CHAPTER TWO

LAND INTERESTS: PRESENT AND FUTURE

OBJECTIVES:

1. To describe and explain the various types of present and future land interests and list the length of those interests and discuss their transferability and characteristics
2. To help students recognize the types of land interests that can be created
3. To discuss the favorable and unfavorable aspects of various forms of land interests and the rules applicable to them

RESOURCES:

Andersen, "Present and Future Interests: A Graphic Explanation," 19 Seattle U.L. Rev. 101 (1995).
Becker, "Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them," 47 UCLA L. Rev. 339 (December, 1999).
Black, "The Historical Background Of Some Modern Real Estate Principles," 34 Real Est. L. J. 327 (2005).
Burby, *Real Property*, Chapters 11, 16 and 17.
Dukeminier and Krier, "The Rise of the Perpetual Trust," 50 UCLA L. Rev. 1303 (2003).
"Dynasty Trusts and the Rule Against Perpetuities," 116 Harv. L. Rev. 2588, 2609 (2003).
Entin, Jonathan L., "Defeasible Fees, State Action," 34 William and Mary L. Rev. 769 (1993).
Foster, "Fifty-One Flowers: Post-Perpetuities War Law and Arkansas's Adoption of USRAP," 29 U. Ark. Little Rock L. Rev. 411, 487 (2007).
"From the Courts: Technology, Real Estate, and Livery of Seisin," 41(3) Real Estate L. J. 331-337 (2012).
Harding, "Perpetual Property," 61 Fla. L. Rev. 285 (April 2009).
Helfman, "Land Ownership and the Origins of Fiduciary Duty," 41 Real Prop. Prob. & Tr. J. 651 (2006).
Hopperton, "Teaching Present and Future Interests: A Methodology for Students that Unifies Estates in Land Concepts, Structures, and Principles," 26 U. Tol. L. Rev. 621 (Spring, 1995).
Jennings, "Real Property Could Use Some Updating," 24 Real Est. L.J. 103 (Fall 1995).
Mahoney, "Perpetual Restrictions on Land Use and the Problem of the Future," 88 Va. L. Rev. 739, 743 (June 2002).
Orth, "Requiem for the Rule in Shelley's Case," 67 N.C. L. Rev. 681 (1989).
Pollman and Edwards, "Scholarship By Legal Writing Professors: New Voices in the Legal Academy," 11 Legal Writing: J. Legal Writing Inst. 3, 212 (2005).
Powell, *Real Property*, Volume 3, 169-260.
Schneider, "A Rule Against Perpetuities For The Twenty-First Century," 41 Real Prop. Prob. & Tr. J. 743 (Winter 2007).
Singer, "Democratic Estates: Property Law in a Free and Democratic Society," 94 Cornell L. Rev. 1009 (May 2009).
Waggoner, "The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period," 73 Cornell L. Rev. 157, 162 (1988).

CASES:

Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).
Muse v. Merrimack Valley National Bank, 327 A.2d 719 (N.H. 1974).
Shack v. Weissbard, 33 A.2d 571 (N.J. 1943).
Teston v. Teston, 217 S.E.2d 498 (Ga. 1975).
Wayburn v. Smith, 239 S.E.2d 890 (S.C. 1977).

LECTURE OUTLINE:

I. Land Interests: Freehold Estates and Accompanying Future Interests

FIGURE 2.1 AND POWERPOINT SLIDE 2-1 PROVIDE AN OVERVIEW OF ALL PRESENT AND FUTURE LAND INTERESTS.

A. Freehold Estates – *USE POWERPOINT SLIDES 2-2, 2-3, 2-4, AND 2-5*

1. Freehold estate – unlimited in duration

2. Fee – is inheritable

B. Fee Simple Absolute Ownership

1. Greatest degree of land ownership

a. Can transfer title – *inter vivos* or by will
b. Can pledge property
c. No one holds any future interest in it

2. Created by language "To A" or "To A and his heirs."

C. Fee Simple Defeasible – unlimited or uncertain in duration with the potential of termination

1. Fee Simple Determinable and Possibility of Reverter

a. Has an attached use restriction
b. Compliance with the restriction is required or the estate is automatically terminated
c. Examples

"To A so long as the property is used for grazing."

"To State University so long as the property is used for a golf course."

"To Mesa School District for the time that the property is used for a Lehi school."

2. Possibility of Reverter – The Fee Simple Determinable Future Interest

a. Future interest is fee simple determinable
b. Future interest in the grantor
c. Creation – "To A so long as the property is used for a playground."
d. Can be transferred *inter vivos* or at death
e. Statutory restrictions

i. Some states limit effectiveness of restriction – 40 years
ii. Other states require that documents reflecting the restriction be recorded
iii. Constitutionality of statutes has been questioned

3. Fee Simple Subject to a Condition Subsequent

a. Has an attached use restriction
b. Compliance with the restriction is required or the grantor can terminate the estate by retaking possession and title
c. Examples

"To A on the condition that A is married, but if A should ever divorce, the grantor may enter and possess the property."

"To A subject to the condition that no dancing ever occur on the property."

"To A provided that the premises are always used for a Lutheran church."

NOTE: Be certain the students understand that the distinction between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable automatically terminates upon violation of the use restriction. A fee simple subject to a condition subsequent terminates only if the grantor re-enters and takes the property back (generally through a quiet title action). The determination is based on the choice of language; a reflection of the parties' intent.

4. Right of Entry/Power of Termination

   a. Future interest that goes with a fee simple subject to a condition subsequent
   b. Grantor's future interest
   c. Creation – "To the city of Minneapolis on the condition that the land be used for a city park, and should the land ever be used for another purpose, I reserve the right to re-enter and take possession of and title to the property."
   d. Different from the possibility of reverter in that the grantor must take action to obtain possessory rights of the future interest whereas the possibility of reverter is automatically vested in the grantor at the time of the restriction violation
   e. Grantor can make *inter vivos* transfer or transfer by will
   f. Some states have restrictions similar to those noted under the possibility of reverter
   g. Distinctions between possibility of reverter and right of entry or power of termination

      i. Possibility of reverter uses timing language – "so long as", "until"
      ii. Right of entry/power of termination uses conditional language – "if", "provided that", "only if", "on the condition that"
      iii. Many states carry a presumption for the right of entry so that land interests are not automatically lost with the resulting confusion

CASE BRIEF: *Rogers v. U.S.*
101 Fed. Cl. 287 (Fla. 2011)

FACTS: Congress enacted the Trails Act to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails. The railroads were granted rights-of-way (easements – see Chapter 5) with the following language in the conveyance:

> *[Grantor] does hereby remise, release, and forever quit claim unto the SEABOARD AIR LINE RAILWAY ... a right of way for railroad purposes over and across the following described parcels of land....*
>
> *This conveyance is made upon the express condition, however that if the Seaboard Air Line Railway shall not construct upon said land and commence the operation thereon [within] one year of the date hereof of a line of railroad, or, if at any time thereafter the said Seaboard Air Line Railway shall abandon said land for railroad purposes then the above described pieces and parcels of land shall [ipso facto] revert to and again become the property of the undersigned, his heirs, administrators and assigns.*

Several landowners (plaintiffs) brought suit challenging the federal government's rails-to-trails program on the grounds that it was an uncompensated taking of their property.

ISSUE: Who owned the easement?

DECISION: The landowners owned the easement because the interest reverted back to them when the railroads ceased operations. They had full fee simple title and for the federal government to convert the rails to trails was a taking of their property. The court held that the property owners are entitled to compensation because of the taking of their property for trails.

ANSWERS TO CASE QUESTIONS:

1. *What type of land interest was granted for the railroad easement?* The grant was a fee simple determinable, with a possibility of reverter in the grantor if the railroad use discontinued.
2. *What happened to title to the easement when the railroads quit using the rights-of-way for railroad use?* Because it was a fee simple determinable, the full fee simple interest was back in the grantor because the future interest of a possibility of reverter merged with the original title. They owned the property free and clear of the railroad easement.
3. *What advice could you give to landowners who have limited use easements that they have granted to others?* They need to be checking on how and when the easement is used and then understand their rights if the use stops (abandonment) or the use changes. If either happens, then they have full title to the property.

ANSWER TO CONSIDER (2.1):

The court found for the Ator heir. Below is the court's explanation:

> It is undisputed that by operation of the 1954 Warranty Deed, Thelma Ator conveyed to School District a determinable fee simple in the Subject Land and retained a transferable possibility of reverter. A determinable fee simple, also known as a determinable fee upon conditional limitation, "is a fee simple except that it is immediately terminated by the happening of some possible event, subsequently. The estate remaining in the grantor after the conveyance of such an estate is a possibility of reverter which he may convey, it being considered an interest in the land." In contrast, a fee simple subject to condition subsequent "may be terminated by the grantor by re-entry upon the happening of some possible event, subsequently. What remains to the grantor after the conveyance of such an estate is a power [of re-entry] ... which is not an interest in the land and is not sufficiently in esse to be subject of conveyance." Breach of a conditional limitation triggers automatic reversion of land, whereas breach of a condition subsequent results in forfeiture.
>
> The question before us is one of contract interpretation − whether a condition has occurred within the meaning of the 1954 Agreement and Warranty Deed triggering automatic reversion of the Subject Property to Plaintiff Ator.
>
> School District argues the "spirit" of the Agreement was to benefit children by promoting football and providing School District with land on which students could practice and play the game. School District insists these objectives currently are being met by its use of the Subject Property for eighth and ninth-grade football practices as well as for FOR practices and games. School District points out that none of these goals would be advanced if Plaintiff Ator assumed control of the Subject Property, demolished the stadium, and prevented children from playing football there. School District notes the 1954 Agreement contains five express references to "the students" of School District, but no references to the high school, its varsity football team, or to the age or grade level of football players. School District maintains FOR football games are played "in the manner and form generally employed by high schools" as required by the Agreement.
>
> Plaintiff Ator counters there is no evidence Thelma Ator intended to donate the land for the promotion of football in general. Rather, the express language of the conveyance indicates she hoped to correct *School District's* inability to "institute and conduct *in its school system* a fully organized and regularly scheduled program of football training and football games" by giving it property on which to "own or maintain a football field, stadium or other facility for the use of the students of said school district in the practice and playing of football." He stresses it was School District's choice to build a new stadium on separate property rather than renovate and expand the facilities on the Subject Property in keeping with its contractual obligations under the 1954 Agreement and Warranty Deed. Plaintiff Ator argues School District cannot rely on FOR's use of the Subject Property to bootstrap itself into alleged compliance with the terms of the conditional grant.
>
> We agree with Plaintiff Ator. The plain language of the 1954 Agreement and Warranty Deed indicates that Thelma Ator intended for *School District,* not any other entity, to (1) maintain "*upon said property* a fully organized football program;" (2) use the Subject Property "for the playing of a complete program of regularly scheduled football games and contests during each school year," and (3) "maintain a regularly organized football program *upon said property* comparable in quality and standards to similar programs maintained in other communities of like size." It is undisputed none of School District's football teams have played any football games at Ator Field since 2001. The plain fact is School District no longer maintains upon the Subject Property a fully organized football program of regularly scheduled football games as required by the 1954 Agreement and Warranty Deed. We agree with the trial court that School District cannot rely on FOR

as its surrogate to avoid reversion of the Subject Property to Plaintiff Ator. *Ator v. Unknown Heirs, Personal Representatives, Devisees, Trustees, Successors and Assigns of Ator*, 146 P. 3d 821 (Ok. App. 2006).

ANSWER TO CONSIDER (2.2):

a. Fee simple determinable and the future interest is a possibility of reverter.
b. Fee simple subject to a condition subsequent and the future interest is a right of entry/power of termination.
c. Fee simple determinable and the future interest is a possibility of reverter.
d. Fee simple determinable and the future interest is a possibility of reverter.

D. Fee Tail Ownership – *USE POWERPOINT SLIDE 2-6*

1. Uncertain or unlimited in duration

2. Inheritable but only by bloodline or lineal descendants such as children, grandchildren and great grandchildren

3. Created by language such as, "To A and the heirs of his body."

4. Legislation

a. More than 20 states treat fee tails as fee simple absolutes
b. Other states have statutes (disentailing devices) which permit the removal of the fee tail restrictions
c. Other states treat it as a life estate
d. Three states recognize and enforce fee tails
e. Still recognize fee tails created before these statutes were passed

E. Life Estate Ownership – *USE POWERPOINT SLIDE 2-7*

1. Creation

a. Freehold – lasts only as long as the life of the holder or another measuring life
b. Uncertain in length
c. Examples:

"To A for life." − conventional life estate

"To A for the life of B." − life estate *pur autre vie* – B is the *cestui* or measuring life and holds no interest

d. Can be an effective estate planning device to provide for a surviving spouse and still leave funds for the children

i. Fee simple determinable
ii. Fee simple subject to a condition subsequent
iii. Fee simple determinable

USE POWERPOINT SLIDE 2-8 TO REVIEW ALL TYPES OF INTERESTS.

2. Rights of life tenants

a. Exclusive possession during their lives
b. Obligation not to destroy the property or commit waste
c. Protect interests of those who will own the land in the future

Examples:

Life tenant on a farm depleting the soil by failure to use proper agricultural techniques

Life tenant of a residence failing to maintain property with resulting water damage

Timber example from the text

d. Life tenants can transfer their interests

i. only while they are alive
ii. cannot transfer by will
iii. creditors have security in property only so long as life tenant is alive

e. Tax payments on life estate allocated in each state

F. Reversions – *USE POWERPOINT SLIDE 2-9*

1. Follows a lesser estate – life estate

2. Future interest in the grantor

3. Creation – "To my husband for his life"

When the husband dies, title to the property reverts back to the grantor

4. Also follows the termination of non-freehold estates such as a tenancy for years or periodic tenancy

G. Remainders – *USE POWERPOINT SLIDE 2-10*

1. Follow the termination of a lesser estate – life estate

2. Future interest in one other than the grantor

3. Creation

"To my husband for life, then to my daughter, Samantha."

4. Vested remainders

a. Remainder given to persons in existence who have the immediate right to the land interest when the life estate terminates
b. Example:

"To my husband for his life, then to my daughter, Samantha."

Samantha holds a vested interest because:

i. She is in existence at time of grant
ii. Upon her father's death, she has the right to the property

5. Vested Remainder Subject to Partial Divestment

a. Remainder given to person or persons in existence, but there could be more persons added so that the interest of each remainderman can decline
b. Generally covers a remainder given to a group
c. Example: "To my brother for life, then to my brother's children. At the time of the grant, the brother is alive and has two children. At the time of the grant the two children are ascertained and will be entitled to their interest of 1/2 upon their father's death. However, there could be more children born after the grant and the two children would only get 1/3 or 1/4 as opposed to 1/2 if more children are born
d. Vested remainders subject to complete divestment

i. Remainder given to person in existence which will automatically vest when prior estate terminates
ii. However, condition subsequent could cause a complete loss of the remainder
iii. Example:

"To my husband for his life, then to my daughter provided she is married." The daughter's interest is vested and automatic, but if she is not married, she can lose the interest completely.

6. Contingent Remainders

a. Taker is unascertained – "To my wife for life, then to the first child of mine to reach age 21." Uncertain which child will be the first to reach age 21
b. Condition precedent – "To my wife for life, then if my daughter has graduated from college, to my daughter." The daughter's interest does not automatically follow the life estate, it is preceded by a condition.

DISTINCTION: Complete divestment vs. contingent remainder. In contingent remainder, the condition precedes the remainder grant. In a vested subject to complete divestment, the condition follows the grant.

c. All remainders are transferable – *inter vivos* or testamentary

ANSWER TO CONSIDER (2.3):

The court held that the will did not provide for termination of life estate if property was used for business purposes or as a bed and breakfast or leased; and the will granted former resident a life estate in the property subject to termination in the event that she chose not to live there.

In other words, the use for business purposes did not terminate her life estate, but she then had to live there. If she did not live there, the life estate terminated. Below is an excerpt from the opinion:

> "An estate in fee simple determinable is created by a limitation in a fee simple conveyance which provides that the estate shall automatically expire upon the occurrence of a certain subsequent event." *Station Assoc., Inc. v. Dare County,* 350 N.C. 367, 370, 513 S.E.2d 789, 792 (1999) (citing *Elmore v. Austin,* 232 N.C. 13, 20-21, 59 S.E.2d 205, 211 (1950)). "Like a fee, a life estate may be defeasible if its continued existence is conditional." *Brinkley v. Day,* 88 N.C.App. 101, 106, 362 S.E.2d 587, 590 (1987) (citing *Blackwood v. Blackwood,* 237 N.C. 726, 76 S.E.2d 122 (1953)). "The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested." *Washington City Board of Education v. Edgerton,* 244 N.C. 576, 578, 94 S.E.2d 661, 664, (1956). For that reason, the Supreme Court "has declined to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken" and has "stated repeatedly that a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry is insufficient to create an estate on condition...." *Station Assoc.,* 350 N.C. at 370, 371, 513 S.E.2d at 792, 793. However, "in those cases in which the deed contained express and unambiguous language of reversion or termination, we have construed a deed to convey a determinable fee or fee on condition subsequent." *Id.,* 350 N.C. at 371-72, 513 S.E.2d at 793. "The language of termination necessary to create a fee simple determinable need not conform to any 'set formula'" as long as "'any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event' or that 'on the cessation of [a specified] use, the estate shall end,'" are used. *Id.,* 350 N.C. at 373-74, 513 S.E.2d at 794 (quoting *Lackey v. Hamlet City Board of Education,* 258 N.C. 460, 464, 128 S.E.2d 806, 809 (1963), and *Charlotte Park and Recreation Commission v. Barringer,* 242 N.C. 311, 317, 88 S.E.2d 114, 120 (1955), *cert. denied sub nom.,* 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851 (1956)). As a result, the fundamental question that we must resolve in construing Item II.B.6 of Ms. Jones' will is determining whether it clearly expresses an intent that the life estate granted to Ms. Frejlach would automatically terminate upon the occurrence of one or more of the events described there.
>
> It is an elementary rule ... that the intention of the testat[rix] is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In determining the testat[rix]'s intention, the primary source is the language

used by the testat[rix]. Isolated clauses are not to be considered out of context, but rather the entire will is to be examined as a whole so as to ascertain the general plan of the testat[rix].

Edmunds v. Edmunds, 194 N.C.App. 425, 433, 669 S.E.2d 874, 879 (2008), *aff'd per curiam,* 363 N.C. 740, 686 S.E.2d 150 (2009) (quoting *Pittman v. Thomas,* 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983) (internal quotations omitted)). "The intent of the testat[rix] must be gathered from the four corners of the will and the circumstances attending its execution." *Ward v. Ward,* 88 N.C.App. 267, 269, 362 S.E.2d 847, 849 (1987), *disc. review denied*, 322 N.C. 115, 367 S.E.2d 921 (1988) (citation omitted). When interpreting a will, "every word and clause must, if possible, be given effect and apparent conflicts reconciled." *Slater v. Lineberry,* 89 N.C.App. 558, 559, 366 S.E.2d 608, 610 (1988).

A careful analysis of the language of Item II.B.6 of Ms. Jones' will discloses that those portions of the will providing that "[t]he house is not to be used for a business or Bed and Breakfast and is not to be leased out by [Ms.] Frejlach" are unaccompanied by any "express and unambiguous language of reversion or termination upon condition broken," *Station Assoc.,* 350 N.C. at 370, 513 S.E.2d at 793, and amount to "a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry." *Id.* at 371, 513 S.E.2d at 793. We are particularly persuaded of the correctness of this conclusion given the Supreme Court's clear statement that the creation of defeasible interests is disfavored. As a result, we conclude that the trial court erred by construing Item II.B.6 to provide that Ms. Frejlach's life estate terminates if she "uses the house or property for business purposes or as a bed and breakfast" or if she "leases the house or property."

On the other hand, the language providing that Ms. Jones "give[s] the right for life to [Ms.] Frejlach to live in the house" located on Gardner Road and that, "if [Ms.] Frejlach declines to exercise this right, I give this 11 acres of property to" Ms. Hagaman is not merely precatory. We are unable to understand the "right" to be "exercised" as anything other than Ms. Frejlach's right to live on the Gardner Road property. Although this portion of Item II.B.6 lacks some of the language that is frequently found in instruments creating defeasible interests, such as "so long as" or "on the condition that," the relevant provisions of Item II.B.6 do clearly state that, in the event that Ms. Frejlach does not "exercise this right" to live on the property, it goes to Ms. Hagaman. As a result, we are unable to avoid the conclusion that Item II.B.6 of Ms. Jones' will does grant Ms. Frejlach a life estate in the Gardner Road property that is subject to termination in the event that she chooses not to live there.

Our dissenting colleague rejects this reading of Item II.B.6 of Ms. Jones' will on the grounds that, "[r]eading the devise in the sequence transcribed by the testatrix, it appears that Ms. Jones' intent was merely to devise appellant Frejlach a life estate in which the testatrix desired her to live in the house" and that, "[a]t best, the devise to appellant in item II, paragraph (B)(6) would be defeasible only upon appellant Frejlach's death or her declining to exercise her right to the devised property, at which point the property would vest in appellee Hagaman." As a result, the dissent concludes that "this language would essentially create a 'plain vanilla' life estate, because any life estate devised is only defeasible upon the death of the life tenant or upon a devisee's decision to renounce the estate." We are not persuaded by this logic because it fails to give sufficient effect to Ms. Jones' very specific and repeated use of the word "live." As used in this context, "live" means "to make one's dwelling; reside." *Webster's New World Dictionary of the American Language,* 857 (1957). We believe that, under the canons of construction discussed above, we must assume that Ms. Jones chose her words carefully and intended to use the language that she used. In the event that one accepts the logic of our dissenting colleague, Ms. Frejlach could retain a life estate in the Gardner Road property without ever setting foot on the premises, a result which we have difficulty squaring with Ms. Jones' explicit statement that she gave Ms. Frejlach the right "to live in the house" located on Gardner Road "for life" and that, if Ms. Frejlach "declines to exercise this right, I give this 11 acres of property to" Ms. Hagaman. Thus, since the logic adopted by our dissenting colleague does not give effect to what we believe to be Ms. Jones' clear intention to divest Ms. Frejlach of her life estate in the event that she failed to live on the Gardner Road property, we do not find the approach taken in the dissent persuasive. *Nelson v. Bennett*, 694 S.E.2d 771 (N.C. App. 2010).

ANSWER TO CONSIDER (2.4):

a. A – life estate
   B – vested remainder
b. A – life estate
   B – vested remainders (language "and his heirs" is simply fee simple absolute language

c. B – life estate
   A – contingent remainder
   Grantor – possible reversion if A is not married at B's death
d. A – life estate
   B's heirs – contingent remainder since heirs are unascertainable until death
e. A – life estate
   B – vested remainder subject to complete divestment (C's interest is discussed later)

H. Executory interests

1. Future interest in one other than the grantor which is not a remainder

2. Creation

a. Two fee simples; possibility of reverter is given by the grantor to another

"To A so long as the premises are used for a school, but if they are ever not so used, to my son, B."

b. Gap between present interests and future interests

"To A for life, then in five years after A's death to A's child."

A holds a life estate but A's child's interest will not be possessory for five years; thus the gap prevents A's child from holding a remainder

c. Future freehold interest

"To my wife in fee simple in 10 years."

There is no present interest and the wife's future interest is not a remainder.

ANSWERS TO CONSIDER (2.5):

USE POWERPOINT SLIDES 2-11, 2-12, 2-13, AND 2-14.

a. Life estate
b. Fee simple absolute
c. Fee simple absolute (in most states)
d. Fee simple absolute to two people
e. Fee tail female
f. Fee simple subject to a condition subsequent
g. Fee simple subject to a condition subsequent
h. Fee simple determinable
i. Life estate
j. Fee simple determinable
k. Fee tail (female)
l. Life estate *pur autre vie*
m. Fee simple determinable
n. Fee tail
o. Fee tail
p. Fee simple determinable

USE FIGURE 2.2 FOR REVIEW.

II. Special Rules Governing Interests in Land – *USE POWERPOINT SLIDES 2-15, 2-16, AND 2-17*

A. Rule in Shelley's Case

1. "To my wife for life, remainder to the heirs of my wife."

2. Ordinary construction – wife has life estate; heirs have a contingent remainder

3. Shelley's case merges life estate with contingent remainder and wife thus has a fee simple

4. Some states have abolished the rule in Shelley's case so that the two estates are not merged and the ordinary construction applies

CASE BRIEF: *Lusk v. Broyles*
694 So.2d 4 (Ala. Civ. App. 1997)

FACTS:

Andy Lusk and Mary Eliza Lusk (1949)
130 acres (Parcel One)
⇩
Howard Lusk (descendent of Elizabeth Broyles, Charles Lusk and Homer Lusk)
⇩
Andy Lusk and Mary Eliza Lusk (1952)
40 acres (Parcel Two)
⇩
Howard Lusk (1994)
(Parcels One and Two)
⇩
Howard Lusk and Ruth Lusk (his wife)
as J/T with ROS

Howard died and the property was given to Howard's descendants and Ruth was left out.

ISSUE ON APPEAL: Did Howard hold fee simple or life estate interests?

DECISION: The rule in Shelley's case is not followed in Alabama. Hence, Howard had a life estate which terminated upon his death. Ruth has no interest.

ANSWERS TO CASE QUESTIONS:

1. *How does Ruth Lusk claim an interest?* Ruth was deeded the property by Howard with her and Howard as J/T with ROS. The Rule in Shelley's case merged the interests and gave Howard a fee simple absolute.
2. *Who are the owners of the property if the Rule in Shelley's Case applies and who are the owners if the Alabama statute applies?* The statute in Alabama returns the grant to a life estate and remainder, thus ignoring the Rule in Shelley's case and leaving no interest after Howard's death.
3. *What language is controlling in determining the intent of the grantors?* It was their intention "to convey to said R.H. Lusk *only a life estate* in and to [Parcel Two], with remainder to his bodily heirs."

B. Doctrine of Worthier Title (DOWT)

1. "To A for life, remainder to my heirs."

2. Ordinary construction – A has life estate

   Heirs have either vested or contingent remainder depending upon whether the grantor is still alive

3. DOWT – A has life estate

   Grantor holds reversion; heirs hold nothing

4. Some states have abolished the rule or courts are permitted to interpret the grantor's true intent

C. Rule Against Perpetuities (RAP)

1. Rule limiting the time the grantor can control the property being transferred

2. Applicable only to

   a. Executory interests
   b. Contingent remainders

3. Interest must vest within lives and being plus 21 years

4. Use text example

   "To my children for life, remainder to any and all of my grandchildren who reach 21." (Grant is made in a will)

   Step 1 – Children have life estate; grandchildren are unascertained and also must wait to take interest. There is a gap in seisin – executory interest

   Step 2 – Since executory interest exists, RAP applies

   Step 3 – Vesting would occur when last grandchild reached age 21

   Step 4 – Lives in being are those given the life estate or those who are in existence at the time of the grant (cannot be grantor; grantor is dead)

   Step 5 – When last child dies – no more grandchildren; thus interest would vest within 21 years after death of last child

   Step 6 – No violation – 21-year maximum met

CASE BRIEF: *Kennewick Public Hosp. Dist. v. Hawe*
214 P.3d 163 (Wash. App. 2009)

FACTS: Albert M. Luth executed a last will and testament in 1957. He devised his Benton County real property to the Kennewick Public Hospital District:

> *I now give, devise and bequeath all of my right, title and interest in and to any real property owned by me at the time of my death within the County of Benton, State of Washington, to the Kennewick Public Hospital District, a municipal corporation, to keep and maintain the same, to collect the rents, issues and profits therefrom and to expend the income therefrom in the up-keep, maintenance and improvement of the hospital building and grounds as in the judgment of the duly elected commissioners of said hospital district seems best. I now direct that the real property shall not be sold but shall be retained as an investment. This devise is in perpetuity, and the property shall at no time be transferred, incumbered [sic] or otherwise alienated from the purposes herein expressed and intended, and if the same or any part thereof, shall at any time be conveyed, transferred or incumbered [sic], by deed, mortgage or otherwise, then in such case I do devise all of the above mentioned real estate to the County of Benton, and in default thereof, to the State of Washington.*

Mr. Luth devised one-quarter of the remainder of his estate to his niece, Laura Hurd; one-quarter to his nephew, Norval Havercroft; and one-half to his sister, Alice Hawe. Mr. Luth died in 1961. In 1978, Ms. Hurd executed a will that left her estate to the Diocese. Ms. Hurd died in the 1980s.

The Hospital sued to quiet title to the property in 2006. Benton County and the State both waived any interest. The court entered default judgments to quiet title against all heirs and others, except the Diocese. The Diocese and the Hospital filed cross-motions for summary judgment in 2008. The court concluded that the Hospital held the property in fee simple absolute and granted summary judgment for the Hospital quieting title. The Diocese appealed.

ISSUE ON APPEAL: What happens to a gift when the grantor has violated the RAP? Who gets title to the land and what type of interest is it?

DECISION: The executory interest violates Washington's version of the rule against perpetuities and is therefore void.

The Diocese argues that Mr. Luth's will conveyed a fee simple determinable estate to the Hospital. And the effect of that was to transfer the property to Ms. Hurd's estate under the residuary clause in Mr. Luth's will, if and when the Hospital violates the prohibitions in the will against transfer.

The rule against perpetuities requires that future estates vest or fail within "a life or lives in being at the time of the testator's death and twenty-one years thereafter." Otherwise, the limitation is void. So Mr. Luth's devise of a future estate to the County and State fails under the rule against perpetuities because their interest may vest or fail into perpetuity.

A conveyance of a fee simple estate may employ language of either "executory limitation" or "special limitation" to cause the created interest to automatically expire upon the occurrence of a stated event. Language creating a fee simple subject to executory limitation must "express[ ] an intent of the conveyor that, on the occurrence of a stated event, an estate in fee simple contemporaneously conveyed or retained by the conveyor is to terminate in favor of an estate created in a person other than the conveyor." By contrast, "[a] fee simple determinable, also called a determinable fee simple, is an estate that automatically terminates on the happening of a stated event and reverts to the grantor by operation of law."

The effect of striking the County's and State's interest in the subject property is removal of the condition of defeasibility. We then agree with the trial judge that the resulting interest is fee simple absolute.

We affirm the summary judgment in favor of the Hospital.

ANSWERS TO CASE QUESTIONS:

1. *Explain which of the types of interests in land the court discusses in making its decision.* The Diocese argues that once the rule against perpetuities invalidated the County's and State's interest, Mr. Luth's devise became a fee simple determinable estate that reserves the right of reverter for Mr. Luth and his heirs. The Hospital characterizes the language in Mr. Luth's will as an attempt to devise an estate subject to executory limitation. So when the court struck the limitation, a fee simple absolute remained.
2. *Why does the clause granting the rights violate the RAP?* Because the interest, which was executor, could not vest within lives and being plus 21 years – it went on forever.
3. *Is there anything that could have been part of the will that would have prevented the litigation?* A saving clause – if anything in the will violates the RAP, then provide for a contingent disposition and make it clear.

ANSWER TO CONSIDER (2.6):

Step 1 – Children have life estate, grandchildren have executory interest
Step 2 – RAP applies to executory interests
Step 3 – Same – interest would vest when last grandchild reaches age 21
Step 4 – Childrens' lives will again be the measuring lives along with grantor, since grantor is alive
Step 5 – Since the grantor is still alive, it is possible that additional children could be born (this is a possibility even if the grantor is 80 under RAP (the fertile octogenarian)). These children would not be included in the measuring lives and a date scenario would be as follows:

Grant is made – 1952
Grantor has 4 children at the time – A, B, C, D
Child E is born – 1965
A and B die – 1972 (have 2 children – G and H respectively)
C and D die – 1980 (have 2 children – X and Y respectively)
E's child Z is born – 1987
Although G, H, X and Y will be 21 years old within the proper period, Z will not be 21 until 2008, which is 36 years after A and B's death and 28 years after C and D's death

Step 6 – The rule is violated because of a potential child.

Emphasize that the rule is violated even if the theoretical Child E is never born. Rule turns on possibilities, not realities.

USE FIGURE 2.3 TO REVIEW FUTURE INTERESTS.

III. Land Interests – Nonfreehold Estates

Limited in duration and non-inheritable

IV. Economics of Land Interests (Review Posner article with students)

A. New Ownership Rights Needed to Provide Incentives

B. Discuss Example of Farmer's Sale to Maximize Profitability and Return on Investment

C. Efficient Economic Land Systems

1. Must be universal

2. Must provide for exclusive rights – protection of land interests – use and possession

3. Transferability

USE POWERPOINT SLIDE 2-18 TO DISCUSS RICHARD POSNER'S ARTICLE.

ANSWERS TO DISCUSSION QUESTIONS:

1. *How do property rights serve to protect and "incent" landowners?* By giving them exclusive rights in the land and its products – crops.
2. *Why is it sometimes more economically efficient for a property owner to transfer property?* Second party may make the land more productive because he may be a better farmer than the first party.
3. *What are the three criteria of an efficient system of property rights?* Universality; exclusivity; transferability.

ANSWERS TO CHAPTER PROBLEMS:

1. Fee simple determinable; must use it for an incinerator or lose the land. *Proctor v. Inland Shores, Inc.,* 373 S.E.2d 268 (Ga. 1988).

2. The court reasoned that the termination of a fee simple determinable determined title to the mineral estate. The only factual issue is whether Grizzle had ceased operations – if he had, then title reverted back to Ramsey and he had the right to extract minerals. *Ramsey v. Grizzle,* 313 S.W.3d 498 (Tex. App. 2010).

3. The basic issue raised on the appeal is this: Does the fact that the Kinney County State Lake located on the land no longer contains a body of water of 150 acres serve as a basis for the activation of the reversion clause so as to terminate the State's title to the real estate and cause title to revert to the plaintiffs? In order to determine this basic issue it would be helpful to consider certain general principles of law which are applicable in cases involving reversion clauses. In this case, the State, as grantee, owns a determinable or qualified fee in real estate which has all the attributes of a fee simple except it is subject to being defeated by the happening of a condition which is to terminate the estate. An estate in fee simple determinable is created by any limitation which: (1) creates an estate in fee simple and (2) provides that the estate shall automatically expire upon the occurrence of the stated event.

   In the past, this court has determined issues involving estates in fee simple determinable. In *Curtis v. Board of Education,* 43 Kan. 138, 144, 23 P. 98 (1890), it was stated that the authorities are uniform that an estate upon condition subsequent, which estate after having been fully vested may be defeated by a breach of the condition, is never favored in law, and that no deed will be construed to create such an estate unless the language to that effect is so clear that no room is left for any other construction. In *Ritchie v. K.N. & D. Rly. Co.,* 55 Kan. 36, 57,

39 P. 718 (1895), it was held that an instrument containing a condition subsequent, working a forfeiture of an estate, is to be strictly construed and its terms will never be extended by construction. This general rule is based upon the theory that, since a deed is the act of the grantor, it will be construed most strongly against him. See *Rose v. School District No. 94,* 162 Kan. 720, 726, 179 P.2d 181 (1947). Where, however, a deed clearly creates a fee simple determinable and reserves a reversionary interest in the grantor, such provisions will be enforced. See, for example, *Thompson v. Godfrey,* 191 Kan. 102, 379 P.2d 269 (1963).

The clause of reversion contained in paragraph six of the warranty deed requires that the premises be used by the State, as grantee, as a "public forestry, fish and game preserve and recreational state park." At the time the deed was executed, the statutes of Kansas provided for the establishment of public forestry, fish and game preserves, and recreational grounds. G.S. 1935, 32-215 authorized the forestry, fish and game commission, among other things, to establish, maintain, and provide for sanctuaries, in which game, game birds, fur-bearing animals or fish may breed or rest; to replenish hunting and trapping grounds and water or fishing waters; and to establish, maintain, and improve recreational grounds for the purpose of affording recreational facilities for the citizens of Kansas. That statute was enacted in 1927 and was in full force and effect at the time the warranty deed was executed in the present case.

These same basic powers are given to the fish and game commission today by virtue of our present statutes in K.S.A. 32-201 *et seq.*

G.S. 1935, 32-214 gave the forestry, fish and game commission broad power and authority to acquire lands by donation or by purchase for the purpose of establishing and maintaining the same as a public forestry, recreational grounds, and fish and game preserves; to acquire or provide for the building of reservoirs, dam or lakes for impounding water and for providing for the planting of forestry trees; to supervise building and construction work of all kinds; to plant forestry trees and to make improvements on the property including the upkeep of roads and to do all and anything possible to carry out the intent of the act. Thus, by statute, the fish and game commission, acting on behalf of the State, is obviously vested with great power and discretion in using donated lands for a public forestry, fish and game preserve or a recreational state park.

In the *City of Wichita v. Clapp,* 125 Kan. 100, 263 P. 12 (1928), it was held that the use of a portion of a public park as an airport came within the proper and legitimate uses for which public parks are created. In the opinion, at page 101, the court discussed the meaning of the term "park purposes." The court stated:

> "The specific question for consideration is whether park purposes may include an airport or landing field for airplanes. Under various authorities, the expression 'park purposes' has been held to include a race track, a tourist camp, bridle trails, boating, bathing, refreshment and lunch stands, providing bathing suits, towels and rooms for bathers, dressing pavilion, waiting room for street cars, refreshment and shelter room for the public, grandstand, ball games, baseball diamond, race meets, tennis courts, croquet grounds, children's playgrounds, hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and many other recreational and educational facilities. In *Bailey v. City of Topeka,* 97 Kan. 327, 330, 154 P. 1014, this court quoted approvingly from Dillon on Municipal Corporations, to the effect that:
>
> > "'A park may be devoted to any use which tends to promote popular enjoyment and recreation.' (Dillon, Municipal Corporations, 5th ed. § 1096, p. 1749.)"

In 1955, the legislature provided for a state park and resources authority (K.S.A. 74-4501 *et seq*). The legislature gave broad and comprehensive definitions to the terms "state park" and "park facilities." See K.S.A. 74-4502(d) and (e).

These various statutes and authorities are cited to show the broad interpretation which has been given to the terms "forestry, fish and game preserve and recreational state park." The trial court in this case granted partial summary judgment in favor of the defendants, holding that the terms of the deed do not support a forfeiture of the State's interest in the property simply because the lake constructed on the premises contained a body of water of less than 150 acres prior to and subsequent to the filing of this action. We agree with the trial court. The deed should be construed to require only that the State in good faith maintain the property as a public forestry, fish and game facility and as a recreational state park. The grantor obviously had in mind an area dedicated to the protection and conservation of natural surroundings, game and fish, and a place where the people could enjoy such natural beauties. The lake is an important factor to be considered in determining whether the State in good faith has maintained the entire property for the intended uses. The maintenance of the lake, however, is not the controlling consideration but is only a part of the big picture. Under the circumstances, we hold that the trial court correctly held that the State of Kansas had not forfeited its title to the land simply because the quantity of

water contained in the lake has not been sufficient to completely fill an area of 150 acres. The quantity of water contained in the lake is bound to vary from year to year depending upon the amount of rainfall and any other available sources of water in the area.

As noted above, however, the trial court, instead of restricting its decision to a partial summary judgment on the single issue presented, found that all other issues in the case were moot and that judgment should be rendered in favor of the defendants and against the plaintiffs "on their cause of action." We hold that, in entering that judgment, the trial court committed reversible error. The final summary judgment rendered was erroneous because it was prematurely granted and denied to the parties the opportunity to complete their discovery and present evidence on the ultimate factual issue presented in the case: Whether the state has in good faith used and maintained the premises for the intended purposes.

In *Lawrence v. Deemy,* 204 Kan. 299, 461 P.2d 770 (1969), this court reviewed our law relating to summary judgment and stated as follows:

> "Generally before a summary [judgment] may be granted, the record before the court must show conclusively that there remains no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law. A mere surmise or belief on the part of the trial court, no matter how reasonable, that a party cannot prevail upon a trial will not warrant a summary judgment if there remains a dispute as to a material fact which is not clearly shown to be sham, frivolous, or so unsubstantial that it would be futile to try the case (*Knowles v. Klase,* 204 Kan. 156, 460 P.2d 444; *Green v. Kaesler-Allen Lumber Co.,* 197 Kan. 788, 420 P.2d 1019.) The manifest purpose of a summary judgment is to obviate delay where there is no real issue of fact. A court should never attempt to determine the factual issues on a motion for summary judgment, but should search the record for the purpose of determining whether factual issues do exist. If there is a reasonable doubt as to their existence, a motion for summary judgment will not lie. (*Secrist v. Turley,* 196 Kan. 572, 412 P.2d 976.) A court, in making its determination, must give to the party against whom summary judgment is sought the benefit of all inferences that may be drawn from the facts under consideration. (*Shehi v. Southwest Rentals, Inc.,* 199 Kan. 265, 428 P.2d 838; *Jarnagin v. Ditus,* 198 Kan. 413, 424 P.2d 265; *Brick v. City of Wichita,* 195 Kan. 206, 403 P.2d 964.)
>
> "Regardless of how refined or sophisticated we attempt to state the summary judgment rule, we always return to the language of the statute itself (K.S.A. 60-256[c]) – there must remain 'no genuine issue as to any material fact.' " 204 Kan. at 301-02, 461 P.2d 770.

Although there was apparently some evidence presented to the trial court at the informal discovery conference that improvements had been made on the land and that the lake had contained water intermittently down through the years and that various sums of money have been spent on the property, such evidence has not been included in the record on appeal and the parties have not been furnished a full opportunity to complete their discovery and develop evidence to be presented on the primary issue in the case, set forth above, or on other issues raised by the parties. We have no hesitancy in holding that final summary judgment in the case was prematurely granted and that the case must be remanded to the trial court for further proceedings.

The judgment of the district court is affirmed in part and reversed in part and remanded for further proceedings in accordance with the views expressed in this opinion. *Kinney v. State of Kansas and Kansas Fish and Game Commission,* 710 P.2d 1290 (Kan. 1985).

4. a. A – life estate
   A's widow – life estate
   A's children – contingent remainder (don't know which children will be living)
   Grantor – reversion
   DOWT does not apply to heirs – not "to heirs" but "to children"; RAP not violated because it vests immediately upon death of the measuring life (the widow)
   b. A – life estate
   Grantor – reversion
   c. A – fee simple subject to a condition subsequent
   G – right of entry/power of termination
   d. A – life estate
   B – vested remainder subject to complete divestment
   G – reversion
   D – estate for years (subject to termination if A dies during the 10-year period)
   e. A – fee simple determinable

G – possibility of reverter
If G left all of his estate to A, A would then have a fee simple

f. A – has an executory interest which will eventually be a fee simple interest
G – has nothing
No violation of RAP since A and G are measuring lives

g. A – life estate
Children – life estate
Grandchildren – vested remainder subject to partial divestment (there could be more grandchildren)

h. A – life estate
B – vested remainder subject to complete divestment
C – executory interest

i. A – life estate
Heirs of A – contingent remainder (if Rule in Shelley's case applies, A holds fee simple)

j. A – life estate
B – vested remainder subject to complete divestment

5. Fee simple determinable = present interest (Church of God); possibility of reverter = future interest (Collins and heirs); no, RAP does not apply. *Collins v. Church of God of Prophecy,* 800 S.W.2d 418 (Ark. 1990).

6. The court held that (a) daughters received vested remainder subject to divestment, not contingent remainder; (b) as a matter of first impression, when a life tenant is explicitly given the right to consume or invade the corpus, absent a showing of waste, she may do so at her discretion without need to petition the court for permission or provide notice of the invasion or an accounting; and (c) wife was not required to provide notice to daughters when wife invaded corpus or to provide accounting. *Hammons v. Hammons,* 327 S.W.3d 444 (Ky. 2010).

7. There was a violation of the use restriction because the P-1 building is used only to test the siren. Fire Department no longer owns the land. It reverted back. *Long v. Pompey Hill Volunteer Fire Dept.,* 539 N.Y.S.2d 1014 (1989).

8. Edna has a life estate. Edna also has an alternative executory interest if she becomes a widow. *Dover v. Grand Lodge of Nebraska Ind. Order of Oddfellows*, 206 N.W.2d 845 (Neb. 1973).

9. Alice has a life estate with a remainder to the heirs of the grantor thus creating a Doctrine of Worthier Title situation. It is a void grant and the grantor thus keeps the reversion. *Harris Trust & Savings Bank v. Beach*, 495 N.E.2d 1170 (Ill. 1986).

10. Every possibility of reverter and right of entry created prior to July 1, 1960, shall cease to be valid or enforceable at the expiration of thirty (30) years after the effective date of the instrument creating it, unless before July 1, 1965, a declaration of intention to preserve it is filed for record with the county clerk of the county in which the real property is located.

    The basis of the trial court's decision was that the language of the deed fell within the statute because it constituted a possibility of reverter or right of entry. If the trial court's interpretation is correct, then the statute does indeed cause the deed language to be unenforceable since no declaration of intention to preserve the right was filed before July 1, 1965.

    The Stumbo heirs argue that the trial court erroneously characterized the grantor's right under the deed to be a determinable fee estate rather than an option. They contend that determinable fee estates are rights retained by grantors which automatically blossom into full title upon the happening of an event. They assert that the right in the deed was not a determinable fee estate since the right retained by the grantor did not automatically blossom into full title when the school closed. In arguing that the statute was not applicable, they maintain that the closing of the school caused the right or option to purchase the property to become vested.

    We agree with the Stumbo heirs that the 1926 deed did not create a fee simple determinable. "The theory of a determinable fee is that there is an ungranted interest retained by the grantor, called a possibility of reverter, which automatically blossoms into full title upon the occurrence of the limiting event." *McGiboney v. Board of Education of Middlesboro, Ky.,* 387 S.W.2d 869, 871 (1965). Because the right under the deed did not automatically blossom into full title upon the closing of the school, the interest in the property may not be characterized as a determinable fee. The trial court did not characterize the interest in the property as a determinable fee. In fact, it made no specific characterization except to state that there existed a possibility of reverter or right of entry. *Stumbo v. Board of Education of Floyd County,* 2001 WL 34800010 (Ky.).

IN-CLASS EXERCISES:

1. Have the students develop the following:

   a. A property grant from their parents to them that would restrict their use of the property.
   b. A property grant to their children (or potential children) that would restrict their use of the property.
   c. A donation of land from them to a College or University that would restrict the college's or university's use of the land.

2. Have the students create a life estate in which they hold both the life estate and the future interest accompanying it.

3. Have the students read the following case and answer Chapter Problem #7:

LONG v. POMPEY HILL VOLUNTEER FIRE DEPT.
539 N.Y.S.2d 1014 (1989)

Richard J. Long, and Mary Long, his wife, conveyed by warranty deed dated September 30, 1949, to the Pompey Fire Department a parcel of land (called P-1). The deed, which was properly recorded in the Onondaga County Clerk's Office on November 15, 1949, stated that the grant of the parcel was given for the purpose of "erecting thereon a fire house." The deed also included the following language:

> In the event that the said premises are no longer used to house a fire department, then and in that event the land and building erected thereon is to revert to Richard J. Long and Mary Long, or their heirs and assigns.

Shortly after the conveyance, a fire house was erected on P-1. The building is a two-story structure with a cinder block first floor and a wood frame second floor. The first floor contains three large bays to house fire trucks and equipment. The building was used continuously from 1950 to 1985 to house the Fire Department.

In 1984, the Fire Department (defendant) acquired another parcel of land (P-2) located about 300 yards from P-1. P-2 had an elementary school which was remodeled to include vehicle bays and other features of a well-equipped fire house. In November 1985, the Fire Department moved its essential equipment and the majority of its functions to the P-2 facility.

Paul Long and others who are the heirs of Richard and Mary Long (plaintiffs) brought suit to have title to P-1 vested in them for violation of the restriction placed on the property in the original grant.

MORDUE, Justice

The issue now before this Court is whether P-1 is still being used to "house a fire department". Based upon the credible evidence adduced at trial, I find that P-1 has been used as follows.

Originally, the building on P-1 housed all activities including meetings, the maintenance and storage of equipment, the maintenance and storage of vehicles, training programs, and fund raising activities. In addition, P-1 had running water, toilet facilities, and heat, and was well maintained. P-1 had a telephone system installed and was the official address for the defendant. The building on P-1 was the response place where the fire fighters would go to get equipment at emergency times. The use of P-1 to house the fire department in the above stated manner continued for several decades and until 1984.

When the defendant bought its new building at P-2 in 1984, most activities at P-1 stopped. The last monthly meeting held at P-1 was in the winter of 1984. The telephone as well as the water pump were disconnected, thereby precluding lavoratory [sic] use as well as outside communication. P-1 was no longer used for storage of emergency vehicles or equipment, nor was it used for training programs.

For all intents and purposes, P-1 was virtually abandoned by the defendant from the fall of 1985, through the summer of 1986. The classrooms were gone, no longer were any chairs in the building, snow was no longer removed, telephone services were removed, lavoratories [sic] were inoperable due to removal of water, heat was turned off, and the outside of the building was no longer being maintained although it was in need of paint and repair. In addition, the 1986-87 telephone book listed P-2 as defendant's address. The evidence reflects that this state of disuse and unkemptness continued until 1988.

After the Demand for Delivery of Real Property was served on the defendant on June 3, 1986, and as the instant lawsuit came closer to fruition and resolution, activities increased at P-1. A few training sessions covering extrications and first aid of car accident victims were held. In addition, a bus that had always been parked across the street in a vacant parking lot, was suddenly being stored in P-1. To demonstrate "activity" at P-1, in 1988, defendant conducted a series of air-mask training programs at P-1.

At the present time, P-2 houses the fire department's activities. All matters dealing with fund raising and medical training are conducted at P-2. In addition, the mandatory monthly meetings are held at P-2. Furthermore, at the present time, there are approximately 1,200 square feet of space in P-2 that are not being used by the defendant. Hence, there appears to be no reason for P-1 to be used by the defendant despite the fact that there is still a siren located at P-1 that is automatically tested every day at 12:00 o'clock noon. The testing of the siren appears to be the only use to which P-1 is devoted by the defendant.

Based on the foregoing, this Court finds that the defendant no longer uses the conveyed premises (P-1) to "house a fire department". As such, the land and building thereon should revert to Richard J. Long and Mary Long or their heirs or assigns, the plaintiffs herein.

Title was vested in the Plaintiffs (the heirs of the Longs).

DISCUSSION QUESTIONS:

1. When was the property originally conveyed to the Fire Department?
2. What restriction was placed on its use?
3. What happened in 1985 to change the character of its use?
4. How was P-1 used after 1985?
5. What type of interest did the heirs of the Longs have?
6. What type of interest did the Fire Department have?

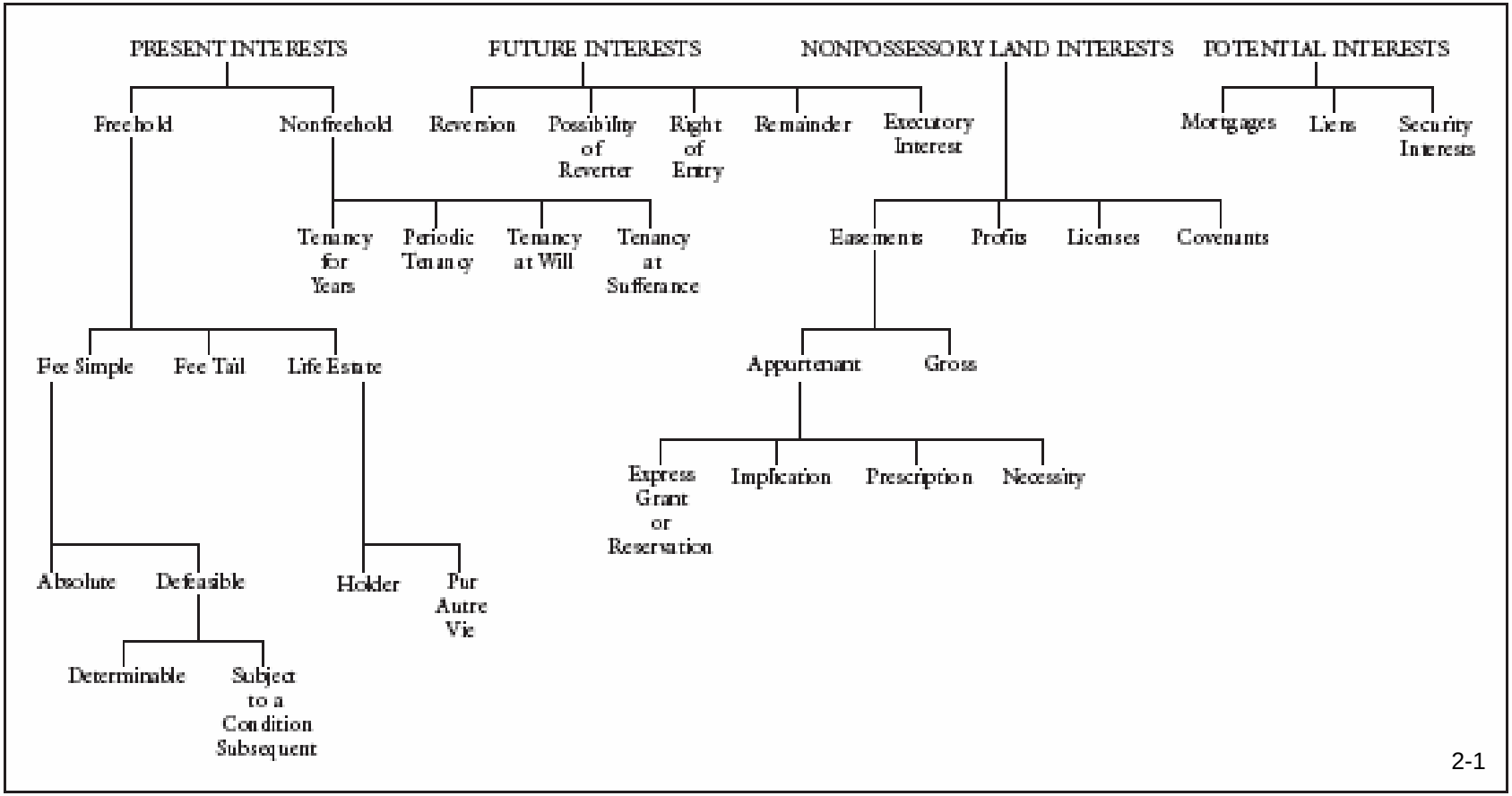
Real Estate Law, 11th Ed. by Marianne M. Jennings

Chapter 2

Land Interests: Present and Future

Land Interests

Figure 2.1 Land Interests



Types of Estates

- **Freehold = uncertain or unlimited in duration**
- **Fee = interest in land that is inheritable**
- **Fee freehold = uncertain or unlimited in duration and can be passed along through inheritance**

Types of Ownership Freehold

1. Fee simple (absolute)
2. Fee simple (defeasible)
3. Fee simple (determinables)
   - "To A so long as the premises are used for school purposes"
     - Grantors (heirs) have title at moment clause is violated
   - Possibility of reverter

(continued on next slide)

Types of Ownership Freehold

4. **Fee simple subject to a condition subsequent**
5. **Right of entry**
   - **“To A provided that liquor is never sold on the premises”**
   - **Grantor (heirs) have right to claim title when clause is violated**

Rails to Trails: *Rogers v. U.S.*

- What was the purpose of the right of way?
- How was the government using the right of way?
- Does a good cause trump property rights?

Types of Ownership Freehold

- **Fee tail: Can be inherited only by lineal descendants (children, grandchildren, etc.)**
- **Fee tail male: Can be inherited only my male lineal descendants (The Jane Austen land interest)**

Freehold/Non-Fee Interests

- **Life estates: Lasts as long as the life of the holder; cannot be inherited**
- **Life estate *pur autre vie*: life estate measured by the life of another**
- **Estate planning tool to avoid double taxation in final passage of title to heirs**

Present and Future Interests in Land

1. Fee simple
2. Fee tail
3. Fee simple determinable
4. Fee simple subject to a condition subsequent
5. Life estate

1. None
2. Executory interest/reversion
3. Possibility of reverter
4. Right of entry (re-entry)/power of termination
5. Reversion or remainder or executory interest

Reversions

- Future interest created in the grantor
- “To A for life.” – Grantor has a reversion
- If grantor is deceased, reversion interest goes to grantor’s heirs

Types of Remainders

- **Vested:**

  “*To A for life, then to B.*”

- **Vested subject to partial divestment:**

  “To A for life, then to B’s children.” (B is alive)

- **Vested subject to complete divestment:**

  “To A for life, then if B is married to B, but if B is not married, to C.”

- **Contingent:**

  “To A for life, then if B is married, to B.”

Consider 2.5

a. “To A for life”
b. “To A and his heirs”
c. “To A”
d. “To A and B”
e. “To A and his female bodily heirs”
f. “To A provided the premises are never used for the sale of liquor”

(continued on next slide)

Consider 2.5

g. “To A on the condition that the premises are never used for a dance hall”
h. “To A so long as the premises are used for church purposes”
i. “To my husband, Ralph, for life”
j. “To the trustee for First County Church so long as the premises are never used for the playing of bingo”

(continued on next slide)

Consider 2.5

k. “To my granddaughter, Alfreda, and all of Alfreda’s female issue”

l. “To my daughter, Sara, for the life of my brother, Sam”

m. “To my granddaughter so long as the premises are used for a library for Whitman College”

(continued on next slide)

Consider 2.5

n. “To my son, John, and his bodily heirs”

o. “To Jess S. Long, and the children of his body begotten, and their heirs and assigns forever”

p. “To A for the period the land is used for a golf course”

The Rules for Future Interests

1. **Rule in Shelley's Case (RISC):**
   Merge life estate in grantee with remainder in grantee's heirs
2. **Doctrine of Worthier Title (DOWT):**
   Grantor who gives remainder to his heirs has a reversion
3. **Rule Against Perpetuities (RAP):**
   Interest must vest within lives and being plus 21 years

Lusk v. Broyles

- **Life estate with a remainder**
- **“Remainder to his bodily heirs”**
- **Who gets what, and why?**

Examples of Future Interest Rules

1. RISC: "To A for life, remainder to the heirs of A."
2. DOWT: "To A for life, remainder to the heirs of the grantor."
3. RAP: "To my children for life, remainder to any and all of my grandchildren who reach the age of 25."

Thoughts on Posner's Economics of Property Rights

1. Property rights create incentives to use resources efficiently.
2. To maximize efficiency, there must be the right to transfer title.
3. Property rights system must be universal.
4. Property rights must be exclusive.
5. Penalties on transfer introduce inefficiencies.

The End

Do you have any questions?