Problems and Answers

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Estates in Land and Future Interests

Second Edition

JOHN MAKDISI

ESTATES IN LAND AND FUTURE INTERESTS

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To George Lee Haskins, teacher, friend,
and scholar, who made Decedents'
Estates come alive

Preface

The rules governing estates and future interests stand as relics of the past attempting to serve the needs of the present. Based on the vagaries of historical circumstance, these rules have developed piecemeal into a complicated structure. The arguments of antiquity no longer justify the intricate convolutions that hallmark this area of the law, but time is slow to remove them. Legislation has been enacted in many jurisdictions to simplify and improve the structure, but the common law rules that were a millennium in the making exert considerable control over this area. As a result, these rules continue to haunt the hallowed halls of our law schools, becoming the bane of every law student's existence.

A traditional method of teaching estates and future interests, in a property course or a course on wills, trusts, and estates, traces their historical development from feudal to modern times. This book approaches the matter differently. It focuses on an in-depth study of the rules as they exist here and now. Within the constricted confines of the fundamental courses in this area of the law school curriculum there is no time to do both methods well. An historical approach to estates and future interests is important for a thorough understanding, but it is best left for courses that devote more time to the area. Premised on the idea that it is preferable to understand the "what" well than to understand a whittled "what" and a hurried historical "how," this book has adopted the present-day approach to ensure a firm foundation in the rules.

This book is written specifically as a supplement to be used in conjunction with any property casebook or wills, trusts, and estates casebook. It provides a skeletal systematized account of the common law in its present form interspersed with several problems to flesh out the structure and provide students with a chance to solidify their learning through practice. The second edition to this book removes class gifts from the first chapter and develops it in a second chapter. The first problem set in the first edition has been divided and expanded into the first three problem sets in the second edition. A new chapter and problem set has been added to cover powers of appointment. Altogether 125 new problems and answers have been added to the 300 problems that were in the first edition.

Thus, Chapters 1 through 6 are a brief survey of the rules. Problem sets with fully explained answers are provided at the ends of each of the chapters. For those students who wish a fuller explanation of this area of the law, reference may be made to such texts as Bergin & Haskell's Preface to Estates in Land and Future Interests and Moynihan's Introduction to the Law of Real Property.

Experience over several years has indicated that the rules presented in this book are a mouthful for students to swallow. An effort has been made to organize them in a form that is clear yet concise. In the process some legal concepts and doctrines that are not needed for understanding the fundamental rules of estates and future interests are deliberately omitted. Coverage in this book, for example, does not include an explanation of personal property rules (such as per capita class gifts), marital estates, concurrent estates, lapse, trusts, adoption, the Rule in Clobberie's Case, most of the statutory modifications of common law rules (such as the wait-and-see test for perpetuities), or some of the more sophisticated or collateral rules for construction of ambiguous conveyances (such as implied conditions of survivorship) or perpetuities (such as infectious invalidity and the validity of charitable gifts). It is my firm belief that the surest path to mastery of estates and future interests is to concentrate on the core of the subject presented in this book without too many digressions into ancillary areas until the core is digested.

I wish to thank my former secretary, Rosa DelVecchio, for the many tireless hours she spent typing the manuscript to the first edition. I also wish to thank my Property students over the past 13 years, whose insight and enthusiasm instigated and encouraged my work on this book.

John Makdisi

December 1994

Summary of Contents

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Classification of Interests and Estates

The words *estate* and *interest* both describe what a person owns in land. Each describes a different aspect of that ownership. *Estate* describes the nature and extent of an ownership in land. *Interest* describes the relationship of that ownership with other ownerships in the land and the type of person who holds the ownership. In particular, *estate* refers to how an ownership ends, and *interest* refers to how an ownership begins.

A *purchaser* or *grantee* is one who takes an interest by way of inter vivos conveyance or by way of a devise from the *grantor,* but not by way of descent under the laws of intestate succession. (For the sake of convenience, this book often refers to a conveyance without mention of a devise, although the latter transfers an estate just as much as the former.) An *heir* takes an interest from the *intestate* by way of descent.

In most of the conveyances discussed in this book, it is assumed that the grantor owns the whole estate (present interest in fee simple absolute) in the property conveyed. When the grantor owns less than the whole estate (such as a present interest in a life estate or a future interest in a fee simple absolute), the grantor's interest and estate will be specified in the discussion of the conveyance.

A. CATEGORIES OF ESTATES

There are two types of estates, *freehold* and *nonfreehold*. The *freehold estates* (with the words used to create them) are:

(1) ***fee simple,*** which has the potential of infinite duration and is created by the words "and his heirs" or "and her heirs" or even without any special words (note that words such as "and her

heirs on her father's side" are ineffective to restrict descent and they create only a fee simple absolute):

"to *A* and her heirs" or "to *A*";

(2) ***fee tail,*** which has the potential of lasting until the (or a) line of descendants of the purchaser runs out and is created by the words "and heirs of his body" or "and his issue" (note that limitations may be imposed on the line of descendants to restrict it to male or female heirs (estate in tail male or in tail female) or to restrict it to the heirs (or the male or female heirs) of one's body by a particular spouse (fee tail special as opposed to fee tail general)):

"to *A* and the heirs of her body" or "to *A* and her issue";

(3) ***life estate,*** which has the potential of lasting until the death of the purchaser or another person (an estate measured by the life or lives of another person or persons is called a *life estate pur autre vie*) and is created by the words "for life":

"to *A* for life."

The fee tail estate requires special attention to the fact that, although the grantee owns the whole, the grantee cannot dispose of the estate beyond her lifetime because the issue are entitled to inherit the estate until the line of issue runs out. "Issue" is used in this book synonymously with "heirs of the body" to refer to the whole line of one's descendants. The fee tail estate is hardly recognized in the United States today. Statutory provisions often modify or convert this estate into another estate or combination of estates.

The statutes converting a fee tail estate may be divided into four types: (1) The most frequent statutory modification converts it to a fee simple held by the first grantee or devisee. About half the states with statutes of this type also provide that any remainder to follow the fee tail shall be construed as an executory interest in fee simple to become possessory if the first taker dies without lineal descendants. (2) The next most frequent statutory modification converts it to a life estate in the first grantee with a remainder in fee simple absolute to that person's lineal descendants. (3) Another approach gives the first taker a fee tail, but the surviving descendants inherit a fee simple absolute. (4) The least frequent approach recognizes the fee tail estate but permits a tenant in tail (the owner of the fee tail estate) to destroy it by conveying it by deed (albeit not by devise) as an estate in fee simple absolute.

The common law fee tail estate must be understood in order to apply the statutes modifying it. Therefore, this book defines the fee tail estate as it exists at common law. The fee simple conditional, which is hardly recognized in the United States today, is not discussed.

In a conveyance a purchaser/grantee is designated by *words of purchase* and his estate is designated by *words of limitation*. For example, when *O* conveys "to *A* and his heirs," *O* conveys a fee simple absolute to *A*. The words of purchase are "to *A*" and the words of limitation are "and his heirs." When *O* conveys "to *A* and the heirs of his body," *O* conveys a

fee tail to *A*. It is important to distinguish between "heirs," "heirs of the body" (equivalent to "issue"), and "children."

Freehold estates are distinguishable from nonfreehold estates in the nature of the holder's right. The holder of a present freehold estate has *ownership* (or, in older terminology, *seisin*). The holder of a present nonfreehold estate has a *right to possession*. This right to possession may be called an ownership of a nonfreehold estate, but it is always subject to a greater concurrent ownership in the one holding the freehold estate. This concept of a freehold and a nonfreehold held by different people at the same time in the same property is known more commonly as the landlord-tenant relationship, wherein the landlord is said to have ownership and the tenant to have possession.

The *nonfreehold estates* are the *term of years, periodic tenancy* and *tenancy at will*. In this book we will be concerned only with the term of years, which has the potential of lasting for a fixed period of time and is created by any words indicating such. For example, when *O* conveys "to *A* and her heirs subject to a term of ten years in *B*," *O* conveys a fee simple absolute to *A* and a term of years to *B*.

B. SUBCATEGORIES OF ESTATES

Each of the freehold estates may be further subdivided into four categories. Three of these categories contain a condition that, if it occurs, cuts short or gives the grantor the power to cut short the estate. This condition is called a *condition subsequent* (to be distinguished from a condition precedent, which will be explained later in connection with the vesting of future interests). The four categories of each freehold estate are:

(1) ***absolute*** (note that this term is not actually used for a life estate or fee tail), which characterizes an estate without a condition subsequent (note that the only way a fee simple absolute ends is when it has no more takers, and then it escheats to the state):

Fee simple absolute:	"to *A* and her heirs" or "to *A*"
Life estate:	"to *A* for life"
Fee tail:	"to *A* and the heirs of her body";

(2) ***determinable,*** which characterizes an estate with a condition subsequent, which, if it occurs, cuts short the estate in favor of the grantor:

Fee simple determinable:	"to *A* as long as *A* does not divorce"
Life estate determinable:	"to *A* for life as long as *A* does not divorce"
Fee tail determinable:	"to *A* and the heirs of her body as long as *A* does not divorce";

(3) ***subject to condition subsequent,*** which characterizes an estate with a condition subsequent, which, if it occurs, gives the grantor the power to retake the estate, that is, the condition sub-

sequent in this case does not cut short the estate until the grantor retakes the estate either by making an entry or bringing an action to recover the land:

Fee simple subject to condition subsequent:	"to *A*, but if *A* divorces, *O* may reenter"
Life estate subject to condition subsequent:	"to *A* for life, but if *A* divorces, *O* may reenter"
Fee tail subject to condition subsequent:	"to *A* and the heirs of her body, but if *A* divorces, *O* may reenter";

(4) ***subject to executory limitation,*** which characterizes an estate with a condition subsequent, which, if it occurs, cuts short the estate in favor of a grantee:

Fee simple subject to executory limitation:	"to *A*, but if *A* divorces, then to *B*" or "to *A* as long as *A* does not divorce, otherwise to *B*"
Life estate subject to executory limitation:	"to *A* for life, but if *A* divorces, then to *B*" or "to *A* for life as long as *A* does not divorce, otherwise to *B*"
Fee tail subject to executory limitation:	"to *A* and the heirs of her body, but if *A* divorces, then to *B*" or "to *A* and the heirs of her body as long as *A* does not divorce, otherwise to *B*."

An estate subject to condition subsequent is distinguished from an estate determinable by the intent of the parties, which in some conveyances may be expressed only in the language of the condition subsequent. Words of *condition* such as "provided that," "on condition that," "if," "but if," and "provided, however," connote an estate subject to condition subsequent. Words of *duration* such as "during," "until," "so long as," "as long as," and "while," connote an estate determinable. Since in an estate subject to condition subsequent the grantor has a power of termination but does not automatically receive a present interest upon the happening of the condition subsequent, words indicating this power, such as "the grantor shall have the right to reenter," also help indicate (and sometimes are required to indicate) the estate. Since the intention of the parties controls, an ambiguity may be clarified by looking to the circumstances of the transaction.

It should be noted that a term of years may be cut short by a condition subsequent in favor of the landlord. This nonfreehold estate is called a *determinable term of years,* but it should not be confused with a freehold estate that is determinable. A nonfreehold estate is concurrent with a freehold estate, contrary to freehold estates that follow each other:

"to *A* for ten years as long as *A* does not divorce" (*O*, the grantor, retains a present interest in fee simple absolute while *A* holds a determinable term of years.),

"to *A* and her heirs as long as *A* does not divorce" (*O*, the grantor, retains a future interest in fee simple absolute following *A*'s fee simple determinable.).

C. CATEGORIES OF FUTURE INTERESTS

An *interest* may be *present* or *future*. It may exist in either the *grantor* or the *grantee*. A *present interest* is a property right to enjoy ownership at the moment a conveyance takes effect. This interest is vested in possession. A *future interest* is a property right, at the moment of conveyance, to enjoy ownership at some future time. Ownership exists whether one has a present or a future interest, but one does not exercise the usual benefits associated with ownership, such as possession, until the future interest becomes a present interest.

Thus, where *O* conveys "to *A* for life, then to *B* and his heirs," *A* has a present interest, which gives her an immediate right to enjoy the property, and a life estate, which gives her a right to enjoy the property until she dies and the estate terminates. *B* has a future interest, which gives him a right to enjoy the property starting at some point in the future, and a fee simple absolute, which gives him a right to enjoy the property forever. Obviously, *B* actually cannot enjoy the property after he dies, but his right to enjoy the property forever means that his heirs will receive his interest upon his death if he has not otherwise disposed of it. When *A* dies and her estate terminates, *B*'s future interest transforms into a present interest. If *B* is alive at the time of *A*'s death and has not otherwise disposed of his interest, *B* has an immediate right to enjoy the property. If *B* dies before *A*'s death and has not otherwise disposed of his interest, *B*'s future interest descends to his heirs by intestate succession and later, upon *A*'s death, it becomes a present interest.

In the example above, *B*'s future interest follows the *natural termination* of the preceding estate in *A*. The natural termination of an estate occurs only when it is a life estate or a fee tail. A fee simple absolute has the potential of infinite duration and cannot terminate naturally. For example, where *O* (owning land in fee simple absolute) conveys "to *A* for life, then to *B* and the heirs of his body," *O* conveys a present interest in a life estate to *A*, which is followed upon its natural termination by a future interest in a fee tail in *B*, which in turn is followed upon its natural termination by a future interest in a fee simple absolute retained by *O*, the grantor. Note that *O*'s original present interest in fee simple absolute has been divided into three interests/estates. Since *O* did not specify someone to take his property after the natural termination of both *A*'s life estate and *B*'s fee tail, the rest of *O*'s original property interest remains in *O* as a future interest in fee simple absolute. If *A* dies before *B*'s line of issue