

Session 6

(FUTURE INTERESTS) Creation

10-14-10

Hornbook §§ 3.1-3.14

I. GENERAL INTRODUCTION**§3.1 Future Interests**

- “future estate” is a non-possessory interest that will, or may, become possessory estate at some future time.
- Characteristics: they are presently existing, legally protected property interests.
- Future refers to the “right to possession”

The O of a possessory estate can create a future estate by:

- 1. Transferring less than the O’s entire estate, retaining the balance of it
- 2. By dividing the estate into two or more “smaller” estates and transferring each of these “smaller” estates to a different person (or group of persons); or
- 3. By transferring the entire estate subject to defeasance on the happening of a stated event.

Two Principle Kinds of Future Estates

- 1. Reversionary future estates created or arising in favor of the transferor
 - **Reversionary Interests 3 Basic Models**
 - A. reversions
 - B. possibilities of reverter
 - C. powers of termination (aka rights of entry for breach of condition)
- 2. Non-Reversionary future interests created in favor of persons other than the transferor.
 - **Non-Reversionary Interests 2 Basic Models**
 - A. remainders
 - B. executory interests
 - Each of these may be further subdivided into several different sub-classes.

§3.2 Vested and Non-vested Future Interests

- **RULE:** the entire “fee simple absolute” MUST always be vested, in possession and in interest, in some identifiable group of persons.
 - i.e. present and vested FE resulting from a transfer MUST add up to a fee simple absolute, no more or less.
 - Significance of this rule: to distinguish between vested and non-vested future estates.
- **VESTED:**
 - a future estate is “vested” IF it is created in favor of a “living person” who is IDENTIFIABLE and ready to take possession of the land immediately upon the “natural” expiration of all prior estates created by the same transfer. (where there is no express or implied condition)
- **NON-VESTED:**
 - If it is created in favor of an “unborn” or otherwise “Unidentifiable person” and/or its ability to become possessory is subject to an express condition “precedent” other than the “natural” expiration of all prior estates created by the same transfer.
- **GENERAL RULES:**
 - –the only future interests that can be vested are “reversions” and “remainders”
 - 1. Reversions are ALWAYS vested. (vs.)

- 2. Remainders MAY be vested or non-vested.
- 3. Possibilities of Reverter, Powers of Termination, and Executory Interests are NEVER vested.
- 4. Possibilities of Reverter, powers of termination, and non-vested remainders are ALWAYS “contingent” (i.e. it is always uncertain at time of creation whether they will satisfy a conditions precedent to their becoming either possessory estates or vested future estates.
- 5. Most executory interests are also “contingent”, but it is possible to created an executory interest that is not “contingent.”
- **its important to determine whether an interest is vested or non-vested to see whether rule is subject to “rule against perpetuities.”*

II. REVERSIONARY FUTURE INTERESTS

1. Future Interests Retained by GRANTOR (O)

[reversions, possibility of reverter, power of termination]

(A) §3.3 Reversions

- Definition: A “Reversion” is a future estate left in a transferor (O) or (if transfer by will, the transferor’s successors in interest) when the transfer is of less than the entire estate.
 - *i.e.* exist when a grantor (O) conveys estate of a lesser quantity than he owns.
 - A grantor can retain both a “reversion” and a “possibility of reverter” or “power of termination.”
- Ex) O → to A for life, then to → B for life
 - *O= retains a reversion in “fee simple absolute” because the life estates transferred to A and B do not add up to a fee simple absolute.*
- Ex) O transfers “to A for ten years, then to B for ten years.”
 - *O = retains a reversion in fee simple absolute*
 - *In jurisdictions where a “fee tail” can be created, a transfer from O to A in fee tail, with a remainder to B in fee tail, would leave O with a reversion in fee simple absolute.*
 - *i.e. O → to A (in fee tail) → with (remainder) to B (in fee tail)*
 - *O = reversion in fee simple absolute*
- **Reversions in general:**
 - *1. May arise where the expressed intent of the transferor is to transfer the entire estate but part of the attempted transfer is void.*
 - *i.e. “to A for life, remainder to B” and B “predeceases O”*
 - *--If no applicable anti-lapse statute, devise to B lapses and is VOID, O=retains a reversion in fee simple absolute.*
 - *2. A Reversion in Fee Simple*
 - *may arise when a transferor creates several successive life estates, or several successive estates, or several successive estates for years, or (where fee-tail estates may still be created), several successive fee tail estates, without expressly transferring residue of the fee simple.*
 - *3. When ALL prior estates have expired.*

- The person (persons) who own the reversion in “fee simple” will be entitled to possession as a matter of law.
 - 4. When “O” predeceases A or B what happens?
 - “to A for ten years, then to B for ten years.”
 - Estates “for years” < life estate ---O=retains a reversion for life bc any estate for years however long its duration, is deemed “smaller” than a life estate.
 - O maintains a reversion upon transfer. It doesn’t matter if he dies before A or B just means O’s reversion never became a possessory estate.
 - 5. Note: a contingent remainder is NOT a property interest
 - 6. A reversion like a remainder takes upon the natural termination of prior interest
 - **Example(s):**
 - O (“fee simple absolute title”) **“to A for life”**
 - O=fee simple absolute following A’s life estate
 - O reversion arises automatically w/o need for express language
 - When A dies, O’s reversion terminates, and he again owns the “fee simple absolute title.”
 - **“to A for her life”**
 - O has a reversion in a life estate (bc A’s estate is smaller than his)
 - A’s estate ends when either party dies
 - O’s will end only on his death and will survive her death if that occurs first.
 - **“to A for life, and then to B for life.”**
 - O=fee simple absolute (in this scenario)
 - The two estates do not add up to a fee simple absolute thus . . .
 - O= reversion in fee simple absolute
 - A=present life estate
 - B=remainder in life estate
 - **“to A for life and then to B and his heirs if he is married before A dies.”**
 - A’s life estate + B’s contingent remainder do NOT equal O’s FSA
 - Thus O=reversion in fee simple
 - **“to A for life, then to B if he survives her, otherwise to C”**
 - O=FSA
 - B or C will get possession when A dies
 - O=reversion, bc B & C only have contingent remainders while A & B are alive.
 - A’s life estate is the only property interest that O conveyed.
- ***Note: a reversion is ALWAYS a vested interest, although it may be divested.

(B) §3.4 Possibilities of Reverter (p.85)

- 1. Whenever O (grantor) conveys a “determinable estate,” he retains a possibility of reverter
- 2. *A possibility of reverter (POR) ALWAYS follows a determinable estate; and a determinable estate ALWAYS is followed by a POR.
- 3. Breach of condition on determinable estate → the POR automatically becomes possessory
- 4. Generally . . .
 - POR arises whenever the transferor receives an estate subject to a “special limitation.”

- *Rule Against Perpetuities does NOT apply to POR
- **Duration:** POR potentially “infinite.”
- 5. Examples
 - “to A for life, so long as the land is used only for residential purposes.”
 - A=receives a life estate determinable
 - O=retains a reversion in fee simple absolute
 - “to A and her heirs for ‘so long as’ liquor is not sold on property.”
 - A=fee simple determinable
 - O=possibility of reverter (POR)
 - IF liquor sold → Fee title and right to possess automatically will revert to O or his heirs.
- **6. POR --“Loss by Adverse Possession”**
 - Note: The holder of a POR faces the risk that possessory title may come back to him without his knowledge, becomes comes back automatically.
 - IF grantee possesses land for statutory period after condition is breach, she may acquire fee simple absolute title by adverse possession. (*O conveying subj to a CS would eliminate this danger)

(C) Power of Termination

- when grantor conveys estate subject to a condition subsequent (CS) he retains power of termination (aka right of re-entry) [note: CS and PT always go together]
- IF CS occurs → O may elect to enforce forfeiture & recover possession of the land OR waive breach.
 - **Example:** [O has a fee simple absolute title]
 - “to A and her heirs, **but if** liquor is ever sold on the premises, grantor (O) or his heirs may re-enter and terminate their estate”
 - A=fee simple subject to condition subsequent
 - O=power of termination

III. NON-REVERSIONARY FUTURE INTERESTS (§3.6)

I. Future Interests Created in Grantee (p.99)

- *When a document, such as a deed, creates a future interest, and conveys it to a grantee, it is either a remainder or an executory interest. Aka an “executory limitation”*
- **Definition:** are future interests created in favor of transferees
 - 2 categories: (1) remainders; and (2) executory interests
 - (1) REMAINDERS (non-reversionary future interest created in favor of transferee)
 - Elements:
 - (a) it is created simultaneously with a present estate smaller than a fee simple –the “particular estate”
 - (b) it is possible for the future interest to become a present estate as soon as all the prior interests created by the transfer have expired. (remainder must be patient and wait for all preceding interests to expire before it becomes a “present interest.”)
 - REMAINDER Examples: [see p.99 in BLO for explanation]
 - -“to A for life, and then to B” (or “remainder to B”)
 - -“to A for life, then to B for life” (or “remainder to B for life”)

- -“to A for life, and then to B for life, then to C” (or “remainder to B for life, remainder to C”)
 - (2) EXECUTORY INTERESTS (non-reversionary future interest created in favor of transferee)
 - Elements:
 - (a) need not be created simultaneously with a present estate (although often it is so created)
 - (b) generally, will become either a “present” or “vested” future interest automatically upon the defeasance of a present estate or a vested remainder by the operation of an “executory limitation.”
 - Examples (when B obtains an executory interest)
 - -“to B, but if A dies without children him surviving, then to B.”
 - -“to B, from and after B’s marriage to A.”
 - -“to A for life, then to B one year after A’s death.”
 - *see more examples of estates defeated by executory limitation and displaced by executory interest on Hornbook §3.6 page 90. (present fee simple in transferee, or present fee simple in grantor, reversion in fee simple by the grantor, or an estate less than fee simple)
 - (3) DURATION (of Future Interests)
 - --RULE: to fully describe a future interest one MUST state what its duration will be once it becomes possessory.
 - -Note: remainders and E.I. are most often in “fee simple” but can be in “fee tail” or “for life”
 - --RULE: neither remainder nor E.I. “in land” may be created for term of years only.
 - --RULE: BUT “a term of years” with the essential characteristics of a remainder or an executory interest can be created.
- Summary of Remainders:
 - --remainders may be “vested” or “contingent”
 - --“vested” remainders may be subdivided into remainders that are “indefeasibly vested, vested subject to complete defeasance, and vested subject to open”
- Summary of Executory Interests:
 - --are NEVER deemed to be vested
 - --usually they are “contingent” (subject to a condition precedent not certain to occur BUT can be subject to a CP certain to occur)
 - --an executory interest subject to a CP certain to occur is NEITHER “vested” NOR “contingent”
- Limit?
 - --no limit to number of remainders that can be created BUT they must be created simultaneously
 - --no limit to the number of executory interests that can be created BUT they must be created simultaneously
 - --simultaneously = either in same will or deed, or two diff deeds delivered simultaneously, or by will and codicil thereto.

- --in the US executory interests are protected in equity and at law.
- Generally . . .
 - A property interest is divested when a condition terminates it.

Read/review

§3.7 Remainder Indefeasibly vested and vested subject to complete defeasance p.92; and

§3.8 Remainders vested subject to open

§3.9 CONTINGENT REMAINDERS –In General (p.97)

A “REMAINDER” IS “CONTINGENT” WHEN . . .

- (a) created in favor of unborn or otherwise unidentifiable person and/or
- (b) is subject to an “express” condition “precedent” (other than the expiration of all prior interests created by the same transfer –that must be satisfied before the remainder can become a present interest)

Examples: (all the remainders created by these transfers are “contingent”)

- (1) to A for life, remainder to the “children” of A” (assuming A has no children)
- (2) to A for life, remainder to the heirs of B (assuming B is living)
- (3) to A for life, remainder to the heirs of A
- (4) to A for life, remainder to B if B reaches the age of 21 (assuming that B is under 21)*
- (5) to A for life, remainder to B if B survives A
- (6) to A for life, remainder to those children of A who reach the age of 21 (assuming no child of A has yet reached 21*)
- (7) to A for life, remainder to those children of A who shall survive A

General Rules:

- --remainder is vested when there is a person in being, who would have an immediate right to possession of the property, on the determination of all intermediate or precedent estates
- --presumed vested in “A’s heirs” (#3) if you can identify the human being, by virtue of a grant or remainder, would have an immediate right to possession of lands if the precedent estate of another should now cease.
- --see page 98 explanation of the examples above.*
- **RULE:** at all times there **MUST** be some combination of present and vested future interests that “adds up” to a fee simple absolute (or the equivalent)
- **RULE:** in all the above examples the “transferor” retains a “reversion in fee simple”

Read/review p.101 §3.11 Shifting Executory Interests

Read/review p.104 §3.12 Springing Executory Interests

Read/review p.105 §3.13 alternative contingent remainders or vested remainder subject to an executory interest

Read/review p.108 §3.14 powers of appointment

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