SUMMARY OF LAST TIME

1. Let me just reinforce what we said last time about *Storke*.
    a. By any fair reading, this is a fsd, but the court intreprets it as a fscs.
    b. It does so because the courts have more control over fscs than it does over fsd's.
        i. In this case, the failure specifically to retain a right of entry bars any attempt to exercise it.
        ii. Even if one had been retained, the court seems willing to hold that the waiver of similar rights in the past will give rise to a waiver of this one.
        iii. The fact that the plaintiffs knew of the violation and did nothing about it will bar an attempt to exercise the right now. The doctrine here is not so called but is, in fact, the doctrine of laches, a close cousin of estoppel.
    c. In this case, it made no difference because the statute of limitations had run if it were an fsd.
    d. That raises the question why bother, and the answer to that probably is the WCTU.
    e. These interests, however, are a problem beyond the WCTU. It's a problem that we'll come back to, but the basic problem can be simply stated: Neither the r/e nor the p/rvtr by the weight of American authority is subject to the Rule Against Perpetuities. Both the fsd and the fscs were in the past, and are to some extent today, popular land use control devices. It is in the nature of land use that it changes in ways that are hard to predict. Hence, the restrictions run considerable risk of getting out of date.
2. Do I need to know anything about the fee tail? I have already said that I think that Problems 5 and 6 are good exercises, but they are good exercises only because they allow you to check on your understanding of basic categories; you don't need to know the results. There is, however, one thing that you do need to know about the fee tail, but it's a negative. The common-law did not allow the creation of any form of inheritance other than the fee simple and the fee tail. Hence, if someone made a grant to "A and his/her heirs on his/her mother's side," the type of inheritance created is invalid, and the grant would be interpreted as one in fee simple. The same rule applies today, and with the abolition of the fee tail in almost all jurisdictions, the only type of inheritance that you can create is the one that is given in the state's intestacy statute.
3. G –> A and his heirs. What do A's heirs have? Words of limitation vs. words of purchase. I guarantee that some version of this will show up on the exam.

REMAINDERS, VESTED AND CONTINGENT

A 'self-test' version of the problems in this outline, which allows you to enter an answer and then check it, is available at http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl16_19S_selftest.html

1. So far we have dealt with present freehold estates, for all practical purposes today, the fee simple and the life estate, and with future interests that are held by the

grantor/devisor, called generally reversionary interests, and specifically the reversion, the possibility of reverter, and the right of entry. Today we begin to deal with future interests created in third parties, someone other than the grantor/devisor. They are basically of two kinds, remainders and executory interests. Today we deal with remainders, in the next class with executory interests. Remainders are future interests in third parties that follow immediately upon the expiration a preceding life estate. Remainders are divided into two kinds: contingent remainders (c rdrs) and vested remainders (v rdrs) — a distinction that is still very much with us. A contingent remainder is a remainder in which one or more precedent conditions other than the expiration of the preceding (life) estate must be fulfilled before the holder of the remainder fully has the interest. A vested remainder is one in which no precedent condition needs be fulfilled other than the expiration of the preceding (life) estate. The consequences of this distinction remain to be explored. At common law, and to some extent today, contingent remainders were destructible, and vested remainders were not. The Rule Against Perpetuities also makes use of the distinction. We will get to that in the class after next. Let us now look at destructibility.

a. G —>le A —>rdr B (and her heirs) — what happens if B dies before A? — the distinction between vest in interest and vest in possession.

b. G —>le A —>rdr A's children — vested remainder subject to open (vrso) if a child — also sometimes called vrdr subject to (s/t) partial defeasance

c. G —>le A —>rdr B if she survives A — need a reversion (rvn) in G to fall in if she fails to survive A

d. G —>le A —>rdr B if she reaches 21, if not —> C

   i. B reaches 21 before A's death and predeceases him.

   ii. B predeceases A without having reached 21.

   iii. A dies before B reaches 21. Can't give it to C, C didn't fulfill the condition if B is not 21 when A dies. Hence, rvn in G.

e. G —>le A —>rdr B if she has reached 21 by the time of A's death, if not —> C

   The reversion because of forfeiture.

f. G —>le A —>rdr B if she reaches 21 whether before or after A's death, if not —> C

   A now dies before B reaches 21. Still can't give it to C; C didn't fulfill the condition if B is not 21 when A dies. (O.k. if she dies before A.)

g. G —>le A —>rdr B, but if B fails to reach 21 —>rdr C

   A now dies before B reaches 21. Still can't give it to C now, if the condition is not met. But here we have a vested rdr no rvn. (The rdr in C is not a remainder, it's an executory interest (x.i.), at least in form, but we'll get to that tomorrow.)

2. Summary—Destructability

   a. by failure to fulfill the condition—still the law today

b. by failure to fulfill the condition at the time of the expiration of the preceding estate—generally today this has become a matter of construction

c. by merger— it's been a long time since any court has held that it happened by merger of a present life estate with the reversion destroying the intervening contingent remainder. That type of merger and destructability is probably dead, and I won't test you on it. Item 3 on the outline (item 4 is not there) shows you how it worked at common law. As we have seen above, however, merger probably continues to work in some situations where the holder of a contingent interest acquires the reversion.

Hence, most of the last two are probably not with us, at least in most jds as a matter of law. The first is still very much with us. The second is still with us as a matter of construction but not of law. I think that the third is largely dead.

3. Merger & destructability — probably not still w/ us

a. G —> A etc as above (1.d). A conveys le back to G.

b. G —> A etc as above (1.g). A conveys le back to G.

Because of the rvn in 1.d merger will occur. Because there is no reversion in 1.g, it will not occur.

4. (p. S213 Problems nos. 12–13, revised)

12. D —> le A —>rdr B's children

13. D —> le A —>rdr B's surviving children

a. A and B both alive, and B is childless

i. B dies, survived by A; the ambiguity makes no difference

ii. A dies, survived by B; the ambiguity makes no difference under common law but does under modern

b. B has a child C; A and B are both alive

i. C conveys his interest to D; vr alienable, c rdr not at common law and in Illinois, in most jd's it is, but is still subject to the contingency in most situations

ii. B dies during A's lifetime; the ambiguity makes a difference under both common law and modern law

iii. A dies during B's lifetime; the ambiguity makes a difference under both common law and modern law

c. A dies during B's lifetime.

i. B w/children—possibility of open must be cut off at common law will be cut off today

ii. B w/o children—possibility of open must be cut off at common law will not be cut off today

Moral: Watch out for that word 'surviving'. In the case of no. 13 say 'such children of B who survive A' or 'such children of B who survive B'.

5. *Browning v. Sacrison*. (Kenneth J. O'Connell, CJ, who wrote this opinion, was one of the great common-law judges of the 20th century, on a par, in my view, with Roger Traynor and Benjamin Cardozo.) D —> le Ada Sacrison —> rdr Francis Marion Browning and Robert Stanley Browning (D —> A le —> rdr FMB and RSB), or if either of them be dead, then all to the other. This is a terrible piece of drafting. Totally apart from the question of dead when; there's also the question of what if both of them are dead. We'll have a case next week that comes back to that issue.

6. What is the issue in *Browning*? The issue is when does the rdr become vested. If "dead" refers to the death of Kate Webb, then FMB had a vested rdr and his widow gets half the property, if it refers to the death of AS then FMB had a contingent rdr and his widow gets nothing. The trial court held and the Oregon Sup. Ct., per O'Connell, CJ, affirmed that it was contingent on FMB's survival of his mother, and his widow gets nothing.

7. How do we solve the problem? The will of the testator is to prevail, but what the testator thought about something that she almost certainly did not think about is not easy, perhaps impossible, to determine. Considerations:

   a. Wording of another paragraph of the will. The danger of negative inferences. The provision that was used to draw the negative inference gave the Pilot Rock property to FB and RS immediately upon KW's death, as the court points out.

   b. Intent to exclude Clyde Browning. Most of this intention probably cannot be achieved because of something called the rule against direct restraints on alienation. As soon as the boys have the power to convey or devise they can give the property to their father if they want to. The question then becomes whether one wants to achieve as much of KW's purpose as one can by preventing the passage of the interest by intestacy during the boys' minority.

   c. Taxes. This is true, but federal estate tax only applies to rather large estates, and we have no idea whether it is relevant here.

   d. Enhancement of alienability. That's simply not true as a legal matter in most jd's including Oregon.

   e. Rule against Perpetuities. That is true, and it's an argument to the contrary, but not relevant here.

   f. What normal people normally think. This in my view is the best argument for what the court did, as the court itself argues. The question, and I think it's a open one, is whether one wants to substitute a relatively simple rule, one that frequently can be applied in a lawyer's office without recourse to litigation with a more complicated rule that will require a trip to the courthouse more often.

8. If any of you creates a legal future interest, I will haunt you.