

# THE LAW OF PROPERTY

*SUPPLEMENTAL READINGS*

Class 14

Professor Robert T. Farley, JD/LLM

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## PROPERTY

Keyed to Dukeminier/Krier/Alexander/Schill,  
Sixth Edition

CALVIN MASSEY

ASPEN  
PUBLISHERS

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## CHAPTER 2

## FREEHOLD ESTATES

**ChapterScope** 

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This chapter examines the freehold estates — the various ways in which people can own land. Here are the most important points in this chapter.

- The various freehold estates are contemporary adaptations of medieval ideas about land ownership. Past notions, even when no longer relevant, persist but ought not do so.
- Estates are rights to present possession of land. An estate in land is a legal construct, something apart from the land itself. Estates are abstract, figments of our legal imagination; land is real and tangible. An estate can, and does, travel from person to person, or change its nature or duration, while the land just sits there, spinning calmly through space.
- The fee simple absolute is the most important estate. The fee simple absolute is what we normally think of when we think of ownership. A fee simple absolute is capable of enduring forever though, obviously, no single owner of it will last so long.
- Other estates endure for a lesser time than forever; they are either capable of expiring sooner or will definitely do so.
- The life estate is a right to possession for the life of some living person, usually (but not always) the owner of the life estate. It is sure to expire because none of us lives forever.
- There are three defeasible fees, estates that will come to an end upon the occurrence of some specified event.
  - A fee simple determinable results when a grantor (owning an estate of longer duration) grants possession only *until* an event occurs, or only for *so long as* something remains true. (“O to A so long as Britain remains a constitutional monarchy.”) When the defeasible condition occurs, the grantor automatically reacquires possession. The grantor’s right to possible future possession is called a possibility of reverter.
  - A fee simple subject to condition subsequent results when a grantor (owning an estate of longer duration) grants possession apparently without limitation or condition, but then immediately attaches a condition by which the grantor may retake possession. (“O to A, but if Britain should cease to be a constitutional monarchy, O may retake possession.”) The grantor must act to retake possession when the defeasible condition occurs; thus the grantor’s retained right to possession sometime in the future is called a *right of re-entry* or *power of termination*.
  - A fee simple subject to an executory limitation results when either of the above defeasible fees is created *but the right to future possession is transferred to a third party*. (“O to A so long as Britain remains a constitutional monarchy and, if not, to B.”) The third party’s right to future possession is called an *executory interest*.
- The fee tail is largely extinct; it was designed to endure so long as the first owner has lineal descendants, but whenever the first owner’s bloodline should die out the estate should die. The principal modern issue pertinent to fees tail is what happens when somebody attempts to create one.

- Restraints on alienation of freehold estates are much discouraged and often invalidated, because such restraints inhibit freedom and efficient allocation of resources.
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## I. ORIGINS AND TAXONOMY OF FREEHOLD ESTATES

- A. Estates generally:** A legitimate possessor of land — *real property* — owns an *estate in land* rather than the land itself. A *possessory estate* is a legal right to occupy the land immediately. By contrast, a *future interest* is the right (and sometimes only the possibility) to possess the land at some time in the future. A future interest is a presently existing estate but the estate does not include the right of possession until some future event or events have occurred. Possessory estates are further divided into *freehold estates* (essentially various types of what nonlawyers think is *ownership*) and *nonfreehold* or *leasehold estates* (possession subordinate to the owner's rights of ownership). At early common law the distinction between freehold and nonfreehold estates was that the freeholder had *seisin* and the nonfreeholder had *possession but not seisin*. Possessory estates may be of perpetual duration or for some shorter period. The various forms of possessory estates are discussed in this chapter. Our system of estates is derived from the feudal origins of land ownership. While we are long removed from feudal society and, hopefully, your professor is not anxious to test you on your knowledge of feudal law, a brief understanding of the origins will help you make sense of the contemporary concepts.
- B. Feudal tenures:** When William of Normandy — William the Conqueror — seized the English crown in 1066 he claimed ownership of all the land in England. Then he handed out possession of separate parcels to his henchmen, but with a catch. This possession-with-a-catch was called *seisin*. Each possessor was a tenant of the King, and his continued possession (his *tenure*) depended on his performance of services for the King. The tenant was *seised of the land*, which meant he held possession from the King, his lord, and owed *services to his lord*. These services could be almost anything from the important (e.g., 50 mounted knights to do combat for the King, 100 bushels of corn each year) to the frivolous (e.g., a sprig of holly at the winter solstice). The first tenant (the one holding directly from the King) was the *tenant-in-chief*. The tenant-in-chief could and often did transfer all or a part of his possession rights to some lesser chief, who was known as a *tenant in demesne* (pronounced *demean*), and who was obligated to provide services (e.g., 10 knights) to the tenant-in-chief, also known as a *mesne lord* (pronounced *mean*), because he was intermediate in the feudal chain of obligation, having a lord above and a tenant below him in the feudal pecking order. This process was called *subinfeudation* and it could produce a lengthy chain of possession and obligation. Everyone but the King owed duties to some lord. Everyone in the feudal chain also was owed services by his tenants. Those at the bottom only owed services to their lord. Holders of nonfreehold estates (lessees for a term of years) were not seised and owed no feudal duties to the lord from whom their landlord held. (This was because leaseholders were regarded as a bit low and untrustworthy, not because there was something special about leaseholds). Think of the feudal services as a tax fixed at the time the tenant was *seised in possession* and constant thereafter.
- 1. Feudal incidents:** As you can imagine, the value of possession rose as population increased but the annual services remained constant. This fact made the imposition of *feudal incidents* (essentially death taxes) important, because the lord acquired the tenant's rights (usually possession of the land) — whenever incidents came due. The lord could then either use the

property himself or *subinfeudate* — transfer — it anew in exchange for a new package of annual services. The principal incidents were *escheat*, *forfeiture*, and *wardship and marriage*.

- **Escheat:** If a tenant in possession died without heirs his tenure ended and possession returned to the next lord up the feudal ladder.
- **Forfeiture:** If a tenant in possession committed treason against the King or violated his obligations to the lord from whom he held possession his tenure was forfeited and the next lord up the chain took possession.
- **Wardship and marriage:** If a tenant in possession died leaving an heir who was a minor, the next lord up the chain was entitled to the profits from the land until the heir reached adulthood, and was also entitled to arrange the minor's marriage and receive payment from the family of the minor's prospective spouse for the marriage. (This was before the age of romantic love; marriage was a cold-blooded calculation of financial and social gain.)

2. **Feudal death tax avoidance and statute *quia emptores*:** To avoid the imposition of incidents, tenants in possession would subinfeudate to their children for nominal services.

**Example:** Lord gave possession of Blackacre to Tenant in return for 50 hogs each year. If Tenant dies while his Son is a minor, Lord has possession of Blackacre until Son reaches maturity. But if Tenant had subinfeudated Blackacre to Son for a sprig of mistletoe in midwinter, Lord's incident on Tenant's death would consist of the receipt of a sprig of mistletoe each midwinter.

Statute *Quia Emptores* (1290) destroyed this tax avoidance scheme by forbidding any further subinfeudation in fee simple. But the political price for this was recognition of the right of free tenants to transfer, or alienate, their land. A tenant could convey his interest to another in substitution for himself in the feudal chain. This was the beginning of free alienability of land in English law, a critical component of modern property law. Over time, *Quia Emptores* eliminated most mesne lords, leaving the right of incidents largely held by the King. This fact produced some new tax avoidance devices by lawyers and freeholders of the fifteenth and sixteenth centuries, another statutory response by the King (in 1536), and the development of new estates, all considered when we study future interests in Chapter 3. By then, however, the feudal economy was all but dead and the feudal system of tenure, marked by personal obligations, was essentially replaced by the modern view of ownership — private rights of use, possession, and alienability coupled with mostly financial obligations to the state in the form of taxes.

- C. **A taxonomy of freehold estates:** When feudal holdings became alienable by free tenants ("free holders") the modern *freehold estate* began to evolve. There are four basic types of freehold estates: the *fee simple*, the *fee tail*, the *defeasible fees*, and the *life estate*. Each of these has its variations and all are considered in the rest of this chapter. *Leaseholds* — the *nonfreehold estates* — are considered in Chapter 5. The principal difference between each freehold estate is the *duration of the estate*. Some freehold estates are of finite duration; some may last forever (or at least as long as the legal system that created them). Remember: An estate in land is *not the same thing as the land itself*. An estate in land is a legal abstraction — a fictional, imaginary thing that is connected to the land but existing apart from it. An estate in land consists of an important bundle of legal rights and obligations toward others with respect to a particular parcel of Earth. It can move from one person to another, be subdivided in various ways and put back together again, all while the land itself remains unchanged.

## II. FEE SIMPLE

- A. Introduction:** The fee simple is the most common freehold estate. There are two types of fees simple: the *fee simple absolute* and the three forms of *defeasible fees*. The difference between the two types is that the fee simple absolute can endure forever and the defeasible fees can be terminated upon the happening of some specified future event. The fee simple absolute is considered here. The defeasible fees are discussed in section IV of this chapter.
- B. Fee simple absolute:** The fee simple absolute is a bit of a misnomer. It is absolute ownership in the sense that its *duration is perpetual*. It may last forever (or at least as long as the legal system). It is probably what you thought of as land ownership before you started law school. It is *not absolute* in the sense that nobody can restrict the owner's use, possession, or alienability of the estate. The state can and does impose such restrictions for perceived public objectives. The question of when such restrictions amount to a taking of the estate is considered in Chapter 11. People (including professors) often speak of a "fee simple" as a shorthand form of the fee simple absolute. But because there are defeasible forms of fee simple, be precise and speak of a fee simple absolute.

### 1. Creation of the fee simple absolute.

- a. Common law:** At common law the fee simple absolute was created by a grant "*to A and his heirs.*" The words to A are "*words of purchase*" — words describing the person or persons who are the takers of the fee simple absolute. The words *and his heirs* are "*words of limitation*" — words *limiting the duration of the estate*. In the early common law, "to A and his heirs" meant that A was granted an estate that was *capable* of inheritance and, therefore, of *potentially infinite duration*. It did *not* mean that A's heirs (who would not be known because A, being alive, had no heirs) had an interest in the estate.

**Example:** In Elizabethan England if O grants Blackacre to "A and her heirs" a fee simple absolute in A is created. The heirs apparent of A have no interest. If, instead, O grants Blackacre to "the heirs of A" no fee simple absolute was created in Elizabeth I's era. Because no words of limitation were used in the second grant, the "heirs of A" would acquire a life estate — a freehold estate that ends with the life (or lives) of the heirs of A. Of course, until A dies the "heirs of A" — the takers of the interest created — are unknown. A contingent future interest is created in a set of unknown people — the "heirs of A."

The words of limitation — "and her heirs" — simply meant that because the estate could be inherited the estate could endure forever. The words *to A and his heirs* created a perpetual estate, presently held by A. That is a fee simple absolute. Of course, A will not live forever, but his fee simple absolute can endure forever. During A's life A might convey it to someone else and, if not, after A's death his fee simple absolute will be held by his *devisees* under his *will* or, in the absence of a will, by his *heirs*. Old owners of fees simple absolute wither and die, but their fees simple absolute go on and on. If the grant did not include the words of limitation only a life estate was created, even though the grantor's intentions might be clear.

**Example:** William Shakespeare, owner of Blackacre-on-Avon in fee simple absolute, conveys Blackacre-on-Avon in 1610 "to A for eternity." A does not have fee simple absolute. A has a life estate. If William Shakespeare wishes to convey his fee simple absolute to A — as his original conveyance plainly suggests — he must convey it "to A and his heirs."

- b. Modern view:** In every American jurisdiction today it is not necessary to use the magic words of limitation — "and his heirs" — to create fee simple absolute. Either by statutory

change or judicial decision the *usual rule* is that a grantor *conveys his entire estate unless the grant is to the contrary*.

**Example:** Will Shakespeare, an American contemporary descendant of the bard, owns Blackacre-on-the-Hudson in fee simple absolute. He conveys Blackacre “to A.” Fee simple absolute in A is created. Because there is nothing to the contrary in the grant Will is presumed to have conveyed his entire estate in Blackacre — fee simple absolute — to A.

**C. Alienability and inheritance of the fee simple absolute:** A fee simple absolute is freely alienable, devisable by will, or inheritable in intestacy (the state of dying without a will).

- 1. Alienation:** An owner of fee simple absolute can convey the entire fee simple absolute to another person. If O conveys his fee simple absolute to A the fee simple absolute continues without interruption. It just has a new owner. An owner can also split his fee simple absolute into lesser estates, but the sum of the estates will add up to a fee simple absolute.

**Example:** Blackacre is owned by O in fee simple absolute. O conveys Blackacre “to A for her life.” By this transaction O has split his fee simple absolute into two parts: a *life estate* in A and a *reversion*, an estate retained by O. The reversion is a *future interest*, a presently existing estate that entitles its holder, O, to future possession (when A dies and her life estate expires). The sum of the two parts adds up to fee simple absolute. If O later conveys his reversion to A, the reversion and the life estate will be *merged* and their sum is fee simple absolute in A.

- 2. Devise:** In England, an estate in land could not be devised (transferred by will) until the Statute of Wills in 1540. Until then, an estate could pass at death only to one’s heirs. The difference is that one’s heirs are prescribed by law (usually children, then the next closely related persons) and devisees can be anybody the testator specifies in his will. Today, an owner of fee simple absolute can send it under his will to whomever he pleases, or split it up into pieces that when added together equal fee simple absolute.

- 3. Inheritance:** Lay persons (and many lawyers) often use the term *inheritance* to describe all testamentary transfers, but the strict meaning of the term is limited to transfers of property owned by a person dying *without a will*. This condition, called *intestacy*, is dealt with by statutes that specify the *heirs*. Strictly speaking, a person dying with a will does *not have heirs*; he has *devisees* (of his real property) and *legatees* (of his personal property). Only a person dying intestate has heirs. At early common law the heirs were the decedent’s *issue*, and the rule of *primogeniture* applied: Estates in land went to the decedent’s first born son; daughters inherited only in the absence of sons. The usual statutory scheme today sets aside some portion of the decedent’s property for the surviving spouse, and distributes the remainder to the decedent’s children. In the absence of a spouse or children, the decedent’s parents are heirs. If the decedent leaves no surviving children, spouse, or parents, the heirs are his *collateral kin* — brothers, sisters, nieces, nephews, aunts, uncles, and cousins. At some point these people become so remotely related they are not treated as heirs. If an intestate decedent has *absolutely no heirs* the decedent’s property will *escheat* to the state.

### III. FEE TAIL

- A. Introduction:** The fee tail is virtually extinct but its vestigial implications continue to pop up like an unexpected and unwanted guest. Fee tail problems mostly occur, if at all, in connection with the various modern methods of destroying this estate.

**B. Origin and operation of the fee tail:** Prior to 1285, a conveyance to “A and the heirs of his body” was interpreted by English courts to create a *fee simple conditional*, which meant that A, the estate holder, was empowered to convey fee simple absolute if and when he should sire a child. In 1285 Parliament enacted Statute de Donis, which created the *fee tail*, the purpose of which was to permit the landed nobility to keep their power over land centralized in their families. Statute de Donis accomplished this by creating an estate, the fee tail, that automatically passed from one generation to the next, expiring only when the lineal bloodline ran out. Upon expiration, the estate reverted to the original grantor and through inheritance or devise (because the grantor would then very likely be an ancient skeleton) to the grantor’s presently living remote heirs or devisees. The magic words necessary to create a fee tail were “to A *and the heirs of his body*” — meaning his lineal descendants.

**Example:** O conveys Blackacre “to A and the heirs of his body.” A has a fee tail in Blackacre. If A conveys Blackacre “to B and his heirs” B does not have a fee simple absolute. Rather, B has possession of Blackacre only until A’s death, at which point A1, A’s son, gets possession and the fee tail.

Because a fee tail might expire — the lineal bloodline might die out — every fee tail was followed by either a *reversion* in the grantor or a *remainder* in a third party. These future interests (reversion or remainder) become possessory estates when the lineal bloodline of the fee tail holder runs out.

**C. Elimination of the fee tail:** In the United States today, the fee tail has been largely abolished by statute. An attempt to create a fee tail will result in one of the following: (1) a fee tail that can be ended by a simple conveyance, (2) a fee simple absolute, (3) a fee simple subject to an executory limitation, (4) a life estate followed by a remainder in the issue of the life tenant, or (5) a fee simple conditional. Each is discussed below.

**1. Fee tail and disentailing conveyance:** Perhaps four states permit creation of the common law fee tail, but all provide that the fee tail is destroyed by a *disentailing conveyance* — an ordinary conveyance of fee simple absolute. This is an exception to the usual rule that a grantor cannot convey more than he owns.

**Example:** Harold conveys Blackacre to William and the heirs of his body. William has a fee tail. William conveys Blackacre to George and his heirs. George has fee simple absolute. If William wants to keep possession of Blackacre but wishes to own it in fee simple absolute, he must use a *straw conveyance*. William would convey Blackacre to his lawyer in fee simple absolute and the lawyer would immediately reconvey it to William, thus giving William both possession of and a fee simple absolute in Blackacre.

**2. Statutory conversion to fee simple absolute:** Many states have, by statute or state constitutional provision, converted the fee tail into a fee simple absolute. Some state statutes declare that an estate that at common law would have been a fee tail is a fee simple. If the creator of the purported fee tail owned fee simple absolute, the grantee would also own fee simple absolute. Other states declare that the fee tail shall not be recognized and that a purported fee tail is a nullity. See, e.g., Texas Const. Art. 1, §26. These states then apply the presumption that a grantor intends to convey the largest estate he owns. Thus, if a grantor owns a fee simple absolute and purports to create a fee tail he conveys fee simple absolute.

**Example:** Bill owns Blackacre in fee simple absolute and conveys it to June and the heirs of her body. June has fee simple absolute either because a state statute converts the purported fee

tail to a fee simple absolute or because the purported fee tail is a nullity and the presumption that Bill intended to convey his entire interest will send his fee simple absolute to June.

3. **Statutory conversion to fee simple subject to executory limitation:** Some states provide that an attempt to create a fee tail will create a fee simple in the first taker under the grant, but if the purported fee tail contains a *remainder* the purported remainder will be given effect *if and only if* the *first taker dies without surviving issue*. See, e.g., Cal. Civ. Code §§763-764. This statutory method of eliminating a fee tail creates in the first taker a *fee simple subject to an executory limitation*. An executory limitation, or *executory interest*, is a future interest in a transferee from the grantor that becomes possessory by either cutting off another transferee's estate or cutting off the grantor's estate at some future time. See Chapter 3.

**Example:** Fred, owner of Blackacre in fee simple absolute, conveys Blackacre to "Emma and the heirs of her body, then to Jane and her heirs." At common law Emma would have a fee tail and Jane would have a remainder (which would become possessory when Emma's bloodline expires — indefinite or general failure of issue). But under this statutory scheme Emma receives a fee simple subject to an executory limitation — the executory interest in Jane. If Emma is survived by Caleb, her son, Emma's successors in interest will own Blackacre in fee simple absolute. Jane will get nothing; her executory interest will lapse or expire. If Emma dies without surviving issue — definite failure of issue — Jane's executory interest will become possessory and she will own Blackacre in fee simple absolute. Jane's interest is an executory interest because she is a transferee from Fred and her interest becomes possessory (if at all) by cutting off the fee simple held by Emma. Emma's fee simple doesn't die with her; it either becomes absolute (if she is survived by Caleb) or shifts over to Jane (if Emma dies without surviving issue) and becomes absolute in Jane.

4. **Life estate and remainder in life tenant's issue:** A few states essentially permit a fee tail to persist for one generation, then convert it into a fee simple absolute. They do this by treating the first holder of the purported fee tail as the owner of a life estate, and recognizing a remainder interest in the issue of the life tenant.

**Example:** David conveys Blackacre to Alice and the heirs of her body. Alice has a life estate. Her issue owns a remainder in fee simple absolute. But this remainder is contingent upon Alice having issue. If Alice has a child, Mary, upon Alice's death Mary will own Blackacre in fee simple absolute. If Alice dies childless, the contingent remainder in Alice's issue will fail and David's reversion will become possessory. David or his successors will own Blackacre in fee simple absolute. See, e.g., *Morris v. Albright*, 558 S.W.2d 660 (Mo. 1977).

5. **Fee simple conditional created:** Perhaps three states — South Carolina, Iowa, and Tennessee — treat an attempted fee tail as creating a fee simple conditional. These states do not recognize Statute de Donis as part of the common law received from England. The holder of a fee simple conditional has a life estate, but if a child is born to the holder she may convey fee simple absolute.

**Example:** Ernie conveys Blackacre to Susanna "and the heirs of her body." Susanna has a fee simple conditional and Ernie retains a reversion. If Susanna never has a child her estate will expire on her death and Ernie's reversion will become possessory, creating a fee simple absolute in Ernie (or his successor to the reversion). But if Susanna gives birth to Bert, Susanna now has the power to convey a fee simple absolute (destroying Ernie's reversion), but she must make the conveyance in order to create the fee simple absolute.

## IV. LIFE ESTATES

- A. The nature of a life estate:** A life estate is, as its name implies, a possessory estate that expires upon the death of a specified person. Usually, the life estate expires upon the death of the life estate holder.

**Example:** John, owner of Blackacre in fee simple absolute, grants Blackacre “to Bonnie for life.” Bonnie has a life estate that expires on her death. John has a reversion, which will become possessory upon Bonnie’s death.

A life estate is always followed by some future interest — either a **reversion** in the grantor or a **remainder** in a third party. A reversion may only be created in a grantor. A remainder may only be created in a transferee.

**Example:** Liz owns Blackacre in fee simple absolute. She conveys Blackacre “to Guy for life.” Liz has retained a reversion. If Liz conveyed Blackacre “to Guy for life, then to John and his heirs,” Liz would no longer have any interest in Blackacre. Guy would own a life estate and John would own a remainder.

- 1. Life estate *pur autre vie*:** When the duration of a life estate is measured by the life of a person other than the estate holder, it is a **life estate *pur autre vie*** — for the life of another.

**Example:** Alison, owner of Tribune Lodge in fee simple absolute, conveys it to Gordon for life. If Gordon then conveys his life estate to Eric, Eric will own a life estate **measured by Gordon’s life** — a life estate ***pur autre vie***. Similarly, if Alison had granted Tribune Lodge to Gordon for “the life of Vincent” Gordon would own a life estate ***pur autre vie*** — lasting as long as Vincent remains alive.

- 2. Defeasible life estates:** Life estates may be defeasible, and the same rules apply to defeasible life estates as to defeasible fees. See section V of this chapter.

**Example:** Lady Catherine grants Rosings Park “to Rev. Collins for life, so long as he never preaches a sermon.” Collins has a determinable life estate and Lady Catherine has both a possibility of reverter (which will become possessory if Collins preaches a sermon) and a reversion (which will become possessory on Collins’s death if he refrains from ever preaching a sermon).

**Example:** Lady Catherine grants Rosings Park “to Rev. Collins for life, but if he ever preaches a sermon, Lady Catherine retains the right to enter and retake possession.” Collins has a life estate subject to condition subsequent and Lady Catherine has both a right of entry and a reversion.

**Example:** Mrs. Blackett grants Beckfoot to Nancy for life, but if she ever commits an act of piracy, Beckfoot goes to Peggy. Nancy has a life estate subject to an executory limitation in favor of Peggy.

- 3. Life estates in a group or class of people:** A life estate may be created in a group of people. The problem with such class interests is that some of the life tenants will die before others, and there is some uncertainty whether the surviving life tenants take the deceased life tenant’s share or whether the remainderman or reversion holder is entitled to possession.

**Example:** Suppose Elizabeth Taylor were to convey her royalty interest in the film “National Velvet” to “all of my former husbands for their lives, and then to the ASPCA.” Assume there are six former husbands, and Eddie, one of them, dies. Most courts rule that Eddie’s life interest is absorbed by the remaining five life tenants, rather than permitting the ASPCA to take Eddie’s

interest. The ASPCA's remainder would not become possessory until all of the former husbands are dead. But if the original grant specified the opposite outcome — “to all of my former husbands for their lives, and upon the death of each one, to the ASPCA” — the ASPCA would be entitled to possession of Eddie's share upon Eddie's death.

4. **Ambiguous grants:** A recurring problem is the ambiguous grant. Courts try to follow the *grantor's intent*, but that is itself often indeterminate. Other factors are often relied upon to decide whether a life estate or some other interest is created.

★**Example:** Jessie Lide's handwritten will stated: “I wish Evelyn White to have my home to live in and not to be sold.” The Tennessee Supreme Court relied on three Tennessee statutes to presume that Jessie meant to give Evelyn fee simple absolute, there being no “clear evidence” to the contrary. One statute stated a common presumption that every grant or devise of real estate shall pass the entire interest of the grantor or testator unless there is clear evidence to the contrary. The second statute stated a presumption that a will conveys the entire interest of the testator in the testator's real property unless there is a contrary intention in the will. The third statute created a presumption against partial intestacy, which is what would happen if Jessie Lide's will was read as creating a life estate in Evelyn White, because Lide did not devise the remainder that would then exist; such remainder would pass to her heirs in intestacy. The court treated the “no sale” restriction as an invalid attempt to restrain alienation of a fee simple absolute rather than clear evidence of a life estate. *White v. Brown*, 559 S.W. 2d 938 (Tenn. 1977).

**Example:** Father devises Hollyhock Farm “to Son, so long as he refrains from imbibing any intoxicating liquors.” Courts split on whether this creates a fee simple determinable or a determinable life estate. Most courts hold that a fee simple determinable is created, on the theory that Father intended to pass his entire estate save for the limitation. See, e.g. *Lewis v. Searles*, 452 S.W. 2d 153 (Mo. 1970) (construing a grant “to Hattie so long as she remains single and unmarried” to be fee simple determinable). The theory of a determinable life estate is that, because the condition can only be satisfied or broken during Son's life, Father must have intended to give him only a life estate. The problem with this is that it is equally probable (if not more so) that Father hoped the prospect of a fee simple absolute in Son's heirs, devisees, or assigns would be an incentive to Son to stay sober.

5. **Transferability and valuation:** A life estate is freely alienable during life, but the transferee receives the transferor's life estate. The market value of a life estate is thus a fraction of the value of a fee simple absolute. The fraction is determined by multiplying the life expectancy (in years) of the person whose life measures the duration of the estate by the annual value of possession and discounting the product to reflect the fact that payment must be made now to receive value over time.

**Example:** If the market value of fee simple absolute in Runymede is \$100,000 and the life tenant has a life expectancy of 5 years, the value of the life estate can be computed by determining the annual value of possession (say 5 percent of \$100,000, or \$5,000) and multiplying that annual value for the remaining expected duration of the life estate ( $\$5,000 \times 5 = \$25,000$ ). But that product overstates the “present” value of the life estate — its value today — because the receipt of \$5,000 every year for the next 5 years is worth less than \$25,000 today. If the \$25,000 were invested at 6 percent, compounded annually, it would be worth about \$32,400 in 5 years. By inverse reckoning, the right to receive \$5,000 per year for the next 5 years (the value of the life estate) is about \$21,000.

This valuation procedure is also used whenever a life estate and the remainder are sold in a single package — fee simple absolute — and the sale proceeds must be divided between the life tenant and the remainderman.

**Example:** In the prior Example, if Runymede were sold for \$100,000, 21 percent of that sum (\$21,000) would go to the life tenant and 89 percent (\$89,000) to the remainderman. The percentages would be more or less reversed if the life tenant had a long life expectancy instead of only 5 years.

This is not always as simple as it seems. Sometimes the life tenant (the owner of the life estate) and the remaindermen disagree about life expectancy and the rate of appreciation of the value of the combined fee simple absolute. When this happens it is not easy to reach agreement between life tenant and remaindermen in order to sell a fee simple absolute.

★**Example:** John Weedon devised Oakland Farm to his widow, Anna Plaxico, for life and then to John's grandchildren by a prior marriage. The elderly Anna lived on the farm, which was rising in value because it was in the path of urban development, but earned only about \$1,300 annually from farm rents. She wanted to sell the farm and invest the proceeds to increase her income, but the remaindermen were unwilling to do so because they thought that the value of the farm was increasing rapidly and that Anna's life expectancy was shorter than it turned out to be. (She lived for 24 years after the decision in the case.) *Baker v. Weedon*, 262 So. 2d. 641 (Miss. 1972). The issue of whether the remaindermen could be forced to join with Anna in selling the farm is discussed in section IV.B.1, below.

- B. The modern life estate:** The *equitable* life estate is a common and important modern estate, but the *legal* life estate is uncommon and a bad idea. An equitable life estate is a property interest, owned for life, in the assets of a trust. A legal life estate is an estate for life in the assets themselves.

**Example:** Arnie devises Deer Park "to my brother Jack, as trustee, to hold for the benefit of my wife, Elka, for life, then to Lucia and Paul, outright and free of trust." Jack, the *trustee*, has *legal title* to Deer Park in fee simple absolute. Elka, a *beneficiary*, has an *equitable life estate* and Lucia and Paul, also beneficiaries of the trust, concurrently own a remainder. If Arnie had left Deer Park "to Elka for life, then to Lucia and Paul in fee simple absolute" Elka would have a *legal life estate* and Lucia and Paul would own the remainder.

A trustee has fiduciary duties to the equitable owners of the trust but, within the limits of those duties, is free to convey the assets in exchange for other assets in order to benefit the equitable owners.

**Example:** Refer to the prior Example. If Elka moves from Deer Park to Palm Beach, making Deer Park useless to her, Jack has power to sell Deer Park and add the proceeds of sale to the trust corpus. A purchaser of Deer Park will receive fee simple absolute in Deer Park. By contrast, the owner of a legal life estate can only convey her life estate, which may not be very marketable. A purchaser will likely want fee simple absolute, and that can only be delivered by conveying both the life estate and the remainder (or reversion). If Elka had a legal life estate in Deer Park, she would need the consent of *every remainderman* to convey fee simple absolute in Deer Park. Suppose Paul thinks it is a bad idea for his mother, age 80, to move to Palm Beach. His refusal to sell his remainder would effectively frustrate Elka's plan to substitute Palm Beach for Deer Park because nobody would pay very much for Elka's life estate alone, or even for the combination of Elka's life estate and Lucia's remainder.

Much more flexibility is possible with the equitable life estate than the legal life estate.

**Example:** Arnie could have made Elka both trustee and holder of an equitable life estate. She could then sell Deer Park as trustee (without having to convince her brother-in-law, Jack, to do so) and use the proceeds to purchase Palm Beach.

**1. Judicial responses to inflexibility of the legal life estate:** There are two principal devices courts use (sparingly) to avoid the effects of the legal life estate.

**a. Construction:** Courts try to implement the grantor's intent, but if a grant is sufficiently ambiguous courts may interpret it to create a more flexible estate, such as fee simple absolute.

**b. Judicial sale:** Courts sometimes order the sale of the life estate and the remainder and either divide the sale proceeds between the life tenant and the remainderman or order the sale proceeds held in trust with the income payable to the life tenant and the trust corpus preserved for the remainderman. This is rarely done. The life tenant and the remainderman can always agree to sell their interests as a package. If they fail to agree courts are reluctant to impose agreement. Even so, there are two situations where courts might order sale.

**i. Equitable necessity:** Where it can be proved that *sale is in the best interests of all parties* and is the only practical method to effectuate the grantor's intention to provide material comfort for the life tenant and preservation of asset value for the remainderman, a court may invoke its equity powers and order sale of all or part of the property.

★**Example:** John Weedon devised Oakland Farm to his wife, Anna, for life, remainder to his grandchildren. Over time, Oakland Farm became valuable for development but produced almost no income to the elderly and impoverished Anna. Anna and the remaindermen could not agree on sale. The Mississippi Supreme Court ruled that sale of *all* of Oakland Farm would not be in the best interest of *all* the parties, but that enough of the property could be sold to provide for Anna's "reasonable needs." But "equity does not warrant . . . sale of all the property since this would unjustly impinge upon the vested rights of the remaindermen" to receive Oakland Farm itself. *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972). Note that this Solomonic judgment required the trial court to engage in the speculative task of determining Anna's "reasonable needs." How much is enough? Everybody has a different answer.

Courts may also order sale when the remaindermen are incompetent (e.g., minors, insane) but only when sale is in the best interests of the parties.

**ii. Waste avoidance:** Courts may also order sale when it is necessary to avoid *waste* — the deterioration or destruction of the underlying property. Again, the idea is that it is in the *best* interest of all parties to sell the asset before its value is dissipated or destroyed. See, e.g., *Kelly v. Neville*, 136 Miss. 429 (1924).

**C. Waste:** Inherent in a life estate is the idea that the life tenant gets to *use* property for life, thus deriving the economic value of possession (e.g., rents, farm income). This use must be consistent with the fact that the property will be handed over to the remainderman on the life tenant's death. *Waste* is the term used to describe actions of the life tenant that *permanently impair* the property's value or the interest of the future interest holders. Older cases tend to conceptualize waste as derived from the grantor's desire to give the life tenant reasonable use of the land, consistent with its preservation in the same character as when received. Newer cases tend to regard waste as a device to prevent one person from unfairly reaping economic benefits from land possession and

imposing economic losses on another person who shares an interest in the land. Waste may be categorized as follows.

1. **Affirmative waste:** When a life tenant acts affirmatively to damage land permanently the life tenant has voluntarily committed waste. This is sometimes called *voluntary waste*.

**Example:** Erma, life tenant in Woodacre, burns the barn, cuts down all the standing mature timber, and removes a large deposit of gravel from Woodacre. Each of these acts is affirmative waste.

2. **Permissive waste:** When a life tenant fails to act reasonably to protect deterioration of the land, permissive or *involuntary waste* has occurred.

**Example:** Ivan, life tenant in Homestead, fails to repair a chronic leaking roof and fails to pay the property taxes on Homestead. Each omission is unreasonable and constitutes permissive waste. See, e.g., *Moore v. Phillips*, 6 Kan. App. 2d 94 (1981)(failure to repair); *Hausmann v. Hausmann*, 231 Ill. App. 3d 361 (1992)(failure to pay taxes).

The question of which omissions are unreasonable is dependent on the particular circumstances. The life tenant must “exercise the ordinary care of a prudent man for the preservation and protection” of the property.

3. **Ameliorative waste:** When the life tenant acts affirmatively to change the principal use of the land, and thereby *increases the value* of the land, *ameliorative waste* has occurred. Ameliorative waste is actionable, however, only when it is clear that (1) the grantor intended for there to be no change in use, and (2) the property may still reasonably be used in the fashion the grantor intended.

**Example:** Adam, owner of Waterside, builds an elaborate complex of tanks, ponds, and buildings comprising a profitable fish farm and hatchery. He devises Waterside “to my son, Abel, for life, then to the University of Eden for use as a fish hatchery and marine biology research facility.” Waterside is well-suited to these piscine purposes. Abel replaces the fish farm and hatchery complex with a factory, which doubles the value of Waterside. Abel has committed ameliorative waste. It is actionable by the remainderman, University of Eden, because Adam made it clear that he intended Waterside to be preserved as a fish hatchery and Waterside may still reasonably be used for that purpose.

If the grantor makes clear that he does not intend for the property to be preserved in its original use, ameliorative waste is not actionable.

**Example:** Suppose Adam had devised Waterside “to my son Abel for life, in order to provide Abel with an opportunity to use Waterside to maximize income, and then to my alma mater, University of Eden.” Abel’s ameliorative waste would not be actionable because it is clear that Abel didn’t care about preserving its original character.

If the grantor intends that the property be preserved in its original character, but it may no longer reasonably be used in that fashion, ameliorative waste is not actionable.

**Example:** Otto, founder of a brewery, devises his residence (adjacent to the brewery) to his son, Wilhelm, for life, remainder to his grandchildren. Time passes, and the residence becomes isolated in a sea of industrial facilities. Wilhelm destroys the residence to incorporate the site into the brewery, thereby making the residence site much more valuable. This ameliorative waste is not actionable, because the *changed conditions* render continued use as a residence unreasonable. See *Melms v. Pabst Brewing Co.*, 104 Wis. 7 (1899).

## V. DEFEASIBLE FEES

**A. Introduction:** Any estate may be made *defeasible* — subject to termination — upon the happening of some future event. This section considers defeasible fees simple, but the principles discussed here may be used in connection with other estates. The distinction between a fee simple *absolute* and a *defeasible* fee simple is that *no future event can terminate or divest a fee simple absolute*, while a *defeasible* fee simple is *subject to termination or divestment upon the occurrence of a future event*. Of course, the future event may never happen, in which case a defeasible fee endures as long as a fee simple absolute, but all the while the threat of termination hangs, like the sword of Damocles, over the defeasible fee. There are three types of defeasible fees simple: (1) the *fee simple determinable*, (2) the *fee simple subject to condition subsequent*, and (3) the *fee simple subject to an executory limitation*. The fundamental difference between the first two is that the fee simple determinable *terminates automatically* upon the occurrence of the future event and the fee simple subject to condition subsequent *terminates only when proper action is taken to terminate the estate* following the occurrence of the future event. The fundamental difference between the fee simple subject to an executory limitation and either of the first two types of defeasible fees is that the future interest that cuts short the fee simple subject to an executory limitation is held by a third party (neither the grantor of the interest nor the holder of the fee) while the future interest that cuts short either the fee simple determinable or the fee simple subject to condition subsequent is vested (at least when it is created) in the grantor.

**B. Fee simple determinable:** A fee simple determinable is created when the grantor intends to grant a fee simple *only until a specified future event happens* and uses language in the grant that manifests that intent.

**Example:** Rick, owner of Blackacre in fee simple absolute, conveys Blackacre to “the Town Library Association for only so long a time as Blackacre is used as a free lending library.” Rick has created a fee simple determinable in the Town Library Association. His intent and the words of his grant are clear: Town Library’s estate will last only until the moment Blackacre ceases to be used as a free lending library. If the grant had merely said, “to the Town Library Association for the purpose of use as a free lending library” a fee simple determinable *would not* be created. The Town Library Association would have fee simple absolute. Mere expressions of purpose are legally inconsequential surplusage.

Because a fee simple determinable is less than a fee simple absolute, a grantor of a determinable fee (who owned fee simple absolute before the grant) necessarily retained an interest. That retained interest is called a *possibility of reverter*. Note: The retained interest is *not* a reversion, and it is *not* a reverter; it is a *possibility of reverter*.

**Example:** In the prior Example, Rick would retain a possibility of reverter in Blackacre. Rick did not have to expressly mention its creation because it was created by operation of law — the fact that he conveyed a fee simple determinable, an estate of less duration than his fee absolute, means that he did not convey his entire interest. Once the possessory estate Rick conveyed terminates, the interest Rick retained must become possessory, and that interest will be a fee simple absolute. Put another way, Rick has divided his fee simple absolute into a presently possessory estate (called a fee simple determinable) and a future interest (called a possibility of reverter) and the two pieces added together equal his original fee simple absolute. The arithmetic of estates is simple but inexorable. Of course, in the grant Rick could expressly retain his possibility of reverter, but he does not need to do so in order to create one.

1. **Words evidencing intent to create fee simple determinable:** Some “magic words” still matter when courts decide whether or not a fee simple determinable has been created. Usages like *so long as*, *until*, *during*, or *while* are indicative of a grant for a limited duration, and thus are likely to be construed as creating a fee simple determinable. This conclusion will be bolstered if the grantor also expressly retains a possibility of reverter or uses other words indicating an intention to create an automatic return of possession in fee simple absolute.

**Example:** Tom, owner of Blackacre in fee simple absolute, conveys Blackacre “to Swank Yacht Club only for so long as Blackacre is used as the SYC clubhouse and, if not so used, the estate granted hereby shall automatically terminate and all right, title, and interest in Blackacre shall revert to grantor.” A grant for a limited duration is clear and the nature of the grant is equally clear even though Tom never described the granted estate as a fee simple determinable or the retained interest as a possibility of reverter. See, e.g., *Mahrenholz v. County Board of School Trustees*, 93 Ill. App. 3d 366 (1981).

2. **Transferability:** A fee simple determinable is a freely transferable estate but the nature of the estate stays the same. The transferee takes the estate subject to the limitation that makes it defeasible.
3. **Abolished in some states:** At least two states, California and Kentucky, have abolished the fee simple determinable. An estate that would be a fee simple determinable is, instead, a fee simple subject to condition subsequent.

- C. **Fee simple subject to condition subsequent:** A fee simple subject to condition subsequent is created when the words of a grant support the conclusion that the grantor intends to convey a fee simple “absolute,” but has attached a string to the grant so that if a specified future event happens (the *condition subsequent* to the grant) the grantor may pull the string and get his fee simple absolute back. Conceptually, the grantor has conveyed his fee simple forever, but has added (almost as an afterthought) a condition that will enable him to get it back. By contrast, the theory of the fee simple determinable is that the grantor has conveyed his fee simple only for a limited period. It is somewhat like the difference between a loan of your computer to a friend for a week (analogous to a fee simple determinable) and a gift to your friend of your computer, but if she ever plays computer games on it, you have the right to take it back (analogous to a fee simple subject to condition subsequent).

**Example:** Orville, owner of Blackacre in fee simple absolute, conveys Blackacre “to Battered Women’s Shelter; provided, however, that if Blackacre should ever be used for any purpose other than sheltering abused women, grantor may enter and retake possession of and title to Blackacre.” Orville has indicated an intent to part with his entire estate in Blackacre (“to Battered Women’s Shelter”). By itself, that would give BWS fee simple absolute. But Orville added a proviso (“if Blackacre should ever be used . . .”) and appended to that proviso a retained power (“grantor may enter and retake possession of and title to Blackacre”) that is utterly inconsistent with the preliminary conclusion that Orville conveyed fee simple absolute. Orville has conveyed a fee simple subject to condition subsequent.

As with the fee simple determinable, because the grantor has parted with less than fee simple absolute the grantor necessarily retains an interest. The interest retained by the grantor when a fee simple subject to condition subsequent is created is called a *right of entry* or *power of termination*. Unlike the possibility of reverter, which automatically becomes a possessory interest upon occurrence of the future event, a holder of a right of entry (power of termination) must *actually exercise the power to terminate* the fee simple subject to condition subsequent in order for that defeasible

fee to come to an end. The holder of a right of entry has the *option to terminate* the fee simple subject to condition subsequent.

**Example:** In the last example, if the Battered Women's Shelter started to use Blackacre as an amusement park instead of a shelter for abused women the condition subsequent would have occurred. But the Shelter's estate in Blackacre would not end *until and unless* Orville takes affirmative action to retake possession and thus terminate the Shelter's estate.

1. **Words evidencing intent to create fee simple subject to condition subsequent:** If the words used in the grant indicate an intention to convey the grantor's entire estate coupled with a conditional right to take it back, courts will construe the grant as creating a fee simple subject to condition subsequent. Phrases suggesting this intent include *provided, however, but if, and on condition that*. The key is whether the grant evidences intent to pass title completely, save only for a right to take it back.
2. **Action necessary to assert right of entry:** To exercise a right of entry the holder must take substantial steps to recover possession and title. The right of entry holder need not actually physically enter and retake possession, but must do more than merely proclaim his intention to retake possession. Filing suit to recover possession is surely good enough. A letter demanding possession is debatable; whether it is enough to constitute exercise of the right of entry may depend on other added facts.

**Example:** Bruce conveys fee simple in Blackacre to Ian, subject to the condition subsequent that "no hunting shall ever occur on Blackacre." Bruce writes Ian as follows: "I hear you have been shooting deer on Blackacre. If true, this is to let you know I hereby exercise my right of entry." If Bruce does nothing further for 5 years, this is probably not enough to constitute exercise of the right of entry. But if Bruce followed up that letter with an investigation that proved conclusively that Ian had shot 40 deer on Blackacre, turned over these facts to the relevant government authorities, posted signs at the edge of Blackacre stating "No Hunting; signed Bruce, Owner" and retained a lawyer to advise him, his efforts probably amount to exercise of the right of entry.

3. **Transferability:** Like the fee simple determinable, the fee simple subject to condition subsequent is freely transferable during life, inheritable, and may be devised by will. Of course, once the limiting condition has occurred and the right of entry exercised there is no estate left to be transferred.
4. **Preference for fee simple subject to condition subsequent:** It is often difficult to determine which defeasible fee has been created. In ambiguous cases courts prefer to find fee simple subject to condition subsequent. The reason for this preference is that a fee simple determinable produces *automatic forfeiture* of title and possession, while the fee simple subject to condition subsequent makes *forfeiture an option* of the holder of the right of entry. In general, courts try to avoid forfeiture of title because it is harsh, depriving a fee holder of the considerable reliance interest she has developed by possession of the land.

**Example:** Simon, owner of fee simple absolute in Blackacre, conveys Blackacre "to Alicia and her heirs so long as Blackacre is left forever wild, but if it is not, then grantor has the right to enter and retake possession and title." This confused grant suggests that the grantor intended to pass title for only a limited time ("so long as") but also indicates reservation of the future interest connected to a condition subsequent ("but if . . . then . . . right to enter and retake possession and

title"). Most courts will resolve this mess in favor of the condition subsequent in order to avoid the harsh consequence of automatic forfeiture of Alicia's estate.

Sometimes courts will rely on extrinsic evidence — evidence wholly apart from the grant itself — to decide which defeasible fee has been created. This usually occurs where the consequences of automatic forfeiture are especially severe.

**Example:** Larry, who holds fee simple absolute in Blackacre, a large but idle wheat ranch, conveys it "to Lynn so long as within one year from today she places Blackacre into agricultural production and harvests a crop of wheat in an amount of not less than 50 bushels per acre." Lynn invests a very large sum to bring Blackacre back into cultivation (buying machinery, seed, and other tools of the farming trade; hiring people; making contractual commitments) and she is about to harvest her wheat crop 10 months later when a freak hailstorm wipes out the crop. A sympathetic Larry writes Lynn that she has another year to fulfill the terms of the original deed. Larry then dies and his heir, Madeline, sues to eject Lynn, contending that Lynn owned fee simple determinable in Blackacre, that the limitation had occurred and, consequently, title had automatically reverted to Larry and descended to Madeline as Larry's heir. What result?

Although the grant seems clearly to create a fee simple determinable many courts will look to the extrinsic evidence (the freak hailstorm, Larry's extension of time, the substantial expenditures of Lynn) to conclude that Lynn had a fee simple subject to condition subsequent and that Larry, holding a right of entry, could and did waive his right for the extended period. Lynn may well prevail.

**D. Some consequences of classification of defeasible fees:** Classification of a defeasible estate as a fee simple determinable or as a fee simple subject to condition subsequent can have significant legal consequences. Some of these are introduced here.

**1. Transferability of the interest retained by the grantor:** At early common law, neither a possibility of reverter nor a right of entry could be alienated or devised. They could only be inherited. This was because they were not regarded as estates — a presently existing property right — but something more gossamer — a mere possibility. Today, most states permit a possibility of reverter and a right of entry to be alienated, devised, or inherited. But some states only permit possibilities of reverter to be freely transferable. And other states extinguish possibilities of reverter if the holder attempts to transfer them. See 2A Powell, *The Law of Real Property* ¶275[2]-275[3] (Rev. ed. 1992).

**2. Accrual of a cause of action for recovery of possession:** Because a possibility of reverter is automatic, once the limitation has occurred the holder of the possibility of reverter has a right to possession. A cause of action accrues at that moment against the person in possession of the property. The possessor, who used to occupy under a fee simple determinable, is now an adverse possessor. If suit is not instituted timely a new title by adverse possession may result.

**Example:** Ron holds a possibility of reverter in Blackacre and Caroline holds a fee simple determinable in Blackacre. In 1980 the limitation occurs. Ron does nothing about it until 1991, when he files suit to eject Caroline, who has remained continuously in possession. The state has a 10-year statute of limitations for actions to recover possession of real property. Assuming Caroline can prove the elements of her adverse possession, she now has fee simple absolute in Blackacre, via adverse possession.

But the cause of action for recovery of possession does not accrue the moment the limitation occurs if the title is fee simple subject to condition subsequent. Because the holder of the right

of entry must take affirmative action to exercise the right of entry, the cause of action accrues when the right of entry is exercised.

**Example:** Refer to the last example. If Ron held a right of entry and Caroline a fee simple subject to condition subsequent, Ron's cause of action for recovery of possession accrued in 1991, when he first took action to recover Blackacre, thus exercising his right of entry. Ron's suit would be timely and Caroline would likely be ejected.

This stark difference in result has been softened somewhat by various doctrines. Some states apply the equitable doctrine of *laches* — undue delay in asserting one's rights — to bar the assertion of stale claims.

**Example:** Refer to the last example. Even though Ron's cause of action for recovery of possession accrued in 1991 (for purposes of the statute of limitations), a court applying the laches doctrine might well conclude that Ron's delay in exercising his right of entry was undue, producing inequitable consequences to Caroline. The equitable doctrine of laches — not the limitations statute — might bar Ron's recovery of Blackacre.

Some states have statutorily or judicially altered their rules concerning accrual of causes of action to recover possession of real property to remove this anomaly. In such states the cause of action would accrue the moment the limitation occurs, regardless of whether the retained future interest is a possibility of reverter or right of entry.

3. **Effect under the Rule Against Perpetuities:** The Rule Against Perpetuities is a tricky doctrine designed to foster alienability and marketability of property. Under the rule, when uncertainty concerning ownership of a future interest persists too long the future interest will be destroyed. The details are best left for Chapter 3; however, a possibility of reverter and a right of entry are each exempt from the rule. But if the very same interest is created in a third party (not the grantor), and thus called an executory interest, it is subject to the rule and will most likely be invalid. Moreover, the consequences of a destroyed executory interest are quite different, depending on whether the void executory interest was akin to a possibility of reverter or a right of entry. In general, a void executory interest akin to a right of entry will leave the holder of the defeasible fee with fee simple absolute, and a void executory interest akin to a possibility of reverter will leave the holder of the defeasible fee with a fee simple determinable and the original grantor (or his heirs) with a possibility of reverter.
- ★4. **Mahrenholz: an illustration:** Many of the foregoing principles are illustrated by *Mahrenholz v. County Board of School Trustees*, 93 Ill. App. 3d 366 (1981). W.E. and Jennie Hutton had conveyed an acre or so of their farm to the school district under an ambiguous grant ("this land to be used for school purpose only; otherwise to revert to Grantors") and the school district built the Hutton School on the land. Later the Huttons conveyed their farm and whatever interest they had in the Hutton School land to the Jacquains, who then conveyed the same interests to Mahrenholz. Under Illinois law, however, neither a possibility of reverter nor a right of entry may be conveyed during life or pass by will; such interests may only be inherited. Thus, in 1969, when Jennie Hutton, W.E. Hutton's widow, died, her interest in the Hutton School land was inherited by her son Harry Hutton. The school district stopped holding classes in the Hutton School in 1973 but used the building for storage. In 1977 Harry Hutton conveyed to Mahrenholz his interest in the Hutton School land. Mahrenholz then sought to quiet title to the Hutton School land in his name. If the original grant created a fee simple determinable in the school district and a possibility of reverter in the Huttons (which is what the court concluded, based on conflicting Illinois precedent), and if the cessation of classes in the Hutton

School in 1973 terminated the fee simple determinable (an issue the court remanded to the trial court), then Harry owned fee simple absolute in the Hutton School when he conveyed his interest in the Hutton School to Mahrenholz, and Mahrenholz should prevail. This is because a possibility of reverter *automatically becomes possessory* upon breach of the condition. But if the original grant had created a fee simple subject to condition subsequent in the school board and a right of entry in the Huttons, and even if the ending of classes in the Hutton School was a breach of the condition, Harry would only have owned a right of entry in the Hutton School when he conveyed his interest to Mahrenholz (because Harry never took any action to reclaim possession of the Hutton School after breach by the school board) and under Illinois law a right of entry cannot be conveyed, only inherited, so the school board should prevail. **Mahrenholz** vividly illustrates the fundamental difference between the fee simple determinable and the fee simple subject to condition subsequent: A fee simple determinable comes to an *automatic* end upon breach of the condition while a fee simple subject to condition subsequent comes to an end *only when the holder of the right of entry asserts his right to recover possession*. Note that the Illinois rule preventing transfer of a possibility of reverter or right of entry by conveyance or will is not commonly followed in America today.

**E. Some problems with defeasible fees:** Among the issues presented by creation of the defeasible fees and their associated future interests are the following.

**1. Invalid restraint on alienation?** All defeasible fees restrict the use that may be made of the property. As discussed in section VI, below, restraints on alienation of property are disfavored because they inhibit economic efficiency and productivity; such restraints prevent resources from being reallocated by the market into the hands of a person who values them most highly and who will presumably make productive use of them. When does a use restriction embodied in a defeasible fee become so onerous that it amounts to an invalid restraint on alienation? The general answer is: when the use restriction materially affects marketability adversely.

★**Example:** Toscano gave to the Odd Fellows Lodge a lot adjacent to its existing building. By the deed he restricted its use to the Odd Fellows Lodge only, and stipulated that in the event of a “sale or transfer” of the property or a failure by the Odd Fellows to use the property title would revert to Toscano. In *Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano*, 257 Cal. App. 2d 22 (1968), a California appellate court voided the no-sale-or-transfer restriction as an invalid restraint on alienation but upheld the use restriction, on the theory that because Toscano meant to convey a determinable fee to the Odd Fellows rather than merely restrict alienability the use restriction was valid. This is mechanical reasoning that fails to get at the real issues. Does the use restriction embodied in a defeasible fee materially inhibit marketability? Would invalidation of such use restrictions, thus converting defeasible fees into fees simple absolute, materially discourage charitable gifts? Do the social and economic benefits of the use restriction embodied in a defeasible fee outweigh the costs imposed by the restriction?

**2. Defeasible fee or covenant?** A use restriction might be seen as the limitation or condition in a defeasible fee (e.g., “so long as Blackacre is used for residential purposes only”) or as a covenant enforceable by a suit seeking either damages for its breach or an injunction preventing violation of the promise. Creation and enforcement of use covenants — generically termed *servitudes* — is considered in detail in Chapter 6. Note here that if language is ambiguous a court might interpret a use restriction imposed by a grantor as creating a servitude rather than a defeasible fee. The consequence of the difference is in the remedy for breach of the use restriction. If the restriction is a defeasible fee the remedy is forfeiture — taking title away

from the owner of the defeasible fee and sending it to the owner of the future interest; but if the restriction is a servitude the remedy is either damages or an injunction, not loss of possession and ownership.

**Example:** Suppose Toscano had conveyed his property “to the Mountain Brow No. 82 Lodge of the Odd Fellows on the stipulation that the property shall always be used for Lodge purposes.” This “stipulation” might be read as surplusage, giving the Lodge fee simple absolute, or as covenant — a promise made by Lodge by its acceptance of the deed — which might be enforceable by an injunction or damages, or as creating a defeasible fee. Which interpretation is best depends primarily on which result is most consistent with Toscano’s intent and the policies applicable to creation and enforcement of such a use restriction. Don’t overlook the varied interpretations that can be given to an ambiguous use restriction.

3. **Valuation of the defeasible fee and the associated future interest:** Placing a separate value on a defeasible fee and its associated future interest is harder than the analogous problem of valuing a life estate separately from its associated remainder. In the case of a life estate the problem is confined by the fact that the estate will expire on someone’s death (usually the life tenant) and we can use actuarial techniques to measure that probable life span. The condition that might terminate a defeasible fee is not so limited, and thus the valuation problem becomes vastly more complicated.

**Example:** Harry Ink conveyed land to the city of Canton, Ohio so long as it was used for a public park. The State of Ohio took most of the park by eminent domain to construct a highway, and a suit arose between the city of Canton and the Ink family, owners of Harry Ink’s possibility of reverter, regarding how the condemnation proceeds should be divided. In *Ink v. City of Canton*, 4 Ohio St. 2d 51 (1965), the Ohio Supreme Court ruled that the Ink family, as owners of the possibility of reverter in the condemned land, should receive that portion of the total proceeds that exceeded the value of the land as a public park. There are problems here. (1) How is a park to be valued? There is no exchange value; public parks are not bought and sold as public parks. There is a replacement value, but because land is unique it is difficult to be sure what that value is. (2) Because the city did not voluntarily cease its park use should the value of the possibility of reverter be discounted by the probability that the city would have violated the limitation voluntarily? The Restatement of Property says that unless violation is imminent or probable independent of eminent domain, condemnation proceeds should go entirely to the defeasible fee owner. (3) Because the city’s determinable fee was a gift to it, would award of the entire proceeds to the city deter charitable giving and deliver a windfall to the city? The court did not consider whether Harry Ink’s original objective — endowing Canton with a public park — might better be served by awarding the entire proceeds to the city, subject to an order to use them to acquire replacement park land and attaching the possibility of reverter to that substituted land. Note that the Restatement view does not apply when the government initiating condemnation is also the owner of the defeasible fee, because to do so would permit the owner of the defeasible fee to create unilaterally a fee simple absolute in itself without compensation. See *City of Palm Springs v. Living Desert Reserve*, 70 Cal. App. 4th 613 (1999).

- F. **Fee simple subject to executory limitation:** A fee simple subject to executory limitation is a fee simple that is *divested*, or *shifted*, from one transferee to another transferee upon the occurrence of some future event. Both the fee simple determinable and the fee simple subject to condition subsequent involve the creation of a defeasible fee with a future interest retained by the grantor (either a possibility of reverter or right of entry). But the same defeasible fee estates can be created

with the future interests transferred to a third party instead of retained by the grantor. When this happens, a fee simple subject to executory limitation is created. If a grantor uses the words necessary to create a fee simple determinable but, *instead of retaining the possibility of reverter the grantor transfers that interest to a third party*, the interest created in the third party is called an **executory interest** and the interest created in the immediate transferee is a **fee simple subject to executory limitation**. If a grantor uses the words necessary to create a fee simple subject to condition subsequent but, *instead of retaining the corollary right of entry the grantor transfers that interest to a third party*, the interest created in the third party is called an **executory interest** and the interest created in the immediate transferee is a **fee simple subject to executory limitation**. Prevailing doctrine says that a fee simple subject to executory limitation is *automatically divested* in favor of the executory interest, no matter whether the divesting condition is phrased in the form of a determinable fee or a fee simple subject to condition subsequent.

**Example:** Joe, owner of Blackacre in fee simple absolute, conveys Blackacre “to Emily and her heirs for so long as Blackacre is cultivated annually and, if not, to Paula and her heirs.” Joe has used words indicating his intent to convey Blackacre for a limited time — “so long as Blackacre is cultivated annually.” If the grant had stopped there, Joe would have created a fee simple determinable and retained a possibility of reverter. But the grant sends what would have been Joe’s possibility of reverter to Paula. Emily has a fee simple subject to executory limitation and Paula has an executory interest. Similarly, suppose that Phil, who holds fee simple absolute in Whiteacre, conveys it “to Michelle and her heirs; provided that no banana trees shall ever be planted on Whiteacre, and if so, to Bob and his heirs.” Without the last clause this would have created fee simple subject to condition subsequent in Michelle and a right of entry retained by Phil, but the added clause turns Michelle’s estate into a fee simple subject to executory limitation and creates an executory interest in Bob. In both cases the executory interest automatically becomes possessory if the divesting condition occurs.

Somewhat inexplicably, these differences in the language of the grant have real consequences when the grantor retains the future interest (a possibility of reverter automatically becomes possessory, a right of entry does not), but have no legal consequences when the future interest is created in a third party (all executory interests automatically become possessory upon breach). Perhaps the assumption is that the creator of the interests wants to endow the third party executory interest holder with automatic possession in all circumstances, but what if the creator explicitly says otherwise?

**Example:** A1 conveys Blackacre to Mary “for residential use only, and if not so used Sigmund shall have the right to retake possession.” If A1’s intentions are the lodestar of interpretation, shouldn’t a court treat Sigmund’s executory interest as divesting Mary only when and if Sigmund manifests his intention to do so? The traditional answer is that Sigmund’s executory interest automatically becomes possessory. What policy is served by such a rule? Simple administration, perhaps, but surely the policy of honoring a grantor’s intentions is poorly served.

## VI. RESTRAINTS ON ALIENATION OF FREEHOLD ESTATES

A. **Types of restraints:** Attempts to prevent alienation of a freehold estate are generally void. These restraints are of three types.

1. **Forfeiture:** A forfeiture restraint purports to cause forfeiture of the estate if alienation is attempted, as when Will conveys The Farm “to Margy, but if she should ever attempt to transfer it in any fashion, to the Modern Language Association.”

2. **Disabling:** A disabling restraint purports to disable the owner by depriving him of any power to transfer the estate, as when Will conveys The Farm “to Margy, but no further transfer by Margy of any interest in The Farm shall be valid.”
  3. **Promissory:** A promissory restraint purports to extract a promise from the transferee that she will not alienate the property, as when Will conveys The Farm “to Margy, and Margy promises that she will never transfer any interest in The Farm.”
- B. Total restraints on a fee interest:** No matter what type of restraint is used, a *total restraint on alienation* of a fee interest is *void*. The reason for this rule is mostly economic efficiency. Restraints on alienation prevent property from moving into the hands of the person who would use it most productively.
- C. Partial restraints on a fee interest:** Some partial restrictions on alienation of a fee interest are valid, but most are void. The general rule is that a restraint on alienation that is *for a reasonable purpose* and *limited in duration* is *valid*.
- D. Restraints on life estates:** Restraints on alienability of life estates are more readily upheld, but validity depends on the type of restraint and the type of life estate to which it is applied.
1. **Legal life estates:** A life estate is theoretically alienable, but not readily marketable by itself. Thus, the practical effect of a restraint on alienation of a life estate is to prevent gift of the estate or creditor seizure of it. These are considerable impediments to economic efficiency and, in the form of a disabling restraint, operate totally to bar alienability, so courts almost always void disabling restraints on alienation. Forfeiture or promissory restraints pose no less a roadblock to economic efficiency but courts sometimes uphold them on the ground that, unlike the disabling restraint, these restraints can be released.
  2. **Equitable life estates:** Disabling restraints on equitable life estates are freely permitted. Such a restraint is called a *spendthrift trust*, because it is usually created in a trust designed to provide a spendthrift relative with an income but prevent him from his folly by denying him power to pledge the trust assets as security for a loan or otherwise use it to tempt creditors to extend credit to the spendthrift beneficiary.

**Example:** Decedent devises \$75,000 in trust and instructs the trustees to pay the income from the fund “to my brother Charles W. Adams during his natural life, . . . free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment.” This is a valid spendthrift trust. No payments may be made to Charles’s creditors to discharge his debts. Of course, once payments are made directly to Charles, creditors may seize the funds disbursed. *Broadway National Bank v. Adams*, 133 Mass. 170 (1882).

The validity of spendthrift trusts is defended on the ground that the property itself — the trust corpus, legally owned by the trustee — is freely alienable, so the spendthrift trust poses no danger to economic efficiency. Moreover, creditors are not defrauded because they can determine before extending credit whether the borrower’s source of wealth is available to repay the debt.

Objection to spendthrift trusts is mostly moral: “[I]t is not the function of the law to join the futile effort to save the foolish and the vicious from the consequences of their own vice and folly . . . [S]pendthrift trusts . . . form a privileged class, . . . an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed.” John Chipman Gray, *Restraints on the Alienation of Property* 247 (2d ed. 1895).



***Exam Tips on  
FREEHOLD ESTATES***

- Freehold estates are elementary building blocks in the property lawyer's conceptual toy chest. These issues are almost always combined with something else, usually future interests, perpetuities, or concurrent ownership, or all three, or any combination.
- The differences between the defeasible estates are mostly a matter of linguistic expression and characterization, but if there is additional evidence that suggests the intention of the grantor to create one or the other type of interest, use that evidence. Grantor's intention should be of paramount concern. Pay attention to the consequences between the two types of defeasible fees.
- Know how these estates are created, and know what to do when you spot a purported fee tail.
- Make sure you understand that the essential difference between these various freehold estates is in their duration. Only the fee simple absolute endures forever. Think of these estates as a series of nesting boxes or eggs — the fee simple absolute is the largest box, encompassing all others. Smaller estates can be carved out of larger estates, and only your imagination (or that of your professor) is the limit.
- Life estates, which are sure to end, pose particular possibilities of conflict between the life tenant and the remainderman. Waste is the doctrine to mediate that conflict. Be alert to issues of waste that can crop up whenever you confront a life estate.



# UNDERSTANDING PROPERTY LAW

SECOND EDITION



John G. Sprankling



LexisNexis

## **Chapter 9**

### **PRESENT ESTATES**

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§ 9.09 Restriction on Use: Waste

[A] Waste in Context

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## § 9.01 A Byzantine System

American property law has long been dominated by a byzantine system of estates in land. Precise, elaborate, and sometimes arbitrary rules are used to classify estates and future interests into various categories. For decades, the study of property law was almost exclusively devoted toward mastering this system of classification. Yet this complex system is increasingly irrelevant. Virtually all land sales transactions today involve only fee simple absolute, the most basic estate. The other historic estates and future interests discussed in this chapter are rarely if ever created in land. In addition, statutes in many states have greatly simplified the subject.

Modern law recognizes only certain types of estates that are equated with “ownership,” traditionally called *freehold estates*.<sup>1</sup> Accordingly, if the language of a deed, trust, or will creates a freehold estate, it will be deemed to be one of the following:

- (1) fee simple absolute (often abbreviated as “fee simple”) (*see* § 9.05[B]);
- (2) fee simple determinable (*see* § 9.06[C][2]);
- (3) fee simple subject to a condition subsequent (*see* § 9.06[C][3]);
- (4) fee simple subject to an executory limitation (*see* § 9.06[C][4]);
- (5) life estate absolute (usually abbreviated as “life estate”) (*see* § 9.05[D]);
- (6) some form of defeasible life estate (*see* § 9.06[C][5]); or
- (7) fee tail (*see* § 9.05[C]).

## § 9.02 Creation of Estates

Estates and their accompanying future interests originate in two main sources: deeds (*see* Chapter 23) and wills (*see* Chapter 28). Certainly, estates and future interests can arise from a trust (*see* Chapter 28), but inevitably either a deed (if an inter vivos trust) or a will (if a testamentary trust) is employed to transfer the property into the trust. Similarly, estates and future interests that already exist may be transferred (but not created) through intestate succession.

Suppose that O holds fee simple absolute—the largest estate recognized by law—in Brownacre; he wants to create a present estate in P for the duration of P’s life and a future interest in Q that matures into a present estate when P dies. O could accomplish this goal by executing a deed that

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<sup>1</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 (2000).

immediately conveys Brownacre “to P for life, and then to Q and his heirs.” Or O might execute a will that (effective upon O’s death) devises Brownacre “to P for life, and then to Q and his heirs.”

### § 9.03 Classifying Estates

The central challenge that estates present is classification. English common law developed a number of specific types of estates, together with an intricate system for determining which language in a deed, trust, or will created each type. American law inherited and somewhat modified this system. Thus, our law is preoccupied with rules designed to determine the *precise* name of a particular estate. Which legal pigeonhole does particular language fit into? Once the type of estate is identified, it is usually simple to determine the resulting rights and duties of the affected parties.

Three main variables are used in classifying an estate: (1) is it freehold or nonfreehold?, (2) is it absolute or defeasible?, and (3) is it legal or equitable? Depending on the answer to each of these inquiries, additional variables may become important.

### § 9.04 Estates: Freehold or Nonfreehold?

The law traditionally recognized six basic types of estates: three *freehold* estates (fee simple, fee tail, and life estate) and three<sup>2</sup> *nonfreehold* estates (term of years tenancy, periodic tenancy, and tenancy at will). Modern law generally retains this system, although some of these estates are rare or obsolete. There appears to be a judicial consensus that no new estates may be created; thus, any language creating an estate will be interpreted to mean one of the traditional types. The basic permissible estates are shown on Table 1 below.

The freehold/nonfreehold distinction was a product of English feudalism. Freehold estates were held by the powerful: the nobles, gentlefolk, and others with a niche on the feudal pyramid. In early England, such estates could be created only through an intricate ceremony (*feoffment with livery of seisin*), which was performed on the land to be transferred. The holder of such an estate was said to have an almost mystical form of possession known as *seisin*. He was benefited by the social, political, and economic facets of the feudal pyramid and obligated to perform feudal duties to a superior. In contrast, nonfreehold estates were held by the powerless—common people who typically farmed the land. A nonfreehold estate could be created informally by agreement; its holder did not have *seisin* and owed no feudal duties.

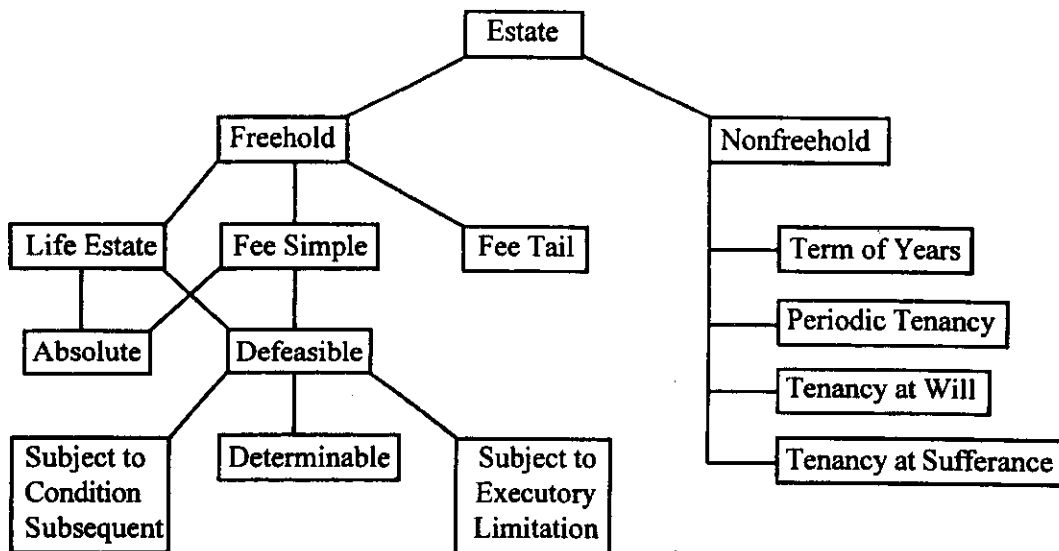
Modern law still reflects the freehold/nonfreehold split, even though its feudal rationale ended long ago. Perhaps predictably, the branch of English law governing freehold estates evolved quite differently from that relating

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<sup>2</sup> Scholars sometimes identify a fourth type of nonfreehold estate, known as the tenancy at sufferance, which arises when a tenant holds over after his legal right to possession ends (see § 15.05[E]).

to nonfreehold estates. Today we view freehold estates as forms of “owning” land, while nonfreehold estates are merely seen as forms of “leasing” land. The balance of this chapter covers freehold estates; nonfreehold estates are discussed in Chapter 15.

**TABLE 1: PRESENT ESTATES**



## § 9.05 Basic Categories of Freehold Estates

### [A] Duration of Estates

The technical distinction between the three basic freehold estates is premised on *duration*. For example, the duration of the fee simple is potentially infinite, while the life estate lasts only for the lifetime of a particular person.

Each type of estate creates different rights and duties in its holder. The fee simple absolute stands alone as the largest “bundle” of permissible property rights, unencumbered by any future interest. By definition, all other freehold estates are accompanied by a future interest in another person, and the rights of the estate owner are accordingly diminished. Thus, if A holds only a life estate in Greenacre, someone else must hold the right to possession of Greenacre after A’s death. A’s rights over Greenacre are limited by this future interest. For example, A cannot destroy the productive apple orchard on Greenacre because this would permanently interfere with future enjoyment of the property and thus constitute waste (see § 9.09).

## [B] Fee Simple

### [1] Characteristics

*Fee simple* roughly corresponds to the layperson's understanding of "ownership." The most common type of fee simple—called fee simple absolute—is the largest aggregation of property rights recognized under American law. It is also—by far—the most common estate utilized for ownership of land. Over 99% of all privately-owned land in the United States is held in fee simple absolute.<sup>3</sup> If you "own" a home, farm, or other real property, your estate is almost certainly fee simple absolute.

Technically, fee simple is a freehold estate whose duration is potentially infinite.<sup>4</sup> Thus, if O holds this estate it may endure forever. It does not end if O conveys it to another person; nor does it end if O dies. Rather, it endures over time, being transferred in multiple transactions by wills, deeds, or intestate succession to perhaps an infinite number of new owners.

Despite the conventional definition, the risk that a fee simple absolute might end is more theoretical than real. In theory at least, this estate might be terminated by escheat. Suppose O dies without leaving a will (in other words, "intestate") and leaves no legal heirs who are entitled to his property under the rules governing intestate succession. Under these circumstances, his fee simple absolute is transferred to the state by operation of law, a process called escheat. In a few states, escheat is seen as ending a fee simple absolute and other estates. In most states, however, the escheat process simply transfers a continuing estate to the state as another new owner.

### [2] Creation

Under the common law approach, a fee simple estate could be conveyed only if a precise legal formula was used. In large part, this result reflected the law's early preference for the life estate. Unless the correct wording was employed to convey a fee simple or fee tail, the resulting estate would be considered a life estate.<sup>5</sup>

If O held fee simple in Greenacre, he could convey his estate to A by using a formula that included the phrase: "to A and his heirs." The words "to A" are termed *words of purchase*; they identify the person who now owns the estate. The words "and his heirs" are called *words of limitation*. They serve only to signal the type of estate A receives, here fee simple absolute, and do not create any property rights in anyone else. Thus, if A has three children (B, C, and D) at the time of O's conveyance, the children have no interest at all in Greenacre despite use of the phrase "and his heirs." A can convey or devise his rights in Greenacre to anyone and exercise all of his

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<sup>3</sup> In practice, "fee simple absolute" is commonly abbreviated as "fee simple."

<sup>4</sup> Restatement of Property § 14 (1936) (defining an "estate in fee simple").

<sup>5</sup> Under the Statute of Wills adopted in 1540, inclusion of specific words of inheritance such as "and his heirs" was not required if the language of the will evidenced the testator's clear intent to devise a fee simple estate.

other rights concerning the property regardless of the wishes of B, C, and D.

In contrast, modern American law assumes that an owner normally intends to convey the entire estate rather than a lesser estate. This produces a constructional preference for the fee simple. Suppose O holds fee simple absolute in Greenacre, and executes a conveyance to A. Unless O uses language that clearly evidences his intent to create a lesser estate, his conveyance will be construed as transferring fee simple absolute to A. For example, if O grants Greenacre "to A" today, A receives fee simple absolute. It is no longer necessary for O to add the traditional verbiage "and his heirs."<sup>6</sup>

This fee simple preference mirrors several concerns. First, in everyday life most grantors both hold fee simple absolute and actually intend to transfer their entire estate. Construing ambiguous language in a deed or will as transferring fee simple absolute implements this intent and respects the autonomy of the grantor. Second, the fee simple preference serves the interrelated goals of marketability and efficiency.

### [3] Rights and Duties of Estate Owner

Fee simple absolute provides an owner with the maximum quantum of rights recognized under American law. Suppose H, an unmarried man, owns fee simple absolute in Greenacre, consisting of ten acres of apple orchards. By definition, no one has a future interest in the property, and thus H owes no duties to other interest holders. Nonetheless, like all property rights, H's rights are affected by various utilitarian restrictions imposed to benefit society as a whole. As one court commented, "[a] man's right in his real property of course is not absolute."<sup>7</sup> What are H's basic rights?

First, H is entitled to the use of Greenacre forever. Accordingly, he may harvest the apples or allow them to rot; he may nurture the trees or chop them all down. No private person has the right to challenge this conduct. Of course, H's right is not absolute, for government might regulate the manner in which H uses the land (*see* Chapters 36–40). While H could chop the trees down, he might not be able to burn them down; states often regulate open burning on private land to protect nearby properties against fire danger. Similarly, the smoke produced by H's fire might drift across adjacent land owned by N, a neighboring owner; if this smoke unreasonably interferes with N's use and enjoyment of his property, N could successfully sue H on a private nuisance theory (*see* Chapter 29). But absent such unusual circumstances, H is relatively free to use Greenacre as he wishes simply because he owns all of the private property rights in the metaphorical "bundle of rights" that represents title.

Second, H is entitled to sole possession of Greenacre, which generally allows him to exclude all other persons from the land (*see* Chapter 30).

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<sup>6</sup> *See, e.g.,* *Cole v. Steinlauf*, 136 A.2d 744 (Conn. 1957). Only South Carolina still clings to the outmoded "and his heirs" formula. *McLaurin v. McLaurin*, 217 S.E.2d 41 (S.C. 1975).

<sup>7</sup> *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971).

Suppose T, a hungry stranger, wishes to enter Greenacre to obtain an apple; H may legally prevent T's entry. If T enters without H's consent, T is liable to H in damages for trespass and might also face criminal trespass charges. Yet the right to exclude is not absolute. A wide range of nonpermissive entries is sanctioned by the law (e.g., police officers may enter in pursuit of a fugitive). In the celebrated *State v. Shack*<sup>8</sup> decision, the New Jersey Supreme Court extended this principle by holding that employees of publicly-funded health and legal services organizations could enter a farm to meet with workers living there despite the vehement protests of the employer-owner.

Finally, H may transfer his rights in Greenacre. During his lifetime, H may convey his estate by deed to whoever he wishes; alternatively, H may devise his rights by will to the devisees of his choice. In either case, H can opt to transfer either all or part of his estate. For example, H could grant a life estate to his sister S, retaining a reversion.<sup>9</sup> Even H's right to transfer, however, is somewhat restricted. A variety of doctrines limit the types of future interests that H can create; other rules curtail restraints on alienation and similar conditions that H may impose on his successors.

## [C] Fee Tail

### [1] Characteristics

The *fee tail*<sup>10</sup> is a largely-obsolete freehold estate whose duration was measured by the lives of the lineal descendants of a designated person.<sup>11</sup> For example, if O granted Greenacre "to A and the heirs of his body," this language created an estate that would endure as long as A's bloodline continued. Assume A had only one child, B, who in turn had only one child, C. Upon A's death, B automatically received the right to possession of Greenacre; upon B's death, the right to possession passed in turn to C. This cycle continued until the family line expired.<sup>12</sup>

Today the fee tail is virtually extinct in the United States. Yet fee tail remains a subject of academic interest, principally because the reasons for

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<sup>8</sup> 277 A.2d 369 (N.J. 1971).

<sup>9</sup> Of course, if H retains rights in Greenacre at his death that are not devised (for example, because he left no will), these rights will pass by intestate succession to his heirs or, if he has no heirs, will escheat to the state (see Chapter 28).

<sup>10</sup> Literally, fee tail means a "cut" or "limited" fee simple. "Tail" stems from the Norman French term "talliare," meaning "to cut" or "to limit." The word "curtail" is derived from the same source.

<sup>11</sup> Restatement of Property § 59 (1936) defines fee tail as an estate "in favor of a natural person as to whom the conveyance contains words of inheritance" and "in specific words confines the succession to the issue of the first taker or to a designated class of such issue."

<sup>12</sup> An estate even more esoteric than fee tail is the *fee simple conditional*, which survives only in Iowa and South Carolina. The fee simple conditional is an estate that may only be inherited by the heirs of the first taker. Even where it survives, this estate has been limited by judicial interpretation; once issue are born to the first taker, he may circumvent the restriction simply by conveying fee simple absolute to another.

its rejection help explain the foundational principles of American property law.

## [2] Creation

Why create a fee tail? Early English landowners wanted the ability to ensure that their land would be passed on to successive generations of their descendants, and thus remain within the family. In feudal England, ownership of land was central to both social identity and personal wealth. If a landowner could limit the alienability of family lands over the long term, he could safeguard the prestige and honor of his descendants. Suppose L owned fee simple absolute in Redacre. If L were about to die, he could of course convey fee simple absolute to his son M. What if M proved an incompetent manager and was forced to convey Redacre to his creditors? Or, even worse, what if M fell into a drunken stupor and gambled Redacre away? Landowners like L sought a method to prevent incompetent or dissipated descendants from alienating the family lands.

The fee tail was born in 1285 with the enactment of the statute *De Donis Conditionalibus*.<sup>13</sup> Under this statute, lands could be restricted so that they would pass only to lineal descendants of the first taker. Eventually, specialized forms of fee tail emerged, including fee tail male (limited to male lineal descendants) and fee tail special (limited to lineal descendants from a particular wife). If a landowner like L conveyed fee tail in Redacre to M (e.g., “to M and the heirs of his body”), M could not endanger future generations by transferring fee simple. At most, M could transfer the right to use Redacre during his lifetime; upon M’s death, his eldest child would automatically be entitled to possession of the land.

Over the ensuing centuries, English land was increasingly “entailed,” that is, held in fee tail. Indeed, the entailed family manor became a stock feature in English novels,<sup>14</sup> until the estate was formally abolished there in 1925. But long before then, fee tail owners were able to circumvent the entail through either of two ingenious and complex procedures, the common recovery (a collusive lawsuit that allowed the successful fee tail holder to convey fee simple)<sup>15</sup> and the fine.

## [3] Accompanying Future Interests

Suppose O conveyed Greenacre “to A and the heirs of his body.” By definition, two future interests arose: (a) one in the lineal descendants of A for as long as A’s bloodline continued; and (b) one in O that would become possessory when A’s bloodline ended. A’s living lineal descendants (and prospective future descendants) all received a remainder. Thus, for example, if A had one living son, S, when O’s conveyance became effective, S received a vested remainder in fee tail. But if A had no living children at

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<sup>13</sup> 13 Edw. I, ch. 1 (1285).

<sup>14</sup> See, e.g., Daphne Du Maurier, *Rebecca* (1938).

<sup>15</sup> See *Taltarum’s Case*, Y.B. 12 Edw. 4, fol. 19, pl. 25 (1472).

the time, his unborn, potential descendants would hold a mere contingent remainder in fee tail.

A separate future interest became possessory when the fee tail ended, here when A's bloodline expired. The classification of this interest turned on who acquired it when the fee tail was first created. The future interest was a reversion (see § 13.02[A]) if it was created in the transferor. Suppose O conveyed Greenacre "to A and the heirs of his body"; O retained a reversion by operation of law simply because he conveyed less than his entire estate. If O later conveyed his reversion to his daughter D or another successor, it would still be considered a reversion.

On the other hand, if O conveyed the property "to A and the heirs of his body, and then to B and her heirs," O transferred all of his rights. Because ultimate future interest was held by B, who received it in the same conveyance that created the fee tail itself, B's future interest was considered a remainder (see § 14.03).

#### [4] Rights and Duties of Estate Owner

The rights of a fee tail owner were quite restricted when compared to those of the fee simple owner. The holder of fee tail was entitled to the use and enjoyment of the land involved, but not to the extreme of committing waste (see § 9.09). For example, if A held fee tail in Greenacre, A could harvest the apples from its orchards or allow them to rot, like a fee simple owner. But—unlike the fee simple owner—A could not chop down the trees because this would unreasonably interfere with the ability of future interest holders to enjoy their rights.

More importantly, the fee tail owner had only a limited right of transfer. Because the owner's possessory right ended at death, it could not be devised or inherited. At most, the owner could convey the right to possess the property during his lifetime. Thus, if A (trying to settle his gambling debts) purported to convey Greenacre to B in fee simple in 1500, B received only what A had—the right to possession of Greenacre until A died. If A died in 1501, B's rights ended and the possessory estate in Greenacre automatically passed to A's eldest son.

#### [5] The Demise of Fee Tail

The fee tail was largely abolished in the United States over 200 years ago. The principal architect of this reform was Thomas Jefferson, who feared that this estate would undermine democracy. He worried that fee tail would contribute to the development of a hereditary aristocracy (akin to the hated English aristocracy) that could control American political and social life.<sup>16</sup>

<sup>16</sup> Jefferson explained that the bill he proposed to abolish fee tail in Virginia was one of four measures "forming a system by which every fibre would be eradicated of ancient or future aristocracy; and a foundation laid for a government truly republican. The repeal of the laws of entail would prevent the accumulation and perpetuation of wealth in select families, and preserve the soil of the country from being daily more and more absorbed in Mortmain." Thomas Jefferson, *Autobiography, 1743-1790*, in Thomas Jefferson: Writings 44 (Merrill D. Peterson ed., 1984).

Jefferson's utopia was a nation of small landowners. Ownership of land would empower each citizen with the self-sufficiency necessary to make independent political decisions, free from the pressure of a landed employer, creating a society founded on individual merit rather than ancestral status. Jefferson spearheaded a successful effort to convince the Virginia legislature to ban fee tail.

Eventually most other states also abolished fee tail.<sup>17</sup> Jeffersonian concerns played a role in this process,<sup>18</sup> as did the traditional concern for free alienation of land. Fee tail would limit the marketability of land, thus impairing American economic development. Suppose O owned fee tail in land suitable for a shipyard, but lacked the capital required to develop it. As a practical matter, O could not sell the land for shipyard use, because a buyer would receive only O's fee tail, which could end at any time; a prudent investor was unwilling to take this risk. Similarly, O could not finance the development of the shipyard with a loan secured by a mortgage on the land, because the mortgage would end whenever O died. In short, land held in fee tail was destined for economic limbo.

What happens if a modern grantor attempts to create fee tail? In almost every state, this contingency is addressed by statute. The majority of states interprets fee tail language as creating fee simple absolute in the first taker. Thus, if O conveys Greenacre "to S and the heirs of his body," S simply receives fee simple absolute.<sup>19</sup> A few states follow different views. In some, the fee tail is preserved for one generation, and is then converted to fee simple absolute in the issue of the first taker.<sup>20</sup> In other states, fee tail language creates a life estate in the first taker, followed by a vested remainder in fee simple absolute in the first taker's issue.

## [D] Life Estate

### [1] Characteristics

The *life estate* is a freehold estate whose duration is measured by the lives of one or more specified persons.<sup>21</sup> For example, a grant "to B for B's life" creates a life estate in B for as long as she lives. B, as the holder of the life estate, is called the *life tenant*. Alternatively, the duration of the

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<sup>17</sup> In theory at least, fee tail may still be created in Delaware, Maine, Massachusetts, and Rhode Island. Yet as a practical matter, any fee tail owner in these states can avoid the entail easily. When a fee tail owner executes and delivers a deed that purports to convey fee simple, the grantee receives fee simple. An example is *Caccamo v. Banning*, 75 A.2d 222 (Del. Super. Ct. 1950), where the fee tail owner conveyed fee simple to a strawman, who reconveyed fee simple to her; the court held that this process eliminated the entail.

<sup>18</sup> See, e.g., *Robins Island Preservation Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409 (2d Cir. 1992) (discussing New York's abolition of fee tail in historical context).

<sup>19</sup> What if the conveyance was "to S and the heirs of his body, and then to T"? Statutes in some states provide that such language gives S fee simple subject to an executory limitation and gives T an executory interest in fee simple (which becomes possessory if and when S dies without issue).

<sup>20</sup> See, e.g., *Long v. Long*, 343 N.E.2d 100 (Ohio 1976).

<sup>21</sup> Restatement of Property § 18 (1936).

life estate may be measured by the life of a person other than the grantee (e.g., "to B for the life of C"); this is called a life estate *pur autre vie*.<sup>22</sup> The life estate is considered the smallest of the three freehold estates.

The life estate is most commonly encountered in the family gift. In the nineteenth and early twentieth centuries, life estates typically involved either the family home or the family farm. For example, suppose W owned a farm in 1920 and wanted both to support her aged sister S and to ultimately give the farm to W's grandchildren. W might devise a life estate in the farm to S, followed by a remainder in W's grandchildren. For a variety of reasons, creation of a legal life estate in land today is unwise and thus rare. The modern life estate is an equitable estate, usually created to facilitate a family gift in trust.

## [2] Creation

After the Norman Conquest, the estates initially granted by the king to his supporters were for life terms only. Later, the holder of a fee simple could choose to create a life estate by using appropriate language in a deed or will. Under the formalistic English common law, a fee simple or fee tail could be created only by precise words in inheritance. Thus, any freehold estate created without such words of inheritance was deemed to be a life estate. A grant "to B," for example, created only a life estate in B.

Reversing the common law approach, modern American law presumes that every grant passes *all* of the grantor's estate, unless the grantor's contrary intention is clearly indicated. As a result, ambiguous language in a conveyance by a grantor holding fee simple (e.g., "to B") is judicially interpreted as transferring fee simple absolute.

An example is *White v. Brown*,<sup>23</sup> where the Tennessee Supreme Court construed a holographic will that provided: "I wish Evelyn White to have my home to live in and not to be sold."<sup>24</sup> Concluding that this sentence did not clearly state the intent of the testatrix, the court held that it devised a fee simple estate. Thus, today the holder of a fee simple estate can create a life estate only by using language that clearly reflects this intention (e.g., "to B for life" or "to B for his lifetime").<sup>25</sup>

Although life estates are usually created by an express grant or devise, they can sometimes arise by operation of law. For example, at common law a widow received "dower," a specialized type of life estate in certain lands owned by her deceased husband (see § 11.02[D][1]); similarly, in some states an attempt to create a fee tail will be construed as creating a life estate instead.

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<sup>22</sup> "Pur autre vie" is old French for the phrase "for another life."

<sup>23</sup> 559 S.W.2d 938 (Tenn. 1977).

<sup>24</sup> *Id.* at 938 (emphasis in original). *But see* Williams v. Estate of Williams, 865 S.W.2d 3 (Tenn. 1993) (devise "to have and to hold during their lives, and not to be sold during their lifetime" created life estate).

<sup>25</sup> See, e.g., Pigg v. Haley, 294 S.E.2d 851 (Va. 1982). *But see* Nelson v. Parker, 687 N.E.2d 187 (Ind. 1997) (deed to A, providing that it was "subject to" life estate in B, created life estate in B).

### [3] Accompanying Future Interests

By definition, whenever a life estate is created a future interest also arises. If O, holding fee simple absolute in Greenacre, conveys “to A for life,” he has granted A *less* than the sum of his property rights. O’s resulting right to possession of Greenacre upon A’s death is termed a *reversion* (see § 13.02[A]). But if O creates this future interest in a third person (e.g., “to A for life, and then to B and his heirs”), it is called a *remainder* (see § 14.03).

### [4] Rights and Duties of Estate Owner

The life tenant is entitled to the use and enjoyment of the land, including any rents and profits it produces. But—like the fee tail owner—the life tenant cannot commit waste (see § 9.09). For example, if T has a life estate in the apple orchard known as Greenacre, she is entitled to harvest the apples or not to harvest them, as she chooses; but T cannot chop the trees down, for this would be considered waste.

Similarly, a life tenant has a restricted right of transfer. A life tenant may transfer what he or she has—possession of the land for the duration of the life estate—but nothing more. Thus, while a life tenant in theory might lease, mortgage, or even convey his or her interest, the land is bound by these transfers only for so long as the life estate endures; accordingly, as a practical matter, such transfers are difficult. Moreover, the normal life estate cannot be inherited or devised. In the example above, T’s life estate ends when she dies. Suppose, however, that T holds a life estate *pur autre vie*, measured by the life of U. If T dies before U, T’s life estate continues and may be transferred to others upon T’s death.

The life tenant’s right to sell his or her interest is often illusory because its value is uncertain and speculative. T’s life estate in Greenacre, for example, may be virtually worthless (e.g., if T dies tomorrow) or quite valuable (e.g., if T lives for 50 more years). An interesting issue arises when the life tenant wishes to maximize the value of the interest by forcing a sale of the affected land over the objections of the remainderman. *Baker v. Weedon*<sup>26</sup> illustrates the problem. There the 73-year-old plaintiff was a life tenant in a Mississippi farm; the farm produced income of only \$1,000 per year, too little for her to live on. But fee simple absolute in the farm was valued at \$168,500. If the fee simple could be sold, and her life estate transferred to the sales proceeds, she would earn enough interest to support herself (e.g., over \$8,000 per year assuming a 5% return). The remaindermen refused to join voluntarily in selling the fee simple because they expected that future construction of a nearby highway would double the land’s value in a few years. Plaintiff sought a judicial decree that would (a) order sale of the fee simple absolute over the remaindermen’s objections and (b) recognize her life estate in the proceeds.<sup>27</sup> Prior Mississippi

<sup>26</sup> 262 So. 2d 641 (Miss. 1972).

<sup>27</sup> See also *United States v. 403.15 Acres of Land*, 316 F. Supp. 655 (M.D. Tenn. 1970) (life tenant awarded income for life from entire condemnation award when federal government condemned land for reservoir project; court rejected remainderman’s argument that life tenant should only receive the cash value of her life estate based upon actuarial table).

decisions had authorized such judicial sale only where necessary to preserve the estate, that is, if the property involved had deteriorated to the point that its income would not pay for required taxes and maintenance. But the *Baker* court embraced a new rule, holding that such a sale would be proper if “necessary for the best interest of all the parties.”<sup>28</sup> The case was remanded to allow plaintiff the opportunity to prove that an immediate sale would serve the best interests of all.

Most states have enacted statutes in recent decades that expand judicial power to order the sale or other transfer of fee simple in this situation. There is quite a bit of state by state variation, but the most common approach echoes the *Baker* standard: sale will be decreed if it is “expedient.”<sup>29</sup>

### [5] Evaluating the Life Estate

Today the legal life estate in real property has been eclipsed by a more effective tool—the trust (see Chapter 28). As *Baker v. Weedon*<sup>30</sup> illustrates, the legal life estate is relatively inflexible. Even if circumstances change dramatically, the future interest holder may have veto power over any alteration in the status quo. However, if an owner creates a life estate in trust (an “equitable life estate”), the trustee holds legal title and can accordingly take appropriate steps to protect all parties against changed circumstances, including selling trust assets. England abolished the legal life estate in land in 1925, and American states may ultimately follow this lead. In short, the legal life estate in land is headed toward extinction.

The life estate is commonly used in connection with personal property assets (e.g., stocks and bonds) held in trust. Thus, if O dies leaving a stock portfolio valued at \$5,000,000, his will might create a testamentary trust for the benefit of his remaining family members. His wife W receives an equitable life estate in the stock portfolio, while his children C and D receive equitable vested remainders.<sup>31</sup>

## § 9.06 Freehold Estates: Absolute or Defeasible?

### [A] Basic Distinction

Each freehold estate is either *absolute* or *defeasible*. The distinction between the two categories turns on the answer to a simple question: how might the estate end?

Most estates are absolute, meaning that their duration is restricted only by the standard limitation that defines that category of estate. For example,

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<sup>28</sup> *Baker v. Weedon*, 262 So. 2d 641, 644 (Miss. 1972).

<sup>29</sup> See, e.g., N.Y. Real Prop. L. §§ 1602, 1604.

<sup>30</sup> 262 So. 2d 641 (Miss. 1972).

<sup>31</sup> The legal life estate retains some vitality in the context of personal property. For example, suppose O owns a rocking chair that has been in her family for decades and possesses special sentimental value. In order to control the chair's ultimate fate, she might bequeath a life estate in the chair to one family member, and a remainder to another.

the fee simple is defined as an estate that is potentially infinite, absent escheat. Thus, if O conveys Blueacre "to S and his heirs," S receives the standard type of fee simple, one which is potentially infinite and which will end (if at all) only by escheat; S owns fee simple absolute. Similarly, a life estate is defined as an estate whose duration is measured by the life of a person or persons. So if O conveys Greenacre "to D for life," D owns a life estate absolute. Its length—consistent with the basic definition—is measured by the life of a person.<sup>32</sup>

On the other hand, a defeasible estate is subject to a special provision—included in the language in the deed, trust, or will that creates the estate—that may end the estate prematurely if a particular future event occurs. Suppose O conveys Blueacre "to S and his heirs for so long as S refrains from smoking a cigar." S clearly owns a type of fee simple, yet it is clear that his estate will end if he smokes a cigar, long before any possible escheat. S holds a type of defeasible fee simple called fee simple determinable. Or O might convey Greenacre "to D for life, but if D ever smokes cigars, then to E and her heirs." Here D owns a form of life estate, but one which may end early; this is a fairly rare type of defeasible life estate, called a life estate subject to an executory limitation. Here, the estates of S and D may end prematurely, if either one smokes a cigar. Although the examples above assume a contingent future event (that is, one uncertain to occur), a defeasible estate will also be found where the stated event is virtually certain to occur, e.g., "to X until it next snows in Alaska."

The discussion of defeasible estates below focuses on the defeasible fee simple because—although defeasible estates are becoming an endangered species—the defeasible fee simple remains the most common type.

## **[B] Why Create Defeasible Estates?**

Although widely used in the past, defeasible estates are rarely created today. The defeasible estate was once commonly utilized in conveyances for charitable purposes such as parks,<sup>33</sup> schools,<sup>34</sup> hospitals, orphanages, and the like. It provided leverage to ensure that the donor's intent was followed even after death. Suppose that D, holding fee simple absolute in Greenacre, wished to encourage the creation of a hospital by donating land for the hospital site. She could convey fee simple absolute in Greenacre to a non-profit hospital corporation. But this might allow the corporation to operate a hospital on the land for a few years, cease operations, and sell the land for another purpose. D could avoid this risk by conveying only a defeasible estate in Greenacre, such as "to Corporation for so long as Greenacre is used as a hospital." Under this granting language, if the hospital use ever ended, the Corporation's estate also ended. Logically, this threatened loss of title would induce a charitable donee to respect the donor's original intent.

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<sup>32</sup> The "life estate absolute" is almost always abbreviated as "life estate."

<sup>33</sup> See, e.g., *Ink v. City of Canton*, 212 N.E.2d 574 (Ohio 1965).

<sup>34</sup> See, e.g., *Mahrenholz v. County Bd. of School Trustees*, 417 N.E.2d 138 (Ill. App. Ct. 1981).

Defeasible estates were also sometimes used to secure economic goals or to control the behavior of family members. If F, a farmer, wanted to ensure that his crops could be easily transported to market, he might grant a strip of his land to the railroad “for so long as used as a railroad.”<sup>35</sup> Or if G, a strict teetotaler, hoped to persuade her son S never to drink alcohol, she might grant property to S “for so long as S never drinks alcohol.”

The use of defeasible estates and related conditions to control the behavior of family members is controversial. Could parent P devise land to daughter D for so long as she remains married to H, follows certain religious practices, or pursues a specified career? Modern cases involving such conditions are scant.<sup>36</sup> The Restatement of Property generally provides that restrictions related to religion, personal habits, education, or occupation are valid;<sup>37</sup> but it limits the enforceability of restrictions concerning marriage, remarriage, divorce, or separation.<sup>38</sup>

## [C] Types of Defeasible Estates

### [1] Basic Distinctions

The three types of defeasible fee simple estates are:

- (1) fee simple determinable;
- (2) fee simple subject to a condition subsequent; and
- (3) fee simple subject to an executory limitation.

Two basic distinctions are used in categorizing a defeasible fee: (a) who holds the future interest? and (b) is the defeasance language expressed in words of time or words of condition? Where the future interest is retained by the transferor (or his successors), the estate is fee simple determinable if words of time (e.g., “for so long as”) are used, and fee simple subject to a condition subsequent if words of condition (e.g., “on condition that”) are used. If the future interest is held by a transferee (that is, a person other than the transferor or his successors), the estate is a fee simple subject to an executory limitation where words of condition are used.

### [2] Fee Simple Determinable

The *fee simple determinable* automatically expires at the time when a particular event occurs, immediately giving the transferor the legal right to possession.<sup>39</sup>

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<sup>35</sup> Cf. *Nichols v. Haehn*, 187 N.Y.S.2d 773, 775 (App. Div. 1959) (deed provided that land would revert to grantor “in case said Railway shall at any time be abandoned”).

<sup>36</sup> See, e.g., *In re Estate of Romero*, 847 P.2d 319 (N.M. Ct. App. 1993) (if decedent intended to separate sons from mother by devise of home to sons for so long as mother did not live with them, then devise would violate public policy).

<sup>37</sup> Restatement (Second) of Property: Donative Transfers §§ 8.1–8.3 (1983).

<sup>38</sup> Restatement (Second) of Property: Donative Transfers §§ 6.1–7.2 (1983). But see *Lewis v. Searles*, 452 S.W.2d 153 (Mo. 1970) (upholding devise of property to niece “for so long as she remains single and unmarried”).

<sup>39</sup> See Restatement of Property § 44 (1936).

Suppose W owns fee simple absolute in Silveracre and grants "to City for so long as Silveracre is used for a park." This conveyance creates a fee simple determinable estate in City. First, under this language W, the transferor, retained the future interest in Silveracre, called a *possibility of reverter*. Even though W's conveyance to the City does not expressly reserve any interest, her possibility of reverter arises as a matter of law simply because she did not convey her entire estate. Second, the defeasance language is expressed in words of time; the City's estate endures only so long as park use continues. Suppose City operates a park on the land for 10 years, and then builds a sewage treatment plant on the site. Once the park use ends, the City's estate expires according to its terms and the right to possession of Silveracre automatically reverts to W, all without any action on her part. W again holds fee simple absolute in Silveracre.

It is sometimes difficult to distinguish between fee simple determinable and fee simple subject to a condition subsequent. In general, the hallmark of a fee simple determinable is language of time or duration.<sup>40</sup> This estate is created by granting language indicating that a fee simple estate will continue only for the duration of a specified state of affairs such as "so long as" (e.g., "to City for so long as the land is used as a park"), "while" (e.g., "to City while the land is used as a park"), and "during" (e.g., "to City during the time the land is used as a park"). For example, in *Mahrenholz v. County Board of School Trustees*,<sup>41</sup> the grant of land to a school district with the restriction "this land to be used for school purposes only; otherwise to revert to Grantors herein" was held to create fee simple determinable. The appellate court reasoned that the term "only" indicated an intent to "give the land . . . only as long as it was needed and no longer."<sup>42</sup>

Where the granting language is so ambiguous that the above guidelines are unhelpful, most courts will construe the estate as fee simple subject to a condition subsequent in order to avoid forfeiture.<sup>43</sup> While the fee simple determinable causes automatic forfeiture when the stated event occurs, the fee simple subject to a condition subsequent presents only the risk of forfeiture.<sup>44</sup>

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<sup>40</sup> See, e.g., *Mayor and City Council of Ocean City v. Taber*, 367 A.2d 1233, 1236 (Md. 1977) (grant to federal government that provided "when the United States shall fail to use the said Life Saving Station, the land hereby conveyed for the purpose aforesaid, shall, without any legal proceedings, suit, or otherwise, revert to the said Trustees" held to create fee simple determinable).

<sup>41</sup> 417 N.E.2d 138 (Ill. App. Ct. 1981).

<sup>42</sup> *Id.* at 142.

<sup>43</sup> See, e.g., *Oldfield v. Stoeco Homes, Inc.*, 139 A.2d 291, 294 (N.J. 1958) (deed restriction that provided in part "a failure to comply with the covenants and conditions . . . will automatically cause title to all lands to revert to the City" held to create fee simple subject to condition subsequent).

<sup>44</sup> As the Pennsylvania Supreme Court further explained in *Higbee Corp. v. Kennedy*, 428 A.2d 592, 596-97 (Pa. 1981), the fee simple determinable "is more cumbersome upon the alienability of land than a fee simple subject to a condition subsequent."

### [3] Fee Simple Subject to a Condition Subsequent

The *fee simple subject to a condition subsequent* is—as the name suggests—a fee simple where the granting words are followed by a limiting condition in favor of the transferor. The estate is accompanied by a future interest held by the transferor, most commonly called a *right of entry*.<sup>45</sup> The hallmark of this estate is that it does not automatically expire when the triggering condition occurs. Instead, once the condition occurs, the future interest holder has the power to take affirmative action to end the estate.<sup>46</sup> If the holder fails to exercise this option, the estate continues.

Suppose that W holds fee simple absolute in Silveracre and grants “to City, but if the land is not used as a park, W may re-enter and retake the premises.” If City uses Silveracre as a park, but then 10 years later builds a sewage treatment plant there, the City’s estate does not automatically end. Instead, W merely has a right to end the City’s estate, which W may or may not choose to enforce. Until W acts, the City’s estate continues.

While the fee simple determinable is characterized by words of time, the fee simple subject to a condition subsequent is characterized by words of event or condition. This estate is typically created by using phrases such as “on condition that” (e.g., “to City on condition that the land be used as a park”), “but if” (e.g., “to City but if the land is not used as a park, then . . .”), and “provided however” (e.g., “to City, provided however that the land shall be used as a park . . .”).

Under the traditional English approach, once the stated condition occurred, the future interest holder could end the estate only by physically re-entering the land with accompanying witnesses. Today physical re-entry is no longer necessary in the United States; indeed, given the growing concern about the risk of violence stemming from self-help, this method should be deemed unacceptable in any event.<sup>47</sup> In some states, the future interest holder can end the estate simply by giving formal notice to the estate owner; other states require the future interest holder to file an ejectment or quiet title action against the estate owner.

### [4] Fee Simple Subject to an Executory Limitation

The *fee simple subject to an executory limitation* is a fee simple estate that automatically expires when a stated event occurs (like fee simple determinable), but gives the right to possession to a transferee (unlike fee simple determinable).<sup>48</sup> This estate arose only after the Statute of Uses authorized executory interests in 1536.

Suppose O conveys Silveracre “to City, but if the land is not used as a park, then to Z and his heirs.” Here the future interest owned by Z is an

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<sup>45</sup> This future interest is sometimes also called a “power of termination” or “right of reentry.”

<sup>46</sup> *Forsgren v. Sollie*, 659 P.2d 1068 (Utah 1983).

<sup>47</sup> *But see Forsgren v. Sollie*, 659 P.2d 1068 (Utah 1983) (grantor physically re-entered unimproved lot when grantee failed to perform conditions).

<sup>48</sup> *Hall v. Hall*, 604 S.W.2d 851, 854 (Tenn. 1980).

executory interest, which will automatically divest or “cut short” the City’s estate if the park use ceases, without any affirmative act by Z. Because the future interest is held by Z (a transferee from O) rather than by O, the City’s estate is a fee simple subject to an executory limitation.

What if O instead conveys Silveracre “to City for so long as the land is used as a park, and then to Z and his heirs”? Some authorities classify O’s estate as fee simple determinable, but disagreement remains. Others suggest that this estate is more aptly described as a “fee simple determinable with an executory limitation.”<sup>49</sup>

### [5] Defeasible Life Estates

Defeasible life estates are permissible but exceedingly rare. For example, if O holds fee simple absolute in Greenacre, she could create any of the following estates: life estate determinable, life estate subject to a condition subsequent, or life estate subject to an executory limitation.

### [6] Consequences of the Distinctions

The distinction between fee simple determinable and fee simple subject to a condition subsequent—however precise in theory—is becoming increasingly blurred. Historically, the distinction has produced three different legal impacts: (1) liability for rent; (2) commencement of the statute of limitations period for adverse possession; and (3) applicability of equitable defenses. Yet critics wonder whether grantors actually intend that these differing results follow from minor variations in granting language. Today there is a clear trend toward eliminating the distinction between the two estates, and treating both as fee simple subject to a condition subsequent.<sup>50</sup>

One traditional distinction is liability for rent. Once a fee simple determinable automatically expires, the former estate owner has no legal right to possession and is liable to the new owner for the fair rental value of the land. In contrast, if the land is held in fee simple subject to a condition subsequent, no rent liability attaches until the future interest holder takes affirmative action to end the estate. Suppose O grants a defeasible fee simple in Blueacre, a farm, to D, and the triggering event is D’s consumption of alcohol; D first drinks alcohol in 1999, but remains in possession of Blueacre until O brings suit in 2008. If D’s estate was fee a simple determinable, it ended in 1999, and D owes O rent for nine years; on the other hand, if D held fee simple subject to a condition subsequent, D owes no rent for his occupancy before O sues in 2008.

Another historic difference is when the statute of limitations for adverse possession commences. All states agree that once a fee simple determinable ends, continued possession by the former estate owner starts the adverse possession period; if D held fee simple determinable in the example above, he started adversely possessing Blueacre in 1999. But there is less logical consistency on the issue when a fee simple subject to a condition subsequent

<sup>49</sup> William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 2.9 (3d ed. 2000).

<sup>50</sup> See, e.g., Cal. Civ. Code § 885.020 (abolishing fee simple determinable).

is involved. Seemingly, D's estate continues until O brings suit in 2008, so D's possession is not adverse until then; some states follow this view. But others hold—illogically—that the period begins running when the stated event occurs, here in 1999, regardless of whether the future interest holder chooses to terminate the estate.

Finally, equitable defenses such as waiver and estoppel are sometimes utilized to bar a future interest holder from terminating fee simple subject to a condition subsequent.<sup>51</sup> Because fee simple determinable ends automatically, such defenses are usually inapplicable.

### **[D] Rights and Duties of Estate Owner**

The owner of a defeasible estate generally has virtually the same rights and duties as an owner of the parallel absolute estate, except that he or she cannot commit waste.<sup>52</sup> For example, absent a contrary condition in the grant or devise, one holding fee simple determinable is entitled to exclusive use and possession of the affected land, and has the full right to transfer the interest, just as if the holder owned fee simple absolute. Of course, any of these rights may be restricted by special conditions inserted by the transferor (e.g., "for so long as X refrains from picking the apples on the land" or "provided, however, that X allows neighbors to cross the land to reach the lake").

### **[E] Judicial Hostility Toward Defeasible Estates**

American courts have been traditionally and understandably hostile toward defeasible estates.<sup>53</sup> In part, this attitude reflects the law's long-standing concern for the free alienation of land. Property held in a defeasible estate is often difficult to lease, mortgage, sell, or otherwise transfer because of the risk that title may be lost. Another reason for this hostility is judicial abhorrence of forfeiture. The termination of a defeasible fee is often seen as providing a windfall to the future interest holder (perhaps a distant relative of the original transferor), while imposing an inequitable loss on the estate owner.

Various judicial mechanisms are employed to limit the scope of defeasible estates. Most importantly, the granting language must indicate a clear intent to impose a condition on the estate. Words that merely recite the intent or purpose of the grantor do not limit the estate that is granted. For example, in *Wood v. Board of County Commissioners*,<sup>54</sup> a deed that recited

<sup>51</sup> See, e.g., *Storke v. Penn Mutual Ins. Co.*, 61 N.E.2d 552 (Ill. 1945) (plaintiffs waived right to terminate fee simple subject to condition subsequent because they were aware that stated event—sale of alcohol on property—had occurred but delayed for years in taking action). But see *Martin v. City of Seattle*, 728 P.2d 1091 (Wash. Ct. App. 1986) (plaintiffs who waited 71 years before seeking to terminate fee simple subject to condition subsequent had not waived right).

<sup>52</sup> See Restatement of Property §§ 193, 194 (1936).

<sup>53</sup> See Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 Tex. L. Rev. 533 (1988).

<sup>54</sup> 759 P.2d 1250 (Wyo. 1988).

that the conveyance was “for the purpose of constructing and maintaining thereon a County Hospital”<sup>55</sup> was held to transfer fee simple absolute; the language did not restrict the fee simple granted, but only stated the grantor’s purpose.<sup>56</sup> Similarly, words of covenant or promise (e.g., “and the grantee promises to use the land only for a hospital”) merely create a contract obligation in the grantee, not a defeasible estate. In addition, where ambiguous language could be construed as creating either an absolute or a defeasible estate, courts uniformly follow a constructional preference for an absolute estate.<sup>57</sup> Even where a defeasible estate clearly exists, courts tend to construe the conditional language narrowly, in order to avoid forfeiture.<sup>58</sup>

### [F] The Lingering Demise of Defeasible Estates

The defeasible estates are slowly following the fee tail into extinction in a lingering death scene reminiscent of a tragic opera. Modern landowners rarely create new defeasible estates, preferring to convey fee simple absolute. In part, this shift reflects our changing culture; as a philosophical matter, landowners are less concerned with restricting the autonomy of future owners than were their nineteenth-century predecessors.

Moreover, as a practical matter, sophisticated landowners are increasingly aware of the constraints that a defeasible estate imposes on land. Land held in a defeasible estate is unlikely to be utilized for its highest and best use; potential buyers, lessees, and lenders, for example, are usually reluctant to invest in land when the owner’s title might immediately end.

Finally, even if a new defeasible fee estate is created, statutes in many states indirectly facilitate its conversion to fee simple absolute by restricting the duration and enforceability of the accompanying future interest (*see* § 13.05).

### § 9.07 Freehold Estates: Legal or Equitable?

Each estate and future interest discussed above could also be created in trust (*see* Chapter 28). O, holding fee simple absolute in Greenacre, might convey Greenacre “to T in trust for L for life, and then for R.” This grant effectively splits the metaphorical bundle of rights in a different manner. T, the trustee, holds “legal” title to Greenacre, here fee simple absolute. But L and R, the beneficiaries, simultaneously hold “equitable” interests in Greenacre. L owns an equitable life estate and R holds an equitable vested remainder.

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<sup>55</sup> *Id.* at 1251–52.

<sup>56</sup> *See also* *Fitzgerald v. Modoc County*, 129 P. 794 (Cal. 1913); *Roberts v. Rhodes*, 643 P.2d 116 (Kan. 1982); *Station Ass’n, Inc. v. Dare County*, 513 S.E.2d 789 (N.C. 1999).

<sup>57</sup> *See, e.g., Humphrey v. C.G. Jung Educ. Center*, 714 F.2d 477 (5th Cir. 1983).

<sup>58</sup> *See, e.g., Mahrenholz v. County Bd. of School Trustees*, 544 N.E.2d 128 (Ill. App. Ct. 1989) (storage of desks and other equipment on land subject to determinable fee held use for “school purpose”); *see also Red Hill Outing Club v. Hammond*, 722 A.2d 501 (N.H. 1998).

## § 9.08 Restrictions on Transfer: Rule Against Restraints on Alienation

### [A] The Importance of Free Alienation

One of the foundational precepts of the English property law system was that land should be freely transferable or “alienable.” Accordingly, the law was extremely hostile to restraints on alienation—provisions in deeds or wills which purport to prohibit or restrict future transfers. Modern American law reflects similar antagonism.

Why should the legal system protect free alienation? Restraints on alienation are viewed as preventing the maximum utilization of land. Suppose O owns fee simple absolute in Greyacre, a perfect site for a new factory, but cannot transfer any interest because his deed contains an enforceable prohibition against transfer. Under these circumstances, O will probably be unable to secure financing to build and operate the factory because he cannot grant potential lenders a mortgage on Greyacre to secure the loan; O might be unwilling to invest his own money in improving Greyacre simply because he would never be able to recoup it through sale. Similarly, O cannot sell Greyacre to investors who already have sufficient capital for the factory project. If the restraint is valid, Greyacre remains devoted to a low-intensity use (e.g., agriculture) and society loses the benefits that the factory would produce.

Free alienation also serves two lesser policies. It protects the good faith expectations of creditors by allowing them to execute on property in order to satisfy the owner’s unpaid debts. Finally, it prevents the undue concentration of wealth that—particularly in the young United States—was seen as a potential threat to democratic values.

### [B] Restraints on Fee Simple Estates

American courts uniformly hold that any total or “absolute” restraint on alienation of a fee simple estate (whether absolute or defeasible) is null and void, regardless of the form of the restraint.<sup>59</sup> Suppose O attempts to express a restraint in defeasible fee language, imposing a “forfeiture restraint.” If O devises Greenacre “to B, but if B ever attempts to transfer Greenacre, then to C,” a court would find the restraint void; thus, B owns fee simple absolute, and C receives no interest. A similar result follows if O imposes a “disabling restraint” by devising Greenacre “to B, however any transfer of Greenacre shall be void”; the restraint is invalid. Similarly, a “promissory restraint”—a promise by the grantee not to transfer the property—is generally held unenforceable.<sup>60</sup>

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<sup>59</sup> See, e.g., *Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano*, 64 Cal. Rptr. 816, 817 (Ct. App. 1967) (deed clause that provided property would revert to grantors “in the event of sale or transfer” held invalid restraint).

<sup>60</sup> An interesting issue arises if a grantor uses defeasible fee language that indirectly restrains alienation. For example, in *Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano*, 64 Cal. Rptr. 816, 817 (Ct. App. 1967), the grantors conveyed a fee simple

Suppose instead that O conveys Greenacre to B on condition that it “is never transferred to anyone other than C, D, or E” or “not transferred to anyone during the next 10 years.” Such phrases impose only partial restraints on alienation. The law governing these limited restraints is somewhat unclear. For example, most courts will invalidate restraints that limit the number of transferees or prevent transfer for a specified duration.<sup>61</sup> But the Restatement (Second) of Property advocates a broader view; it suggests that a partial restraint that is reasonable given its purpose, nature, and duration should be upheld.<sup>62</sup>

### [C] Restraints on Life Estates

The common law was substantially less concerned with restraints on alienation of the life estate, presumably because its limited duration already impairs marketability. The modern American rule is that forfeiture and promissory restraints on a life estate are valid, but—somewhat illogically—that disabling restraints are void.<sup>63</sup>

## § 9.09 Restriction on Use: Waste

### [A] Waste in Context

Waste is the principal common law mechanism for resolving land use disputes where property rights are divided between persons holding present estates and future interests in the same land.<sup>64</sup> In general, absent a superseding agreement, the waste doctrine restrains the present estate owner from acting in a manner that unreasonably injures the affected land and thus reduces the value of the future interest. The law effectively presumes that the original grantor intended the estate holder to pass on possession of the land to the future interest holder in approximately the same condition as it was received.

Suppose L owns a life estate in Redacre, and R owns the ensuing vested remainder. L might prefer to exploit Redacre in a manner that maximizes

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subject to a condition subsequent in a town lot to a fraternal lodge; the deed provided, inter alia, that the land would revert to the grantors “in the event the same fails to be used” by the lodge. When the lodge later sued, claiming a de facto restraint on alienation, the court upheld the restriction based on the historic common law refusal to extend the doctrine to mere use restraints. *But see Falls City v. Missouri Pac. R.R. Co.*, 453 F.2d 771 (8th Cir. 1971) (contra).

<sup>61</sup> Similarly, a restraint that purports to preclude transfer based on the race, color, national origin, religion, or other personal characteristic of the transferee would—as a matter of public policy—be invalid. *See, e.g.*, 42 U.S.C. § 3604(a) (residential property); Cal. Civ. Code § 53 (generally).

<sup>62</sup> Restatement (Second) of Property: Donative Transfers §§ 4.1, 4.2 (1983). *See also* RTS Landfill, Inc. v. Appalachian Waste Systems, 598 S.E.2d 798 (Ga. Ct. App. 2004) (preemptive right to purchase personal property was invalid restraint on alienation).

<sup>63</sup> Restatement (Second) of Property: Donative Transfers §§ 4.1–4.3 (1983). *See also* Alsop v. Montoya, 488 S.W.2d 725 (Tenn. 1972).

<sup>64</sup> For an analysis of the development of the law of waste in the United States, see John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519, 533–36 (1996).

his short term profit—for example, by extracting all the oil from Redacre—even if this causes long run damage to R's interest. As Judge Richard Posner observed, a life tenant in this situation has "an incentive to maximize not the value of the property, . . . but only the present value of the earnings stream obtainable during his expected lifetime."<sup>65</sup> Posner posits that various factors may prevent the life tenant and remainderman from negotiating a mutually-acceptable plan for using the land; he envisions waste as the law's solution to this stalemate.

Two principal types of waste are recognized today: affirmative waste and permissive waste. England and the young United States formerly recognized a third category, called ameliorative waste, under which any change in the character of the land was deemed actionable waste.<sup>66</sup> Converting forest into farm land was deemed waste, for example, even if this change increased the market value of the land. Nineteenth-century American courts abandoned this rule as inconsistent with the need for agrarian development of the nation's wilderness land.<sup>67</sup>

### [B] Affirmative Waste

*Affirmative waste* (or *voluntary waste*) occurs when the voluntary acts of the present estate owner significantly reduce the value of the property. For example, if life tenant L wantonly destroys the valuable residence on the land, L will be liable to remainderman R in waste. Conversely, the demolition of obsolete and worthless improvements in order to permit the productive use of the land will not constitute waste, as explained in the classic *Melms v. Pabst Brewing Co.*<sup>68</sup> decision.

Does the life tenant commit waste by exploiting natural resources on the land such as minerals or timber? Most jurisdictions follow the traditional English rule regarding mining activities. If an open mine existed on the land when the present estate owner took possession, its operation may continue until the resource is totally depleted; this result is justified by the presumption that the original grantor intended to permit this ongoing use to continue. On the other hand, the present estate owner may not open a new mine, unless all affected future interest holders agree.<sup>69</sup> Similarly, American courts have relaxed the strict application of waste as applied to timber cutting. If the original owner engaged in commercial tree harvesting, by analogy to the "open mines" rule most courts will allow the life tenant to continue such cutting. Even absent such a history, American courts usually allow the life tenant to cut trees to the extent consistent with good

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<sup>65</sup> Richard A. Posner, *Economic Analysis of Law* 73 (6th ed. 2003).

<sup>66</sup> See, e.g., *Brokaw v. Fairchild*, 237 N.Y.S. 6 (Sup. Ct. 1929).

<sup>67</sup> See, e.g., *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899).

<sup>68</sup> *Id.* (life tenant's acts of demolishing valueless dwelling and grading lot surface down to street level to allow profitable business use of site were not waste).

<sup>69</sup> Cf. *Nutter v. Stockton*, 626 P.2d 861 (Okla. 1981) (where oil and gas lease executed by testator expired during life estate, life tenant could not execute new lease unless remainderman agreed).

husbandry, either to clear land for cultivation or to obtain firewood and building materials.

### **[C] Permissive Waste**

*Permissive waste* stems from inaction: the failure of the possessor to exercise reasonable care to protect the estate. Most permissive waste cases involve the life tenant who fails to repair a dwelling (e.g., fails to fix a leaky roof), resulting in substantial loss.<sup>70</sup> In addition, permissive waste will be found where the possessor fails to pay property taxes and assessments, mortgage payments, and related expenses necessary to preserve the estate for the future interest holder.<sup>71</sup>

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<sup>70</sup> See, e.g., *Moore v. Phillips*, 627 P.2d 831 (Kan. Ct. App. 1981); see also *Estate of Jackson*, 508 N.W.2d 374 (S.D. 1993).

<sup>71</sup> See, e.g., *Hausmann v. Hausmann*, 596 N.E.2d 216 (Ill. App. Ct. 1992) (property taxes).

EXAMPLES & EXPLANATIONS

# Property

Second Edition

**Barlow Burke and Joseph Snoe**



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# 9

## *Common Law Estates and Present Interests*

Real property can be divided up several ways. *O*, owning 100 acres of real property, might transfer 50 acres to *A* and the other 50 acres to *B*. Alternatively, *O* might sell the surface rights to *A* and the mineral rights to *B*. If he wanted, *O* could transfer the management rights to *A* (a trustee of a trust, for example) and the income and profits interest to *B* (a beneficiary of the trust, for example). The next few chapters develop a fourth method of dividing up ownership: over time. *O*, for example, might transfer acreage to *A* for a period of time (say, 10 years) and then give it to *B* for the rest of the time, or might give it to *A* “for life” (this is known as a life estate, meaning it lasts as long as *A* lives, and no longer) and then give it to *B* for the rest of the time, meaning that *B* will wind up, after *A* dies, owning the property in perpetuity. In other words, property can be divided physically, but may also be divided along a timeline.

Studying estates and present and future interests requires more than reading for and attending class. You should work problems outside of class. In addition to the Examples in this book, you can find more practice problems in John Makdisi, *Estates in Land and Future Interests* (3d ed. 1999), and Linda H. Edwards, *Estates in Land and Future Interests: A Step-By-Step Guide* (2002).

### Some History

In 1066, the battle of Hastings set English legal history on its present course: a Norman archer shot the Anglo-Saxon king, Harold, in the eye socket, killing him and leading to the conquest of England by William I, the Conqueror. After the battle, William parceled out the countryside to his knights; what he gave them was a use right, or *tenure* — the right to hold.

William initially parceled out lands for limited periods of time. The knights, however, quickly became interested in the rights of their families and children to continue to hold the land after their deaths. They were actually interested in two rights: the right to transfer or dispose of their property by will after death (*testamentary power*, or *devisability*) and the right to dispose of their land during their lifetimes (*a power to alienate*, or *alienability*). Like William, the knights were also interested in setting up a line of successors who could hold tenure, accounting for spouses, children, and grandchildren: It was and is still possible today to create interests in property that are split along a timeline running successively from the present into the future. Such a split in ownership is one of the features of our common law interests and estates, created first for England's nobility but available to all of us today.

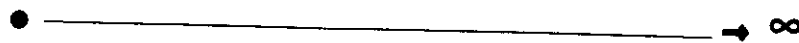
Split ownership — fragmented over time — involves a transferor's or testator's desire to control the ownership of property after the transfer or, in the case of a will, after the testator's death (a *testator* is a person dying and leaving a will). Most devices for transfers and wills discussed in this chapter were either formulated for testators interested in such control or by their children, heirs, and transferees resisting that control. The history of common law estates may be seen as a series of intergenerational conflicts, as well as a series of devices designed to achieve that age-old aim of the propertied classes, tax avoidance.

## Estates: Some Fundamentals

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Common law estates are divided into current ownership rights where the owner has the right to current possession (*present interests*), and current ownership rights where the owner must wait until a future time to take possession of the property (*future interests*). While ownership of property without the right to immediate possession in effect means the future interest owner gets no present enjoyment or economic benefit (other than appreciation in value) from owning the land, the future interest is an ownership interest nonetheless.

Fragmentation of ownership interests over time is the basic concept underlying present and future interests. The human mind, particularly that of judges in early England, wanted to visualize ownership of property for all time. An oft-used diagram shows a dot representing today and a line extending to infinity to identify all estates in property from today to infinity:

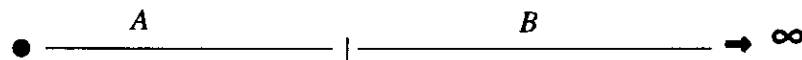


*Fee simple absolute* interest is complete ownership until the end of time. The fee simple absolute owner can enjoy the property, transfer it away by

sale or gift during his life, or devise it (by will) at his death. If he dies without a will and still owning the property, the property passes to his heirs, usually family members, designated in a statute known as the Intestacy Statute. The above diagram illustrates the fee simple absolute (also called the fee simple or fee).

The diagram indicates that beginning at the present, the dot, on the facts known today, all persons who can use or possess the property from now to infinity must get their rights from or through the fee simple absolute owner. Obviously the owner cannot personally use the property until infinity. Human mortality precludes that. The owner, however, controls who gets the property from now until infinity. The owner during his life or at his death will pass the right to control use and possession to others.

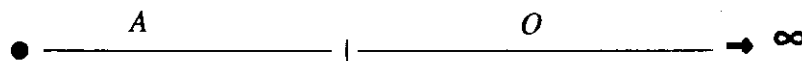
A common transfer is from the property owner (*O*) to *A* for life, remainder to *B*. This grant would be diagrammed:



*A* has a life estate.

*B* has a (vested) remainder.

If *O* had granted *A* a life estate and not stipulated what happens after *A* dies, the law stipulates the property will revert back to *O* (or *O*'s later designee) at *A*'s death. The timeline would look like this:



*A* has a life estate.

*O* has a reversion. Once *A* dies and the property reverts to *O*, *O* again has a fee simple absolute, and once more is free to possess the property or designate who will.

## Estates and Interests

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The study of estates and interests is one of concepts and vocabulary. Master the vocabulary and relationships early and often.

We'll begin by defining and distinguishing "estates" and "interests." *Estates* are present or future possessory interests in property. There are four core estates, categorized based on the potential longevity or duration of the possessory interests.

ESTATE	DURATION
Fee Simple	Forever (Infinity)
Fee Tail (fee simple conditional)	Until original grantee's lineage dies out
Life Estate	For the life of the grantee
Term of Years	Fixed period measured in years, months, or days; or a date certain

The first three estates for historical reasons are known as *freehold estates*. The term of years, and its legal cousin, the leasehold, are known as *nonfreehold estates*. Historically the owners of freehold estates had more rights and power. The distinction is not so relevant today. Nonfreehold estates are treated like leases. An apartment rental, for example, is a nonfreehold estate.

An *interest* is any legal right associated with specific property. All estates are interests in land. Hence, “estates” are a subset of “interests.” Interests that are not estates include interests studied later in the course such as easements, restrictive covenants, equitable servitude, liens, and mortgages, all of which give somebody an interest in real property. Also, later chapters explore concurrent interests — when more than one person shares equal possessory rights to specific property.

## What to Look for in Studying Freehold Estates

Much of the study of estates is the study of nomenclature, or labels. Master precise labels. There are differences among fee simple absolute, fee simple determinable, fee simple subject to a condition subsequent, and fee simple on executory limitation, for example.

Next, learn the characteristics of each estate. The main characteristic is *duration*. A fee simple absolute has a duration of infinity, for example; a life estate lasts only for the life of some person.

Master whether and in what ways the interest holder can transfer the interest. Property is **devisable** if the owner can transfer ownership by a will — a testamentary transfer. Property is **descendible** or **inheritable** if the property can pass by the state's intestacy statute to “heirs” if the owner dies without a will. Property is **alienable**, **assignable**, or **transferable** if the owner can sell or gift the interest during his lifetime — an inter vivos transfer. Most interests are devisable, inheritable, and alienable (except a person owning a life estate based on her life cannot devise it, nor is it inheritable since the life estate terminates at the person's death). There are quirky exceptions.

Learn how estates end — either naturally or by a condition subsequent. A **condition subsequent** is the occurrence or nonoccurrence of an event that can cut short an estate.

Finally, master the wording used to create each estate. There may be seemingly subtle differences in wording to distinguish different estates. There is a big difference, for example, between a grant to “Jill and her heirs” (fee simple absolute) and one to “Jill and the heirs of her body” (fee tail or fee simple conditional).

### (a) *Fee Simple Absolute*

A *fee simple absolute* is an estate with an infinite or perpetual duration. A person owning a fee simple interest (also known as fee simple or fee) theoretically can possess the property forever. There is no inherent end to the ownership. The owner sells or gifts the property or devises it by will. Hence a fee simple absolute is alienable (transferable or assignable), devisable, and descendible (inheritable).

The language to create a fee simple absolute is “*To A and his heirs.*” Today the phrase “to A” also transfers a fee simple absolute, as do phrases such as “to A, his heirs and assigns.”

The phrase “to A and his heirs” is rife with historical influences. In the eleventh century in England, the king granted a right to the lords and knights to use land during their lives — i.e., life estates. The king needed loyal warriors to defend the country and rewarded these warriors with land. The land reverted to the king at the lords’ and knights’ deaths. Over time, the lords and knights were allowed to pass property along to male heirs, and by 1290 to devise real property. The right to alienate property was recognized by the Statute *Quia Emptores* in 1290.

Because the life estate was the dominant estate for more than 100 years, courts interpreted transfers “to A” as life estates. That is, when in doubt whether the grantor meant to transfer a life estate or a fee simple absolute, English courts 1000 years ago would find a grant to be a life estate. The reverse is true today. A person transferring property today is deemed to transfer his or her entire interest in the property unless the words of grant or other evidence indicate that the grantor intended to transfer a lesser interest. Today a grant from O to A would transfer a fee simple absolute to A.

Currently, the more popular approach to create a fee simple absolute is to use the words “to A and his heirs” or “to A and her heirs.” A’s heirs get absolutely nothing from this transfer. Only A gets the property. Diagramming the grant:



The critical language to determine who owns the estate are the **words of purchase**. Property transferred “to A” belongs to A. Property transferred “to A and his heirs” still belongs solely to A. Property “to A’s heirs” goes to

A's heirs today (most of the time — more on this later). The remaining language, "and his heirs," are **words of a limitation** or **words of duration**. They tell experienced lawyers the grantor intended the estate to be one greater than a life estate, and that the estate lasts in perpetuity — i.e., that the grantor transferred a fee simple absolute.

### (b) *Life Estate*

The life estate — as the name implies — means the owner owns the property for life. As discussed earlier, in twelfth-century England virtually all estates were life estates. Life estates are alienable inter vivos (transferable during the life tenant's life), but because the estate ends on the death of the life tenant, the life estate is not devisable or descendible (inheritable).

(1) Attributes of Life Estate. One slight quirk: usually the life estate owner is also a person whose death terminates the interest. Thus if *O* transfers Blackacre to *A* for life, *A* owns the property until *A* dies, at which time *O*, or some other person holding the reversion through *O*, owns the property again. In some situations, however, the owner of the life estate and the person whose life determines the duration of the life estate are different people. For example, assume *A*, the owner of a life estate, transfers (assigns) her life estate to *B*. *B* now owns a life estate; *B*'s ownership ends not on *B*'s death, however, but on *A*'s death. *B*'s interest is called a *life estate pur autre vie A* — that is, a life estate based on the life of another person, *A* in the example.

*B*'s life estate pur autre vie is alienable just as *A*'s life estate was alienable. In addition, since *B* may die before *A*, *B*'s life estate pur autre vie is devisable and descendible. Since *A* cannot transfer more than she owned, *B*'s interest in Blackacre will terminate immediately upon *A*'s death, even if *B* is still alive.

The language to create a life estate is "to *A* for life." Diagrammed:



The words "to *A*" are words of purchase or words of grant indicating who gets the property. The words "for life" are words of limitation or words of duration indicating the grantee — in the example, *A* — gets the property for life. As another example, a transfer from *O* "to *A* for the life of *B*" would give *A* a life estate pur autre vie *B*.

(2) Marketability Problems. As a practical matter, life estates are difficult to market. Lenders may be reluctant to take property held as a life estate for security for a loan for fear the life tenant may die before the loan is repaid. Purchasers who wish to improve the property likely will not purchase a life estate and invest

millions of dollars in constructing improvements since they would lose the improvements and land as soon as the life tenant dies. There are other problems with life estates, so much so that England no longer recognizes the *legal* life estate (the *equitable* life estate — one held in trust — is recognized). The legal life estate continues to be recognized in the United States.

(3) Conflicts Between Life Tenant and Remaindermen. Besides the lender and sales problems discussed above, legal life estates create problems between the holder of the legal life estate and the person who owns the property once the life estate ends (the original grantor who has a *reversion*, or a third party who has a *remainder*). Often the current possessor, a life tenant, will want to use the property contrary to what the future interest holder would want. Some rules have evolved to resolve these conflicts.

First, logically enough, the holder of the life estate can exclude others from the property, including any holder of a future interest (reversion and remainder interest). The life estate holder keeps all the income and profits from the use of the land during the life estate. As mentioned earlier, the life estate holder can transfer his life estate to others. Of course, the third party's right to continue using the property ends with the original life tenant's life.

The life tenant has some obligations. The life tenant must keep the premises in ordinary repair, must pay taxes, must pay the interest on any mortgage for all the property, and in some jurisdictions must pay insurance premiums. A life tenant is not entitled to contribution or reimbursement from the future interest holder for these expenses. The repairs required to be made are ordinary repairs only. The life tenant is not obligated to improve the property; to repair extraordinary damages caused by storms, earthquakes, fires, and the like; or to repair damages from ordinary wear and tear. Likewise, a tenant who constructs improvements on the land cannot seek partial payment from future interest holders. We take this up in more detail later in the chapter in the discussion of waste.

As for mortgages and notes, the life tenant is responsible for the interest payments but not for the principal of any loan secured by the property. A life tenant who pays the principal on a mortgage can seek contribution or reimbursement from the future interest holder.

Although some states require the life tenant to insure buildings on the land, most do not. In these states, a life tenant who insures the building anyway cannot seek reimbursement from the future interest holder. Some states hold a life tenant may keep any insurance proceeds received on any claim made against the policy, while other states hold the life tenant and the remaindermen must split any insurance proceeds according to the relative values of each person's interest (which can be calculated using actuarial tables).

The duty of a life tenant to pay taxes includes the obligation to buy the property at a tax sale. Moreover, if the local government makes a special

assessment against the property for permanent improvements, such as streets, sidewalks, sewers, and so on, most states hold the life tenant and the remainderman liable for each person's proportionate share (again based on relative values of each person's interest).

(4) Life Estate or Fee Simple. One big issue in practice is deciding whether a grantor intended to give the grantee a fee simple absolute or a life estate when the drafter did not use "to A and his heirs" or "to A for life." A court will try to ascertain the grantor's intent or, as is more likely, since most of these occur in nonlawyer drafted wills, ascertain the testator's intent. Often the court resorts to rules of construction. *Rules of construction* are not laws, but are accepted suppositions that can be rebutted by evidence. One rule of construction is that the testator intended to give away all her property through her will. An interpretation that disposes of all the testator's property in the will rather than resorting to the state's intestacy statute is favored. A corollary of the first rule is that a partial intestacy is disfavored. Another rule of construction is that a grantor or testator conveys her full interest in the property unless the intent to pass a lesser estate is clearly expressed or necessarily implied by the terms of the deed or will.

### (c) *Fee Tail and Fee Simple Conditional*

Unless you practice in Delaware, Maine, Massachusetts, Rhode Island, or South Carolina, you likely will not see fee tails or fee simple conditionals in your practice. All other states have abolished or never recognized them.

The fee tail and fee simple conditional are related estates — in fact, one replaced the other and both are created by the same language: "*to A and the heirs of his body.*" Initially the grant created a fee simple conditional. The holder of a *fee simple conditional* had a fee simple absolute when he first had an heir. At the time, "heir" meant a male son heir, the system of inheritance then in use being *primogeniture*, or inheritance limited to the eldest male son or heir. Before the birth of the first male son, the holder of the fee simple conditional had a fee simple conditioned on the birth of an heir. If the holder of the estate died without an heir, the property reverted back to the grantor. By the Statute *De Donis Conditionalibus* (1285, five years before passage of the Statute *Quia Emptores*), the fee simple conditional was changed into a fee tail, and thereafter, when O conveyed "to A and the heirs of his body," a fee tail, inheritable to the last member of the grantee's family line, was established. South Carolina is the only jurisdiction recognizing this estate today.

Desiring to maintain large estates as a unit for generations so as to preserve a family's wealth and social standing, a grantor might have created a fee tail. The *fee tail* in effect was a series of life estates. A enjoyed a life estate; on A's death the property automatically passed to A's eldest son for his life; on his death the property passed to that son's eldest; and so

on until the family line ended (died “*without issue*” is the popular phrase), at which point the property reverted back to the grantor (or more likely to one of the grantor’s heirs). The ending of the grantee’s bloodline is called *failure of issue*.<sup>1</sup>

Fee tails, like life estates, are not devisable or inheritable because the property passes from one generation to the next under the fee tail grant. The fee tail, when used in conjunction with a principle of primogeniture, served to preserve the largest English estates intact rather than to split them up among the children of the nobility. It was also used to return land transferred to a child to the family’s estate should the line of that child die out. (You will think the fee tail a less strange device than it sounds when you realize that during the time the estate was first created, mortality rates were such that it took on average a minimum of four children in a family to ensure that land would ever be held by the next generation.)

Only a few states today recognize the fee tail. These are three New England states (Maine, Massachusetts, and Rhode Island) and Delaware. In these four states, the holder of the fee tail can break the entail or *disentail* the property simply by conveying his interest in fee simple absolute to a third party, who takes it in fee simple absolute. The third party is often the entailed owner’s attorney, who serves as strawman, or someone bound to convey it right back in fee simple absolute. In all other states, the fee tail is abolished by statute. The statutes abolishing it result in one of two configurations of estates: either the first grantee takes a fee simple absolute, or else the first taker has a life estate and the heirs of his body take a fee simple absolute. Only a few states use the second configuration.

Fee tails, even where authorized, are seldom used. More than that, the use of the fee tail was unusual even at common law, because grantors and testators often did not want to take the chance that their children and grandchildren would not produce issue — a “*failure of issue*.” Better to have used the conveyance “to A and his heirs” or some variation or to split the fee into more acceptable present and future interests.

## Waste

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### (a) *Voluntary, Permissive, and Ameliorating Waste*

An interesting conflict between the life tenant and the remainderman (the present interest owner and the future interest owner) concerns the use or

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1. Rules evolved to address situations where the eldest son had died without issue or was survived only by daughters or by a son who was not the eldest son. Those details are beyond the scope of this book.

nonuse of the property under a label called “waste.” Under English common law, a life tenant was obligated to deliver the property in essentially the same condition or use as when the life tenant took possession. *Waste* occurs when the possessory life tenant permanently impairs the property’s condition or value to the future interest holder’s detriment. The future estate holder has standing to enjoin waste.

Waste falls into several categories. *Affirmative* or *voluntary waste* occurs when the life tenant actively changes the property’s use or condition, usually in a way that substantially decreases the property’s value. A court will enjoin affirmative waste.

A second category of waste, *permissive waste*, is akin to nonfeasance — the life tenant fails to prevent some harm to the property. For example, one court found that not making normal repairs to a water pump that resulted in dead lawn, shrubs, and trees was permissive waste. *Kimbrough v. Reed*, 130 Idaho 512, 943 P.2d 1232 (1997). The life tenant was required to pay damages to the remainderman. The law of permissive waste evolved to become the duties discussed earlier: to make ordinary repairs, to pay interest on debt, to pay taxes and assessments, and in some jurisdictions to pay insurance premiums.

A variation of affirmative or voluntary waste is *meliorating* or *ameliorating waste*. In England, the law of waste was strict: A life tenant could not stop growing crops and begin grazing cattle, for example, even if it made the property more productive or valuable. Even changing crops may have been waste. Courts in the United States have allowed reasonable changes in use and condition. For example, in *Melms v. Pabst Brewing Company*, 79 N.W. 738 (Wis. 1899), a life tenant owned a stately mansion. Over time breweries and other commercial activities encroached on the mansion to the point at which it was no longer suitable for use as a residence, and not efficiently convertible to commercial purposes. The court held under the circumstances that demolishing the mansion and replacing it with a commercial building would not be waste. In evaluating whether ameliorative waste will be permitted, courts look at the life tenant’s expected remaining life, the need for change, and the good faith of the life tenant and future interest holder in proposing or opposing the change.

### (b) *Open Mines Doctrine*

The open mines doctrine sets out rules applicable to natural resources, particularly minerals. Under the **open mines doctrine**, a life tenant may mine and remove minerals (and keep the profits) if the grantor had opened the mines or began the mining and removal before he granted the life estate. The presumption is the grantor intended the life

tenant to continue using the property as the grantor had been using it. That same presumption swayed courts to conclude, unless the future interest holder consented, that the life tenant could not conduct mining operations if no mining took place before the life estate began. While England applied the same rule to timber cutting, American courts in some cases allow timber cutting using the ameliorative waste analysis.

### (c) *Economic Waste*

A variation on waste is economic waste. *Economic waste* occurs when the income from property is insufficient to pay the expenses the life tenant has a duty to pay: ordinary maintenance, real estate taxes, interest on mortgages, and in some jurisdictions insurance. Economic waste does not mean the property is not being used for its highest and best use, only that it does not pay for its own upkeep. The life tenant — and in some cases the remainderman — can bring an action to sell the property if economic waste occurs.

Some casebooks include the case of *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972), in which Anna Weedon, the life tenant, suffered personal economic distress and wished to sell land (her life estate interest and the remainder interest) and put the money in a trust so she could use the income from the trust to pay for her personal living expenses. The court held that economic waste does not mean the life tenant personally would be better off financially, or that a court can act when a life tenant needs to sell (not just her interest but the remainderman's as well) for economic reasons. Only if the income from the property is insufficient to "pay taxes and maintain the property" could a court order a sale. The property in that case generated just enough money each year to pay the taxes and maintenance. Hence the court found no economic waste.<sup>2</sup>

## Defeasible Fee Simple Estates

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In addition to the three freehold estates developed to this point — fee simple absolute, life estate, and fee tail (fee simple conditional) — are variations of the three freehold estates, particularly the fee simple absolute, that may be prematurely terminated by a condition subsequent. A *condition subsequent* is an event whose occurrence or nonoccurrence will terminate the estate. Once the condition subsequent occurs, the estate holder's interest ends and the property either reverts to the original grantor or passes to a third party.

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2. Despite its no-economic-waste holding, the court fashioned a second theory, technically unrelated to waste, that it could order a sale of the property if it was in the "best interest of all parties."

**Example:** Armas transfers Blackacre “to Britney and her heirs, but if Britney sells alcohol on Blackacre, then to Carrie.” Armas has transferred a fee simple to Britney but it is not a fee simple absolute since Britney may lose all her interest in Blackacre if she sells alcohol on Blackacre.

The example illustrates the concept of a defeasible estate. Although defeasible life estates exist, most defeasible estates are defeasible fee simple estates. Three distinct defeasible fees have evolved, each with its own label and characteristics. Britney’s estate in the above example is called a fee simple subject to an executory limitation. If the property were to return to Armas, the grantor, Britney’s interest would be called a fee simple subject to a condition subsequent. The grant could have been worded slightly differently to create a fee simple determinable.

### **(a) Fee Simple Determinable**

A *fee simple determinable* is an estate that would be a fee simple absolute but for a provision in the transfer document that states that the estate shall *automatically* end on the happening of an event or nonevent. An example is “to A and her heirs so long as the property is used for church purposes,” or “to A and his heirs unless liquor is sold on the property.” Although it is sometimes said that no words of art or magic words are necessary to create such estates, the words typically employed to create a fee simple determinable are “so long as,” “during,” “while,” “unless,” and “until.”

The significant difference between a fee simple absolute and a fee simple determinable is that while both potentially have an infinite or perpetual duration, the fee simple determinable might terminate automatically if the condition subsequent occurs. Historically a grantor could not provide that the property would pass to a third party if the condition subsequent eventuated and the fee simple determinable ended. The only option was to have the property return to the original grantor (or his heirs if the original grantor was dead). The chance that the property might return to the grantor if the condition subsequent happened is called the *possibility of reverter*. Memorize the relationship: A fee simple determinable is a present possessory estate followed by a possibility of reverter in the grantor. Sometimes the possibility of reverter is expressed in the deed or will creating the fee simple determinable; if not expressed it will be implied as part of the nature of a fee simple determinable.

**Example:** Armas deeds Blackacre to Britney “so long as Britney does not sell alcohol on Blackacre.” Britney owns a fee simple determinable estate in Blackacre that could last forever. However, if Britney sells alcohol on Blackacre, the property automatically returns to the grantor, Armas.

**(b) Fee Simple Subject to a Condition Subsequent**

Closely related to the fee simple determinable is the *fee simple subject to a condition subsequent*. The holder of a fee simple subject to a condition subsequent may hold it forever, but could lose it entirely if the condition subsequent occurs. The difference between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable ends automatically upon the happening of the condition subsequent, whereas the grantor of a fee simple subject to a condition subsequent must assert his right of entry (also called “right of re-entry” or his “power of termination”). Until the grantor exercises his power of termination (right of entry), the holder of the fee simple subject to a condition subsequent continues to own the property.

The fee simple subject to a condition subsequent usually can be identified by some of the following language in the granting instrument: “provided that,” “but if,” “on the condition that,” or “provided, however.” Compare these phrases with the one used to create a fee simple determinable.<sup>3</sup>

**Example:** Armas transfers Blackacre “to Britney; provided, however, if Britney sells alcohol on Blackacre, then Armas may re-enter and retake the land.” Britney owns a fee simple subject to a condition subsequent in Blackacre. Her interest may last forever. If she sells alcohol on Blackacre, however, Armas can elect to take back the property.

As is the case with the fee simple determinable, the only person who can retake the property on the event of the condition subsequent is the grantor or his heirs. The grantor’s right to retake the property is called the *right of entry*, the *right of reentry*, or the *power of termination*.

There are some different legal consequences between a fee simple determinable and a fee simple subject to a condition subsequent. First, since the holder of a right of entry does not automatically gain immediate possession upon a broken condition, the holder may waive any transgression. In that case the owner of the fee simple subject to a condition subsequent continues owning the land. On the other hand, title automatically reverts to the holder of the possibility of reverter on the broken condition, so the owner of the fee simple determinable loses all interest in the property immediately. Once title reverts, it is too late for a waiver. A new deed is required to undo the effect of the broken condition.

Second, unless modified by statute (which many states have done), the running of the statute of limitations for adverse possession starts at different times. The adverse possession statute starts running against the holder of a possibility of reverter on the day the condition subsequent happens. In contrast, since the owner of a fee simple subject to a condition subsequent

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3. The phrases most associated with the creation of a fee simple determinable are “so long as,” “during,” “while,” “unless,” or “until.” See *supra* page 116.

continues owning the property even if the designated event occurs, the adverse possession limitations period does not begin to run until the holder of the right of entry exercises that right. A few states by judicial fiat or by statute equate the two estates for adverse possession purposes and begin the running of the statute of limitations as soon as the condition occurs.

Finally, while most states have adopted a uniform rule on the assignability of possibilities of reverter and rights of entry — either both are assignable or neither is — in a few states the possibility of reverter is transferable, while the right of reentry is not.

Commentators have long urged that the two estates be consolidated by statute and that the remaining differences are too small to warrant continuing both. The critics contend that despite the fact that the fee simple determinable has an automatic termination feature and the fee simple subject to a condition subsequent does not, a reentry is never automatic. To them the view that *O* turns up and *A* gives up possession is simply unrealistic. Further, as a matter of policy, any exercise of *O*'s rights ought to be judicially supervised in any event, no matter what words the grantor uses.

Some state legislatures have responded to the problems that possibilities of reverter and rights of reentry create for conveyancing attorneys by enacting statutes that limit their duration to a period of 20 or 30 years. These interests must be asserted within the statutory time period or else be forever barred. A few courts have done the same thing without waiting for their legislatures by limiting the life of a possibility of reverter or right of reentry to a reasonable length of time. See, e.g., *Mildram v. Town of Wells*, 611 A.2d 84 (Me. 1992) (holding that not asserting a right of reentry for 82 years vested the holder of the present interest with a fee simple absolute). Other courts have found, based on the language used by the drafter, that the future interest was personal to the grantor or transferor and not intended to be alienable, devisable, or descendible for the benefit of his or her heirs.

### ***(c) Distinguishing a Fee Simple Determinable From a Fee Simple Subject to a Condition Subsequent From a Covenant***

At times it may be critical to determine whether a given grant is a fee simple determinable or a fee simple subject to a condition subsequent. If properly drafted, the determination is easy. A grant using the words “as long as,” “so long as,” “during,” “while,” “unless,” or “until” creates a fee simple determinable. A grant using the words “provided that,” “provided, however,” “but if,” or “on condition that” creates a fee simple subject to a condition subsequent. Problems arise when the grant uses words from both categories or the grant is otherwise ambiguous.

A court will try to ascertain the grantor's intent as expressed in the document as a whole. Courts disfavor forfeitures, however. Consequently, when in doubt, as a matter of construction, a court more likely will construe

a grant as a fee simple subject to a condition subsequent rather than as a fee simple determinable because the fee simple subject to a condition subsequent allows the possessor to continue ownership until the holder of the right of reentry (power of termination) acts to retake the property.

In some cases a court may interpret the qualification to the title as not being a divesting condition at all, but instead a covenant. A *covenant* is a promise to do or not do some act. A grantor may seek injunctive relief or damages for a breach of a covenant, but the owner of the fee simple will not forfeit ownership. In some cases a court may even interpret limiting language as *precatory language* (unenforceable suggestion, expectation, or intention) instead of as a condition or a covenant.

#### ***(d) Fee Simple Subject to an Executory Limitation***

One shared characteristic of the fee simple determinable and the fee simple subject to a condition subsequent is that only the original grantor or his heirs can hold the future interest (the possibility of reverter or the right of reentry). For more than 200 years in England, a grant could not divest a defeasible fee in favor of a third party. The grantor had to retain the future interest for himself. Finally, by the Statute of Uses enacted in 1536, grantors could pass future interests following a defeasible fee simple to a third party. After more than 200 years of judges and lawyers repeating the mantra “only the grantor can have a future interest following a defeasible fee,” the English legal community settled on a new label for the expanded rights.

The same granting language that would create either a fee simple determinable or a fee simple subject to a condition subsequent creates a *fee simple subject to an executory limitation*. (also known as a fee simple on executory limitation). Only one label for the possessory interest was coined, not two. The new label given to the future interest to a third party following a fee simple subject to an executory limitation is the *executory interest*.

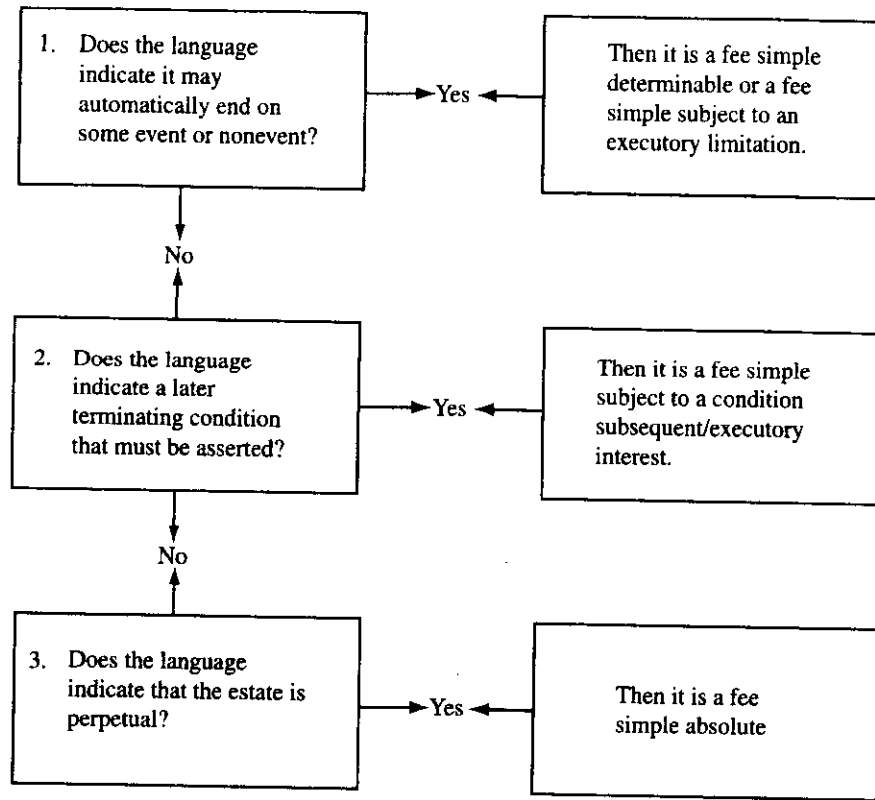
**Example 1:** Armas transfers Blackacre “to Britney as long as Britney does not sell alcohol on Blackacre.” Britney’s possessory interest is a fee simple determinable. Armas’ future interest is a possibility of reverter.

**Example 2:** Armas transfers Blackacre “to Britney as long as Britney does not sell alcohol on Blackacre, then to Carl and his heirs.” Britney’s estate is a fee simple subject to an executory limitation. Carl’s future interest is an executory interest (technically a *shifting* executory interest, as will be discussed in the next chapter).

## **Classifying Estates in Fee Simple – A Flowchart**

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If an estate is alienable, devisable, and descendible, then ask yourself the following questions, in the order presented in the following flowchart:



## EXAMPLES

### A Present and a Future Estate

1. (a) *O*, having full ownership, conveys Blackacre "to *A* for ten years." What is *A*'s estate?  
 (b) What is *O*'s interest?  
 (c) What estate will *A* and *O* have in ten years?

### Words of Purchase and Limitation

2. In the following conveyances, does *A* hold an estate in fee simple absolute?  
 (a) *O* conveys "to *A*."  
 (b) *O* conveys "to *A* and his heirs."  
 (c) *O* conveys "to *A* and his heirs, but if *A* dies, to *B* and his heirs."

### No Issue

3. *O* conveys "to *A* and his bodily heirs, but if *A* dies without issue, to *B* and his heirs." *A* has a daughter, *C*, who predeceases *A*. This may occur, for example, if a farmer, Orville, dies, leaving his farm to his eldest son, "Arnold, and his bodily heirs, but if Arnold dies without issue, to Bart and his heirs." What estates are created?

## An Estate for Joint Lives

4. O conveys “to A and B for the lives of A and B.” When does the estate end?

## Insurance Proceeds

5. O conveys Blackacre “to Larry for life, remainder to Freda and her heirs.” Larry the life tenant insures Blackacre against fire for \$100,000. Improvements on Blackacre are worth \$75,000. They burn to the ground. Larry claims the proceeds of the policy. Freda appears and claims the bulk of the proceeds. Can she do so successfully?

## She Meant Well

6. O writes, “I give my house and lot to you for your residence. Don’t sell it. Let your sister have the rest of my property.” What estate is transferred?

## A Slew of Estates

7. What estates are created in the following transfers?
- (a) O conveys “to A and his heirs so long as the property is used as a residence.”
  - (b) O conveys “to A and her heirs, on the express condition that Blackacre be used only for residential purposes, but if it ceases to be used for such purposes, then O and her heirs shall have the right to reenter.”
  - (c) O conveys “to A, provided that the estate granted shall cease and determine if liquor is sold, used, or stored on the premises.”
  - (d) O conveys “to A and his heirs, it being my wish and purpose in making this conveyance that the property be used for residential purposes.”
  - (e) O conveys “to A and his heirs, provided further that O and A agree and promise that the property shall only be used for residential purposes.”
  - (f) O conveys Blackacre “to A so long as he wishes to live on the property.”
  - (g) O conveys Blackacre “to A, provided that he lives on the property, but if he does not live there, then to O.”
  - (h) O conveys “to A for life, then if B graduates from law school, to B and her heirs so long as the land is used for a law office.” What interests do the parties have before B graduates from law school?
  - (i) What interest do the parties have in (h) when B graduates from law school?

- (j) *O* conveys “to *A* so long as the property is used as a residence solely, provided, however, that if it is not so used, the estate shall cease and revert to *B* and his heirs, who have the right to repossess the property.” What estate does *A* have?

### Adverse Possession

Review Example 7, “Dispossessing Future Estate Holders,” in Chapter 8.

## EXPLANATIONS

### A Present and a Future Estate

1. (a) *A* has a term of years or a leasehold, and so a nonfreehold estate. It is a present possessory estate.
- (b) Just after the conveyance, *O* has a reversion in fee simple absolute. It is a future interest (currently nonpossessory). See *infra* Chapter 10.
- (c) After a term of years ends, *A* no longer has any interest in Blackacre. *O* will possess, among estates, the grandest of them all — a freehold held in fee simple absolute, which is what we think of when we say that a person has “ownership” of real property.

### Words of Purchase and Limitation

2. (a) Yes. Today *A* holds an estate in fee simple absolute. The words of purchase are “to *A*” and the words of limitations are supplied by the canon of construction that a fee simple absolute is preferred, unless the language of the deed or will indicates the grantor or testator meant to transfer a lesser estate.
- (b) Yes. Although other words might be used, “to *A* and his heirs” are the recommended words to create a fee simple absolute.
- (c) No. *A*’s estate is something less. The words of purchase are the same, but the words of limitation are “and his heirs, but if *A* dies to *B* and his heirs,” and indicate that the grantor intends that descendibility and devisability not be part of *A*’s estate; thus no fee simple absolute was intended. *A* holds a life estate. See Mark Reutlinger, *Wills, Trusts, and Estates: Essential Terms and Concepts* 92 (1993).

### No Issue

3. “*A* and his bodily heirs” is interpreted to mean the same as “*A* and the heirs of his body.” Hence *A* has a fee tail (or fee simple conditional); here it is recognized.

Since *A* has a child, *C*, who predeceased him, it matters how the jurisdiction handles the failure of issue. If the state retains the historically more

popular vehicle, the fee tail, the land would belong to *A* as long as he lived, then to *A*'s eldest child as long as he lived, then to his eldest child as long as he lived, until *A*'s bloodline ended, at which point the land would go to *B* (or his heirs). In the Example, *A*'s line died with him and his daughter, *C*; so on *A*'s death *B* would get a fee simple absolute estate in the farm.

States that have abolished the fee simple conditional and the fee tail have interpreted language that historically created one of the two estates in two different ways. The majority of states treat the “and the heirs of his body” and “and his bodily heirs” language as words of limitation indicating a fee simple absolute — i.e., just like “and his heirs.” In those states, *A* received a fee simple absolute, and *B* got nothing.

In other states *A* has a life estate and if he dies with children living at his death (or grandchildren if no surviving child) the child (or grandchild) takes the land in fee simple absolute. If *A* dies without issue, the property passes to *B* in fee simple absolute.

Which interpretation applies makes a big difference in the Example since *A* died without a surviving child (*C* predeceased *A*). In the first instance *A* owns the farm in fee simple absolute and can devise it in his will or it passes to his heirs (siblings, cousins, etc.). In the second instance, *A*'s interest in the farm ends on *A*'s death and *B* owns the farm in fee simple absolute.

### **An Estate for Joint Lives**

4. The estate ends either (1) when the first of *A* and *B* dies, or (2) when the last of the two dies. The intent of the transferor or grantor, *O*, controls the choice. That choice involves either construing the greatest estate granted by the transferor or freeing the title of this life estate at the earliest possible time and vesting the transferor's reversion. Thus, policies of either presuming the words of conveyance against the grantor or freeing up the alienability of the title conflict here. The transferor's intent should control.

If there were added to this conveyance a “remainder to the survivor of them in fee simple absolute,” the length of the life estate would be clear. (This remainder would, as we will see, be a contingent remainder, lacking as it does ascertainability of the identity of the survivor until the death of either *A* or *B*.) See 1 *American Law of Property* § 2.15, at 128 (James Casner, ed., 1952).

### **Insurance Proceeds**

5. Some courts hold that a life tenant has no duty to insure the property. If Larry has no duty under a state's law to insure the improvements, then the proceeds should be wholly his, and some courts have so held. There may be insurance law questions as to what Larry can insure, but Freda as the holder of the remainder has no standing to raise those questions. (The moral here is

for the present and future interest holders to get together and purchase insurance, making sure that everyone's interest is adequately covered — or for the person creating the tenancy to impose the duty to insure specially on the tenant.) See 1 *American Law of Property* § 2.23, at 159 (James Casner, ed., 1952).

### She Meant Well

6. Several aspects of this language are relevant. The “for your residence” language may indicate a life estate; dead people don’t need a house. Similarly, the “don’t sell it” language perhaps negates the alienability aspect of a fee simple absolute.

On the other hand, perhaps the drafter intended merely to reenforce and define the purpose of the writing — to provide a residence for the transferee — i.e., precatory language. The restraints on use and alienability on the holder of the estate, may be consistent with either a fee simple absolute or a life estate. If the court finds it to be a fee simple, the court will independently review the “don’t sell it” language to decide whether the restraint is an unreasonable restraint on the alienability of land.

On the other hand, perhaps the “rest of my property” language indicates a future interest to follow a life tenancy in the house and lot. If this is a lay drafter, however, one cannot put too much store in such a person’s knowledge of future interests. Also relevant to a determination of the issue of how to define the estate are the other provisions of the transfer. Is the sister otherwise well provided for by the “rest of my property” language?

As things stand, the jurisdiction’s statutes preferring the larger estate, such as a fee simple, most likely will control.

### A Slew of Estates

7. (a) *A* has a present interest in fee simple determinable, followed by *O*’s future interest, a possibility of reverter, held in fee simple absolute. See Thomas Bergin & Paul Haskell, *Preface to Estates in Land* 48 (2d ed. 1984).
- (b) *A* has a present interest in fee simple subject to a condition subsequent. *O*’s future interest is a right of reentry or a power of termination. If, after the terminating event is described, the last clause were to read instead “*B* and his heirs shall have the right to reenter,” *A* would hold a fee simple subject to an executory limitation, and *B* would hold an executory interest in fee simple absolute.
- (c) This is a conveyance with words indicating a fee simple determinable (the “cease and determine” phrase, indicating an automatic shift of the

fee simple back to grantor *O*) and with words indicating a fee simple subject to a condition subsequent (the “provided that” language). In this ambiguous grant, the modern canon of construction, that the grantor is presumed to have conveyed whatever interest and estate he held becomes a preference for finding the larger estate in the grantee; this preference helps construe the conveyance as a present interest in *A*, held in fee simple subject to a condition subsequent, *O*’s retaining a right of reentry at the moment of the conveyance.

- (d) *A* has a fee simple absolute. The additional language is precatory language, indicating *O*’s desire, but is neither a condition nor a covenant, and therefore is unenforceable.
- (e) *A* has a fee simple absolute. The language neither makes the interest into a fee simple determinable nor subjects it to a condition subsequent. Rather, the promise is a covenant to use the property as a residence; when he does not, the breach of this promise subjects *A* to contract remedies (e.g., damages or an injunction).

The difference between a condition and a covenant is that breach of a condition results in a forfeiture of the property while the owner retains ownership when a covenant is breached, but may be subject to monetary damages or, more likely, an injunction.

- (f) This conveyance creates either a determinable life estate or a fee simple determinable in *A*. A court will try to ascertain the grantor’s intent based on the surrounding facts and circumstances. Today a court would tend to find that *O* transferred the fee simple determinable, the larger estate, to *A*, the grantee. If the grant is a fee simple determinable, *O* retains a possibility of reverter. If, on the other hand, the grant is a determinable life estate, *O* has a reversion, getting Blackacre back when *A* ceases living on Blackacre and no later than *A*’s death.

If *A*’s interest is a fee simple determinable and *A* continued to live on the property up to his death, *A* has satisfied the condition and, as a result, at the moment of death he holds the property in fee simple absolute. Some good it will do him! This result will, however, benefit his heirs or assigns.

- (g) *A* has a fee simple subject to a condition subsequent. It is not subject to an executory limitation. Such a limitation would require that the reentry be made by a third party. The drafting, however, is extremely sloppy: Instead of “then to *O*,” better to have said that “*O* has the power to terminate *A*’s interest and the right to reenter the property.” This makes plain that the termination is not automatic and that *O* must do something, through either self-help or at law, to reenter. See 1 *American Law of Property* § 4.6, at 417 (James Casner, ed., 1952).

- (h) *A* has a life estate, *B* has remainder (a contingent remainder since *B* must satisfy a contingency — graduate from law school — to take after *A* dies). Because it is possible *A* may die before *B* graduates, *O* the grantor retains a reversion. *O* also has a possibility of reverter, but as a matter of tradition, lawyers only mention the first interest *O* holds, the reversion.
- (i) *B*'s remainder interest is no longer contingent. It is a vested remainder in fee simple determinable. Contingent and vested remainders are developed more fully in the next chapter. Since *B*'s remainder is vested, *O*'s reversion has ended, but *O*'s future interest, the possibility of reverter, remains. Thus, *B* has a vested remainder in fee simple determinable, and *O* has a possibility of reverter. See 1 *American Law of Property* § 4.12, at 427 (James Casner, ed., 1952).
- (j) *A* has a fee simple subject to an executory limitation. The language is ambiguous, indicating either a fee or a life estate. The preference for the larger estate permits this language to be construed as a fee simple subject to an executory limitation. *B* has an executory interest (in the next chapter we learn that *B* has a *shifting* executory interest).

**PRINCIPLES  
OF  
PROPERTY LAW**  
**Sixth Edition**

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## Chapter 6

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# CONSTRUCTION OF DEEDS AND WILLS CONCERNING PRESENT POSSESSORY FREEHOLD ESTATES

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### SUMMARY

#### § 6.1 Rules of Construction Generally

1. The purpose of construing a conveyance or will when its terms are ambiguous is to determine the intention of the parties. All rules of construction are subservient to this purpose. In other words, the first rule of construction is to give effect to the parties' intent.

2. In construing an instrument every part of it should, if possible, be given a meaning in considering the meaning of the instrument as a whole. This rule might be characterized as the "four corners doctrine," meaning that everything within the four corners of the instrument should be considered in its construction.

3. If possible, parts of an instrument should be construed as consistent with each other.

4. A deed is always construed most strongly against the grantor who has used the language.

5. If an instrument contains two clauses which are contradictory, the former governs over the latter. This is part of the old

maxim, "the first deed and the last will shall operate." In a deed, this may take the form of the granting clause and the habendum clause being repugnant to the other. In this case, the granting clause governs. This "rule of repugnant clauses" in modern times will normally not be applied in an arbitrary manner, and it frequently will be rejected in favor of the "four corners doctrine."

6. A deed will be construed to grant a fee simple absolute rather than a fee simple determinable or a fee simple on condition subsequent if the language of the whole instrument makes this interpretation reasonably possible.

7. A provision in a deed or will directing that the transferee of property cannot dispose of the property is void as a disabling restraint on alienation.<sup>1</sup>

## § 6.2 Fee Simple<sup>2</sup>

1. Estates in fee simple are:
  - a. fee simple absolute
  - b. fee simple defeasible
2. Estates in fee simple defeasible include:
  - a. fee simple determinable
  - b. fee simple subject to condition subsequent
  - c. fee simple subject to executory interest including:
    - (1) springing executory interest
    - (2) shifting executory interest

3. The only way a fee simple estate could be created at common law was by the use of the words of limitation "and his heirs" or "and their heirs." These magic words were indispensable. Under modern statutes these words of limitation are not necessary to create a fee simple estate. It is presumed that the named grantee takes the entire estate the grantor had unless a lesser estate is described in the governing instrument.

4. Under many modern statutes the fee tail estate is deemed a fee simple estate. In jurisdictions where this is the case there is but one inheritable freehold estate, the fee simple.

5. A fee simple determinable comes to an end automatically upon the occurrence of some specified event or act expressed in the words of limitation. A fee simple subject to a condition subsequent requires both a breach of the specified condition and an affirmative act by the grantor or the grantor's heirs to terminate the estate.

1. This rule does not apply to so-called "spendthrift trusts."

2. See Ch. 5.

6. Any disabling restraint on the power to alienate a fee simple estate is void.

### **§ 6.3    Fee Simple Conditional and Fee Tail**

1. The fee simple conditional estate was the forerunner of the fee tail estate and existed prior to the Statute De Donis Conditionalibus which was passed in 1285. This statute destroyed the fee simple conditional estate.

2. The fee simple conditional was an estate that terminated upon the transferee's death if the transferee had no child. Upon termination, the estate reverted to the grantor who retained a possibility of reverter. Upon birth of a child, however, the grantee had the power to convey a fee simple absolute. Absent a conveyance, the property descended under like terms to the grantee's heir of the body, or absent such a surviving heir, the property reverted to the grantor.

3. The Statute De Donis (1285) created the fee tail estate and made it a substitute for the fee simple conditional estate.

4. The typical words which created the fee simple conditional estate before 1285 and the fee tail estate after 1285 were, "to A and the heirs of his body."

5. The fee tail tenant owned an inheritable freehold estate but with limited powers over the estate. The tenant in tail could use it during his lifetime, but he could make no disposition thereof so as to prevent its descending to his bodily heirs, if any, or if no bodily heirs, he could not prevent its reverting to the grantor who retained a reversion. Each succeeding fee tail tenant had the same rights and limitations upon his estate.

6. Because the fee tail estate restricted the free alienability of land, the courts did not favor it. Fictitious legal proceedings were evolved to enlarge the powers of the fee tail tenant. The fine empowered him to cut off the rights of his bodily heirs. The common recovery<sup>3</sup> empowered him to cut off both the rights of his bodily heirs and the reversion of the donor.

7. A fee simple estate is a larger estate than a fee tail estate. Thus, when a fee simple owner conveys a fee tail estate, there is a reversion left in the donor.

8. Almost all states by statutes have abolished the fee tail estate by transforming it into a fee simple or into a life estate in the first taker with a remainder in fee simple to his issue or lineal descendants.

3. See chap. 5, note 17.

## § 6.4 Life Estates

1. Life estates include: (a) life estate for the life of the tenant, (b) life estate for the life of one other than the tenant (*pur autre vie*), (c) life estate resulting from a fee tail special tenancy after possibility of issue extinct, (d) life estate by dower, (e) life estate by curtesy, and (f) life estate by and during coverture.

2. A life estate is one in which the duration of the estate is measured by the life or lives of one or more human beings and is not otherwise terminable at a fixed or computable period of time.

3. If an estate may last for a lifetime, it is a life estate, even though it may be extinguished before it runs its natural course. However, if a limitation is made expressly subject to the will of the grantee or lessee, there is a conflict, and the interest created is either a life estate determinable or a tenancy at will depending upon the jurisdiction.

4. If a conveyance identifies the grantee but fails to describe effectively the estate which the grantee takes, then the grantee takes a life estate at common law. Today, the grantee is presumed to take whatever estate the grantor had to convey unless a contrary intent appears in the governing instrument.

5. A life tenant, in addition to his estate for life, may be given a power to convey, sell, appoint, or mortgage the fee. Upon the exercise of this power, the rights of the remaindermen or reversioners are affected accordingly.

6. Under the Rule in Shelley's Case, a conveyance of a remainder to the heirs or the heirs of the body of the life tenant, gives the remainder to the life tenant in fee or in fee tail, as the case may be. This Rule, which is a rule of property law at common law and does not give way (as a rule of construction would) to a contrary intent, defeats the intention of the grantor to create a life estate and a remainder in the life tenant's heirs.

7. A life estate may be measured by resort to a reasonable number of lives. Thus, a conveyance "to B for the lives of B, C, D and E" terminates upon the death of the survivor of the four named lives. On the other hand, a life estate to B to last for her life and for the lives of all the persons of a given state would give B a life estate for her life only.

8. Forfeiture restraints on the power to alienate a life estate, usually phrased so as to make the life estate defeasible on an attempted alienation, are valid. The reasons for upholding these restraints are: (1) life estates are not readily alienable in a commercial sense anyway; and (2) the restraint may have been imposed for the benefit of the reversioner or remainderman.

**§ 6.5    Concurrent Estates**

*a.    Joint Tenancy*

1. Joint tenancy is always created by deed or by will, never by descent.

2. In joint tenancy there must always be two or more grantees or devisees.

3. O "to B and C and their heirs" are typical words for creating a joint tenancy at common law. Today in the absence of a clearly expressed intent to create a joint tenancy with the right of survivorship, this limitation creates a tenancy in common.

4. At common law a joint tenancy was preferred over a tenancy in common. Under modern statutes tenancy in common is preferred over joint tenancy.

5. At common law, every joint tenancy required the four unities of:

a. time—meaning all tenants take their interest in the premises at the same instant of time.

b. title—meaning all tenants take their interest from the same source, the same deed or the same will.

c. interest—meaning every tenant has the same identical interest in the property as every other tenant, such as fee simple, fee tail, life estate, etc.

d. possession—meaning the possession of one joint tenant is the possession of all the joint tenants and the possession of all the joint tenants is the possession of each joint tenant.

6. Every joint tenant owns the undivided whole of the property; co-tenants do not own a fractional interest.

7. The grand incident or characteristic of joint tenancy is that of survivorship. This means that upon the death of one joint tenant, the survivor or survivors own the whole of the property and nothing passes to the heirs of the decedent.

8. Upon the death of a joint tenant the survivors take nothing from the decedent but take the whole from the original conveyance which created the joint tenancy and which whole they have owned all the time.

9. A severance of the joint tenancy can be made by a conveyance, but not by will, because survivorship is prior to and defeats any purported disposition in the will.

10. If all joint tenants except one die without having severed their interests, the survivor owns the whole property.

11. Joint tenancy is destroyed by severance inter vivos, by partition, or by any act destroying any one of the four unities.

12. Except in those jurisdictions where the joint tenancy has been abolished, husband and wife may, by a clearly expressed intention in the conveyance, take and hold as joint tenants.

*b. Tenancy by the Entirety*

1. A tenancy by the entirety is a form of concurrent ownership based upon the common law concept of unity of husband and wife.

2. Tenancy by the entirety is a species of joint tenancy and as in joint tenancy each spouse owns the whole estate and not a fractional part thereof.

3. Tenancy by the entirety can exist only between husband and wife.

4. The doctrine of survivorship obtains in tenancy by the entirety—the survivor taking all and the heirs nothing.

5. Five unities are essential in tenancy by the entirety: (a) time, (b) title, (c) interest, (d) possession and (e) person. The first four are the same as in joint tenancy. The fifth involves the common law concept of unity of person in husband and wife.

6. Tenancy by the entirety is created only by deed or will, never by descent.

7. In most jurisdictions that recognize the estate by the entirety, neither spouse can dispose of any interest in the estate owned by the entirety; both must join in the conveyance.<sup>4</sup>

8. In most jurisdictions that recognize the estate by the entirety, a creditor of one spouse cannot levy upon the estate owned by the entirety, nor is a judgment against one spouse a lien against the estate held in the entirety.<sup>5</sup>

4. In some states in a tenancy by the entirety, the husband has the sole right to possession during the joint lives, and a fee simple absolute in all of the estate if he survives the wife. The wife, on the other hand, has no present estate but she does have a fee simple absolute in all of the estate if she survives her husband. The husband can convey his interests subject only to the right of the wife to absolute ownership if she survives; but the wife, during their joint lives, cannot convey her possibility of acquiring the estate. See *Powell on Real Property* ¶ 623. See *D'Ercole v. D'Ercole*, 407 F.Supp. 1377 (D.Mass.1976) (where an

estranged wife brought suit claiming that the common-law concept of tenancy by the entirety deprived her of due process and equal protection in that it gave her husband the right of possession and control during his lifetime of their home, the court held that since tenancy by the entirety is but one option open to married persons seeking to take title to real estate, it is constitutionally permissible).

5. In those states that preserve the estate by the entirety in all its common law flavor, creditors of the husband can attach and sell under execution all of his interest in an estate by the entirety, but

9. Divorce eliminates the unity of person, destroys the tenancy by the entirety and the divorced persons become tenants in common of the property, or in some states, joint tenants.

10. Neither spouse has a right to partition a tenancy by the entirety, and neither has power, without the consent of the other, to destroy it.

*c. Tenancy in Common*

1. Tenancy in common may be created by deed, by will, or by operation of law.

2. Under modern statutes, tenancy in common is preferred over joint tenancy. Thus, a conveyance to two or more persons presumptively creates a tenancy in common.

3. Only one unity, that of possession, need be present in tenancy in common.

4. Each tenant owns an undivided fractional part of the property, none owns the whole as in joint tenancy.

5. Each tenant can dispose of his undivided fractional part or any portion thereof, either by deed or by will.

6. Upon the death intestate of a tenant in common her interest descends to her heirs. There is no right of survivorship.

7. Tenancy in common may be destroyed by partition or by merger when the entire title vests in one person, either by purchase or otherwise.

8. If one cotenant ousts the other from possession, the ousted tenant has a cause of action against the possessor to regain possession.

9. There is no real fiduciary relationship between cotenants merely because of the cotenancy, but good faith between cotenants prevents one cotenant from buying up an adverse title and asserting it against cotenants if the other cotenants offer to share their part of the expense of gaining the title. The buyer of the adverse title is made to hold in constructive trust for his cotenants.

separate creditors of the wife cannot reach her interest. See *Licker v. Gluskin*, 265 Mass. 403, 164 N.E. 613 (1929) (where a husband and wife were tenants by the entirety and a creditor of the wife attached her interest in the land and sought to sell it, the court held that under force of statute the attachment

and levy were void because the creditor could not do what the wife could not do); *West v. First Agricultural Bank*, 382 Mass. 534, 419 N.E.2d 262 (1981) (suggesting that historical inequalities in tenancy by the entirety were now unconstitutional), *Powell on Real Property* ¶ 623.

**PROBLEMS, DISCUSSION AND ANALYSIS****§ 6.2 Fee Simple<sup>6</sup>**

**PROBLEM 6.1:** O grants Blackacre<sup>7</sup> "to B." In the jurisdiction where the land is located a statute provides in substance that every grant or conveyance of an estate in land made to a person shall be deemed a fee simple unless a lesser estate is described in the instrument. (a) What estate would B take at common law? (b) What estate would B take under the statute?

**Applicable Law:** Words of limitation, "and his heirs," were indispensable to the creation of a fee simple estate at common law. Under modern statutes and some cases, the use of these words is usually not necessary and a fee simple estate may be created without the presence of these words.

**Answer and Analysis**

(a) At common law B took a life estate in Blackacre but under the statute B takes a fee simple estate. At common law no conveyance could pass a fee simple from the grantor to the grantee without the use of the magic words of limitation, "and his heirs." Thus, even a conveyance to "B in fee simple absolute" gave B only a life estate.

(b) Under the statute the named grantee takes a fee simple estate in every conveyance (assuming the grantor had a fee simple) unless by express words in the deed it is stated that the grantee takes an estate less than a fee simple. Thus, under the statute B takes a fee simple even though the phrase "and his heirs" was excluded from the terms of the conveyance. Some jurisdictions hold that B takes a fee simple in such case even without the aid of a statute.

The common law rule mandating the use of "and his heirs" was subject to some important exceptions. These were:

If O conveys to B corporation (whether sole, aggregate, or municipal), the corporation takes a fee simple absolute without the use of words of inheritance. Although corporations are legal "persons," they do not have heirs.

If O conveys to "B as trustee," B takes such estate as is necessary to carry out the trust, including a fee simple, even though the phrase "and his heirs" did not appear in the conveyance.

6. At this point those portions of chapter 5 describing the characteristics of the fee simple absolute and the fee simple subject to limitations should be carefully re-read. In each of the following problems, assume that O owns

Blackacre in fee simple absolute unless the problem provides otherwise.

7. Unless the problem otherwise provides, O or T, when conveying or devising Blackacre, owns Blackacre in fee simple absolute.

If O conveyed to the heirs of B (a deceased person), that heir took a fee simple even though the phrase "and his heirs" did not appear in the conveyance. This resulted from the fact that at common law B had but one heir where primogeniture applied; thus, the use of the plural heirs was a substitute for "B's heir and his heirs." Similarly, if O conveys to B for life, remainder to the heirs of C while C is still living, C's heirs took as purchasers and as a class of heirs a contingent remainder in fee simple. If C dies before B, they then take a vested remainder in fee simple without words of inheritance being used in the deed.

Suppose O conveyed Blackacre to A and B and their heirs as joint tenants in fee simple. A releases her interest to B. B now is owner in fee simple in severalty without use of the words of inheritance in the deed. The reason is that B, as well as A, had previously owned the fee in the whole. By contrast, suppose O conveyed to A and B and their heirs as tenants in common. In this case each of them owns an undivided one half of Blackacre in fee simple. If A grants "to B" A's interest in Blackacre, B will only take a life estate in A's undivided half at the common law unless words of inheritance are used. This is because A's estate is wholly separate and distinct from B's fee simple, each having a different interest. Lastly suppose T devises Blackacre to B. B takes a fee simple without the use of words of inheritance if this is the testator's intention.<sup>8</sup>

**PROBLEM 6.2:** O conveys Blackacre "to my son-in-law, B, and his heirs to have and to hold for his lifetime, and at his death to be equally divided among his heirs, they being my grandchildren then living." What estate does B take under this deed?

**Applicable Law:** If two clauses in a deed are in conflict but the grantor's intention can be found by a reading of the entire instrument, this intention shall govern.

### Answer and Analysis

B has a life estate. There is an inconsistency between the granting clause which gives B a fee simple and the habendum clause which limits B's estate to a life estate. If the rule of construction is that if the granting clause is repugnant to or inconsistent with the habendum clause, the former governs, then, of course, B takes a fee simple estate. This rule, however, is resorted to only when the intention of the parties cannot be ascertained from the entire instrument. In this problem O's intent can be gleaned by reading the entire instrument.

8. See Restatement of Property §§ 29-37; Simes, 181-185.

In analyzing the entire instrument little emphasis should be placed on the order in which the words, phrases, or clauses appear. In the first place, the grantee, B, is the grantor's son-in-law. In the second place, the deed provides for another purchaser upon B's death, namely, B's heirs, who are the grantor's grandchildren. A is providing for a remainder among B's children, A's grandchildren. True, there can be no heirs of a living person and it cannot be foretold who B's heirs will be at the time of B's death. Nonetheless, there is reason to believe that O is using "B's heirs" as synonymous with "B's children." If this is the case, then it is clear that B takes a life estate and there is a contingent remainder to B's children living at B's death.

Furthermore, by taking this view, the words "and his heirs" used in the granting clause might well be read as "and his children." This construction would give effect to every part of the deed and reconcile the granting and the habendum clauses. Under this interpretation, B takes a life estate in Blackacre and his children living at his death take a contingent remainder. O, of course, retains a reversion. From a reading of the entire deed this seems to be O's intention.

**PROBLEM 6.3:** In State X a statute provides that a conveyance which prior to the enactment of the statute would create a fee tail estate should thereafter create a fee simple estate in the grantee. O is domiciled in State X. O conveys Blackacre "to B and the heirs of his body." What estate does B take under the instrument?

**Applicable Law:** Under many modern statutes a conveyance which would have created a fee tail estate at common law now creates a fee simple estate.

### Answer and Analysis

B takes a fee simple absolute. Prior to the statute and at common law the expression "to B and the heirs of his body" created a fee tail estate in B. This estate was limited to lineal heirs. Many states have statutes which provide that an estate which was at common law a fee tail shall be deemed a fee simple. Under this type of statute B would take a fee simple estate. Thus if B owned the property at the time of his death and died intestate, the property would pass to B's lineal descendants, or if none, among his collateral heirs.<sup>9</sup> This estate is also alienable and devisable.<sup>10</sup>

9. Depending upon state law, these heirs might be ancestors of B or collateral relatives of B.

10. See Restatement of Property § 42, Simes, 196-202.

**PROBLEM 6.4:** O conveys Blackacre to "B and his heirs so long as Blackacre is used for school purposes." What interest does B have in Blackacre?

**Applicable Law:** A grant to B and his heirs so long as the land is used for school purposes creates in B a fee simple determinable; the grantor retains an estate called a possibility of reverter.

### Answer and Analysis

B has a fee simple determinable. B has a fee because words of inheritance, "and his heirs" were used following the grantee's name (words of purchase), which indicate the estate in B may last forever. However, additional words of limitation appear in the deed. These words tie up the use to which B may put the land. Because of these additional words of limitation, there is the possibility that B's estate will not last forever. If B ceases to use Blackacre for school purposes, then B's estate automatically terminates and Blackacre reverts to O because the very words of the conveyance state that B's estate shall last just that long. Thus, there is no forfeiture involved. Rather, B's estate ends naturally.

In this problem, the future interest retained by the grantor is called a possibility of reverter. This estate becomes possessory upon the natural termination of B's estate.

In some cases a limitation may be void as a matter of public policy. For example, suppose O transfers Blackacre to A so long as A remains single. If A marries, does Blackacre revert to O? In resolving this issue, the reasonableness of the restriction may be relevant. Generally, restraints on the marriage of a surviving spouse are upheld, while restraints on the marriage of the grantor's children or others are not.<sup>11</sup> Likewise, any restraint that violates some independent body of law, such as the law of race or gender discrimination, is invalid or unenforceable. For example, a grant "To A so long as the property is occupied exclusively by white persons" is not enforceable in a court.<sup>12</sup>

**PROBLEM 6.5:** Within X County O owned Blackacre which comprised an area of several blocks of land. The land was unimproved and undeveloped. O offered to convey one block of this land, Whiteacre, in the center of the tract to X County to be used for courthouse purposes. The proper county officers agreed to receive the property on behalf of the county and to locate the courthouse there. O executed a deed granting "to X

11. See, e.g., *Lewis v. Searles*, 452 S.W.2d 153 (Mo.1970) (upholding limitation regarding marriage as against a niece because court found testator only

intended to provide for niece when she would have no other sources of support).

12. See Ch. 12.

County, all of my right, title, claim, interest and estate in and to Whiteacre, but upon this condition that Whiteacre shall be used forever as the site on which the courthouse of X County shall be erected." The courthouse was built on Whiteacre and remained there and was used as such for more than 100 years, when it was abandoned as a courthouse. When the structure ceased to be used for courthouse purposes, H was the sole heir of O then living. H sues X County for possession of Whiteacre contending that the above deed created in X County either a determinable fee simple or a fee simple on condition subsequent. May H succeed?

**Applicable Law:** This problem distinguishes a fee simple determinable from a fee simple subject to a condition subsequent. The provisions of a deed will be construed to create a fee simple absolute rather than a fee simple determinable or a fee simple subject to a condition subsequent, if this interpretation is reasonable.

#### Answer and Analysis

No. A determinable fee is a fee which is created by an instrument of conveyance which provides that such estate shall come to an end automatically upon the happening of some described event. A fee simple subject to a condition subsequent is a fee which is created in an instrument of conveyance which provides that, upon the happening of some certain event, the grantor or his successors in interest shall have the power to enter and terminate the estate of the grantee. The principal difference between the two is this: in the determinable fee the estate automatically comes to an end when the stated event happens, whereas in the fee subject to a condition subsequent the termination of the estate is not automatic but must be terminated by an entry or exercise of the reserved power by the grantor or his successor in interest. The former involves no forfeiture, the latter does. Whether a given deed conveys a fee simple absolute or a determinable fee or fee simple on condition subsequent is a matter of construction of the words used in the instrument.

In the construction of limitations the courts favor unconditional estates rather than conditional ones for the reason that estates once vested should not be uprooted after long periods of time unless it was the intention of the grantor expressed in the deed that this should occur. Applying this principle the deed should be construed in favor of the defendant county unless it is fairly clear that the grantor intended either a determinable fee or a fee simple upon condition subsequent. In the deed O grants to X County, a quasi-municipal corporation, "all of his right, title, claim, interest and estate in and to Whiteacre." Words of inheritance are not only not

required but are quite inappropriate where a public corporation is the grantee. Thus, it is clear that O intended to grant a fee simple estate to X County.

The words following, "but upon this condition that Whiteacre shall be used forever as the site" of the courthouse are the only words on which it can be contended there was either a determinable fee or fee simple upon condition subsequent. These words show no intention whatsoever that the fee simple in X County should automatically revert to O or his heirs. While they limit the use to which Whiteacre shall be put, they put no limit on the time during which the estate shall last. The typical words for creating a determinable fee are "so long as," "during," "until," or "while." None of these or similar expression was used but the use was to be "forever." Thus, it seems there is no expression of intention by O in the deed that there should be a determinable fee simple in X County.

Was there a fee simple on condition subsequent? A fee simple on condition subsequent is generally introduced by such phrases as "provided that," "on condition that," "subject to the condition that," or "but if." An express reverter clause giving the grantor the right to re-enter generally is appended. But these reverter clauses are not absolutely necessary. The fee simple subject to a condition subsequent always involves a forfeiture of a vested interest. The law abhors forfeitures and the courts will not construe the words of a deed to create this future estate unless the language is so clear as to admit of no other interpretation. In this case the deed did say, "upon the condition" that the tract be used "forever" as a courthouse site. But there is not one word in the deed expressing what should happen in case the site were not so used. There is no right of entry or power to terminate the estate reserved in O or O's successors in interest. Without any express reservation of this power, the court ought not to imply such, when the result of that implication would cause a forfeiture of an estate which has lasted for more than a century. Thus, there was no fee simple upon condition subsequent created in X County.<sup>13</sup>

There is a further economic argument in this case which should not be overlooked. It may be that O's grant of Whiteacre to X County was not wholly altruistic. If the county courthouse could be located in the middle of land owned by the grantor, such an institution might enhance the value of the lots surrounding the courthouse. Reading the language of the deed as a whole and considering the conditions under which it was executed, it seems

13. In *Mahrenholz v. County Board of School Trustees*, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) grantor conveyed to a local school board

with the land to be used only for school purposes; "otherwise to revert to the" grantor. The court held this language created a fee simple determinable.

quite correct to conclude that X County took a fee simple absolute estate in Whiteacre and that no defeasible fee simple was intended. Thus, H should not succeed in his action.<sup>14</sup>

In many jurisdictions statutes require holders of retained future interests to periodically file a notice or claim to the effect they intend to enforce their rights if the limitation or condition occurs. If State X had a statute of this type and neither H nor H's predecessors timely filed this notice, then even if a fee simple determinable or a fee simple on condition subsequent were created, H would be barred from reclaiming possession of Whiteacre.

**PROBLEM 6.6:** O conveys Blackacre "to B and his heirs provided that, if intoxicating liquors are ever sold on the premises, then O reserves the right to enter and terminate B's estate." What estate does B take under this deed?

**Applicable Law:** A grant to B and his heirs provided that if a specified condition occurs or fails to occur the grantor or his heirs have the right to re-enter and terminate the estate creates in B a fee simple subject to a condition subsequent and leaves in the grantor a right of re-entry for condition broken which today is also called a power of termination.

#### Answer and Analysis

B has a fee simple subject to a condition subsequent. The older cases used the expression "right of re-entry for condition broken" to describe O's right. The more recent cases describe O's right as a "power of termination." B has a fee simple because words of inheritance "and his heirs" are used to describe the quantum of B's estate. B's estate may last forever provided intoxicating liquors are not sold on the premises. It may also last forever although intoxicating liquors are sold on the premises provided O or his successors in interest do not terminate the estate of B by exercising their power of termination.

The usual words for creating a condition subsequent are, "on condition that," "but if," "on the express condition that," "provided that" or similar expression. The usual expressions for reserving the power to terminate are that the grantor may "re-enter and take the property," "enter and terminate the estate," "in such case cause the title to revert back to the grantor," or other words evincing an intention to take back the property. The power to terminate may even be implied from such expressions as "every

14. See *Chouteau v. City of St. Louis*, 331 Mo. 781, 55 S.W.2d 299 (1932) (where a deed conveyed all interest in realty on condition that it should be used forever as a courthouse site with no express provision for re-entry, the

deed conveyed a fee and not an estate on condition subsequent and hence the grantor's heir had no right to the property after its abandonment as a courthouse site); *Restatement of Property* §§ 44, 45.

thing herein shall be null and void" or "this deed shall be null and void and the title shall revert to the grantor."

In this problem, both the condition subsequent and the power to terminate are provided for expressly in the deed. The phrase "provided that if intoxicating liquors are ever sold on the premises" describes the condition subsequent. The phrase "then I reserve the right to enter and terminate the estate hereby created" describes the power to terminate or right to make reentry for breach of the condition. It is clear then that O intended to create a fee simple in B and that if a certain event or condition happened, namely, the selling of intoxicating liquor on the premises, then O would have the right or power to enter and put an end to that fee simple. B's estate would not end automatically. It would end only if and when the condition happened and thereafter the grantor or his successors in interest performed the requisite affirmative act of reentry for terminating such estate.<sup>15</sup>

**PROBLEM 6.7:** O conveys Blackacre "to B and his heirs but upon the express condition that B shall not dispose of or alienate Blackacre for a period of five years after B receives the title." Ten days after the deed was delivered to B, B purports to convey Blackacre to C. What estate does C have in Blackacre?

**Applicable Law:** A restraint which disables a fee simple owner of land from alienating the property is void and the owner may dispose of the property in fee simple.

### Answer and Analysis

C owns Blackacre in fee simple absolute. O purported to convey a fee simple absolute to B and also to impose on B a restraint on B's power to alienate or dispose of the fee simple estate. Is this restraint valid? The answer is an unequivocal no.

The power to dispose of the fee simple estate is an integral part of the fee simple estate. This estate cannot exist apart from the power in its owner to dispose of it. This type of restraint or power to alienate is classified as a disabling restraint and is void in all cases except when connected with spendthrift trusts. Where this restraint appears in a deed, the grantee takes the property free of the restraint and with full power to dispose of the property.<sup>16</sup> This is true whether the restraint refers to real or personal property,

15. See Restatement of Property § 45; Simes, 30.

16. Accord, *White v. Brown*, 559 S.W.2d 938, 941 (Tenn.1977) (where the testatrix stated in her will that she wished a named person to have her

home to live in and that it was not to be sold, the testatrix passed a fee simple absolute in the home to such person, and her attempted restraint on alienation was void as contrary to public policy).

whether it refers to legal or equitable interests (spendthrift trusts excepted), and whether the estate involved is a fee simple, fee tail, life estate, or an estate for years. In other words, there is no power on the part of a grantor or testator to convey a fee simple estate to a person *sui juris* and deny that person the power to dispose of the estate for five years, for one year, for one day or one minute. In this case then, O's attempted restraint on B's power to alienate the estate was void and B took the fee simple absolute in Blackacre. B's estate was alienable. B had both the right and power to convey the fee simple estate to anyone. Since B granted B's estate to C, C took from B the estate which B had which was a fee simple absolute.

The disabling restraint illustrated in this problem is a type of direct restraint on alienation. Other types of direct restraints are the promissory and forfeiture restraints. Unlike the disabling restraint which is generally held invalid except in the case of spendthrift trusts, promissory and forfeiture restraints are generally held valid when imposed on interests less than fees simple.

§ 6.3 *Fee Simple Conditional and Fee Tail [Omitted]*

§ 6.4 *Life Estates*<sup>17</sup>

**PROBLEM 6.12:** T's first wife died. Later T remarried W-1. T later dies and bequeaths Blackacre to "my second wife, W-1, so long as she remains a widow, and then to my child C and his heirs." W-1 later dies and bequeaths her entire estate to her brother X and his heirs. X enters Blackacre. C sues X in ejectment. Who wins?

**Applicable Law:** A grantor can create a determinable life estate as well as a fee simple determinable. Ordinarily distinguishing the two is easy. However, where the limitation is tied to an event that could only occur during the grantee's lifetime, ambiguities can arise whether the grantor intended to create a determinable life estate or a fee simple determinable.

**Answer and Analysis**

C probably wins. Whether C or X wins depends on whether W-1 had a determinable life estate or a fee simple determinable. If W-1 had a determinable life estate, then C would have a remainder which would become possessory at W-1's death. A determinable life estate is neither devisable nor descendible. If, on the other hand, W-1 had a fee simple determinable, then W's estate would be devisable and descendible and, given that the limitation could not occur after W-1's death, C's shifting executory interest<sup>18</sup> could never become possessory.

17. On life estates, see Ch. 5, Part I.

18. The fact that C would have a shifting executory interest is an excep-

The proper classification of W-1's interest depends on T's intent. A strong argument can be made that T wanted W-1 to have only personal enjoyment of the property during her widowhood and not a devisable or descendible estate. This argument is particularly strong where as here, C is a child of T's first marriage and construing W-1's estate as a fee simple determinable would permit her to devise the property to strangers.<sup>19</sup>

**PROBLEM 6.14:** H and W were husband and wife who had five minor children. H devised Blackacre "to my wife, W, for the term of her natural life, remainder to our children share and share alike, but if my wife, W, determines it to be for the welfare of the family to sell Blackacre, then she is hereby empowered to sell the land and pass a fee simple title thereto." W decided that it was for the family welfare to sell Blackacre so she conveyed it to "B and his heirs." W died and the five children sue B for possession of Blackacre. Should they succeed in their action?

**Applicable Law:** A life tenant can be granted a power to convey a fee simple even if by exercise of that power the interest of the remainderman is defeated.

#### Answer and Analysis

No. Sometimes an estate is given with a power in someone to cut short or destroy it. Sometimes an estate is given with a power to enlarge it. This case involves both types—a life estate in W with a power to dispose of the fee simple and a remainder in fee simple in the children with power in W to destroy it. By W's conveyance to B in fee simple she exercised that power. This act both enlarged her life estate to a fee simple absolute in her grantee and destroyed the vested remainder in her children. But until the exercise of the power by W, she had only a life estate.

**PROBLEM 6.15:** O conveys Blackacre "to B for the lives of B, C, D and E and the survivor of them." B conveyed to X all of B's right, title and interest in Blackacre. B then died survived by C, D and E. O sues to eject X from Blackacre and argues that B's death terminated X's interest in the premises. May O succeed?

tion to the classification structure. Logically, C should have a vested remainder since, if it were to ever become possessory, it would do so following the natural termination of W's estate upon the happening of a limitation, not a condition. However, because of the early common law rule that a fee simple could not follow on the heels of a fee simple, C's

interest was classified as a shifting executory interest and continues to be so classified today.

19. Compare *Dickson v. Alexandria Hospital, Inc.*, 177 F.2d 876 (4th Cir. 1949)(fee simple determinable) with *Mouser v. Srygler*, 295 Ky. 490, 174 S.W.2d 756 (1943)(determinable life estate).

**Applicable Law:** O "to B for the lives of B, C, D and E and the survivor of them," is valid to create a life estate in B until the death of the survivor of the four named persons, B, C, D and E. O "to B for the joint lives of B, C, D and E" is valid and lasts as long as all four live and ends upon the death of the first of the four; O "to B for B's life and the lives of all the people who live in State X and the survivor" is a valid life estate for the life of B only, the provision for the other lives and survivor being void for impracticability of determining the death of the survivor.

### Answer and Analysis

No. It should be noted that the life tenant's name, B, is listed among the measuring lives so that this is not wholly an estate *pur autre vie*. B has a valid estate for the lives of B, C, D and E and the survivor of them. This phrase makes the life of the survivor of the four the maximum term of the estate which B had and which B assigned to X. Thus, O has no right to eject X until all of the four are dead. If B is not the survivor of them, B's estate passes to those persons who are the successors of his estate—his heirs if B dies intestate; the beneficiaries of the interest if B dies testate.

Had the conveyance read, "for the joint lives, of B, C, D and E," then the "joint lives" could only last until the first of the four died and when B died, O could have ejected X. But the deed did not so provide.

Had the measuring lives been "for the life of B and the lives of all the persons now living in the State of South Dakota and the survivor of them," the provision for the lives beyond that of tenant, B, would be void for the reason that it would be impracticable if not impossible to determine the time of death of the survivor, and B would take a life estate for his own life only.<sup>20</sup>

**PROBLEM 6.16:** T devised Blackacre to her daughter, D, for life. T's will directed that upon D's death Blackacre should be distributed to D's two children, X and Y, and their heirs. The will also provided that Blackacre should not be sold until X and Y reached 45 years of age. Is the provision against sale valid?

**Applicable Law:** (a) Disabling restraints on alienation (spendthrift trusts excepted)<sup>21</sup> generally are void regardless of the estate to which they are attached. (b) Forfeiture and promissory restraints on life estates and lesser interests generally are

20. See Restatement of Property § 107, illustrations 1, 4, 5.

21. A spendthrift trust is a trust which provides, among other things, that the equitable life estate (and re-

mainder) while held by the trustee are not alienable nor reachable to the creditors of the income beneficiary or remainderman.

valid. (c) All unreasonable restraints on the alienation of fee simple estates are invalid. (d) Life estates are subject to termination by special limitations and powers of termination.

### **Answer and Analysis**

In most states the restraint on alienation is invalid. The provision against sale is a restraint on alienation of the disabling type.

A disabling restraint is a direction in the creating instrument that the estate shall not be alienated. If this restraint were valid, it would create a non-transferable estate. If a disabling restraint were valid, the transferee subject to the restraint could not alienate the property and would not lose his interest in the property even though in violation of the restraint he purported to alienate the property.

The general rule, with the exception of a disabling restraint on the beneficial interest under a spendthrift trust, is that all disabling restraints on alienation are void. This rule applies whether the disabling restraint is attached to a fee simple, life estate, or lesser interest. It also applies whether the restraint is total or partial, limited or unlimited as to duration. The rule is based upon a public policy preference to eliminate impediments to the alienability of land. When tied to a life estate or other estate smaller than a fee simple absolute, the practical effect of the restraint is unclear. All future interests act as impediments to the alienability of land. Thus, in this problem, if the restraint were limited to the life of D, an empirical question arises whether the land would be any more alienable without the restraint as it would be with it since D's children have a future interest. If they do not join in a conveyance, no purchaser from D could acquire a fee simple estate.

When applicable, the rule of invalidity invalidates the illegal restraint on alienation and makes the estate freely alienable. Thus, in most jurisdictions D acquires a life estate which D can alienate, and X and Y can alienate their remainder interests during the lifetime of D. They also can alienate the fee simple after the death of D regardless of whether or not they reach the age of 45.

Forfeiture and promissory restraints on fee simple estates generally have been held invalid. Forfeiture and promissory restraints on life estates and lesser interests generally are held valid. A forfeiture restraint exists when the creating instrument provides that on an attempted alienation the estate created or transferred is forfeited or terminated with a further provision for the estate to pass to another.

A promissory restraint is in the form of a covenant (promise) that the grantee will not alienate the estate. Thus, in this problem,

if the will provided that should D transfer or alienate her life estate, then her estate should end and the entire estate vest in X and Y, the provision would be perfectly valid and enforceable.

Forfeiture restraints on life estates may be justified on two grounds: (1) they may be imposed for the benefit of the reversioner or remainderman; and (2) life estates are somewhat inalienable (at least in a commercial sense) anyway because of the uncertainties surrounding the life expectancy of the life tenant. Because the life tenant may die the next day, no one is willing to pay very much for a life estate. Forfeiture restraints on leaseholds are common and are valid. These restraints customarily take the form of affording the landlord the right to re-enter and terminate the estate if the leasehold is transferred without the landlord's consent. The interest of the landlord in protecting rental income and the reversionary estate are sufficient justification for upholding such restraints.

Life estates also are subject to termination by (1) special limitation, such as "to B for life so long as B does not sell liquor on the premises," or "to W for life for so long as W remains a widow (or until she remarries)," and (2) by the exercise of a power of termination, such as, "to B but if he does not keep the fences in repair, then I reserve the right to re-enter and take back the premises."<sup>22</sup>

The modern trend toward condominium and cluster housing has given rise to increased restrictions on the use and transfer of such housing units. The close interrelationships of the community members, whether controlled by a home owners' association, a condominium or a cooperative association, have resulted in the use of restrictions in order to achieve a community of compatible and financially responsible persons. The restrictions frequently involve not only restrictions on use, i.e., single family residence, no children under a certain age, or no pets, but also restrictions on sale or transfer.

A wholly disabling restraint on sale most likely would not be used, and even if it were, it would most likely be held invalid although limited as to duration. However, provisions are common

22. See *McCray v. Caves*, 211 Ga. 770, 88 S.E.2d 373 (1955) (where a husband's will devised a tract of land to his wife for life and at her death to the heirs of her body but should she cease "to be

the wife or widow" of the husband "then in that event she forfeits her right to the life estate" to her children, the estate divested upon her remarriage); Restatement of Property § 18, Note 2.

that grant the condominium association a right of first refusal. In other words, when an owner wishes to sell, the association may either approve the prospective buyer and sale, or instead, may buy the unit on the terms and conditions offered by the prospective buyer. As long as the association does not have an unreasonably long period of time in which to exercise its purchase option, such provisions have been, and should be upheld as long as the particular terms do not violate the rule against perpetuities.<sup>23</sup>

One court expressed the opinion that a right of first refusal was not a restraint on alienation since the seller in effect had two purchasers instead of one.<sup>24</sup> This reasoning is questionable. If a right of first refusal exists, any prospective purchaser that the seller gets must be prepared and willing to wait until the association decides whether or not to exercise the option. If the association is given too long a period of time to decide, many prospective purchasers will refrain from making an offer because they will not want to be bound for a long time without an assurance that they will get the land. Thus, there will definitely be a restraint on alienation. Reasonable controls, however, are common and even desirable.

In view of these recent developments, statements about direct restraints on alienation should be phrased as follows: reasonable restraints on alienation are upheld, but unreasonable restraints on alienation are invalid.<sup>25</sup>

23. Options in gross may be subject to the common law Rule against Perpetuities, but options to renew or purchase attached to leases are not generally subject to the Rule, because they promote rather than hinder alienability. See Ch. 13. See generally, Ch. 8, §§ 8.4; 8.5.

24. *Watergate Corp. v. Reagan*, 321 So.2d 133 (Fla. 4th D.C.A. 1975) (action for declaratory judgment; an agreement granting a right of first refusal with respect to the sale of certain property did not violate the Rule against Perpetuities and enhanced alienability because the seller had two potential buyers instead of one).

25. See *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d D.C.A. 1977), holding that unit owner must tender a qualified purchaser (here, with no children under 12), before association has

duty to purchase or provide another purchaser; *Hoover & Morris Dev. Co., Inc. v. Mayfield*, 233 Ga. 593, 212 S.E.2d 778 (1975), holding that owner did not comply with declaration requirements concerning notice to the association so as to require exercise of the option or consent, but that there was evidence of a waiver; and *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal.App.3d 688, 146 Cal. Rptr. 695 (1978), holding that age restrictions on occupancy and sale were reasonable and valid, and that coupled with a right of first refusal as provided in the documents would impose on the association the duty within fifteen days to either provide a qualified purchaser, purchase itself, or waive the restriction. See Ch. 13.

FREEHOLD ESTATES COMPARED WITH  
AND DISTINGUISHED FROM NON-  
FREEHOLD ESTATES

Freehold estates illustrated	Non-freehold estates illustrated
<p>Case 1. Fee simple  <i>A to B and his heirs</i>—this gives B a fee simple and leaves nothing in A. B's estate is inheritable by his heirs general, either lineal or collateral.</p> <p>Case 2. Fee tail  <i>A to B and the heirs of his body</i>—at common law this gave B a fee tail and left a reversion in A. B's estate was inheritable only by B's lineal heirs. Today the nature of the estate created by such a conveyance varies from state to state.</p> <p>Case 3. Life estate  <i>A to B for life</i>—this gives B an estate for B's life and leaves a reversion in A. B's estate is not inheritable.</p>	<p>Case 1. Estate for years  <i>A to B for 10 years</i>—this gives B an estate for years and leaves a reversionary interest in A. If B dies during the 10-year period the balance of the term passes to B's personal representative, i. e. his executor or administrator, for purposes of administration. In many jurisdictions the rules as to the intestate transmission of real and personal property are the same.</p> <p>Case 2. Estate from year to year  <i>A to B from year to year</i>—this gives B an estate from year to year and leaves a reversionary interest in A. If B dies during the period of the lease the balance thereof passes to his personal representative.</p> <p>Case 3. Tenancy at will  <i>A to B as long as A wishes</i> (or as long as both A and B agree)—this gives B an estate at will and leaves a reversionary interest in A. B's death (or A's death) during the tenancy terminates the tenancy and A has the right to immediate possession.</p> <p>NOTE, HOWEVER, that if the limitation is from <i>A to B for as long as B wishes</i>, there is a conflict of authority and B has either a life estate determinable (believed to be the better view) or a tenancy at will depending upon the jurisdiction.</p>

Freehold estates illustrated	Non-freehold estates illustrated
	Case. 4. Tenancy at sufferance A leases to B for 2 years and after the expiration of the 2-year term, B remains in possession without A's permission—B has a tenancy at sufferance which is really no tenancy at all but is called such. A has the right to eject B. B has a mere naked possession without right.

## SIMILARITIES

- |   |   |
|---|---|
| 1. In each case B has possession of the land. | 1. In each case B has possession of the land.   |
| 2. In each case B has an estate in the land.  | 2. In cases 1 and 2 above B has an estate in the land but in cases 3 and 4 B does not have an estate but mere possession. |

## DISSIMILARITIES

- |   |  |
|---|--|
| 1. The interest of B is <i>real property</i> .  | 1. In cases 1, 2 and 3 B's interest is <i>personal property</i> —called a chattel real. In case 4, B has no interest.  |
| 2. B's interest is <i>inheritable</i> —that is, passes to B's heir or heirs in cases 1 and 2 but this is <i>not true as to case 3</i> for a life estate measured only by the life of the tenant is not inheritable. | 2. In cases 1 and 2 and 3 B's interest is <i>inheritable</i> but in cases 3 and 4 it is not.   |
| 3. B's interest is of <i>indefinite</i> or uncertain duration.  | 3. B's interest in case 1 is of <i>definite</i> duration, in cases 2 and 3 of indefinite duration.   |
| 4. B is <i>seised</i> which means that he is possessed claiming a freehold interest in the land.  | 4. B is <i>not seised</i> but only possessed—seisin exists only as to freehold estates.  |
|   | 5. A tenancy at will is a chattel interest in land, of the lowest nature but it is possession at the mutual wills of the land owner and the tenant, and will support trespass or ejectment; death terminates it. |

Freehold estates illustrated	Non-freehold estates illustrated
	6. A tenancy at sufferance is no tenancy at all; it is a mere wrongful, naked possession but neither an estate nor property.

### § 6.5 Concurrent Estates

#### a. Joint Tenancy

**PROBLEM 6.17:** O conveyed Blackacre "to B, C and D and their heirs as joint tenants with right of survivorship in the survivors, and not as tenants in common." Blackacre is located in State Z. State Z law provides that all concurrent tenancies shall be deemed tenancies in common and not joint tenancies unless it is expressly declared that the grantees or devisees shall take as joint tenants. B died testate devising all of his interest in Blackacre to X and his heirs. X immediately took possession of Blackacre. C and D sue X in ejectment. May they succeed?

**Applicable Law:** Joint tenancy must under many modern statutes be expressly declared to overcome the preference for tenancy in common. A joint tenant can convey his or her undivided interest by deed. A joint tenant cannot convey his or her interest by will.

#### Answer and Analysis

Yes. Under modern statutes the survivorship feature of cotenancies is not popular. Many such statutes in express terms prefer tenancy in common over joint tenancy, which is the reverse of the common law. In order to create a joint tenancy under the type of statute given in the problem, there must be a clear expression of intention that the grantor intends the grantees to take as joint tenants. Any doubt is and should be resolved in favor of their taking as tenants in common.<sup>26</sup>

It would seem that O has succeeded in creating a joint tenancy in the grantees. O uses these words, "as joint tenants with right of survivorship and not as tenants in common." Three distinct ideas are expressed: (a) the grantees are called joint tenants; (b) they are to have the right of survivorship; and (c) they are not to be tenants in common. Any one of these expressions by itself may not overcome the preference for tenancy in common. But when all three are

<sup>26</sup> In Oregon, common law joint tenancies have been abolished. Ore. Rev. Stat. § 93.180 (1973). However, a right of survivorship can be created in two or more persons without the right to sever that feature. This is accomplished by

characterizing language which would have created a joint tenancy as creating a life estates in the grantees, and a contingent remainder in fee in the survivor. See *Halleck v. Halleck*, 216 Or. 23, 337 P.2d 330 (1959).

put in the conveyance, and it is expressly declared to be joint tenancy as the statute requires, then B, C and D would take as joint tenants. Accordingly, when B died testate or intestate, the survivors, C and D, continue as survivors to hold Blackacre in fee simple in joint tenancy. In order to destroy the joint tenancy by severance the joint tenant must convey his or her interest by deed.<sup>27</sup> A destruction of the joint tenancy occurs even by the conveyance of a lesser interest than the joint tenant has. The joint tenant's interest being in fee simple, a severance occurs by a conveyance of a fee tail, life estate or, according to some cases, by his transfer of a term of years. On the other hand, the will of a joint tenant is wholly ineffective to pass any interest in the jointly owned property; at the instant of death the right of survivorship takes effect and the attempted severance comes too late. Thus, B's devisee, X, takes nothing under the will, has no interest in Blackacre, and can be ejected from the premises by the owners and possessors, C and D.

Suppose during his life, B conveyed all of her interest to Y. That would create a tenancy in common in Y as between Y, and C and D. But the joint tenancy of C and D would not be severed by B's conveyance and upon C's death survived by Y and D, D would own 2/3 and Y 1/3 of Blackacre.

**PROBLEM 6.18:** T owned a regular section of land, Blackacre, in a given township and effectively devised it to A and B as joint tenants. Later, A executed a deed to X as follows, "I hereby convey all of my right, title and interest in the North East Quarter of Blackacre to X and his heirs." Thereafter, Y, a judgment creditor of A, levied upon and sold to M on execution sale, all of "A's right, title and interest in the South Half of Blackacre." A died intestate leaving W his widow and Z his sole heir at law. Who owns Blackacre?

**Applicable Law:** A joint tenant owns the whole of the jointly owned property, not a fractional part. The joint tenant can dispose of his or her entire interest and the grantee of that interest takes a fractional part as a tenant in common. A joint tenant may dispose of an interest in a specific part of the jointly owned property. The interest of a joint tenant can be levied upon and sold by his creditors. Upon the death of a joint tenant, the decedent's surviving spouse cannot claim dower and the decedent's heirs have no interest in the property.

27. *Riddle v. Harmon*, 102 Cal. App.3d 524, 162 Cal.Rptr. 530 (1980) (contrary to the common law, a joint tenant can sever a joint tenancy by conveying to himself as a tenant in common); *Swartzbaugh v. Sampson*, 11 Cal. App.2d 451, 54 P.2d 73 (1936) (lease by one joint tenant does not sever tenancy). See also, *Tenhet v. Boswell*, 18 Cal.3d 150, 554 P.2d 330, 133 Cal.Rptr. 10 (1976). As respects mortgages, see *Harms v. Sprague*, 105 Ill.2d 215, 85 Ill.Dec.

331, 473 N.E.2d 930 (1984); *Brant v. Hargrove*, 129 Ariz. 475, 632 P.2d 978 (1981); *People v. Nogarr*, 164 Cal.App.2d 591, 330 P.2d 858 (1958) (all holding that joint tenancy not severed where one joint tenant mortgages his interest where mortgage is not a transfer of title but merely the creation of a lien). In states following the title theory of mortgages, the execution of a mortgage by one joint tenant can sever the joint tenancy.

### Answer and Analysis

(1) B and X are tenants in common of the North East Quarter of Blackacre, (2) B and M are tenants in common of the South Half of Blackacre, and (3) B is the owner in severalty of the North West Quarter of Blackacre.

Every joint tenant owns the whole of the jointly owned property and does not own a share or a fractional part thereof. Furthermore, each joint tenant has the right and power to dispose of his or her undivided interest. This means that A and B as a unit owned Blackacre and that A owned Blackacre and B owned Blackacre. It also means that by a conveyance A had the right and power to dispose of an undivided one half interest in Blackacre. If A could dispose of this entire interest in Blackacre, then A could dispose of part of such interest by limiting the conveyance to the North East Quarter of Blackacre. Thus, A's deed to X carved out and vested in X an undivided one half interest in the North East Quarter of Blackacre. But as to that Quarter, X and B are tenants in common because the unities of time and title have been severed by A's deed. X takes title from a different source than did B and X takes title at a different time than did B. Thus, B and X cannot be joint tenants. B and X each own an undivided one half interest as tenants in common in the North East Quarter of Blackacre in fee simple.

Because a joint tenant has the right and power voluntarily to dispose of an interest in the jointly owned property, the joint tenant's creditors have the right and power to take that interest involuntarily. A's judgment creditor, Y, therefore, had the right to levy upon and sell A's interest in the south half of Blackacre. Having done so, when M purchased Blackacre at the execution sale, the unities of time and title were destroyed because M took this interest in Blackacre from a different source and at a different time than did B. The result is that M and B are tenants in common of the south half of Blackacre, each owning an undivided one half interest therein.

The North West Quarter of Blackacre remained unaffected by the conveyances to X and M. A and B remained joint tenants of that quarter until A's death. Survivorship defeats any right which a surviving spouse otherwise might have in the estate of a joint tenant. It also defeats the rights of the heirs of the deceased joint tenant. Therefore, A's widow, W, and his heir, Z, can claim no interest in the North West Quarter of Blackacre. That quarter belongs to B in severalty in fee simple by the doctrine of survivorship.<sup>28</sup>

28. See *Klajbor v. Klajbor*, 406 Ill. 513, 94 N.E.2d 502 (1950) (joint tenancy may be severed and the estate destroyed

by the conveyance of interest of one of the joint tenants and the interest severed is changed into a tenancy at com-

**PROBLEM 6.19:** T devised Blackacre "to A and B as joint tenants." The property consisted of a 50 foot lot fronting on a very busy street in a city. One half of the 50 foot frontage was covered by a store building. The other half was vacant. The land was worth \$16,000. The building was worth \$5,000 but needed \$1,000 worth of repairs on the roof as an absolute necessity to make it habitable for business purposes. The other half of the lot could be used for store purposes if a building costing \$4,000 were built. A asked B to contribute \$500 towards repairing the roof of the existing building and \$2,000 towards the construction of another store building on the lot for rental purposes. B refused to do anything. A then repaired the roof for \$1,000 and built another store building on the lot for \$4,000 and, with B's approval, rented both buildings. A then asked B to repay to A one half of the sums A expended in repairs and in building the new store. B refused. A then sued B to partition Blackacre, it being conceded that it was not partitionable in kind but only by making a sale and dividing the proceeds. Under order of the court Blackacre was sold to X for \$26,000. The court then ordered the \$26,000 divided as follows: \$10,500 to B and \$15,500 to A. B objects to this division. Was the court correct?

**Applicable Law:** A joint tenant has no right of contribution against the other joint tenants for repairs or improvements he or she has made, but if a court orders that the property be partitioned, the court in making an equitable division of the proceeds will take into consideration the expenditures made by one tenant for repairs and improvements.

#### Answer and Analysis

Yes. A partition suit is in equity and an equity court should do equity. At common law A might have had a cause of action to compel B, the other joint tenant, to contribute for the making of repairs which are absolutely necessary, provided he brought the action before the repairs were made. No such action would lie after the repairs were made. Furthermore, one joint tenant has no cause of action against the other joint tenants for contribution for improvements. Under these principles, it is plain that A had no right against B for contribution either for repairs or the improvement.

In a partition suit, however, each joint tenant has the right to have the jointly owned property partitioned. Under the circumstances, by A making and paying for repairs and improvements, A

mon, but severance of joint tenancy must take place before the death of the cotenant and before the other has become owner of the whole by virtue of the right of survivorship).

has enhanced the value of Blackacre by \$5,000.<sup>29</sup> By returning to A the \$5,000 which A expended in repairing and improving the property, A is made whole and B is not injured. Had there been no repairs or improvements the property would only have been worth \$21,000. There is still that sum left after reimbursing A for A's expenditures for repairs and improvements. Thus, it seems the equity court made an equitable partition of the proceeds.<sup>30</sup>

**PROBLEM 6.20:** H conveys Blackacre to himself and his wife, W, in the following language, "I, H, hereby grant Blackacre to H and W, husband and wife and their heirs forever, in joint tenancy with right of survivorship, and not to them as tenants by the entirety or as tenants in common, it being my intention that all the rights and powers of joint tenants shall accrue to said H and W." H died intestate leaving S as his sole heir at law. In whom is the title to Blackacre?

**Applicable Law:** A husband and wife can hold real property in joint tenancy. A joint tenancy (or tenancy by the entirety) in most jurisdictions can be created by husband, H, making a grant "to H and W, husband and wife" with clearly expressed intention to that effect.

#### Answer and Analysis

W owns Blackacre in fee simple absolute. There is no question concerning H's intention. In unmistakable language H expressed an intention that H and W hold Blackacre in joint tenancy. There is no question either (except in those jurisdictions that do not recognize all types of concurrent estates), that a husband and wife may hold real property either as tenants by the entirety, as joint tenants, or as tenants in common, depending on the intention expressed in the conveyance.

The only real question is this: can a grantor grant to himself and another and thereby create a joint tenancy, (or tenancy by the entirety), when such is the grantor's clearly expressed intention? It

29. While an improver cotenant cannot compel other co-tenants to pay for the improvements, the court takes account of the improvement in the partition action. For example, if feasible, the improvement would be included in the portion of the property set aside to the improver. If the property is sold, however, a portion of the proceeds attributable to the improvement would be set off to the improver. See *Johnson v. Hendrickson*, 71 S.D. 392, 24 N.W.2d 914 (1946).

30. See *Calvert v. Aldrich*, 99 Mass. 74 (1868) (where two tenants in common owned a machine shop that needed

repair after having caught fire and one tenant paid for repairs after the other refused to contribute, the court held that a tenant in common who makes necessary repairs upon common property without the consent of his cotenant cannot maintain an action at law to recover contribution for costs incurred; rather, partition is the usual and natural remedy). See also, *Giles v. Sheridan*, 179 Neb. 257, 137 N.W.2d 828 (1965) (Co-tenant who pays off mortgage on which co-tenants are equally liable does so for common benefit of the joint tenants and is entitled to contribution).

seems that a proper analysis can bring only an affirmative answer. The cases present at least three distinct views as to the effect of the conveyance.

At common law the husband and wife were one and he was the one. Thus, when the husband granted to himself and wife, he was granting to himself. When one grants to himself, nothing happens. So the conveyance is void. But this concept is an anachronism. Today the wife is a legal person and her personality is no longer merged in that of the husband.

The second view holds that the effect of the conveyance is to create a tenancy in common between the husband and wife, each owning an undivided one half interest in Blackacre. There are two objections to this result. The first is that it does violence to the grantor's clearly expressed intention that H and W shall not take as tenants in common. The second is that it treats H, the grantor, as the same person, as H, the grantee. This view suggests that one part of the conveyance wherein H conveys to H is void and of no effect, and H therefore remains the owner of one half, whereas the other part of the conveyance from H to W affects only an undivided half of Blackacre which H originally owned and therefore W becomes an owner of such other undivided half. Therefore, they are tenants in common.

The third view and the one which is believed to be the correct one is this: Joint means oneness. In joint tenancy when two, three, or a dozen persons are named as grantees, those joint tenants take as a unit, as one juristic person. In this conveyance H is one person and "H and W" constitute in the singular number quite another person. For the purpose of joint tenancy (or tenancy by the entirety) such grantees or devisees take as a unit personage.

Why do all the cases say that when one joint tenant dies, the survivors take nothing from the decedent but take wholly from the original conveyance? Because each owned the whole and they all owned the whole as a unit. When one died the survivors still continued as a unit owning the whole until there was but one survivor. Thus, when H conveyed Blackacre to "H and W" intending them to take as joint tenants, the grantor, H, was one person, and "H and W" was (singular number) another person, and they as a unit took Blackacre as joint tenants. The grantee, "H and W," take title from the same source, at the same time with the same interest and with unity of possession. When H died W held in fee simple by survivorship.

Today, there is much to be said in favor of carrying out the clearly expressed intention of the grantor in the creation of estates,

even though technically all of the so-called four unities may not be present.<sup>31</sup>

**PROBLEM 6.21:** T devises Blackacre to A, B and C as joint tenants. A then conveys all of his right, title and interest in the premises "to X for the period of his natural life." (a) What is the effect of this conveyance? (b) Who now owns Blackacre?

**Applicable Law:** A conveyance by a joint tenant constitutes a severance and a destruction of the joint tenancy as to the conveying joint tenant's interest. Thereafter X owns a life estate in one third as tenant in common and A owns the reversion in that same one third; B and C remain fee simple owners in joint tenancy between themselves as to the other two thirds, but as to X they own the two thirds as a tenant in common.

### Answers and Analysis

A's conveyance destroys the joint tenancy as to A's interest and X owns a life estate as a tenant in common in an undivided one third interest in Blackacre; A owns the reversionary interest in that same undivided one third interest; B and C own the remaining two thirds interest as joint tenants between themselves but with X as a tenant in common for his life.

Any conveyance by a joint tenant of his entire interest or a freehold interest, or probably of an estate for years, constitutes a complete severance of that joint tenant's interest in the jointly owned property and destroys the joint tenancy as to that interest. Thus, by conveying a life estate to X, A has severed A's entire interest in Blackacre from the joint tenancy. Having carved out of the whole estate an undivided one third portion, and having created in that undivided portion a life estate in X, A has a reversion in such undivided one third in fee simple. A's conveyance destroyed the unities of time, title and interest without which a joint tenancy could not continue.

However, the four unities remain as to the two thirds interest remaining in B and C which was unaffected by A's conveyance to X.<sup>32</sup> As to that undivided two thirds interest B and C remain joint tenants. If one of them should die without having made a conveyance, the survivor of those two would own that undivided two thirds by survivorship. In other words, there are two tenants in common with the one unity of possession: X has an undivided one

31. See also *Miller v. Riegler*, 243 Ark. 251, 419 S.W.2d 599 (1967) (Intent to create a joint tenancy is sufficient to create a joint tenancy even though four unities test not met).

32. *Jackson v. O'Connell*, 23 Ill.2d 52, 177 N.E.2d 194 (1961).

third, and B and C as a unit possess the other two thirds. Thus, B and C occupy two roles. Between themselves they are joint tenants of two thirds interest but as to X they, as a single unit, constitute a tenant in common of the two thirds interest.

A, the owner of the reversion in an undivided one third interest, is not called a tenant in common. Rather A owns a future interest in an undivided one third. A is not called a tenant in common because the phrase "concurrent estates," is limited to possessory estates. It involves presently possessory estates owned by two or more persons. Thus, in our case, B, C and X, but not A, have immediate possessory estates in Blackacre and the possession of B or C or X of Blackacre is in law the possession of all three together.

*b. Tenancy by the Entirety*

**PROBLEM 6.22:** T devised Blackacre "to H and W, husband and wife, and their heirs forever, jointly." Thereafter H executed to M a mortgage on Blackacre. H then procured a divorce from W and on a later date married W-1. H then died intestate, leaving W-1 his widow, and X as his sole heir. W sues Y and X seeking to quiet in her the title to the whole of Blackacre. May W succeed?

**Applicable Law:** At common law, there was a presumption that a conveyance to husband and wife jointly creates a tenancy by the entirety. A divorce eliminates the unity of person in tenancy by the entirety, destroys that tenancy and the husband and wife become tenants in common of the property. During the existence of the tenancy by the entirety, in most jurisdictions neither spouse has the right or power to dispose of or encumber the property without the consent of the other.

**Answer and Analysis**

No. By appropriate language in the conveyance a husband and wife can hold real property as tenants in common, as joint tenants or as tenants by the entirety, where such estate is recognized. But, at common law, there was a presumption that a conveyance to a husband and wife jointly created a tenancy by the entirety. Under this presumption the conveyance in this case would be construed to make H and W tenants by the entirety rather than joint tenants.

Assuming then that H and W are tenants by the entirety, in most jurisdictions recognizing such estates, neither had the right or power to dispose of or encumber such estate without the consent of the other spouse.<sup>33</sup> Therefore, the mortgage which was executed

33. At common law a husband had greater management and administrative authority over tenancy by the entirety property.

alone by H to M was wholly ineffective at that time to create a lien or incumbrance on the land. M's remedy must be limited to his personal action on the debt owed by H to M. Similarly, creditors of one spouse ordinarily cannot reach the tenancy by the entirety property in satisfaction of their claims.<sup>34</sup>

When H procured a divorce from W, the unity of person which is essential to the creation and continued existence of an estate by the entirety was destroyed and with it the tenancy by the entirety was destroyed.<sup>35</sup> H and W, however, continued in some form of concurrent tenancy. Are they joint tenants with right of survivorship or tenants in common? Logically, theirs would be a joint tenancy because of the five unities in tenancy by the entirety, only one, unity of person, was destroyed by the divorce. The other four unities of time, title, interest and possession, remain. But this generally is not the law. H and W after the divorce should be strangers in their property ownership as far as possible. Tenancy in common is more probably in accord with their intent since it is unlikely either would want the survivorship feature preserved. Most cases so hold.<sup>36</sup>

H and W were then each owner of an undivided one half interest in Blackacre when H married W-1. Upon H's death intestate the title to H's undivided one half interest in Blackacre descended to his heir, X, but subject to W-1's right of dower in such half interest, if dower exists. Thus, W and X each own an undivided one half interest in Blackacre as tenant's in common, with X's undivided half interest possibly being subject to the choate right of dower in W-1 widow.

There is also a good possibility that X's undivided one half interest may be encumbered by the mortgage to M as a result of the doctrine of estoppel by deed. Although the mortgage was initially

34. *Sawada v. Endo*, 57 Hawaii 608, 561 P.2d 1291 (1977); *Central National Bank of Cleveland v. Fitzwilliam*, 12 Ohio St.3d 51, 465 N.E.2d 408 (1984) (neither spouse can alienate interest in tenancy by the entirety).

35. *Porter v. Porter*, 472 So.2d 630 (Ala.1985) (divorce decree does not automatically sever a joint tenancy between the former spouses); *Mann v. Bradley*, 188 Colo. 392, 535 P.2d 213 (1975) (provision in divorce settlement agreement that joint tenancy be sold upon spouse's remarriage or when youngest child attained age 21 constitutes a severance of the joint tenancy). See also, *Duncan v. Vassaur*, 550 P.2d 929 (Okla.

1976)(husband and wife were joint tenants and wife killed husband; that act severed the joint tenancy causing  $\frac{1}{2}$  of the property to pass to husband's estate and  $\frac{1}{2}$  to wife.

36. But see, *Finn v. Finn*, 348 Mass. 443, 204 N.E.2d 293 (1965) (tenants by the entirety who divorce become joint tenants with right of survivorship pursuant to a property settlement agreement incorporated into the divorce decree). A joint tenancy between husband and wife is not affected by divorce absent a specific provision in their property settlement agreement or divorce decree severing the joint tenancy. See generally, *Westerlund v. Myrell*, 188 Wis. 160, 205 N.W. 817 (1925).

invalid, upon divorce H acquired an undivided one half interest which was freely alienable and mortgageable. Thus, as to this after-acquired severable interest, H can be estopped to deny the effectiveness of M's mortgage in the same way he would be estopped as to previously conveyed or encumbered other after-acquired property. Thus, if estoppel is invoked against H, his second wife, W-1, and his heir, X, take their interests subject to such mortgage.

COMMON LAW CONCURRENT TENANCIES COMPARED\*

Kind of tenancy	How created	Typical words in deed or will	Units in present	Interest owned by tenant	Power of disposition	How can disposition be made	Rules on intestacy	How destroyed
Tenancy by the entirety	By act of the parties, deed or will	A "to H & W and their heirs"	Time Title Interest Person	Husband and wife as a unit own the whole, joint ownership	Both husband and wife must join in conveyance	By deed only and not by will. Survivorship defeats effect of will.	Survivor continues to own all but in entirety	Divorce terminates the tenancy and makes them tenants in common
Joint tenancy	By act of the parties, deed or will	A to "B & C and their heirs as joint tenants with the right of survivorship and not as tenants in common"	Time Title Interest Person	All tenants as a unit own the whole, joint ownership	All may join and dispose of whole or each tenant can dispose of share he did not own as such	By deed only and not by will. Survivorship defeats effect of will.	If only one survivor he continues to own but in severalty. If more than one survivor they continue to own in joint tenancy.	1. One tenant conveys his interest. 2. By partition in kind among tenants. 3. By any act which to even in joint tenancy.
Tenancy in coparcenary	By law of inheritance	A dies intestate leaving a complete share to B, C & D, his only heirs	Title Interest Person	Each tenant owns an undivided part of the whole, which partitions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherit undivided interest of deceased partner.	1. By partition 2. By conveyance by one partner 3. By whole decedent or vesting in one partner
Tenancy in common	By act of the parties, deed, will, or by law	A to B and C and their heirs share & share alike as cotenants	Person	Each tenant owns an undivided part of the whole, which partitions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherit undivided interest of deceased owner	1. By partition 2. By conveyance by one tenant 3. By selling all title in one tenant in severalty by purchase or otherwise

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