

CLASS OUTLINE 17 – ANSWERS

Problem II.

A has a present life estate. B (grant 1) has a contingent remainder in fee simple absolute, the precedent condition being that she be 21, probably before the expiration of the life estate. C has an alternative remainder in fee simple absolute. G has a vested reversion in fee.

A has a present life estate. B (grant 2) has a vested remainder in fee simple subject to defeasance if she fails to reach the age of 21. C has an executory interest in fee simple absolute which will fall in if B fails to reach the age of 21. G has nothing.

Problem III1a.

A has a present life estate. A's children have an executory interest in fee simple absolute to take effect if one or more of them are alive five years after A's death. The executory interest is an executory interest because it cannot take effect upon the expiration of the preceding life estate, but five years later. Hence, it operates as a springing executory interest arising out of the 5-year reversion of the grantor. The reversion is a reversion in fee, and fees have no natural expiration.

Problem III1b.

A has a present life estate. B has a contingent remainder in fee simple absolute, the precedent condition being the one stated, that he obtain a college degree. G has a reversion to take effect if B does not obtain a college degree prior to A's death. At common law, this was rule of law. Under modern law, the same result would probably be reached as a matter of construction. Why is B's interest not an executory interest? The Rule in *Purefoy v. Rogers*, says that if an interest can take effect as a remainder, i.e., immediately upon the expiration of the preceding estate, it will be treated as a remainder, and, hence, destructible if the condition is not fulfilled by the time of A's death. What if the remainder had been worded "obtains a college degree whether before or after A's death"? At common law that would make no difference. The remainder would be destroyed if the condition were not fulfilled at the time of A's death. Under modern law, G's reversion would fall in, subject to an executory interest if B obtains a college degree after A's death. This is one of a number of cases in which under modern law an interest can change from a remainder to an executory interest depending on what happens.

Problem III1c.

A has a term of years (a non-freehold interest) for 200 years, determinable on his death. B has an executory interest in fee simple absolute to take effect at the end of the term of years (which will certainly occur before 200 years are up). G has a fee subject to a term of years and subject to the executory interest in B. The best explanation for this somewhat odd result (Krier has a somewhat different explanation for it; less accurate in my view but it gets to the same result) is that the executory interest does not operate on the term of years, but on the underlying freehold (a term of years is not a freehold interest). The underlying freehold interest (the landlord's interest if you will) is a fee with no natural expiration. Hence, B's interest must be an executory interest. Sometimes students ask if the G could convey what is sometimes inaccurately called the landlord's reversion to B immediately. The answer to that question is 'yes', but then B does not have a future interest, but a present fee subject to a term of years. For example, if there were any rent owing on the lease, B would collect it, not G. The problem is different in that the G remains the landlord until the expiration of the term.

Problem III2.

In both grants 15 and 16, A has a present life estate. In grant 15, the life estate is followed by alternative contingent remainders. In grant 16, the life estate is followed by what is in form a vested remainder subject to an executory interest. The difference between the two is explored in the factual variations.

Problem III2a.

If A and B are both living and A has no children, the remainders under both grants 15 and 16 are contingent remainders. The reason for this is that grant 16, although it is worded as a vested remainder, is not a vested remainder because there is a precedent condition for the first remainder to become vested: one or more persons have to be identified as children of A, and A has, as yet, no children.

Problem III2ai.

The contingent remainder in A's children is destroyed by its own terms. (A had no child, much less one who reached the age of 21.) The heirs of B have not fulfilled the implied precedent condition that they be identified. Hence, at common law the remainder in them is destroyed and G takes a fee simple absolute. In modern law whether we close the class of B's heirs at the death of the life tenant is a matter of construction, and almost all courts will, in this case, hold the class open until they are identified. Hence, under modern law G ends up with a reversion, subject to an executory interest in the heirs of B, who will be identified when B dies.

Problem III2aii.

The remainder in the children of A is still contingent under both grants, because we have not yet identified anyone who is a child of A. We have now identified who will take upon the failure of the first remainder, but it is still a contingent remainder because a precedent condition to its becoming effective is that no child of A reach the age of 21. No difference here between modern law and common law.

Problem III2aiii.

The heirs of B have a fee simple absolute under both common law and modern law. The precedent condition for the remainder to take effect in the children of A was not fulfilled. (A had no child, much less one who reached the age of 21.) The heirs of B have been identified and stand ready to take upon the expiration of the life estate.

Problem III2b.

The identification of a child of A fulfills one of the precedent conditions for the interest in A's children to vest under grant 15 and all of the precedent conditions for it to vest under grant 16.

Problem III2bi.

C has a contingent remainder under grant 15. (He still needs to make it to 21). C has a vested remainder under grant 16. His remainder can be divested if none of A's children lives to the age of 21. Hence, in grant 15, B's heirs have an alternative contingent remainder; in grant 16 they have an executory interest.

Problem III2bii.

C having died before reaching the age of 21, his contingent remainder (grant 15) is destroyed on its own terms under both common law and modern law. At common law, the alternative contingent remainder in the heirs of B will also be destroyed because the heirs of B are not yet identified. In modern law the interest in the heirs will be treated as it was under problem III2ai. The common law is not clear as to what will happen to B's heirs interest under grant 16. Because it is an executory interest, the logic suggests that it will not be destroyed. Thus, G would have a reversion subject to a springing executory interest which would fall in on the death of B. (To put it another way, the shifting executory interest in the heirs of B becomes a springing executory interest.) That is certainly the way in which it would be treated today.

Problem III2biii.

The results are given on the outline. At common law (grant 15) the contingent remainder is destroyed by C's failure to fulfill all the precedent conditions prior to the death of A. Under modern law, we may, and in this case probably would, give a reversion to the grantor and wait to see if C makes it to 21. In grant 16, the results are probably the same under common law and

modern law (a bit of doubt about common law, none about modern law): C takes his/her vested remainder subject to defeasance by the heirs of B, if s/he fails to reach the age of 21.

Problem III2biv.

Again, the results are given in the outline. The reason for the difference between grant 15 and grant 16 is that they are worded differently. In order to qualify for class membership in grant 15, one has to be both a child of B and at least 21. C has qualified; D has not yet qualified. Hence, in grant 15, C has a vested remainder subject to open by D reaching the age of 21, and, though it seems unlikely, by both C and D acquiring another sib who reaches the age of 21. In grant 16, if one member of the class reaches 21, that qualifies all of the members of class of children of A. Thus both C and D have a vested remainder subject to open by their acquiring another sib. In either case the interest in the heirs presumptive of B is destroyed by its own terms: there is at least one qualifying member in the class of A's children.

Problem III2bv.

The result given in the outline for modern law may be a bit rigid. Although there is a decided preference in modern law for closing the class at the death of the life tenant when there is one or more people who already qualify, it is open to a court as a matter of construction to keep the class open to see if others qualify. The temptation for a court to do so in the case of D, who has only three years to go, would be strong, particularly because we now know that A is not going to have any more children. In either case, the death of B is irrelevant. The interest in B's heirs has already been cut off by the fact that at least one class member has qualified.