Property (B)

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SUPPLEMENTARY MATERIALS--PART V

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Determining the Interests in a Grant

Step One: **Determine who has the present right to possess the property, and make a preliminary determination of what that interest is called.** The determination of what the interest is called has to be preliminary at this stage, because your answer may change somewhat once you've identified all the future interests. If there is any condition on the present right to possess it, make sure you understand what the condition is and what it would take for it to be violated.

Step Two: **Determine whether or not the grant creates any future interests in a third party/grantee (i.e., not O, the grantor)**. Remember that there may be more than one such future interest. If the grant creates any interest or interests in a grantee, go to Step Three. Otherwise, go to Step Six.

Step Three: **For each future interest created in a *grantee*, determine whether it's a remainder or an executory interest.** It will be one or the other.

To be a remainder, the interest must satisfy *all three* of the following rules (or tests). If it flunks any one of them, you know it's not a remainder. And since it's one or the other, if it's not a remainder it must be an executory interest.

1. A remainder can follow only a life estate.[20] So if it follows anything other than a life estate, it can't be a remainder. It must be an executory interest.
2. A remainder must be *capable* of taking effect immediately upon the expiration of the preceding estate. It doesn't have to be certain to take effect when A (the life estate holder) dies – it just has to be *possible*, as of the time of the grant, that it would take effect immediately when A dies. If, for example, there's a built-in gap between the end of the life estate and the time when B could take possession, it can't be a remainder; it's an executory interest.
3. And a remainder can't take effect before the previous life estate expires. Or, to put it another way, it can't cut off the previous life estate. If the interest cuts off the life estate, then it can't be a remainder. It must be an executory interest.

Examples:

No. 21 *O → A and his heirs so long as the land is farmed, then to B and his heirs*. B's interest fails the first test. It doesn't follow a life estate. You don't need to apply the second and third tests to this grant to determine that it's not a remainder. All it takes is flunking any one of the three tests for a future interest created in a grantee to not be a remainder. Since it's not a remainder, it must be (and it is) an executory interest.

No. 24 *O → A for life, then 1 day after A dies, to B.* B's interest fails the second test. There's no way it could take effect immediately after A dies. It must be an executory interest.

[20] In fact, a remainder could also follow a fee tail, but don't worry about that. We aren't covering fee tails.

No. 26 *O → for life, but if B graduates from law school, then to B and his heirs*. B's interest fails the third test. The grant appears to say that B would get the property upon graduating even if A is still alive. This would cut off A's life estate.

In any of these three grants, B's interest is not a remainder. It therefore wasn't permitted at all before 1536. (The Casebook at CB 328-329 puts this in terms of a prohibition before 1536 of shifting and springing interests; this is just another way of saying that any interest created in a third party that did not qualify as a remainder under the rules above was not permitted.) Today it would be permitted, but it would be an executory interest, not a remainder.

The three rules, then, serve a dual purpose. They tell you whether the future interest created in a third party (like B) is a remainder. Post-1536 (when the Statute of Uses took effect), a future interest created in a third party that didn't qualify as a remainder was an executory interest. That remains so today. Again, an executory interest is a future interest that:

a) is created in a third party; AND
b) is not a remainder.

Why bother distinguishing a remainder from an executory interest? In particular, a contingent remainder and an executory interest look virtually identical in their function. The difference is that where the Doctrine of Destructibility of Contingent Remainders (DDCR) is in force, it applies to contingent remainders, but not to executory interests. (See the next section for more detail).[21] On an exam, if the question states that the particular jurisdiction follows the common law, you should assume the DDCR applies.

Whether the future interest is a remainder or an executory interest, make sure you can answer this question: a remainder (or executory interest) *in what*? For example, is it remainder (or executory interest) in fee simple? A remainder (or executory interest) in a life estate? A remainder (or executory interest) in fee simple subject to an executory interest? The question is – what sort of possessory interest will the future interest holder receive when the interest becomes possessory?

Finally, note what you do *not* need to worry about if the future interest in the grantee is an executory interest – namely, whether it is a shifting or a springing executory interest. There is no rule the application of which turns on whether an executory interest is shifting or springing. How you classify it (as shifting or springing) never makes a difference to what happens to the interest. So there's no point in identifying it one way or the other. It's labeling gone berserk.

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[21] As the casebook notes (CB 342-344), the Restatement (Third) proposes to simplify the catalog of future interests. All future interests would be called "future interests." They would be either "vested" or "contingent." It's useful to be generally familiar with this proposal, but you need to know the classic formulation, because that's what states follow. You should, however, assume (as does the Restatement (Third)) that all future interests are fully devisable, descendible, and alienable *inter vivos*, unless a case you're reading tells you otherwise.

If the future interest is a remainder, the next step is Step Four. If the future interest is an executory interest, go to Step Five.

Step Four: **Determine whether the remainder is a vested remainder or a contingent remainder.** A remainder is contingent if it satisfies either of the following two tests:

1. There is a condition that needs to be satisfied (a condition other than the death of the preceding life estate holder) for the remainder to become vested.
2. The remainder is held by an unascertained person.

If the remainder is not contingent, it's vested.

Step Five: **Go back and review your preliminary determination of the label to be applied to the present possessory estate, and decide whether you need to modify it.**

For example, in No. 21, you might have been tempted to call A's interest a fee simple determinable. But applying Step Two, you saw that there is a future interest created in a grantee (B), so you next determined (Step Three) whether it was a remainder or an executory interest. It flunks the first of the three tests for a remainder (it doesn't follow a life estate), so it must be an executory interest. Now you look back at A's interest and realize that A has a "fee simple subject to an executory interest" (i.e., B's executory interest) (it could also be called "fee simple on executory limitation").

NOTE: It's very helpful in learning the material to follow the labels exactly. Regardless of how some courts or commentators might label it, the interest in described in 21 is best termed a "fee simple on executory limitation" (or "subject to executory limitation"), with the executory interest in B – as opposed to a "fee simple determinable in A, with an executory interest in B." But on an exam, I won't take off points if your label isn't exactly correct, so long as I can understand what you're talking about.

Step Six: **Determine whether O, the grantor, retained any interest in the property.**

If there is no way that O could get it back, then there is no future interest in the grantor.

If O might get it back, determine what that interest is called. It will be called a reversion, possibility of reverter, or a right of entry/power of termination.

Here, too, you need to determine what sort of possessory interest O would be entitled to if the retained future interest became possessory. It might be, for example, a reversion in fee simple. But it might also be a reversion in fee simple subject to an executory interest (as in No. 29).

Finally, remember that the label you give a future interest may or may not change, depending on events after the grant is made. Keep in mind two rules:

1. A transfer of a future interest from one party to another will *not* change its name. Consider, for example, O → A for life. A has a life estate; O has a reversion. If a year later, while A is alive, O transfers O's interest to B, then we would say, A has a life estate, and B has a reversion. Or consider, O → A for life, then to B. Then a year later B transfers B's remainder to O. Then we would say A has a life estate, and O has a remainder.

2. Subsequent events can cause a future interest to change from contingent to vested or even destroy it. Consider O → A for life, then to B if B marries C. Initially, A has a life estate; B has a contingent remainder; and O has a reversion. If B marries C, though, then A has a life estate, and B has a vested remainder; O now has nothing. Or suppose that a year after the original grant is made, C dies without ever having married B. Now B can never fulfill the condition. This destroys B's contingent remainder. We would then say A has a life estate and O has a reversion. (We don't say that O has B's remainder, because the death of C just destroyed B's remainder; it wasn't transferred to O. Rather, the reversion was created in O at C's death.) Note of course that there could interpretive issues in a grant like this. For example, what if B, a non-US citizen, enters into what state law deems a valid marriage with C, a US citizen, while A is alive, but B is then convicted of violating federal law based on evidence that the marriage was entered into for the purpose of securing US citizenship?

The Doctrine of Destructibility of Contingent Remainders (DDCR)

Contingent remainders were subject to the DDCR at common law. Today you would need to ask in any given state whether the doctrine was in effect. In most states it has been abolished. In a few states it has not.

Remember that it is the Doctrine of Destructibility of *Contingent Remainders*. It is not the Doctrine of Destructibility of Executory Interests, nor is it the Doctrine of Destructibility of Contingent Remainders and Executory Interests. Executory Interests are not subject to the Doctrine of Destructibility of Contingent Remainders. Where the DDCR is in effect, it is important to distinguish between contingent remainders and executory interests.

There are two ways the DDCR can destroy contingent remainders.

1. The life estate ends because the life estate holder dies, and the contingent remainder is not ready to take effect. Then the contingent remainder is destroyed.
2. The life estate ends before the person holding the life estate dies, and the contingent remainder is not ready to take effect.

No. 27 O → A for life, then to B and her heirs if B marries C.

Assuming the state has the DDCR, we would say that A has a life estate, and B has a contingent remainder in fee simple. O has a reversion in fee simple. B could lose out in either of two ways:

1. A dies and B hasn't gotten around to marrying C. O gets it back and keeps it in fee simple. B's contingent remainder is destroyed.
2. X, a developer, buys A's life estate and O's reversion, and gets a fee simple through merger. (Merger means that the present possessory estate plus the next vested estate (i.e., one certain to become possessory someday) will merge into a fee simple.) B's contingent remainder is destroyed.

The Rule in Shelley's Case and the Doctrine of Worthier Title

As the Casebook explains (CB 353-354), these two rules, like the DDCR, were created by the common law courts to destroy certain contingent remainders. **You are not responsible for knowing the Rule Shelley's Case or the Doctrine of Worthier Title.**

Restatement (Second) of Torts

§ 822. General Rule

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

a) intentional and unreasonable, or
b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

§ 826. Unreasonableness of Intentional Invasion

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

a) the gravity of the harm outweighs the utility of the actor's conduct, or
b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

§ 827. Gravity of Harm--Factors Involved

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

a) the extent of the harm involved;
b) the character of the harm involved;
c) the social value that the law attaches to the type of use or enjoyment invaded;
d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
e) the burden on the person harmed of avoiding the harm.

§ 828. Utility Of Conduct--Factors Involved

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

a) the social value that the law attaches to the primary purpose of the conduct;
b) the suitability of the conduct to the character of the locality; and
c) the impracticability of preventing or avoiding the invasion.

§ 829. Gravity vs. Utility--Conduct Malicious Or Indecent

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and the actor's conduct is

a) for the sole purpose of causing harm to the other; or
b) contrary to common standards of decency.

§ 831. Gravity vs. Utility--Conduct Unsuited To Locality

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, and

a) the particular use or enjoyment interfered with is well suited to the character of the locality; and
b) the actor's conduct is unsuited to the character of that locality.

§ 7.12 Modification and Termination of Certain Affirmative Covenants

(1) A covenant to pay money or provide services terminates after a reasonable time if the instrument that created the covenant does not specify the total sum due or a definite termination point. This subsection does not apply to an obligation to pay for services or facilities concurrently provided to the burdened estate.

(2) A covenant to pay money or provide services in exchange for services or facilities provided to the burdened estate may be modified or terminated if the obligation becomes excessive in relation to the cost of providing the services or facilities or to the value received by the burdened estate; provided, however, that modification based on a decrease in value to the burdened estate should take account of any investment made by the covenantee in reasonable reliance on continued validity of the covenant obligation. This subsection does not apply if the servient owner is obliged to pay only for services or facilities actually used and the servient owner may practicably obtain the services or facilities from other sources.

(3) The rules stated in (1) and (2) above do not apply to obligations to a common-interest community or to obligations imposed pursuant to a conservation servitude.