Practice Question 5: Model Answer

O's will left F a life estate in Blackacre. Then the first of F's children to become a published author would get Blackacre in fee simple. It is conceivable that the reference to children in the will refers to Y and Z, who were F's children when O wrote the will and when O died in 2022. But the language is broader than that. The will doesn't say "to the first of *Y or Z* to publish." Also, when he signed his will, O talked about inducing "the younger generation" to publish, which sounds like he meant "F's children," not "Y and Z specifically."

The interest in the first of F's children to publish could be labeled a contingent remainder if O's intent was that the publication happen by the time of F's death: it would follow a life estate, always be capable of taking effect immediately on F's death (no gap), and wouldn't cut off F's life estate. But O did want to induce F's kids to publish, and that could easily happen *after* F died. Also, O's will doesn't actually say "to the first of F's children to become a published author during F's life." So O probably intended that one of F's children could get Blackacre even if they didn't publish until after F's death, which means there could be a gap after F died. So the interest is an executory interest in fee simple.

O's estate would have a reversion in fee simple subject to that executory interest. If F died leaving at least one child alive and none of his kids had published, Blackacre would go back to O's estate, waiting until one of F's children published or until they all died unpublished. That reversion would belong to A&B under the residuary clause in O's will.

If Cania follows the traditional common law RAP ("what might happen"), the executory interest is invalid. To determine if it is valid, we look for a measuring life – someone we could point to in 2022, and say we'd know for sure during that person's life (or within 21 years of their death) whether the executory interest would ever vest. Here there's no such person. Neither O nor F (nor Ina Garten nor A nor B) can be a measuring life: we can't say for certain as of 2022 that we will know within their lifetimes, or within 21 years after their death, whether a child of F will be the first to publish.

Neither can Y or Z be measuring lives. First, it's possible a manuscript one of them wrote would first be published 50 years after their death. Second, it's possible as of 2022 that F would have another child in 2024, and then F, Y, Z, A, B, or any other particular person you might point to in 2022 dies, and then that after-born child would be the first to publish at age 90, way more than 21 years after the lives of F, A, B, etc.

Since there's no measuring life, the executory interest is invalid under the classic "what might happen" RAP. That Z *maybe* published something in 2024 wouldn't matter. The court would strike the executory interest from the will, leaving a devise to F for life, with a reversion in fee simple in O's estate, which A&B would get.

However, many states have adopted reforms to the RAP. If Cania has adopted the wait and see approach, a court might be willing to consider what happened after O died. If Z has "published" a novel in 2024, the court might uphold the interest under this approach.

If Cania applies *cy pres,* a court might reform the will in a way that saves the interest from invalidation while doing the least to re-write the will. For example, the court could read as saying "then to the 1st of Y or Z to become a published author." That wouldn't violate the RAP and even if it's not exactly what O intended, O would probably prefer that over the interest being invalidated.

If Cania has adopted the USRAP, in essence there'd be up to a 90-year waiting period to see if some child of F became the first to publish. At the end of that period, Y or Z were still alive

and hadn't published, the court might invalidate the interest. Or it might rewrite the will to reflect O's general intent – to award Blackacre to Y or Z if they'd become (say) an educator or book critic.

If a reformed RAP would leave the executory interest in place, the court would have to decide what "become a published author" means. A&B would argue that just being called "Twitterature" doesn't make her tweets a novel, as opposed to a long social media thread on X. They're too emphemeral. It's not even clear Z finished her "novel." O's remark about storing carbon shows he meant traditional books. Plus Z's post on X are risqué and don't really "educate" youth.

Z would say "published" means "available to the public," and her Tweets amount to a novel. Novels can be published in installments. Retweeting her work, Garten even called her a novelist. Z's a member of the younger generation and her creative work inpsires 890,000 followers, fulfilling O's wish. Many books are risqué, too, and O did mention "entertaining.

In my view, a court would likely say that [if Cania follows a reformed RAP, Z owns Blackacre, because her work is fresh and creative and inspiring, which is what an editor would like.] OR [if Cania follows a reformed RAP, the executory interest remains in place so long as Y or Z is alive, because either Z or Y (if he swears off TikTok and gets to work) may someday "publish" in a more traditional sense.] OR [if Cania follows the classic RAP, A&B own Blackacre through the reversion, since the executory interest is invalid.]

Finally, A&B would get Blackacre now if the executory interest is invalid. Or, if it's valid but Z isn't yet a published author, they could get Blackacre if both Y and Z die without ever publishing. In what form would A&B have it? The language "so each is provided for" etc might indicate they'd get a joint life estate of some sort, which would terminate when both are dead. But Cania likely has a presumption in favor of a fee simple. Also, reading O's will as giving them a life estate would just mean there'd be a reversion in his estate, and A&B would have that too under the residuary clause. So the "end of their days" language will probably be read as just describing the reason for the gift of a fee simple: to support them.

A&B might have Blackacre as a tenancy by the entireties, or as a joint tenancy or tenancy in common. If Cania has entireties, the courts would presume entireties in transfers to a married couple because it protects them from creditors. If Cania doesn't have entireties, the interest is probably a T-i-C. Courts presume T-i-C unless it's clear that a JT is meant. Here, the reference to "together" isn't very specific. It could encompass JT or T-i-C. Neither "joint" nor "survivorship" (or "survive") is used. So it's very likely a T-i-C.

If A&B hold Blackacre in entireties, then B got it when A died. If A&B hold it as T-i-C, then B would own it after A's death as T-i-C with NFF, who'd take its share from A's will.

NOTE: I'd suggest that before you write an answer to a question like this, you do two things:

1. *Write out the grant/will in schematic form, with a timeline. For example*:
   O ⇨F for life, then to the 1st born of F's kids to become "published author." Everything else to A&B "together," provided till the end of days.
   2022: O's will takes effect
   2024: Z writes Lord of the Onion Rings, tweets; "published author"?
   F dies. Z owns Blackacre?
   A&B claim Blackacre.

A dies; will leaves all to NFF.

2. *Write an outline of the issues, including key facts*.