CASES, MATERIALS, AND PROBLEMS IN PROPERTY (THIRD EDITION 2010)

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REPLACEMENT FOR §4.02[2] IN CHAPTER 4: PRESENT AND FUTURE ESTATES IN LAND, THE TIMING OF OWNERSHIP, AND RACIAL CONDITIONS

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[1] Introduction

To this point, the text has reviewed various ways groups of people may hold property—concurrent estates, marital estates, trusts, partnerships and corporations. In this chapter, the focus slightly shifts to an examination of the various ways any person or group may structure the time during which ownership interests are held. It is a follow-up to the Gruen v. Gruen case at the end of Chapter 2. This chapter covers *estates in land*—the devices that may be used to split the time line of ownership between those holding present possessory rights and those eligible to take over possession in the future. During the late nineteenth and early twentieth centuries some of these estates in land, or timing devices, were used to control the contours of real estate development and maintain racial segregation. We will take a look at some of those cases in this chapter.

This chapter begins the journey through property and its operation over time by reviewing estates in land. This survey in part is an inquiry into the relevance of Formalist or Classical methods of legal analysis in the contemporary world of property law. In prior sections of the text on married women's earnings statutes, p. 227, and the development of the corporation as a legal "person," p. 349, there was discussion of Formalism as it was embodied in political movements and modes of legal analysis prevalent in the later decades of the nineteenth and the early decades of the twentieth centuries. The political movement was built largely on laissez faire economic analysis, relying on contracts as the best way to guarantee personal independence. The freedoms to contract about and to sell property came to be seen as central features of liberty in many segments of society. Those favoring the emancipation of slaves viewed the right to contract for one's labor as a prerequisite to liberty. Entrepreneurs in large-scale commercial enterprises claimed the right to make agreements and transfer property without government constraint. Part of

this debate also involved a mode of legal analysis. For in freedom of contract theory the highest obligation of the state was to protect liberty by enforcing agreements. And the best way to enforce agreements was to allow the intentions of the parties as expressed in their private arrangements to govern behavior.

In this sort of environment, the meaning of texts split apart from their place in a social milieu. That perspective became of major importance. The goal was to discern the meaning of contracts from the words used by the parties rather than by reference to government policy or the needs of large segments of society. In such a world, rules of construction of documents take on great weight. And incentives arose for industries regularly using contracts to develop legal terms of art that took on meanings that could be repetitively used in related transactions. This sort of legal analysis, without regard to the now century old political moment in which it was popular, is of great moment in property law. Systems relying on title documents, descriptions of property boundary lines, and agreements about management of real estate developments need understandings about the meanings of certain words in order to function efficiently.

Paradoxes arise in both arms of Formalist or Classical Legal Thought—the political and the analytical. Encouraging freedom of contract about property may easily lead to contractual arrangements that inhibit the liberty of the next generation. Favoring the freedom of action of the living will have an impact on the autonomy of those who follow. Similarly, reliance on the "neutral" or "clear" meaning of words in texts, or upon common rules of construction, may produce results that seem bizarre or unfair. The desire for certainty will sometimes clash with a preference for fairness. Such problems form the theoretical background for this chapter.

For some readings about the impact of Formalist modes of analysis on property law, read Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988), and Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985), excerpted at the end of this chapter.

[2] The Basics of Estates in Land

Estates in land may be grouped into two categories—present possessory interests and future interests. Present possessory interests include the fee simple absolute, the maximum interest any person or group may hold in property, various fee simple estates with limitations, life estates and leases. Fee simples in all their guises and life estates are taken up here. Lease law is saved for Chapter 6. Future interests include any holding in which the owner takes possession of the asset in the future. All of the common future interests are covered here.

[a] Present Possessory Estates

Real property has traditionally been described with a somewhat cryptic vocabulary. But the basic concepts are not difficult. First, the maximum interest that can be held in a piece of land is a *fee simple absolute*. A fee simple absolute defines an interest held by a single person or group lasting forever.[1] The "lasting forever" is important. Even though a person owning a fee simple absolute will not live forever, the definition of the interest guarantees that a transfer of a fee simple operates to transfer complete title—eternal ownership—from one entity to another. If fee simple absolute ownership ended at some point, it would be impossible to transfer full ownership from one person or group to another.

All other estates in land are time variations on the fee simple absolute theme. Some describe a period of time shorter than eternity. A *life estate*, a right to use and receive income from property for life, is a good example. A lease is usually even shorter, allowing possession for a period of months, a year, or perhaps a period of years. Other estates leave open the possibility of eternal ownership, while creating some circumstances in which ownership of the eternal interest will switch to another. These

1. The entity that holds a fee simple may take on a variety of forms. Groups, businesses, couples and individuals may all fill the bill. The consequences of placing a fee simple in one or another entity were taken up in prior chapters.

sorts of interests are fee simples subject to some sort of condition or limitation. Still other property instruments split ownership and possession, leaving possession in one person now, as with a life estate, while creating a separate *future interest* in another having the right to take possession in the future. *Remainders* are an example of a future interest.[2] Gruen v. Gruen involved the splitting of ownership interests in the Klimt painting between a present possessory life estate held by the donor father and a remainder held by the donor's son. This segment of the chapter concentrates on the various present possessory interests. The next segment take up future interests.

Life Estates. Many wills contain provisions giving an asset to someone, often a spouse, for life and then passing it on to others, such as children. Such a grant might read as follows:

> *G (for Grantor) to my husband H for his life, then to my children surviving my husband.*[3]

We will take up future interests like that in the surviving children a bit later. The life estate itself is pretty straightforward. In this example, H holds the possessory interest in the asset until he dies. That interest gives him the right to use the property or to take its income. In the case of an investment asset, such as a bond, H gets the interest but not the principal. If the asset is land, H gets to use the land or to take income from it in the form of crop payments or rent.

You can easily see that a timing problem might emerge. Suppose H rents the asset to Samantha for five years. What happens if H dies before the lease expires? Samantha's lease will end, since H can only transfer an interest in the asset for the period of his ownership. Similarly, what happens if H sells his life estate to Gregory. Gregory gets an interest that will last only for H's life. If Gregory gets an interest for his life and he outlives H, the right of the surviving children to take their future interest in the property would be disturbed. In this sort of setting, Gregory is said to have a *life estate pur autre*

2. A transfer to A for life, then to B, for example, creates a life estate in A and a remainder in B.
3. It is common for wills with this sort of provision to limit the remainder interest to surviving children. In general, parents are not interested in making a gift to a dead person. If there are grandchildren, the instrument usually contains additional provisions protecting their interests.

vie, or a life estate for the life of another.

Fee Simple Absolutes and Use of the Word "Heirs". Before getting to some examples of limited fee simple interests, you need to understand the ways the word "heirs" may be used in title documents. Consider two grants:

G to A and his heirs.

G to A for life, then to the heirs of A and their heirs.

The word "heirs" is used in two different ways in these grants. The first grant is "hornbook" language creating a fee simple absolute in A. The words "and his heirs" denote the period of time—eternity—that the land is to be held by A or A's successors. In this grant "heirs" does *not* refer to any people. A's heirs, that is those who would take his estate under intestate succession laws, get nothing unless he dies without a will while still owning the property. When "and his heirs" is used to describe a period of time or when any other language, such as "for life," is used to denote an interval of time, the words are called *words of limitation*. Although most careful instrument drafters use the "and his heirs" language when creating a fee simple absolute, the presumption is that a simple grant like "G to A" creates a fee simple absolute in A even though the words of limitation are not used.

In the second grant, the first use of "heirs" in the language "to the heirs of A," describes the class of takers of A's land designated by intestate succession statutes. This group of takers is not within A's control in a will, since he only holds a life estate. Thus, the words "for life" are words of limitation, but the words "heirs of A" are *words of purchase*, that is, words designating takers of property. The second use of "heirs" in the phrase "and their heirs" represents words of limitation, just like the first grant to "A and his heirs."

One other note about the word "heirs" is appropriate. As mentioned above, when the word is used as a word of purchase, the correct meaning refers to intestate successors. But the word appears in many property documents, sometimes without much concern over technical meanings. People, for example, may use "heirs" to describe children or relatives generally. In addition, "heirs" are thought of by laypersons as any party getting property from the estate of a deceased person, whether through intestate succession laws

or under a will. Technically, a taker of real property under a will is a *devisee* and a taker of personal property under a will is a *legatee*. Any time "heirs" is used, care must therefore be taken to discern how the person drafting the instrument intended to use the word.

Fee Simple Determinable. A typical *fee simple determinable* is written as follows:

> *G to A and her heirs so long as the land is used for church purposes, and should the land ever be used other than for church purposes, then it reverts automatically to G and his heirs.*

The words of limitation—words of time—in this grant are "and her heirs so long as the land is used for church purposes." This is not quite an absolute grant for eternity. It may last forever in real life, but it need not. G retains an interest, the possibility that the land will revert if it is not used for church purposes. Just as the life estate in A terminates automatically in a grant "to A for life, then to B and his heirs," so the grant to A in this example terminates automatically and the land returns to G or G's successors in interest when church use ceases. All interests retained by grantors in this and later examples are called *reversions*. This particular kind of reversion is called a *possibility of reverter*.

Fee simple determinables may also be written so that the land passes to a third party rather than G upon the happening of the relevant event. If, in the above example, the last phrase of the grant read "then automatically to B and his heirs," the grant to A would still be a fee simple determinable, but G holds no reversion. B's interest is called an *executory interest*, an interest that defeats a pre-existing *freehold estate* (life estate or fee simple) or *vested remainder*. The definition of vested remainder will have to wait until the next set of examples. Also note that executory interests are subject to the Rule against Perpetuities, discussed later in this chapter.[4]

Fee Simple Subject to a Condition Subsequent. A typical fee simple subject to a condition subsequent reads as follows:

> *G to A and his heirs, but if the land is ever used other than for church*

4. You will discover that the executory interest used as an example above would be void under the standard, common law version of the Rule Against Perpetuities.

purposes, then G and her heirs may re-enter and take possession.

In this example the estate in A terminates only upon the action of G or her successors. G retains a slightly different reversion from a fee simple determinable. This one is called a *right of re-entry*, the *discretionary* right to take back the property. From the language, A is given a fee simple absolute; the only words of limitation are "and his heirs." This fee simple, however, may be taken back if the stated event occurs. The distinction between a determinable fee and a fee subject to a condition resides in the difference between "so long as" and "but if." In the first case, the words of limitation defining A's interest never grant a full fee simple. In the second, the words of limitation grant a full fee simple, but enable G to regain it upon the happening of an event. The language of the determinable fee creates a time for its existence based upon a stated event by using language such as "so long as" or "until." Technically, an entire fee simple absolute is never conveyed, but only that part of a fee simple prior to the happening of the stated event. In a fee subject to a condition subsequent, the language conveys an entire fee simple, subject to defeat later upon the happening of a condition subsequent.

The difference between the two fees is largely semantic, but then much of estate law is largely semantic. Often the semantic difference makes no difference. If, for example, the party violating the condition imposed by either a fee simple determinable or a fee simple subject to a condition subsequent fails to vacate the premises, legal action will be necessary regardless of the sort of fee involved. But the semantic difference may sometimes have consequences. In the world of adverse possession, the statute of limitations will start to run against the holder of a possibility of reverter as soon as the condition imposed by the fee simple determinable is violated. But it may not start to run when the holder of a right of re-entry gains the right to oust the party in possession under a fee simple subject to a condition subsequent. Possession is not wrongful or adverse until the party in possession is notified that the right of re-entry will be exercised. Some also thought that the distinction between automatic happening and discretionary action was important in *Charlotte Park Recreation Commission v. Barringer*, the first case in this chapter. After reading the opinion, you should consider whether the difference between an *automatically* operating possibility of reverter and a *discretionary* right of re-

entry is important to analysis of the state action issue in the case.

Fee Simple Subject to an Executory Limitation. A typical fee simple subject to an executory limitation reads as follows:

> *G to A and her heirs, but if the land is ever used other than for church purposes, then to B and his heirs.*

The practical effect of this fee is the same as a fee simple determinable with the property going to a third party upon the termination of the determinable fee. The difference, again, is largely semantic. The recipient of a determinable fee never gets a full fee simple. The recipient of a fee subject to an executory limitation, gets the fee, but that fee may go to a third party on the happening of a stated event. It is much like a fee subject to a condition subsequent. In both fees, A gets the full fee but may lose it. But in a fee on a condition subsequent, it is the grantor who *may* claim it, and in a fee subject to an executory limitation, a third party gains the fee automatically on the happening of the stated event. In the above example, B, who has an interest that defeats the continued existence of a fee simple in the hands of A, has an executory interest. Should the land ever be used other than for church purposes, B's executory interest would ripen into a full fee simple in possession,[5] and A would have nothing. Note well that with the happening of events, the nature of the interests held by various persons may change.

Perhaps this table will help you organize your thoughts about the possessory estates.

5. As with executory interests following a fee simple determinable, the Rule Against Perpetuities may void them.

Chart of Standard Present Estates in Land[6]

G to:	Interest in A	Interest in B	Reversionary Interest
A for life.	Life Estate	None	Remainder
A so long as [cond.], then to G.	Fee Simple Determinable	None	Possibility of Reverter
A, but if [cond.] then G may re-enter.	Fee Simple Subject to a Condition Subsequent	None	Right of Re-entry
A, but if [cond.], then to B.	Fee Simple Subject to an Executory Limitation	Executory Interest	None

[b] Future Interests

Indefeasibly Vested Remainder. A typical grant with an indefeasibly vested remainder reads as follows:

G to A for life, then to B and his heirs.

A, of course, has a life estate. B has a vested remainder that will go into possession upon the death of A. The phrase "indefeasibly vested" connotes that this remainder is *owned*, at the instant of its creation,[7] without any limitations expressed *in the language* of the grant. Only possession is delayed. B owns a "concept," the right to take possession in the future, which he can sell, devise or encumber. Another example of an indefeasibly vested remainder is:

G to A for life, then to B for life.

Even though B gets nothing *in possession* if he dies before A, he *presently owns*, without any limitation imposed *in the language* of the grant by G, the right to take possession

6. All entries written as "to A" or "to B" mean the same thing as "to A and his/her heirs" or "to B and her/his heirs." The table has been written as if the presumption that the language "and his/her heirs" is unnecessary to create a fee interest is operating in all cases. [Cond.] means some condition of the grantor's choice is inserted at that spot.

7. Though the estate in this example is a vested remainder at the instant the conveyance occurs, indefeasibly vested remainders may also arise at other moments. Later examples of contingent remainders present settings in which a future interest begins as one type, and becomes a vested remainder on the happening of an event.

upon the death of A. Remember that labeling future interests is largely a semantic exercise, not necessarily related to the realities of life. So the following instrument creates a life estate in A, an indefeasibly vested remainder for life in B, and an indefeasibly vested remainder in fee simple absolute in C:

G to A for life, then to B for life, then to C and her heirs.

Vested Remainder Subject to Defeasance. A typical grant with a vested remainder subject to defeasance reads as follows:

G to A for life, then to B and her heirs, but if B dies before A then the property reverts to G and his heirs.

Read this grant very literally. First G gives B a vested remainder in fee simple with the use of the words of limitation "and her heirs." No pre-conditions are contained in the language of the grant on B's ability to own the right to future possession of the property. Then read the language after the first comma. If, however, B dies before A, then her remainder in fee simple returns to G or his successors. In non-artistic language, G has given everything after A's life estate to B with one hand, but taken it back (perhaps) with the other. Such interests are vested remainders (I giveth) subject to defeasance (and taketh away). Other examples of such an interest are:

G to A for life, then to B and his heirs, but if B sells alcohol on the land, to C and her heirs.

or

G to A for life, then to B and her heirs, provided that if B subdivides the land or destroys the solar energy devices presently in place on the land, then to the City of Madison.

Focus again on the word *vested*. It does not connote immediate possession. Nor does it connote that the taker of the interest will *always* gain possession in the future. It *does* connote a *present intention* on the part of the grantor to *immediately* bestow a *future* right to possession upon the taker. A vested remainder subject to defeasance indicates that the grantor had such a present intention to depart with a future interest in land, subject to subsequent conditions.

Executory Interests. Return to the last two examples in the prior paragraph. Recall the fee simple subject to an executory limitation from the notes on present estates just above. That fee simple estate is linguistically similar to the vested remainder subject to defeasance. If the life estates are removed from the examples of vested remainders subject to defeasance just above in this note, you are left with fee simples subject to executory limitations. Both the fee simples and the vested remainders are completely disposed of, only to be taken back (perhaps). Such *divesting* of a prior estate or vested interest is accomplished by the subsequent estate, called an executory interest.

Contingent Remainders. Look at this example:

> *G to my wife for her life, then, if our daughter graduates college before the death of my wife, to our daughter*.

The language of this conveyance places a pre-condition upon the gift from G to his daughter. There is no present intention to immediately bestow a future right to possession. The interest taking effect at the death of G is a contingent remainder. If the daughter graduates college before the death of G's wife, then the pre-condition will be fulfilled and the daughter's interest will become an indefeasibly vested remainder.[8]

Compare a Contingent Remainder with a Vested Remainder Subject to Defeasance. Compare:

> *G to A for life, then to B and her heirs, but if B dies before A, then to C and his heirs*.

with

> *G to A for life, then if B survives A, to B and her heirs, but if B does not survive A, then to C and his heirs*.

As a practical matter, these two interests are likely to accomplish the same purposes. As a legal matter, they are different. The first example creates a vested remainder subject to defeasance in B; the second creates a contingent remainder in B. The first exemplifies a present intention to bestow a future right to possession, subject to a possibility of loss. The second places a pre-condition on the receipt of the future right to possession.

8. Note that if the daughter already has graduated college at the moment the conveyance occurs, then the pre-condition has been fulfilled and the daughter immediately gets an indefeasibly vested remainder.

Alternate Contingent Remainders. Look again at the examples in the last note. What of the interests of C? In the first example, C's interest divests a prior vested remainder and is therefore an executory interest. In the second example, however, the interest of C does not divest a vested interest since B has a contingent remainder. If you took a stab in the dark and guessed that C also has a contingent remainder in this example, you were right. In legalese B and C have *alternate contingent remainders*. What happens in the second example if at the death of A, B and C are both alive? Then B's interest vests (and, incidentally, goes into possession as well) and C's disappears. What if, while A is alive, B dies? Then B's interest is defeated, and the precondition upon C's interest has been met. Thus, under these circumstances, C's interest vests (but not in possession because A is still alive). Continuing this same example, what happens if, after B dies before A and C, C dies before A? C's interest does not disappear! Since it has vested in C and C's successors (remember the significance of the words of limitation "and his heirs."), C's will or the intestate succession laws will designate the final takers.

The following chart may be helpful in assembling the future interest jigsaw puzzle.

Chart of Future Interests[9]

G to A for life, then:	Interest in B	Interest in C	Reversionary Interest in G
to B.	Indefeasibly Vested Remainder	None	None
to B, but if [cond.] then to C.	Vested Remainder Subject to Defeasance	Executory Interest	None
if [cond.] then to B.	Contingent Remainder	None	Yes
if [cond. #1] then to B, but if [cond. #2] then to C.	Alternate Contingent Remainder	Alternate Contingent Remainder	Perhaps

9. All entries written as "to B" or "to C" mean the same thing as "to B and his/her heirs" or "to C and her/his heirs." The table has been written as if the presumption that the language "and his/her heirs" is unnecessary to create a fee interest is operating in all cases. [Cond.] means some condition of the grantor's choice is inserted at that spot.

[c] Estates in Land Problems

Label the property interests held by the various parties in the following grants under the circumstances given in each example. Assume that G is a grantor of some sort. The sign "→" means "transfers" or "conveys."

1. *G → to A.*

2. *In a Will: G → to A for life, then to B for life, then to C and her heirs.*

    a. Assume that at the death of G, A, B and C are all alive.

    b. Assume that at the death of G, A is alive, B is dead and C is alive.

    c. Assume that at the death of G, A is alive, B is alive and C is dead.

    d. Assume that at the death of G, A is alive, but B and C are both dead.

3. *In a Will: G → to A for life, then, if B survives A, to B for life, then to C and her heirs.*

    a. Assume that at the death of G, A, B and C are all alive.

    b. Assume that at the death of G, A is alive, B is dead and C is alive.

    c. Assume that at the death of G, A is alive, B is alive and C is dead.

    d. Assume that at the death of G, A is alive, but B and C are both dead.

4. *By Inter Vivos Deed: G → to A and his heirs so long as A does not marry B, but if A does marry B, then to C forever.*

    a. Assume that after the grant is conveyed, A marries B and C is alive.

    b. Assume that after the grant is conveyed, A marries B and C is dead.

    c. What happens to the labels when B dies before A?

5. *By Inter Vivos Deed: G → to The Main Street First Religion Church for use as a place of worship, but if the land is ever used other than as a place of worship, then to My Favorite University School of Law.*

    a. Assume that the Church is a "living" institution using the land for church purposes.

    b. Assume that the Church sells the land to the Second Street Congregation of God which then uses the land and building as a place of worship.

    c. Assume that the Church sells the land to the Oriental Religion Center for use as a place of meditation and education about Oriental religions.

d. Assume that the Church ceases to exist and the building is left vacant for a year.

6. *In a Will: G → to A for life, then to the children of A, but if A dies without children surviving A, then to B and her heirs.*

a. Assume that A is alive, but childless, and that B is alive.

b. Assume that A is alive, has one child, and that B is alive.

c. Assume that A is alive, has two children, and that B is dead.

d. Assume that A is dead, leaving two living children, and that B is alive.

7. *In a Will: G → to A for life, then to the children of A alive at the death of A, but if A dies without children surviving A, then to B and his heirs.*

a. Assume that A is alive, but childless, and that B is alive.

b. Assume that A is alive, has one child, and that B is alive.

c. Assume that A is alive, has two children, and that B is dead.

d. Assume that A is dead, leaving two living children, and that B is alive.

8. *In a Will: G → to A for life, then to the children of B forever, but if B dies without children surviving him, then to the children of C forever.*

a. Assume that A is alive, that B is childless and that C is childless.

b. Assume that A is alive, that B has one child and that C is childless.

c. Assume that A is alive, that B has two children and that C has one child.

d. Assume that A dies before B, that at the death of A, B has two children and C has three children, and that after A dies, B has a third child.

e. Assume that at the death of A, B is alive but childless and that C has one child.

f. Assume that at the death of A, B is dead with two surviving children and that C is alive with two children.

9. *By Inter Vivos Deed: G → to A for life, then to the children of A reaching the age of 25 and their heirs.*

a. Assume that A is alive and has three children ages 4, 7 and 10.

b. Assume that A is alive and that A is childless.

10. *In a Will: G → to T in trust, T to distribute the income produced by the property to my surviving children in equal shares, provided that, upon the death of any child after my*

death, the still surviving children shall equally divide the income share of the deceased child, and that upon the death of my last surviving child, the corpus of the trust shall be distributed by T as follows:

1/10 to My Favorite University;

2/10 to my grandchildren surviving all of my children;

3/10 to my great-grandchildren surviving all of my grandchildren; and

4/10 to the children of Uncle George and Aunt Susan.

Make up your own questions for this problem.

11. Here is a problem that reprises the law of gifts and marital property, discussed in Chapter 2, and also raises interesting estate problems. At a 1973 engagement party for their son James and Carol Posnick, Mr. and Mrs. Singer announced that they were giving the couple "a home to live in as a wedding gift." The elder Singers then retitled the home so it was owned by them and their son. Ms. Posnick's name did not appear on the title. The couple's plans to wed were then cancelled, but they continued to live together in the house for six years. In 1979 they married. The couple later split and a divorce decree first was entered in 1990. The family court was confronted with the task of deciding what marital or separate property interests, if any, were held in the house by James and Carol. Note that the date upon which any interest held by Carol began will have an influence on the ownership interest she will get upon divorce. Would you:

a. Conclude that Carol held no interest in the house because there could be no gift unless the marriage occurred within a reasonable time from the engagement party?

b. Conclude that, if Carol got a gift in 1973 that it was:

i. a fee simple interest, subject to the condition subsequent that the Singers could reclaim the house if the marriage did not occur shortly after the engagement party?

ii. a contingent interest (remainder or executory interest) subject to the precondition that marriage occur shortly after the engagement party?

iii. a vested interest (remainder or executory interest) subject to defeasance upon the failure to marry shortly after the engagement party?

iv. any of i, ii or iii without the limitation that marriage must occur shortly after

the engagement party?

c. If you selected b.i., did the failure of the elder Singers to exercise their right to retake Carol's interest in the house mean that she had a fee simple interest (as a tenant in common) from the time of the engagement party?

You can learn more about this problem from the saga of Singer v. Singer, 636 A.2d 422 (D.C. 1994); 623 A.2d 1226 (D.C. 1993); 583 A.2d 689 (D.C. 1990).

[3] Estates in Land and Racial Conditions

[a] History of *Charlotte Park Recreation Commission v. Barringer*

In 1927, agreements were reached to transfer three pieces of land to the Charlotte Park and Recreation Commission if the City of Charlotte provided a fourth parcel to complete a new park. The plan to create the park began on August 31, 1927 when W. T. Shore and T. C. Wilson, Osmond L. Barringer and Abbott Realty Corporation offered three parcels of land as gifts to the Park and Recreation Commission of the City of Charlotte. The gifts, however, were conditioned upon the Charlotte Park and Recreation Commission using their parcels together with the fourth from Charlotte "for white people's parks and playgrounds, parkways and municipal golf courses only," beautifying and maintaining the parks at a cost of not less than $5,000 annually for at least eight years after the gifts were made, and providing for the construction of driveways. The offers to donate the land were accepted by the Park and Recreation Commission on February 18, 1929. The City of Charlotte adopted a conforming ordinance three days later.

The three parcels of land were then conveyed to the Park and Recreation Commission. Osmond Barringer and his wife conveyed their parcel on May 22, 1929. The *granting clause*[10] conveyed the land "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The *habendum clause*[11] then recited the conditions described in the offer to donate the land, followed by this language:

10. This is a clause in a deed declaring that an interest in land is to be transferred.
11. The habendum clause in a deed describes the nature of the estate in land to be taken by the grantee.

> In the event that the said lands comprising the said Revolution Park area as aforesaid, being all of the lands hereinbefore referred to, shall not be kept and maintained as a park, playground and/or recreational area, at an average expenditure of five thousand dollars ($5,000) per year, for the eight-year period as aforesaid, and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only, and if such disuse or non-maintenance continue for any period as long as one year, and/or should the party of the second part, or its successors, fail to construct or have constructed the roadway above referred to, within the time specified above, then and in either one or more of said event, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs or assigns; provided, however, that before said lands, in any such event, shall revert to the said Osmond L. Barringer and as a condition precedent to the reversion of the said lands in any such event, the said Osmond L. Barringer, his heirs or assigns, shall pay unto the party of the second part or its successors the sum of thirty-five hundred dollars ($3,500).

On the same day that the Barringers conveyed their parcel, W. T. Shore and his wife, and T. C. Wilson and his wife, tendered a deed much like the Barringers'. The only difference was that the Shore-Wilson deed did not contain the last phrase in the habendum clause of the Barringer deed requiring the payment of $3,500 as a condition to a reversion of the land. Some time later a controversy arose between the Park and Recreation Commission and Shore-Wilson. In settlement of litigation brought against the Commission, the heirs of Wilson were paid $2,400 and Shore was paid $3,600. In return Shore and the heirs of Wilson delivered *quit claim deeds*[12] to the Commission in which they "remised, released and forever quitclaimed" to the Commission "all rights of reversion, forfeiture, entry, re-entry, title, interest, equity and estate and all other rights of

12. A *quit claim deed* conveys whatever interest the grantor has. If the grantor has no interest in the land, then the deed conveys nothing. If the grantor owns the complete title in the land, then the deed conveys that interest. Such a deed provides a handy way of transferring an interest when you are not exactly sure what you have. Most real estate transactions use *warranty deeds*, in which specific interests are conveyed with guarantees made by the grantor that such interests are owned by the grantor and available for transfer.

every nature, kind and character" in the land.

Abbott Realty also delivered a deed to the Park and Recreation Commission on May 29, 1929. This deed was similar to the Barringers' deed, containing the same list of conditions, including the racial restriction. However, the reverter portion of the habendum clause in the Abbott Realty deed contained neither a provision calling for a reversion of the land if it was used by non-whites, nor a requirement that Abbott pay the Commission money as a condition precedent to a reversion. The omission of the racial reversion created a somewhat strange deed—one containing a conveyance conditioned on use of the land by whites only without a provision for what should happen to the land if non-whites used it. Finally, the City of Charlotte conveyed the last of the four parcels to the Commission, also on May 29. The deed contained a racial restriction in both the granting and reversionary portions of the instrument. Charlotte's conveyance completed the assembly of land necessary for construction of the park.

When the park was ready for use, it contained a municipal swimming pool, public tennis courts, and the Bonnie Brae Golf Course. The golf course, placed entirely on land donated by Shore and Wilson and the City of Charlotte, was the only public course in Charlotte. In December, 1951, a group of black residents of the city sought to use the golf course. On being denied entry they presented a petition to the Commission stating that they had been denied the right to use the golf course in violation of their Constitutional rights and demanding to be allowed to play the course. In response the Commission filed a law suit against the black petitioners and all the grantors of lands making up the park, except Shore and Wilson, asking for a *declaratory judgment*[13] as to what would happen if black persons were allowed to use the golf course. Shore and Wilson were omitted from the case because their quitclaim deeds left their chunk of the park fully in the hands

13. Most plaintiffs sue either for money or an injunction. Those forms of relief, however, do not always meet the needs of litigants. In the situation of the Park Commission, they were not interested in money or an injunction. They simply wanted to know the consequences that would follow from removal of the whites-only policy on the golf course. If they tested the racial restrictions by letting blacks on the course, they risked losing the land immediately because of the deed restrictions. Procedural situations like this surface often enough that most states and the federal government have adopted *declaratory judgment* statutes that permit plaintiffs with real disputes to seek a statement of their rights in the situation giving rise to the problem.

of the Commission. Pending the outcome of the litigation, the Commission declined to alter its whites-only policy.

The trial court then came to the following conclusions of law in the case:

> The deeds from Osmond L. Barringer, and wife, and from Abbott Realty Company vested in plaintiff a valid determinable fee with the possibility of reverter in and to the lands described in the deeds.
>
> In the event any one of the reverter provisions in the Barringer deed or the Abbott Realty Company deed be violated, then and in such event title to the lands conveyed in said deeds will by operation of law immediately revert title in the grantors; and the admission of negroes on the Bonnie Brae Golf Course to play golf will cause the reverter provisions in said deeds immediately to become operative, and title to revert.
>
> The deed from the city of Charlotte vested in plaintiff a valid determinable fee with the possibility of reverter. That the use of Bonnie Brae Golf Course by negroes as players would not cause a reversion of the property conveyed by the city of Charlotte to plaintiff, for that [sic] the reversionary clause in the city's deed is, under such circumstances, void as being in violation of the 14th amendment to the U.S. Constitution.
>
> The plaintiff is the owner in fee, free of any conditions, reservations or reverter provisions of the lands conveyed to it by Shore and Wilson.
>
> Revolution Park was created as an integral area of land, and to permit negroes to play golf on any part of said land will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective and result in the title of plaintiff terminating and the lands reverting to Barringer and Abbott Realty Company.[14]

The black defendants appealed. On the next page is a table summarizing the situation after the trial court rendered its opinion. On appeal the black plaintiffs challenged the results in the table cells with bold borders.

14. Charlotte Park and Recreation Commission v. Barringer, 242 N.C. 311, 315-316, 88 S.E.2d 114, 119 (1955).

STATUS OF REVOLUTION PARK PARCELS AFTER TRIAL				
Grantor in Deed	*Race Restriction?*	*Required to Spend $ for 8 Years?*	*Express Reversion to Grantor or Heirs?*	*Status of Parcel After Trial*
Barringer	Yes	Yes	Yes, But Must Pay $3500 to Get Land Back	Determinable Fee Simple With Reverter if Park Used by Blacks
Abbott Realty	Yes	Yes	No!	Determinable Fee Simple With Reverter if Park Used by Blacks
Shore/Wilson	Yes	Yes	Yes, Without Payment Obligation	Pre-Trial Dispute Settlement Left Fee Simple Absolute in Park Commission Without Reverter and Race Restriction.
City of Charolotte	Yes, by Legislation	Not Applicable	Not Applicable	Racial Restriction Violates the 14th Amendment.

[b] Opinion of the North Carolina Supreme Court in *Charlotte Park and Recreation Commission v. Barringer*

Charlotte Park and Recreation Commission v. Barringer

North Carolina Supreme Court

242 N.C. 311, 88 S.E.2d 114 (1955)

PARKER, JUSTICE.

* * * *

We shall discuss first the Barringer Deed . . . The first question presented is: Does the Barringer Deed create a fee determinable on special limitations, as decided by the Trial Judge?

This Court said in *Hall v. Turner*, 110 N.C. 292, 14 S.E. 791:

Whenever a fee is so qualified as to be made to determine, or liable to be

> defeated, upon the happening of some contingent event or act, the fee is said to be base, qualified or determinable.
>
> An estate in fee simple determinable, sometimes referred to as a base or a qualified fee, is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event . . . No set formula is necessary for the creation of the limitation, any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event being sufficient . . .. So, when land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purposes only, and that, on the cessation of such use, the estate shall end, without any re-entry by the grantor, an estate of the kind now under consideration is created. It is necessary, it has been said, that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an essential characteristic of a fee that it may possibly endure forever.
>
> Tiffany: *Law of Real Property*, 3rd Ed., Sec 220.

* * * *

In *First Universalist Society of North Adams v. Boland*, 155 Mass. 171, 29 N.E. 524, 15 L.R.A. 231, "the grant of the plaintiff was to have and to hold, etc., 'so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion' as specified, and when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons, etc.'" The Supreme Court of Connecticut in *Connecticut Junior Republic Association v. Litchfield*, has quoted the language of this case holding that the grant creates "'a determinable or qualified fee.'" Immediately after the quoted words, the Massachusetts Court used this language:

> The grant was not upon a condition subsequent, and no re-entry would be

> necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted then the estate would cease and determine by its own limitation.
>
> * * * *

In the Barringer Deed in the granting clause the land is conveyed to plaintiff "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The *habendum* clause reads, "to have and to hold the aforesaid tract or parcel of land . . . upon the following terms and conditions, and for the following uses and purposes, and none other, to-wit . . . . The lands hereby conveyed, together with the other tracts of land above referred to (the Shore, Wilson and City of Charlotte lands) 'as forming Revolution Park, shall be held, used and maintained by the party of the second part'" (the plaintiff here), ". . . as an integral part of a park, playground and recreational area, to be known as Revolution Park and to be composed of the land hereby conveyed and of the other tracts of land referred to above, said park and/or recreational area to be kept and maintained for the use of, and to be used and enjoyed by persons of the white race only." The other terms and conditions as to the use and maintenance, etc., of the land conveyed are omitted as not material. The pertinent part of the reverter provision of the deed reads: "In the event that the said lands comprising the said Revolution Park area as aforesaid, being all of the lands hereinbefore referred to . . . and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only . . . then, and in either one or more of said events, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs and assigns," provided, however, that before said lands shall revert to Barringer, and as a condition precedent to the reversion, Barringer, his heirs or assigns, shall pay unto plaintiff or its successors $3,500.

Barringer by clear and express words in his deed limited in the granting clause and in the *habendum* clause the estate granted, and in express language provided for a reverter of the estate granted by him, to him or his heirs, in the event of a breach of the expressed limitations. It seems plain that his intention, as expressed in his deed, was that plaintiff should have the land as long as it was not used in breach of the limitations of the grant,

and, if such limitations, or any of them, were broken, the estate should automatically revert to the grantor by virtue of the limitations of the deed. In our opinion, Barringer conveyed to plaintiff a fee determinable upon special limitations.

It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee, and the entire fee automatically ceases and determines by its own limitations. . . .

No action on the part of the creator of the estate is required, in such event, to terminate the estate. . . .

According to the deed of gift "Osmond L. Barringer, his heirs and assigns" have a possibility of reverter in the determinable fee he conveyed to plaintiff. It has been held that such possibility of reverter is not void for remoteness, and does not violate the rule against perpetuities. 19 Am.Jur., Estates, Section 31; Tiffany: *Law of Real Property*, 3rd Ed., Section 314.

The land was Barringer's, and no rights of creditors being involved, and the gift not being induced by fraud or undue influence, he had the right to give it away if he chose, and to convey to plaintiff by deed a fee determinable upon valid limitations, and by such limitations provide that his bounty shall be enjoyed only by those whom he intended to enjoy it.

* * * *

We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own.

If negroes use the Bonnie Brae Golf Course, the determinable fee conveyed to plaintiff by Barringer, and his wife, automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer, by virtue of the limitation in the deed, provided he complies with the condition precedent by paying to plaintiff $3,500, as provided in the deed. The operation of this reversion provision is not by any judicial enforcement by the State Courts of North

Carolina, and *Shelley v. Kraemer*, 334 U.S. 1, has no application. We do not see how any rights of appellants under the 14th Amendment to the U.S. Constitution, Section 1, or any rights secured to them by Title 42 U.S.C.A. §§ 1981, 1983, are violated.

If negroes use Bonnie Brae Golf Course, to hold that the fee does not revert back to Barringer by virtue of the limitation in the deed would be to deprive him of his property without adequate compensation and due process in violation of the rights guaranteed to him by the 5th Amendment to the U.S. Constitution and by Art. 1, Sec. 17 of the N.C. Constitution, and to rewrite his deed by judicial fiat.

* * * *

Now as to the Abbott Realty Company deed. This deed conveyed as a gift certain lands to plaintiff upon the same terms and conditions, and for the same uses and purposes, and for the white race only, as set forth in the Barringer deed. This deed contains a reverter provision, if there is a violation of certain limitations of the estate conveyed, but the reverter provision does not provide that, if the lands of Revolution Park are used by members of a nonwhite race, the lands conveyed by Abbott Realty Company to plaintiff shall revert to the grantor. In our opinion, the estate conveyed by Abbott Realty Company to plaintiff is a fee determinable upon certain expressed limitations set forth in the deed, with a possibility of reverter to Abbott Realty Company if the limitations expressed in the deed are violated and the reverter provision states that such violations will cause a reverter. That was the conclusion of law of the Trial Judge, and the appellants' assignment of error No. 2 thereto is overruled. However, the reverter provision does not require a reverter to Abbott Realty Company, if the lands of Revolution Park are used by negroes. Therefore, if negroes use Bonnie Brae Golf Course, title to the lands conveyed by Abbott Realty Company to plaintiff will not revert to the grantor.

The Trial Judge concluded as a matter of law that if any of the reverter provisions in the Abbott Realty Company deed were violated, title would revert to Abbott Realty Company, and that if negroes use Bonnie Brae Golf Course, title to the land granted by Abbott Realty Company will revert to it. The appellants' assignments of error Nos. 5 and 6 are to this conclusion of law. These assignments of error are sustained to this part of the

conclusion, that if negroes use Bonnie Brae Golf Course, title to the land will revert to Abbott Realty Company: and as to the other part of the conclusion the assignments of error are overruled.

The appellants' assignment of error No. 7 is to this conclusion of law of the Trial Judge, that the deed from the city of Charlotte to plaintiff created a valid determinable fee with the possibility of a reverter, and that as the city of Charlotte has only one municipal golf course, the use of Bonnie Brae Golf Course by negroes will not cause a reversion of title to the property conveyed by the city of Charlotte to plaintiff, for that said reversionary clause in said deed is, under such circumstances void as being in violation of the 14th Amendment to the U. S. Constitution.

From this conclusion of law the city of Charlotte and the plaintiff did not appeal. We do not see in what way appellants have been aggrieved by this conclusion of law, and their assignment of error thereto is overruled.

The appellants also include as part of their assignments of error Nos. 3, 4, 5 and 6 these conclusions of law of the Trial Judge numbered 7 and 8. No. 7, that the plaintiff is the owner in fee simple, free of any conditions, reservations or reverter provisions of the property which was conveyed to it by W. T. Shore and T. C. Wilson. The city of Charlotte has not appealed from this conclusion of law, and we are unable to see how appellants have been harmed, so their assignments of error thereto are overruled. No. 8, that Revolution Park, in which is located Bonnie Brae Golf Course, was created as an integral area of land, comprising the various contiguous tracts conveyed to plaintiff by Barringer, Abbott Realty Company, city of Charlotte, Shore and Wilson, and to permit negroes to use for golf any part of said land will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective, and result in title of the plaintiff terminating, and the property reverting to Barringer and Abbott Realty Company. As to this conclusion of law the assignments of error are sustained as to that part which states that, if negroes use Bonnie Brae Golf Course, the reverter provision in the Abbott Realty Company deed will become effective and title will revert to Abbott Realty Company: as to the other parts the assignments of error are overruled.

Judgment will be entered below in accordance with this opinion.

Modified and affirmed.

[c] Notes on *Charlotte Park and Recreation Commission v. Barringer*

(1) *Denouement*. After the North Carolina Supreme Court decision, the Park Commission purchased the Barringer reversion for $18,000.[15] Despite the judicial result, the Barringers never sought to enforce the restriction as to their segment of the park. By the time the litigation was concluded, Mr. Barringer was an old man in some need of funds. The case simply was settled. Revolution Park still exists and is operated as an integrated park.[16] According to the Mecklenburg County Park Commission website, it has a club house, parking, kids' play area, three softball fields and a multi-purpose field in addition to the nine-hole golf course.

(2) *Statement of the Problem in the* Charlotte Park *Case*. The *Barringer* court wrote that the operation of the reversion provision in the Barringer deed "is not by any judicial enforcement by the State Courts of North Carolina, and *Shelley v. Kraemer*, 334 U.S. 1, has no application. We do not see how any rights of appellants under the 14th Amendment to the U.S. Constitution, Section 1, or any rights secured to them by Title 42 U.S.C.A. §§ 1981, 1983, are violated." *Shelley v. Kraemer*, a case you will read in Chapter 4, involved the enforceability of clauses in deeds for residential property barring sale of the property to blacks or other minority purchasers. The *Shelley* Court noted that the racial covenants in the deeds were directed toward a "designated class of persons," and that the plaintiffs had available to them the "full coercive power of government" to forestall the performance of a deal between willing buyers and sellers. As a result, the Court concluded, enforcement of the racial covenants by a state court violated the Fourteenth Amendment provisions barring a state from violating the Equal Protection of

15. Telephone Interview, July 2, 1986, with Mr. Joe Grier, Jr., an attorney in Charlotte, N.C., who was on the Park Commission at the time of the litigation.
16. The Revolution Park may be found at http://www.charmeck.org/Departments/Park+and+Rec/Parks/Parks+By+Region/West+Park+Region/RevolutionPK.htm (Visited 7/3/2009). The golf course has a separate website at http://charlottepublicgolf.com/revolution-park.php (Visited 5/5/2009).

the laws. The *Charlotte Park* restrictions were also directed toward a designated class. But there were at least two differences between this situation and *Shelley*. First, the impact of enforcing the restrictions was to close the park, a result which would have affected people of all races in Charlotte. Second, there was an argument available in *Charlotte Park* that the termination of the park would occur automatically. If the Barringer grant created a fee simple determinable, then, the argument went, use of state power was not required to enforce the racial restriction. These notes are designed to help you understand this argument.

(3) *Two Examples of Fee Simple Estates in Operation*. Before returning to the *Charlotte Park* case, study two other cases to see how the various fee simple estates may operate. In *Storke v. Penn Mutual Life Insurance Company*, 390 Ill. 619, 61 N.E.2d 552 (1945), land in Chicago was sold by Storke via a deed containing the following language:

> [To X and his heirs, party of the second part] . . . [T]he party of the second part his heirs and assigns hereby covenant and agree that no saloon shall be kept and no intoxicating liquors be sold or permitted to be sold on said premises herein conveyed or in any building erected upon said premises; and that in case of breach in these covenants or any of them said premises shall immediately revert to the grantors, and the said party of the second part shall forfeit all right, title and interest in and to said premises.

What kind of interest was transferred here—a fee simple absolute subject to a covenant, a fee simple determinable, or a fee simple subject to a condition subsequent? A covenant, which you will study in the next chapter, is a contractual undertaking that is also enforceable against persons purchasing the land from the original buyer. The court held that the language was ambiguous. If it was meant to create a fee simple determinable, the court held, it failed since automatic forfeitures are disfavored; determinable fees will not be said to exist unless the intention to create them is clear. If it was meant to create a fee simple subject to a condition subsequent, it also failed. As with the Abbott Realty deed in *Charlotte Park*, a right of re-entry was not expressly reserved. Finally, if it was meant to create a fee simple absolute subject to a covenant, as in *Shelley*, the covenant failed because the forty-acre neighborhood subject to deeds like this one

was full of liquor establishments by the time of this litigation. The change in neighborhood circumstances supported an equitable decision to deny enforcement.[17] A table summarizing the nature of the various interests considered in the case and the outcomes is presented on the next page. (A third traditional, but rarely used, form of limited fee simple is also listed simply for information's sake.)

17. This result follows the general rule that covenants will not be enforced when the purposes for their creation may no longer be served. *See* Ginsberg v. Yeshiva of Far Rockaway, *infra* at p. ___.

SUMMARY OF *STORKE* RESULTS				
Type of Interest	*Example*	*Features*	*Used in* Storke*?*	*Result*
Fee Simple Determinable	Grantor → Grace Church so long as the land is used for church purposes, but if the land is ever used other than for church purposes, then it reverts automatically to the Grantor and her heirs.	Grantee receives less than full fee simple. Fee simple terminates automatically on happening of event. Reversion in grantor or heirs.	Maybe, but not successfully. Language ambiguous and forfeitures disfavored.	Grantee retains title.
Fee Simple Subject to a Condition Subsequent	Grantor → Grace Church forever, but if the land is ever used other than for church purposes, then the Grantor or His Heirs May Re-Enter and Take Possession.	Grantee receives full fee simple. At option of grantor or heirs of grantor, fee simple may be recaptured on happening of an event.	Maybe, but not successfully. Right of re-entry was not reserved.	Grantee retains title.
Fee Simple Subject to an Executory Limitation	Grantor → Grace Church forever, but if the land is ever used other than for church purposes, then title passes automatically to Ms. Third Party and her heirs.	Grantee receives full fee simple. Fee simple transfers automatically on happening of an event. Future interest held by third party automatically goes into possession.	No	Not Applicable
Fee Simple Subject to a Covenant	Grantor → Grace Church forever. Grantor and Grace Church agree that the land shall be used only for church purposes and that is the intention of the parties that this agreement run with the land.	Grantee receives full fee simple. Parties to transaction agree to a contract. Contract enforceable against successors in interest.	Maybe.	Not enforceable because of change in circumstances in the neighborhood.

The *Storke* opinion is a wonderful example of the hostility courts sometimes show toward all sorts of limitations on fee simple absolutes. Fee simple absolutes are preferred because they are easier to transfer than conditioned or limited fees. Among the conditioned fees, those subject to a condition subsequent are favored because they leave open the option in the grantor to waive enforcement. In this particular case, the long-term failure of anyone to seek enforcement of the restriction in the deeds probably was the critical factor in the outcome. Even if you think the language was best read to create one or another sort of limitation or condition on the fee, the court's reluctance to enforce it was understandable.

Compare *Storke* with *Babb v. Rand*, 345 A.2d 496 (Me. 1975). The *Babb* court construed the following language as a fee simple subject to a condition subsequent:

> That the share of the Estate of Henry Rand of the Town of Southport, Lincoln County, State of Maine, shall be left to John Freeman Rand in fee simple with the proviso that he shall never deny access or occupation to the several heirs hereinafter named during their lifetime.

The next paragraph in the will, apparently drafted without the aid of an attorney, named the five children and stepchildren of the deceased. The court had several options in construing this will. First, it could have given the heirs "hereinafter named" life estates. But the instrument uses the magic words "fee simple" to describe the ownership interest of John Freeman Rand. That made it very difficult to give others life estates. How could they have possessory interests for life when another person already had the fee? Second, the court could have given one or another limited or conditioned fee simple to John Rand. This route was adopted by the court, which concluded that the testator intended to create a fee simple subject to a condition subsequent. Finally, the court could have given Rand a fee simple absolute, as in *Storke*, because no right of re-entry was clearly delineated in the will. The court probably decided to enforce the interests of the "heirs hereinafter named" because the will was drafted by a layperson and the intentions were pretty clear. In addition, there was no evident unfairness if the restriction was enforced, the land's marketability was not constrained for a very long period and there were no indications that anyone had ever waived enforcement of the "hereinafter named" provision.

Remember that in *Storke* all sorts of inequities might have surfaced if the restrictions were suddenly reinvigorated in a neighborhood full of liquor establishments.

These two cases make clear that *rules of construction*, or routinized judicial statements describing how an instrument should be construed, are not always rigidly applied. Various rules of construction may be called upon, depending on the circumstances. While hostility to restricted fees in unfair factual settings led to a narrow construction of the language in the *Storke* case, the opposite occurred in *Babb*. Lack of a clearly stated reversion will not always lead a court to haul out a rule of construction ignoring a restriction imposed on a fee simple in a document of conveyance.

(4) *Go Back to the* Charlotte Park *Case*. The trial court construed the various deeds setting up Revolution Park as interdependent; if one reversionary interest was activated, then all the land reverted. Even though the golf course was entirely on the Shore-Wilson and City segments, the court concluded that its use by blacks also would cause the Barringer and Abbott reversions to operate. But, by the time the case got to court, only half of the park was really involved. Remember that some time before the opinion was written, the Shore/Wilson segment became the property of the Park Commission in fee simple absolute as part of the settlement of prior litigation. In addition, all sides agreed that the City of Charlotte segment was subject to the commands of the Fourteenth Amendment. Since an agency of the state owned the land, the enforcement of a racial restriction fulfilled the state action requirement of the amendment and the racial restriction therefore violated the Equal Protection clause. In addition, the state supreme court said that the lack of a racial reversion in the Abbott Realty deed, like the lack of a right of re-entry in *Storke*, meant that segment of the land was unrestricted. As a result, the Park and Recreation Commission effectively held a fee simple absolute. The effect of all these holdings combined was that only the Barringer segment had an active racial restriction and that only the Barringer segment would revert if blacks used *any* portion of the park.

Now, recall from the first note in this series the argument that the activation of the racial restriction in the Barringer deed operated automatically and that therefore the state action required to find a violation of the Fourteenth Amendment was missing. From these

notes you now should understand that if the grant in the Barringer deed was a fee simple determinable, then the possibility of reverter was triggered automatically. That was the conclusion the court ultimately reached. But was that conclusion justified? Answering that question is the main topic for the Problem Notes that follow.

[d] Problem Notes

(1) *Did the Barringer Deed Create a Fee Simple Determinable?* Note that before Barringer or Barringers' successors could regain the land, they had to pay $3,500 to the Park Commission. This payment was presumably discretionary. If they made it, they got the land; if they didn't, ownership was left unchanged. Doesn't that mean enforcement of the reverter was discretionary and that the interest held by the Park Commission really was a fee simple subject to a condition subsequent?

(2) *State Action and the Fee Simple on a Condition Subsequent*. Assume that the interest created by the Barringer deed was a fee simple subject to a condition subsequent. Should that *really* make any difference in the outcome of the case? If a determinable fee does not trigger state action under the Fourteenth Amendment, why should a fee on a condition subsequent? Does the state need to undertake any action to activate the right of re-entry in a fee simple subject to a condition subsequent situation? Does the fact that the case exists mean that judicial action and state intervention are necessary regardless of the nature of the fee simple at issue? Is it fair to conclude that the court's dismissal of the result reached in *Shelley v. Kraemer* in a single sentence was erroneous? If there be a trend in the cases, it seems to be that a fee simple subject to a condition subsequent implicates the Fourteenth Amendment, while a fee simple determinable does not. See Jonathan L. Entin, *Defeasible Fees, State Action and the Legacy of Massive Resistance,* 34 WM. & MARY L. REV. 769 (1993). Do you agree with that result?

[e] History of *Evans v. Abney*: Future Interests and Racial Conditions

Augustus O. Bacon died on February 14, 1914, leaving his home and estate,

"Baconsfield," to the City of Macon as a park. Bacon was, to say the least, a very well-known figure in Macon. After practicing law in Atlanta, and serving as a captain in the Confederate Army, Bacon married Virginia Lamar, moved to Macon, and developed a large legal practice. In 1870 he was elected to the Georgia House of Representatives, in which he served for 14 years. After a failed campaign for Governor, Bacon joined the United States Senate in 1894, where he served until his death.[18]

Bacon's will was quite complex, creating a number of trusts for various members of his family.[19] Item Nine of the will provided that Baconsfield be given in trust to named trustees for the benefit of his wife and two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, for their joint use during their lives. The will then provided:

> When my wife, Virginia Lamar Bacon, and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control [of a Board of Managers of seven white persons, at least four of whom must be women.]

In addition, the will had a *residuary clause*[20] designating the takers of all of his property not otherwise disposed of by the will. These takers were Bacon's grandchildren, the four children of Mary Louise Bacon Sparks—A. O. B. Sparks, Willis B. Sparks, Jr.,

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18. A. JOHNSON (ED.), 1 DICTIONARY OF AMERICAN BIOGRAPHY 473-474 (1964).
19. The will was the subject of other litigation besides that over Baconsfield. In Curry v. Crump, 192 F.2d 279 (5th Cir. 1951), one of his grandchildren litigated an aspect of one of the family trusts.
20. This clause appears in virtually every will. It is frequently the most important clause, but its main function is to name the takers of all the property of the estate that is not specifically disposed of. Its function to get rid of all that is left suggests it is the "garbage" clause of will writers.

M. Garten Sparks, and Virginia Lamar Sparks—and the three children of Augusta Lamar Bacon Curry—Louise Curry Williams, Shirley Curry Cheatam, and Manley Lamar Curry. At the time litigation over Baconsfield began, the interests of the Curry grandchildren were held in trust; the Sparks grandchildren had charge of their shares of their grandfather's estate.

After Bacon died in 1914, the park was not immediately developed. The old farm was left largely wild. By 1931, his former home was being used, in accordance with Bacon's will, by several women's clubs for meetings, receptions, luncheons and dances. A wading pool was dedicated in 1931. During the depression, in part with federal funding from the Works Progress Administration, thousands of trees, flowering shrubs and flowers were planted and a women's clubhouse was constructed. A swimming pool and a zoo were constructed in the 1940s.[21]

By the early 1960s desegregation of public facilities was in full swing and black persons had begun to use Baconsfield. In response, Charles E. Newton and the other members of the Board of Managers of the park filed an action in May, 1963, against the residuary takers under Bacon's will and the City of Macon as trustee of the park. They alleged that the City was failing to obey the racial restrictions in Bacon's will and asked that new trustees be named to manage the park. The City of Macon's answer to the complaint asserted that as a public entity it could not enforce segregation in the park and asked that the court inform it of its obligations in the circumstances.[22] The residuary takers admitted the allegations of the complaint, asked that the City be removed as trustee, and argued that if the city was removed as trustee, the park property reverted to them!

Then things got really interesting. Reverend E. S. Evans and other black residents of

21. Many details of the park's history and demise may be found in Mary Anne Berg Richardson, *Baconsfield Park: Macon's Lost Treasure*, MACON MAGAZINE 24 (July-August, 1990).

22. This is a fairly common tactic for a trustee who does not know exactly what to do. Rather than take the chance of having to repay the trust for any damages occasioned by making an erroneous judgment, a trustee may file a petition seeking instructions from a court on how to behave. In *Evans*, the trustee was responding to a complaint filed by another party, but the idea is the same.

Macon asked to intervene in the case,[23] arguing that the court could not consistently with the United States Constitution appoint a private trustee in order to maintain Baconsfield as a segregated park and asking that the court reform the will of Bacon so as to permit the park to be integrated.[24] The City of Macon then resigned as trustee, and amended its pleadings by asking the court to accept its resignation and appoint new trustees. On March 10, 1964, the trial judge entered an order granting the black residents of Macon the right to intervene, but accepting the resignation of Macon as trustee, and appointing three private parties, Hugh Comer, Lawton Miller and B. L. Register, as the new trustees. Reverend Evans and his black colleagues appealed, but the Georgia Supreme Court affirmed the trial judge.[25] The United States Supreme Court then agreed to review the case. In *Evans v. Newton*[26] the Court ruled that the appointment of private trustees could not magically transform the park from a state to a private entity and thereby avoid the constraints of the Fourteenth Amendment and that the new trustees could not operate the facility in a segregated fashion. Signs of future difficulties abounded in the Court opinions. Justices Black, Harlan and Stewart dissented, arguing that private trustees were not controlled by the Constitution and could do as they pleased with the park. Justice White concurred on the narrow ground that the Georgia statute enabling Bacon to create a charitable trust for a segregated facility[27] created sufficient public involvement to fulfill state action requirements and that the appointment of private trustees was therefore an unacceptable charade to avoid the Constitutional mandate to integrate public facilities. And Justice Douglas' opinion for a majority of only five said nothing about what would happen if the state chose to close the park if it could not be operated under the terms of Bacon's will.

The case then went back to the Georgia courts. The Georgia Supreme Court declared

23. Intervention is a procedural device permitting those claiming an interest in litigation to join a case filed by others. *See*, e.g., Federal Rule of Civil Procedure 24.
24. Such reformation under the *cy pres* rules is discussed in the notes after the United States Supreme Court opinions in Evans v. Abney.
25. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).
26. 382 U.S. 296 (1966).
27. At the time of the litigation, Georgia Code Annotated §§ 69-504 and 69-505 provided for gifts to municipalities with racial restrictions and authorized municipalities to accept the gifts.

that integration of the park meant that the main purpose for the Bacon trust had failed and remanded the case to the trial court for a determination as to whether the trust should be reformed or the assets of the estate given over to the residuary takers.[28] The trial court declined to reform the trust under the *cy pres* rules, and ordered the trust assets distributed to Guyton Abney and the other trustees of the three Curry grandchildren and to the four Sparks grandchildren. The Currys each took a 1/16 interest as beneficiaries of a trust and the Sparks' each took a 1/8 interest. That result was also affirmed on appeal,[29] and the case went back to the Supreme Court a second time.

[f] United States Supreme Court Opinions in *Evans v. Abney*

Evans v. Abney
United States Supreme Court
396 U.S. 435 (1970)

MR. JUSTICE BLACK delivered the opinion of the Court.

Once again this Court must consider the constitutional implications of the 1911 will of United States Senator A. O. Bacon of Georgia which conveyed property in trust to Senator Bacon's home city of Macon for the creation of a public park for the exclusive use of the white people of that city. As a result of our earlier decision in this case which held that the park, Baconsfield, could not continue to be operated on a racially discriminatory basis, *Evans v. Newton*, 382 U.S. 296 (1966), the Supreme Court of Georgia ruled that Senator Bacon's intention to provide a park for whites only had become impossible to fulfill and that accordingly the trust had failed and the parkland and other trust property had reverted by operation of Georgia law to the heirs of the Senator. Petitioners, the same Negro citizens of Macon who have sought in the courts to integrate the park, contend that this termination of the trust violates their rights to equal protection and due process under the Fourteenth Amendment. We granted certiorari because of the

28. Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966).
29. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

importance of the questions involved. For the reasons to be stated, we are of the opinion that the judgment of the Supreme Court of Georgia should be, and it is, affirmed.

* * * *

We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will. At the time Senator Bacon made his will Georgia cities and towns were, and they still are, authorized to accept devises of property for the establishment and preservation of "parks and pleasure grounds" and to hold the property thus received in charitable trust for the exclusive benefit of the class of persons named by the testator. Ga. Code Ann., c. 69-5 (1967); Ga. Code Ann. §§ 108-203, 108-207 (1959). These provisions of the Georgia Code explicitly authorized the testator to include, if he should choose, racial restrictions such as those found in Senator Bacon's will. The city accepted the trust with these restrictions in it. When this Court in *Evans v. Newton* held that the continued operation of Baconsfield as a segregated park was unconstitutional, the particular purpose of the Baconsfield trust as stated in the will failed under Georgia law. The question then properly before the Georgia Supreme Court was whether as a matter of state law the doctrine of *cy pres* should be applied to prevent the trust itself from failing. Petitioners urged that the *cy pres* doctrine allowed the Georgia courts to strike the racially restrictive clauses in Bacon's will so that the terms of the trust could be fulfilled without violating the Constitution.

The Georgia *cy pres* statutes upon which petitioners relied provide:

> When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

Ga. Code Ann. § 108-202 (1959).

> A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation,

effectuate the purpose in a manner most similar to that indicated by the testator.

Ga. Code Ann. § 113-815 (1959). The Georgia courts have held that the fundamental purpose of these *cy pres* provisions is to allow the court to carry out the general charitable intent of the testator where this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. But this underlying logic of the *cy pres* doctrine implies that there is a certain class of cases in which the doctrine cannot be applied. Professor Scott in his treatise on trusts states this limitation on the doctrine of *cy pres* which is common to many States as follows:

> It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable.

4 A. Scott, *The Law of Trusts* § 399, p. 3085 (3d ed. 1967).

In this case, Senator Bacon provided an unusual amount of information in his will from which the Georgia courts could determine the limits of his charitable purpose. Immediately after specifying that the park should be for "the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon," the Senator stated that "the said property under no circumstances . . . (is) to be . . . at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized." And the Senator continued:

> I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.
>
> I am, however, without hesitation in the opinion that in their social relations the two races . . . should be forever separate and that they should not have

pleasure or recreation grounds to be used or enjoyed, together and in common.

The Georgia courts, construing Senator Bacon's will as a whole, concluded from this and other language in the will that the Senator's charitable intent was not "general" but extended only to the establishment of a segregated park for the benefit of white people. The Georgia trial court found that "Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield." . . . The Baconsfield trust was therefore held to have failed, and, under Georgia law, "[w]here a trust is expressly created, but [its] uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." Ga. Code Ann. § 108-106(4) (1959).[2] The Georgia courts concluded, in effect, that Senator Bacon would have rather had the whole trust fail than have Baconsfield integrated.

When a city park is destroyed because the Constitution requires it to be integrated, there is reason for everyone to be disheartened. We agree with petitioners that in such a case it is not enough to find that the state court's result was reached through the application of established principles of state law. No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated. Here,

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2. Although Senator Bacon's will did not contain an express provision granting a reverter to any party should the trust fail, § 108-106(4) of the Georgia Code quoted in the text makes such an omission irrelevant under state law. At one point in the Senator's will he did grant "all remainders and reversions" to the city of Macon, but the Supreme Court of Georgia showed in its opinion that this language did not relate in any way to what should happen upon a failure of the trust but was relevant only to the initial vesting of the property in the city. The Georgia court said:

> Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the intervenors appears in the following provision of the will: "When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc." This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision.

however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will.

Petitioners first argue that the action of the Georgia court violates the United States Constitution in that it imposes a drastic "penalty," the "forfeiture" of the park, merely because of the city's compliance with the constitutional mandate expressed by this Court in *Evans v. Newton*. Of course, *Evans v. Newton* did not speak to the problem of whether Baconsfield should or could continue to operate as a park; it held only that its continued operation as a park had to be without racial discrimination. But petitioners now want to extend that holding to forbid the Georgia courts from closing Baconsfield on the ground that such a closing would penalize the city and its citizens for complying with the Constitution. We think, however, that the will of Senator Bacon and Georgia law provide all the justification necessary for imposing such a "penalty." The construction of wills is essentially a state-law question, *Lyeth v. Hoey*, 305 U.S. 188 (1938), and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs.

A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation. In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will. Nor is there any indication that Senator

Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes. On the contrary, the language of the Senator's will shows that the racial restrictions were solely the product of the testator's own full-blown social philosophy. Similarly, the situation presented in this case is also easily distinguishable from that presented in *Shelley v. Kraemer*, 334 U.S. 1 (1948), where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.

Petitioners also contend that since Senator Bacon did not expressly provide for a reverter in the event that the racial restrictions of the trust failed, no one can know with absolute certainty that the Senator would have preferred termination of the park rather than its integration, and the decision of the Georgia court therefore involved a matter of choice. It might be difficult to argue with these assertions if they stood alone, but then petitioners conclude: "Its [the court's] choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a 'guess,' an item in 'social philosophy,' or anything else at all." We do not understand petitioners to be contending here that the Georgia judges were motivated either consciously or unconsciously by a desire to discriminate against Negroes. In any case, there is, as noted above, absolutely nothing before this Court to support a finding of such motivation. What remains of petitioners' argument is the idea that the Georgia courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favor of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its

normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Another argument made by petitioners is that the decision of the Georgia courts holding that the Baconsfield trust had "failed" must rest logically on the unspoken premise that the presence or proximity of Negroes in Baconsfield would destroy the desirability of the park for whites. This argument reflects a rather fundamental misunderstanding of Georgia law. The Baconsfield trust "failed" under that law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together but, rather, because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people.

Petitioners also advance a number of considerations of public policy in opposition to the conclusion which we have reached. In particular, they regret, as we do, the loss of the Baconsfield trust to the City of Macon, and they are concerned lest we set a precedent under which other charitable trusts will be terminated. It bears repeating that our holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts. Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule. More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

In their lengthy and learned briefs, the petitioners and the Solicitor General as *amicus curiae* have advanced several arguments which we have not here discussed. We have carefully examined each of these arguments, however, and find all to be without merit.

The judgment is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

Bacon's will did not leave any remainder or reversion in "Baconsfield" to his heirs. He left "all remainders and reversions and every estate in the same of whatsoever kind" to the City of Macon. He further provided that the property "under no circumstances, or by any authority whatsoever" should "be sold or alienated or disposed of, or at any time for any reason" be "devoted to any other purpose or use excepting so far as herein specifically authorized."

Giving the property to the heirs, rather than reserving it for some municipal use, does therefore as much violence to Bacon's purpose as would a conversion of an "all-white" park into an "all-Negro" park.

* * * *

Moreover, putting the property in the hands of the heirs will not necessarily achieve the racial segregation that Bacon desired. We deal with city real estate. If a theatre is erected, Negroes cannot be excluded. If a restaurant is opened, Negroes must be served. If office or housing structures are erected, Negro tenants must be eligible. If a church is erected, mixed marriage ceremonies may be performed. If a court undertook to attach a racial-use condition to the property once it became "private," that would be an unconstitutional covenant or condition.

Bacon's basic desire can be realized only by the repeal of the Fourteenth Amendment. So the fact is that in the vicissitudes of time there is no constitutional way to assure that this property will not serve the needs of Negroes.

The Georgia decision, which we today approve, can only be a gesture toward a state-sanctioned segregated way of life, now *passé*. It therefore should fail as the imposition of a penalty for obedience to a principle of national supremacy.

MR. JUSTICE BRENNAN, dissenting.

For almost half a century Baconsfield has been a public park. Senator Bacon's will provided that upon the death of the last survivor among his widow and two daughters title to Baconsfield would vest in the Mayor and Council of the City of Macon and their successors forever. Pursuant to the express provisions of the will, the Mayor and City

Council appointed a Board of Managers to supervise the operation of the park, and from time to time these same public officials made appointments to fill vacancies on the Board. Senator Bacon also bequeathed to the city certain bonds which provided income used in the operation of the park.

The city acquired title to Baconsfield in 1920 by purchasing the interests of Senator Bacon's surviving daughter and another person who resided on the land. Some $46,000 of public money was spent over a number of years to pay the purchase price. From the outset and throughout the years the Mayor and City Council acted as trustees, Baconsfield was administered as a public park. T. Cleveland James, superintendent of city parks during this period, testified that when he first worked at Baconsfield it was a "wilderness . . . nothing there but just undergrowth everywhere, one road through there and that's all, one paved road." He said there were no park facilities at that time. In the 1930s Baconsfield was transformed into a modern recreational facility by employees of the Works Progress Administration, an agency of the Federal Government. WPA did so upon the city's representation that Baconsfield was a public park. WPA employed men daily for the better part of a year in the conversion of Baconsfield to a park. WPA and Mr. James and his staff cut underbrush, cleared paths, dug ponds, built bridges and benches, planted shrubbery, and, in Mr. James' words, "just made a general park out of it." Other capital improvements were made in later years with both federal and city money. The Board of Managers also spent funds to improve and maintain the park.

* * * *

No record could present a clearer case of the closing of a public facility for the sole reason that the public authority that owns and maintains it cannot keep it segregated. . . . I have no doubt that a public park may constitutionally be closed down because it is too expensive to run or has become superfluous, or for some other reason, strong or weak, or for no reason at all. But under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility. . . .

When it is as starkly clear as it is in this case that a public facility would remain open but for the constitutional command that it be operated on a nonsegregated basis, the closing of that facility conveys an unambiguous message of community involvement in

racial discrimination. . . .

The Court, however, affirms the judgment of the Georgia Supreme Court on the ground that the closing of Baconsfield did not involve state action. The Court concedes that the closing of the park by the city "solely to avoid the effect of a prior court order directing that the park be integrated" would be unconstitutional. However, the Court finds that in this case it is not the State or city but "a private party which is injecting the racially discriminatory motivation." . . . The exculpation of the State and city from responsibility for the closing of the park is simply indefensible on this record. This discriminatory closing is permeated with state action: at the time Senator Bacon wrote his will Georgia statutes expressly authorized and supported the precise kind of discrimination provided for by him; in accepting title to the park, public officials of the City of Macon entered into an arrangement vesting in private persons the power to enforce a reversion if the city should ever incur a constitutional obligation to desegregate the park; it is a *public* park that is being closed for a discriminatory reason after having been operated for nearly half a century as a segregated *public* facility; and it is a state court that is enforcing the racial restriction that keeps apparently willing parties of different races from coming together in the park. That is state action in overwhelming abundance. I need emphasize only three elements of the state action present here.

First, there is state action whenever a State enters into an arrangement that creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official, for example the official action involved in Macon's acceptance of the gift of Baconsfield. The State's involvement in the creation of such a right is also involvement in its enforcement; the State's assent to the creation of the right necessarily contemplates that the State will enforce the right if called upon to do so. Where, as in this case, the State's enforcement role conflicts with its obligation to comply with the constitutional command against racial segregation the attempted enforcement must be declared repugnant to the Fourteenth Amendment.

* * * *

A finding of discriminatory state action is required here on a second ground. *Shelley v. Kraemer*, 334 U.S. 1 (1948), stands at least for the proposition that where parties of different races are willing to deal with one another a state court cannot keep them from doing so by enforcing a privately devised racial restriction. . . . Nothing in the record suggests that after our decision in *Evans v. Newton*, the City of Macon retracted its previous willingness to manage Baconsfield on a nonsegregated basis, or that the white beneficiaries of Senator Bacon's generosity were unwilling to share it with Negroes, rather than have the park revert to his heirs. Indeed, although it may be that the city would have preferred to keep the park segregated, the record suggests that, given the impossibility of that goal, the city wanted to keep the park open. The resolution by which the Mayor and Council resigned as trustees prior to the decision in *Evans v. Newton*, reflected, not opposition to the admission of Negroes into the park, but a fear that if Negroes were admitted the park would be lost to the city. The Mayor and Council did not participate in this litigation after the decision in *Evans v. Newton*. However, the Attorney General of Georgia was made a party after remand from this Court, and, acting "as *parens patriae* in all legal matters pertaining to the administration and disposition of charitable trusts in the State of Georgia in which the rights of beneficiaries are involved," he opposed a reversion to the heirs and argued that Baconsfield should be maintained "as a park for all the citizens of the State of Georgia." Thus, so far as the record shows, this is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of the Georgia courts thus, under *Shelley v. Kraemer*, constitutes state action denying equal protection.

Finally, a finding of discriminatory state action is required on a third ground. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this Court announced the basic principle that a State acts in violation of the Equal Protection Clause when it singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law, even though the State does not itself impose or compel segregation. This approach to the analysis of state action was foreshadowed in MR. JUSTICE WHITE'S separate opinion in *Evans v. Newton*. There MR. JUSTICE WHITE comprehensively reviewed the law of trusts as that law stood in Georgia in 1905, prior to the enactment of

§§ 69-504 and 69-505 of the Georgia Code. He concluded that prior to the enactment of those statutes "it would have been extremely doubtful" whether Georgia law authorized "a trust for park purposes when a portion of the public was to be excluded from the park." 382 U. S. at 310. Sections 69-504 and 69-505 removed this doubt by expressly permitting dedication of land to the public for use as a park open to one race only. Thereby Georgia undertook to facilitate racial restrictions as distinguished from all other kinds of restriction on access to a public park. *Reitman* compels the conclusion that in doing so Georgia violated the Equal Protection Clause.

* * * *

I would reverse the judgment of the Supreme Court of Georgia.

[g] Notes on Charitable Trusts, Future Interests and Wills

(1) *Charitable Trusts and the Social Preference for Alienability*. Charitable trusts operate somewhat differently from other trusts. They may last longer than personal trusts[30] and are subject to reformation under the *cy pres* rules. These differences play an important role in cases like *Evans*.

A basic conflict exists between two important policies in American property law. On the one hand, an assumption exists that an asset ought to be transferable. Transferability, or *alienability* as it is often called by lawyers, is thought to increase the likelihood that productive use will be made of the property. On the other hand, a number of property rules and institutions, to say nothing of environmental controls, are designed to permit individuals or governments to limit alienability in order to protect future generations, the public welfare, or the ecology.

A will like that of Bacon presents the conflict directly. Even if the racial restriction is put aside, Bacon's will controlled large amounts of property for a long period of time. It delayed for a couple of generations the final distribution of those assets left to various members of his family and bestowed a large amount of property permanently (or so he

30. The rule against perpetuities, discussed later in this chapter, generally does not limit the length of time a charitable trust may continue to operate.

hoped) on public authorities. The general preference to encourage the transfer of property was suspended for quite some time so that Bacon could control his clan's wealth.

Discord between the desire to transfer and the desire to let property owners dispose of property to private parties in wills is mediated by the Rule Against Perpetuities, discussed later in this chapter. For now, understand only that the perpetuities rules permit a person to control the disposition of property in private hands for about two generations into the future. With charitable trusts the preference to permit transfer is totally suspended in favor of encouraging gifts of property for the public use of this and future generations.

The permanence of charitable trusts may create serious problems. When shifts in social mores occur, some older charitable impulses will be viewed as tainted, inappropriate, out of date or impractical. The arrival of the Civil Rights Era, for example, caused serious tension in the operation of Baconsfield. Under such circumstances, you might predict that a set of rules would develop permitting courts to modify the terms of some charitable trusts to permit their continuance. The *cy pres* rules have taken on this role. Surprisingly, the rules are not cast in such a way that courts may alter any charitable trust to meet "modern" needs. Rather, the courts inquire, as in *Evans*, whether the *settlor*, the party establishing the trust, had a general charitable intent. If so, the court may, but need not, make modifications in the trust to permit this general charitable intent to continue operating. If, however, the charitable intent was specific, and the purposes of the trust may no longer be served, the trust is ended. This, of course, was the outcome in *Evans*. One way of thinking about *Evans* is to inquire whether the judicial use of the *cy pres* rules to forbid modification of a trust with racial restrictions fulfilled the state action requirement.

The focus of the *cy pres* rules on the intent of the settlor rather than upon the ability to modify the trust to meet modern social needs represents a compromise among the various cultural demands at issue. On the one hand, the desire to grant property owners control over the disposition of their assets suggests a need to constantly look at the intent of the grantor or settlor. Indeed, the cases on future interests and trusts all have ritualized references to the importance of the intention of the person establishing the trust. On the other hand, the desire to maintain charities for the benefit of future generations leads us to

fiddle with such intent when it is said to be "general." Such an outcome satisfies our reluctance to simply throw away the generous instincts of somewhat picky donors. Only when the settlor quite specifically says that he or she does not wish to be charitable at all if certain events occur will we terminate the trust. Bacon's clear statements in his will indicating that he was a segregationist led the Georgia courts to close the park rather than alter the trust to meet contemporary social mores.

The final result in *Evans* was not a foregone conclusion. Other courts confronting similar situations have applied the *cy pres* rules to reform trusts. The best known such case probably is *Commonwealth of Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir. 1967) involving the will of Stephen Girard which provided funds for establishing Girard College in 1831. Further information on the *cy pres* debate may be found in Jonathan Macey, *Private Trusts for the Provision of Private Goods,* 37 EMORY L.J. 295 (1988).

(2) *Future Interests*. The provisions in Bacon's will relevant to the *Evans* case may be paraphrased and rewritten as follows:

> *Bacon to my wife and two daughters for their lives, then upon the death of the last of my wife and two daughters, to the Mayor and City Council of Macon in trust for use as a park for white women and children*.

Use the notes at the beginning of this chapter to label the various interests in this version of the Bacon will. You should be able to discern that Bacon's will created life estates in his wife and daughters, followed by a vested remainder subject to defeasance in the Mayor and City Council of Macon. The Macon authorities acted as a trustee for the town's white people, who held beneficial or equitable interests that were also much like vested remainders subject to defeasance. There was, however, no executory interest. Instead, the park land reverted to Bacon and his heirs. In addition, note that the wife and daughters held their life estate as tenants in common.

(3). *Another* Evans-*Based Problem*. Rewrite the Bacon will to read as follows:

> *To my wife and daughters for their lives, then if before the death of the last of my wife and daughters, the City of Macon builds a memorial to my memory costing no less than $1,000, to the City of Macon in trust for use as a park for white women and children*.

What interests does this conveyance create? The language places a pre-condition upon the gift from Bacon to the City of Macon. There is no present intention to immediately bestow a future right to possession. The interest taking effect at the death of Bacon is a contingent remainder. If Macon builds the memorial before the death of the wife and daughters, then the pre-condition will be fulfilled and the City of Macon's interest would become a vested remainder subject to defeasance.

[h] Problem Notes

(1) *Denouement of* Evans. Justice Douglas' dissent in *Evans* was a bit prophetic. After the United States Supreme Court sent the case back to the Georgia courts, the Baconsfield park was closed, and the land reverted to Bacon and his heirs. Since his will had a residuary clause distributing all assets not otherwise disposed of in his will, the reverted park passed to the residuary takers. They in turn sold the land for a tidy sum to various developers who have since constructed a large shopping center, McDonald's Restaurant, apartments, condominiums, row houses and office buildings. Part of the edge of the park also was used for an interstate highway. Black persons, at least in legal theory, must be allowed access to all of these facilities under present civil rights laws. Does this outcome mean that the Supreme Court decision came out the wrong way?

(2) *Formalism and Construction of Conveyance Documents*. Recall the *Storke v. Penn Mutual* and *Babb v. Rand* cases discussed in Note 3, *supra* at p. 27. I made the point there that rigid use of rules of construction may well lead courts (and students) astray. A similar debate occurs in studying future interests. Though the categorization of interests in property has the appearance of ease of application, the vagaries of individual cases may cause a great deal of head scratching.

In re Estate of Houston 414 Pa. 579, 201 A.2d 592 (1964), is one of the most famous head scratchers. Enormous sums of money rode on the construction of the last clause in an extremely complex will. The end of the clause read, "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 parent's share." By the time the last surviving child died, three of the testator's twelve grandchildren had also died. If the language quoted above was construed literally, these three dead grandchildren were entitled to a share of the estate. Such a literal construction was adopted by the court. That resulted in splitting the $145,000,000 estate twelve ways, reopening estates of long dead persons, bestowing property on persons related to the testator only by marriage and not part of the rest of his estate plan, and forcing the payment of substantial estate taxes that would not otherwise have been paid. The dissenters argued that the quoted language should be construed to mean that assets were to go only to *surviving* grandchildren. That construction would have left only nine shares to the estate, prevented reopening the estates of long dead persons, and avoided the payment of huge taxes.

How literal would you be? What would convince you to construe the conveyance as one to surviving grandchildren? The outcome of the case was one reason a prominent academic wrote an article sharply criticizing the courts for being too quick to apply a standard rule of construction favoring vested over contingent interests. Edward Rabin, *The Law Favors Vesting of Estates. Why?*, 65 COLUM. L. REV. 467 (1965). This is part of a large and important debate in property law. The need for certainty in titles suggests that we should be quite Formalist in the way we use legal terms of art in documents of conveyance. That instinct is sorely tested when Formalism produces unfair results. Such was the nature of the debate between the majority and dissenting judges in *Houston*.

(3) *Use of Attorneys and Rules of Construction*. At one point the *Houston* court noted that the will was carefully drafted by a lawyer. Is it appropriate to apply stricter rules of construction to such a will than to wills handwritten by untutored persons? In some jurisdictions, holographic wills—handwritten, unwitnessed, but signed, wills—are enforced upon the death of the maker. Do you suppose that courts are less prone to apply technical rules of construction, such as early vesting notions, to holographic wills? If so, why should Houston's will have been treated differently? After all, Houston's family, not the attorney, were the ones that took a licking in the case! Why should the sins of the lawyer be visited upon the client or the client's family? Should the court have noted that errors of this sort—leaving out the word "surviving"—are easy to overlook in long wills

and then construed it with human frailty in mind? Or should lawyers, well paid for their time, be expected to deal perfectly with all the complexities of a will like Houston's? Was the attorney negligent? And if a lawyer drafts the will, can the court talk "honestly" about the intention of the testator when it construes the document? Do you think that Houston, or the testator of any other very complex will, really understood his will?

(4) *Definition of Discrimination and "Neutral" State Legal Rules*. The *Evans* court opined that the decision of the Georgia Supreme Court not to apply the *cy pres* rules to modify the Bacon trust involved no racial discrimination. Rather the state court was applying old and well understood "neutral" property rules. Was the outcome in *Evans* really neutral? Baconsfield was established by a segregationist. Is enforcement of the intention of a segregationist "neutral"? What if Baconsfield was the park in town most convenient to largely black neighborhoods? Would the consequences of closing the park be "neutral"? Does the idea of "neutrality" in cases like this force us to divorce the technical meaning of legal rules involving estates in land from the social consequences of legal rules? If so, are you willing to do that?

(5) *Definitions of Discrimination and State Action*. Does it make any difference that in *Shelley v. Kraemer*, the case about enforcement of racial restrictions on sale of property, the operation of the restriction deprived only black persons of property while in *Evans* both black and white people lost a park? In the *Evans* opinion, the Court assumed for purposes of argument that Macon could not close a facility, but held that it was Bacon, not Macon, that closed the park. Subsequent to the decision in *Evans*, the Supreme Court decided that public authorities could close a public facility rather than integrate it. Both races were equally affected, the Court opined. *Palmer v. Thompson*, 403 U.S. 217 (1971). Would you define "discrimination" to include outcomes based on an "intention" to treat persons differently, results that "effect" one group differently from another, or outcomes based on intent that also effect groups differently? If intent is the only requirement, was not *Palmer v. Thompson* wrongly decided?

[i] Some Further Notes on Estates in Land

There are a few other rules about future interests which sometimes trap the unwary.

Destruction of Contingent Remainders. Consider this grant:

G to A for life, then to the heirs of B.

The heirs of B are not known until B dies. The interest is thus contingent upon the determination of the heirs.[31] Suppose that A dies before B. In such a situation we would not know the heirs of B until a later time. There is a "gap" in the flow of interests, and G would hold a reversion in the property between the time A and B die. At common law, such a gap caused the destruction of the contingent remainder. As Professor Jesse Dukeminier made clear in the article excerpted below, almost all states have done away with destructibility and permit such interests to take effect upon the death of B as executory interests.

Other Relics. At common law, just like today, taxation led to tax avoidance schemes. As a general rule, passage of wealth through an estate was a heavily taxed event. Efforts were therefore made to avoid taxes by the use of various future interests. Courts sometimes responded with rules to circumscribe the tax avoidance. Two such old rules—the Rule in Shelley's Case and the Doctrine of Worthier Title—still haunt some jurisdictions.

The Rule in Shelley's Case involved the construction of the transfer:

G to A for life, then to the heirs of A.

If the interest in the heirs of A was deemed a contingent remainder at the moment G created these interests, then the land would not pass through A's estate upon his death. Instead, the property would automatically go to the heirs of A, determined at A's death. To insure tax collection, the courts construed this language to create a fee simple absolute in A. The heirs of A then collected as takers of the estate of A, not as transferees from G. Most jurisdictions have abolished the rule.

The Doctrine of Worthier Title involved construction of a transfer such as:

G to A for life, then to the heirs of G.

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31. Note that "heirs" is used here as a word of purchase describing takers, not as a word of limitation describing time. If "heirs" were used in both senses in this grant, it would read:

G to A for life, then to the heirs of B and their heirs.

If the interest in the heirs of G was viewed as a contingent remainder, the interest would not pass through G's estate, but would arise automatically upon the death of A. The court found the interest void, requiring the heirs of G to take as devisees or intestate heirs rather than as *inter vivos* transferees. This rule, believe it or not, has not (at least in theory) been universally abolished. In most areas where it survives it operates as a "rule of construction," making it possible for a clear statement of intention in derogation of the rule to operate effectively.

Class Gifts. Gifts of future interests to groups sometimes create intriguing little problems. Consider the following testamentary grant:

G to Zelda for life, then to the children of Zelda.

Suppose that upon the death of G, Zelda is alive but childless. Then the gift to the children of Zelda is a contingent remainder; its vesting depends upon the birth of a child. Now suppose that the year after G dies, Zelda has a child, Abe. Abe then becomes the proud owner of a vested remainder; the pre-condition that a child be born has been removed. But Zelda could have more children. These children would also be entitled to take a share in this remainder. So, assume that after Abe's birth, Zelda has two more children, Bertha and Carla. Then Abe, Bertha and Carla each are proud owners of a vested remainder. Until the death of Zelda, more children could be born. Though the interests of Abe, Bertha and Carla are vested they are said to be *vested remainders subject to open*, that is subject to the addition of more members of the class of takers known as the "children of Zelda." This sort of remainder is very much like a vested remainder subject to defeasance. But rather than being totally defeated, interests subject to open are reduced in size for each taker as the class expands. Class gifts are common.

Gifts Per Capita and Per Stirpes. In the *Houston* case discussed above at p. 50, the will established a trust. Income produced by the assets held in the trust was to be distributed to the children of Houston in equal shares upon the death of Houston's wife. However, the income was to be distributed to grandchildren upon the death of a child with the grandchildren splitting their parent's share. The first type of gift is made *per capita*, or per head; each taker gets an equal share. The second type of gift is *per stirpes*, meaning the share of the ancestor. Thus, the grandchildren split their parent's share.

Various grandchildren may not get the same amount of income. In the *Houston* case, for example, the two surviving grandchildren of one child split her share of income in half, while the three surviving grandchildren of another split his share in thirds. This is a fairly common practice. Parents tend to make equal gifts to their children and then allow each child's share to be split among his or her descendants.

[j] Have Executory Interests Seen Their Day?

There is a great deal of reluctance to ignore old, and perhaps useless, rules of construction, or to discard old, and perhaps useless, property vocabulary. Our Formalist instinct is to hold on to any term of art that may provide precise guidance on the devolution of property. In a valiant effort to notify us of the tendency of outmoded words to obfuscate rather than enlighten our thinking, one commentator had little good to say about the continued use of the label "executory interest."

Jesse Dukeminier, *Contingent Remainders and*
Executory Interests: A Requiem For a Distinction
43 MINN. L. REV. 13-14, 51-55 (1958)[32]

> A few years ago James Thurber spun a whimsical yarn about a Duke who "limped because his legs were of different lengths. The right one had outgrown the left because, when he was young, he had spent his mornings place kicking pups and punting kittens. He would say to a suitor, 'What is the difference in the length of my legs?' and if the youth replied, 'Why, one is shorter than the other,' the Duke would run him through with the sword he carried in his swordcane and feed him to the geese. The suitor was supposed to say, 'Why, one is longer than the other.' Many a prince had been run through for naming the wrong

32. Reprinted by permission of the Minnesota Law Review and Jesse Dukeminier.

difference."[1]

Many a student in future interests has been run through by his instructor for an error of equal magnitude: calling a contingent remainder an executory interest (or vice versa). We who pretend to some knowledge of future interests are wont to stress the importance of precise labeling, of carefully classifying the interest by the rigid and artificial criteria of the common law. But if the legal consequences which flow from the label "executory interest" are the same as the consequences which flow from "contingent remainder" then the student is likely to believe he is being impaled by a crotchet. Either label should do. And would, were it not for our professional love of being able to speak well the language of the dead.

The question is, is a contingent remainder an interest that differs in important ways from an executory interest? This must be answered "no" before we can dismiss proper labeling as a mere matter of good form. In order to answer it we shall have to look into the criteria for applying the labels and then examine the situations where it has been suggested the label matters. These situations are:

A. *Creation*

(1) Application of the Rule in Shelley's Case

(2) Application of the Rule Against Perpetuities

(3) Invalidity of gift over where first taker has power to alienate

B. *Termination of Possessory Estate*

C. *Rights Against Owner of Possessory Estate*

(1) Waste

(2) Security for personal property

D. *Alienation Inter Vivos*

There are many, many other problems that may arise concerning contingent future interests, such as: may the holder partition, sue a third party in tort, recover a portion of condemnation proceeds? What rights has he against a possessory owner who fails to pay taxes or interest on the mortgage? In these problems there

1. THURBER, THE 13 CLOCKS 20 (1950).

is no evidence that the two interests might be treated substantially differently. Hence they are excluded from discussion.

If we conclude that executory interests and contingent remainders are treated alike in the seven situations discussed, the question then arises whether it is wise to preserve the two concepts in seemingly unchanged historic form or whether it would be better to revamp them to account for factors modern cases reveal to be important. If the concepts are too stubborn to change, they may have to be discarded altogether. I shall take up this question at the end of the article.

* * * *

Executory interests can be divided into two groups: (1) those that are in an ascertained person on an event certain to happen, and (2) those that are given to unascertained persons or on an uncertain event. Executory interests of the first type are rare. Examples are "to A thirty years from date," "to A after my death." The first is analogous to a vested remainder after a term of years, the second to a vested remainder after a life estate. These executory interests are treated like vested remainders under the Rule Against Perpetuities, and, although the cases are scarce, it is believed that they would also be treated as "vested" for other purposes as well. If they do not differ in consequences from vested remainders, they may as well be called vested future interests or vested remainders. And by a number of courts they have been. In this Article they have not been included within the term "executory interests" except where expressly stated or where the context has indicated otherwise. This exclusion was made to avoid repetition of the clumsy phrase, "contingent executory interests."

Executory interests of the second type are analogous to contingent remainders. It is with these executory interests that we have been primarily concerned. The foregoing analysis indicates there is no difference between them and contingent remainders except where the issue is destructibility and, possibly, where the Rule in Shelley's Case is involved. No court has refused to apply Shelley's Case to an executory interest because it was an executory interest, and for the reasons given above, the distinction between the two interests under the Rule in Shelley's Case

is either nonexistent or, if theoretically existent, of no substantial importance. We are left with destructibility as the only distinguishing feature. That relic of feudalism exists in Florida and, viewed in the friendliest fashion, possibly, although certainly not probably, in less than a dozen other states. In three-quarters of the states destructibility has been wholly done away with. Thus, in at least three-quarters of the states, there is no discernible difference between executory interests and contingent remainders. Only in Florida are we sure of any difference between them.

Is there any reason for retaining two concepts that produce the same consequences? Of what value are the hours after hours spent teaching students to use labels properly, when they are functional equivalents? It is clear the concepts cannot be revamped in any useful way. The alternatives are keeping the two concepts separate and merging them under one label. It seems to me there are two arguments for the former alternative and two for the latter. I shall deal briefly with each of them.

The arguments for retaining the two concepts are both, in a sense, pedagogical. The first is that students must be taught to distinguish between the two interests because the different labels are currently used by judges and lawyers. The second suggests that while the distinction may be unimportant for contemporary purposes all the history wrapped up in it ("gaps in seisin," "destructibility" and so forth) is of educational value. The first seems fallacious in that it assumes that the labels are meaningfully used today by courts. There is no need to cite again the many cases wherein the labels are treated with utmost indifference, where the wrong label is applied or where the labels are used interchangeably.

The second has merit, and I am sure it could be stated with much greater effect by one who believes in it more strongly than I do. The great trouble I have with it is that it proves both too much and too little. All history has many insights to offer, but it cannot all be taught. When the emphasis shifts from the reasons for, and methods of, change and growth to technicalities, the value sharply diminishes.

In this field all too often has the mind's eye skipped over the greatness of the common law as a process constantly adapting forms to changing circumstances and fixed uncritically on the technicalities: on the Rule in Shelley's Case, on destructibility, on contingent interests as "mere possibilities," on form rather than substance. What is justified as history becomes only training in the worst sort of artificial reasoning.

The first argument for abandoning the distinction is doctrinal simplification. Even John Chipman Gray, ruled though he was by a passion for rigid adherence to theorems, saw the need of paring off useless, artificial distinctions beyond the comprehension of the ordinary lawyer.

> A serious objection to the continuance of the old doctrines of real property in the jurisprudence of today is that, while the judges are thoroughly familiar with and move at ease among the general doctrines of contract and equity which govern the ordinary transactions of modern life, it is impossible (or if not impossible at least very unlikely) that they should have at their fingers' ends the fundamental distinctions of a highly artificial system, and they are in danger of being unduly governed by "the *cantilena*[142] of lawyers" and of losing opportunities for the simplification of the law.[143]

Gray's genius was achieving insight within apparent complexity by discovering a simpler doctrinal order. His energy was fired by an *élan* to understand multiplicity in terms of a few basic ideas. If he was wrong in thinking that clear and rational doctrines could be built on such words as "vest,"[144] "condition precedent," "divest," he was right in thinking that, in order to be useful in advocacy and decisions, words have to have some meaning for the ordinary lawyer and judge.

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142. For those who do not have a dictionary handy, the word means "melody." The phrase comes from *O'Connell v. The Queen*, 11 C1. & Fin. 155, 8 All E.R. 1061, 1143 (1844).
143. Gray § 782.
144. Gray himself subsequently had doubts about the word "vest." *See* Gray, Appendix M §§ 970-74.

Society, and by reflection the lawyer's practice, has become far more complex than in Gray's time. Lawyers are even less likely to "have at their fingers' ends the fundamental distinctions" between such things as contingent remainders and executory interests. If we are truthful we must admit that not too many students master the distinction and most of those forget about it in their first years of practice. If they think very, very hard they may remember that executory interests are "divesting" or "springing" or "shifting" interests, but that is about as far as their memory and understanding go. More often than not their "knowledge" of executory interests simply clutters up their minds with ambiguous verbalisms and half understood maxims, such as "there can be no remainder after a fee." (That particular maxim has led astray a good many lawyers and judges who did not realize all it means is that we call the gift over by another name.)

As a result of this surfeit of vaguely understood words, arguments in future interests cases are often remarkable for their vacuity and for their failure to come to grips with the fundamental problem. Many of the cases cannot be read without writhing.[145] Here, more than in any other field, there is a tendency to collect familiar quotations, glue them together and by sheer humbug make them

145. A leading contender for honors is *Sands v. Fly*, 292 S.W.2d 706 (Tenn. 1956), 45 Ky.L.J. 704 (1957). Testatrix devised land to her only son Howard for his life, then to his children for their lives, and at the death of the last child of Howard in fee to named nieces and nephews, the issue of any deceased niece or nephew to take his or her share per stirpes, and if any niece or nephew be then dead without issue, his share to the surviving nieces and nephews or their issue. The court held the remainder in fee vested immediately and was entirely valid even though an event to happen later was said to be a "condition precedent" to the remainder's vesting. Counsel quoted Gray § 108, to the effect that a remainder is contingent where the conditional element is incorporated into the gift to the remaindermen. The court agreed that here "the conditional element was incorporated in the gift to the remaindermen," but, said the court, "it definitely and conclusively appears that this condition was satisfied at the time of the testatrix's death, all children of Howard J. Sands being alive at that time." Having survived living persons is undoubtedly a neat trick, but even more marvelous is having survived the unborn (for the court later conceded that some children of Howard "might be born after the death of the testatrix"). The best argument for invalidity—that the remainder in fee was a gift to a class which would not close until the death of Howard's children—was not mentioned by the court.

Other features of this bizarre case include an argument by Howard that the remainder in his children for life and the remainder in fee were alternative contingent remainders; a contention by the guardian *ad litem* of the children that his ward's remainder was void; and a finding of an alternative remainder after a vested remainder in fee. The court cited numerous cases as authority, not one of which was in point. The case is annotated in 57 A.L.R.2d 188 (1958) by an inapposite note entitled "Character of remainder limited to surviving children of life tenant."

applicable to the problem. It is hard for the lawyer to know why he has won and even harder for losing counsel to understand why he has lost. Thus the more profane practitioner comes to regard future interests as not a divine madness at all, but, like William James' algebra, a peculiarly low sort of cunning.

It is a reasonable assumption that two labels stand for two different things; and when they do not, when we have two labels for equivalent future interests, confusion is the natural result. Abandoning the distinction between contingent remainders and executory interests would not be a giant step toward improving this situation, but it would be a much larger step than some might imagine. for understanding the distinction requires at least a speaking acquaintance with "gaps in seisin" and "destructibility—an acquaintance not likely to be quickly made. If the distinction goes, "gaps in seisin" and "destructibility," which make up a large part of the history of real property law, can go with it.

The second argument for abandonment is that emphasizing labels leads to an unfortunate type of reasoning. It makes form important and substance unimportant. It moves from words to label to result. Numerous examples of this type of reasoning have been exhibited in this Article, and especially in the parts dealing with waste and security. There distinctions were drawn by eminent scholars between executory interests after fees and contingent interests after life estates, between "to *A* but if *A* die without issue to *B*" and "to *A* for life, then to *A*'s issue, but if *A* die without issue to *B*." *B* was said to be entitled to less protection in the latter case, irrespective of *A*'s age or the existence of issue or of a host of other important variables. It was shown that in terms of results in the cases the distinctions were illusory. The right inference from this is that the labels had better be dispensed with in analysis of these problems; they are not an adequate substitute for analysis of the many factors that move decisions. The same thing may be said of other problems as well, for there is no proof that labels affect results except in one case (destructibility) in one state (Florida).

It is enchantment with labels that is the hidden cause of most of the law's failures in the field of future interests. So long as we concern ourselves with

> labels and purely verbal distinctions, we can have no doctrinal structure that is more than a play with words, no doctrines that can justify themselves in terms of policy, no doctrines that can recognize the important factors, that can give predictability. All in all, the way to a useful, critical analysis of future interests seems to lead, not through gaps in seisin, but around them.

[4] Dead Hand Control: Perpetuities and Restraints on Alienation

[a] Introduction

Earlier in this chapter, it was noted that there is a tension in American law between insuring that land is freely alienable and allowing for charitable impulses to operate without regard to alienability.[33] A related strain emerges in parsing our sometimes conflicting desires to allow each person the liberty to determine who will take their property after death and to insure that property is freely transferable. For if we allow a person to tie up an asset in a long string of future interests, there is a risk that the multiplicity of ownership interests will lead to both inefficient use of the asset and inability to sell it. Two closely related sets of rules have developed to grapple with this problem—bans on provisions limiting the transfer of property to large groups of potential buyers and the Rule Against Perpetuities. Alienation restraints, which can arise in either donative or non-donative contexts, are taken up in the Chapter 4. The materials that follow work out the parameters of the traditional common law Rule Against Perpetuities, as well as the various reform proposals that have been adopted in recent years.

[b] Rule Against Perpetuities Basics

Before reading any litigation or commentary about the Rule Against Perpetuities, try

33. *See* Note (1) *supra* at p. 47.

to understand the traditional common law rule. It is traditionally stated[34] as follows:

> *An interest is void unless it must totally vest or totally fail to vest not later than twenty-one years after the death of some life in being at the creation of the interest.*

An array of proposals has surfaced in recent years to modify the common law rule, but let's first work on the meaning of its traditional configuration. To figure it out, work with this example:

> *G by will → To my wife and children for their lives, and upon the death of the last of my wife and children then the remainder shall go to my grandchildren, but if any grandchild dies with issue surviving then that grandchild's share shall go to the surviving issue.*

From prior notes and some concentration, you should be able to reach the somewhat messy conclusion, assuming that at least one grandchild is living at the death of G, that the interest of the grandchildren was vested subject to open upon the birth of additional grandchildren and subject to defeasance upon death with issue surviving. Now work through the rule one phrase at a time.

Total Vesting or Total Failure to Vest. The rule says that an interest *must totally* vest or *totally* fail to vest within a certain period of time. Forget what the required period of time is for a moment, and concentrate only on this *total* vesting language. *Total* vesting requires not only that the interest *must totally* vest or *totally* fail to vest within the rule period rather than remain contingent, but, if it is an interest held by a class, that the class members *must* all be known within the rule period. In legalese, in order for a class gift to *totally* vest, the *class must close*. It is also possible that the gift will *fail* to vest within the rule period. If a gift *must totally fail* to vest within the rule period, it also will not violate the rule. Thus, a gift to George that is contingent upon George's surviving Sarah will either *totally* vest if Sarah dies before George or *totally fail* to vest if George dies before Sarah. Furthermore, we will always know if this gift has either *totally* vested or *totally failed* to vest at the latest when Sarah dies.

34. The classic treatise on future interests and the Rule Against Perpetuities is JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (1886). The book was edited and reissued several times in later years.

In the example given at the beginning of this note, the remainder to the grandchildren is vested, but since it is a class gift to grandchildren it is also subject to open. Thus this gift could not *totally* vest until the class of grandchildren closes. This event will occur when the last child dies, since it is impossible to produce a new grandchild when the children are all dead. Thus, the gift to the grandchildren will *totally* vest when the last child dies. But you might say, this gift to grandchildren is also subject to defeasance. Does that defeat total vesting? In short, no. The rule requires class gifts to close, but does not require that all defeasance possibilities disappear. Pre-conditions on a contingent remainder must disappear, but post-conditions creating a defeasance need not.

In a sense this distinction between class closing and defeasance is arbitrary; you have to draw the line somewhere. But it arguably follows the peculiar logic of future interests. Remember that linguistically, a vested remainder subject to defeasance provides for the future possession of a full fee simple to a known taker or group of takers and shifts that whole fee simple to another person or group upon the happening of the defeating event. To whatever degree the terms of the Rule Against Perpetuities are motivated by a desire to create certainty about the takers of property, that motivation is, linguistically at least, fulfilled by vested remainders subject to defeasance.

Note that in analyzing the nature of the future interests in the example problem, we not only looked for the appropriate labels to describe the interests, but also noted the *latest moment in time when total vesting or total failure to vest had to occur*. It is crucial to figure out that moment. The Rule Against Perpetuities does not require that the owners of future interests must actually go into possession of their interests within the rule period, but only that total vesting or total failure to vest must occur within the rule period.

Lives in Being and The Rule Period. The event of total vesting or total failure to vest must occur within twenty-one years after the death of some life in being at the creation of the interest. The notion of *life in being* is the one that usually causes the most difficulty for property students working with the Rule Against Perpetuities. It sounds so amorphous and changes in each case according to the nature of the future interests created. But there are some guidelines that will take care of almost all situations. First, the life or lives in being (yes, there can be more than one) must be people actually alive at the moment the

interest in question is created. Second, the life or lives in being are usually, though not always, living persons of the generation before that of the eventual takers of the interest. Third, the life or lives in being are usually named in the instrument creating the interest, but they need not be. Fourth, the life or lives in being usually, but not always, hold possession of the property before the eventual takers. Together these guidelines create a pattern of rational relationships between the definition of the present and future estates.

Applying these notions to the example problem, assume that the persons alive when the will takes effect include the testator's wife, his three children and some grandchildren. The living persons from the generation before the eventual takers will be his three living children. They are, of course, actually named in the will and hold possession of the life estate. The lives in being are the children of the testator.[35]

When you think about it, the notion that the lives in being are the kids makes a lot of sense. The Rule basically functions to require that vesting decisions be made within two generations of the time a will or *inter vivos* deed takes effect. In this example, the first generation is the children; the testator, after all, is dead when the will is probated. The second generation is represented by the additional twenty-one years stated in the Rule Against Perpetuities.

Summary. If you put all this together, the Rule Against Perpetuities requires, in the example situation, that the vested class interest in the grandchildren must *totally vest and close* within the lives of the three children plus another twenty-one years. We have already discovered that the class gift to the grandchildren totally closes when the last child dies. Thus, the interest will totally vest (*and has to do so*) upon the death of the last life in being, well within the period of time represented by the life of the last life in being plus another twenty-one years. Put simply, there is not a Rule Against Perpetuities problem in the example.

Consider another example.

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35. This statement is not quite accurate, but for introductory purposes it will do fine. Houston's wife may also be treated as a life in being. As you become more familiar with the rule's application, you will see that her addition to the list does not change the outcome of the analysis at all. It is for this reason that I have left her out. It simplifies matters a bit.

G to A for life, then to the first child of A to reach age 22.

Assume that A is alive and childless at the time the interests are created by G. First, is the interest in the first child of A to reach age 22 vested or contingent? It is contingent upon both the birth of a child (A is childless) and the aging of that child for 22 years. Thus, this gift will *totally* vest upon the birth of a child that lives for 22 years. It will *totally* fail to vest upon the death of A childless or the death of all children of A before their 22nd birthdays. Who is the life in being? A looks good. A is of the generation before the taker, named in the instrument, in possession of the property first, and alive when G sets up these property interests. Must the event of *total* vesting or failure to vest occur within A's life plus twenty-one years? *No*! If A had a child the day after G created these interests and A died the day after that, the interest *might not* totally vest until 21 years, 364 days later, or 364 days longer than the period permitted by the Rule. Note well that the interest *might* vest within the rule period. But the traditional statement of the Rule requires that an interest *must always* vest or fail to vest, not that it might vest or fail to vest, within the period.

Change the facts of this last example slightly so that A is dead, but has one child, a 12-year-old daughter, when G creates these interests. Then the interest in the first child of A to reach age 22 is still contingent; the only child has ten years to go before reaching the required age. (The interest, by the way, will take effect as an executory interest because G or G's successors holds a "gap" reversion in this example.) But this interest *must* either *totally* vest or fail to vest in ten years. The daughter will either live or die. The vesting decision will therefore occur, on these facts, within the life of A (which is zero years since A is dead) plus ten years. That means that there would not be a violation of the Rule Against Perpetuities.

Before going to the first case, work on three more problems.

(1) Change the opening example in this set of notes to read:

G by will → To my wife and children for their lives, and upon the death of the last of my wife and children then the remainder shall go to my surviving grandchildren, but if any grandchild dies with issue surviving before the death of the last of my wife and children then that grandchild's share shall go to the

surviving issue.

Figure out why this grant does not violate the Rule Against Perpetuities.

(2) Assume that the gifts made in the problem just above are *inter vivos*; that is, made while G is still alive. Figure out why such gifts violate the Rule Against Perpetuities.

(3) Consider this example:

G by will → to my wife for life, then, if she has any surviving children, to the children of my wife, but if she dies without children surviving, then to my grandchildren, share and share alike.

Why does the interest in this example not violate the Rule? Be careful with the complication caused by the alternative takers under the will being the children of the wife and the grandchildren of the testator.[36]

(4) Look at one final example:

G by will → to Place of Worship, so long as the land is used for religious purposes, but if the land is ever used for non-religious purposes, then G may re-enter and take possession of the land.

Though the policy of the Rule Against Perpetuities clearly applies to the possibility of reverter held by G and her heirs, American courts have consistently declined to apply the rule to such interests, or to rights of re-entry. These types of interests arose before the common law rule developed to constrain the transfer of contingent interests. Reversionary interests, which remain with the grantor after a transfer, were left unconstrained. In response, some states have adopted legislation limiting the lifetime of reversionary interests, either to the Rule Against Perpetuities period or to some definite term of years.

[c] Twentieth Century Reforms of the Rule Against Perpetuities

[1] Introduction

36. This example is taken from Baker v. Weedon, which you can find *infra* at p. _____.

Since World War II, there has been an explosion in perpetuities reforms. For the most part, the changes have enlarged the dead hand authority of testators to control the disposition of their property. Alterations of the common law Rule Against Perpetuities have taken three different forms. Some states adopted statutes allowing courts to reform devises that violate the Rule Against Perpetuities under *cy pres*-like rules. An example of such a technique is presented in the next case. Another reform technique permits courts to "wait and see" if an event that would normally cause a perpetuities problem actually occurs. If it does not, then the devise will be allowed to operate. The third technique sets a specific time limit, such as ninety years, within which an interest must either vest or fail to vest. This method eliminates much of the ambiguity associated with determining lives in being and avoids the insecurity of a long "wait and see" period.

The reform era was ushered in by Pennsylvania in 1947 when it adopted a "wait and see" statute. Momentum for change increased in recent years with the promulgation in 1986 of the Uniform Statutory Rule Against Perpetuities and the integration of that uniform act into the 1990 version of the Uniform Probate Code. The vast bulk of states have adopted the perpetuities segment of this code in some form.[37] The most important features of the uniform act provide that an interest will be valid if it vests or fails to vest within 90 years of its creation, and that courts are given the power to reform interests so they will comply with the statutory formulation of the rule. The main provisions of the uniform act read as follows:

§ 2-901. Statutory Rule Against Perpetuities

(a) [Validity of Nonvested Property Interest.] A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

37. As of 2011, 33 states and the District of Columbia had adopted the Uniform Statutory Rule Against Perpetuities Act. Another 18 states had adopted the Probate Code. No state retains the common law rule. For a summary of the recent trends, see Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEG. & PUB. POL'Y 89 (2013).

* * * *

(d) [Possibility of Post-death Child Disregarded.] In determining whether a nonvested property interest * * * is valid under section (a)(1) * * * the possibility that a child will be born to an individual after the individual's death is disregarded.

* * * *

§ 2-903. Reformation

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 2-901(a)(2) * * * if:

(1) a nonvested property interest * * * becomes invalid under Section 2-901 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 2-901 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not invalidated by Section 2-901(a)(1) can vest but not within 90 years after its creation.[38]

The impact of perpetuities reforms like those in the Uniform Probate Act has been significantly magnified by demographic patterns. Increases in life expectancy, even without statutory changes in the rule, would have increased the dead hand authority of testators. Together, reform and demography has caused a stunning shift in the balance of power from recipients of largesse to donors and testators.

The changes mirror many other recent changes in property law enlarging control by the living over use of assets after death. A famous personality may now control the commercial use of her likeness and name during life and after death. This publicity right, which will be taken up in Chapter XII, has blossomed in the last twenty years. The ability of medical personnel to harvest the organs of a dead person for use in transplant surgery is constrained by the preferences of the donor rather than by the wishes of surviving

38. Uniform Probate Code (U.L.A.) (1998). Section 2-904 excludes a number of interests from the rule, including nondonative transfers.

members of the donor's family. As you will see in the next chapter, developers may create governing structures for housing developments that are quite difficult for later residents to change. Recent takings cases, taken up in Chapter XI, have diminished the authority of governments to alter pre-existing understandings about the nature of property ownership. All of these developments illustrate a pronounced trend in present-day culture favoring the interests of the living generation over the interests of those arriving in future generations. Currently popular theories of individualism pay more attention to the living than to the unborn. The next case illustrates both the current desire of people to exercise extensive control over the lives of surviving family members and the willingness of legislatures and courts to sanction most of that control.

[2] A Case Law Example of Perpetuities Reform: *Estate of Ghiglia*

In the Matter of the ESTATE of Frank P. GHIGLIA

Court of Appeal, Fifth District, California.

42 Cal.App.3d 433, 116 Cal.Rptr. 827 (1974)

OPINION

FRANSON, Associate Justice.

Appellant, one of three surviving children of the testator, Frank P. Ghiglia, challenges the validity of a testamentary trust established for the benefit of appellant, his sister and their children (testator's grandchildren), on the ground that the gift to the grandchildren of a future interest in the trust estate, the possession of which is deferred until the youngest grandchild reaches age 35, is a class gift which includes any grandchild born after the testator's death, thus permitting the vesting of the interests of the class members beyond a life in being and 21 years in violation of the rule against perpetuities. We hold that, although the gift to the grandchildren violates the vesting rule, under the authority of Civil Code 715.5,[1] we should order the will reformed to require the vesting of the

1. Civil Code section 715.5 provides: "No interest in real or personal property is either or voidable as in

interests of all class members within the allowable period of time.

Frank P. Ghiglia died on January 1, 1972, a widower. He was survived by three grown children, Frank P. Ghiglia, Jr., Adeline Marguerite McClintock and Robert J. Ghiglia. Each child had two children. Frank P. Ghiglia, Jr. had two sons, Frank Joseph Ghiglia and George Frank Ghiglia. Adeline Marguerite McClintock, had a son, John Arthur McClintock, and a daughter, Nancy Ann [McClintock] Berge. Robert J. Ghiglia had two sons, William Joseph Ghiglia and John Robert Ghiglia. At the time of the testator's death, the testator's daughter, Adeline, who was divorced, was about 53 years of age, the testator's son Robert, was about 51 years of age, and Robert's wife was about 45 years of age; all of the testator's grandchildren were adults.

Decedent left a will which was admitted to probate. The testator's oldest son, Frank, was named executor in the will. The will provides that Frank shall receive one-third of the estate outright after certain household furniture, automobiles and personal belongings are divided equally among Frank and the other two children, Adeline and Robert. The will then provides in the fourth clause as follows:

> ". . .
>
> "B) The remaining two-thirds, IN TRUST—to Frank P. Ghiglia and the Bank of America National Trust and Savings Association, for the uses and purposes hereinafter set forth.
>
> ". . .
>
> "E) The NET INCOME of THE TRUST ESTATE shall be distributed as follows:
>
> "1) One full share to my daughter Adeline Marguerite McClintock.
>
> "2) One full share to my son Robert J. Ghiglia.
>
> "3) The net income to my daughter Adeline Marguerite McClintock and my son Robert J. Ghiglia shall be distributed in convenient installments, not less frequently then quarterly during their lifetime.

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violation of [the rule against perpetuities] if and to the extent that it can be reformed or construed within the limits of that [rule] to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent."

"F) Upon the death of my daughter Adeline Marguerite McClintock, the Trustees shall apportion her share of the net income and pay the same to my grandchildren Nancy Ann McClintock and John Arthur McClintock, equally.

"G) Upon the death of my son Robert J. Ghiglia, the Trustees shall apportion his share of the net income and pay the same to my grandchildren William G. Ghiglia and John Ghiglia, equally.

"Upon the death of each of my children, Adeline Marguerite McClintock and Robert J. Ghiglia, the trust shall terminate *provided, however, if any of my grandchildren have not attained the age of thirty-five (35) years, the two trusts shall continue until all of the grandchildren have attained the age of thirty-five (35) years. In other words, each trust shall continue in full force and effect, until all of my grandchildren reach the age of thirty-five (35) years.* Upon such termination the entire Trust Estate, shall be distributed to the persons for whom said estate is then held in trust, in proportion to the trusts then held for such persons and, if there shall be no such persons surviving, then said Trust Estate shall be distributed to my heirs, to be determined according to the laws of California relating to the succession of separate property in force at the date of such termination."

On March 12, 1973, Robert Ghiglia filed a petition to determine the interests under the will. The petition sets forth the fact that the three children were the decedent's heirs-at-law and alleges that the grandchildren's interests under the trust violated the rule against perpetuities. Following a hearing, the trial court upheld the validity of the trust by deciding that the testator's use of "grandchildren" in the will had reference only to the four children of Adeline and Robert alive at the testator's death and, therefore, the gift to them did not violate the vesting rule. Robert Ghiglia appeals from that decision.

VIOLATION OF THE VESTING RULE

We commence our decision by reciting the general rules of law applicable to the questions before us. Civil Code section 715.2 codifies the common law rule against perpetuities; it provides that no interest in real or personal property is valid unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

Civil Code section 715.6 sets forth an alternate period in gross; it provides that "No interest . . . which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 . . . ."

The determination as to whether a future interest vests within the time allowed is made as of the moment the instrument containing the limitation speaks; we are not permitted to wait and see what happens in order to determine its validity. (Estate of Gump, 16 Cal.2d 535, 547, 107 P.2d 17.) Thus, the validity of an interest in a testamentary trust is determined at the time of the testator's death. Moreover, it is not the probability that a perpetuity may have been created that brings the rule into operation. If, at the time of the creation of the interest, there exists even a bare possibility that the interest involved may not vest within the prescribed period, the rule has been violated.

If the possession of a testamentary gift to a class is postponed to a future time, the class includes all persons coming within the description within the time to which possession is postponed. (Prob.Code, § 123.) If the gift is not of a specific sum to each member or subgroup in the class, then the gift violates the vesting rule because the interest of each member cannot be finally ascertained until the membership is fixed.

In determining whether the testator intended the trust estate eventually to go to his four named grandchildren or to all of his possible grandchildren as a class, we must look to the language of the will and the surrounding circumstances and, inasmuch as a will speaks from the date of the testator's death, we also must consider the state of things then existing.

In the instant case, the testator's language is ambiguous. In subparagraph "F)" and "G)" of paragraph "Fourth" of the will, he provides that upon the death of the life beneficiaries of the trust (his daughter, Adeline, and his son, Robert), the trustee shall pay the net income to his four named grandchildren. Subparagraph "G)" then provides among other things that the trust shall continue "until *all of my grandchildren* have attained the age of thirty-five (35) years. In other words, *each trust* shall continue . . ., until *all of my grandchildren* reach the age of thirty-five (35) years. Upon such termination the entire trust estate shall be distributed to the persons for whom said estate is then held in trust . . . ." (Emphasis added.)

The first question to be decided is whether the phrase "all of my grandchildren" was intended to include the testator's grandchildren by his oldest son, Frank. We think not, for Frank received his one-third of the estate free of the trust, and presumably the testator intended that Frank would support his children during their minority and that they would inherit his estate upon his death. That the testator had this in mind is borne out by the fact that upon the death of Adeline and Robert the income beneficiaries of the trust are only their respective children. Nor do we see any logical reason why the testator would use Frank's children, who are not named as beneficiaries of the trust, as measuring lives to determine when the trust corpus should be distributed to Adeline and Robert's children. Accordingly, we construe the phrase "all of my grandchildren" to exclude Frank's children.

The second question, admittedly more difficult to resolve, is whether the phrase "all of my grandchildren" used to describe the ultimate beneficiaries of the trust corpus was intended to include only the four grandchildren named as income beneficiaries, or whether it was intended to include any additional grandchild born after the testator's death. If we conclude that the gift of the trust corpus was not limited to the four grandchildren, then the gift was to a class and would include all persons coming within the class description before the time to which possession is postponed.

When the testator executed his will, his daughter, Adeline, then was about 47 years of age, his son, Robert, was about 45 years of age and Robert's wife was about 39 years of age. It is entirely possible that either Adeline or Robert could have had another child. We find nothing in the language of the will to suggest that the testator intended to cut off from his estate any child thereafter born to Adeline or Robert. The fact that the testator designated only his four grandchildren as income beneficiaries does not force another conclusion; this designation is explained simply by the fact that the four grandchildren were the only children of Adeline and Robert living at the time the testator executed his will, and he did not contemplate the birth of an additional child to either Adeline or Robert. This belief becomes even more apparent if we view the circumstances as of the time of the testator's death when Adeline was then 53 years of age and Robert and his wife were 51 and 45 years of age; the testator simply assumed that they would not have

any more children.

However, our search to ascertain the testator's intent cannot stop at this point merely because the testator did not contemplate the possibility that additional children might be produced by Adeline or Robert. We must ask: what if the possibility had been brought to his attention—would he nonetheless have excluded an after-born grandchild from his estate: In the absence of contrary evidence, we believe the answer is self-evident—he would have wanted an after-born grandchild to share in his estate. The use of the term "all my grandchildren" in reference to Adeline and Robert's children indicates that he intended that final distribution of his trust corpus would be made to those who would be the natural recipients of his beneficent objectives. Interpreting a similar provision in a will, the court in Estate of Van Wyck, 185 Cal. 49, 57, 196 P. 50, 54, said: "Reading it as a provision for such grandchildren only as should be born prior to the testator's death, it is an unnatural and unreasonable provision, and one contrary to the natural meaning of the language used. We think it certain, therefore, that by 'youngest grandchild' the testator meant exactly what he said—his youngest grandchild, whether born before or after his death." For the reasons stated in *Van Wyck*, we conclude that a reasonable interpretation of the will before us, reading the particular language in the light of the entire testamentary scheme, is that the testator intended to make a gift of the trust corpus to all of his grandchildren, including any born after his death.

It is clear that the gift violates the rule against remoteness of vesting. Either Adeline or Robert, in the eyes of the law, possibly could have another child who might not reach age 35 within 21 years after their respective deaths. Moreover, the child could be born more than 25 years after the testator's death and would not reach age 35 within 60 years after the creation of the interest under the alternative period in gross provided by Civil Code section 715.6.

Can we sever the invalid portion from the valid portion, i.e., can we uphold the gift of the trust corpus to the four members of the class living at the testator's death and exclude only the gift to a future member born after his death? We think not, for, again, we find nothing in the will to suggest that had the testator foreseen the partial invalidity of his testamentary scheme that he nonetheless would have intended to exclude a member of the

class in order to save the interests of the other members. The test of severability is "whether the two (parts) are so parts of a single plan or scheme or otherwise so dependent one upon the other, that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that (he) would not have made the valid provisions if he had been aware of the invalidity of the others." (Estate of Van Wyck, *supra*, 185 Cal. at p. 62, 196 P. at p. 56) We hold the gift to the unborn members of the class inseparable from the gift to the living members of the class.

REFORMATION

Contrary to appellant's position, however, it does not follow that the trust should be declared void because the vesting of the grandchildren's interest exceeds the lawful period of perpetuity. The testator's general intent was to create a spendthrift trust under which his children, Adeline and Robert, would receive the income for their lives, but would not receive a fee interest in the corpus—only the grandchildren would receive such an interest after the death of Adeline and Robert. Appellant seeks to overthrow the dominant intention of the testator by having the trust declared entirely void for remoteness merely because the testator is unable to defer the vesting of the trust estate in his grandchildren as long as he wished.

Testamentary dispositions that are otherwise valid are not necessarily invalidated by illegal limitations. Moreover, Probate Code section 101 provides in part: "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, *it must have effect as far as possible*." (Emphasis added.)

Of particular importance in the present case is Civil Code section 715.5. While we have been unable to find a California case applying this statute to uphold a testamentary disposition in violation of the rule against perpetuities, courts in other jurisdictions have taken such an approach. In Edgerly v. Barker, 66 N.H. 434, 31 A. 900, the testator left property in trust to be distributed among the children of his living son and daughter when the youngest reached age 40. In order to achieve the testator's primary intent and at the same time conform the trust to the limitation imposed by the rule against perpetuities, the court applied the *cy pres* doctrine and held that the grandchildren's interest would vest at

21 rather than 40. More recently, in Carter v. Berry, 243 Miss. 321, 140 So.2d 843, the court applied the doctrine of "equitable approximation" to make an invalid gift to the testator's children at age 25 distributable at age 21. This approach is in accord with English law where the severity of the common law rule has been mitigated by a statute providing, "[T]he disposition should be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age nearest to that age which would, if specified instead, have prevented the disposition from being so void." (Perpetuities and Accumulations Act of 1964, ch. 55, § 4.)

We recognize that the testator intended that the gift of the trust corpus to his grandchildren be delayed until the youngest was sufficiently mature to deal responsibly with his inheritance and that the testator believed that age 35 was a prudent age for this purpose. However, this does not mean that, if faced with the realization that by postponing the vesting in his grandchildren to age 35 he rendered the trust itself invalid, with the result that two-thirds of his estate would be taken outright by Adeline and Robert, he nonetheless would not have elected to set up a trust with the corpus vesting at the time the youngest grandchild reached age 21 rather than age 35. We believe that rather than forego his dominant testamentary plan of preserving two-thirds of his estate for Adeline and Robert's children, he would have intended to give his trust estate to their children within a permissible period of time.

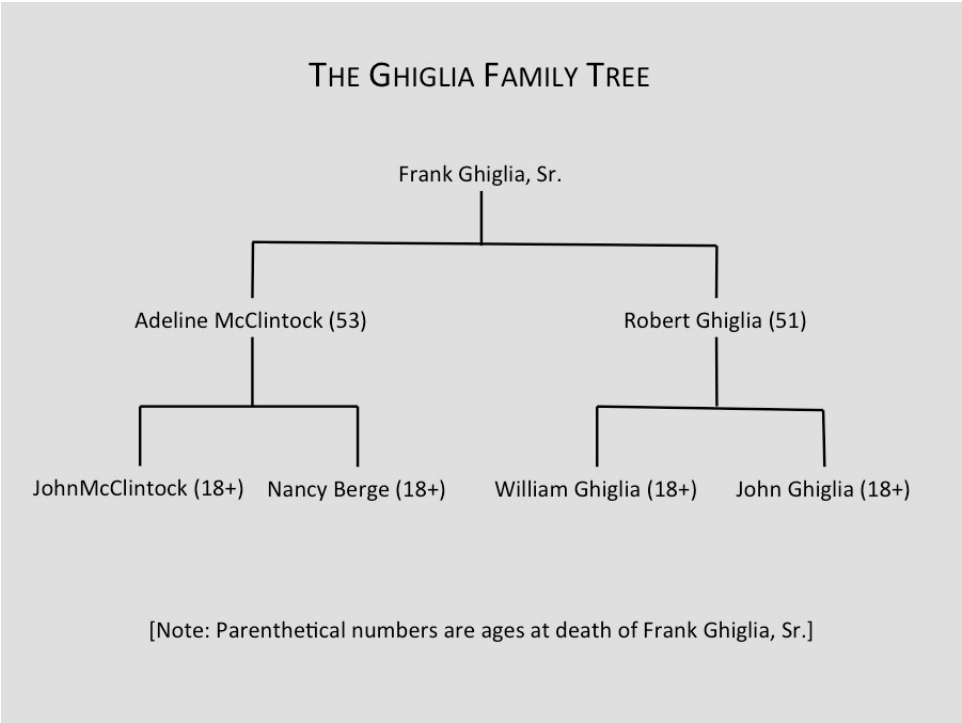
Because it is the duty of the court to give effect to the testator's general intent to the fullest extent possible, we hold that the trial court must use its power as defined in Civil Code section 715.5 to reform the will so that distribution of the trust corpus will be made when the youngest grandchild reaches 21 with the result that all class interests must vest within the required time.

The order on the petition for determination of rights and distribution is reversed; the matter is remanded to the trial court with directions to reform the last will of Frank P. Ghiglia, Deceased, in accordance with this opinion.

GEO. A. BROWN, P.J., and GARGANO, J., concur.

[3] Explanatory Notes

(1) *The Family Tree*. Part of the Ghiglia family tree is reproduced below. Referring to it should make your analysis of the case a bit easier. Ghiglia had three children. He gave one third of his estate to Frank Ghiglia, Jr. without any restrictions. That branch of the estate plan is not at issue in the case. To ease the analysis a bit, Frank, Jr.'s line is left out of the diagram. The numbers in parentheses represent the ages of the various members of the family at the death of Frank Ghiglia, Sr. The court's opinion notes that each of the grandchildren were adults when Frank, Sr. died. Though we don't know their exact ages, we do know they were all at least eighteen years of age. The maximum number of years it would take for each of the grandchildren to reach the age of thirty-five after the death of Frank, Sr., therefore, was seventeen.



(2) *Work Out the Future Interests in* Ghiglia. Frank Ghiglia's will established two trusts. The income from one trust went to Ghiglia's daughter, Adeline Marguerite McClintock, for her life. When she died, the income was to be paid to her two children in equal amounts. Income from the other trust went to Ghiglia's son, Robert Ghiglia, for his life. When he died, his two children split his income stream. The two trusts were to be closed when the last of the grandchildren reached the age of thirty five. Paraphrasing,

Ghiglia's will distributed a bunch of income interests and then provided:

> *upon the death of my children Adeline and Robert, the trusts shall terminate and the assets shall be paid per stirpes to my grandchildren, provided that if the last of my grandchildren has not reached the age of 35, the trusts shall not terminate until the last of my grandchildren reaches the age of 35, but if no grandchild reaches the age of thirty-five, then to my heirs at law.*

This language created a contingent remainder in the grandchildren, which was also subject to defeasance.

(3) Ghiglia *and Class Gifts*. Before getting to the Rule Against Perpetuities, think about the court's conclusion that the contingent remainder in Ghiglia's will was a class gift to grandchildren. Despite the use of the open-ended word "grandchildren" in the will, the court quickly (and easily it noted) concluded that the children of Frank, Jr. were not included. At a minimum, therefore, it is fair to say that the testator did not actually mean to use the word "grandchildren" as a completely open designation of a class. Why then conclude that he intended to leave the class open for any additional children that might be parented by Adeline or Robert? Adeline and Robert's wife were probably past their child bearing years when Frank, Sr. died. Wouldn't it have made more sense to view the class gift as closed? The structure of the entire case actually depends on resolving this class gift issue, for as the next note indicates, there cannot possibly be a violation of the common law Rule Against Perpetuities if the gift is viewed as closed.

(4) *Application of the Common Law Rule*. For starters, assume that the gift to the grandchildren was closed and included only the four living grandchildren of Frank, Sr.—John, Nancy, William and John. Then the gift could be rewritten as:

> *upon the death of my children Adeline and Robert, the trusts shall terminate and the assets shall be paid per stirpes to my grandchildren John, Nancy, William and John if the last of these four grandchildren has reached the age of 35, and if not all four have reached the age of thirty-five, the trusts shall terminate when the last of them reaches the age of 35, but if none of John, Nancy, William or John reaches the age of thirty-five,*

then to my heirs at law.

This interest would not violate the common law rule. Though it would be contingent when Frank, Sr. died if any of the four grandchildren had not yet reached age thirty-five, that milestone would occur a maximum of seventeen years after Frank, Sr.'s death. The interest would therefore vest less than 21 years after the death of Frank, Sr.

If the gift to the grandchildren is treated as an open class gift, then the gift is void under the common law rule. During the year after Frank, Sr.'s death, one of his children could have had another child. If Adeline and Robert then died, the new grandchild would not become thirty-five until more than twenty-one years after the death of Frank, Sr.'s children, the lives in being for purposes of the applying the common law rule. Even if the couples were biologically incapable of having children, the interest would still be void. The common law cared not a bit about reality, but only about the theoretical possibility of vesting happening too late. Since the court found the gift to grandchildren to be open, the interest was void unless the statutory reform rule was applied to rescue it. That, of course, is exactly what the court did.

[4] Problem Notes

(1) *Ninety Years?* The Uniform Probate Code perpetuities provisions allow donors to allow contingent interests to survive for ninety years. And, of course, the end of contingency does not mean that the owners of interests will actually go into possession of the property. That step could be delayed for another quite substantial period of time. Why should any one person be able to control the disposition and use of property for such a long time? It is interesting to note that the standard terms for copyrights in the United States were recently enlarged and now last for the life of the author plus 70 years or, in the case of institutionally created works, for ninety years after the work is published.[39] Is there something about the ninety to one hundred year range which is particularly important for modern property holders?

39. 17 U.S.C. § 302.

(2) *Parents and Children*. Think about the different feelings of parents and children over the disposition of parental wealth. Should younger generations have as much to say about the distribution of property as older generations? Is it appropriate to allow one generation to so constrain the structure of property that later generations find it difficult to alter prior allocations of wealth?

[d] Future Interests and Perpetuities Reform: The Demise of Classical Legal Thought?

In the introduction to this chapter, the point was made that studying future interests and the Rule Against Perpetuities inevitably requires study of the role of formal or classical legal thought in American property law. Reliance on freedom of contract may be paradoxical in any setting in which donors are allowed to transfer property in ways that restrict the dispositional freedom of donees. In such settings one actor's freedom limits another's liberty. In a fascinating article on the nineteenth century history of the perpetuities rule in the United States, Gregory Alexander describes the paradox.

Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*[40]

37 STAN. L. REV. 1189-91 (1985).

> [There is] * * * a basic paradox at the core of liberal property law.[1] Individual freedom to dispose of consolidated bundles of rights cannot simultaneously be allowed and fully maintained. If the donor of a property interest tries to restrict the donee's freedom to dispose of that interest, the legal system, in deciding whether to enforce or void that restriction, must resolve whose freedom it will protect, that of the donor or that of the donee.
>
> Although post-realist American property lawyers acknowledge this conflict, at least nominally, it did not emerge in legal consciousness in so starkly visible a form until the end of the nineteenth century. Several features of antebellum legal thought obscured the problem in the "dead hand" doctrines. Incident to the Classical, or late nineteenth century, effort to recategorize and rationalize private

40. Republished with the permission of Gregory Alexander and the Stanford Law Review, 559 Nathan Abbott Way, Palo Alto, CA 94305. *The Dead Hand and the Law of Trusts in the Nineteenth Century,* G. Alexander, 1985, Vol. 37. Reproduced by permission of the publisher via Copyright Clearance Center, Inc.

1. Two characteristics distinguish liberal property law. First, it promotes individual freedom of disposition as the basic mechanism for allocation. Second, it exhibits a strong preference for * * * [concentrating] in a single legal entity, usually an individual person, the relevant rights, privileges, and powers of possessing, using, and transferring discrete assets. * * *

law rules on the basis of "scientific" principles that abandoned the old "feudal" policy supporting property's "technical" elements, these pre-Classical mediating devices began to erode. With the disintegration of the pre-Classical conceptual structure, Classical lawyers explicitly faced the problem of the freedom of disposition principle. Their effort to construct a synthesis that resolved the contradiction on an objective basis and that assimilated equitable with legal doctrine failed toward the end of the nineteenth century.

The demise of the Classical synthesis was signaled by the adoption in most jurisdictions of a pair of new trust law doctrines that reversed established trust rules. The spendthrift trust doctrine permitted trust transferors to tie up a beneficiary's interest by imposing direct restraints on its alienability. The *Claflin* doctrine soon thereafter immunized private trusts from attempts by beneficiaries to destroy them through premature termination. Far from being reconcilable with the conventional property rules which invalidate most restraints on legal interests, these doctrines placed trust and property, equity and law in fundamental conflict over the problem of freedom of disposition.

This doctrinal development and the changes in legal consciousness that underlay it are central to a historical understanding of the ideology of private property in liberal legal thought. Anglo-American lawyers have long identified the lifting of restraints on alienation as the major defining characteristic of a liberal commercial society as opposed to a feudal one. Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets. Nineteenth century lawyers conflated the distinction between state-imposed restrictions on alienation and privately imposed restraints, treating the policy underlying rules proscribing the latter as continuous with the policy opposed to the old feudal restraints. Their historical vision, which persists today, sees the development of the law of disposition as continuous and directional. Within this vision, modern lawyers have pushed the deviationist trust rules into a corner as aberrational or accommodated them on the basis of instrumentalist accounts of the doctrines as

pragmatic responses to existing social "needs."

In the rest of his article, Alexander did two things with the freedom of alienation paradox he described. First, he tracked the development of the two areas of trust law noted above—the right of a donor to restrict the alienability of a beneficiary's interest in a trust and the right of beneficiaries to terminate a trust prior to the date specified by the donor. At the opening of the nineteenth century, donors generally lacked the ability to restrain transfer of a beneficial interest in a trust and beneficiaries were able to terminate their trusts. By the end of the century the rules had flipped, simultaneously increasing the dispositional authority of donors and decreasing that of donees.

Alexander also takes his readers on a lengthy journey through the corridors of judicial thought and legal commentary about these two changing areas of trust law. The large message is that the standard idea that progress in a liberal society may in part be measured by the solidity of rules about restraints on alienation is internally incoherent. New paradigms of thought, Alexander argued, based on "the recognition of the inevitability of interdependence" must be developed. Alexander constructed the constituent parts of his message by describing how various schools of legal thought in one way or another ignored the contradictions inherent in using freedom of alienation rhetoric to justify either the early or late nineteenth century version of the trust rules. Early Republicans opining about perpetuities rules during the decades after the founding of the nation justified their rules by labeling dispositional control by beneficiaries as feudal or technical and dispositional authority of donors as modern and liberal. And late nineteenth century classical or formal thinkers, convinced that disposition of "clean" property bundles, unencumbered by conditions and limitations, was central to the maintenance of freedom, railed against the changes in trust rules. Both groups missed Alexander's central message—that reasoning about these rules by recourse to adages about alienability and liberalism was incoherent.

At one point in this discourse, Alexander wrote about the ways rhetoric about self-determination and protectionism was used by those attempting to justify the late

nineteenth century changes in trust doctrines.[41] Classical thinkers tended to measure freedom by the degree to which dispositional authority was protected by the state. Market participants were thought of as juridical equals, each capable of fully controlling their economic lives. Those outside of the market, however, such as dependent women and children, immigrants or blacks, were often discussed in quite different ways evoking the need to protect them from the cruel vicissitudes of the economy, or cordon them off from economic influence. In fact, Alexander noted, the late nineteenth century changes in trust rules were laden, not only with notions of protecting the dynasties of the wealthy, but also with paternalistic features designed to safeguard the well being of wives and children.

Alexander's description of the rhetoric surrounding nineteenth-century changes in trust perpetuities law conforms quite well with the history of the late nineteenth century. That era was replete with examples of law reform based on a mixture of dynastic and protectionist motivations. The cultural idea of generational replication—the desire of the middle and upper classes to maintain the social position of their offspring—requires that both social standing and wealth be passed in a protected way from generation to generation. Maintenance of the dynasty for the late nineteenth-century upper classes was heavily focused on children. From Anthony Comstock's anti-gambling crusades to anti-alcohol sit-ins by upper class women in Ohio in the 1870s, fear of immigration, the temptations of urban vice, and the loss of romantic visions of agricultural America led members of the upper classes to take steps to cordon off their children from the "frightful" images of city life. Boarding schools in the country side for children of the elite opened in droves, public prostitution and obscenity were subjected to constant diatribes, books thought to tempt children to adopt the vices of the lower classes were banned, and, lo and behold, trust rules were changed in ways that prevented children from altering their parents' economic preferences. This is indeed a case where the legal rhetoric about freedom of alienation for men and protectionism for women and children reflected deep currents of anxiety among those most concerned with the impacts of

41. The beginning of this discussion is found in 37 STAN. L. REV. at 1240.

perpetuities rules. Perhaps similar fears also lay behind the contemporary enlargement of authority granted to members of the present generation to control the disposition of property by their successors.

The intellectual paradox Alexander discussed in his work was, therefore, mirrored in the social history of the late nineteenth century. Indeed, as the twentieth century opened, legal thinkers were beginning to openly note such contradictions, complain about classical reliance on freedom of contract and property alienation as central tenets of American political life, and construct new theories for justifying the existence and operation of regulatory regimes. The gradual unwinding of the political side of classical or formal modes of legal analysis is one of the subjects taken up in the next chapter on the rise of zoning, urban planning and land use regulation. And, of course, since history sometimes repeats itself, the paradox in nineteenth-century thought Alexander wrote about reappeared in recent decades as debates flowered over the wisdom of reforming the common law Rule Against Perpetuities. For part of that debate, see Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 U.C.L.A. L. REV. 1023 (1987).