REAL PROPERTY

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I. ESTATES IN LAND

A. IN GENERAL

"Estates in land" are ***possessory interests*** in land. These interests may be ***presently*** possessory (present estates), or they may become possessory in the ***future*** (future interests). They may be "freeholds," which give possession under some legal title or right to hold (*e.g.,* fees or life estates), or they may be "nonfreeholds," which give mere possession (*i.e.,* leases). Estates in land may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years. But whatever their characteristics, "estates in land" must be distinguished from ***nonpossessory*** interests such as easements, profits, covenants, and servitudes.

This section of the outline will examine various estates in land. It divides the interests into two classes: present interests and future interests. However, some future interests (those following defeasible fees) will be considered with the present interests to which they are attached.

B. PRESENT POSSESSORY ESTATES

1. Fee Simple Absolute

An estate in fee simple absolute is the largest estate permitted by law. It invests the holder of the fee with full possessory rights, now and in the future. The holder can sell it, divide it, or devise it; and if she dies intestate, her heirs will inherit it. The fee simple has an indefinite and potentially infinite duration. The common law rule requiring technical words of inheritance ("and his heirs") has been abolished by statute in nearly all jurisdictions. Typically, such statutes provide: "A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended."

Example: A conveyance from "O to A" is presumed to pass a fee simple interest if O owned one. At common law, absent the words of inheritance, even a conveyance "to A in fee simple" would convey only a life estate to A.

2. Defeasible Fees

Defeasible fees are fee simple estates of ***potentially*** infinite duration that can be terminated by the happening of a specified event. Because defeasible fees can result in forfeitures, courts will construe, where possible, a purported limitation as a mere declaration of the grantor's purpose or motive for making the grant (*i.e.,* as precatory language).

a. Fee Simple Determinable (and Possibility of Reverter)

A fee simple determinable, also called a determinable fee, is an estate that ***automatically terminates*** on the happening of a stated event and goes back to the grantor. (It must be distinguished from the fee simple subject to a condition subsequent, where the grantor must take affirmative steps to terminate the estate of the grantee if the stated event occurs.) It is created by the use of durational, adverbial language, such as "for so long as," "while," "during," or "until." A fee simple determinable can be conveyed by the owner thereof, but his grantee takes the land subject to the termination of the estate by the happening of the event.

Example: O conveys land "to A for so long as no alcoholic beverages are consumed on the premises." This gives A a fee simple because the estate may last forever if no one ever quaffs a brew. If A conveys his fee simple determinable estate to B, B will own the "for so long as" estate.

If A does not convey his estate, on A's death it will pass by will or intestacy to his successors, and so on. If, however, someone ever consumes an alcoholic beverage on the premises, the estate will automatically come to an end according to its own terms; and O will immediately and automatically become the owner of the fee simple, without taking any steps to terminate A's interest.

1) Correlative Future Interest in Grantor—Possibility of Reverter
Because the grantee's estate may end upon the happening of the stated event, there is a possibility that the land may revert back to the grantor. The interest that is left in a grantor who conveys an estate in fee simple determinable is called a "possibility of reverter." It is a future interest because it becomes possessory only upon the occurrence of the stated event.

a) Possibility of Reverter Need Not Be Expressly Retained
At common law and in nearly all states today, the grantor does not have to expressly retain a possibility of reverter. It arises ***automatically*** in the grantor as a consequence of his conveying a fee simple determinable estate, with its built-in time limitation.

b) Transferability of Possibility of Reverter
At early common law, the possibility of reverter could not be transferred inter vivos or devised by will. An attempted transfer of the interest was invalid; but the possibility of reverter was not extinguished by the attempted transfer and would still descend to the heirs of the owner. Today, in most jurisdictions, the possibility of reverter can be transferred inter vivos or devised by will, and descends to the owner's heirs if she dies intestate.

2) Correlative Future Interest in Third Party—Executory Interest
A possibility of reverter arises only in the grantor, not in a third party. If a comparable interest is created in a third party, it is an executory interest. (*See* C.3., *infra*.)

b. Fee Simple Subject to Condition Subsequent (and Right of Entry)
A fee simple subject to a condition subsequent is created when the grantor retains the power to terminate the estate of the grantee upon the happening of a specified event. Upon the happening of the event stated in the conveyance, the estate of the grantee ***continues until the grantor exercises her power of termination*** (right of entry) by bringing suit or making reentry. The following words are usually held to create conditions subsequent: "upon condition that," "provided that," "but if," and "if it happens that."

Example: O, owning Blackacre in fee simple, conveys it "to A and his heirs, on the express condition that the premises are never to be used by A for the sale of liquor, and in the event that they are so used, then O or her heirs may enter and terminate the estate hereby conveyed." A has a fee simple subject to a condition subsequent. O has a right of entry. If the condition is broken, O has a power to terminate the estate of A by asserting her ***right of entry***.

1) Correlative Future Interest in Grantor—Right of Entry
A right of entry (also known as "right of reentry" or "power of termination") is the future interest retained by the transferor who conveys an estate on condition subsequent. It is necessary to ***expressly*** reserve the right of entry in the grantor; this retained interest does not automatically arise as in the case of a fee simple determinable and possibility of reverter.

a) Waiver of Right of Entry
Because the grantor can elect whether or not to terminate the grantee's estate, she may waive her right or power to enforce a forfeiture by express agreement or by her conduct. (Such is not the case with a fee simple determinable, where the forfeiture is automatic.)

(1) Inaction by Itself Not a Waiver
The general rule is that when there is a breach of the condition and the grantor simply does nothing about it, the power of termination is not waived. However, where there is any element of ***detrimental reliance*** by the fee holder, many courts treat inaction as a waiver on an estoppel or laches theory.

b) Transferability of Right of Entry
At common law, a right of entry was ***not devisable or transferable inter vivos*** to a third person. The right of entry did, however, descend to the heirs of the grantor on her death. Today, in most jurisdictions, a right of entry is still ***not*** alienable inter vivos. (Indeed, in a handful of states, an attempted transfer destroys it.) But in most states, rights of entry are devisable; and in all states, they descend to the owner's heirs.

2) Correlative Future Interest in Third Party—Executory Interest
A right of entry can be created only in favor of the grantor and her heirs. If a similar interest is created in favor of a third party, the interest is called an executory interest (*e.g.,* "if the property is ever used for other than church purposes, then to B and his heirs"). Unlike a right of entry, an executory interest is subject to the ***Rule Against Perpetuities***. (*See* E., *infra.*)

3) Compare—Fee Simple Determinable
This estate is distinguished from a determinable fee in that the breach of the condition does ***not*** itself terminate the estate and immediately revest the fee in the grantor or her successor. The estate continues in the grantee or his successor unless or until the grantor or her successor affirmatively elects to terminate it.

c. Fee Simple Subject to an Executory Interest
A fee simple subject to an executory interest is an estate that, upon the happening of a stated event, is ***automatically divested in favor of a third person*** rather than the grantor.
Examples: 1) O conveys land "to Church; provided, however, that if the premises shall ever cease to be used for church purposes, title shall pass to the American Heart Association." Church has a fee simple subject to an executory interest in favor of the Heart Association. O does not have a