193
   2. Easements in Gross 193
   3. Creating Easements 193
      a. Express Grant 194
      b. Reservation in a Deed 194
      c. By Implication 194
      d. By Necessity 194
      e. By Prescription 194
      f. By Cartway Proceeding 195
      g. By Condemnation (Eminent Domain) 195
   4. Terminating Easements 195
      a. Loss of Purpose 195
      b. Merger 196
      c. Expiration of a Stated Time Period 196
      d. Release 196
      e. Abandonment 196
Relevant Case 197
Chapter Summary 199
Review Questions 200
Assignment 201
Terms and Phrases 201
Chapter 11  Title Searches 203
   I. Introduction to Title Searches 203
      A. Why Is a Title Search Necessary?
CONTENTS

B. Beginning a Title Search 204
   1. Attorney Approval 204
   2. Information Needed to Begin a Title Search 204
      a. Names of the Current Owners 205
      b. Description of the Property to Be Conveyed 205
      c. Time Period 205
         i. The North Carolina Marketable Title Act 205
      d. Tax ID Number 206
      e. Deed Book and Page Number 206
      f. Additional, Helpful Information 207
   C. Title Search Banks 207

II. Steps in a Title Search 207
   A. Step 1: Establishing the Chain of Title 208
      1. The Tax Office 208
         a. Tax Maps 208
      2. Creating the Links in the Chain of Ownership 209
      3. The Grantor/Grantee Index 209
   B. Step 2: Establishing the Out Conveyances 210
      1. Reviewing Title Documents 211
         a. Deed of Trust Issues in Title Searches 212
         b. Liens 213
      2. UCC Listings 213
      3. Index of Vital Statistics (Birth and Death Records) 214
   C. Step 3: Checking for Judgments 214
      1. The Clerk of Courts Office 215
         a. The Index to Special Proceedings 215
   D. Step 4: Putting All the Information Together 215
      1. Preparing Abstract Title Forms 216
   E. Step 5: The Preliminary and Final Title Certificates 216

III. Legal Malpractice Issues in Title Searches 217
   A. Tacking 217
   B. The Paralegal's Role in Title Searches 217

V. Payment for Title Searches 218
   Relevant Case 218
IV. Common Problems in Title Searches 219
   A. Sub-Divided Properties 219
   B. “Missing” Transactions 219

Chapter Summary 221
Review Questions 222
Assignment 223
Terms and Phrases 223

Chapter 12 The Closing 225
I. Introduction to Loan Closings 225
   A. Loan Closings Require Close Attention to Detail 225
II. Preparing for the Closing 225
   A. Financing 226
   B. Contacting the Attorney 226
   C. Setting a Closing Date 226
      1. The Fine Art of Scheduling Closings 226
D. Gathering Information Necessary to Complete the Closing 226
   1. Loan Payoff Amounts 227
      a. The Seller’s Attorney 227
   2. The Title Search 227
      a. Encroachments 227
      b. Repairing Title Defects 228
      c. The Preliminary Opinion on Title 228
   3. Tax Information 228
   4. The Legal Description 228
   5. Termite and Other Inspections 228
E. Loan Closing Software 229
III. The Closing Procedure 229
   A. Preparing the Loan Package 229
   B. Verifying Hazard Insurance 230
   C. Documents Required at the Closing 230
      1. The General Warranty Deed 230
         a. Preparing the Deed 231
      2. Deed of Trust 231
         a. Promissory Note 231
      3. Subordination Agreements 231
      4. Lien Waiver Affidavits 231
      5. IRS Forms 231
         a. IRS Form 4506 232
         b. W-9 Form 232
      6. HUD-1 Settlement Closing Form 232
      7. Bill of Sale for Personal Property 232
      8. Compliance Agreement 232
      9. Credit Insurance or Protection Plan Addendum 232
CONTENTS

10. Loan Application 232
11. U.S. Patriot Act Requirements 232
12. PMI Disclosure 233
13. Trust Disbursement Records 233
15. Termite Inspection Letter 234
16. Survey 234
   a. Seller’s Affidavit 234

IV. Conducting the Closing 234
   A. People Normally Present at a Closing 234
      1. Attorney 235
      2. Paralegal 235
      3. The Buyers 235
      4. The Sellers 235
      5. Real Estate Agent 235
   B. Disbursing the Funds 235
      1. Lender’s Fees 236
         a. Escrow Accounts for Insurance and Taxes 236
      2. Attorney’s Fees 236
      3. Recording Fees 236
      4. Seller’s Profit on the Transaction 236
      5. Certified Funds from the Buyer 237
      6. Real Estate Agent’s Commission 237
      7. Tax Payments 237
         a. Pro-Rated Taxes 237

V. Other Closing Issues 238
   A. “Escrow” Closings 238
      1. The Doctrine of Relation Back 238
   B. Dual Representation 238
   C. Disclosures 239
   D. Refinances 239
   E. Title Insurance 239

VI. After the Closing 240
   A. Filing Issues 240

Relevant Case 240
Chapter Summary 243
Review Questions 244
Assignment 245
Terms and Phrases 246
Chapter 13  Taxes, Liens and Assessments  247

I.  Real Property Taxes  247
   A.  The Power to Levy Taxes  247
   B.  The Types of Property That Can Be Taxed  247
      1.  Homestead Exclusion  248
      2.  Property Excluded from Tax Calculations  248
   C.  Determining the Value of Real Property for Tax Purposes  248
      1.  Calculating the Tax Rate  249
   D.  Reassessment  249
   E.  Enforcing Tax Regulations  249
      1.  Tax Liens  250
         a.  Tax Lien Priorities  250
      2.  Foreclosing a Tax Lien  250

II.  Assessments  250

III. Liens  251
    A.  What Is a Lien?  251
    B.  Types of Liens under North Carolina Law  252
       1.  Statutory Liens (Mechanics and Materialmen’s Liens)  252
          a.  Statutory Liens  252
       2.  Judgment Liens  253
    C.  The Importance of Liens  252
    D.  Perfecting and Enforcing a Lien  254

Relevant Case  254
Chapter Summary  258
Review Questions  258
Assignment  259
Terms and Phrases  259

Appendix  261

Index  265
Preface

This is a textbook designed to teach the basics of North Carolina real estate law. Designed with both the instructor and paralegal students in mind, this text seeks a balance between two competing interests: theory and practice. The theoretical underpinnings of real estate law are essential for anyone studying the topic, but a student must also have a solid grasp of the practical aspects, from liens to title searches. The text includes not only discussions of the theoretical basics of real estate law, but also places a premium on practical applications, which form the core of a real estate practice.