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CHAPTER 2

FREEHOLD ESTATES

ChapterScope

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.

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 × 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 modem 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. **Equitible 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 or the underlying property. Again, the idea is that it is in the iiest 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 Jacqmains, 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: Al conveys Blackacre to Mary "for residential use only, and if not so used Sigmund shall have the right to retake possession." If Al'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.

CHAPTER 4

CONCURRENT OWNERSHIP AND MARITAL INTERESTS

ChapterScope

This chapter examines various forms of concurrent ownership of property, marital property interests, and the rights and obligations of co-owners. Here are the most important points in this chapter.

- All types of property may be owned simultaneously by multiple people, a condition that invites conflict among co-owners. While co-owners are generally free to specify the terms of their relationship, law must provide some default rules that mediate conflict.
- The principal forms of concurrent ownership are tenancy in common, joint tenancy, and tenancy by the entirety.
  - Tenancy in common is the modern default position. Unless a grant indicates a contrary intention, tenancy in common results from a grant to two or more persons. Tenants in common own separate but undivided interests in the whole of the property.
  - Joint tenancy differs from tenancy in common in that each joint tenant has an undivided interest in a single unit. The consequence is that each joint tenant has a right of survivorship — when a joint tenant dies his or her interest dies with him and the remaining joint tenant or tenants own it all. When there are two joint tenants this is an effective way to avoid probate.
    - At common law a joint tenancy was possible only if the joint tenants had unity of interest, time, title, and possession. These requirements have been relaxed by statute. A corollary to the four unities was that the destruction of any unity severed the joint tenancy, producing a tenancy in common instead. Today, a conveyance by one joint tenant will sever the joint tenancy.
  - Tenancy by the entirety is a form of joint tenancy limited to married couples, but unlike the joint tenancy the survivorship right is indestructible — it may not be destroyed by the unilateral act of a single owner.
- Two different forms of marital property exist: Community property or separate property.
  - Community property, a civil law institution recognized in nine states, treats all property acquired during marriage (except gifts and inheritances) as owned by the marital community. Each marital partner has an equal interest in the property of the marital community.
  - Separate property, the form of marital property recognized by the common law, holds that property acquired during marriage is owned by the marital partner who acquired it. This "his-is-his" and "hers-is-hers" rule is tempered at divorce by equitable distribution laws that require courts to ignore title to achieve equity in property division, and at death by spousal elective share statutes that permit a surviving spouse to take some portion of the deceased spouse's property, even if the deceased spouse's will is to the contrary.

- Unmarried cohabitants may agree to share property but cannot by agreement acquire any of the status benefits of marriage. In Vermont and Hawaii, same-sex partners may obtain the status benefits of marriage by civil ceremony.

- Every co-owner except tenants by the entirety have the right at any time to demand partition of the property. Divorce is the effective method of partition for tenants by the entirety.

  - Partition is in-kind (physical division) unless that is impracticable or would not be in the best interests of *all* co-owners, in which case partition is by sale and division of the sale proceeds.

- Each co-owner is entitled to possession of the whole, but when one co-owner actually possesses the entire property courts disagree over whether the tenant-in-possession must pay fair rent to the tenants not in possession.

  - Most courts hold that unless the tenant-in-possession has ousted the other tenants there is no duty to pay rent. Ouster consists of either refusing a co-owner's demand to share possession or unequivocally denying that one's co-owner is really an owner.

  - Some courts hold that a co-owner in sole possession has an obligation to pay fair rent to the other co-owners regardless of whether there has been ouster.

- Co-owners must account to each other for the rents they have received from third parties. Co-owners are liable to each other for their proportionate share of the costs of ownership, but not for improvements. An improving co-owner can recover the value added by the improvement only upon partition or sale.

- Condominiums and cooperative apartment corporations are unique forms of co-ownership. Condominium owners have title to their unit and own the common areas of the development as tenants in common. Cooperative apartment owners actually own shares in the corporation that owns the building and lease their apartments from the corporation, thus making the shareholder-tenants extremely financially interdependent.

I. FORMS OF CONCURRENT OWNERSHIP

A. Introduction: When the same interest in property is owned by more than one person at the same time there is ***concurrent ownership.*** There are at least five forms of concurrent ownership recognized by the common law, only three of which are studied in the typical Property course: ***tenancy in common, joint tenancy,*** and ***tenancy by the entirety.*** Of the remaining two, ***co-parceny*** is extinct in the United States and ***tenancy in partnership*** is usually covered in courses on Business Associations. This chapter also covers marital interests, only some of which are forms of concurrent ownership.

B. Tenancy in common:

1. **Nature of tenancy in common:** Tenants in common own ***separate but undivided*** interests in the same interest in property. Conceptually, each tenant in common owns the entire property, but must necessarily share that ownership with the other tenants in common. Two people who own a sailboat as tenants in common each own a fraction of the entire boat, and they are each entitled to sail it, but they cannot prevent the other from doing so. Much of the law of concurrent

ownership is designed to mediate the friction that can arise from co-ownership of the same article. A tenancy in common interest may be alienated, devised, or inherited separately from the other tenancy in common interests. Unlike the joint tenancy, there are ***no survivorship rights*** among tenants in common.

Example: Tim conveys Roundhouse to Ezra and Geraldo, as tenants in common. If Ezra conveys his interest in Roundhouse to Newt, Geraldo and Newt are tenants in common. If Geraldo dies, devising his interest in Roundhouse to Maxine, Newt and Maxine are tenants in common.

2. **Presumption of tenancy in common:** By statute or judicial decision, a conveyance of real property to two or more persons who are not married to each other is ***presumed to convey a tenancy in common.*** That presumption is rebuttable. The best evidence rebutting it is a clear statement in the conveyance of the alternative form of co-ownership (e.g., joint tenancy). Property that passes by intestate succession to two or more heirs is always taken as tenants in common.

3. **Rights to possession:** Each tenant in common is entitled to possess the entire property. In practice, this means that a tenant in common can possess the entire property if ***no other cotenant objects.*** Tenants in common may, and often do, regulate their rights to the property by agreement among themselves. But if they do not, and disagreement erupts, their rights and obligations are governed by "default" rules of law. See section II, below.

4. **Uneven shares and different estates:** Tenants in common may own ***unequal shares*** and ***different estates.***

Example: Able, Baker, and Cassie own Blackacre, in equal shares, as tenants in common. Able conveys his interest to Baker. Baker and Cassie are still tenants in common, but Baker has a two-thirds share and Cassie a one-third share. Cassie conveys her interest in Blackacre to Sophie for life, then to Andrea and her heirs. Baker is now a tenant in common with Sophie (as to possession) and with Andrea (as to her remainder).

There is a rebuttable presumption that tenants in common have equal shares in the property. The best evidence rebutting this presumption is a clear statement in the conveyance creating the tenancy in common (e.g., "*O* conveys a two-thirds share to *A*, and one-third share to *B*, as tenants in common"), but evidence extrinsic to the conveyance (e.g., relative contributions of purchase cost or carrying costs) is germane to this issue.

C. **Joint tenancy:**

1. **Nature of joint tenancy:** Joint tenants own an undivided share in the same interest in either real or personal property, but the surviving joint tenant owns the entire estate. This ***right of survivorship*** is the hallmark of joint tenancy, setting it apart from tenancy in common. Any number of people may be joint tenants. Upon the death of one joint tenant, the share held by the remaining joint tenants increases proportionately.

Example: Alan, Betty, and Charles own equal undivided interests in Blackacre as joint tenants. Alan dies, leaving all his property by will to David. Betty and Charles now own equal undivided interests in Blackacre. Alan's will is ineffective to transfer his interest in Blackacre because the nature of joint tenancy is that his interest expires at his death. Charles then dies intestate, leaving Emmy as his heir. Betty now owns the entirety of Blackacre by herself. Charles's estate has no interest in Blackacre. When a joint tenant dies, his ***entire interest*** dies with him.

A joint tenancy may only be created by an inter vivos conveyance or a will. Property acquired by multiple heirs through intestate succession is taken as tenants in common.

a. **The theory of joint tenancy:** Common law conceived of joint tenants as bound together as a single owner. The common law's expression for this unwieldy concept was to say that each joint tenant owned the property *per my et per tout* — by the moiety (the half) and the whole. This summed up the inherent duality of the joint tenancy — multiple people own an equal interest in the entirety of the property. Each joint tenant owns it all. Thus, when a joint tenant dies, his interest dies because he was a mere participant with others in a single ownership entity. The dead joint tenant simply drops out of the ownership unit. No interest in property passes to the survivors, because they already own the entire property. There is just one less member of the ownership consortium. Significant consequences flow from the idea that no interest passes at death: (1) A ***joint tenancy is not subject to probate,*** an expensive, cumbersome, time-consuming judicial procedure to transfer a decedent's property; and (2) Creditors of a joint tenant must seize and sell the debtor's joint tenancy interests during the debtor's life because the joint tenant debtor's interest disappears at his death.

2. **The four unities of joint tenancy:** From the theory of the joint tenancy, common law judges derived the principle that the ***interests of joint tenants must be equal in every respect.*** Hence, the ***four unities*** of joint tenancy: ***all joint tenants*** must take their interests: (1) at the ***same time,*** (2) under the ***same instrument,*** (3) with the ***same interests,*** and (4) with the ***same right to possession of the entire property.*** At common law a joint tenancy ***could not be created without the four unities being satisfied.*** If the four unities were not satisfied, a tenancy in common resulted. This is still the law in many states, but many states have relaxed the rule to permit creation of a joint tenancy whenever there is sufficiently clear intention that a joint tenancy was intended.

a. **Time:** The joint tenants must receive their interests at the same moment in time.

Example: Oliver conveys Blackacre to "my son, Michael, and to my daughter, Eliza, if and when they marry, as joint tenants." This springing executory interest vests in interest and possession as each of Michael and Eliza marry. Obviously, they cannot marry each other and, unless they happen to marry in an exquisitely timed double ceremony their respective interests in Blackacre will vest at different times. When Michael marries Jane and, a year later, Eliza marries Roger, Eliza and Michael will own Blackacre as tenants in common, not as joint tenants.

b. **Title:** All joint tenants must receive their interests under the same instrument: a deed, a will, or a decree quieting title by joint adverse possession.

Example: Edward was the sole owner of Bower Cottage prior to his marriage to Andrea. As a marriage present, Edward conveyed Bower Cottage "to Andrea and Edward, as joint tenants." At common law this did ***not*** create a joint tenancy, because Edward's interest in Bower Cottage was created by a prior instrument. The deed from Edward to Edward and Andrea was construed as a nullity insofar as it purported to transfer Edward's interest, but did operate to convey half of Edward's interest to Andrea. Common law did not recognize transfers from oneself to oneself. Thus, Edward and Andrea would be tenants in common.

This example, which occurred with some frequency, proved to be a bothersome annoyance. The solution at common law was for Edward to convey to his lawyer (or some other trusted friend) who would promptly convey back to Edward and Andrea, as joint tenants. This "straw man" conveyance met the four unities requirement but was cumbersome and, in essence, an

empty formality. As a result, many states today have, by statute, provided that a person may create a joint tenancy by a conveyance from himself to himself and another, as joint tenants. Under such a statute Edward, in the example, would have created a joint tenancy between himself and Andrea. See ***Riddle v. Harmon,*** 102 Cal. App. 3d 524 (1980), discussed in section I.C.4, below.

c. Interest: Each joint tenant must have the identical interest in the property. This means two things: (1) each joint tenant must have the same share of the undivided whole, and (2) each joint tenant must have the same durational estate.

Example — Same share: George conveys "a two-thirds interest in Whitewall to Andrew, and a one-third interest in Whitewall to Bruce, as joint tenants." Andrew and Bruce take as tenants in common because the unity of equal interest is not present.

Example — Same durational estate: George conveys Whitewall to Andrew and his heirs, and to Bruce and his heirs so long as Whitewall's library remains intact, as joint tenants. Bruce and Andrew are tenants in common because Andrew has fee simple absolute and Bruce has fee simple determinable (George retaining a possibility of reverter as to half of Whitewall). But this requirement does ***not*** preclude holding a portion of an estate in joint tenancy and another portion in tenancy in common.

Example: Olivia conveys "a half interest in Tinderbox to Amy and Ben, as joint tenants, and a quarter interest in Tinderbox to Cameron, as a tenant in common." After this conveyance, Amy and Ben own an undivided interest as to half of Tinderbox in joint tenancy; Cameron owns a quarter undivided interest as a tenant in common, and Olivia continues to own a quarter undivided interest as a tenant in common. If Ben dies, Amy will be the sole owner of an undivided half interest in Tinderbox, as a tenant in common with Cameron and Olivia. *Remember:* The joint tenancy is considered a single ownership entity, so throughout this scenario the joint tenancy owned an undivided half interest in Tinderbox as a tenant in common with Cameron and Olivia. When Ben dies, Amy simply owns the entire interest formerly held by the joint tenancy, but the relationship of tenancy in common with respect to the other interests is not altered.

d. Possession: At creation of the joint tenancy, each joint tenant must have the right to possession of the whole property. After creation, joint tenants may agree among themselves to divide possession, or to deliver exclusive possession to one joint tenant. So long as the arrangement is consensual, it amounts to a voluntary waiver of a joint tenant's legal right to possess the whole. Generally, the law is willing to enforce the voluntary agreements of co-owners concerning their co-ownership.

3. **Creation of joint tenancy:** Common law presumed that any conveyance or devise to two or more persons (other than husband and wife) was in joint tenancy. This simplified the performance of feudal obligations, because only one entity — the joint tenancy — owed those obligations. Because we don't live in a world of feudal obligations, every American jurisdiction has reversed the presumption. Today, a tenancy in common is presumed, unless there is clear evidence of joint tenancy. At common law, husbands and wives were presumed to take as tenants by the entirety. Today, husbands and wives are presumed to take either as tenants by the entirety or as joint tenants.

a. **Evidence sufficient to create joint tenancy:** The modem presumption of tenancy in common can be overcome only by a clearly expressed intention in the grant itself. The best expression is "to *A* and *B*, as joint tenants with right of survivorship," although Michigan and Kentucky regard this clear expression as creating a joint life estate in *A* and *B*, with a contingent remainder in the survivor. See *Albro v. Allen*, 434 Mich. 271 (1990); *Sanderson v. Saxon*, 834 S.W. 2d 676 (Ky. 1992). The significance of the Michigan and Kentucky view is that the survivorship right cannot be destroyed by a joint tenant through a conveyance to a third party that severs the joint tenancy.

b. **Evidence insufficient to create joint tenancy:** The following common expressions are dangerous. Some courts regard them as adequate to create a joint tenancy; others do not.

Example: "To *A* and *B* as joint tenants." This is ordinarily adequate to create a joint tenancy but some states hold that failure to include the phrase "with right of survivorship" renders this usage inadequate to create a joint tenancy. But note that inclusion of that phrase in Michigan and Kentucky creates a joint life estate with contingent remainder in the survivor.

Example: "To *A* and *B* jointly." This is problematic, because the term "jointly" is often used colloquially to refer to any form of co-ownership.

Example: "To *A* and *B*, joined together." This probably produces a tenancy in common, because the term "joined together" is not a term of art, and is probably a lay reference to co-ownership.

Example: "To *A* and *B* as joint tenants, then to the survivor and her heirs." This is hopelessly ambiguous; a mixed message. The phrase "joint tenants" is clear enough, but when followed by the express conveyance of an interest "to the survivor and her heirs" the inference is reasonable that the grantor intended to create a remainder in the survivor. On the other hand, the "survivor and her heirs" language could be taken to mean nothing more than an empty restatement of the legal effect of a joint tenancy. This usage may result in a joint tenancy but is probably more apt to create a joint life estate or tenancy in common in *A* and *B*, followed by a remainder in the survivor. The latter result prevents either *A* or *B* from destroying the survivorship right by an inter vivos conveyance.

4. **Severance of joint tenancy:** A joint tenant may destroy the joint tenancy at anytime by severing the joint tenancy, usually by conveyance. A tenancy in common results. Because the "four unities" were necessary to create a joint tenancy at common law, the destruction of any one of those unities would operate to sever the joint tenancy. That rule is still alive, but many courts today prefer to rely on evidence of the intention of the conveying party.

a. **Conveyance:** If a joint tenant conveys his interest to a third party or to another joint tenancy, the joint tenancy is severed ***as to that interest.***

Example: Tom, Dick, and Harry are joint tenants. If Tom conveys his interest to Bill, the joint tenancy is severed ***as to that interest.*** Bill owns a one-third undivided interest as a tenant in common with Dick and Harry. Dick and Harry continue to be joint tenants with respect to their interests. If Dick then dies, Bill and Harry will be tenants in common, with Harry holding two-thirds and Bill one-third. If Tom had conveyed his interest to Harry, instead of to Bill, Harry would own a one-third interest (the interest acquired from Tom) as a tenant in common with Dick and a one-third interest in joint tenancy with Dick. If Harry

then died, Dick would own a two-thirds interest as a tenant in common with Harry's heirs or devisees.

A conveyance includes a contract to convey that is specifically enforceable, because the buyer under such a contract has equitable title to the property. Severance occurs at the moment such a contract is made.

★i. **Unilateral severance: Conveyance to self:** Common law regarded a conveyance of an interest held by a person to himself as an empty act, devoid of legal effect. Thus, to convert a joint tenancy into a tenancy in common, the joint tenant would have to employ a straw man, to whom the severing conveyance would be made and from whom a reconveyance would be made. In ***Riddle v. Harmon,*** 102 Cal. App. 3d 524 (1980), the California Court of Appeal held that Frances Riddle could validly sever the joint tenancy with her husband, Jack, by a conveyance from herself as joint tenant to herself as tenant in common with Jack. Frances's deed made plain that her intent was to sever the joint tenancy; the reasons for refusal to recognize a conveyance from self to self were archaic and rooted in livery of seisin; many other but more complex ways to unilaterally sever a joint tenancy existed; and California had already by statute permitted ***creation*** of a joint tenancy by a conveyance from "*A* to *A* and *B*, as joint tenants." ***Riddle v. Harmon*** takes a realistic view of severance and elevates the intent of the grantor to prominence. Note, however, the possibilities of some injustice occurring: (1) Jack probably never knew that the joint tenancy was severed; as a result his interest would pass at his death through intestacy or the residual clause of his will (dispositions that he might not have made had he known he owned a tenancy in common); and (2) An unscrupulous hypothetical Frances could sever the joint tenancy by executing a deed, not recording it, and telling a trusted but equally unscrupulous beneficiary of her will of the deed's existence, but then wait to see if Jack dies first, at which point the severing deed would secretly be destroyed; if Frances died first her devisee would produce the deed. California dealt with this dark possibility by requiring such conveyances to be recorded.

b. **Mortgage:** Jurisdictions differ as to whether a joint tenancy is severed by the act of one joint tenant mortgaging his interest. Resolution of this issue traditionally depended upon whether the jurisdiction adhered to the ***lien theory*** or the ***title theory*** of mortgages, but that distinction has mostly broken down for this purpose.

i. **Title theory of mortgages:** The title theory holds that a mortgage effects a transfer of legal title, subject to an equitable right of the mortgagor (the borrower) to reclaim title by paying off the loan secured by the mortgage ***(equity of redemption).*** This was the common law theory of mortgages. As a result, a mortgage by one joint tenant had the effect of severing a joint tenancy because the unity of interest is destroyed. The joint tenancy could not be restored by redemption because the unities of time and title would not be present. After the mortgage, the former joint tenants would become tenants in common and there would be, of course, no right of survivorship. See, e.g., *Stewart v. AmSouth Mortgage Co., Inc.,* 679 So. 2d 247 (Ala. App. 1995). This result has often been criticized as inconsistent with the mortgagor's intentions (who likely never considered, or even knew of, the magic four unities of the common law). Many (but by no means all) jurisdictions today modify the title theory to treat the title held by the mortgagee (the lender) as one held only for purposes of securing the loan, a view that effectively makes a title theory state into a lien theory state for purposes of resolving this issue of severance.

See, e.g., ***Harms v. Sprague,*** 105 Ill. 2d 215 (1984); *Brant v. Hargrove,* 129 Ariz. 475 (1981); *Hamel v. Gootkin,* 202 Cal. App. 2d 27 (1962).

ii. Lien theory of mortgages: The lien theory of mortgages holds that the mortgagee (lender) only has a lien against the property (an inchoate right to seize title if the loan is not paid). On this view, a mortgage by one joint tenant makes no alteration to title and thus does ***not*** sever the joint tenancy. But another problem crops up, one that divides lien theory states (and title theory states that treat mortgages as liens for this purpose): Upon death of the mortgaging joint tenant while the loan is unpaid, does the surviving joint tenant have an interest that is ***wholly unencumbered by mortgage,*** or an interest that is ***burdened by the mortgage?*** The prevailing answer is that the surviving joint tenant takes free and clear of the mortgage.

★**Example:** John and William Harms owned a farm as joint tenants. John mortgaged his interest to Carl and Mary Simmons in order to secure a loan made by them to John's friend, Charles Sprague. Later, John died while the loan was unpaid. In ***Harms v. Sprague,*** 105 Ill. 2d 215 (1984), the Illinois Supreme Court held that (1) there was no severance, and (2) William owned the farm entirely free of the mortgage to Carl and Mary Simmons. The court reasoned that the mortgage burdened only John's interest and that because John's interest died with him, leaving only the previously unencumbered interest of William as the surviving title, the mortgage had died with John. Accord: *People v. Nogarr,* 164 Cal. App. 2d 591 (1958); *Ogilvie v. Idaho Bank & Trust Co.,* 99 Ida. 361 (1978); *Irvin L. Young Foundation, Inc. v. Damrell,* 511 A. 2d 1069 (Me. 1986).

The majority view, exemplified by ***Harms v, Sprague,*** is criticized on the ground that it penalizes the unsophisticated lender (because a savvy lender will never lend to a single joint tenant on the strength of the joint tenancy interest as security for payment of the loan) and delivers a windfall to the surviving joint tenant. Consider the opposite result.

Example: Suppose that after John's death William took John's interest in the farm subject to the mortgage to Carl and Mary Simmons. This result would fully preserve William's survivorship rights and still preserve the Simmons' expectation that a half interest in the farm would continue to secure payment of their loan to Charles. After all, John always had the right to mortgage his interest, or even convey it outright (which would destroy William's survivorship right), so it does not seem unfair to William to allow him to take John's interest subject to the burden John placed upon it. Cf. Wis. Statutes §700.24.

c. Lease: At common law, if one joint tenant leased his interest the joint tenancy was severed. The unity of interest was destroyed, because the leasing joint tenant retained only a reversion in the property. The lease, however, was valid. Most jurisdictions today do ***not*** regard a joint tenancy as severed by one joint tenant's lease of his interest. The survivorship right continues but, as with mortgages, the problem is presented of whether the lease survives the death of the leasing joint tenant. Most jurisdictions say "no."

Example: Johnson and Tenhet were joint tenants. Without Tenhet's knowledge or consent, Johnson leased the entire parcel to Boswell for 10 years, then died 3 months later. Tenhet demanded that Boswell vacate. He refused, relying on his lease. The California Supreme Court held that (1) the lease did not sever the joint tenancy, and (2) the lease expired on the death of Johnson, the lessor. See *Tenhet v. Boswell,* 18 Cal. 3d 150 (1976).

As a practical matter, the *Tenhet v. Boswell* view requires a prospective lessee either (1) to examine title to be sure that the lessor is not a joint tenant, or (2) to insist that all joint tenants join in the lease. The opposite view, which rejects the idea that the lease expires with the lessor, allows the surviving joint tenant to take subject to the possessory interest of the lessee.

d. Agreement: A joint tenancy can be severed by agreement, so long as the intention is clearly manifested. This usually occurs in the context of marital dissolution.

Example: Betty and Aaron owned their residence as joint tenants. When they divorced they agreed that the house would be sold and the proceeds evenly divided between Betty and Aaron when (1) Betty remarried, or (2) their youngest child reached age 21, or (3) they agreed to sell. Before any of those events occurred, Betty died and Aaron claimed to own the entire house by virtue of the right of survivorship. The Colorado Supreme Court ruled that the agreement severed the joint tenancy because it clearly "evince[d] the intent to no longer hold the property in joint tenancy." Thus, because Betty was a tenant in common her half interest in the property passed to her children instead of to her ex-husband. See *Mann v. Bradley,* 188 Colo. 392 (1975). See also *Sondin v. Bernstein,* 126 111. App. 3d 703 (1984).

An agreement to sever can be inferred from the manner in which the parties deal with the property. See, e.g., *Thomas v. Johnson,* 12 Ill. App. 3d 302 (1973); *Mamalis v. Bornovas,* 112 N.H. 423 (1972); *Wardlow v. Pozzi,* 170 Cal. App. 2d 208 (1959). But this is dangerous; in order to preserve certainty in land titles many courts will not find severance based on agreement unless that agreement is absolutely clear. See, e.g., *Estate of Violi,* 65 N.Y. 2d 392 (1985). However, an agreement to permit one joint tenant to have exclusive possession of the property does not destroy a joint tenancy (even though it destroys the unity of possession), absent additional and specific evidence of intent to sever. See *Porter v. Porter,* 472 So. 2d 630 (Ala. 1985); *Tindall v. Yeats,* 392 Ill. 502 (1946). Perhaps the intentions of the parties should always govern.

e. Operation of law: Most severance issues begin with some voluntary act of a joint tenant that immediately implicates the four unities and thus, joint tenancy. But there are two recognized instances in which the law operates to sever a joint tenancy even in the absence of these voluntary acts.

i. Criminal homicide: If one joint tenant kills another joint tenant with criminal culpability, the usual result is severance of the joint tenancy by operation of law, thus turning the interests into tenancy in common. This can occur by statute, or by judicial conclusion that criminal homicide is "inconsistent with the continued existence of the joint tenancy" because it would benefit the wrongdoer. *Duncan v. Vassaur,* 550 P. 2d 929 (Okla. 1976). Accord: Uniform Probate Code §2-803.

ii. Simultaneous death: Under section 3 of the Uniform Simultaneous Death Act, applicable in most states, the simultaneous death of joint tenants (e.g., a plane crash) results in a division of the joint tenancy into separate shares.

5. Joint tenancy bank accounts: Litigation frequently results when a bank account is established in joint tenancy because there are a variety of reasons for creating such an account. A depositor might wish to make a *present gift* of an undivided interest in the account ("It's yours and mine together from now on"), or might wish to use the survivorship aspect as a *will substitute* — a "payable on death" or *POD account* ("It's mine until I die and then it's

yours"), or might wish to use joint ownership as a *convenience* to permit the other owner to manage the depositor's money, much like giving a person power of attorney ("It's mine but you can have access to it to pay my bills"). Because there is the possibility of very different intentions courts do not automatically honor the putative survivorship rights, but seek to ascertain the specific intentions of the depositor.

Example: Otto, a widower, opens a joint bank account with Ally, his niece, telling her "I want your name on this account so if I get sick you can get the money for me." No present gift was intended; this was a convenience account. *Franklin v. Anna Natl. Bank of Anna,* 140 Ill. App. 3d 533 (1986). See also *Allen v. Gordon,* 429 So. 2d 369 (Fla. App. 1983).

Example: Otto adds Ally to the signature card giving access to his safe deposit box, which contains $328,000 in cash and securities. The safe deposit box lease agreement stipulates that the contents of the box are owned in joint tenancy. Despite this, the lack of an additional specific written statement by Otto that he intended to make a present gift of the contents to Ally negated the lease agreement's stipulation of joint tenancy. The significant value of the contents influenced the result. As value increases, probably more and better evidence of a present gift is needed to prove joint tenancy. See *Newton County v. Davison,* 289 Ark. 109 (1986).

Generally, creditors of one joint tenant can reach only the portion of a joint tenancy bank account that equals the debtor's contribution to the account, but the burden of proving the proportion of contributions is on the joint depositors, on the theory that these facts are more likely to be known by the depositors than the creditor. See *Maloy v. Stuttgart Memorial Hospital,* 316 Ark. 447 (1994).

D. Tenancy by the entirety:

1. **Nature of tenancy by the entirety:** A tenancy by the entirety is a ***form of joint ownership available only to a husband and wife.*** Like the joint tenancy, each tenant by the entirety has a right of survivorship. In essence, this is the common law's special joint tenancy for marital partners. The usual four unities of joint tenancy are required for its creation, plus the requirement of marriage between the tenants. There are, however, significant differences from the joint tenancy. About half the states recognize tenancy by the entirety.

   a. **One person:** The common law presumed that upon marriage, a husband and wife merged into ***one legal person.*** The woman lost her legal identity and became the legal ward of her husband. Before marriage she was a ***feme sole;*** after marriage she was a ***feme covert.*** From the common law's perspective, marriage produced one person — the husband. Of course, we do not observe this disabling condition of married women today, but states that recognize tenancy by the entirety still observe the fiction that the tenancy by the entirety is owned by one person, with consequences that are discussed in the remainder of this section.

   b. **No severance:** A key attribute of the tenancy by the entirety is that it ***may not be severed.*** Unlike the joint tenancy, neither tenant acting alone can destroy the tenancy by the entirety. Thus, neither tenant may obtain partition (see II.B, below) nor can either spouse, acting alone, convey the entire estate. The right of survivorship is indestructible so long as the marriage remains intact.

2. **Creation:** At common law a conveyance to a husband and wife necessarily created a tenancy by the entirety. Because they were one person, legally speaking, they could share a tenancy in common or joint tenancy. It was all or nothing, and the "all" was tenancy by the entirety. No

American jurisdiction observes this rule today. A husband and wife may own property as joint tenants, tenants in common, or as tenants by the entirety. Some states recognize the civil law institution of the "marital community" as the owner of property, and in these ***community property*** states a husband and wife compose a marital community that owns most property acquired by them during marriage. See III.C, below. Tenancies by the entirety are not recognized in the community property states.

a. **Presumptions concerning creation:** Most states that recognize tenancies by the entirety observe a ***rebuttable presumption*** that a conveyance to a husband and wife creates a tenancy by the entirety. A minority of states recognizing the tenancy by the entirety presume (unless rebutted) that the ambiguous grant to a husband and wife creates a tenancy in common. Another minority of states recognizing tenancy by the entirety employ a rebuttable presumption that the ambiguous grant to a husband and wife creates a joint tenancy.

b. **Failed attempts:** An attempt to create a tenancy by the entirety in unmarried persons will fail everywhere. Most states treat this failed attempt as creating a tenancy in common, though a few hold that it creates a joint tenancy because a joint tenancy is closer to a tenancy by the entirety than a tenancy in common. Much may depend on the parties' intentions.

3. **Operation of the tenancy by the entirety:** The modern tenancy by the entirety functions differently from its common law predecessor.

a. **Common law:** The common law fiction that marriage produced one person, embodied by the husband, made the husband the master of the tenancy by the entirety. The husband had the right to exclusive possession as well as his survivorship right. Both of those rights could be alienated by the husband inter vivos, and so could be seized by the husband's creditors. The wife had only her survivorship right, which could not be alienated by her without her husband's consent (and thus could not be seized by her creditors).

Example: Harry and Wanda own Blackacre as tenants by the entirety. If Bank, Harry's creditor, seizes and acquires Harry's interest in Blackacre, Bank is entitled to exclusive possession of Blackacre during Harry's life. If Wanda predeceases Harry, Blackacre is owned solely by Bank. If Harry predeceases Wanda, Blackacre is owned solely by Wanda and Bank has no further interest. Wanda's creditors, however, may not seize her interest in Blackacre.

The pure common law tenancy by the entirety no longer exists in the United States.

b. **Modern operation of the tenancy by the entirety:** The modern tenancy by the entirety treats both spouses as equals. The principal source of this change has been the Married Women's Property Acts, adopted by every state in the mid-nineteenth century in order to eliminate the legal disabilities placed on married women by the common law. They did so by restoring to a married woman her separate legal identity which the common law took away from her on the occasion of her marriage. Courts then interpreted these acts, as applied to a tenancy by the entirety, to equalize the interests of husband and wife in the tenancy. But this could be done in one of two ways: Either (1) the ***woman acquired equal rights with the man to alienate her possession and survivorship rights,*** or (2) ***neither spouse was permitted to alienate their possession and survivorship rights.***

i. **Equal right to alienate:** Perhaps a half dozen states (including Alaska, Oregon, New York, and New Jersey) provide that either spouse may alienate their possession or survivorship rights in a tenancy by the entirety. The principal effect of this version of

equality, which gives the wife the same rights the husband had at common law, is to ***enable her creditors to seize her possessory interest*** in the tenancy but not the survivorship right. At common law the husband's possessory interest, of course, was always subject to seizure by his creditors.

Example: Todd and Heidi own Blackacre in tenancy by the entirety. Todd is indebted to Loanshark, who seizes Todd's interest in Blackacre in satisfaction of the debt. Loanshark and Heidi are now equally entitled to possession. Heidi continues to have her indestructible survivorship right and Loanshark now owns Todd's survivorship rights. Note that this estate, owned concurrently by two unmarried people, is functionally identical to a tenancy in common with the added twist of indestructible survivorship rights.

ii. Neither spouse may alienate: The majority of states recognizing tenancy by the entirety provide that neither spouse may alienate their possession or survivorship rights in a tenancy by the entirety. The principal effect of this version of equality, which places the husband on the same footing as the wife at common law with respect to a tenancy by the entirety, is that it ***prevents the creditors of either spouse from seizure of their interest*** in the tenancy.

★**Example:** Kokichi Endo inflicted personal injuries on Masako and Helen Sawada by his negligent operation of an auto. Kokichi owned a home in tenancy by the entirety with his wife, Ume. After the auto accident but before the Sawadas brought suit, Kokichi and Ume conveyed their home to their sons. This conveyance would be a fraud on Kokichi's creditors, including the Sawadas, if Kokichi's creditors were entitled to seize his interest in the tenancy by the entirety to satisfy their claims. In ***Sawada v. Endo,*** 57 Hawaii 608 (1977), the Hawaii Supreme Court held that property held in tenancy by the entirety may not be subjected to claims of creditors against only one spouse. The rationale for this view was partly the fiction of one person (the estate is owned by the marital couple, not the constituent partners), partly the view that contract creditors have ample opportunity to insist on both spouses pledging the property as security for extensions of credit, and partly the view that tort creditors of a single spouse ought not be permitted to seize a portion of the family residence with dangerous consequences to the innocent spouse. Given a conflict between creditors and the family unit, the Hawaii court preferred protecting the family unit.

iii. Variations on the theme: A few states recognizing tenancy by the entirety hold that creditors can seize the ***survivorship right*** of a spouse but ***not the possessory rights*** of either spouse. See. e.g. *Covington v. Murray,* 220 Tenn. 265 (1967); *Hoffman v. Newell,* 249 Ky. 270 (1932).

Example: Creditor obtains a judgment lien against Henry, owner with Willa of Blackacre in tenancy by the entirety. While both Willa and Henry are alive Creditor has no right to possession. If Willa predeceases Henry, Creditor may enforce the lien on Blackacre, owned now entirely by Henry. If Henry predeceases Willa, Creditor's lien is extinguished with respect to Blackacre. If Henry and Willa divorce, or Henry and Willa join together to convey Blackacre, Creditor can enforce the lien against Henry's share of Blackacre, because the tenancy by the entirety would have terminated.

iv. Federal government claims: There are a variety of ways in which the federal government can become a creditor of a person who owns property in tenancy by the entirety. If the

government's claim is by way of a tax lien, the government may seize the debtor spouse's interest as if it were a tenancy in common, regardless of the state law rules with respect to creditors' claims. Federal tax law displaces contrary state law. See *United States v. Craft*, 535 U.S. 274 (2002). If the government seeks civil forfeiture of property that has been used in criminal transactions (e.g., illegal drug dealing), *United States v. 1500 Lincoln Avenue*, 949 F.2d 73 (3d Cir. 1991), held that the government could only seize the debtor spouse's survivorship interest (rather than all or none of the property), because that compromise would best accomplish the twin goals of forfeiture of the guilty spouse's interest and protection of the interest of the innocent spouse. But if the property subject to civil forfeiture has itself not been used in the criminal transaction, at least one circuit has ruled that the government's interest in forfeiture is not sufficiently weighty to outweigh the innocent spouse's interest in retaining her property without the government becoming her co-owner. See *United States v. Lee*, 232 F.3d 556 (7th Cir. 2000).

v. **Bankruptcy:** After *Craft*, some creditors claimed that filing a federal bankruptcy petition by a single spouse operates to sever the debtor spouse's interest in any property held in tenancy by the entirety, thus rendering the debtor spouse's share subject to creditors' claims in bankruptcy. This position seems to be untenable with respect to bankruptcy debtors who elect the state law exemptions in bankruptcy, as 11 U.S.C. §522(b)(3)(B), enacted after *Craft* was decided, provides that "an individual debtor may exempt from property of the estate . . . any interest" the debtor may have in property owned "as a tenant by the entirety . . . to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law." Bankruptcy law thus appears to incorporate explicitly state law rules regarding creditors' claims in bankruptcy.

4. **Termination:** A tenancy by the entirety is terminated (1) by death of a spouse, (2) divorce, or (3) joint action of both spouses to convey the property held in tenancy by the entirety. Upon divorce, most states convert a tenancy by the entirety into a tenancy in common, but a few inexplicably convert it into a joint tenancy.

5. **Personal property:** Common law did not recognize a tenancy by the entirety in personal property because the husband, upon marriage, became the sole owner of his wife's personal property. Most states today that recognize tenancy by the entirety permit tenancies by the entirety in most forms of personal property. Some forms of personal property (e.g., deposit accounts) are not susceptible to tenancy by the entirety because it is impossible to maintain inviolate survivorship rights when either spouse can withdraw the deposited property at any time.

E. Partnerships and coparceny:

1. **Nature of partnership tenancy:** Tenancy in partnership is inextricably connected to the rights and obligation of business partners. The property is owned by the partnership and each partner has an interest in the property via their partnership interest. The details of partnership are covered in courses in Business Associations.

2. **Nature of coparceny:** Coparceny is extinct. The English common law system of primogeniture made the first-born son the sole heir. If a decedent had no sons, his daughters inherited as coparcenors, an estate that was a bit like tenancy in common. Because primogeniture never took root in America, coparceny never had occasion to develop. Good riddance.

II. RIGHTS AND OBLIGATIONS OF CONCURRENT OWNERS

A. Introduction: In general, the rights and obligations of co-owners are the same regardless of the type of concurrent ownership. The exceptions, of course, are the rights and duties ***inherent in the type of concurrent ownership,*** e.g., the right of survivorship that forms part of the joint tenancy and tenancy by the entirety. Those exceptional issues have been discussed in section I, above.

B. Partition: A joint tenant or a tenant in common may demand ***partition*** of the property at any time and for any reason, or for no reason at all. A tenant by the entirety may not demand partition — the effective remedy is divorce. Absent agreement among the parties, partition is accomplished by a suit in equity. The court will order ***either*** (1) ***physical division*** of the property, or (2) ***sale and division of the sale proceeds.*** Any other claims among the parties (e.g., for an accounting or for rent — see II.C and D, below) will also be resolved in the same proceeding.

1. **Partition in kind:** Physical division of the property (called ***partition in kind***) is the preferred method. Courts will order partition in kind unless a party can prove either (1) that physical partition is ***impossible*** or ***extremely impractical,*** or (2) that physical partition is ***not in the* best interest *of* all parties.** See, e.g., ***Delfino v. Vealencis,*** 181 Conn. 533 (1980). Evidence germane to the "best interest" prong includes the economic costs (or gain) involved in physical partition, but also the more subjective costs imposed on a tenant in possession by ordering partition by sale. Compare the following examples.

★**Example:** Helen Vealencis owned 20.5 acres in Bristol, Connecticut as a tenant in common with Angelo and William Delfino. Helen lived on a portion of the property and operated a garbage hauling business from there. The Delfinos wished to develop the property into single-family residences and so demanded partition by sale even though the property was capable of partition in kind. Although the evidence suggested that the total value of the property would be maximized by sale and development, the Connecticut Supreme Court held that it was not in the best interest of ***all parties*** (including Helen) to sell the entire property. The value to Helen of continued possession (secured by physical partition) was sufficient to convince the court that partition in kind should be ordered. ***Delfino v. Vealencis,*** 181 Conn. 533 (1980).

Example: Karl Hendrickson and his twin sons lived on and farmed a 160-acre farm, in which they owned a one-third interest as tenants in common with the Baumans, a group of relatives who owned fractional shares ranging from one-twelfth to two-ninths. The Baumans sought and obtained partition by sale under a statute authorizing partition by sale if physical partition could not be accomplished without "great prejudice to the owners." The South Dakota Supreme Court gave little weight to the value of continued possession to Karl and his sons, relying almost entirely on the conclusion that division of the farm into parcels ranging in size from 13.33 acres to 53.33 acres would "materially depreciate its value, both as to salability and . . . use for agricultural purposes." The court did not even consider the possibility that the Baumans could unite to sell their 106.67-acre block after physical partition. *Johnson v. Hendrickson,* 71 S.D. 392 (1946).

When implementing partition in kind courts strive to divide property so that the value of each divided parcel (as a fraction of the value of the entire property) is equal to the ownership share of the recipient. If not, the recipient of the disproportionately valuable parcel is obligated to pay *owelty* — enough cash to the other tenant(s) to equalize values.

Example: Ed and Louise own Blackacre as tenants in common. Louise has a two-thirds interest; Ed owns a one-third interest. The value of Blackacre is $120,000. If, after partition

in kind, Ed's parcel is worth $50,000 and Louise's is worth $70,000, Ed will owe Louise $10,000 cash to equalize their proportionate shares.

2. **Partition by sale:** Even though partition by sale is not favored by courts it is probably the most common method of partition. This is because it is impractical or impossible physically to divide most real property in America: houses, condominiums, office buildings, warehouses, and retail stores. Rural undeveloped land is the most likely candidate for physical division. After a partition by sale the net proceeds are divided among the co-owners in proportion to their ownership interests. In the absence of express evidence in title of unequal shares, courts employ a rebuttable presumption that each co-owner is entitled to an equal share of the proceeds.

3. **Agreement not to partition:** Though courts often say that "partition between cotenants is an absolute right," an agreement between cotenants not to partition is ***enforceable*** if (1) it ***clearly manifests the parties' intent not to partition,*** and (2) its ***duration is limited to a reasonable period of time.***

   Example: Marion and Alexandra, husband and wife, separated and entered into an agreement by which they promised not to "do or permit anything [to be done] to defeat the common tenancy" of Marion and Alexandra in certain properties for the remainder of their joint lives. A New Jersey appellate court found this to be a sufficiently clear expression of their intent not to partition. Its duration was reasonably limited because it would expire upon the death of either party, and both Marion and Alexandra were of "advanced age" (apparently about 60 when they entered into the agreement). *Michalski v. Michalski,* 50 N.J. Super. 454 (1958).

   Because partition is inherently equitable, a nonpartition agreement (even if otherwise enforceable) will be enforced only if it is "fair and equitable." Changed circumstances are especially relevant to this inquiry.

   Example: In their 1949 nonpartition agreement, Marion and Alexandra promised to treat each other "with kindness and respect" and agreed that they would continue to reside together in their home. By 1951 they were not living together in the home and had embarked on a continuous bout of civil and criminal litigation against each other. In 1958 a New Jersey appellate court ruled that "the circumstances have so changed that it would be inequitable to deny partition. The intent of the parties has been entirely destroyed." *Michalski v. Michalski,* 50 N.J. Super. 454 (1958).

C. **Rents, profits, and possession:** Each co-owner has the right to possess the entire property and no co-owner may exclude his fellow co-owners. If co-owners cannot agree on how they share possession, the "default" rules discussed here apply.

1. **Exclusive possession by one co-owner:** Because each co-owner has a right to possess all of the property, exclusive possession by one co-owner is presumptively valid. If it is pursuant to agreement of all co-owners it is conclusively valid. If not by agreement, the cotenant in exclusive possession has the following obligations to his cotenants.

   a. **Rental value of exclusive possession:** Jurisdictions split on the question of whether the cotenant in exclusive possession is liable to his cotenants for their share of the fair rental value of his exclusive possession. Here are the two views on this question.

      i. **No liability absent ouster or special duty:** The ***majority rule*** is that a cotenant in exclusive possession has no liability for her share of the rental value of possession unless: (1) the other cotenants have been ***ousted,*** or (2) the cotenant in possession owes a

fiduciary duty to the other cotenants, or (3) the cotenant in possession has ***agreed to pay rent.*** This rule is premised on the fact that each cotenant is entitled to possession. The exceptions reflect instances in which the cotenant in possession has voluntarily assumed a duty to his cotenants (by agreement to pay rent or by acting as a fiduciary) or has prevented his cotenants from exercising their equal right to possession (***ouster***). The corollary to this rule is that the cotenant validly in exclusive possession is obligated to pay the "carrying costs" of the property (e.g., mortgage payments, taxes, utilities, maintenance) up to the fair rental value of the property. Any excess costs must be shared ratably by all cotenants. ***Ouster*** occurs if the tenant in exclusive possession ***either:*** (1) actually ***prevents or bars physical entry by a cotenant,*** or (2) ***denies the cotenant's claim to title.*** The former can occur by such things as changing the locks; the latter can occur by express statements denying that the cotenant out of possession has any valid claim of ownership of the property.

★**Example:** Spiller and Mackereth owned a commercial building as tenants in common. Spiller took possession of the entire building and used it as a warehouse. Mackereth demanded that he vacate half the building or pay rent. Spiller did nothing and Mackereth sued for the rental value of half the building. In ***Spiller v. Mackereth,*** 334 So. 2d 859 (Ala. 1976), the Alabama Supreme Court reversed an award of rent, reasoning that Spiller had neither denied that Mackereth was an owner of the building nor prevented Mackereth from actually moving in and taking possession. Mackereth's demand that Spiller vacate or pay rent was insufficient to trigger ouster; she needed to prove that she "actually sought to occupy the building but was prevented from moving in by Spiller."

ii. Liability for rent: The ***minority rule*** is that the cotenant in exclusive possession is liable to cotenants out of possession for their share of the fair rental value of the occupied premises, ***unless there has been an agreement among the parties to excuse the tenant in possession from this obligation.*** On this view, there is no need to show ouster, or agreement to pay rent, or the presence of a fiduciary obligation to the cotenants out of possession. Instead, the burden is on the cotenant in possession to prove the existence of an agreement excusing him from the obligation to pay rent. This rule is designed to induce agreements among the parties by placing the burden on the tenant in possession (the one who is gaining the economic value of occupancy) to pay or prove an agreement not to pay. But this rule also undercuts the general principle that a cotenant is entitled to possess the whole.

2. Rents from third parties: A cotenant who receives rents on the property from a third party is obligated to account to his cotenants for those rents. If the rents or other income received by a cotenant are greater than the cotenant's share, he is obligated to pay the excess to the other cotenants.

Example: Anne and Clarke own Blackacre as equal cotenants. A portion of Blackacre is rented to Ajax for $500/month and the remainder is rented to Hector for $700/month. If Clarke receives Hector's rent and Anne receives the rent from Ajax, both must account to each other for the rents they received, and Clarke must pay $100/month to Anne.

This duty to account is a continuing one and may be enforced at any time during the cotenancy, upon partition, or within the period of the statute of limitations following expiration of the cotenancy.

3. **Profits from the land:** The normal rules regarding possession apply to exclusive possession for farming, animal husbandry, or other agricultural uses, but if a cotenant permanently removes an asset from the land he must account to his cotenants for this reduction in value. If minerals are removed, the cotenant must pay to the other cotenants their proportionate share of the value of the removed minerals. Other natural resources, like standing timber, may be removed by a cotenant without payment to other cotenants so long as the cotenant does not cut more than her share of the total timber. Some states require the consent of all cotenants to the cutting of timber.

D. **Accounting for the costs of ownership:** Subject to the exceptions set forth in II.C, above, and others discussed here, each cotenant is liable for his proportionate share of the costs of ownership — mostly mortgage payments, taxes, repairs, and maintenance.

1. **Mortgage payments:** Mortgage payments consist of ***principal*** and ***interest.*** A cotenant's payment of a disproportionate share of these items is treated differently.

a. **Interest:** Each cotenant is obligated to pay his proportionate share of mortgage interest. A cotenant who pays more than his share can force the other cotenants to reimburse him for their share immediately, upon partition, or within the limitations period following the end of the cotenancy.

b. **Principal:** Each cotenant is obligated to pay his proportionate share of the mortgage principal, but the cotenant who pays more than his share of the mortgage principal has additional remedies. The paying cotenant succeeds to the mortgagee's (lender's) rights, called ***subrogation.*** The paying cotenant can enforce all the rights and powers of the mortgagee against his cotenants who fail to pay their share of the principal, including foreclosure sale.

2. **Taxes:** Each cotenant is obligated to pay his proportionate share of the taxes, and a cotenant who pays more than his share can recover the excess from his fellow cotenants at any time during the tenancy, upon partition, or within the limitations period after cessation of cotenancy.

3. **Repairs:** A cotenant has no obligation to repair his property. If he wishes to let it fall into ruin, that is his choice. The law will not generally compel prudent and responsible behavior toward one's own affairs. Accordingly, a cotenant who voluntarily repairs the property may not force his cotenants to reimburse him for their share of the repairs, but the repairing cotenant can recover those excess repair costs in two situations.

a. **Accounting for rents:** If a repairing cotenant is under a duty to account to his fellow cotenants for rent (whether received from third parties or for the reasonable rental value of exclusive occupancy) the repairing cotenant may deduct from the rents due the other cotenants their share of the repair costs incurred by the repairing cotenant.

b. **Partition:** Upon partition, a repairing cotenant is entitled to be reimbursed for the repair costs in excess of her share. If partition is by sale, this will occur by a cash reimbursement from the sale proceeds before pro rata distribution to all cotenants. If partition is in kind, the repairing cotenant will either receive cash reimbursement from the other cotenants before physical division or the repairing cotenant will receive a larger parcel, representing reimbursement in kind.

4. **Improvements:** No cotenant has a duty to improve property. Indeed, cotenants may disagree about what constitutes an improvement, or what improvements are optimal. Accordingly, an improving cotenant may not recover from her fellow cotenants their pro rata share of the cost of the improvements. Upon partition, or if the improving cotenant is under a duty to account to cotenants for rent, the improving cotenant is entitled to ***recover only the* value added *by the improvement,* not the cost *of the improvement.*** If the improvement adds no value, there is no recovery. If the value added is less than the cost of the improvement, the improver is only entitled to her fellow cotenants' share of the added value.

E. **Adverse possession:** Cotenants can occupy adversely to their fellow cotenants, but it takes more than mere possession to do so, because every cotenant is entitled to be in possession. A cotenant must give his cotenants ***absolutely clear and unequivocal notice that he* claims exclusive and sole title** in order for adverse possession to begin. Nothing less will do.

F. **Implied fiduciaries:** In general, cotenants have no fiduciary duties to each other. A cotenant can, of course, voluntarily assume such a duty and a fiduciary duty will be implied when one cotenant acts to gain an advantage of *title* over his fellow cotenants.

Example: Bert and Ernie own Blackacre as cotenants. They fail to pay the property taxes and Blackacre is sold by the government at a tax foreclosure sale. Bert buys Blackacre at that sale for a fraction of its fair market value. Bert is not the sole owner of Blackacre. He will be held to a fiduciary obligation toward Ernie, and Ernie has the right to pay his share of the purchase price to Bert in order to redeem his cotenancy. See, e.g., *Massey v. Prothero,* 664 P. 2d 1176 (Utah 1983). The same principle applies to mortgage foreclosure sales. See, e.g., *Barr v. Eason,* 292 Ark. 106 (1987).

★G. ***Swartzbaugh v. Sampson:* A case study:** This case provides an illuminating study of the options available to a cotenant who is unhappy with the actions of her fellow cotenant. John and Lola Swartzbaugh owned in joint tenancy a 60-acre walnut orchard. John leased 4 acres to Sam Sampson, a boxing promoter, who constructed a boxing pavilion on the site. Lola did not join in the lease; indeed, she objected vehemently to the boxing pavilion. Lola sought to cancel the lease made by John, and in ***Swartzbaugh v. Sampson,*** 11 Cal. App. 2d 451 (1936), the California court of appeal denied her claim, reasoning that a lease by a single joint tenant to a third party "is not a nullity but is a valid . . . contract in so far as the interest of the lessor in the joint property is concerned." Consider the possibilities open to Lola Swartzbaugh after this ruling, keeping in mind that her objective is to eliminate the presence of Sam and his objectionable pugilists. (1) She could appear at the pavilion and demand that Sam let her into possession. He would probably invite her in to watch the fights and, if he did not she would simply have triggered ouster, thus causing Sam to be liable to her for half the fair rental value of the premises. In that event, Sam's ability to deduct the rent paid Lola from what he had agreed to pay John might depend on how clearly Sam understood he was leasing only John's interest. If he knew that to be the case (which seems to be so) he is not entitled to any deduction. (2) Lola could acquiesce in the lease and demand and receive half the rents received by John from Sam. (3) Lola could partition the leasehold, which would probably result in a partition by sale (because it would be impossible to physically divide the pavilion). But who would buy the leasehold, and for how much? In any case, the proceeds of sale would be used first to reimburse Sam for his "improvement" (Is it an improvement? Should the value of the destroyed walnut trees be deducted from the value of the improvement?) and the balance of the proceeds would be divided between Sam and Lola, leaving the buyer with a leasehold and the obligation to pay rent to John. (4) Lola could hope for John's death, which

would terminate Sam's leasehold because Sam had leased only John's interest and John's interest would expire at his death (he owned the land as a joint tenant with Lola). None of these options are particularly desirable in terms of removing Sam, and the last is more of a bitter and cynical hope than an option.

III. MARITAL INTERESTS

A. **Introduction:** Many of the property issues involved in the law governing the property of married people are covered in other courses dealing with marital dissolution, family, and related issues. These issues are discussed here only to the extent relevant to a first-year Property course.

B. **The common law system:** The pure common law system of marital property no longer exists in any relevant jurisdiction, but knowledge of its structure will help you in understanding the many current versions of marital property.

1. **Femmes sole and femmes covert:** A single woman (a ***femme sole***) had power to use, dispose, and possess her own property. While that sounds axiomatic, a married woman (a ***femme covert***) had almost none of those rights. Common law said husband and wife were one, but the husband was the One. The severity of these rules were evaded by the very wealthy through the creation of elaborate marriage settlements, usually involving trusts, that were designed to enable a married woman to control her property through a compliant trustee.

2. **Husband *über alles:*** With the marriage vow the common law bestowed **jure uxoris** on the husband: the right to possess, use, or convey all of his wife's property except her clothes and jewelry for the duration of the marriage. Even her earnings were his. In the hands of an honorable and capable husband in a happy marriage, *jure uxoris* preserved or increased the value of the wife's property. In the hands of a rogue, *jure uxoris* was license to steal. Like the dodo, *jure uxoris* is extinct.

3. **Wife's rights:** A wife had no legal control of her property, but had some inchoate property rights:

   a. **Support:** A wife had the right of ***support*** from her husband. Thus, in the event of divorce, the husband was obliged to continue support by paying ***alimony*** to her.

   b. **Dover:** On death of her husband, a wife had the ***right of dower.*** Dower was the right to a ***life estate*** in one-third of each and every ***possessory freehold estate*** the husband enjoyed at ***any point during the marriage*** which was ***capable of inheritance by children born of the marriage.*** This was a valuable right for a widow of a wealthy landowner or freeholding tradesman in seventeenth- or eighteenth-century England, but was useless to those without land ownership.

      i. **Each freehold ever possessed:** The dower right attached to every freehold the husband possessed that was capable of inheritance by children of the marriage. Thus dower did ***not*** attach to the husband's life estates, leaseholds, personal property, equitable interests, future interests, or any possessory freehold held in tenancy by the entirety with the wife or in joint tenancy, whether with the wife or a third party. The common law's gift to the bride was a dower right in all the inheritable freeholds her husband possessed at the moment of the ceremony, ***and*** to every additional such freehold he possessed in the future during their marriage. But, as seen from the list of property to

which dower did not attach, it was an easy matter for a husband to acquire property in a manner that avoided dower.

ii. **Scope and release of dower:** The inchoate dower right, once attached, could only be removed by divorce or with the wife's consent.

Example: During George I's reign, Harry owns Blackacre in fee simple while married to Molly. Harry mortgages Blackacre, then defaults on the mortgage, and Bank buys it at foreclosure sale. Bank conveys Blackacre to Zelmo. Harry dies. Molly is entitled to a life estate in one-third of Blackacre. Zelmo must turn over to Molly possession of one-third of Blackacre or one-third of the rents and profits from Blackacre.

Example: Suppose Harry paid off the mortgage, then conveyed Blackacre to Arnie without Molly signing anything. Upon Harry's death Molly is entitled to dower in Blackacre because she never released her dower.

Example: Molly and Harry divorce. Molly's inchoate dower rights are irrevocably extinguished. But if Molly and Harry simply separate and remain legally married, Molly's inchoate dower rights are unaffected.

iii. **Operation of dower:** A physical third of all properties subject to dower that were capable of physical division was set aside for the wife's life estate. If a property was not susceptible to division the wife received a third of the rents or profits from the land for the remainder of her life.

iv. **Defeasible fees:** Most jurisdictions hold that a dower interest in a defeasible fee ends if the limiting condition occurs, reasoning that the dower interest is derived from the husband's title, which was defeasible. A few reject this logic and hold that dower is indefeasible, a conclusion permitting a widow to flout limiting conditions during her lifetime. In most states the issue will not arise because dower is no longer recognized.

v. **Abolition:** Fewer than ten states continue to observe dower. In most dower has been abolished by statute, usually replaced by an analogous right usually known as the ***spousal elective share,*** which entitles a surviving spouse to take a specified portion of the decedent's probate estate even if the decedent spouse left a lesser share by will to the surviving spouse. See section III.C.2, below. Some states that observe dower have made the widow's share more generous: a fee simple interest in one-third or even one-half of dower lands.

4. **Curtesy:** Common law gave a husband who survived his wife a right similar to dower, called ***curtesy.*** Curtesy attached to ***all possessory interests in land*** of the wife, ***including equitable possessory interests.*** Thus, while the marriage settlement trust avoided *jure uxoris,* it did not evade curtesy. But curtesy only attached if ***issue were born to the marriage.*** Once a child was born, even if it later died, curtesy attached. Curtesy no longer exists in the United States.

C. **The modern (mostly statutory) "common law" system:** Every common law marital property jurisdiction (as distinguished from community property states, see III.D, below) has altered the common law system substantially. Statutes vary considerably, but set forth below are the major themes of these statutory alterations.

1. **Rights on divorce:** Almost every jurisdiction has adopted some form of an ***equitable distribution*** statute, designed to produce an equitable (usually equal) division of the marital property subject to the statute. Differences occur, however, in the way the states define what marital property is subject to equitable distribution. Some include *all property owned by either spouse,* whenever and however acquired; others limit equitable distribution to *property acquired during marriage,* no matter how; and some limit equitable distribution to *property acquired by the earnings of the marital partners.* Some kinds of personal property, like clothing and jewelry, are often exempted.

   a. **Professional skills and credentials:** A major issue is whether professional degrees and skills acquired during marriage are subject to equitable distribution. What happens when one spouse supports another while he or she obtains a professional degree or some similar enhancement of earnings power? Courts divide three ways.

      i. **Not property:** Some states hold that professional degrees and skills are not property, but simply personal accomplishments that may or may not produce property, and thus not subject to equitable distribution.

      ★**Example:** After Dennis and Anne Graham married she continued to work as an airline flight attendant and Dennis mostly pursued his education, earning a B.S. and an M.B.A. Shortly after he had embarked on his business career the marriage foundered. A Colorado trial court awarded Anne about $33,000, representing 40 percent of the estimated future earnings value inherent in Dennis's M.B.A. In ***In re Marriage of Graham,*** 190 Colo. 429 (1978), the Colorado Supreme Court reversed, concluding that Dennis's M.B.A. was not "property" because it could not be transferred or inherited but was simply "an intellectual achievement." Granted that, why wasn't the increased earnings of Dennis attributable to his "intellectual achievement" property?

      ii. **Property subject to equitable distribution:** Other states, particularly New York, treat professional degrees and enhanced professional skills as property subject to equitable distribution.

      ★**Example:** After a 17-year marriage, Frederica von Stade, the celebrated opera diva, and her husband divorced. At the beginning of the marriage to her voice teacher, von Stade was young and unknown, performing minor roles with New York's Metropolitan Opera. By the time the marriage ended she was an opera superstar, earning over $600,000 annually. A New York trial court ruled that the "enhanced value" of her career and her celebrity status were not marital property subject to equitable distribution, but in ***Elkus v. Elkus,*** 169 App. Div. 2d 134 (1991), New York's appellate court reversed, ruling that the contributions to her career and *career potential* made by her husband (in the form of voice instruction and domestic duties) entitled him to share in the increased earnings power acquired by von Stade during their marriage. See also *O'Brien v. O'Brien,* 66 N.Y. 2d 576 (1985) (increased earnings power attributable to medical degree acquired during marriage). Note that because professional degrees and skills cannot be divided and conveyed, the New York position requires the degree holder to pay a lump sum now or a portion of future earnings to satisfy equitable distribution.

      iii. **Restitution:** Some states take the middling course of requiring the degree-enhanced spouse to reimburse the supporting spouse for the financial support (***"reimbursement alimony"***). See, e.g., *Mahoney v. Mahoney,* 91 N.J. 488 (1982).

2. **Rights on death:** In place of dower, most states give the surviving spouse the right to receive in fee simple a fraction (anywhere from one-quarter to one-half) of all property owned by the deceased spouse at his or her death. This is called an ***elective share*** because a surviving spouse may elect this share or to take under the deceased spouse's will, ***but can't have both.*** Some states recognizing dower give a surviving spouse the further election of whether to take dower or a statutory elective share. In a few states the spousal elective share is much like dower, being as little as a life estate in one-third of the decedent spouse's probate estate. One common law state, Georgia, has no elective share.

   a. **Difference between dower and elective share:** The elective share applies to **all property *of the deceased spouse* owned at his or her death.** Thus the elective share is broader than dower ("***all*** property," not just freehold realty) and narrower ("only property owned at spouse's death").

   b. **Avoidance of the elective share:** A spouse sometimes tries to avoid the elective share by transferring all his property to a trust, retaining an income interest for life, and vesting a remainder in someone other than the spouse.

   Example: Oscar, married to Hilda, conveys all his property to his brother Sam, as trustee, under directions to pay to Oscar for life the income and such principal as necessary to support Oscar, then to distribute the principal outright and free of trust to Minnie, Oscar's paramour. (Oscar's will, which disposes of only the incidental property of Oscar that was not placed in trust, leaves everything to Minnie.)

   This works in all states to defeat the elective share if the trust is irrevocable and created before the marriage. It works in many states to defeat the elective share if the trust is irrevocable and created after the marriage (because the settlor spouse owns no property at death) but is more problematic if the trust is revocable. Some states treat a revocable trust just like an irrevocable one, so long as the assets are conveyed to the trust prior to death. Others refuse to recognize a revocable trust for this purpose and some refuse to recognize the trust if the settlor's intent was to defeat the elective share. Still other states focus on how much real control the settlor retained over the trust assets — the more control retained, the more likely that the surviving spouse's elective share will reach the trust assets.

3. **Antenuptial agreements and spousal contracts**

   a. **Antenuptial agreements:** Agreements made between prospective spouses prior to marriage purporting to govern property division upon divorce were not generally enforceable at common law. Jurisdictions today split on their validity. The emerging standard is that such agreements are enforceable if (1) the parties' assets and earnings power have been fully revealed to each other, and (2) the substantive terms of the agreement are not unconscionable. See, e.g., Uniform Marital Property Act §10(g); Uniform Premarital Agreement Act §6.

   b. **Spousal contracts:** In community property states, spouses may agree to transmute separate property into community property and to divide community property into separate property. It is an open question, however, whether agreements between spouses in a common law state to hold their property as community property will be enforced. In some states a contract between spouses by which one spouse agrees to care for another in return for property to be received at the death of the invalid spouse is not enforceable for want of consideration, because spouses are obliged to care for one another. See, e.g., *Borelli v. Brusseau,* 12 Cal. App. 4th 647 (1993).

D. Community property:

1. **Origins and concept:** The civil law of Spain and France recognizes marriage as creating a "marital community" of husband and wife, and treats that community, rather than its constituent members, as the owner of most property acquired during marriage. The fundamental premise of community property is that each spouse is an equal partner in marriage, and that each spouse has an equal claim to the material possessions that are derived from the efforts of either spouse during marriage. By contrast, the pure common law system presumed that the wife was and should be economically dependent on her husband, and imposed a correlative obligation of lifetime support on the husband. The modern common law system is far more equitable and produces results that often are not dramatically different from community property. Community property came to America through French and Spanish colonization and was absorbed into the United States along with formerly French or Spanish territory. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are the only states recognizing community property. This discussion of community property is cursory, adequate for the survey course in Property but not detailed enough for a separate course in Community Property.

   a. **Uniform Marital Property Act:** The Uniform Marital Property Act (UMPA), proposed in 1983, is based on community law principles and, for all practical purposes, is a community property regime. Wisconsin is the only state to have adopted the UMPA. The UMPA defines ***marital property*** to include all property acquired during marriage except through gift, devise, or inheritance. Everything else is ***individual property.***

2. **Definition of community property:** American community property systems define community property as the **earnings during marriage** of either spouse and **all property acquired from such earnings.** This definition ***excludes*** property acquired ***before marriage*** or acquired during marriage ***by gift, devise, or inheritance.*** Such property is **separate property** and is owned solely by that spouse. The character of property — separate or community — may ***not be changed except by*** **agreement of both spouses.** When it is difficult to determine the character of property, courts apply a **rebuttable presumption** ***that the property is*** **community property.**

   a. **Tracing, not title:** Once property becomes community in character, it retains that character even if it is exchanged for other property and ***regardless of its title.*** If its original source can be ***traced to community property*** it is community property, absent agreement of both spouses to change its character.

      Example: Irene, married to Al, lives in a community property state. She deposits one of her paychecks in a deposit account owned solely by Irene. She then uses the money in the deposit account to purchase a painting, which she trades for a vacation home, taking title in her name alone. Because the source of this chain of assets — deposit account to painting to second home — was Irene's earnings during marriage, each of these assets is community property. Title in Irene's name doesn't matter if the property's source can be traced to community funds. The vacation home is community property and Al has an equal interest in it.

   b. **Commingling of separate and community property:** The tracing rule applies to commingled property as well. If the sources of commingled property can be identified accurately as separate or community funds, the commingled property will be divided into separate and community portions. If it is ***impossible to trace*** the sources of commingled funds, the entire property will be ***presumed to be community property.*** In the absence of

accurate records, commingled property will, in practice, become community property. A variation on this principle occurs when a partially paid-for asset is brought to a marriage and the remainder of the purchase price is paid with community funds. There are three approaches to this problem.

i. **Inception of right:** This approach (followed by Texas) holds that the character of the property is determined at the inception of the legal right to the property.

ii. **Time of vesting:** This approach holds that the character of the property is determined when title passes.

iii. **Pro-rata apportionment:** This approach (followed by California and Washington) holds that the percentage of the purchase price paid prior to marriage establishes the portion of the property that is separate, and the percentage of the purchase price paid with community funds establishes the community interest in the property.

Example: Al enters into an installment sale contract to purchase a building lot for $45,000. He pays a total of $15,000 under the contract, then marries Jane. The remaining $30,000 is paid with the combined earnings of Al and Jane, at which point Al and Jane divorce. The lot is worth $120,000. Who owns the lot?

- In Texas, an ***inception of right*** state, the lot is Al's separate property (because Al acquired a contract right in the property before marriage), but the community is entitled to return of $30,000 plus interest (but Al is entitled to half this sum). Ignoring interest, Jane gets $15,000; Al gets $105,000. See *McCurdy v. McCurdy,* 372 S.W. 2d 381 (Tex. Civ. App. 1963).
- In a ***time of vesting*** state, the lot is community property because title did not pass until the payments were completely made. Al and Jane each get $60,000 out of the lot.
- In California or Washington, ***pro-rata apportionment*** states, one-third of the lot is Al's separate property, and two-thirds is community property. Al's share is $80,000 (consisting of $40,000 separate property and his equal $40,000 share of the community property). Jane's share is $40,000, one-half of the community's two-thirds interest in the lot. See, e.g., *Estate of Gulstine,* 166 Wash. 325 (1932).

c. **Agreement transmuting the character of property:** So long as both spouses are fully informed about the consequences of their actions, an agreement to transmute community property into separate property or separate property into community property will be enforced.

d. **Income from separate property:** The general rule is that income earned from separate property retains its character as separate property. Three states (Texas, Louisiana, and Idaho) hold that income earned from separate property is community property.

e. **Pensions:** Vested pension rights are community property because they are the fruits of earnings. The status of nonvested pension rights is less clear. California and Nevada treat such rights as community property. See *In re Marriage of Brown,* 15 Cal. 3d 838 (1976); *Gemma v. Gemma,* 105 Nev. 458 (1989).

f. **Personal injury damages:** The portion of personal injury damage awards that is compensation for ***pain and suffering*** is ***separate property,*** but the portion that is compensation for

lost earnings is ***community property.*** See, e.g., *Rogers v. Yellowstone Park Co.*, 97 Idaho 14 (1974).

g. **Increased value of separate property from community efforts:** A spouse may devote time and energy to the management of his or her separate property. The community is entitled to share in the value added to the separate property by those efforts. The amount of the community's share depends on whether the increased value of the separate property is primarily attributable to the ***spouse's personal effort*** or to the ***capital investment.*** If the spouse's personal effort produced the increased value, the increment is community property (after deduction of a fair rate return on the separate capital investment).

Example: Hugo owned an art gallery and then married Alice. Hugo's capital investment in the gallery at the time of marriage was $100,000. During the marriage the art gallery prospered because of Hugo's unerring eye for art that would be highly in demand. As a result, when Hugo and Alice divorced after 10 years of marriage, the gallery was worth $500,000. The increment ($400,000) is due primarily to Hugo's personal efforts, but first Hugo must receive a reasonable rate of return on his separate capital investment of $100,000. Assume 6 percent annually is a reasonable rate of return. Ignoring compounding, Hugo would be entitled to receive (as his separate property) 6 percent of $100,000 (or $6,000) multiplied by 10 years ($60,000). The remainder of the increment ($340,000) is community property (of which Hugo and Alice are each entitled to half).

If the increased value is due to the capital investment, the community's share is simply the value of the spouse's services; the remainder is separate property.

Example: Suppose when Hugo married Alice he also had a $100,000 portfolio of stocks and bonds. Hugo hired Lou to manage the portfolio, paying Lou from his separate property. Hugo took no active role in managing the portfolio. Ten years later, when Hugo and Alice divorce, the portfolio is worth $500,000. The community's share of this increase is the value of Hugo's services, which appears to be practically nil. Call it $10,000, of which half belongs to Hugo. The remainder of the increment ($390,000) is Hugo's separate property.

Some courts hold that the community is entitled to share in the increased value of separate property attributable to inflation in the proportion that the community has contributed to acquisition cost. See, e.g., *In re Marriage of Elam,* 97 Wn. 2d 811 (1982).

3. **Management of community property:** Husband and wife have equal management powers. Either spouse, acting alone, may sell, lease, or otherwise deal with community property. Of course, neither spouse acting alone may convey their ***interest in the community*** to a stranger. And, as a practical matter, both spouses will be required to join in a conveyance of real property held as community property. However, the equal management rule permits either spouse to invest or otherwise deal with deposit or investment accounts. Each spouse has a fiduciary duty toward the other spouse in the management of community affairs. States differ with respect to gifts: some hold that gifts of community property may not be made by a single spouse, others hold that only gifts defrauding a spouse may be set aside, and still others hold that either spouse may make "reasonable" gifts from community funds. The exception to the equal management rule is that each spouse is the sole manager of any business carried on by the spouse, even if the business itself is a community asset.

4. **Rights upon divorce:** At divorce, each spouse is entitled to half of the community property and, of course, all of their separate property.

5. **Rights upon death:** Upon death of one spouse, the one-half interest of the decedent spouse in the community property is disposed of according to the decedent spouse's will. In the absence of a will, it descends by intestate succession.

   Example: Donald, married to Marla and residing in a community property state dies, devising all his property to Babette. Babette takes a half interest, as a tenant in common with Marla, in all the former community property. If Donald died intestate, survived by Marla and Zoe, their child, Zoe would take Donald's half interest in the former community property, as a tenant in common with Marla.

6. **Creditors' rights:** In general, debts incurred during marriage are presumed to be community obligations and the community's assets are liable for their satisfaction. Debts incurred by a spouse prior to marriage are separate obligations and only that spouse's separate property is exposed to the creditor. The extent to which separate creditors may reach community property is in disarray.

E. "Quasi-marital" property: Unmarried cohabitants

1. **Common law marriage:** Common law recognized a de facto marriage between a man and woman if they were cohabitants, agreed between themselves to be husband and wife, and thereafter represented to the public that they were husband and wife. The status thus acquired was indistinguishable from ceremonial marriage. Common law marriage is still recognized in only 11 states and Washington, D.C. Section 6.02 of the American Law Institute's Principles of Family Dissolution endorses a common law marriage approach to the problem of any cohabiting couple, whether of the same or opposite sexes. So long as they share a primary residence and exhibit other traits of a couple sharing life together, upon separation during life their property will be divided under marital property principles.

2. **Contracts:** Unmarried cohabitants may create ***express contracts*** to govern their property upon death or termination of the relationship in a fashion similar to that delivered by law to married couples. Such agreements are generally enforceable. See, e.g., *Cook v. Cook,* 142 Ariz. 573 (1984). This extends to contracts ***implied from the parties' conduct.*** See, e.g., *Marvin v. Marvin,* 18 Cal. 3d 660 (1976). *Marvin* involved an unmarried heterosexual couple but the principle has been applied to same-sex couples. See *Whorton v. Dillingham,* 202 Cal. App. 3d 447 (1988). The *Marvin* rule is not invariable. In *Hewitt v. Hewitt,* 77 Ill. 2d 49 (1979), Illinois refused to enforce such contracts (whether express or implied) on the ground that they were an attempt to create by contract the doctrine of common law marriage, which had been eliminated by statute: "The policy of the Act gives the State a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will . . . .[P]ublic policy disfavors private contractual alternatives to marriage." New York recognizes only express contracts. See *Morone v. Morone,* 50 N.Y. 2d 481 (1980).

★3. **Same-sex couples:** Even where enforceable, a contract cannot create the status benefits of marriage, such as the right to spousal benefits under social security, or the right to file a joint tax return, or the right to take the marital deduction for federal estate tax purposes, or the right to inherit from one's spouse. The rights and obligations of the marital state are entirely dependent on legislation, and only Massachusetts permits same-sex couples to marry. In ***Goodridge v. Department of Public Health,*** 440 Mass. 309 (2003), the Massachusetts S.J.C. relied on the Massachusetts Constitution's due process and equality provisions to conclude that same-sex

couples must be permitted to marry. Although the S.J.C. applied only minimal, or rational-basis scrutiny, it rejected three rationales offered by the state to support the limitation of marriage to opposite-sex couples. According to the S.J.C., marriage is about commitment, not the "begetting of children," so the argument that marriage "provides a favorable setting for procreation" was beside the point. While the court recognized that protecting the welfare of children is of paramount importance, it concluded that limiting marriage to heterosexual couples "cannot plausibly further this policy." Finally, the court stated that a same-sex marriage ban was not rationally related to the goal of conserving scarce resources that are expended upon married couples.

a. **Marriage substitutes:** Several states provide substitutes for marriage. Vermont permits couples to unite in civil union, a status that confers the "same benefits, protections, and responsibilities" as marriage. California confers on registered "domestic partners" (a term that includes same-sex and opposite-sex couples) virtually all the status benefits and obligations of marriage. Hawaii and New Jersey have more limited substitutes. Hawaii permits same-sex couples to register as "reciprocal beneficiaries," a status that confers inheritance rights upon the survivor. New Jersey permits same-sex and opposite-sex domestic partners age 62 or older to register as such and obtain certain health care and retirement benefits but not inheritance rights.

b. **DOMA and interstate migration:** The federal Defense of Marriage Act (DOMA) provides that marriage is limited to opposite sex partners, thus depriving same-sex married partners of various federal tax and welfare benefits. DOMA also stipulates that no state must recognize a same-sex marriage that is valid in the state in which it was contracted. While some 35 states have acted to prohibit recognition of such marriages, DOMA does not compel any state to do so. Apart from recognition of Massachusetts same-sex marriages, a number of related questions remain unanswered. May a Massachusetts same-sex married couple acquire property as tenants by the entirety in a state that does not recognize their marriage? If such a couple moves to a state that does not recognize their marriage, how may they dissolve their union?

c. **What determines sex?** States are divided over the knotty question of whether sex is chromosomally determined at birth, or whether sex is a matter of outward genital appearance. The issue is most acute with respect to post-operative transsexuals but can also affect people with a variety of intersex disorders. One of the most common is Klinefelter Syndrome, in which a person is born with the combination of XXY chromosomes. Some of these people have "androgen insensitivity syndrome" or "gonadal dysgenesis," conditions that produce external female genitalia. In a state that determines sex on the basis of chromosomal alignment, is such a person male or female?

IV. CONDOMINIUMS AND COOPERATIVES

A. **Introduction:** Strictly speaking, neither condominiums nor cooperatives are true forms of concurrent ownership, but they combine sole ownership with concurrent ownership in unique ways.

B. **Condominiums:** The condominium consists of (1) fee ownership (or long-term leasehold) of an individual unit (usually defined to include the interior perimeter surfaces of the unit) and related auxiliary space (e.g., parking or storage spaces), and (2) a fractional or percentage tenancy in

common interest with all other condominium owners of the common areas (walls, roof, foundation, grounds, stairs, elevators, etc.).

1. **Creatures of statutes:** Every state has enacted legislation governing the creation and administration of condominiums. These statutes vary. The description here is a typical composite.

2. **Creation:** The owner wishing to establish a condominium development usually does so by recording a master deed or declaration stating that intent.

3. **Owner's association:** Once the condominium units are sold the owners are members of an association empowered to elect a board of directors to run the association, usually by hiring a manager or making important decisions about repair, maintenance or improvement of common areas, and promulgating rules for the use of owners' units and common areas. These rules can be very restrictive (e.g., no pets, no laundry lines, no loud noise, no prickly plants) but are generally enforceable if they are reasonable. See, e.g., ***Nahrstedt v. Lakeside Village Condominium Association,*** 8 Cal. 4th 361 (1994), discussed in section VII.B of Chapter 9.

4. **Conveyance and financing of units:** Because each condominium unit is a separate freehold estate, each unit is conveyed by deed (like any other real property). Purchase of condominiums is conducted like any other realty transaction, in that the buyer is likely to obtain a loan secured by a mortgage on the borrower's individual unit.

5. **Responsibility for common areas:** Pursuant to condominium by-laws, each condominium owner is responsible for his or her proportionate share of the cost of maintaining or improving common areas. Owners are also jointly and severally liable for injuries resulting from failure adequately to maintain the common areas.

6. **No right to partition:** Even though each owner is a tenant in common with respect to the common areas, the governing statutes deny to owners any right to partition this tenancy in common.

7. **Restrictions on condominium conversion:** Many municipalities have legislated to limit the ability of owners of rental housing to convert such units to condominiums. These laws are designed to preserve rental housing, but probably serve more to drive up the price of condominiums. Nonetheless, such ordinances are usually valid exercises of municipal authority.

C. **Cooperatives:** A cooperative apartment building is owned by a corporation. To acquire an apartment one must purchase the capital shares of the corporation that represent the value of the apartment and enter into a lease with the corporation for occupancy of the apartment. Each cooperative apartment owner is part owner (by virtue of owning shares in the corporate building owner) and tenant (by virtue of the lease).

   1. **Financial operation:** The corporation will, of course, have a board of directors elected by the tenant-shareholders. Lease rentals are set to reflect the operational costs of the building. Because the corporation is the sole owner of the freehold, any mortgage loan will be the corporation's obligation, but a proportionate share of the mortgage expenses will be passed on to each tenant under the leases. Mortgage lenders insist on clauses in each lease subordinating the tenant's interest to that of the mortgage lender. The effect of these clauses is that, in the event of default and foreclosure, the mortgage lender is entitled to occupancy of the entire building and the tenants have no further occupancy right or ownership interest.

2. **Transfer restrictions:** Given the high interdependence of tenant-shareholders, restrictions are typically placed on transfer of both stock and lease in order to be sure that any transferee is financially and otherwise capable of discharging the obligations of ownership and tenancy. These restrictions are typically valid. New York goes so far as to hold that consent to transfer may be withheld for any reason, though most jurisdictions hold that consent may not be withheld unreasonably.

3. **Limited liability:** Because the corporation is the sole owner of the building, any tort liability accruing from ownership is the corporation's responsibility. The liability of tenant-shareholders is limited to their capital investment in the corporation.

Exam Tips on CONCURRENT OWNERSHIP AND MARITAL INTERESTS

- An easy issue to include in an exam is an ambiguous conveyance that may be one of several different types of co-ownership. Be attentive to any facts that may indicate the intent of the grantees. This issue can easily be combined with a later conveyance by one co-owner, thus producing multiple possibilities of resulting ownership. Cover all bases.

- Whenever you spot co-owners there are multiple rights and responsibilities of the co-owners. Check them all to see which are relevant to your problem Also, consider the possibilities for future action. Partition is always an option.

- Marital property issues crop up whenever you have married couples. Pay attention to whether the state is a community or separate property state. Be alert to the problems that can occur when couples migrate from one type of state to the other. Property is not a course in family law but be sensitive to the emphasis your professor places on these issues; there is enough material in Dukeminier and Krier to create marital property issues.

- What counts as property for purposes of division of marital property at divorce varies from state to state. This is often governed by statute so be particularly attentive to statutes that may be included in your exam.

UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 9

PRESENT ESTATES

SYNOPSIS

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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.*[1] 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

[1] *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[2] *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.

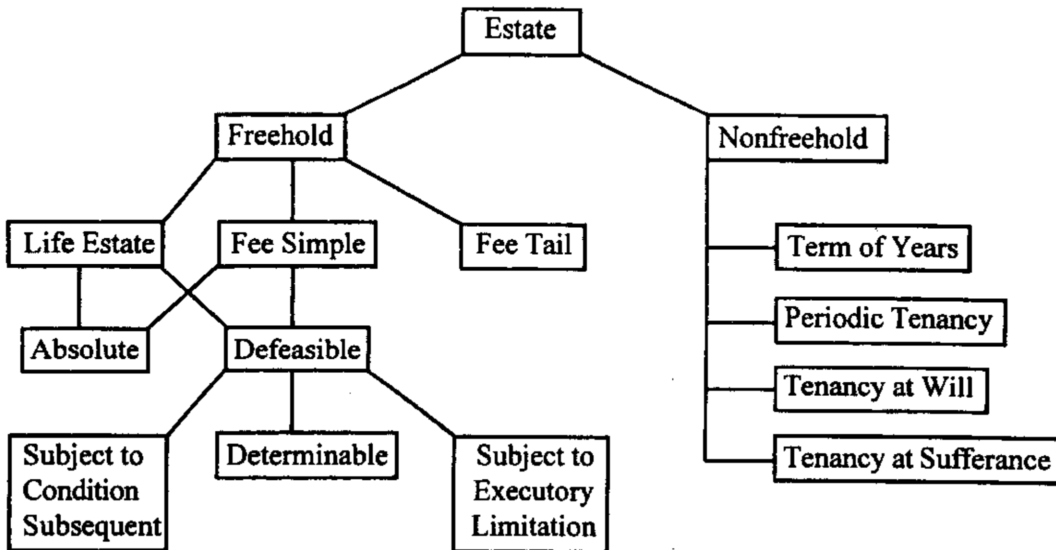
The freehold/nonfreehold distinction was a product of English feudalism. Freehold estates were held by the powerful: the nobles, gentlefolk, and others with a niche on the feudal pyramid. In early England, such estates could be created only through an intricate ceremony (*feoffment with livery of seisin*), 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

[2] 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.[3] 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.[4] 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.[5]

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

[3] In practice, "fee simple absolute" is commonly abbreviated as "fee simple."

[4] Restatement of Property § 14 (1936) (defining an "estate in fee simple").

[5] 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."[6]

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."[7] 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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[6] *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).

[7] 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*[8] 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.[9] 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*[10] is a largely-obsolete freehold estate whose duration was measured by the lives of the lineal descendants of a designated person.[11] 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.[12]

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

[8] 277 A.2d 369 (N.J. 1971).

[9] 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).

[10] 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.

[11] 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."

[12] 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.[13] 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,[14] 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)[15] 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

[13] 13 Edw. I, ch. 1 (1285).

[14] *See, e.g.*, Daphne Du Maurier, Rebecca (1938).

[15] *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.[16]

[16] 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.[17] Jeffersonian concerns played a role in this process,[18] 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.[19] 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.[20] 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.[21] 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

[17] 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.

[18] *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).

[19] 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).

[20] *See, e.g.*, Long v. Long, 343 N.E.2d 100 (Ohio 1976).

[21] 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.*[22] 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,*[23] where the Tennessee Supreme Court construed a holographic will that provided: "I wish Evelyn White to have my home to live in and <u>not</u> to be <u>sold</u>."[24] 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").[25]

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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[22] "Pur autre vie" is old French for the phrase "for another life."

[23] 559 S.W.2d 938 (Tenn. 1977).

[24] *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).

[25] *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*[26] 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.[27] Prior Mississippi

[26] 262 So. 2d 641 (Miss. 1972).

[27] *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."[28] 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."[29]

[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*[30] 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.[31]

§ 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,

[28] Baker v. Weedon, 262 So. 2d 641, 644 (Miss. 1972).

[29] *See, e.g.*, N.Y. Real Prop. L. §§ 1602, 1604.

[30] 262 So. 2d 641 (Miss. 1972).

[31] 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.[32]

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,[33] schools,[34] 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 nonprofit 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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[32] The "life estate absolute" is almost always abbreviated as "life estate."

[33] *See, e.g.*, Ink v. City of Canton, 212 N.E.2d 574 (Ohio 1965).

[34] *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."[35] 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.[36] The Restatement of Property generally provides that restrictions related to religion, personal habits, education, or occupation are valid;[37] but it limits the enforceability of restrictions concerning marriage, remarriage, divorce, or separation.[38]

[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.[39]

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[35] *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").

[36] *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).

[37] Restatement (Second) of Property: Donative Transfers §§ 8.1–8.3 (1983).

[38] 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").

[39] *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.[40] 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*,[41] 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."[42]

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.[43] 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.[44]

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[40] *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).

[41] 417 N.E.2d 138 (Ill. App. Ct. 1981).

[42] *Id.* at 142.

[43] *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).

[44] 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*.[45] 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.[46] 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.[47] 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).[48] 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

[45] This future interest is sometimes also called a "power of termination" or "right of reentry."

[46] Forsgren v. Sollie, 659 P.2d 1068 (Utah 1983).

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

[48] 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."[49]

[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.[50]

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

[49] William B. Stoebuck & Dale A. Whitman, The Law of Property § 2.9 (3d ed. 2000).

[50] *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.[51] 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.[52] 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.[53] 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*,[54] a deed that recited

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[51] *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).

[52] *See* Restatement of Property §§ 193, 194 (1936).

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

[54] 759 P.2d 1250 (Wyo. 1988).

that the conveyance was "for the purpose of constructing and maintaining thereon a County Hospital"[55] was held to transfer fee simple absolute; the language did not restrict the fee simple granted, but only stated the grantor's purpose.[56] 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.[57] Even where a defeasible estate clearly exists, courts tend to construe the conditional language narrowly, in order to avoid forfeiture.[58]

[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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[55] *Id.* at 1251–52.

[56] *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).

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

[58] *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.[59] 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.[60]

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[59] *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).

[60] 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.[61] 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.[62]

[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.[63]

§ 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.[64] 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).

[61] 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).

[62] 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).

[63] Restatement (Second) of Property: Donative Transfers §§ 4.1–4.3 (1983). *See also* Alsup v. Montoya, 488 S.W.2d 725 (Tenn. 1972).

[64] 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."[65] 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.[66] 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.[67]

[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.*[68] 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.[69] 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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[65] Richard A. Posner, Economic Analysis of Law 73 (6th ed. 2003).

[66] *See, e.g.*, Brokaw v. Fairchild, 237 N.Y.S. 6 (Sup. Ct. 1929).

[67] *See, e.g.*, Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).

[68] *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).

[69] *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.[70] 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.[71]

[70] *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).

[71] *See, e.g.*, Hausmann v. Hausmann, 596 N.E.2d 216 (Ill. App. Ct. 1992) (property taxes).

Chapter 10
CONCURRENT OWNERSHIP

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§ 10.01 The Nature of Concurrent Ownership

A present estate in real or personal property can be simultaneously owned by two or more persons, each holding the right to concurrent

possession.[1] Three basic types of concurrent estates are generally recognized: the tenancy in common, the joint tenancy, and the tenancy by the entirety. Suppose O conveys fee simple absolute in Greenacre to A and B "as tenants in common." A and B now own the concurrent estate called tenancy in common; it provides them with equal rights to simultaneously use and enjoy all of Greenacre.

The rules governing concurrent estates attempt to reconcile three often-conflicting policies that underlie American property law: autonomy, efficiency, and equity. From the standpoint of the law and economics movement, communal ownership is inherently inefficient and does not maximize the productive use of property.[2] Judge Richard Posner asserts that cotenants such as A and B "are formally in much the same position as the inhabitants of a society that does not recognize property rights."[3] He observes, for example, that if A spends his own money to repair buildings on the common property, B will share in the enhanced value stemming from the repairs, but—despite the equities of the situation—has no obligation to compensate A. Ultimately, A can escape the cotenancy through partition, but at the expense of disregarding O's autonomy to dispose of his property as he wishes.

§ 10.02 Types of Concurrent Estates

[A] Tenancy in Common

[1] Characteristics

The simplest concurrent estate—and the most frequently encountered—is the *tenancy in common*. Each co-owner of this estate holds an undivided, fractional share in the entire parcel of land; and each is entitled to simultaneous possession and enjoyment of the whole parcel. This "unity of possession" is the hallmark of the tenancy in common.

Suppose again that A and B are tenants in common in fee simple absolute in Greenacre, a 100-acre farm; A holds a 75% undivided interest and B holds the remaining 25% interest. B is entitled to possession of all 100 acres, and so is A. Their respective fractional ownership shares are quite different, but each has an equal right to possession of the whole parcel. Rather than viewing B, for instance, as effectively owning 25 acres, the law views B as owning an undivided share of the entire 100-acre tract. Notably, the other

[1] *See generally* Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants*, 21 Ariz. L. Rev. 1015 (1979); Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 Marq. L. Rev. 423 (2001); N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 Iowa L. Rev. 582 (1966); Evelyn A. Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. Rev. 331; John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U. L. Rev. 35.

[2] *See* Robert C. Ellickson, *Property In Land*, 102 Yale L.J. 1315, 1338–39 (1993).

[3] Richard A. Posner, Economic Analysis of Law 74 (6th ed. 2003).

key unities required for a valid joint tenancy or tenancy by the entirety—time, title, and interest—are irrelevant to the tenancy in common. A and B can be tenants in common even if they acquired their interests at different times and by different instruments, and even though the fractional size of their shares is different.

Use of the tenancy in common has expanded in recent decades with the advent of the condominium (*see* Chapter 35). If K "owns" a condominium unit, she actually holds two related sets of rights. She owns title to her individual unit, which includes the air space within the unit (as bounded by the floor, ceiling, and common walls) and may also extend part way inside the exterior or common walls. In addition, a condominium owner such as K is normally also a tenant in common in the remaining parts of the building structure and in the underlying land.

Tenants in common do not have a right of survivorship, unlike joint tenants or tenants by the entirety. Thus, if A and B are tenants in common in Greenacre and A dies, A's tenancy in common interest will pass to his devisees or heirs, not to B.

[2] Creation

Today any conveyance or devise to two or more unmarried persons (e.g., "to A and B") is presumed to create a tenancy in common, absent clear language expressing an intent to create a joint tenancy.[4] This rule stems from state statutes that repudiate the traditional English preference for the joint tenancy. Under early English common law, a conveyance or devise[5] was presumed to create a joint tenancy (absent express language to the contrary), probably because its right of survivorship tended to vest ownership in one person, rather than in many; this process facilitated the collection of feudal services and incidents.

A tenancy in common may also arise involuntarily. The leading example is intestate succession. Suppose D, holding fee simple absolute in Blueacre, dies intestate and leaves three children—E, F, and G—as her only surviving relatives. Under these circumstances, the laws governing intestate succession will award each child a one-third interest in Blueacre as a tenant in common with the others. Similarly, a tenancy in common will arise when (a) severance ends a joint tenancy or (b) divorce ends a tenancy by the entirety.

[3] Transferability

A tenant in common has the right to sell, mortgage, lease, or otherwise transfer all or part of his interest without the consent of other co-tenants; and such a transfer does not end the tenancy in common.[6] Unlike the joint

[4] *See* Gagnon v. Pronovost, 71 A.2d 747 (N.H. 1949) (grant to A and B "and to the survivors of them" held to create a tenancy in common).

[5] The devise of an estate in land was possible in England only after 1540, when the Statute of Wills was enacted. 32 Hen. VIII, ch. 1 (1540).

[6] *See* Kresha v. Kresha, 371 N.W.2d 280 (Neb. 1985) (tenant in common may lease his interest without cotenant's consent).

tenancy and tenancy by the entirety, the tenancy in common does not include a right of survivorship. Accordingly, a co-tenant may devise his interest or allow it to descend by intestate succession.

[B] Joint Tenancy

[1] Characteristics

The *joint tenancy* differs from the tenancy in common in that each joint tenant has a right of survivorship. Suppose C and D are joint tenants in fee simple absolute in Redacre. While C and D are both alive, each has an equal, undivided right to simultaneous possession and use of Redacre. But each has the right to sole ownership of Redacre if the other dies first. Thus, for example, if C dies, D now holds fee simple absolute in Redacre.

The right of survivorship stems from the common law's schizophrenic vision of a joint tenancy, expressed in archaic French as "per my et per tout."[7] Joint tenants were seen as both (a) a unit that owned the entire estate and (b) individuals who each owned an undivided fractional share (or *moiety*) in the estate. Since joint tenant D already owned the entire estate, C's death was not seen as creating any new rights in D. Rather, the death merely withdrew C's interest from the estate, leaving D as the only remaining owner.

What if D murders C? As a matter of public policy, the murderer cannot profit from the crime; the murder severs the joint tenancy. D receives only a one-half interest as a tenant in common, and the remaining interest passes to C's devisees or heirs other than D.[8]

What if C and D die simultaneously, for example, in an auto accident? Here the joint tenancy is treated like a tenancy in common, with no right of survivorship. C and D are each deemed to own a half interest in the property that passes to their respective heirs or devisees.[9]

[2] Creation

Consistent with its vision of joint tenants as a unit, English common law required four *unities* in order to create (and continue) a valid joint tenancy: time, title, interest, and possession. The joint tenants had to acquire title at the same *time*; they had to acquire *title* by the same deed or will, or by joint adverse possession; each *interest* had to be identical, meaning each joint tenant owned the same fractional interest in the same estate; and each joint tenant had to have an equal right to *possession* of the entire parcel. For example, if O conveys a "one-half undivided share in Greenacre as a joint tenant" to E on Monday, and then conveys a similar interest to F on Tuesday, E and F are not joint tenants because the unities of time and title are missing; E and F acquired their interests at different times and by different deeds. Instead, E and F are tenants in common.

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[7] Meaning, "by the share and by the whole."

[8] Unif. Probate Code § 2-803(c)(2); Duncan v. Vassaur, 550 P.2d 929 (Okla. 1979).

[9] Unif. Simultaneous Death Act § 4.

The modern standard for creating a joint tenancy differs markedly from the common law model. At common law, the joint tenancy was the law's "default" setting; absent clear contrary language, any concurrent estate was presumed to be a joint tenancy as long as the four unities were present. By contrast, today in most states a concurrent estate is considered a tenancy in common unless the intent to create another estate is clearly expressed.[10] The rationale for rejection of the English rule is straightforward. The original reason for favoring the joint tenancy ended with feudalism. Moreover, recognizing a right of survivorship in ambiguous cases may be inequitable, as where, for example, a merchant has extended credit in reliance on the deceased customer's apparent property rights.

Predictably, states vary widely on the phrasing that manifests the requisite intent to create a joint tenancy. In most jurisdictions, language such as "to E and F as joint tenants" or "to E and F as joint tenants with right of survivorship" will suffice.[11] On the other hand, phrases like "to E and F jointly" may be insufficient.[12]

Moreover, while many states still require the traditional four unities, some states have eroded this standard. For example, at common law an owner could not create a joint tenancy by conveying to herself and others, because the unities of time and title were absent. Of course, this requirement could be—and commonly was—circumvented by the use of a "straw man." A, owning fee simple absolute, would convey her entire interest to B, who would then convey to A and C as joint tenants with right of survivorship. A number of states now permit an owner to create a joint tenancy through a direct conveyance,[13] presumably because the common law bar could be routinely avoided through a sham transaction.

[3] Transferability

In contrast to the relatively free alienability of a tenancy in common interest, a joint tenancy interest is virtually inalienable. Due to the right of survivorship, a joint tenant's interest ends upon death, so the interest cannot be devised or descend by intestate succession. Similarly, any inter vivos conveyance of a joint tenancy interest will break the unities of time and title, severing the joint tenancy; thus, the grantee receives merely a

[10] *See In re* Estate of Michael, 218 A.2d 338 (Pa. 1966). *But see In re* Estate of Vadney, 634 N.E.2d 976 (N.Y. 1994) (court reforms deed to add right of survivorship omitted by scrivener's error).

[11] *See* Palmer v. Flint, 161 A.2d 837 (Me. 1960) (conveyance to A and B "as joint tenants, and not as tenants in common, to them and their assigns and to the survivor, and the heirs and assigns of the survivor forever" created a joint tenancy); *see also* Downing v. Downing, 606 A.2d 208 (Md. Ct. App. 1992) (conveyance to A and B "as joint tenants" was sufficient). *But see* Smith v. Cutler, 623 S.E.2d 644 (S.C. 2005) (conveyance to A and B "for and during their joint lives and upon the death of either of them, then to the survivor of them" created tenancy in common for life, with remainder in fee to survivor).

[12] *See* James v. Taylor, 969 S.W.2d 672 (Ark. Ct. App. 1998) (conveyance to A, B, and C "jointly and severally" created tenancy in common).

[13] *See* Cal. Civ. Code § 683(a); Miller v. Riegler, 419 S.W.2d 599 (Ark. 1967) (joint tenancy in stocks). *But see* Hass v. Hass, 21 N.W.2d 398 (Wis. 1946).

tenancy in common interest. The authorities are split as to whether a lease, mortgage, or other transfer of a lesser interest will sever a joint tenancy (*see* § 10.04[A][2]).

[4] Contemporary Relevance of the Joint Tenancy in Land

The joint tenancy in land has been extensively used in recent years as a tool to avoid the cost and delay of probate proceedings.[14] In particular, most married couples hold title to their family residences as joint tenants, presumably as a result of decades of well-intentioned (but simplistic) advice from real estate brokers and bank officers.[15]

Suppose H and W, a married couple about to purchase Greenacre jointly, want to ensure that the survivor obtains sole title. They could take title as tenants in common, and execute mirror-image wills that devise the interest of the first dying spouse to the surviving spouse. But if H now dies first, W's right to sole possession of Greenacre will not receive legal recognition until the probate of H's will is completed and H's 50% interest in Greenacre is distributed to W under judicial supervision; further, the inclusion of Greenacre in H's estate will increase the cost of the procedure. Instead, H and W might take title as joint tenants; when H eventually dies, W automatically becomes the sole owner without the need for H's interest to pass through probate.[16]

[5] Special Rules for Joint Bank Accounts

Bank accounts are often held in joint tenancy. One study discovered that 81% of all savings accounts reviewed were—at least in theory—jointly owned.[17] Yet even if the formal agreement with the bank appears to create a "joint account" or "joint and survivorship account," the account holders may not have intended the legal consequences that accompany a true joint tenancy. Depositor D might open a joint account with her son S so that S can handle her financial affairs; or D might plan to use the account as a will substitute, intending that S have no rights in the account proceeds until D's death.

Accordingly, the nature of a joint account turns on the intent of the parties, not the terms of the agreement with the bank. In applying this principle, many states follow two helpful principles contained in the Uniform Probate Code. First, during the lifetime of the account holders, the amount on deposit is presumed to belong to each party in proportion

[14] For discussion of the benefits of joint tenancies, see Regis W. Campfield, *Estate Planning for Joint Tenancies*, 1974 Duke L.J. 669, 671–73.

[15] For example, one author noted that 85% of deeds recorded by married couples in California created joint tenancies. Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 928 (1983).

[16] However, there is a risk in most states that one cotenant could defraud the other by secretly executing a severance deed. *See* § 10.04[A][1].

[17] N. William Hines, *Personal Property Joint Tenancies: More Law, Fact, and Fancy*, 54 Minn. L. Rev. 509, 574 (1970).

to his or her contribution to the account, absent clear and convincing evidence of a contrary intent.[18] In effect, during life the account is treated like a tenancy in common, each party owning a fractional share based on actual contributions. Second, the amount remaining on deposit at the death of an account holder belongs to the surviving party or parties, unless the terms of the account specify otherwise.[19] The law presumes the parties intended the right of survivorship that characterizes a joint tenancy.

[C] Tenancy by the Entirety

[1] Characteristics

The *tenancy by the entirety*—now abolished in many states—is a medieval relic.[20] Historically, the law viewed a husband and wife as a single legal unit controlled by the husband. Under this logic, a married couple could not hold title as tenants in common or joint tenants because a wife had no existence as a legal person. Thus, at common law, every conveyance or devise to a husband and wife was deemed to create a tenancy by the entirety that vested title in the spouses as a unit, without any individual shares.[21] A valid tenancy by the entirety required the four unities of time, title, interest, and possession, plus the fifth unity of a valid marriage.

Like the joint tenancy, the tenancy by the entirety provides a right of survivorship. But a tenancy by the entirety is a far more durable estate because it can be terminated[22] only by divorce of the couple, death of one spouse, or the agreement of both spouses. One spouse cannot unilaterally break the required unities and thereby transform the estate into a tenancy in common. However, if one spouse murders the other, the tenancy by the entirety is severed and the murderer cannot enforce the right of survivorship.[23]

Originally, this estate gave the husband exclusive possession of the land and the sole right to the rents and profits it produced.[24] The husband could transfer this possessory right to a third party over his wife's objection, but could not defeat the wife's right of survivorship. In most jurisdictions, therefore, the husband's creditors could levy on property held in tenancy

[18] Unif. Probate Code § 6-211.

[19] Unif. Probate Code § 6-212. *Cf.* Seman v. Lewis, 830 P.2d 1294 (Mont. 1992); Wright v. Bloom, 635 N.E.2d 31 (Ohio 1994).

[20] *See generally* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U. L. Rev. 35.

[21] Thus, they held "per tout et non per my," that is, "by the whole and not by shares."

[22] There is a split of authority on whether a tenancy by the entirety continues after the property is destroyed or sold. *See, e.g.*, Hawthorne v. Hawthorne, 192 N.E.2d 20 (N.Y. 1963) (estate did not attach to fire insurance proceeds after destruction of dwelling).

[23] Estate of Grund v. Grund, 648 N.E.2d 1182 (Ind. Ct. App. 1995).

[24] The common law view persisted with remarkable vigor, even in states such as Massachusetts. *See, e.g.*, D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976) (state law giving husband sole control over family home owned in tenancy by the entirety did not constitute gender discrimination that violated the wife's rights to due process or equal protection).

by the entirety to satisfy his debts. As one court admitted, "[i]t is possible that a wife might receive no benefits at all from land held by the entireties if she predeceases her husband."[25] The later Married Women's Property Acts (*see* § 11.03[B]) largely redressed this imbalance by vesting control equally in both spouses.

[2] Creation

The tenancy by the entirety is recognized in about half of the states. Many of these states still follow the common law presumption that any conveyance or devise to a married couple creates a tenancy by the entirety. In other jurisdictions that recognize the estate, however, the intent to create a tenancy by the entirety must be clearly expressed (e.g., "to A and B as tenants by the entirety").

Moreover, most jurisdictions still require the traditional five unities: time, title, interest, possession, and marriage. The principal exception to this rule permits one spouse to create a tenancy by the entirety by a direct conveyance to both spouses, even though the unities of time and title are absent. If W, married to H, holds fee simple absolute in Blueacre as her sole property, she can create a tenancy by the entirety by conveying "to W and H as tenants by the entirety."

What if a grantor attempts to create a tenancy by the entirety in two unmarried persons? Some states consider the resulting estate to be a joint tenancy, reasoning that it best approximates the grantor's intent. Other states apply the default standard, construing the estate as a tenancy in common.

[3] Transferability

The dominant characteristic of the estate is that neither spouse possesses a separate share; rather, the couple as a unit owns the entire estate. Thus, under traditional theory, the consent of both spouses was required to convey the estate. But, given his historical control, the husband could transfer his right of survivorship and the right to lifetime possession (including rights to future income), subject to the wife's right of survivorship.

However, the Married Women's Property Acts (*see* § 11.03[B])—adopted in all common law marital property states—have eliminated the husband's right of exclusive control. Under these statutes, either spouse has the power to manage and control marital property, including property held in tenancy by the entirety.[26]

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[25] Dearman v. Bruns, 181 S.E.2d 809, 811 (N.C. Ct. App. 1971).

[26] Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650 (Mass. 1993) (husband can mortgage property).

[4] Rights of Creditors

[a] A Shield Against Creditors?

Does the modern tenancy by the entirety shield property from creditors' claims? As a potential source of debtor protection, the estate has enjoyed an undeserved reprieve from extinction in some states.

The legal muddle stems from judicial efforts to reconcile tenancy by the entirety theory with the provisions of the Married Women's Property Acts. The basic theme of these Acts is equality: each spouse owns, manages, and controls his or her separate property, which is subject to the claims of that spouse's creditors. For example, if H and W are married, H's wages (and all property acquired with those wages) are his separate property; H's creditors can levy on H's property, but not on W's property.

Before these reform statutes, the rights of creditors in tenancy by the entirety property were relatively clear. Because the husband controlled the property, creditors could levy on it to satisfy his debts; as a practical matter, the husband's debts were family debts, since the wife was deemed incompetent to contract. After the Married Women's Property Acts, however, states still recognizing the estate wrestled with a dilemma. If a wife is now entitled to the equal use and enjoyment of tenancy by the entirety property, how can that property be subject to the claims of her husband's creditors without her consent? Conversely, how can the wife's creditors levy on tenancy by the entirety property over the husband's objection? Most states resolve this dilemma by concluding that the creditor of an individual spouse cannot reach tenancy by the entirety property. Some states allow creditors to execute on the right of survivorship of the debtor spouse only,[27] while others permit creditors to sell the debtor spouse's interest subject to the non-debtor spouse's right of survivorship.

[b] Majority Approach: *Sawada v. Endo*

The Hawaii Supreme Court's decision in *Sawada v. Endo*[28] illustrates the majority view. There, the plaintiff Sawadas sued to cancel a fraudulent conveyance in order to collect on a personal injury judgment. Defendant Endo asserted that at the time of the conveyance, the property was held in tenancy by the entirety, and thus not subject to execution by creditors.

The court reasoned that the effect of the Married Women's Property Acts was to convert the tenancy by the entirety into a "unity of equals and not of unequals as at common law."[29] Accordingly, neither spouse owned a separate interest that could be conveyed to, or reached by, creditors. The court noted that this result protected the integrity of the family unit by ensuring that real property was available as housing and as security for educational and other expenses. Unfairness to creditors was avoided, the

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[27] United States v. 1500 Lincoln Ave., 949 F.2d 73 (3d Cir. 1991); United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990).

[28] 561 P.2d 1291 (Haw. 1977).

[29] *Id.* at 1295.

court observed, because they (a) were charged with notice of a spouse's limited estate in deciding whether to extend credit, or (b) never relied on the asset in the first place.

[c] Reflections on the *Sawada* Approach

The majority approach, as exemplified by *Sawada*, may be criticized on several grounds.[30] Initially, one may ask whether state legislatures—bent on achieving gender equality between spouses—actually intended to curtail or frustrate creditors' rights. Certainly this result is not compelled by the common law tradition. Indeed, perhaps a more logical outcome would be to conclude that the equality resulting from Married Women's Property Acts subjects tenancy by the entirety property to claims of creditors against either spouse.[31]

The "family asset protection" rationale underpinning *Sawada* is overbroad. The majority rule insulates all property held in tenancy by the entirety from creditors, far beyond the amount required for family housing or support. For example, assume H and W hold title to a $5,000,000 beachfront estate and a $20,000,000 shopping center in tenancy by the entirety. Under the majority approach, neither asset can be reached by creditors. A more narrowly tailored doctrine—such as the homestead protection available in many states to insulate the ordinary family home from creditors—would be preferable.[32] In any event, why should certain property owners be exempt from creditors' claims, when wage earners too poor to own land are subject to wage garnishment for their debts?

Finally, the *Sawada* court may underestimate the impact on creditors. Victims of tortious conduct like the Sawadas obviously cannot protect themselves in advance by evaluating the creditworthiness of future tortfeasors. And to suggest that the Sawadas or other involuntary creditors cannot recover because the property "was not a basis of credit" (i.e., was not relied upon in deciding to extend credit) is disingenuous. The court seemingly vests tortfeasors with de facto immunity from suit as long as their assets are held in tenancy by the entirety.

[5] Requiem for the Tenancy by the Entirety?

The tenancy by the entirety may be slowly withering away. Once the law finally acknowledged that married women were legally capable of owning property, the archaic rationale for the estate vanished. Many states have abolished the tenancy by the entirety and England—where the estate originated—banned it altogether in 1925.

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[30] For an excellent pre-*Sawada* critique of the majority rule, see Richard G. Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. Indus. & Com. L. Rev. 197, 205–07 (1959).

[31] *See* King v. Greene, 153 A.2d 49 (N.J. 1959) (sheriff's deed following execution sale against tenancy by the entirety property to satisfy wife's debt effectively conveyed, inter alia, wife's right of survivorship).

[32] The nature of any homestead protections varies widely among states. California, for example, provides exemptions ranging from $50,000 to $150,000, depending on age, income, disability, and other factors. Cal. Civ. Proc. Code § 704.730.

Certainly, the estate's new popularity as a debt avoidance device has temporarily arrested its decline in some states. But as the resultant creditor unfairness becomes more apparent, the demise will continue. In the interim, the patchwork of widely varying state approaches will undoubtedly provoke both confusion and injustice.

One interesting example is the problematic impact of this estate on the national battle against drug trafficking operations. Under federal law, property used to sell illegal drugs, or acquired with proceeds from such sales, is subject to civil forfeiture by government agencies; yet property owned by an "innocent" owner cannot be seized.[33] If property is held in joint tenancy or tenancy in common, the concurrent interest of the guilty spouse can be readily seized; the innocent spouse becomes either a cotenant with the government or receives half of the sales proceeds. But what if the property is held in tenancy by the entirety? Most courts conclude that only the survivorship right of the guilty spouse—whose value is speculative and uncertain—can be forfeited.[34] Accordingly, the innocent spouse is entitled to lifetime use of the property, together with a right of survivorship. This disparity may tend to encourage drug dealers to relocate to states that recognize the tenancy by the entirety.[35]

§ 10.03 Rights and Duties of Cotenants

[A] Relationship Between Cotenants

The precise relationship between cotenants defies easy definition.[36] In some respects, the law treats them as relatively independent actors; for example, one cotenant cannot contract on behalf of other cotenants.

In other respects, the law seems to impose stringent duties. Cases and textbooks often recite that cotenants who receive their interests from a common source at the same time (e.g., from a single deed or will) owe fiduciary duties to each other; this universe would include all joint tenants and most tenants in common. Yet the assertion that a broad fiduciary relationship exists among most cotenants—like partners or trustees—is an overstatement. Most of the decisions making this claim arise in one situation: where a cotenant has acquired sole title to the cotenancy property through a foreclosure, tax sale, or other involuntary sale.[37] In that

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[33] 21 U.S.C. § 881(a).

[34] *See, e.g.*, United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990).

[35] *See also* United States v. Craft, 535 U.S. 274 (2002) (holding that federal tax lien attached to debtor/husband's interest in land held in tenancy by the entirety, pursuant to Internal Revenue Code, even though state law would prevent private creditor from attaching husband's interest).

[36] *See* Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants*, 21 Ariz. L. Rev. 1015 (1979).

[37] Also, when a cotenant in possession attempts to claim sole title by adverse possession, many courts justify use of a more rigorous adverse possession standard by characterizing the cotenant as a fiduciary.

specialized context, the acquiring cotenant is often deemed to hold title as a de facto trustee for the benefit of the other cotenants, as long as they promptly pay their proportionate share of the acquisition price.[38]

However, most decisions hold that—unlike a fiduciary—a cotenant has little or no obligation to affirmatively safeguard the rights of other cotenants, e.g., by repairing a leaky roof or purchasing casualty insurance. Moreover, unlike a fiduciary, a cotenant is normally entitled to exclusive use of the cotenancy property without any duty to compensate other cotenants.

[B] Right to Possession

In theory, each cotenant has an equal right to possession and enjoyment of the whole property, regardless of the size of his or her fractional share.[39] Accordingly, under the majority rule, even a cotenant in exclusive possession of the property is not liable to the other cotenants for rent.[40] If A, B, and C are all tenants in common in Blueacre, and A holds sole possession of the land, in most jurisdictions A is not required to pay rent or other compensation to B or C.

Yet the basic precept that each cotenant has an equal right to possession is little more than a legal fiction. How can multiple cotenants each utilize the entire property simultaneously? Suppose again that A, B, and C are cotenants in Blueacre; A is standing on the property, occupying a particular square foot of land. In hyperbole that defies the laws of physics, the common law rule permits B and C to simultaneously occupy the same square foot of ground. Clearly, the respective possessory rights of A, B, and C conflict; three people cannot stand in the same place.[41]

The common law recognized one major exception to the rule that a cotenant had no duty to pay rent: ouster. *Ouster* occurs when a cotenant in possession refuses the request of another cotenant to share possession of the land.[42] For example, assume cotenant A holds sole possession of

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[38] Laura v. Christian, 537 P.2d 1389 (N.M. 1975) (cotenant pays off mortgage obligation to avoid pending foreclosure sale); Massey v. Prothero, 664 P.2d 1176 (Utah 1983) (cotenant purchases at tax sale).

[39] Thus, if one cotenant leases his interest, the lessee is similarly entitled to an equal right to possession of the whole property. Schwartzbaugh v. Sampson, 54 P.2d 73 (Cal. Ct. App. 1936); Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988).

[40] *See* Martin v. Martin, 878 S.W.2d 30 (Ky. Ct. App. 1994). *But see* Lerman v. Levine, 541 A.2d 523 (Conn. App. Ct. 1988) (applying minority rule that cotenant in possession is obligated to pay rent to other cotenant, even without ouster).

[41] Mastbaum v. Mastbaum, 9 A.2d 51, 55 (N.J. Ch. 1939) ("Two men cannot plow the same furrow.").

[42] Ouster is also established when a cotenant in exclusive possession of the common property claims to hold sole title to the property, adverse and hostile to the rights of other cotenants. *See, e.g.,* Estate of Hughes, 7 Cal. Rptr. 2d 742 (Ct. App. 1992). In addition, some states recognize the special doctrine of "constructive ouster" in the context of divorce proceedings; when mutual antagonism makes it impracticable for spouses to share the family home while a divorce is pending, the spouse who leaves the home is entitled to partial rent from the remaining spouse. *See, e.g.,* Olivas v. Olivas, 780 P.2d 640 (N.M. Ct. App. 1989).

Blueacre; B appears at the front gate to Blueacre and demands that A unlock the gate to allow him to enter and use the land; if A rejects this demand, he has ousted B. As an ousted cotenant, B is entitled to recover his pro rata share of Blueacre's fair rental value from A. On the other hand, if B simply demands that A pay him rent, no ouster occurs when A refuses, because B has failed to demand shared possession.[43]

Professor Evelyn Lewis notes that the majority "no rent liability" rule originated in an agrarian age when property owners typically lived and worked on family farms.[44] The majority rule arguably made sense in that context because ordinary owners had an immediate economic use for cotenancy property; also, the rule tended to encourage the productive use of land. But today, Lewis argues, the rule imposes unjust economic burdens on cotenants who are unlikely to have a personal use for the cotenancy property. At a minimum, she suggests that a cotenant using cotenancy property as a personal residence should be required to pay rent under limited circumstances, e.g., when persons who are already living elsewhere acquire cotenancy interests by devise or intestate succession.

[C] Right to Rents and Profits

Each cotenant is entitled to a pro rata share of rents received from a third person for use of the land.[45] For example, if A, B, and C each own equal shares as tenants in common in Blueacre, and A receives $30,000 in rental income from X for use of the property, B and C are each entitled to $10,000 from A. If A refuses to pay, they may bring an *accounting* action against him to force payment.

Similarly, if a cotenant exploits natural resources on the cotenancy property such as minerals or timber, each cotenant is entitled to a pro rata share of the resulting net profits. In *White v. Smyth*,[46] a tenant in common holding a one-ninth interest mined and sold valuable rock asphalt from the property. When the other cotenants sued for compensation in an accounting action, the defendant asserted that he had removed less than one-ninth of the asphalt, and thus had only taken his fair share, just as he might have done through partition. The Texas Supreme Court ruled that the defendant could not effect a de facto partition through self-help and, accordingly, that each cotenant owned a share in the mined asphalt. The defendant was ordered to pay eight-ninths of his net profits to his cotenants.[47]

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[43] Spiller v. Mackereth, 334 So. 2d 859 (Ala. 1976).

[44] Evelyn A. Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. Rev. 331.

[45] Goergen v. Maar, 153 N.Y.S.2d 826 (App. Div. 1956).

[46] 214 S.W.2d 967 (Tex. 1948).

[47] *But see* Threatt v. Rushing, 361 So. 2d 329 (Miss. 1978) (cotenant may not cut timber without consent of other cotenants).

[D] Liability for Mortgage and Tax Payments

As a general rule, all cotenants are obligated to pay their proportionate share of mortgage, tax, assessments, and other payments that could give rise to a lien against the property if unpaid.[48] Such payments are considered necessary to prevent the estate from being lost by foreclosure. If one cotenant pays more than a pro rata share, he or she may recover the excess in a *contribution* action.[49] For example, suppose K and L are tenants in common in Greenacre, each owning a one-half share. If Greenacre is subject to a mortgage requiring a payment of $2,000 per month, and K is forced to cover these costs for one year ($24,000) because L refuses to pay, K is entitled to recover half of his payments ($12,000) from L.[50]

However, in most states, a special rule applies to the cotenant in sole possession of the property: the cotenant cannot recover for these payments unless they exceed the reasonable rental value of the property.[51] Thus, if the fair rental value of Greenacre is $30,000 per year, and K held sole possession of Greenacre during the year, K cannot recover any part of his mortgage payments from L.[52]

[E] Liability for Repair and Improvement Costs

Under the majority rule, a cotenant who pays for repairs or improvements to the common property is not entitled to contribution from the other cotenants, absent a prior agreement. Thus, if D, a joint tenant in a home known as Whiteacre, pays $15,000 to repair the leaky roof, he cannot sue his cotenants E and F to recover their $10,000 pro rata share. Why not? Cotenants exercising their business judgment may disagree over the necessity, character, extent, and cost of repairs and improvements.[53] If the law permitted contribution actions for such expenditures, courts might be forced to adjudicate multiple lawsuits between the same cotenants over comparatively minor disagreements, consuming undue time, energy, and money.

To break such stalemates, the law provides the remedy of *partition*. Any cotenant who cannot agree with another can permanently end the relationship. Upon partition, a cotenant like D will receive a credit for the excess cost of reasonable repairs he has borne.[54] Improvements are treated

[48] Laura v. Christian, 537 P.2d 1389 (N.M. 1975).

[49] Alternatively, the cotenant may use the excess payment as a credit in an accounting or partition action. For example, if K has received $40,000 in rents from Greenacre, and L sues for an accounting, L will receive only $8,000 ($20,000, representing L's half share of the rents, less the $12,000 credit for payments K made on L's behalf).

[50] A cotenant's failure to pay his pro rata share is normally not considered an abandonment of his interest in the property. Cummings v. Anderson, 614 P.2d 1283 (Wash. 1980).

[51] *See, e.g.,* Barrow v. Barrow, 527 So. 2d 1373 (Fla. 1988); *see also* Esteves v. Esteves, 775 A.2d 163 (N.J. Super. Ct. App. Div. 2001).

[52] *But see* Yakavonis v. Tilton, 968 P.2d 908 (Wash. Ct. App. 1998) (contra).

[53] Posner characterizes this relationship as an example of "the familiar bilateral-monopoly problem." Richard A. Posner, Economic Analysis of Law 74 (6th ed. 2003).

[54] Such repair costs may also be used as a credit in an accounting action brought against the cotenant.

similarly; when partitioning the property, the court will either assign the improved portion of the property to the improving cotenant if feasible, or award that cotenant a credit for the added property value produced by the improvement.

[F] Liability for Waste

In theory, a cotenant is liable for waste when he or she uses the common property in an unreasonable manner that causes permanent injury, under much the same standards that govern life tenants and other owners of present estates accompanied by future interests (*see* § 9.09). Yet the weight of authority treats certain acts by a cotenant that would normally constitute waste—such as extraction of minerals or cutting of timber—simply as sources of income (like rents from third parties) for which he must account to the other cotenants.[55] While such acts are often judicially characterized as "waste," the traditional penalties for waste are not imposed.

§ 10.04 Termination of Concurrent Estates

[A] Severance of Joint Tenancy

[1] Conveyance of Joint Tenant's Entire Interest

In general, a joint tenant has the absolute right to end or "sever" the joint tenancy without the consent (or sometimes even the knowledge) of the other cotenants.[56] The procedure is simple: the joint tenant merely conveys his interest to a third person.[57] For example, if A and B are joint tenants in Greenacre, and B conveys his estate to C, the unities of time and title are broken. This severs the joint tenancy, leaving A and C as tenants in common.

But can B convert the joint tenancy into a tenancy in common without losing his interest in Greenacre? The formal response of English law was "no." B could not convey his interest from himself (as a joint tenant) to himself (as a tenant in common) because the traditional ceremony of feoffment with livery of seisin required two participants; "one could not enfeoff oneself."[58] But indirectly, using one of those ingenious sleight-of-hand tricks that brought flexibility to the common law, the answer was "yes." In a prearranged, sham transaction, B simply conveyed his interest to C (an intermediary called a "straw man"), which severed the joint tenancy, and C conveyed the resulting tenancy in common interest back to B.

[55] *See, e.g.*, White v. Smyth, 214 S.W.2d 967 (Tex. 1948) (cotenant who removed rock asphalt required to account to other cotenants for his net profits); *but see* Chosar Corp. v. Owens, 370 S.E.2d 305 (Va. 1988) (cotenant enjoined from mining coal without consent of other cotenants).

[56] Robert W. Swenson & Ronan E. Degnan, *Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954).

[57] A joint tenancy may be severed when one joint tenant merely enters into a contract to sell his interest. Estate of Phillips v. Nyhus, 874 P.2d 154 (Wash. 1994).

[58] Riddle v. Harmon, 162 Cal. Rptr. 530, 533 (Ct. App. 1980).

Common law courts tolerated this fiction because it facilitated free alienation, and thus encouraged productive use of land. Because the interest was no longer burdened with a right of survivorship, it could be transferred more easily.

Although some states still require use of a "straw man," the modern trend is to allow a joint tenant to terminate the joint tenancy by conveying his interest directly to himself. The rationale for the traditional rule ended in 1677 when the Statute of Frauds effectively replaced livery of seisin with the deed. Moreover, as one court commented, "[c]ommon sense as well as legal efficiency dictate that a joint tenant should be able to accomplish directly what he or she could otherwise achieve indirectly by use of elaborate legal fictions."[59]

Yet the joint tenant's unilateral right to end the joint tenancy poses a hidden peril. As Professor Samuel Fetters observed, "one joint tenant, while secure in his own survivorship right, can defraud his cotenant of his survivorship right with impunity."[60] Assume that H and W take title to Redacre as joint tenants, but that unscrupulous H secretly executes a deed conveying his interest to B, his brother; H places the deed in his personal safe deposit box. If H dies first, the deed will be seen as having severed the joint tenancy during H's lifetime; thus W is a mere tenant in common with B. On the other hand, if W dies first, H simply destroys the hidden deed and acquires sole title to Redacre.[61]

What if A, B, and C are all joint tenants in Greenacre and C conveys her interest to D? D is a tenant in common because he does not share the unities of time and title with A and B. But C's conveyance does not affect the unities *between* A and B; thus, *as between themselves* A and B are still joint tenants. Greenacre is now held in a hybrid form of ownership: D owns a one-third interest as a tenant in common, while A and B each own a one-third interest as joint tenants.[62] Assuming A dies first, B and D will then be tenants in common, B owning a two-thirds interest and D retaining his one-third interest.

[2] Lease or Mortgage Executed by One Joint Tenant

When will a cotenant's transfer of less than her entire interest sever a joint tenancy? This issue arises in two main contexts: leases and mortgages.

It is unclear whether a joint tenancy is severed when one joint tenant leases the common property. "[T]he problem is like a comet in our law: though its existence in theory has been frequently recognized, its observed

[59] *Id.* at 534.

[60] Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights,* 55 Fordham L. Rev. 173, 175 (1986).

[61] *See* Crowther v. Mower, 876 P.2d 876 (Utah Ct. App. 1994) (joint tenant wife secretly conveyed her interest to child by a prior marriage). *But see* Cal. Civ. Code § 683.2 (allowing unilateral severance only if severing deed is recorded before grantor's death or shortly thereafter).

[62] Jackson v. O'Connell, 177 N.E.2d 194 (Ill. 1961).

passages are few."[63] *Tenhet v. Boswell*,[64] an influential decision by the California Supreme Court, held that while a joint tenant had power to execute a valid lease, the lease did not effect a severance.[65] Thus, the lease was subject to the other cotenant's right of survivorship and ended when the lessor cotenant died. While the reasoning of the *Tenhet* court is somewhat circular, the decision seems to rest on the policy of protecting the good faith expectations of the nonleasing cotenant that her survivorship right will endure. Some decisions follow the *Tenhet* approach. Others conclude that a lease effects a permanent severance, because the unity of interest is lost; this result is presumably based on the policy of encouraging alienability by eliminating the survivorship right.

The law governing the effect of a mortgage on a joint tenancy, in contrast, is well developed. In states that follow the traditional view that a mortgage transfers legal title to the mortgagee, a mortgage executed by one cotenant effects a severance. This result is usually justified with the formalistic conclusion that the unities of time and title have been broken. As a policy matter, recognizing a severance protects the mortgagee (and thus presumably enhances the availability of credit) by ensuring that the mortgage will survive the death of the mortgagor joint tenant. Conversely, in states that follow the modern approach that a mortgage merely creates a lien, most courts find that no severance has occurred, again based on the formalistic rationale that the unities are intact.[66]

[3] Agreement Between Joint Tenants

A joint tenancy may be severed by agreement of all cotenants. The issue arises most commonly in divorce proceedings that result in a property settlement agreement. Does such an agreement sever a joint tenancy? Most courts appear to follow a presumption that a divorcing spouse does not intend to preserve any right of survivorship in the other spouse, and thus tend to interpret ambiguous agreements as terminating the joint tenancy.[67] However, an agreement between joint tenants that merely provides that one of them will occupy the common property does not effect a severance.

[B] Partition

The traditional "escape hatch" from the confines of cotenancy is partition. Any tenant in common or joint tenant may sue for judicial partition, which ends the cotenancy, distributes the property among the former cotenants as solely-owned property, and provides a final accounting among them. Absent a contrary agreement, each cotenant has a right to obtain

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[63] Tenhet v. Boswell, 554 P.2d 330, 334–35 (Cal. 1976).

[64] 554 P.2d 330 (Cal. 1976).

[65] *See* Swartzbaugh v. Sampson, 54 P.2d 73 (Cal. Ct. App. 1936).

[66] *See, e.g.*, Brant v. Hargrove, 632 P.2d 978 (Ariz. Ct. App. 1981); People v. Nogarr, 330 P.2d 858 (Cal. Ct. App. 1958); Harms v. Sprague, 473 N.E.2d 930 (Ill. 1984).

[67] Mann v. Bradley, 535 P.2d 213 (Colo. 1975) (agreement impliedly severed joint tenancy). *But see* Porter v. Porter, 472 So. 2d 630 (Ala. 1985) (divorce decree did not sever joint tenancy).

partition—without proving any cause or reason—regardless of any inconvenience, burden, or damage to other cotenants.[68] Why? The conventional explanation is that free partition is central to the efficient use of land. If cotenants are stalemated by mutual disagreement about the future of their common property,[69] the land may not be developed for its most productive use. This perspective, which views all land as a relatively fungible commodity, ignores Professor Margaret Radin's concern for respecting the emotional attachment that many owners feel toward family residences and other "personhood" property.[70]

There are two basic types of partition: *partition in kind* and *partition by sale*. Partition in kind—the preferred technique—is a physical division of the property into separate parcels.[71] If E, F, and G all own equal shares as tenants in common in Redacre, a 300-acre unimproved farm tract, a partition in kind would probably assign each one sole ownership of a 100-acre parcel.[72] Of course, the value of the parcels might not be equal due to differences in soil quality, topography, access, or water availability; a court can equalize the distribution by ordering a money payment called *owelty*.

However, if physical division of the land is impossible, impracticable, or inequitable, a court may order partition by sale. It is usually impracticable, for example, to divide a single-family home. Under this technique, the property is sold and the sales proceeds are divided among the cotenants according to their respective shares. Partition by sale typically forces poorer cotenants off their land simply because they cannot afford to bid successfully.[73]

The right to partition, while strongly favored in the law, is not absolute. An agreement to restrict partition will be upheld if the restraint on alienation it imposes is reasonable under the circumstances.[74] Moreover, statutes universally bar a condominium owner from obtaining partition; otherwise, any owner could effectively destroy a condominium project.

[68] *But see* Harris v. Crowder, 322 S.E.2d 854 (W. Va. 1984) (husband's creditors can reach his joint tenancy interest and force partition only if wife's rights are not prejudiced).

[69] Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988).

[70] Margaret J. Radin, *Property and Personhood,* 34 Stan. L. Rev. 957 (1982).

[71] *See, e.g.,* Delfino v. Vealencis, 436 A.2d 27 (Conn. 1980) (requiring partition in kind); Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004) (stating preference for partition in kind); Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004).

[72] *See* Schnell v. Schnell, 346 N.W.2d 713 (N.D. 1984) (discussing factors considered for partition in kind of 4,420 acre ranch).

[73] *See* John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies,* 27 B.C. L. Rev. 755 (1986).

[74] Michalski v. Michalski, 142 A.2d 645 (N.J. Super. Ct. App. Div. 1958).

Chapter 11

MARITAL PROPERTY

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§ 11.01 Gender and Marital Property

The historic foundation of American marital property law is gender bias. England's male-dominated society produced a body of common law that was overtly oriented in favor of men and against women. Broadly speaking, the law allowed men to exercise almost total control over marital property during the marriage, upon divorce, and at death. Most American states initially adopted this common law view.[1] Since then, piecemeal reforms have propelled this approach toward greater gender equality. Many critics contend that even this reformed common law approach is still profoundly flawed by gender inequality.

The principal alternative approach—adopted in eight states—is the community property system. Under this view, marriage is seen as an economic partnership between wife and husband, with each one having an equal interest in the resulting marital assets during marriage, upon divorce, and at death. The Uniform Marital Property Act, modeled on community property principles, may ultimately bridge the gap between these two approaches.

The movement toward a gender-neutral marital property law system is concerned more with practical economics than with abstract idealism. For example, under the traditional common law view, the spendthrift husband could waste family property, leaving his wife and children without financial support. Similarly, upon divorce the husband received the bulk of the family property, again endangering the financial security of his wife and children.[2] From the standpoint of utilitarian theory, it is desirable to craft a marital property system that ensures that family assets are available to support all family members.

§ 11.02 Traditional Common Law System

[A] Gender Bias and the Common Law

Marital property presents the most striking example of gender bias found in the common law. Traditionally, as Blackstone summarized, "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage."[3] Upon marriage, a woman

[1] *See generally* Marylynn Salmon, Women and the Law of Property in Early America (1986).

[2] Even under modern marital property law, the financial condition of men tends to improve after divorce, while that of women tends to decline. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 Geo. L.J. 2227 (1994).

[3] J.W. Ehrlich, Ehrlich's Blackstone 83 (1959). *See also* Dibble v. Hutton, 1 Day (Conn.) 221 (1804) (invalidating contract between husband and wife concerning sale of jointly owned land because under "the common law, the husband and wife are considered as one person in law, the existence of the wife being merged into that of the husband").

lost her status as a legal person, and with it the right to control most of her own property. Under the doctrine of *coverture*, she became a dependent (a "femme covert") entitled to her husband's protection and support, and obligated in return to provide domestic services for him. Women were viewed as physically, mentally, and morally inferior to men. Thus, the husband's legal power over his wife "resembled a guardianship of an incompetent."[4]

[B] Rights During Marriage

The husband obtained a life estate in all freehold lands that his wife held at the time of marriage or acquired later, called an estate jure uxoris. He was accordingly entitled to sole possession of these lands during the marriage and to receive all rents and profits that they produced. A wife could regain control over her lands only upon divorce or the husband's death. In addition, the personal property owned by the wife at marriage or acquired by her later became the husband's property, except for her clothing and jewelry. For example, if both H and W worked outside of the home, the earnings of both were owned by H.

[C] Rights Upon Divorce

When divorce occurred—which was relatively rare—property was divided between the spouses according to who held title. Whether the husband was still obligated to support the wife effectively hinged on whether the wife was at fault in causing the divorce, e.g., through infidelity. The blameless wife was entitled to continued support from the husband, called alimony. The blameworthy wife, in contrast, received no further support.

[D] Rights Upon Death

[1] Dower

Suppose A died, holding fee simple absolute in the family farm, and was survived only by his wife B and son C. Under the rules governing disposition of real property upon death, the farm would descend to C, not B; a widow was not considered an heir. C might support B thereafter, but such support was not assured (e.g., what if B was not C's mother, but rather A's second wife?). How could B survive?

The common law met this concern by giving the widow *dower*—a special life estate in one-third of her deceased husband's qualifying real property. During the marriage, the wife had a protected interest known as "inchoate dower" in all freehold lands in which the husband had an estate that could be inherited by the wife's issue. Thus, all fee simple estates and most fee tail estates[5] that the husband held at any time during the marriage were

[4] Jesse Dukeminier & James E. Krier, Property 324 (2d ed. 1988).

[5] If H held property in "fee tail special" (an estate that limited its descent to the children of a specified wife, say W1), then it would not be inheritable by the children of W2, H's second wife; W2 would have no dower rights in it.

subject to dower.[6] Without the wife's consent, the husband could not voluntarily transfer these interests to others, nor could creditors seize them to satisfy the husband's debts. Upon the husband's death, the widow's dower became "consummate," and one-third of the qualifying lands were set aside for her lifetime use. In theory, the widow could support herself by either leasing these lands to others or farming them herself.

Today dower is virtually obsolete.[7] Almost all states have abolished the doctrine in favor of more effective techniques for protecting the surviving widow.[8] Even in its original form, the limitations of dower were clear. Unless the husband owned a qualifying estate in farm land or other income-producing real property, the widow might receive little practical benefit (e.g., imagine the widow holding a life estate in one-third of the family home). Over time, as family wealth increasingly took the form of stocks, bonds, cash, and other personal property—to which dower did not apply—the utility of the doctrine diminished.

[2] Curtesy

When a wife died before her husband, the common law provided the surviving husband with *curtesy*, the counterpart of dower. Curtesy was a special life estate the husband received in real property that his wife held in either fee simple or fee tail. While dower provided the wife with a life estate in only one-third of her husband's qualifying lands, curtesy gave the husband a life estate in all such lands held by his wife. Again unlike dower, curtesy arose only if the marriage produced issue capable of inheriting the wife's lands. Upon the birth of such issue, the husband received "curtesy initiate" in the wife's qualifying lands, which precluded his wife from transferring any interest in them without his consent. If his wife predeceased him, the husband acquired "curtesy consummate" upon her death. Like dower, curtesy has been abolished in almost all jurisdictions.

§ 11.03 Modern Common Law System

[A] Statutory Reforms

The modern common law approach to marital property—which prevails in most states—bears little resemblance to its ancestor. Dramatically reshaped by two waves of statutory reforms, it increasingly resembles the community property system. At some point, the two systems will probably converge, creating uniform standards in all states.

[6] A prospective husband could not evade his future wife's dower rights by secretly conveying his property to another before the marriage; this might be considered a fraudulent conveyance in contemplation of marriage. *See* Strong v. Wood, 306 N.W.2d 737 (Iowa 1981).

[7] *See, e.g.*, Opinion of the Justices, 151 N.E.2d 475 (Mass. 1958).

[8] *But see* Pezza v. Pezza, 690 A.2d 345 (R.I. 1997) (widow's statutory right to life estate in decedent/husband's real property superceded by husband's inter vivos conveyance of property to trust).

[B] Rights During Marriage: Married Women's Property Acts

In the nineteenth century, reform legislation called the "Married Women's Property Acts" eroded much of the anachronistic, gender-based system that governed property rights during marriage.[9] Coverture was abolished; women were allowed to retain control of their property after marriage. Over time, all common law property states acknowledged the legal rights of married women to enter into contracts and to acquire and control property on terms generally equal to men. Accordingly, a spouse was not liable to creditors for non-marital debts incurred by the other spouse.[10] Professor Richard Chused has suggested that gender equality was not the exclusive impetus for these reforms; he notes that they were at least partly enacted to shield family property from the husband's creditors.[11]

Still, the result was a marital property system that—at least in theory—provides wife and husband with the legal opportunity to enjoy equal rights during marriage. The foundation of the reformed system is simple: property is owned by the spouse who acquires it. For example, consider rights to property that each spouse owns before marriage. If W already owns a farm worth $200,000 when she marries H, W retains complete control over this property after marriage. In the same manner, after marriage H continues to own the $100,000 stock portfolio that he previously owned. Similarly, each spouse owns whatever property he or she acquires during the marriage, absent a gift to the other spouse.

In practice, however, the promise of gender equality remains unfulfilled. Assume H and W are penniless when they marry. If H now begins earning wages from employment outside the home, these earnings—and all other assets purchased from them—are viewed as his property. W similarly has the legal right to own any wages she earns from outside employment. Yet during the nineteenth and twentieth centuries, married women were much less likely to work outside the home than were married men. Thus, if H works outside the home for 20 years, he "owns" his resulting wages and the assets they produce: the family home, car, furniture, bank account, and so forth. If W works only inside the home, the system assigns no monetary value to her labors; W owns nothing, unless H makes her a gift of his property. Under this model, H holds almost as much control over marital property as coverture formerly provided.

As married women increasingly work outside the home, this imbalance has lessened. Even for working women, however, inequality persists because husbands statistically earn more than wives.

[9] Richard H. Chused, *Married Women's Property Law: 1800–1850,* 71 Geo. L.J. 1359 (1983).

[10] For discussion of the impact of the Married Women's Property Acts on property held in tenancy by the entirety, *see* § 10.02[C][4].

[11] Richard H. Chused, *Married Women's Property Law: 1800–1850,* 71 Geo. L.J. 1359 (1983).

[C] Rights Upon Divorce: Equitable Distribution

[1] Toward Gender Equality

The late twentieth century brought revolutionary change to the law governing the property rights of divorcing spouses. In the 1970s, common law states began abandoning the traditional approach in favor of statutes requiring *equitable distribution.* Today all common law states follow this view, which—like the community property system—rests upon the foundation that marriage is an economic partnership.

Under this approach, the divorce court distributes property between wife and husband based on equitable principles after considering a variety of criteria relating to each spouse's needs, abilities, and circumstances.[12] Although these criteria vary considerably from state to state, most statutes direct the court to take into account factors such as:

(1) the income and property of each spouse at the time of marriage;

(2) the duration of the marriage;

(3) the age and health of each spouse;

(4) the income and property of each spouse when the divorce action begins;

(5) the occupation and vocational skills of each spouse;

(6) any antenuptial agreement;

(7) the special needs of each spouse;

(8) the contribution of each spouse to the marriage, in terms of both acquisition of assets and provision of household services;

(9) the dissipation of assets by each spouse during the marriage;[13] and

(10) the opportunity of each spouse for future employment.

As courts apply these equitable distribution criteria, there is a clear trend toward equal distribution.[14] For example, statutes in some states presume that equal distribution is equitable, absent contrary criteria. Even without statutory guidance, many courts appear to utilize equal distribution as a starting point in determining an equitable result, by analogy to community property principles. Like all legal standards involving numerous criteria,

[12] Similarly, the court may temporarily alter the respective property rights of the spouses during the pendency of divorce proceedings. *See, e.g.,* Cote v. Cote, 599 A.2d 869 (Md. Ct. Spec. App. 1992) (court order restraining husband from entering family home due to danger of domestic violence against wife during divorce proceeding did not unconstitutionally "take" his rights in house; he received compensating benefit by not bearing cost of finding alternate housing for wife).

[13] *See, e.g.,* Gastineau v. Gastineau, 573 N.Y.S.2d 819 (Sup. Ct. 1991) (husband's breach of his contract as a professional football player was a dissipation of marital assets).

[14] Child support concerns may militate against equal distribution. *See, e.g., In re* Marriage of King, 700 P.2d 591 (Mont. 1985) (custodial parent properly awarded entire value of family home in lieu of child support from spouse, a professional gambler whose future income was uncertain).

the equitable distribution factors are difficult to apply in practice, leading some courts to adopt equal distribution as the easiest path.[15]

[2] Marital Property Defined

[a] General Principles

There are three different approaches to defining the "property" that is subject to equitable distribution.[16] In some states, the statute covers all property owned by either spouse, acquired at any time and from any source. A second group of states follows a somewhat more restrictive definition, limiting the scope of marital property to property acquired during marriage by either spouse from any source (including property obtained by gift, bequest, devise, or descent). Finally, a number of states apply equitable distribution only to property acquired from income earned during the marriage; this is essentially the same definition followed in community property states.

[b] Educational Degrees/Professional Licenses

Are educational degrees, professional licenses, or careers "property" that is subject to equitable distribution upon divorce? Beginning in the 1970s, as "no fault" divorce laws swept the nation, courts have struggled with this difficult issue.

[i] Majority Approach: Not Marital Property

Most jurisdictions refuse to recognize degrees, licenses, or the like as property.[17] An illustrative case is *In re Marriage of Graham*.[18] Anne Graham worked full-time as an airline stewardess for six years, financing the education of her husband Dennis Graham; Dennis obtained an undergraduate degree and a master's degree in business administration. Shortly thereafter, upon divorce, Anne petitioned the court for a share in the monetary value of Dennis's M.B.A. degree; the trial court awarded Anne

[15] *But see* Painter v. Painter, 320 A.2d 484 (N.J. 1974) (upholding 80% award to husband, despite wife's argument that statute was unconstitutional as vague and uncertain).

[16] Many divorce cases pose the basic question of what is "property" in the first place. For example, does it extend to graduate degrees, professional licenses, goodwill, pension rights, or disability payments? *See, e.g.*, Morrison v. Morrison, 692 S.W.2d 601 (Ark. 1985) (disability retirement payments are marital property); Ciliberti v. Ciliberti, 542 A.2d 580 (Pa. Super. Ct. 1988) (true disability payments are not marital property).

[17] *See, e.g.*, Simmons v. Simmons, 708 A.2d 949 (Conn. 1998) (medical degree not marital property). Interestingly, however, many courts hold that goodwill produced by a spouse's professional activities is marital property subject to judicial distribution. *See, e.g.*, Dugan v. Dugan, 457 A.2d 1 (N.J. 1983). *But see* Prahinski v. Prahinski, 582 A.2d 784 (Md. 1990) (contra).

[18] 574 P.2d 75 (Colo. Ct. App. 1978). *See also* Todd v. Todd, 78 Cal. Rptr. 131 (Ct. App. 1969) (law degree not marital property); Goldstein v. Goldstein, 414 S.E.2d 474 (Ga. 1992) (rights of attorney/husband under contingent fee agreement not marital property).

$33,134, an amount equal to 40% of the statistically-anticipated future earnings attributable to the degree.[19]

The Colorado Supreme Court, however, concluded that an educational degree "is simply not encompassed even by the broad views of the concept of 'property.'"[20] In a widely-cited passage, the court reasoned that the degree had none of the traditional characteristics of property: it had no exchange value; was personal to the holder; could not be transferred to another; ended on the death of the holder and was not inheritable; and could not be assigned, sold, transferred, conveyed, or pledged. Rather, it was "simply an intellectual achievement that may potentially assist in the future acquisition of property."[21]

The court's formalistic approach to the definition of property—widely imitated by other courts—is troubling. For example, many types of property have no exchange value (e.g., old love letters); some property rights expire when the holder dies (e.g., a life estate); and often property rights cannot be transferred (e.g., a tenancy for years that is expressly not transferable).

Instead, the result in *Marriage of Graham* and similar decisions following the majority rule is better explained by two themes that lurk below the surface of the opinion. One theme revolves around whether human abilities should be considered property subject to private ownership. In part, the *Graham* court seems to suggest that Dennis' education (an "intellectual achievement") was attributable to the inherent abilities he possessed before marriage. For example, if Dennis still had two kidneys, while Anne had only one left, a court would not classify the extra kidney as marital property subject to equitable distribution, and the same rationale might be applied to an education. The other theme is the practical difficulty of appraising the value of an education. Statistics may have little relevance in the individual case. Dennis' future income will be influenced by a wide range of factors other than his education (e.g., his health, his interpersonal skills, his employer's solvency). Some courts express concern that any such valuation attempt is largely speculative.[22]

[ii] New York Approach: Marital Property

In contrast, it is well-settled in New York that educational degrees, professional licenses, and other career-enhancements are marital property subject to equitable distribution. The New York statute establishing the equitable distribution criteria directs the court to consider, among other things, the contribution of a spouse to "the career or career potential of the other party."[23] It further requires consideration of the contributions made

[19] In concluding that Anne was entitled to a 40% share, the trial court assigned no importance to the housework she performed. It reasoned that she worked 40 hours per week, while Dennis studied 40 hours and worked 20 hours each week. Anne accordingly received a 40/100ths share.

[20] *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. Ct. App. 1978).

[21] *Id.*

[22] *See, e.g.,* O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985) (Meyer, J., concurring).

[23] N.Y. Dom. Rel. Law § 236(B)(5)(d)(6).

to the acquisition of marital property by the spouse not holding title to it, including the "expenditures and contributions and services as a spouse, parent, wage earner and homemaker."[24]

The leading decision interpreting this standard is *O'Brien v. O'Brien*,[25] presenting facts strikingly similar to those in *Marriage of Graham*. The wife worked as a teacher for nine years, allowing her husband to finish his undergraduate degree, graduate from medical school, and complete internship training. Two months after receiving his medical license, the husband initiated divorce proceedings. The trial court awarded the wife $188,800, representing 40% of the value of her husband's medical license.

The court had little difficulty affirming this result. It rejected plaintiff's plea—based on decisions like *Marriage of Graham*—that the license did not satisfy the traditional definition of property, reasoning that the applicable New York statute created a "new species of property" unknown at common law. The court observed that a working spouse often contributes substantial income and sacrifices personal educational, career, and childbearing opportunities, all to support the other spouse's pursuit of a professional degree that will ultimately benefit both. Consistent with the premise of equitable distribution that marriage is an economic partnership, it held that the medical license was the product of the parties' joint efforts, and thus marital property. As a secondary basis for its holding, the court noted that—even outside of the statute—a professional license is a "valuable property right" that, for example, cannot be revoked without due process of law.

Six years later, *Elkus v. Elkus*[26] extended *O'Brien* by holding that a plaintiff opera singer's career and celebrity status were marital property. The defendant husband sacrificed his own potential career in order to serve as his wife's voice coach and to care for their children, all of which increased the value of her career. Although plaintiff's successful career was primarily based on an "innate talent," the *Elkus* court reasoned that the appreciation in the value of her career due to the husband's efforts was marital property.

[iii] Alternative Approach: Reimbursement Alimony

Some states embrace a third approach, agreeing that graduate degrees and the like are not property, but awarding "reimbursement alimony" to compensate the supporting spouse for economic sacrifices made during the marriage.[27] Yet this remedy is quite limited. Usually only out-of-pocket contributions to educational expenses such as tuition can be recovered. Thus, for example, if W earned wages during the marriage, using $50,000 from her earnings to pay for H's medical school tuition, she will be able

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[24] *Id.*

[25] 489 N.E.2d 712 (N.Y. 1985).

[26] 572 N.Y.S.2d 901 (App. Div. 1991).

[27] *In re* Marriage of Francis, 442 N.W.2d 59 (Iowa 1989); Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982); Hoak v. Hoak, 370 S.E.2d 473 (W. Va. 1988). *But see* Martinez v. Martinez, 818 P.2d 538 (Utah 1991) (reversing lower court's award of "equitable restitution" to wife for her contributions to husband's medical education).

to recover $50,000 in alimony payments over time. But W's expenditures on rent, food, and other family needs will not be repaid. Moreover, if W worked only inside the family home and raised the couple's children, these non-monetary contributions will be ignored.

[iv] Reflections on the "Degree Dilemma"

The legal scholarship exploring the "degree dilemma" emphasizes the unfairness to women generally if graduate degrees, licenses, and other forms of human capital are not treated as marital property.[28] Young families primarily invest in education or similar human capital, not tangible assets such as land or stocks, and most commonly this investment enhances the career potential of men, not women.[29] Thus, for example, a dissenting justice observed in *Marriage of Graham*: "As a matter of economic reality the most valuable asset acquired by either party during this six-year marriage was the husband's increased earning capacity."[30] The majority rule effectively assigns this asset to the professional spouse, who is usually the husband, to the detriment of the wife.

[D] Rights Upon Death: Elective Share

The *elective share* has replaced dower and curtesy in almost all common law property jurisdictions. The surviving spouse may elect to *either* (a) abide by the terms of the decedent spouse's will *or* (b) take a share (normally one-half or one-third) of all property the decedent owned at death. For example, suppose that H dies owning real and personal property valued at $1,000,000; his will bequeaths $50,000 in stocks to W, his widow, and gives the balance of his property to his cousin C. Under an elective share statute, W may either accept the $50,000 bequest or repudiate the will and receive an elective share, most likely $500,000.[31] Inter vivos gifts made by the decedent to the surviving spouse are normally not considered in this process; thus, for example, W would still receive her elective share even if H had given her $2,000,000 during his lifetime.[32]

Although the size of the elective share varies from state to state, there is a clear trend—presumably influenced by the community property system—toward a one-half share. The 1993 amendments to the Uniform Probate Code reflect this trend.[33] The Code formerly provided for a

[28] *See, e.g.*, Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181 (1981).

[29] Curtis J. Berger & Joan C. Williams, Property: Land Ownership and Use 468 (4th ed. 1997).

[30] 574 P.2d 75, 78 (Colo. 1978) (Carringan, J., dissenting).

[31] This example assumes that H left no debts outstanding at death. The elective share is usually computed based on the net estate remaining after creditors' claims are paid.

[32] *But see* Unif. Probate Code § 2-202(b) (providing that inter vivos gifts from decedent to surviving spouse are credited against the amount of the elective share).

[33] Unif. Probate Code § 2-201(a). For an evaluation of the Uniform Probate Code approach, see Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. Mich. J.L. Reform 1 (2003).

one-third share. As amended, the Code provides the surviving spouse with a share of the couple's combined assets, using a sliding scale based on the principle: "the longer the marriage, the larger the share." Thus, the surviving spouse who was married for 15 years or longer receives a one-half share, while one married for a shorter period receives less.[34]

Yet the elective share approach suffers from a major loophole that threatens to undermine its effectiveness: the inter vivos gift to a third party. Suppose that H gives all of his property to his cousin C, following the common law view that during life a spouse has complete control over his or her own property. One week later, H dies, leaving his wife W penniless. If we apply the standard rule that the elective share is computed based on the property the decedent owned at time of death, W receives nothing. How can these two seemingly inconsistent principles be reconciled? Judicial wrestling with this issue has produced a variety of compromise tests. Some states follow an "illusory transfer" standard, which allows the surviving spouse an elective share in property over which the decedent retained significant control (e.g., assets in a revocable trust, insurance policies).[35] Others focus on the scienter of the decedent, extending the elective share to property that the decedent transferred to a third party in order to defeat the survivor's elective share.[36] Ironically, for all their faults, the common law doctrines of dower and curtesy probably afforded better protection against inter vivos gifts; property subject to dower or curtesy could not be transferred without the consent of both spouses.

§ 11.04 Community Property System

[A] Marriage as Partnership

The community property system is founded upon equality. It views marriage as an economic partnership between husband and wife in which the contributions of each spouse—whether outside or inside the home—are valued equally.

[B] What Is Community Property?

[1] General Principles

The broad outlines of the community property system are simple. In general, the earnings of either spouse during marriage—and all property

[34] Unif. Probate Code § 2-201(a). Similarly, the Uniform Marital Property Act provides the surviving spouse with a one-half share (*see* § 11.07).

[35] *See, e.g.*, Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937) (now superseded by statute in New York, but still followed in other states). *See also* Kerwin v. Donaghy, 59 N.E.2d 299 (Mass. 1945) (discussing rule).

[36] Knell v. Price, 550 A.2d 413 (Md. Ct. Spec. App. 1988) (upholding conveyance of remainder interest in home to decedent's nurse and companion because gift was not solely motivated by intent to deprive spouse of elective share; rather, decedent intended to reward grantee for care and companionship), *rev'd*, 569 A.2d 636 (1990).

acquired with those earnings—are deemed *community property*. Each spouse owns a one-half undivided interest in all community property. For example, suppose that after W and H marry, W works inside the home while H earns wages working in a bank; H's earnings during marriage are used to purchase a $200,000 house. The house is community property, with W and H each owning an undivided interest worth $100,000. In contrast to the approach of the Married Women's Property Acts, the identity of the spouse whose wages are used to purchase the house is irrelevant.

But not all property is considered community property. Property that a spouse acquires before marriage, or acquires during marriage through gift, devise, bequest, or descent, is deemed *separate property*. Separate property is the sole property of the owner spouse who may use or transfer it freely, just as if the owner were unmarried. For example, suppose that W owns stocks worth $60,000 before she marries H and during the marriage H inherits family jewelry worth $40,000. The stocks and jewelry are the separate property of W and H, respectively.[37]

An unscrupulous spouse might attempt to disguise community property as separate property. Thus, property owned or possessed by either spouse during marriage is ordinarily presumed to be community property, regardless of who formally holds title. This presumption can be rebutted by evidence that the asset is separate property. For example, if O conveys fee simple absolute in Brownacre to H "as his sole and separate property" while H is married to W, the deed recital will be overcome by the presumption that Brownacre is now community property, unless H can prove its separate character.

Of course, spouses may alter or "transmute" the character of property by agreement; this is simply a specialized form of gift between spouses. Thus, H and W could agree to transmute community property (e.g., a sports car) into separate property.[38] Using the same process, they could convert separate property (e.g., stocks that W acquired before marriage) into community property.

[2] Assets Acquired with a Mixture of Community and Separate Property

Who owns property acquired with a combination of community and separate property? Suppose that during marriage H and W buy a house with a $200,000 cash payment that is a combination of community

[37] Are graduate degrees and professional licenses community property, separate property, or not property at all? Like most common law states (*see* § 11.03[C][2][b]), community property jurisdictions generally hold that degrees, licenses, and the like are not property. *See, e.g.*, Todd v. Todd, 78 Cal. Rptr. 131 (Ct. App. 1969) (law degree not community property). Similarly, some authorities conclude that nonvested pension rights are a mere expectancy, and thus not community property. *In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976); *cf.* Boggs v. Boggs, 520 U.S. 833 (1997) (federal law preempted state law that allowed nonparticipant spouse to bequeath rights in undistributed pension plan benefits). *But see In re* Marriage of Horn, 226 Cal. Rptr. 666 (Ct. App. 1986) (severance pay from football league was community property).

[38] *See, e.g., In re* Marriage of Lucas, 614 P.2d 258 (Cal. 1980) (community property motor home transmuted into wife's separate property by husband's gift).

($150,000) and separate ($50,000 owned by W) property. Virtually all community property states would agree that W owns a 25% interest in the home as her separate property and the remaining 75% interest is community property.

But what happens if the property is purchased with payments over time that start before marriage? Suppose, for example, that before marriage W purchases a $200,000 house, giving the seller S a $50,000 down payment and a promissory note for $150,000. Assume that H and W are now married and that H's earnings during marriage—community property—are used to make the loan payments to S. Who owns the house now?

The eight community property states differ in their approaches to this problem.[39] Some states follow a pro rata approach that reaches the same result as in the case of a lump sum payment: 25% is the wife's separate property, and 75% is community property.[40] Other states use an "inception of right" approach, under which the character of the asset is determined when the transaction begins; because W executed the purchase contact before marriage, the home would be her separate property. Finally, a few states employ a "time of vesting" rule that determines the character of the asset when title is transferred; the home would also be W's separate property under this view because she received title before the marriage.

[3] Profits Received from Separate Property

Similar uncertainty surrounds a related issue: who owns profits or other income received during the marriage from separate property? In some states, all such income is considered community property. But most community property jurisdictions provide that income derived from separate property normally remains separate in character. One exception to the majority rule involves profits derived from a combination of capital and labor. Suppose, for example, that H devotes all of his time during marriage to managing his stock portfolio, which is separate property. Jurisdictions following the majority approach will typically treat H's stock profits as a mix of separate property (from the separate capital) and community property (from H's labor during marriage), and attempt to apportion them accordingly.[41]

[C] Rights During Marriage

During marriage, the husband and wife have equal rights to use, manage, and otherwise control community property.[42] For example, either spouse can sell community property, although some states require both spouses

[39] To complicate matters further, a state may use differing approaches depending on the nature of the asset; for example, insurance policies may be governed by one rule and pensions by another.

[40] *See, e.g., In re* Marriage of Lucas, 614 P.2d 285 (Cal. 1980).

[41] *See, e.g.,* Beam v. Bank of Am., 490 P.2d 257 (Cal. 1971).

[42] Thus, some states allow the creditor of one spouse to levy on that spouse's interest in community property. *See, e.g.,* Keene v. Edie, 935 P.2d 588 (Wash. 1997).

to consent to the sale of community real property. Gifts of community property pose a recurring problem. Some states allow either spouse to make reasonable gifts to third parties (e.g., small donations to charity) without consent of the other; other states prohibit all gifts unless both spouses consent.[43]

[D] Rights Upon Divorce

Upon divorce, community property is divided between the spouses and separate property is retained by the owner spouse. Statutes in most states merely require an "equitable" division of community property based on consideration of various criteria. In a few states (notably California), courts are required to divide community property equally between the spouses, unless some special exception applies.[44]

[E] Rights Upon Death

Upon death, a spouse may transfer by will one-half of the community property and all of his or her separate property. Thus, if H and W own a community property home worth $400,000 and W owns $100,000 in separate property, at death W can transfer $300,000 ($200,000 in community property plus her $100,000 in separate property) to whomever she wishes.

Spouses holding assets as community property receive a special federal income tax benefit known as a "stepped up" basis when one spouse dies. Suppose H and W originally purchased their home for $150,000; if they sold it for $400,000 during the marriage, they would normally be obligated to pay federal income tax on the amount of gain they realize from the sale, here $250,000, absent any special exclusion. However, suppose W dies while they still own the home and devises her share to H. The home receives an adjusted tax basis of current fair market value, here $400,000; thus, if it is later sold for $400,000, no "gain" is realized and no federal income tax is due.

§ 11.05 Conflict Between the Systems: The Problem of Migrating Couples

What happens when both systems apply to a couple at different stages of their marriage? Suppose H and W live in a community property state where only H earns wages; all the property acquired with these earnings is community property. If H and W now move to a common law state where

[43] *See, e.g.*, Osuna v. Quintana, 993 S.W.2d 201 (Tex. App. 1999) (gift of community property by one spouse without the consent of other spouse was invalid). *But see* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Ct. App. 1993) (even in California, a community property state, a wife owes a duty to support her husband; the wife's promise to care for her infirm husband in exchange for husband's promise to leave wife his separate property did not create an enforceable contract due to lack of consideration, because she owed a preexisting duty).

[44] *See, e.g.*, Cal. Fam. Code § 2550 (directing courts to "divide the community estate of the parties equally").

H dies, W enjoys the protection of both systems. She already has a half interest in the property brought to the new state; she now receives an elective share or intestate share in H's half.

But the transition from a common law jurisdiction to a community property jurisdiction may be problematic.[45] For example, in *Estate of Hanau v. Hanau*,[46] a couple married and lived in Ohio for 25 years; only the husband worked outside the home. Under Ohio's common law property approach, the $500,000 in assets acquired from the husband's earnings were owned by the husband. The couple moved to Texas, a community property state; the husband soon died, bequeathing his estate to his daughter by a prior marriage. If the couple had remained in Ohio, the wife could have recovered an elective share of her husband's estate. However, under the controlling Texas community property law, the entire estate was deemed the husband's separate property, which he could bequeath as he wished.[47]

§ 11.06 Attempts to Avoid the Systems: Premarital Agreements

An increasing number of couples enter into agreements before marriage that establish their property rights in the event of divorce. The common law was traditionally hostile to such premarital agreements on the basis that they tended to encourage divorce. Some courts still cling to this view, refusing to enforce such agreements on grounds of public policy.

The modern trend is to recognize the validity of premarital agreements. A majority of states have adopted the Uniform Premarital Agreement Act, which provides that an agreement is generally enforceable unless (1) it was unconscionable when made and (2) the complaining spouse *both* did not receive full financial disclosure and did not execute a written waiver of rights.[48] Some states have adopted the Act with the modification that unconscionability or lack of full disclosure will invalidate the agreement, and several non-adopting states also appear to follow this approach.

§ 11.07 The Future of Marital Property Law?: Uniform Marital Property Act

The Uniform Marital Property Act may ultimately bridge the gap between the common law and community property systems. To date, however, the Act has received an unenthusiastic reception; it has been adopted only by Wisconsin.[49]

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[45] *See also* Pacific Gamble Robinson Co. v. Lapp, 622 P.2d 850 (Wash. 1980) (creditor on non-marital debt incurred by husband while couple lived in common law state could recover against community property of couple after move to community property state).

[46] 730 S.W.2d 663 (Tex. 1987).

[47] California avoids this dilemma by treating separate property acquired with earnings in a common law state as "quasi-community property." Cal. Fam. Code §§ 63, 125, 2550.

[48] Unif. Premarital Agreement Act § 6.

[49] *See* Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. Rev. 455 (2003).

The Act dramatically alters property rights during the marriage, abandoning the "you earn it, you own it" approach of the Married Women's Property Acts. The Act essentially creates a community property system, although the phrase "community property" is delicately avoided. During the marriage, each spouse owns a present half-interest in all "marital property."[50] Marital property consists of all earnings during marriage and the property acquired with those earnings. All property acquired before marriage, together with property acquired during marriage by gift, bequest, devise, or descent, is deemed separate property, not subject to the provisions of the Act.[51]

For example, assume that when H and W are married, W owns stocks worth $100,000; during the first year of marriage, H earns $50,000 and receives a $10,000 painting by gift from his aunt. At this point in the marriage, both H and W own a $25,000 share in marital property; W owns the stocks as her separate property; and H owns the painting as his separate property.

The impact of the Act at divorce or death is relatively minor. Despite its stress on equal rights during marriage, it continues the equitable distribution approach to property rights upon divorce. Upon death, each spouse may transfer one-half of the marital property, which is quite similar to the elective share system prevailing in common law states.

§ 11.08 Property Rights of Unmarried Couples

[A] Traditional Approach

The marital property law principles discussed above apply only to legally-married couples.[52] Most jurisdictions require a ceremonial marriage that is duly licensed and registered with the state, having long abolished the concept of "common law" marriage.[53] Under the traditional view, unmarried cohabitants cannot derive any property rights from their status as a couple. Suppose that A and B enter into an agreement to live together as an unmarried couple, sharing income and household duties equally. If A and B now separate, neither has any property rights against the other—despite their express contract—under the traditional approach.

Today this approach is followed only in a minority of states. Courts use a variety of bases to defend the historic rule. The repeal of statutes permitting common law marriage is widely viewed as evidence of legislative intent to confine the scope of marital property rights to ceremonial marriages. A second theme is that any cohabitation agreement is effectively

[50] Unif. Marital Property Act § 4.

[51] Unif. Marital Property Act § 4.

[52] Some states also protect "putative spouses," that is, couples who are not validly married, but who believe in good faith that they are.

[53] Some jurisdictions extend marital property rights to the "common law" marriage, i.e., the heterosexual couple who cohabit for a required period, holding themselves out as husband and wife.

a contract for prostitution, founded upon the illegal and immoral consideration of sexual services. Finally, some courts raise the broader concern that unmarried cohabitation tends to discourage marriage, and thus weakens "our family-based society."[54]

[B] The *Marvin v. Marvin* Revolution

The modern movement toward extending property rights to unmarried couples was sparked by the California Supreme Court's controversial "palimony" decision in *Marvin v. Marvin*.[55] Plaintiff Michelle Marvin alleged that she entered into an oral agreement with defendant Lee Marvin whereby (a) they would live together as husband and wife, (b) they would equally share their earnings and property, and (c) she would provide "services as a companion, homemaker, housekeeper and cook." Plaintiff further asserted that she fully performed the agreement for six years, until defendant expelled her from his house. She sued for half of the $3.8 million that he had accumulated during their relationship.[56]

The court first held that plaintiff could maintain her express contract claim. It acknowledged that a contract between nonmarital partners would be unenforceable if it rested solely on the illegal consideration of sexual services; but it found other lawful consideration, e.g., the agreement to share earnings and property. As the court summarized: "[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[57]

The second strand of *Marvin* was more surprising: the court concluded that plaintiff might have enforceable property rights even without an express contract. It observed that unmarried cohabitants might have expectations that courts would "fairly apportion property accumulated through mutual effort," which should be protected in equity. Citing changing societal mores, the court concluded that moral considerations should not block this result. It also rejected concern about the stability of marriage, suggesting that unmarried cohabitation sometimes served as a trial period before marriage. Accordingly, it remanded the case to the trial court to determine whether the conduct of the parties demonstrated an implied contract, an implied agreement of partnership or joint venture, or a similar "tacit understanding," and whether principles of quantum meruit, constructive trust, or resulting trust might apply.

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[54] *See, e.g.,* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979).

[55] 557 P.2d 106 (Cal. 1976).

[56] The case reached the court following the defendant's successful motion for judgment on the pleadings. Accordingly, the court treated plaintiff's allegations as true for purposes of the appeal.

[57] Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976).

[C] Post-*Marvin* Decisions

In the wake of *Marvin*, the majority rule is that property rights may exist between unmarried cohabitants. In over 30 states, these rights stem from *Marvin* theories, most commonly express contract. In *Watts v. Watts*,[58] for example, on facts[59] even more compelling than those in *Marvin*, the Wisconsin Supreme Court held that a former cohabitant could sue in express contract and unjust enrichment, and utilize the constructive trust remedy.[60] And many other states still recognize common law marriage, which produces a similar result.[61]

[D] Gay and Lesbian Couples

Jurisdictions that recognize property rights between unmarried heterosexual couples have sometimes extended this protection through case law to gay and lesbian couples as well, particularly where an express contract is present.[62] However, the contours of debate are somewhat different. Legal scholars argue that the logic for recognizing rights for gay and lesbian couples is even stronger than that for heterosexual couples because the option of ceremonial marriage is unavailable.[63]

Most states have adopted statutes that restrict marriage to heterosexual couples.[64] But do such statutes violate state constitutional law? In recent years, several courts have so held.[65] An example is *Goodridge v. Department of Public Health*,[66] where the Massachusetts Supreme Court found that such a restriction violated the equal protection and due process clauses of the state constitution, because it lacked any rational basis.[67] By denying

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[58] 405 N.W.2d 303 (Wis. 1987).

[59] In *Watts*, the couple not only held themselves out as husband and wife generally, and entered into the type of agreement claimed in *Marvin*, but also produced two children who were given the defendant's surname; the couple also maintained joint tenancy bank accounts, filed joint income tax returns, and acquired real and personal property as husband and wife.

[60] *See also* Cook v. Cook, 691 P.2d 664 (Ariz. 1984) (holding that express contract between unmarried cohabitants would be enforceable); Connell v. Francisco, 898 P.2d 831 (Wash. 1995) (requiring a "just and equitable disposition" of property acquired during relationship).

[61] For scholarly perspectives on the issue, see Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815 (2005); William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 La. L. Rev. 1677 (1984).

[62] *See, e.g.*, Crooke v. Gilden, 414 S.E.2d 645 (Ga. 1992) (express contract by lesbian couple); Ireland v. Flanagan, 627 P.2d 496 (Or. Ct. App. 1981) (same). *Cf.* Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989) (surviving member of gay couple may be "family member" of deceased member under rent control laws).

[63] *See, e.g.*, Kristin Bullock, Comment, *Applying* Marvin v. Marvin *to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. Davis L. Rev. 1029 (1992).

[64] *But see, e.g.*, Cal. Fam. Code §§ 297-297.5 (allowing same-sex couples to register as "domestic partnerships" and thus hold the same rights and duties as married couples).

[65] *See, e.g.*, Baker v. State, 744 A.2d 864 (Vt. 1999).

[66] 798 N.E.2d 941 (Mass. 2003).

[67] For background on *Goodridge*, see Mary L. Bonauto, Goodridge *in Context*, 40 Harv. C.R.-

same-sex couples the legal and economic benefits of marriage, "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community."[68] The court concluded that the ban was "rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."[69]

C.L. L. Rev. 1 (2005). *See also* Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. Ill. U. L. Rev. 589 (2004).

[68] 798 N.E.2d 941, 968 (Mass. 2003).

[69] *Id.* at 968.

EXAMPLES & EXPLANATIONS

Property

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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.

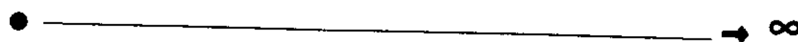
William initially parceled out lands for limited periods of time. The knights, however, quickly became interested in the rights of their families and children to continue to hold the land after their deaths. They were actually interested in two rights: the right to transfer or dispose of their property 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

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:

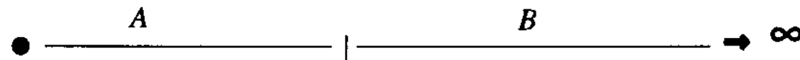


Fee simple absolute interest is complete ownership until the end of time. The fee simple absolute owner can enjoy the property, transfer it away by

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).

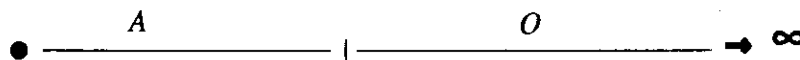
The diagram indicates that beginning at the present, the dot, on the facts known today, all persons who can use or possess the property from now to infinity must get their rights from or through the fee simple absolute owner. Obviously the owner cannot personally use the property until infinity. Human 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

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 characterstic 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 has "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 devisible 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 Tenet 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***.[1]

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

(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

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.[2]

Defeasible Fee Simple Estates

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.

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.[3]

> **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.

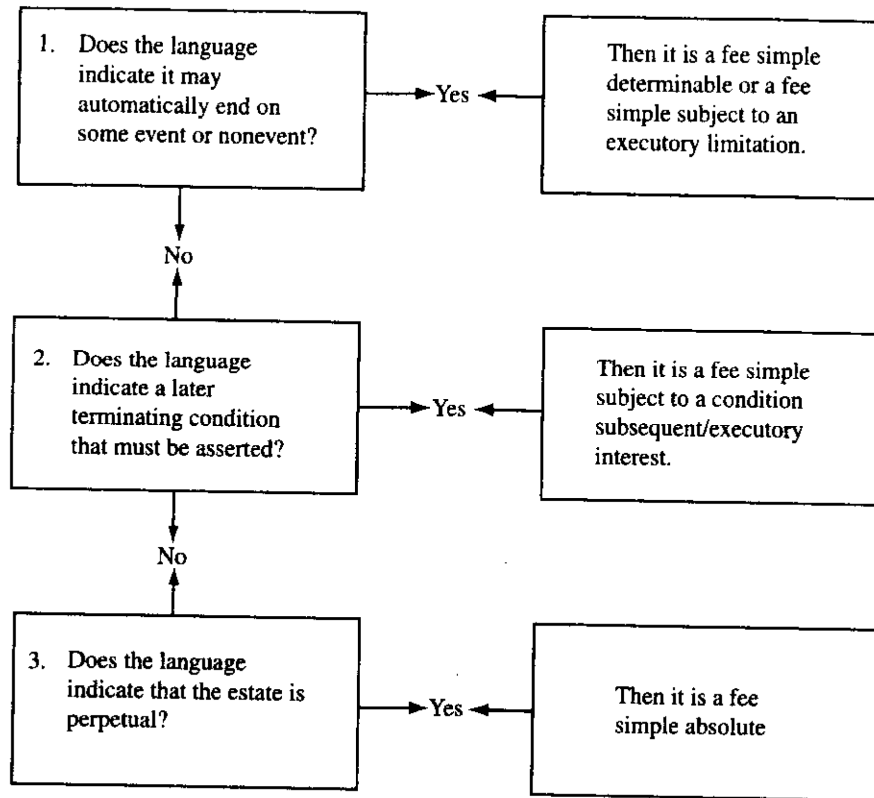
The same granting language that would create either a fee simple determinable or a fee simple subject to a condition subsequent creates a ***fee simple subject to an executory limitation***. (also known as a fee simple on executory limitation). Only one label for the possessory interest was coined, not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

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).

13

Concurrent Ownership

As we have seen, property ownership can be divided up in several ways. A landowner of 100 acres, for example, may give 50 acres to one person and 50 acres to another; the landowner may give one person the whole 100 acres as a life estate and another the remainder; the landowner may sever the surface from the subsurface by granting away the mineral rights; or the landowner may transfer legal title to a trustee with rights to manage and sell the property for the economic benefit of beneficiaries who have the right to income and value appreciation.

Finally, two or more persons may concurrently own the same estate in the same land. There are three major concurrent interests recognized in America: tenancy in common, joint tenancy with right of survivorship, and tenancy by the entirety.

Tenancy in Common

The most common form of concurrent ownership is the tenancy in common. Each tenant in common owns a share of one piece of property. While the default rule is that each co-tenant has equal rights to possess the whole property and to share equally in rents and appreciation in value, the parties frequently own different interests in the land. One rebuttable presumption is the co-tenants own the land in proportion to the amount each contributed to purchase the property. Tenants in common normally share in rents and sales proceeds according to their respective ownership interests. Even if co-tenants own varying interests in property, it does not affect each co-tenant's right to possess the entire property. Thus if *A* owns a 50 percent interest and *B* and *C* each own a 25 percent interest in Blackacre, as tenants in common, *A* would receive 50 percent of any net rents from the property, but all three would have equal rights of possession.

As discussed more fully later, concurrent ownership breeds conflict and disagreement. Common law default rules have evolved to resolve possession, use, profit sharing, and expense contribution issues that may arise when concurrent owners cannot agree.

A person's tenant-in-common interest is assignable (transferable), devisable, and inheritable. Transferees become tenants in common with the remaining tenants in common. A co-tenant can mortgage his interest to secure a loan or can sell his interest; a co-tenant cannot sell his co-tenants' interests in the property, however.

Example: *O* transfers Blackacre, a 100-acre farm, to *A* and *B* as tenants in common. *A* and *B* each own a 50 percent (or half) undivided interest in the entire 100 acres. Three years later *A* dies, devising his interest in Blackacre to *M*. *M* now owns a 50 percent (or half) interest in Blackacre. *B* and *M* are tenants in common.

Joint Tenancy with Right of Survivorship

The joint tenancy with right of survivorship is a form of concurrent ownership with a survivorship element. It is often used as a will substitute. When a joint tenant dies, her interest ends. The last surviving joint tenant owns the property outright, and may sell or devise the property.

Example: Annie and Brady are joint tenants with right of survivorship in Whiteacre. Annie dies, her will devising all her real property to Donna. Donna gets no interest in Whiteacre. Brady is the sole owner. A year later Brady dies, his will devising all his real property to Emmylou. Emmylou owns Whiteacre.

At one time — and still today in many states — a joint tenancy could be created and maintained only if all co-tenants shared the four unities:

(1) Unity of Time — The joint tenants' interests must vest at the same time.
(2) Unity of Title — The joint tenants must acquire title in the same deed or will.
(3) Unity of Interest — Each joint tenant must own equal shares of the same estate.
(4) Unity of Possession — Each joint tenant has a right to possession of the whole property.

Historically a joint tenant could destroy the joint tenancy with right of survivorship by destroying any one of the four unities. That absolute rule is no longer the law either for creating or destroying joint tenancies in many states. An agreement between joint tenants that one tenant have sole possession, for

example, does not destroy the unity of possession. Likewise, a court in equity may look to the respective contributions each joint tenant made to acquire the property and divide any sales proceeds in proportion to each joint tenant's respective contribution.

Unity of title is still required in some states, but it has been abolished by statute or judicial opinion in most states, after decades of being circumvented by use of a strawman. A ***strawman*** or ***straw*** is a person who briefly takes legal title for the sole purpose of reconveying the property back to his grantor. Usually the straw is someone in the lawyer's office.

The process worked this way: A person holding land solely in his own name wanted to own the property as a joint tenant with right of survivorship. He may have wanted to pass the property to his spouse or child outside of probate. The joint tenancy with right of survivorship is a useful tool to avoid the cost and time of probate administration since a decedent's interest in the property ends on his death and the other joint tenant takes the title. Often the property involved is the family residence.

Let's assume the landowner wanted to transfer the family residence to himself and his wife as joint tenants with right of survivorship. The law treated a transfer from a person to himself as a nullity; so either a direct transfer to his spouse or a transfer to himself and his spouse created an interest in the spouse at a different time and under a different title (deed). The landowner could not deed an interest the property to his spouse as a joint tenant or to himself and his spouse as joint tenants with right of survivorship. A tenancy in common and not a joint tenancy with right of survivorship resulted. The solution was for the landowner to transfer the property to a straw, who immediately deeded the land to the original landowner and his wife as joint tenants with right of survivorship.

The majority of states have concluded that there is no reason to require a straw, especially on transfers between spouses, and allow a direct transfer from one person to himself and another as joint tenants with rights of survivorship, particularly when the other is the spouse.

A joint tenancy does not arise by intestate succession: Two or more persons inheriting the same property become tenants in common. On the other hand, it is possible under proper facts — usually taking the land under a faulty deed naming the co-tenants as joint tenants with right of survivorship — that joint adverse possession could yield a joint tenancy held by two or more adverse possessors.

When two joint tenants die simultaneously, most courts treat half the property as if one tenant survived and the other half as if the other tenant survived — effectively treating the property as a tenancy in common, giving the heirs of each tenant an equal share. When one of two co-tenants murders the other one, the murderer forfeits the right of survivorship, but not his interest. In effect, murder turns the joint tenancy into a tenancy in common.

Since her interest in the joint tenancy ends on her death, a joint tenant cannot devise her interest in a joint tenancy with right of survivorship; nor is

her interest inheritable. A joint tenant may, however, transfer or assign her interest inter vivos. As discussed more fully below under "Severance," the assignment ends the joint tenancy at least as to the transferee, who thereafter holds his interest as a tenant in common with the other tenants, who continue to hold their fractional share in a joint tenancy with right of survivorship.

Distinguishing Joint Tenancies from Tenancies in Common

Centuries ago in England, the joint tenancy was the default concurrent interest. A transfer from *O* "to *A* and *B*" created a joint tenancy with right of survivorship. It was presumed to be the intent of parties when there was any ambiguity as to whether a document created a tenancy in common or a joint tenancy. The purpose of the presumption was to maintain family estates intact.

Today, however, this presumption is reversed. The tenancy in common is preferred. Statutes in the majority of states provide that a grant to concurrent owners is presumed to be a tenancy in common unless the deed clearly establishes that the grantor intended to create a joint tenancy with right of survivorship.

A major caveat with regard to married couples is in order here. In many states that recognize the tenancy by the entirety (an estate exclusively reserved for married couples — to be developed later in this chapter), a grant to a husband and wife is presumed to create a tenancy by the entireties unless the deed expresses a clear intent to create another interest. In some states that do not recognize the tenancy by the entireties, a grant to a husband and wife is presumed to create a joint tenancy with right of survivorship unless the deed or will clearly manifests an intent to create a tenancy in common. In some states that do not recognize the tenancy by the entirety, only married couples can hold property as joint tenants with right of survivorship, but the presumption is that the grant creates a tenancy in common unless the grant evidences a clear intent to create a joint tenancy with right of survivorship. In the remaining states, a grant to a husband and wife is treated like any other grant to multiple persons, and is presumed to be a tenancy in common unless a clear intent to create another concurrent interest is expressed.

The most popular words to create a joint tenancy with right of survivorship are "to *A* and *B*, as joint tenants with a right of survivorship, and not as tenants in common." Some courts will find the requisite intent to create a joint tenancy with right of survivorship in a grant "to *A* and *B* as joint tenants," but many courts refuse to find a joint tenancy with right of survivorship unless the deed or will contains words of survivorship. "To *A*

and *B* jointly" creates a tenancy in common for example, not a joint tenancy with right of survivorship. A specific indication of an intention to establish the right of survivorship, along with a negation of a tenancy in common, is the best course for the conveyancer.

A grant to "*A* and *B* as joint tenants, remainder to the survivor of them" creates joint life estates, with a contingent remainder in the survivor. It is not the same as a joint tenancy with right of survivorship, however, and dramatically different legal consequences may follow. As discussed in the next section, any joint tenant can unilaterally "sever" her interest from the joint tenancy and become a tenant in common with the other co-tenants. Severance destroys the survivorship character as to her interest. When she dies, her heir or devisee takes her interest. In contrast, persons holding joint life estates with a contingent remainder cannot unilaterally terminate the survivorship requirement.

Severance

In some states, when one or more of the four unities of a joint tenancy with right of survivorship is destroyed, the joint tenancy is said to be ***severed***. States that don't emphasize the four unities look for some action or relationship that is inconsistent with a person continuing as a joint tenant to find a severance. A severance turns a joint tenancy into a tenancy in common between the severed interest and the remaining joint tenants. The remaining joint tenants continue holding their fractional interests in the property in a joint tenancy with right of survivorship. Thus, when the joint tenancy is created in three or more persons, a unilateral act of one of them leaves the joint tenancy intact as between the remaining tenants, who together then would hold a tenancy in common with the severing tenant.

Example 1: *O*, the holder of a fee simple absolute in Blackacre, conveys "to *A*, *B*, and *C*, as joint tenants with right of survivorship." Five years later *C* conveys to *D*. The deed to *D* is a severance of *D*'s interest in the joint tenancy. *A* and *B* continue in joint tenancy with each other, but are in a tenancy in common with *D*, each of the three having a one-third interest in Blackacre. If *A* dies, leaving a will devising her interest in Blackacre to *M*, *M* gets nothing. *A*'s interest ends on her death and *B* owns a two-thirds interest in Blackacre as a tenant in common with *D*, who owns a one-third interest.

Example 2: Same facts as in Example 1, except *A* and *B* survive while *D* dies, leaving a will devising his interest to *N*. *D* held an interest as a tenant in common at his death. A tenancy in common is devisable, so *N* owns a one-third interest in Blackacre. *A* and *B* continue to own the remaining two-thirds

interest in Blackacre as joint tenants with right of survivorship as between themselves, but as tenants in common with *N.*

Example 3: Same facts as in Example 1, except *A*, *B*, and *D* all survive. *A* sells her interest to *L*. This severs *A*'s interest from the joint tenancy. Since joint tenancy requires more than one person (and *B* cannot be in a joint tenancy by herself), the joint tenancy is now a tenancy in common, with *B*, *D*, and *L* as co-tenants.

Severance is an important issue in joint tenancy with right of survivorship. It keeps one joint tenant from passing his interest to someone in a younger generation to maximize his bloodline's chances of getting the property. Underlying the joint tenancy, moreover, is the idea that one should be in a joint tenancy only with people they know and would want to have the property. The chance those expectations may be frustrated is why the law favors the parties hold as tenants in common when the original arrangement is disturbed.

The most common voluntary severance occurs when one joint tenant unilaterally transfers her interest to another person, as when *A*, a joint tenant, deeds to *E*, a third party. The most common involuntary severance is a foreclosure sale or a sale in bankruptcy proceedings.

(a) Leases

Courts have disagreed on whether a severance results by one joint tenant's leasing the property to an outsider, or by a joint tenant's granting a mortgage to secure a loan from a financial institution. Courts agree that a short-term lease by one joint tenant does not sever a joint tenancy. However, the lease will end on the death of the leasing joint tenant. The lessee has possessory rights through the lessor joint tenant; when the lessor joint tenant no longer has an interest, the lessee also loses his right of possession. The lease terminates with the death of the leasing co-tenant even though the lessee has no notice in the lease or elsewhere of the extent of the lessor's rights. Some older cases held that a lease with a longer term might work a severance, at least for the term of the lease. More recent cases have concluded that even a long-term lease by one joint tenant will not sever the joint tenancy. Lesson to be learned: A lessee should be sure all joint tenants execute a lease.

(b) Mortgages

The vast majority of states are ***lien theory states***, meaning a mortgage is security for a loan. Title remains with the debtor. Since legal title remains with the debtor joint tenant, the giving of a mortgage by one joint tenant to secure his personal debt does not sever the joint tenancy. Only if the creditor forecloses on the interest and the interest is sold does a severance occur.

States differ on what happens to the mortgage if the debtor joint tenant dies while the mortgage is outstanding. Conceptually, the mortgage should be worthless since the deceased debtor no longer owns an interest in the property; the creditor's rights depend on the debtor's interest. The deceased joint tenant's interest, moreover, does not pass to the other joint tenants; rather, the interest just ends, similar to a life estate. Some states, by statute or judicial opinion, conclude that the property continues to be subject to the mortgage. Lesson to be learned: Lenders should have all joint tenants sign the mortgage, even if they are not personally liable for the debt. For more on mortgages, see infra pages 354-357.

About a dozen states are known as ***title theory states***, where a mortgage conveys legal title to the creditor. The creditor owns the debtor's interest in fee simple determinable, to revert to the debtor when the debt is retired. Some courts, especially a few decades back, viewed the transfer of legal title as destroying at least one of the four unities, and thus severed the debtor's interest from the joint tenancy. While that is still the law in some title theory states, others recognize that the mortgage is a security device, and the debtor remains the true owner. In these states the mortgage, as in the lien theory states, does not sever the joint tenancy.

(c) Unilateral and Secret Severances

A joint tenant unilaterally can sever a joint tenancy by transferring her interest to a third party. Sometimes a joint tenant wants to sever her interest from the joint tenancy, but she wants to maintain her interest in the property, as a tenant in common rather than as a joint tenant. In some states the joint tenant must resort to the use of a strawman or straw[1] to sever her interest. A few states from among those that allow the direct creation of a joint tenancy with right of survivorship without the use of a strawman see no reason to prevent the direct severance without using a straw. Some allow direct severance when the other joint tenants are given notification.

Usually direct severance or a deed to a third party is known to others. Attorneys, for example, prepare the document. Often the beneficiaries of the severance — the heirs of the severing joint tenant, for example — are given notice of it in some fashion. Sometimes the severance document is recorded in the public land records of the county. In other words, the unilateral severance is not a matter of complete secrecy — and the notice or the recording may help explain why some cases seem to tolerate it.

The possibility exists, however, that the severance is done secretly and does not come to light until one or the other joint tenant dies. The secret

1. See supra page — as to the use of a straw to create a joint tenancy with right of survivorship.

severance opens up the possibility of fraud: A joint tenant may execute a severance deed to himself or to another as a tenant in common without telling anyone else or even recording the deed in the public deed records. If he dies first, a severance will be found to have occurred, with the joint tenant's assignee, devisee, or heir taking the joint tenant's interest as a tenant in common. If he is the survivor, he might destroy the severance document and take the whole of the property. The law should not countenance this ruse. Thus, where courts approve direct severances that do away with the use of straws, they should closely scrutinize the completely secret severance. To prevent this fraud on the other joint tenants, some states require either public recording or notification to the other joint tenants. See Samuel Fetters, ***An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights***, 55 Fordham L. Rev. 173 (1986).

Tenancy by the Entirety

A third form of concurrent ownership is the tenancy by the entirety. The tenancy by the entirety is limited to husbands and wives, who own the property as a unit, not by equal shares. The same four unities necessary to form a joint tenancy with right of survivorship are essential to form a tenancy by the entirety; in addition, the couple must be married at the time they acquire the property. Engaged to be married is insufficient. Hence, a couple buying a home to live in after their marriage will not hold the home in a tenancy by the entirety. Divorce terminates the tenancy by the entirety and a tenancy in common results in most states (a joint tenancy with right of survivorship results in a minority of states).

Like the joint tenancy with right of survivorship, the tenancy by the entirety is characterized by a right of survivorship in the surviving spouse. Unlike in the joint tenancy, one spouse cannot unilaterally sever the tenancy by the entirety. Moreover, neither spouse can seek judicial partition.

About half the states recognize the tenancy by the entirety. In the majority of those, a grant to a husband and wife is presumed to create a tenancy by the entirety unless a different form is indicated in the deed. In other states, a grant to a husband and wife creates a presumption that a tenancy in common is created unless the deed indicates a tenancy by the entirety or joint tenancy with right of survivorship is intended. Parties intending to create a tenancy by the entirety should convey to "*H* and *W*, husband and wife, as tenants by the entirety."

At one time, a husband and wife owning property as tenancy by the entirety were deemed one — and that one was the husband. He had management rights, rights to the income, and the power to sell. The wife had survivorship rights — even if the husband sold the property, the wife's survivorship rights continued in force; so as a practical matter husbands and

wives both signed deeds conveying the property to third parties. A wife relinquished her survivorship rights if she signed the deed.

Since the husband could sell the property, he also could pledge it as security. His creditors, secured and unsecured, could foreclose on the property. A purchaser at foreclosure was entitled to possession of the property, and to all rents and income from the property. If the husband outlived the wife, the purchaser kept the property in fee simple absolute. If the wife survived her husband, she got the property back.

Well over a century ago, states began enacting Married Women's Property Acts (MWPA) giving married women rights to control property. Courts and legislatures applied MWPA to fashion three theories of the modern tenancy by the entirety.[2] In the majority of tenancy-by-the-entirety states, a creditor can foreclose on the tenancy by the entirety property only if both spouses are liable for the underlying debt or both have executed a mortgage. Husband and wife, moreover, must both execute deeds on the sale of the property. In a second group of states, a creditor of one spouse's separate debts may foreclose on the debtor spouse's half interest (the half interest being a fiction, since the couple holds the property as whole) subject to the other spouse's survivorship rights. Thus the creditor can get rents from the property if any are collected, but will lose all rights in the property if the nondebtor spouse outlives the debtor spouse. Finally, in two states — Kentucky and Tennessee — creditors can reach a spouse's survivorship interest, but not the right to current possession and rents. Hence creditors have no interest while both spouses are alive, and will have an interest only if the debtor spouse survives the nondebtor spouse.

Rights and Obligations Between Co-Tenants

(a) Possession and Ouster

Each co-tenant (tenant in common, joint tenant, or tenant by the entirety) has the right to possess the entire property. As such, the majority rule is that a co-tenant using the whole property, absent ouster, does not owe rent to the other co-tenants. In a small minority of states, a co-tenant using the property owes a fair rental to the remaining co-tenants.

In the majority of states where a co-tenant owes no rent to his co-tenants for using the property, the rule changes if the occupying tenant ousts the other co-tenants. ***Ouster*** occurs when the occupying tenant acts to prevent the other co-tenants from using the property. Ouster may occur if

2. By the mid-1990s the last state had abandoned the tenancy by the entirety in its original form.

the occupying tenant changes the locks or if the occupying tenant makes use of the property in a way that no other use can be made of any part of the property and refuses to make room for another's use. Generally, before the ousted co-tenant can bring an action for ouster, the co-tenant must make a demand for access to the property and be denied access.

(b) Contribution

A co-tenant who expends money for some matter related to the co-owned property may want to be reimbursed for his expenditure. There are three distinct processes to seek reimbursement from his co-tenants: contribution, an accounting, and a final settlement on sale or partition. A co-tenant seeks ***contribution*** when he demands his co-tenants pay for their pro rata share of the expenses.

(1) Taxes, Interest, and Insurance

Assuming no one is using the property, a co-tenant who pays the annual property taxes, government assessments, or interest on mortgages may seek contribution from the other co-tenants.[3] Taxes and interest are known as ***carrying charges***. All co-tenants have a duty to pay taxes and interest on mortgages. In a minority of states, insurance is a carrying charge. Where insurance is a carrying charge, a co-tenant paying insurance premiums can seek contribution. Otherwise, no contribution is allowed for insurance premiums.

If the paying co-tenant is the only co-tenant using the property, no contribution is permitted for carrying charges up to the fair rental value of the property. Because the occupying co-tenant is not obligated to pay rent to her co-tenants, she is responsible for the taxes and interest on the mortgage since she is the principal beneficiary of the payment (plus, in some way it serves as a substitute for the payment of rent). If the occupying co-tenant does pay rent to her co-tenants, she may offset the others' share of the carrying charges against the rent due.

(2) Mortgage Principal

A co-tenant who makes a mortgage principal payment when due or past due may seek contribution from his co-tenants. A co-tenant who prepays the principal of a mortgage, on the other hand, cannot seek contribution, but must wait until the principal payment comes due and payable under the original mortgage.

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3. Co-tenants are responsible only for interest on mortgages existing when the concurrent ownership began, or the mortgage secures a debt for which all co-tenants are personally liable. If one co-tenant mortgages the property or her interest in the property, she is solely liable for the interest payment and cannot get contribution.

(3) Repairs and Maintenance

A co-tenant cannot get contribution for repairs, even necessary repairs. While on first blush it would seem best if the paying co-tenant received contribution for necessary repair and maintenance — say, to fix a broken window, replace a roof, or mow the lawn — courts have been reluctant to decide on a case-by-case basis which repairs were necessary, what type of repair (quality and extent) was needed, and how much should have been spent for the repair. Hence courts have concluded that no co-tenant has the duty to make repairs. We found no case on point, but wonder what a court will decide when a co-tenant pays to repair a building or clean a yard because a city orders him to do so pursuant to a city ordinance. It seems contribution would be appropriate.

(4) Improvements

A co-tenant who improves property cannot compel contribution from his co-tenants. The rationale is that no one has a duty to improve property, and no one who chooses to improve the land should force his co-tenants to contribute.

(c) An Accounting

Even though a co-tenant cannot seek contribution for repairs and improvements, he may get some reimbursement indirectly in an accounting. An accounting occurs when a co-tenant rents the property to a third party. Even though a co-tenant can solely possess co-owned property and keep any profits generated from that sole possession, once he leases or rents the property to others he must account for any profits and share the net proceeds with his co-tenants. See Statute of Anne, ch. 16, § 27 (1705) (adopted by all American states either as part of the common law or by statute).

In an accounting the co-tenant collecting rent payments may offset the costs associated with generating and collecting the rent. The co-tenant offsets revenues by the amount he expended on taxes, interest, mortgage principal, and insurance. In addition, he can offset other expenses, such as advertising, management fees, ***actual*** amounts spent on repairs or maintenance, and utilities. The co-tenant can offset monetary outlays only to the extent of any rental income received. In other words, the accounting serves to reduce how much of the rental proceeds the co-tenant must distribute to his co-tenants. The accounting does not allow him to demand contribution from his co-tenants if expenditures exceed revenues (unless the co-tenants have agreed to share the risk). Notwithstanding this limitation on the accounting, the paying co-tenant can still demand contribution if rent revenues are insufficent to pay the property taxes, interest, and currently payable principal payment on a mortgage.

Example: *A, B,* and *C* own raw land as tenants in common. *A* pays the annual taxes of $3000 and the interest of $5000 on the outstanding mortgage. *A* rents the land to a local farmer who will cut the grass on the land to use as hay to feed his livestock. The farmer pays *A* $2000 rental. *A* can demand *B* and *C* each contribute $2000 ($8000 total carrying costs less $2000 rents equals $6000, divided by 3 equals $2000 per co-tenant).

Improvements are tricky. The co-tenant cannot offset the total cost of improvements in an accounting. He can offset only so much of the cost of the improvements as is traceable to the increased rental received because of the improvements, but no more.

(d) Final Settlement on Sale

If the co-tenants sell the property, either voluntarily or by a judicially ordered partition sale (discussed below), a final settlement takes place. A co-tenant who expended money and has not been reimbursed for taxes, interest, mortgage principal, repairs, maintenance, insurance, and other common expenses associated with owning the property will be reimbursed out of sales proceeds.

Improvements are a special case. A co-tenant who paid for improvements will receive the sales proceeds attributable to the value added by the improvements. The amount paid for the improvement is irrelevant.

Example 1: Adam, who owns a one-third interest in Blackacre as a tenant in common, builds a house on Blackacre for $100,000. Five years later the three co-tenants sell Blackacre for $250,000. The land is worth $75,000; the building is worth $175,000. Adam receives the $175,000 attributable to the building and one-third of $75,000 ($25,000) as his share of the sales proceeds.

Example 2: Maurice, who owns a one-third interest in Whiteacre as a tenant in common, spends $20,000 to install a swimming pool. Two years later the co-tenants sell Whiteacre for $215,000. The land and building are valued at $210,000. The swimming pool added $5000 to the property's value. Maurice receives $5000 for the swimming pool and one-third of the $210,000 ($70,000) for the land and building as his share of the sales proceeds.

(e) Tax Sales and Foreclosure Sales

If no co-tenant pays taxes or mortgage payments, the state or the mortgage may seek a judicial sale of the property to pay either the taxes or the mortgage. The co-tenants share excess proceeds as explained in (d), above.

If a co-tenant purchases the property at the tax sale or foreclosure sale, the majority rule is that the purchasing co-tenant is deemed to be acting in her capacity as a co-tenant. The remaining co-tenants have the option of remaining co-tenants by contributing their share of the taxes or mortgage. If the other co-tenants choose not to contribute, after a reasonable time the purchasing co-tenant will own the property outright.

In a minority of states, if the other co-tenants have an opportunity to bid at the tax sale or foreclosure sale, the purchasing tenant represents himself and not the co-tenancy. There are exceptions — if the other co-tenants are not adults, if the purchasing co-tenant deceived the other co-tenants into believing he was representing the co-tenancy, or if the purchasing co-tenant intentionally did not pay the taxes or the mortgage because he was in a superior financial position to successfully purchase the property at the forced sale.

(f) Adverse Possession

Since each co-tenant has the right to possess the co-owned property, it is difficult for a co-tenant to adversely possess the property. It can be done, however. To begin running the statute of limitations the co-tenant claiming by adverse possession must give clear notice to the other co-tenants that she is claiming adversely. Usually the notice must be in writing. Mere ouster may not suffice, but ouster combined with acts so inconsistent with a concurrent ownership that co-tenants must be deemed to be on notice of the adverse possession might suffice.

Partition

Tenants in common or joint tenants with right of survivorship are not obligated to continue a concurrent ownership, and they are not required to sell just their interests to separate themselves from the co-tenancy. Instead, the tenant in common or the joint tenant may petition a court to partition the property.[4] There are two distinct categories of partition: partition in kind and partition by sale.

(a) Partition in Kind

Courts favor partition in kind, or physical partition. In a partition in kind, the court divides the property into parcels of equal value; each co-tenant

4. Neither spouse can seek partition of property held in a tenancy by the entirety.

receives a parcel as his or her separate property, or one or more hold separate parcels while two or more parties become co-owners of a parcel.

If a court cannot partition the property into parcels of equal value, the court may order a money payment from one party to another. This payment is known as ***owelty***. Because a partition is seldom likely to involve equally valuable parcels distributed to each tenant, owelty is a common feature in a partition in kind.

(b) Partition by Sale

Partition in kind is not always practicable or advisable. A single-family residence, for example, is not suited to partition in kind. Other factors, including the number of co-tenants, the terrain, and the size of the tract, may convince a judge that a partition in kind is not advisable. The court then may order a ***partition by sale***. Judicial discretion in administering this action is broad, although the rules governing contribution traditionally confine this discretion. The proceeds of the sale are distributed as in a final accounting and settlement discussed above. Any co-tenant who has not accounted for any rents must do so. Sales proceeds from improvements will be allocated to the improver equal to the *value* of the improvements added to the overall value of the property, and not the *cost* of the improvements.

An agreement between the co-tenants prohibiting judicial partition normally is invalid as a restraint on alienation, but such restrictions will be sustained when limited to a reasonable time. See Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957). For example, limitations on sale of a residence, embodied in a divorce settlement and prohibiting a co-tenant's filing a partition action, have been found reasonable. Whether a restriction is reasonable may depend on whether the co-tenant wanting partition acquired his or her interest with knowledge of the restriction, the expertise of the co-tenant in possession, or the terms of an agreement on the subject between the parties.

Nonetheless, an agreement to limit access to the judicial process is not to be inferred lightly. Partition is favored by the law and agreements to limit the remedy will be strictly construed. A provision that one of two co-tenants receive the rents and profits from an apartment house, contained in a judicial decree (of divorce, say), is not likely to be found by implication to prohibit a partition action brought by the other tenant. A voluntary contract to the same effect might give rise to such an implication, and the implication might be stronger still if the property were residential.

EXAMPLES

Drafting Exercise

1. Now that you know the basic characteristics of all three of the major concurrent interests, please draft the granting clauses in a deed to create a

tenancy in common, a joint tenancy with right of survivorship, and a tenancy by the entirety.

Dying to Know What Happened

2. (a) *O*, the holder of a fee simple absolute in Blackacre, conveys "to *A*, *B*, and *C* as joint tenants with right of survivorship." A year later *C* conveys all his interest in Blackacre to *D*. Who has what interest in Blackacre?
   (b) *A* dies five years later, devising his interest in Blackacre to *E*. Who owns what interest in Blackacre?
   (c) Three years later *B* dies, devising his interest in Blackacre to *F*. Who owns what interest in Blackacre?

Surviving Joint Tenancies

3. *O* conveys Blackacre "to *A* and *B* and the survivor of them." What interest or estate is created for *A* and *B*?

Creating a Tenancy by the Entirety

4. Toby purchased his home when he was single. Now he is married to Veronica and wants to own the home as a tenant by the entirety with Veronica. How would you advise Toby to create the tenancy by the entirety?

On Second Thought

5. Kent and Richard own their law office building as joint tenants with right of survivorship. Kent was recently diagnosed with cancer. He wants to sever the joint tenancy and drafts a deed conveying his interest in the office building to himself as a tenant in common. What is the result of such a conveyance?

Mortgage Business

6. In a jurisdiction that does not clearly adhere to either a lien or a title theory, how would you recommend that a mortgage lender proceed in a loan for the purchase price of a residence whose title is to be held in the name of a husband and wife as joint tenants?

Our Land, His Debt

7. *H* and *W*, husband and wife, hold title to Blackacre as joint tenants. They separate. *H* executes a mortgage on Blackacre. A year later *H* dies.

Blackacre is condemned by the state to build a new arena. The state agrees to pay $500,000 for Blackacre. The mortgage ($100,000) is unpaid, but not the subject of a foreclosure. *H*'s executor claims a portion of the condemnation award for his estate. Is this claim valid?

He Did *What*?

8. (a) Anthony and Barlow hold title to Blackacre as joint tenants with right of survivorship. Barlow executes a mortgage in a lien theory state. Barlow defaults on the mortgage loan and the creditor brings a foreclosure action. The court hearing the foreclosure orders that Blackacre be sold through a judicial sale, conducted as an auction. Barlow shows up at the sale, is the highest bidder for the property, and obtains a decree confirming the title to the property to him in fee simple absolute. Anthony now claims his interest in Blackacre. Barlow sues Anthony to quiet title in fee. What result?
   (b) Same facts as in the previous problem, but a third party, not Barlow, obtained title through the foreclosure sale. Would this affect the result?
   (c) What result in (a) if Anthony and Barlow had both signed the mortgage, and Barlow was the highest bidder at the foreclosure auction?

Future Interests Intrude

9. (a) *O* conveys Whiteacre "to *A* for life, remainder to *B* and her heirs." *A* and *B* cannot agree on the management of Whiteacre and *A* sues *B* for partition. What result?
   (b) *O* conveys Blackacre "to *A* and *B* as tenants in common for life, remainder to *C* and her heirs." *A* and *B* disagree about the management of Blackacre and *A* sues *B* for its partition. May *A* bring this action?

Contribution and Accounting

10. (a) Shane, a widower, died intestate, survived by his three children: Homer, who lives one mile from Shane's residence; Louise, in Louisiana; and Ken, in Kentucky. Shane's residence passed to his three children under the state's intestacy statute. In what concurrent interest do the three children own the home?
    (b) The house sat vacant for four months after Shane's death. Homer looked after the house but did not reside in it. He paid the monthly water and electricity bills totaling $120 for four months, paid a

junior high school student $240 over four months to mow the lawn, and paid $90 for the annual termite inspection. Homer sent a check monthly to Mortgage Company in the amount of $1000 ($4000 total in four months). Of the $4000, $1200 was interest, $1800 went against principal of the note, $600 went to property taxes, and $400 went to insurance on the house. Homer asked Louise and Ken to reimburse him. Assuming Ken and Louise do not want to pay anything, but will pay the minimum the law requires, how much will Homer collect from Ken and Louise?

(c) After four months of letting the house sit empty, Homer hired a painter to paint both the exterior and the interior of the house for $4500. He could have a hired a painter for $3600, but felt more comfortable with the one he hired. After the house was painted, Homer paid $90 to advertise the house for rent.

Homer leased the home for $1500 a month. Homes in the neighborhood similar to the house rented for $1800, but Homer was happy to get $1500. Homer continued paying the $1000 each month to Mortgage Company. The tenant paid for the utilities and lawn maintenance.

What are the financial ramifications to Homer, Louise, and Ken after the first month's rental?

(d) After two years, Homer collected enough rental revenues to reimburse himself for expenditures out of his personal funds. In the first month after that he collects $1500 rent and pays Mortgage Company $1000, $120 for the annual termite inspection, and $80 to repair a clogged toilet. What financial consequences to the co-tenants?

(e) A year later the tenant moves out. In the first month there is no revenue on the house, but for outgoing expenses there is only the Mortgage Company's $1000 ($900 carrying charges and $100 insurance premium). Instead of sending Louise and Ken the $1000 a month they had come to expect, Homer sends a letter demanding each contribute $300. Louise does not want to pay and demands to know why she did not receive her $100. Homer, frustrated, files a suit seeking judicial partition. Should the judge order a partition in kind or a partition by sale?

(f) Homer engages a real estate broker, who finds a buyer who purchases the house for $180,000. The broker's commission was $10,800. Other expenses of sale were $4200. To retire the note and mortgage, $15,000 of the sales proceeds were paid directly to Mortgage Company. Homer tells the closing agent that he spent 45 hours on the sale of the house and dedicated 450 hours to managing the property for the benefit of the three co-tenants since their father's death. He figures conservatively his time was worth $20 an

hour, for which he has never been compensated, and for which he wanted to be compensated out of the sales proceeds ($900 for time on the sale of the house; $9000 for his labors all those years). How much does each co-tenant get from the sale of the house?

Alimony and Child Support

11. The tenancy by the entirety was established in an era without widespread divorce, and in an era when a person was expected to marry for life. Would it be wise to remove the immunity from levy and sale enjoyed by entireties property when a former spouse seeks to collect support payments — including child support — due from an ex-spouse now remarried and presently holding property in a tenancy with a subsequent spouse? What are the legislative alternatives?

EXPLANATIONS

Drafting Exercise

1. To create a tenancy in common, you might say that *O* conveys to "*A* and *B*, in equal shares, as tenants in common." For a joint tenancy, say *O* conveys to "*A* and *B*, as joint tenants with full right of survivorship, and not as tenants in common." For a tenancy by the entirety *O* conveys to "*A* and *B* (husband and wife) and to the survivor of them as tenants by the entirety, and not as tenants in common or joint tenants." Some of these suggestions are the product of caution, some make use of a default rule, but the intent in each case is made clear.

Dying to Know What Happened

2. (a) *C*'s deed to *D* severs the joint tenancy. *A* and *B* continue in joint tenancy with each other, but together reform as a tenancy in common with *D*, each of the three having a one-third interest in Blackacre.
   (b) *A*'s interest in Blackacre ends on his death. He has nothing to devise to *E*. *B*, as a joint tenant, gets *A*'s interest. *D* is a tenant in common and will not increase her ownership. *A* now owns a two-thirds interest and *D* owns a one-third interest in Blackacre as tenants in common.
   (c) *B* died owning her interest as a tenant in common. A tenant in common can devise her interest. Therefore, *F* owns a two-thirds interest and *D* owns a one-third interest in Blackacre as tenants in common.

Surviving Joint Tenancies

3. Because a survivorship right is indicated (though not as clearly as it might be), many state courts say that this conveyance creates a joint tenancy with a right of survivorship in *A* and *B*. However, some state courts — a minority — hold that *A* and *B* have a concurrently held life estate, lasting as long as they both live, followed by a contingent remainder held by the survivor in fee simple absolute. States using the minority rule sometimes do so in order to prevent a partition action that would otherwise defeat the survivorship right. See William Stoebuck & Dale Whitman, *The Law of Property* § 5.2, at 181 n.39 (3d ed. 2000).

Creating a Tenancy by the Entirety

4. When one party to a proposed joint tenancy already owns the property to be held in the tenancy, the parties should proceed in a two-step transaction. First, Toby should transfer the title to the property to a straw (an intermediary to temporarily hold legal title). Second, the straw should retransfer the title to Toby and Veronica as husband and wife in a tenancy by the entirety; they then would receive the title with the four unities present at the moment of the tenancy's creation. A straw is used when a jurisdiction does not clearly permit the unilateral creation of a joint tenancy by one of the tenants. The straw serves some function. The formalities of the process bring home to the sole owner the legal significance of what he or she is doing. They also prevent a layperson from accidentally creating a tenancy by the entirety when a tenancy in common was intended.

On Second Thought

5. It depends on the jurisdiction. If a jurisdiction requires a straw for a sole owner to create a joint tenancy in himself and another, then it is also likely to require the use of a straw to end the joint tenancy. Some jurisdictions allowing a person to create a joint tenancy directly without the use of a straw may require a straw for a joint tenancy to sever his interest. In either of these jurisdictions, Kent's deed to himself is ineffective to sever the joint tenancy; and the joint tenancy continues.

If, however, the jurisdiction allows a joint tenant unilaterally to sever a joint tenancy, Kent's deed severs the tenancy. This assumes Kent abides by any other requirement the state may impose, such as recording in the public deed records or notifying Richard.

Mortgage Business

6. The simplest and safest method is for both husband and wife to sign both the note and the mortgage.

Our Land, His Debt

7. The executor's claim is not valid. The mortgage, even given without *W*'s consent, works no severance of the joint tenancy in lien theory states and in many title theory states so long as *H* has the financial ability to repay the loan and eliminate the mortgage. In most states the mortgage is extinguished with *H*'s death (*H*'s estate still is liable on the loan, however; only Blackacre does not serve as security for nonpayment). The survivorship right is still effective on *H*'s death and on *H*'s death *W* owns Blackacre. As owner of Blackacre she is entitled to the entire condemnation award. The separation does not affect how the title is held. People v. Nogarr, 330 P.2d 858, 861 (Cal. Dist. Ct. App. 1958).

In some title theory states, however, *H*'s mortgage severs the joint tenancy with right of survivorship. In these states *H*'s estate owns a one-half interest in Blackacre as tenant in common and will receive half the condemnation proceeds. The executor can use $100,000 to retire the outstanding note. *W* keeps her half of the condemnation proceeds. For more on condemnation, eminent domain, and the Takings, see infra Chapter 35.

He Did *What?*

8. (a) Anthony prevails. Barlow will neither win nor quiet the title. The mortgage did not work a severance of the joint tenancy when executed, but when the property was put into foreclosure and beyond Barlow's power to recall, a severance occurred. Thus, when the court ordered that the results of the sale were binding on Barlow, a severance of the joint tenancy had destroyed the survivorship right and Anthony and Barlow became tenants in common. Only Barlow's interest in Blackacre was auctioned. The title obtained in foreclosure was subject to Anthony's rights and, by decree, the court in Barlow's suit will find that Anthony and Barlow hold Blackacre as tenants in common. A deed claiming to give Barlow sole ownership in fee simple absolute may have been color of title for an adverse possession action, but Anthony acted well within any limitations period.

   (b) A third party, not Barlow, obtaining title through the foreclosure sale would not affect the result. Anthony and Barlow would still be tenants in common at the point when the court orders the sale. The third party is now a tenant in common with Anthony.

   (c) First, since both parties executed the mortgage, a third party purchasing at a foreclosure sale would own the whole property, not

just a one-half interest. The issue here is whether Barlow will receive the same favorable treatment allowed a third-party purchaser. In a majority of states Barlow would be deemed to purchase the property on behalf of the joint tenancy. If he had the money to buy at the foreclosure sale he had the money to make the mortgage payments, and he had a duty to make the mortgage payments. Anthony would be allowed to continue as a joint tenant with right of survivorship. In most states Anthony would be required to contribute funds for his share of the purchase price.

If, however, Anthony and Barlow lived in a state where a joint tenant is treated the same as a third party as long as the other joint tenants have an equal opportunity to bid, and there was no indication Barlow engaged in fraudulent conduct or was in a fiduciary relationship with Anthony for some reason, Barlow would own Blackacre outright. Any excess sales proceeds over the amount of the mortgage would be divided between the two in a final settlement.

Future Interests Intrude

9. (a) Judgment for *B* — no partition. *A* has a present possessory interest in life estate; *B* has a vested remainder in fee simple absolute. *A* and *B* do not have concurrent possessory right and so neither has a right to bring a partition action against the other. See Garcia-Tunon v. Garcia-Tunon, 472 So. 2d 1378, 1379 (Fla. Dist. Ct. App. 1985).
   (b) Yes. *A* and *B* have a concurrent right to possess the life tenancy, so each has a right to bring partition against the other, but only as to the life estate they both hold, and not as to *C*'s remainder. *C* does not have any concurrent rights to possession with them. Concurrent life tenants may bring partition inter se. An analogous result: If *T1* and *T2* both hold a joint leasehold, they have a right to partition the lease inter se, but have no such right against their landlord.

Contribution and Accounting

10. (a) A tenancy in common is presumed unless the deed or will stipulates another form. Here there was no deed or will, only a statute. Homer, Louise, and Ken own the residence as tenants in common.
    (b) Ken and Louise are obligated to pay carrying charges, which are the interest of $1200, the property taxes of $600, and the mortgage principal reduction payments of $1800. In some states the $400 for insurance is also a carrying charge; in others it is not. The law of the state where the property is located controls what is a carrying charge, not the state where the various co-tenants live. Assuming

insurance is not a carrying charge, the total of the carrying charges is $3600. The three siblings own equal shares and are equally liable for the carrying charges. Thus Ken and Louise should both contribute $1200 to Homer.

While it seems in fairness the co-tenants should all contribute to pay the reasonable costs of societally acceptable (and even mandated) expenses, a court will not force Louise and Ken to contribute for the yard maintenance, the utilities, the termite inspection, and, in most states, the insurance premiums. The termite inspection is an interesting twist, since in some states legislatures mandate annual termite inspections. Thus this may not be an elective expense. A good argument could be that this should be a carrying charge since it is state mandated and outside the control of any co-tenant. On the other side of the argument, a co-tenant must select the inspector, and that may result in a range of costs within the discretion of one co-tenant.

(c) Homer keeps the entire first month's rental of $1500. Under the Statute of Anne, Homer must share net rental proceeds with his co-tenants, Louise and Ken. In an accounting, Homer can reduce the amount to be split with Louise and Ken by the interest ($300), the mortgage principal reduction ($450), and the taxes ($150) (total of $900). In addition, he can offset other expenses related to the rental — insurance ($100), advertising ($90), and painting (repairs and maintenance are not an improvement) ($4500) (total of $4690).

In the accounting the revenues are the actual amount collected, not what *could* have been collected, so rent revenues are $1500, not $1800. Likewise, deductions are actual amounts paid, not what *could* have been negotiated, so it is the full $4500 deductible. The total deductions cannot exceed the gross revenues, however. Thus, even though Homer paid $3990 ($1500–($900 + $4690)) more than he collected, he cannot ask for a contribution for the excess. Homer could have demanded contribution if the rent revenues did not cover the carrying charges, but here they did. Nothing prohibits Homer from requesting Ken and Louise pay their share if Louise and Ken are willing to pay, but he cannot force them to contribute. Expenditures not offsetting revenues are carried forward to offset any excess revenues in the next month, months, or years.

(d) Homer can offset the carrying charges, the insurance premium, and the termite inspection costs (total of $1200). Homer keeps the $1200. He then splits the remaining $300 equally among himself, Louise, and Ken; or $100 to each.

(e) Partition by sale. It's hard to imagine any of the three co-tenants even arguing for a partition in kind. Assuming one does, the judge

begins with the presumption that a partition in kind is preferred. But here, where the property is a rental house — a single-family house — in a neighborhood, the impracticalities of a partition in kind are so great that a partition by sale is an easy decision.

(f) First, no co-tenant is entitled to compensation for representing the co-tenancy unless the co-tenants agree. Therefore, Homer gets no money for his efforts in the sale or for the many years he managed the property. After that, the math is simple. Sales proceeds of $180,000 less the commissions ($10,800), the other fees ($4200), and the mortgage payment ($15,000) leaves $150,000 to be divided among the three co-tenants, or $50,000 each.

Alimony and Child Support

11. There are at least two legislative alternatives. First, legislation might authorize a court to issue a lis pendens (a recorded document in the deed records giving notice of a potential claim against the property) for a tenancy-by-entirety property, so that when the present spouses seek to sell or transfer it, the proceeds of that sale or transfer will be available to support the spouse of the former marriage to the extent of the ex-spouse's interest. This recognizes the continuing usefulness of the tenancy for the subsequent marriage, but only so long as the property itself is needed to support that marriage. This approach might, however, encourage evasion — as when the property is leased under a long-term arrangement, rather than sold outright — and so might be difficult to enforce.

Second, the docketing of a judgment or order for support of the former marriage might convert the tenancy in the subsequent marriage into a tenancy in common for purposes of the lien attachment/execution with regard to the support order. Here, the legislature recognizes the primacy of the first marriage over the second. This alternative is best suited to situations in which an ex-spouse has failed to meet support obligations for children of a former marriage. When the second spouse of the nonsupporting ex-spouse relies on the tenancy, this approach might work a hardship, and might deny the partners of the second marriage a future domicile of equal quality. Given the deference to state property law in the courts, the choice between these alternatives is best left to a legislature.

14

Marital Property

At common law, a spouse was not an heir of his or her husband or wife. By virtue of the marriage, however, each held a life estate in some types of property of the other. These life estates were implied by law, not created by a deed or in a will.

Common Law Dower

At common law, a wife had a claim in the form of a life estate to a one-third share of all of the real property of which the husband was solely and beneficially seised in fee simple at any time during his marriage. This estate is called ***dower***.

Dower is available from the moment of marriage. In early England dower designation of the dower house and lands was a part of the marriage ceremony: This designated property was called "named dower." Originally, the bride's family met with the groom and determined the lands to serve as his bride's house and lands, should she outlive him — hence the term "dowager," meaning a resident of a dower house. Often a large estate had a permanent dower house on its grounds. Kensington Palace in London, for example, is the dower house of the House of Windsor. Dower expanded from that beginning to include all lands.

Dower is intended to provide economic and social security for a widow, assuring her that she will live as she had become accustomed during her marriage. Originally it permitted her to live in the same locale as during the marriage. Today it permits her to maintain the same social position. In an age of primogeniture, it also provided in some measure for younger sons and daughters, who could continue living with their mother.

Before a husband's death, the wife's dower interests were called ***inchoate dower*** — not yet a legal estate in the husband's real property, but giving her a basis for suit in case the husband attempted to defeat a later dower claim by a fraudulent conveyance during the marriage.

After the husband's death, dower was termed ***consummate dower.*** On the basis of it, when the husband in his will provided for the wife less than dower would, she had the right to have commissioners or masters appointed by the court probating the will survey the husband's property and set aside one-third of each parcel of his land — the dower lands — for her life.

Dower Reform

States are abolishing dower. Where it continues, it is a claim to a one-third or one-half life estate in all the spouse's real property. Although in most states retaining dower, the wife (and in some states the surviving spouse — dower being extended to husbands as well as wives) has a dower in all lands, unless barred or released, of which the deceased spouse was ever seised during marriage; a few states limit dower to lands held by the decedent spouse at death. In Kentucky a wife has a dower of one-third of the lands the decedent did not own at death and of half the lands held at the husband's death. Moreover, contrary to the trend of most states to abolish dower, Kentucky extends dower to personal property. See Ky. Rev. Stat. Ann. § 392.020 (Michie 1999).

A spouse cannot defeat his spouse's dower by selling or mortgaging the property. Purchasers and lenders thus are advised to get the dower-owning spouse's signature releasing her dower in the property.

The Elements of Dower

Today the first element of a dower claim is a ***valid marriage*** when the property is owned. A marriage that is annulled or otherwise void ab initio is insufficient. A final decree in divorce may extinguish the dower claim by agreement. If no agreement is reached at divorce or in some other post-nuptial agreement, the dower continues, but will not attach to property acquired after the divorce.

The second element is ***sole and beneficial seisin*** in the deceased spouse of the property at any time during the marriage. Property transferred before the marriage or acquired after the marriage ends cannot be dower.

Seisin is always in a person holding a present possessory freehold estate. If the deceased spouse was a co-tenant, no dower lies because he or she was not solely seised. If the deceased spouse was a trustee for another, there is no dower in the property held in trust because there was no beneficial seisin. Similar results obtain when the spouse held as a strawman or otherwise held bare legal title. If the spouse, for example, executed a binding contract of sale to sell the property before death, there is no dower in it. That title was held for the purchaser pending the closing are transfer of title.

The estate of which the deceased spouse is seised cannot be one that ends at the deceased spouse's death. Dower does not apply to remainders and executory interests since the husband never had seisen in the property. A right of reentry, exercised or exercisable by the time of death, is subject to dower. As to whether a possibility of reverter must be exercised, there is a split in the cases on the matter: Some courts do not require exercise because the right of possession given in the possibility of reverter is automatic.

In summary, dower does *not* apply to a deceased spouse's . . .

1. term for years. It is a nonfreehold estate and has no seisin.
2. life estate. It has seisin, but is not inheritability. The purpose of dower is to give the surviving spouse a share of what the deceased's spouse's heirs take, for her security and for the security of younger children of the marriage. The life estate ends at the death of the deceased spouse and the heirs have no further interest in the property to which it applied.
3. joint tenancy. Where the deceased spouse is not the surviving tenant, the right of survivorship prevails over a dower claim.
4. partnership interest in real property. A partnership interest is not subject to common law dower because the interest is regarded as personalty rather than real property. Any restrictions on transfer should be limited to those in the partnership agreement.

Dower does apply to a . . .

1. fee simple determinable. Dower attaches, but is subject to the occurrence of the stated condition. Dower rises no higher than the estate to which it attaches (which, as a general rule, explains why it does not attach to a life estate).
2. fee simple subject to a condition subsequent, or to an executory limitation. Same answer as in the prior paragraph: Dower attaches, but subject to the condition.

Dower applies to legal, rather than equitable, estates. Dower applies, moreover, whether the spouse held property in fee simple absolute or fee tail. Only in the instance of a fee tail special — i.e., a fee tail limited to the issue of a prior spouse — did dower not apply.

Dower and Adverse Possession

Property acquired by adverse possession is subject to dower. If the deceased was in the process of adversely possessing property and so was still subject to disseisin or ouster by its true owner, so is the spouse claiming dower: He or she cannot acquire more rights than the deceased spouse had acquired by the time of death.

Dower and Waste

In this country, widows were early permitted by statute to protect their inchoate dower rights with a cause of action in waste, and were protected from suits in waste when clearing uncultivated lands held through dower.

Release of Dower

A wife can release dower by signing away her rights. Release of dower claims is necessary, or at least customary where dower has been repealed, upon the transfer of the property. Buyers and lenders insist wives join in executing deeds with their husbands even if the husband is the sole legal owner of the property.

Dower also can be released by an agreement, including a prenuptial or postnuptial agreement. Since dower survives divorce unless the wife (or husband) agrees to release her (or his) rights, a final divorce decree (as opposed to a pending action for one) may and should make express provision to release a spouse's estate from a dower claim by the exspouse.

Barring Dower

Dower claims can sometimes be barred in two ways. The first way is by putting property into a trust prior to marriage, because dower does not apply to equitable interests. An example of such an interest is a spouse's right to receive the income from a trust. Today this is not a foolproof method of barring dower because it may apply to personal as well as real property — and trust proceeds are regarded as personalty.

Second, dower is barred by giving the deceased spouse a life estate in property, with a power of appointment created prior to the marriage. This may be a surer method of barring dower, but it is more inflexible than a trust.

Forcing an Election

Some states retaining dower stipulate that the surviving spouse must choose between taking her dower or taking under the husband's will (or by inheritance if there is no will). In states that allow a wife to take dower in addition to taking under the deceased husband's will, a husband can force a surviving spouse to elect between her dower rights and her rights under his will.

Curtesy

Dower was a wife's life estate in one-third of her husband's real property at common law. In contrast, at common law a husband received a life estate in

all — not just a third — of his wife's real property of which she was seised. This estate arose at the time of the marriage. It lasted until either the husband or the wife died. It was called the ***estate by the marital right***, or the estate (in Latin) ***jure uxoris*** — all this while the wife was entitled only to the equivalent of walking-around money. The husband's estate by marital right was a right of use and occupation — a right to possess the eligible property and use its rents and profits. It carried with it a life tenant's rights and duties and depended on the continued survival of the wife.

At the birth of issue born alive to the husband and wife during their marriage, the husband acquired a life estate measured by his life — called tenancy for life by the ***curtesy initiate*** (this was intended to support children and maintain their father in the same economic condition as existed throughout the marriage). Thus, so long as the issue of the marriage were born alive, whether or not they survived, the estate jure uxoris merged into a larger estate the husband acquired a life estate in the wife's freehold estates inheritable by the children. This estate lasted so long as the marriage did, and was followed by a reversion in the wife, should she outlive her husband.)

The common law also gave the husband, upon the death of a wife by whom there was a child born, a tenancy for life by the ***curtesy consummate*** (or curtesy). Thus did curtesy initiate become curtesy consummate, and it continued to the end of the husband's life. Unlike dower, both claims to curtesy by the husband required the birth of issue born to the couple during their marriage; no such requirement attached to a dower claim. So curtesy was, like dower, a life tenancy, except that it applied to both legal and equitable estates of the wife in any lands she held during the marriage. Like dower, it is a derivative estate, but for the husband to claim curtesy, the wife need not have had seisin in the lands claimed; some cases said that "seisin in fact" (bare possession) would suffice.

One of the principal legislative results of the first women's movement, begun at the Seneca Falls Convention in 1848, was the enactment by state legislatures of the Married Women's Property Acts. Courts interpreted the Married Women's Property Acts to have abolished the estate jure uxoris. Curtesy soon was abolished. States retaining dower extended dower to husbands so that husbands and wives were treated the same.

Comparing Dower with Curtesy

Dower	Curtesy
attaches to a fraction	attaches to all
requires seisin in law	requires (actual) seisin in fact
attaches to legal estates	attaches to legal and equitable estates
does not require issue	requires birth of issue

The Modern Elective Share

States abandoning dower and curtesy give the surviving spouse an ***elective share***, also known as a ***statutory share*** or ***forced share***. The elective share is a right of the surviving spouse to elect to take as though she were an heir under the state's intestacy statute or under a provision in the elective share statute, or to take under the deceased spouse's will.

The elective share is usually one-third or one-half of the deceased spouse's estate. It is generally one-third of the estate when there are lineal descendants of the decedent, and one-half when there are none. It applies to both real and personal property and to both legal and equitable interests in property, so long as the property is owned by the deceased at death.

The elective share is not self-executing. It provides nothing until the surviving spouse — during probate of the estate or as part of an intestate distribution — files an election to take it after the decedent's death. Typically, the election must be made within nine months of the spouse's death, or within six months after the will is probated, whichever occurs later. The survivor taking the elective share must forego all devises under a decedent's will.

Calculating the Amount of the Elective Share

Calculating the amounts of an elective share is complicated. As background, not all of a decedent's property passes by will or by intestate succession (through probate). Much passes outside probate. We have studied tenancy by the entirety and joint tenancy with right of survivorship. Other nonprobate assets include trusts (i.e., one spouse tranfers valuable assets to a trustee making himself, his spouse, or a child the beneficiary), life insurance policies, retirement plans, and inter vivos gifts.

An issue is to what extent nonprobate assets should be considered in calculating the elective share. Some states do not consider nonprobate assets; others include only some. The Uniform Probate Code lumps most nonprobate assets into an ***augmented estate***, which is the total of the probate estate and a reclaimable estate.

The ***reclaimable estate*** is comprised of the following:

1. Assets owned by the electing spouse received from the deceased. This prevents the electing spouse from getting a larger share than is due by getting inter vivos gifts, for example, and then electing an intestacy share of what remains in the decedent's estate.
2. Assets held in trust for the spouse that originated with the decedent.
3. Insurance and pension plans of the decedent naming the spouse as beneficiary.

4. Assets held by others, often in a trust, if the decedent had a power of appointment (a right to designate who would receive the income or principal of the trust on a yearly basis or at his death), or had a right to revoke the trust.
5. Assets transferred by the decedent to another where the decedent retained a life estate, possession, or income, or with a right of survivorship. This keeps the decedent spouse from depleting the surviving spouse's share.
6. Any assets gratuitously transferred to anyone within two years of the decedent's death (i.e., gifts). There is a $3000 per donee exception.
7. A 1990 revision to the Uniform Probate Code would bring into the reclaimable estate all the assets held by the surviving spouse, not just those received from the decedent.

The reclaimable estate is added to the probate estate to get the augmented estate. The applicable fraction (normally one-third or one-half) is multiplied against the augmented estate to determine the surviving spouse's elective share. The spouse's elective share is reduced by the assets already in his or her possession, and by the assets passing to the electing spouse outside of probate. That leaves the net elective share, which comes from the decedent's estate.

Homesteads

Some state statutes and state constitutions protect a family's residence or "homestead" against creditors' claims. The homestead exemption protects eligible property from the claims of unsecured creditors and many secured creditors of either spouse. The homestead property cannot be foreclosed on by secured creditors unless the mortgage or lien being foreclosed was given for delineated purposes — a mortgage to purchase or improve the homestead property; a lien for past-due property taxes; a federal tax lien; or as a lien from a property settlement in a divorce, for example.

The main homestead property is the principal residence. The residence is defined as a dwelling and the land on which it is located, the acreage sometimes being limited to a certain area or acreage, or value, or both. Some states protect other assets, such as a car or motorcycle, farm animals, or tools of a trade, but it is the family residence and sometimes one business location that constitutes the major protected asset. Not only is the residence protected against creditors, but purchasers cannot defeat a spouse's homestead rights unless the spouse signs the deed. Hence both spouses are required to sign the deed to a residence even if the house is in the name of only one spouse. In some states a homestead right is not self-executing; there must be a recorded declaration of homestead defining its extent.

The homestead is of limited effectiveness as a shield against the claims of creditors in most states. The homestead exemption is typically limited to a stated value and often that value, adequate when enacted into law, is outmoded and too low. If a residence is worth more than the homestead value, the house gets sold and the creditors can claim the excess value. In other states, however — Texas being the prime example — the homestead exemption can safeguard some valuable assets (200 acres plus improvements for land outside a city; up to 10 acres of land with improvements including the residence and maybe a business in a city).

Community Property

Eight states — Louisiana, Texas, New Mexico, Arizona, California, Nevada, Washington, and Idaho — were founded as community property states, derived from the civil laws of Spain and France, which were brought by early settlers from those countries to these states. Two other states — Wisconsin and Alaska — have chosen to become community property states in recent years. The remaining, common law states, derive their concepts of property ownership from English common law.

In ***common law states***, property is owned by the spouse who paid for or inherited it. A person's property is separate from his or her spouse's property. In practice, for most of our history, that meant the husband owned most of the marital assets since he earned income, while the wife cared for the house and children. On divorce the husband got the assets. Common law states developed alimony and support laws to prevent divorced women from becoming destitute. On the death of the husband, he controlled who got his assets, unless dower or the elective share rules protected the widow. Many common law states have passed legislation that mimics those of community property states in cases of divorce.

Community property states view the marital unit as one — a universal partnership — in which the husband and wife work as a unit for their mutual benefit. Hence, whatever one earns is deemed owned by both. Property bought with the husband's wages, for example, is deemed owned half by the husband and half by the wife. As a starting premise, all property acquired during the marriage is presumed to be community property.

That community property presumption can be rebutted, however. Property acquired before the marriage is ***separate property*** and belongs to the spouse who owned the property before the marriage. Property acquired during marriage as a gift or an inheritance or devise is the separate property of the recipient spouse. In most community property states, a couple can enter into a prenuptial agreement, providing assets purchased with income earned by one party shall remain that person's separate property. This may occur, for example, on second or third marriages, where

both spouses have independent sources of income and also likely children by prior marriages.

The biggest divergence among the community property states centers on income earned from separate property. In three community property states (Texas, Louisiana, and Idaho) income from separate property is community property. In the five other states, income from separate property is separate property. Gains from the sale of separate property are separate property and considered a return of the principal of the asset.

If separate property is commingled with community property (usually this concerns money in bank accounts), the rebuttable presumption is the separate money was spent first and for living expenses rather than for assets. In other words, commingled funds most likely will be found to be community property. To illustrate, if *W* owns corporate stock as a separate asset and receives dividends from the corporation, in the majority of community property states the money received as dividends remains her separate property (in the minority of community property states the income is community property). If, however, *W* deposits that money into a joint banking account or any account with both separate funds and community funds in it, unless *W* kept meticulous records classifying the separate funds and the community funds, the funds will be presumed to be community funds.

The spouses can ***transmute*** separate property into community property (or vice versa) by agreement — written in most of the eight states, oral in some. Both spouses must agree. One spouse cannot act unilaterally.

Recognizing that some married couples move from common law states to community property states, some community property states say property continues to hold its character as separate or community property, as it had when acquired. Others say all separate property acquired during a marriage is considered to be quasi-community property once the couple moves to a community property state.

Each state has its own rules as to who can manage which assets and which assets creditors can reach. A typical statute may require creditors of only one spouse to exhaust that spouse's separate assets before resorting to the community property. A creditor of one spouse cannot reach the other spouse's separate property. A creditor of both spouses can reach community property, as well as the separate assets of both spouses.

In marriages of any length most assets will be community assets on divorce each spouse is entitled to half the community property. If one spouse has a business, generally that spouse gets the business's assets, and other assets of equal value will be awarded to the other spouse. On death, the deceased spouse may devise his or her half of the community property.

Until 1948, there was a decided federal income tax advantage given to married couples in community property states, but the Internal Revenue Code that year was amended to permit married persons in all states to split their income with their spouse for purposes of income tax liability. Hence

the category of "married, filing jointly" on IRS Form 1040. Much of the community property system is embodied in the Uniform Marital Property Act, enacted in Wisconsin in a modified form. Its aim is to bridge the gap between common law and community property jurisdictions by providing for shared management of property during the marriage, no matter who holds title to it, and to protect the nonowning spouse if the owner dies first or upon dissolution of the marriage.

EXAMPLES

Dower Power

1. Harry and Wanda marry. Harry acquires Blackacre in fee simple absolute. They divorce. Years later, Harry dies. Does Wanda have a common law dower claim on Blackacre?

Elective Share

2. Darrell holds title in fee simple absolute to Blackacre. Darrell transfers that title to his son Steven for "one dollar ($1.00), love, and affection." Shortly after the transfer, Darrell dies. Is the value of Blackacre subject to the elective share otherwise available to Darrell's spouse, Wynona?

Will Substitutes

3. Does the elective share apply to will substitutes — e.g., gifts causa mortis, gifts to another's bank account, and joint bank accounts?

The Tax Man Cometh

4. *H* and *W*, husband and wife, own their residence, Blackacre, as tenants in common. *H* and *W* file separate federal income tax returns, as they have done for years. *H* becomes delinquent in the payment of his taxes. The Internal Revenue Service is authorized by Int. Rev. Code §§ 6321 and 7403 to seize and sell any property in which the delinquent taxpayer has any right, interest, or title. Thus, the IRS seeks to satisfy *H*'s delinquency by asserting its statutory lien on and selling Blackacre. *H* and *W* seek to block the sale, saying that under state law the homestead is exempt from such a sale. Are they correct?

Community Property Transmuted?

5. In a community property state, Harvey opens a stock brokerage account, held in trust "for Harvey and Willa as joint tenants, with a right of

survivorship, and not as tenants in common." Willa signs a form consenting to the creation of the trust. Willa dies and her estate asserts a claim against the account as community property. A state statute requires that a "transmutation" (as described above, a civil law term) of community property into separate property is invalid unless an express declaration is made by a spouse whose interest is adversely affected. Is the claim valid?

A Community Effort in Common

6. Larry and Melinda had been married for six years. Larry received a $100,000 year-end bonus at work. He bought $100,000 of Capitol Co. stock. Melinda's grandfather died soon thereafter, leaving Melinda $100,000 in Capitol Co. stock. A year later Capitol Co. sent Larry a dividend check in the amount of $5000. Capitol Co. also sent a $5000 dividend check to Melinda. Larry and Melinda deposited their dividend checks in separate bank accounts (Larry into his account and Melinda into hers). Six months later they divorced.

(a) Assuming Larry and Melinda live in a common law state, who gets the Capitol Co. stock, and who gets the $10,000 from dividends?

(b) Assuming Larry and Melinda live in a community property state, who gets the Capitol Co. stock, and who gets the $10,000 from dividends?

EXPLANATIONS

Dower Power

1. Yes, Wanda has a dower claim. Absent a contrary provision in the divorce decree, dower is not terminated by divorce, and so Wanda's dower claim is not barred, even though it is asserted years after the end of the marriage. This is a rule that was formulated long ago, well before the divorce rate rose so steeply. It makes little sense today, but indicates the strong attachment of the common law to dower claims.

Elective Share

2. Under the Uniform Probate Code, the value of Blackacre is subject to the elective share otherwise available to Darrell's spouse, Wynona, since it was a gratuitous transfer within two years of Darrell's death. If Darrell's intent in effectuating the transfer is to give *S* what he would otherwise inherit under Darrell's will, but takes Blackacre out of his estate, the answer should be yes.

If, on the other hand, Steven had paid full consideration for the asset, then Darrell's estate would be held harmless and the amount of Wynona's elective share would not be diminished by the transfer.

Will Substitutes

3. Does the elective share apply to will substitutes — e.g., gifts causa mortis, Totten trust bank accounts, and joint bank accounts? This is a generalized way of reiterating the issue in the previous problem. The answer, then, is essentially the same, but with regard to any particular will substitute, the answer will often be a matter of statute and part of the state's probate code. So check the applicable code. When the code is silent, it makes sense to include within the elective share any assets and funds governed by any functional equivalent of a valid will. The intent of the transferor is the same as that of a decedent, and the decedent's estate would be depleted if the use of the substitute robs the estate of its value. The value of the elective share is lost if the value of the substitute is not included in the share's calculation.

The Tax Man Cometh

4. No. A homestead provides an exemption from many debts, but not from tax liens. The IRS may levy on the whole title to property held in co-tenancy by a delinquent taxpayer with a nondelinquent one, so long as the nondelinquent co-tenants receive just compensation for their interest as a result of the IRS sale. United States v. Rogers, 461 U.S. 677, 698 (1983).

Community Property Transmuted?

5. Yes, there was no express transmutation. The consent form has a narrower purpose and is insufficient. This ends the inquiry. The transfer fails to create a joint tenacy also because it does not meet the four unities to create a joint tenancy with right of survivorship unless the state allows a direct transfer from a person to himself and another as joint tenants rather than using a straw.

The property remains community property and Willa's estate gets half the account. Spouses in community property states can hold property as joint tenants with right of survivorship, but the intent to do so must be more formally expressed than was done here.

A Community Effort in Common

6. (a) In a common law state, each marital partner owns separate property. Larry's bonus is his, and his purchase of the stock with his money means he owns the $100,000 worth of stock. The dividends earned from his property are his money. Likewise Melinda's inheritance is hers, and the dividends she receives from her stock are her money. Larry and Melinda each get $100,000 in stock and $5000 in cash.

(b) In a community property state, all income earned by either spouse is community property and belongs equally to both spouses. Larry's bonus, therefore, is community property. The dividends on community property are community property. Gifts and inheritances received by a spouse during a marriage are the separate property of the recipient spouse. Thus the $100,000 in stock Melinda inherited is Melinda's separate property. The community property states differ on the character of the dividends on community property. Some say income earned on separate property is community income; others say income earned on separate property is separate property.

For sure, Larry gets $50,000 of Capitol Co. stock and $2500 in cash for his half of the community property. Just as certainly, Melinda gets $150,000 worth of Capitol Co. stock (her $100,000 separate property and her $50,000 share of community property) and $2500 in cash from the community property dividends. In some community property states, Larry and Melinda split the $5000 dividends Melinda received on her separate stock; in other states Melinda gets the entire $5000.

PRINCIPLES
OF
PROPERTY LAW

Sixth Edition

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Chapter 6

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.[1]

§ 6.2 Fee Simple[2]

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[3] 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.[4]

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.[5]

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*[6]

PROBLEM 6.1: O grants Blackacre[7] "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.[8]

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.[9] This estate is also alienable and devisable.[10]

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.[11] 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.[12]

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.[13]

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.[14]

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.[15]

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.[16] 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[17]

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. It 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[18] 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.[19]

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.[20]

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)[21] 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 remainder) 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."[22]

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.[23]

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.[24] 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.[25]

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**
Case 1. Fee simple A *to B and his heirs*—this gives B a fee simple and leaves nothing in A. B's estate is inheritable by his heirs general, either lineal or collateral.	Case 1. Estate for years A *to B for 10 years*—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.
Case 2. Fee tail A *to B and the heirs of his body*—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.	Case 2. Estate from year to year A *to B from year to year*—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.
Case 3. Life estate A *to B for life*—this gives B an estate for B's life and leaves a reversion in A. B's estate is not inheritable.	Case 3. Tenancy at will A *to B as long as A wishes* (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. NOTE, HOWEVER, that if the limitation is from *A to B for as long as B wishes*, 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.

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 *real property*.	1. In cases 1, 2 and 3 B's interest is *personal property*—called a chattel real. In case 4, B has no interest.
2. B's interest is *inheritable*—that is, passes to B's heir or heirs in cases 1 and 2 but this is *not true as to case* 3 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 inheritable* but in cases 3 and 4 it is not.
3. B's interest is of *indefinite* or uncertain duration.	3. B's interest in case 1 is of *definite* duration, in cases 2 and 3 of indefinite duration.
4. B is *seised* which means that he is possessed claiming a freehold interest in the land.	4. B is *not seised* 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.[26]

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

26. 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.[27] 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.[28]

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.[29] 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.[30]

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.[31]

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.[32] 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.[33] 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.[34]

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.[35] 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.[36]

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 (Okl. 1976)(husband and wife were joint tenants and wife killed husband; that act severed the joint tenancy causing ½ of the property to pass to husband's estate and ½ 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	Unities present	Interest owned by tenant	Power of disposition	How can disposition be made	Rights 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 Possession 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 severalty	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 Possession	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 breaks any unity.
Tenancy in coparcenary	By law of inheritance	A dies intestate leaving 3 daughters, B, C & D, his only heirs	Title Interest Possession	Each tenant owns an *undivided* portion which portions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherits undivided interest of deceased parcener.	1-By partition 2-By conveyance by one parcener 3-By whole descending or vesting in one parcener
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."	Possession	Each tenant owns an undivided portion which portions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherits undivided interest of deceased co-owner	1-By partition among tenants 2-By uniting all titles in one tenant in severalty by purchase or otherwise

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