I. REVIEW OF LAST TIME

1. *Browning*. D —> l.e. Ada Sacrison (AS) —> rdr Francis Marion Browning (FMB) and Robert Stanley Browning (RSB), or if either of them be dead, then all to the other.

   a. 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 court holds that it refers to the death of AS, and the widow gets nothing. This is contrary to the general preference for early vesting, as the court recognizes.

   b. Considerations:

      i. 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 FMB and RSB immediately upon KW's death, as the court points out. It makes sense to add a condition to that grant that says 'if either of them be dead at the time of my death'.

      ii. 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.

      iii. Taxes. This is true, but federal estate tax only applies to rather large estates, and it seems unlikely that it is relevant here.

      iv. Enhancement of alienability. That's simply not true as a legal matter in most jd's including Oregon. With very few exceptions, cdr's are alienable under modern law.

      v. Rule/Perp. That is true. The preference for early vesting does help in avoiding perpetuities violations, and it's an argument to the contrary of what the court did here as a general matter, but not relevant here.

      vi. 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.

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

2. A couple of you asked me after class if a gift to the children of B would include adopted children. At common law the answer to that question was 'no'. England did not recognize adoption, and that only by statute, until 1926 (Adoption of Children Act, 16 & 17 Geo. V, c. 29). The U.S. became much more open to adoption over the course of the 19th century. Today, there are very few, if any, U.S. courts that would not include adopted children in the class of children, unless the language of the instrument specifically excluded them.

3. There is one modern constructional preference that we did not mention last time. D —>le A —>rdr children of B. A dies, and B is childless. We said yesterday, and this is correct, that most modern courts would probably imply a reversion in D's heirs or devises and wait and see if B had any children, and if so, how many. That effectively holds the estate open until B's death, which is a bit awkward, particularly if B is young. On the other hand – and this is what we did not say – if B has a child, C, when A dies, the modern tendency is to close the class at that point, and any after-born children of B are out of luck. I emphasize that these are rules of construction not rules of law, and although courts are not supposed to be influenced by what happened later, they very frequently are. If B is in late middle age and C is a young adult, the temptation to close the class is much stronger than if she is young, newly-married, and has just had her first child C, who is a baby.

4. The Green hypo: G–>A for life–>rdr A's children. A has a child B, who dies young leaving A as his/her sole heir. What is the state of the title now?

II. EXECUTORY INTERESTS

There is a self-test version of the problems in this outline that allows you to enter your proposed answer and then check it: http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl17_19S_selftest.html

1. To introduce today's topic, let's go back to two problems that we did last time:

G —> A for life —> rdr B if she is 21, if not —> rdr C

G —> A for life —> rdr B, but if B fails to reach the age 21 —> rdr C

2. Executory interest (x.i.) = any future interest created in a party other than the G'or/D'or which cannot take effect after the natural expiration of the preceding freehold estate

   a. G —>le A —>rdr A's children alive 5 yrs. after A's death

      i. can't do it before Statute of Uses (1536) at law

      ii. not destructible but subject to the Rule Against Perpetuities (R/Perp)

   b. G —>le A —>rdr B if he obtains a college degree — the Rule in *Purefoy v. Rogers*

   c. G —> A 200 yrs. if he should live so long —>rdr B if he obtains a college degree

      G —> 200 yr term, a non-freehold interest determinable on the death of A

G —> freehold subject to a term of years to B if he obtains a college degree

(Professor Krier in *Gilbert's Outlines* has a different analysis of this problem, though he reaches the same result. To put it bluntly, I think his analysis is wrong.)

3. Problems 15 & 16, pp. S215 [somewhat simplified].

15. G —>le A —>rdr such of A's children who reach 21 but if none reaches 21 —> heirs of B

16. G —>le A —>rdr A's children but if none reaches 21 —> heirs of B (WARNING: A grant to the heirs of a living person is always contingent. No one's heirs can identified until s/he is dead.)

Before we get into the factual variations, what interests in form are created by these grants?

a. A has no children.

i. A & B are living

ii. A dies survived by B.

iii. B dies survived by A.

iv. B dies, then A dies.

b. A has at least one child. Consider the effect of this generally before considering the factual variations.

i. A & B living. A has one child, 5-yr. old C.

ii. A & B living. C dies at age 10. Then A dies.

iii. A & B living. B dies. Then A dies survived by C, an 18-year old. [Note from here on the factual variations are slightly different from those in the book.]

iv. A & B living. A has a 22-yr. old C and an 18-yr. old D.

v. A & B living. A has a 22-yr. old child C and an 18-yr. old D. Then B dies. Then A dies.

4. P. S156. James A. —> Clarissa B. and her heirs, to take effect upon my death if she survives me

Know all men by these presents, that I, James Abbott of Gardiner in the county of Kennebec, in consideration of one dollar paid by my wife Clarissa B. Abbott, and for the purpose of providing and securing to my said wife a comfortable support in the event of my decease during her life, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Clarissa B. Abbott of said Pittston, her heirs and assigns forever a certain lot of land situate in said Pittston and bounded [description follows]....

<So far we've got JA–>CB and her heirs, and a lot of what looks like suplusage.>

This deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall

survive me, and if she shall survive me then and in that event only this deed shall be operative to convey to my said wife said premises in fee simple.

<Is this instrument ambulatory?>

Neither I, the grantor, nor the said Clarissa B. Abbott, the grantee, shall convey the above premises while we both live without our mutual consent.

<Is this valid? Possible direct restraint on alienation. Possible co-tenancy.>

If I, the grantor, shall abandon or desert my said wife then she shall have the sole use and income and control of said premises during her life.

<This looks like a conditional life estate.>

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Clarissa B. if she shall survive me, her heirs and assigns, to their use and behoof forever. [Followed by title covenants.]

a. held

   i. cutting of timber is not waste in Maine

   ii. she did not have an interest that would give her the action

b. charter of feoffment, will, bargain & sale deed, covenant to stand seised, statutory form deed

c. the court is mistaken in its implication that this interest could not be created at common law

d. Clarissa B. lost the battle but won the war.

5. *Abbott v. Holway* summarized:

   a. The case holds that Clarissa B. did not have such an interest in the property during James Abbott's lifetime that would support an action of waste against his estate for his cutting of timber. I.e., Clarissa B. lost the battle.

   b. The court also holds (and you can have some fun arguing whether this was holding or *dictum*) that Clarissa B.'s interest under James Abbott's deed of April 30, 1872 was good; she has a fee simple interest in the land upon her surviving him. I.e., having lost the battle, Clarissa B. won the war.

   c. The court seems to think that validating the interest required the aid of the Maine statute of conveyancing that was in effect at the time. It is not clear that it did. There is nothing in the common law that prevents one from granting an executory interest to spring out of the fee of the grantor on the condition that the grantee survive the grantor. Indeed, there is evidence that the country conveyancer who wrote the instrument thought that that was exactly what he was doing and that he employed sufficient language to do it.

d. The real issue in the case is whether this instrument is void as testamentary, and that is a somewhat different issue. The court finds that the fact that instrument was not revocable enough to save the instrument. That result would probably hold today in most jurisdictions. There is even authority that the retention of a power of revocation is not enough to make the instrument testamentary, so long as it is clear that something passes with the delivery of the deed, though there is less agreement about this.