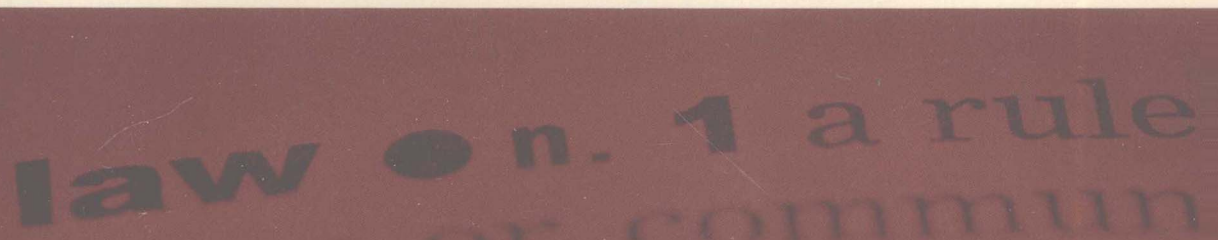
The Law of Estates and Future Interests

CASES, EXERCISES, AND EXPLANATIONS

Danaya C. Wright



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THE LAW OF ESTATES AND FUTURE INTERESTS

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by

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444 Cedar Street, Suite 700
St. Paul, MN 55101
1-877-888-1330

Printed in the United States of America

ISBN: 978-1-60930-238-2

Mat #41349582

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INTRODUCTION

Why Estates and Future Interests

This is a book on estates in land and future interests, a subject that often strikes terror into the hearts of many law students. But you can be comforted knowing that, unlike your fifteenth century counterparts, knowing the common law writs, writing in law French, and mastering the details of complex pleading are not necessary for understanding this subject today. Like the Rule against Perpetuities (RAP), its reputation for arcane complexity likely precedes it, but with a little attention to detail, a general understanding of the historical roots, and some basic common sense, you may soon find that there are great rewards to mastering this area of law. Besides being able to talk intelligently about the Statute of Uses or Livery of Seisin at cocktail parties, you will be able to competently represent your clients whose estate planning and property needs will greatly benefit from these skills.

Today the tendency in law schools is to gloss over the details of future interests in first year Property courses because there isn't enough time to cover the more modern subjects like takings, leaseholds, fair housing law, and intellectual property that take up more and more of first year Property casebooks. Property professors simply don't have the time in the typical first year course to adequately cover this subject, especially since most law schools have dropped it from six to four credits, and they assume that it will be taken care of in Trusts and Estates for those students that are going to practice in the area. Many Property professors don't even cover the RAP because its complexity scares the students, and they incorrectly think the RAP is on its way out. Unfortunately, Trusts and Estates professors are under the same time pressures, and often don't have time to cover future interests in great detail either, and they skim over it on the assumption that students covered it in Property. With complex trusts, powers, and elective shares to go over in class, future interests get pushed aside. Forty years ago nearly every law school offered a separate course on future interests, in part because the subject was complex enough to deserve its own course, but also because there simply weren't as many other subjects demanding their attention, like cyber law, civil rights, international law, and the like. This isn't because those other subjects weren't there, but because the law hadn't developed in these areas as much as they have since, and they could be covered more quickly, leaving more time to devote to the traditional subjects, like property, wills, and civil procedure. Today, however, professors tend to assume that students can teach themselves the technical details of future interests and the RAP with a good workbook or study aid.

As a professor who teaches Property, Trusts and Estates, Advanced Constitutional Law of the Takings and Due Process Clauses, Legal History, and an advanced Future Interests course, I can say that even being aware of how this subject gets short shrift, I still feel dissatisfied with the education students are getting in this area. As estate planning becomes more and more complex, with many more specialized trusts and the possibility of dynasty trusts in many states, I am often surprised at how ignorant practitioners and judges are of the law in this area. And if I thought the subject was going to just fade away, like the law of dower and curtesy, I wouldn't mind so much. But the subject is only getting

more and more important as wealth increases, family relationships become more complex, trusts are used in greater numbers, and the desire to benefit more and diverse people drives our clients' hopes and needs. If tomorrow's lawyers can't properly draft a trust, because they don't know the difference between a contingent remainder and a vested remainder, future generations are going to sue them, quite justifiably, for malpractice.

I was tangentially involved in a trust litigation matter that brings home the importance of understanding this subject well. Just a few years ago, in 2010, a well-known trusts and estates lawyer, working for a big firm in New York City, drafted a trust for a client whose principal place of residence was in Palm Beach, Florida, but whose business was in New York. The client was worth in the neighborhood of $100 million. The lawyer, using a proprietary trust database prepared by the law firm, simply checked certain boxes on the computer database to indicate what kind of boilerplate language should be added to the trust, including a paragraph indicating the choice of law, one on the severance clause, and a RAP savings provision. RAP savings clauses typically state that any future interest given to a beneficiary under the trust, that would fail the RAP because it is not certain to vest within the perpetuities period, will vest or terminate 21 years after the death of the last person alive at the trust settlor's death. In this case, the trust established sub-trusts for the settlor's three sons, with each having the power to establish further trusts for their children and grandchildren. But the RAP savings clause forced the termination of all of these further trusts 21 years after the death of each son, at which time the trust corpus would pass out of trust and be subject to estate taxes. Estate taxes are 45% on all transfers over $5.34 million for 2014. For a $100 million trust, the estate taxes 21 years after the deaths of the sons could be well over $50 million. So what did the lawyer do wrong? The trust was established in Florida, under the laws of Florida, which has a 360 year RAP. By checking the box for a common law RAP savings clause, the lawyer is inadvertently forcing the termination of these trusts 300 years before they needed to be terminated, thus subjecting the property to potential estate taxes that could wipe out nearly half the value of the trust. If that isn't a malpractice action waiting to happen, I don't know what is. Whether it was sloppiness associated with a computer database that provides all sorts of standard language, not knowing the law of the state in which the trust was to be established, failing to have someone who knew the law check the trust, or a combination of all of these, the lawyer who drafted this trust failed his client. Don't believe anyone who tells you that the RAP is not important!

Many students, professors, and practitioners will tell you that they only learned enough about this subject to pass the bar, and that is probably fine if you are going to go into cyber law or international law. But anyone working in a small or mid-size firm, especially one who might do real estate, wills and trusts, family law, or even litigation will need to know the subject well. The last thing you want is to be sued for malpractice and have your botched documents end up as example cases of what not to do.

I also want you to think about the role of dead hand control in the context of the succession of property. We will all die, and our property

will pass out of our hands and into the hands of others. That is about the only good thing that comes of death. Most people amass property because they want to use it to ensure that their loved ones will be taken care of when they are gone. I certainly want my kids to be able to go to college and start their lives without having to worry about where their next meal will be coming from if I am not around to take care of them. At the same time, I don't want them wasting my hard-earned money on sports cars, cocaine, the local casino, or the latest iPhone 46. I want to control the use of my property after my death at least to the extent of wanting others, with my values, to be able to put the property to the kinds of purposes I would put it. That is a perfectly reasonable desire, and it is one that is fully supported by the law of property. Dead hand control isn't a bad thing. But it can become a bad thing if it too tightly restricts the use of property in the hands of the living. After all, the dead are dead. They can't use the property anymore. So as you embark on your study of future interests, you should always keep in mind that the law is trying to balance the reasonable desires and concerns of the dead to provide for their loved ones after they are gone, with the reasonable desires and needs of the living. When either group becomes unreasonable, your instinct should tell you that there are likely to be ways to get around their unreasonable behavior and fashion an outcome that works better for the dead, the living, and society. Knowing your craft and being a dedicated and diligent lawyer will help you to find those solutions.

Why this Book

There are many books on the market that attempt to explain the law of future interests, powers, and the RAP, so what's so special about this one? If you head out to teach yourself the subject, you are likely to find that there are four basic kinds of sources on this topic. The first is your Property or Trusts and Estates casebook, which is a good place to start. But these casebooks simply don't have the space to explain the complexity or the nuances that you need to know to actually begin to practice in this area. The second are workbooks and practice guides that give you pages and pages of exercises for you to learn how to identify the interests. These workbooks are also fine if you are planning on being a criminal lawyer and need know only enough to pass the bar. Their main shortcoming is that the exercises are completely unrealistic. They ask you to identify and classify the future interests from an example like: *O to A for life, then to B so long as B finishes law school.* This is fine if people actually drafted will and trust language in this form, but they don't. Rather, real people and their real lawyers tend to write clauses like this:

> Twenty-second: All the rest, residue, and remainder of the *net income* of my estate including herein such income as may fall into and become a part of the residue by reason of the death of any of the beneficiaries hereinbefore mentioned, I direct shall be paid and distributed one fourth thereof to my believe [sic.] wife Sallie S. Houston *during her life.* One fourth thereof to my daughter Sallie H. Henry *during her life*, one fourth thereof to my son Samuel F. Houston *during his life* and one fourth thereof to my daughter Gertrude Houston *during her life.* On the death of my said wife I direct that the one fourth of the income payable to her shall thereafter be payable to my said children in equal shares *during their lives* (sic) and should any of my said children

> be dead *leaving children* at the time of the death of their mother I direct that the said income be *paid to the children* of such deceased child until the death of my last surviving child. On the death of any one of my said children *without leaving lawful issue him or her surviving* I direct that the income heretofore payable to such deceased child shall be paid to my wife and *surviving children* in equal shares and if either of the said children shall *then be dead leaving issue*, such issue shall take the deceased parents share. On the death of any one of my said *children* leaving *lawful issue him or her surviving*, I direct that the *income* to which such deceased child would have been entitled if living, shall be paid in equal shares to and among his or her children and the issue of deceased children, *if any there be*, such issue taking their deceased parents share, until the death of my last surviving child. *On the death of my last surviving child* I direct that *the whole of the principal* of the trust estate shall be distributed *in equal portions to and among my grand-children*, the children of any deceased grandchild taking their deceased parents share.'[1]

I can't imagine how one is expected to learn the law and how to draft provisions like the one above from the simple workbook examples.

The third source for understanding the law of future interests are legal encyclopedias and the Restatements. These can be very helpful if you have a particular problem, like differentiating between shifting and springing executory interests. But neither is written in a manner that attempts to explain the law as well as teach it. Instead, they identify the relevant rule and assume that you know enough about the subject to know what the rule means.

The fourth type of legal material consists of casebooks and treatises specifically on future interests. These are very helpful, but they are either woefully outdated (the Bergin and Haskell book hasn't been updated since the 1980s and that is the most recent!) so that statutory changes or common law modifications aren't reflected, or they are directed to an audience whose main practice would be drafting wills, not trusts. The needs of the modern, non-traditional family has changed so much in the last 30 years that pedagogical materials aimed at teaching the lawyers of the twentieth century aren't very helpful for those of the twenty-first century.

This book seeks to fill a very important void. First, it explains the history and the law like a short treatise, but it is aimed at students who don't already know the subject. Second, it presents modern cases, most of them post-2000, so that students see how courts are actually deciding these issues today, not in the 1930s or 1960s. One of my main concerns about teaching future interests is that many current law professors teach the subject the way they learned it, 30 or 40 years ago, when magic terms often dictated the outcome. Today, however, most courts have moved away from particular terminology to effectuate the donor's intent, regardless of the particular terms being used. This means that we need

[1] Estate of Houston, 201 A.2d 592 (Pa. 1964).

to focus more closely on the donor's family situation and likely intent to determine how to interpret an ambiguous grant. This book also uses some simple exercises, but more often uses complex paragraphs from real live wills and trusts, so students can begin to try their hand at drafting provisions involving complex future interests. I provide the answers to many of the problems in the back of the book, so you can check your progress and determine if you understand the material well enough. I also provide enough history so students can usually get to the right answer just by understanding the origins and parameters of the legal categories. After completing this book, you should have a good feel for the subject, so you can often get to the right result through intuition and common sense.

Finally, I think this book will be useful as a supplement for Property or Trusts and Estates students, it can be used in a specialized Future Interests or Trust drafting course, and it should provide a valuable resource for practitioners who might be faced with a poorly drafted provision and are wondering how best to interpret it for litigation. I believe that the more students understand this important area of law, the better it will develop, and the more the law can help clients achieve their ultimate goals. And for the students who are completely geeked out by this subject in their first year courses, this book will give them almost everything they need to engage in really scintillating conversations at those bar meeting receptions.

Scope and Organization of the Book

This book has eight chapters. The first sets out the basic history of how the common law of future interests evolved from Anglo-Norman feudalism and its consequent limitations. The second chapter gives you a basic overview of the seven present estates and ten future interests that are currently recognized in American property law. The third chapter tackles the fee simple absolute, the fourth chapter explores the three defeasible fee interests (fee simple determinable, fee simple subject to a condition subsequent, and the fee simple subject to an executory limitation) and their respective future interests. The fifth chapter explores the life estate and term of years, and their respective future interests. The sixth chapter briefly covers the fee tail, an interest that is rarely seen in American property law, but which should be understood for its historical place. The seventh chapter covers powers of appointment, which are increasingly becoming more important in estate planning, and deservedly so. And the eighth chapter treats the Rule Against Perpetuities, including its many modern manifestations.

For such a relatively short book, I have tried to provide many examples of relevant, preferably post-2000, cases. And there are practice problems throughout the chapters. My hope is that you will feel confident that you understand the basic policy limitations and how these arcane categories came to be so that you can deploy them for the benefit of your clients. As always, I have tried to make the subject interesting and welcome any comments you might wish to share for future updates and

editions. This is a fascinating subject and one that I believe will yield satisfying results if you give it a chance.

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TABLE OF CASES

The principal cases are in bold type.

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