Chapter 2

ESTATES AND FUTURE INTERESTS IN LAND

§2.01. Estates in Land; In General. Estates in land are generally grouped into two categories: **freehold** estates and **non-freehold** estates (or estates less than freehold). The term **estate**, as used in this context, signifies the nature, extent, and duration of an ownership interest in land.[1] A **vested estate** is an estate or interest clothed with a present, legal, and existing right of alienation; an estate in which there is an immediate right of present enjoyment or a present right of future enjoyment.[2] Vested estates may nevertheless be **indefeasible** (*i.e.,* abso-

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[1] See Table of Estates or Interests and Corresponding Future Interests, Exhibit A of this Chapter.

[2] "The word 'vest' *prima facie* connotes a vesting in interest, not in enjoyment or possession …. A vested interest is one in which there is a present fixed right to future enjoyment, though the effective date of that enjoyment be uncertain." *Montclair Nat'l Bank v. Seton Hall*, 96 N.J. Super. 428, 435 (App. Div. 1967).

lute) or **defeasible**. This may be contrasted with a **contingent estate**, which depends for its effect upon an event which may or may not occur.[3] Words of **limitation** define the nature or quantum of the estate granted or conveyed. For example, a conveyance to "X and his heirs" creates a **fee simple**, in which "and his heirs" are words of limitation, to be distinguished from words of **purchase**, which designate the party to whom the estate is conveyed (X).

Freehold Estates:

- fee simple
- fee tail[4]
- fee simple determinable
- fee simple conditional
- life estate
- life estate *pur autre vie*
- dower estate
- curtesy estate

All freehold estates are estates of inheritance, except life estates. The term **seisin** is frequently used to denote the ownership of a freehold estate. Seisin may be defined as the right of possession of a freehold estate by one having legal title thereto. For example, it is common to say that "X is seized of an estate in fee simple in Blackacre." The common law rule that "seisin can never be held in abeyance" is generally in force today.[5] This means that at any point in time one must be able to identify the party in whom the fee simple title to a particular tract of land is vested, or the parties whose estates or interests taken together would comprise a fee simple.

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[3] "An interest is held to be contingent because the right of enjoyment is itself uncertain, not because of any uncertainty as to the date of actual enjoyment." See previous Note.

[4] The fee tail has been abolished by statute. See §2.03.

[5] *Fidelity-Philadelphia Tr. Co. v. Harloff,* 133 N.J. Eq. 44 (Ch. 1943); see §68.03. The concept of *transitory seisin* is discussed in §37.04. See also §§52.08, 71.04, 71.13 and 76.03.

Less than Freehold (Non-Freehold) Estates:

- estate for years (leasehold estate)
- periodic tenancy
- tenancy at will
- tenancy at sufferance

§2.02. Fee Simple (Absolute) Estates. At common law a *fee simple estate* was created by a conveyance "to A and his heirs". Today it is no longer necessary to include the word "heirs" in a deed in order to create a fee simple.[6] Therefore, most deeds now in use pass a fee simple estate. A fee simple estate creates an "absolute" ownership interest in the sense that there is no limitation on the ability of the owner to dispose of the land, either during the owner's lifetime or upon the owner's death. Of course, it can be subject to other interests, such as easements, mortgages, etc. This is the form of estate most commonly used today.

§2.03. Fee Tail Estates. Fee tail estates will not be discussed at length here, since they have been abolished prospectively by statute.[7] A fee tail is created by a conveyance "to A and the heirs of his body," *i.e.*, A's children. A tail could be general or special. The phrase "… heirs of his body male" created a **tail male**, while "… heirs of his body female" created a **tail female**. A fee tail estate is sometimes called an **entailed** estate. In order to create a fee tail, it is necessary that precise wording be used. So, a conveyance to "A and X, Y, and Z" does not create a fee tail, even though X, Y, and Z are in fact the heirs of A's body.[8]

§2.04. Fee Simple Determinable Estates. A fee simple determinable is created by a conveyance from A "to B and his heirs, *so long as* the land is used for church purposes." B holds a **fee simple determinable** and A (the grantor) and A's heirs hold a **possibility of reverter**. The phrase "so long as" is typically used to create this estate.[9]

§2.05. Fee Simple Conditional Estates. A fee can be subject to a **condition precedent** or a **condition subsequent**. In the former, the estate does not come into being until the fulfillment of the condition; *e.g.*, A conveys "to B and his

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[6] N.J.S.A. 46:3-13. 2 *Blackstone's Commentaries*, 107 (8th Ed.).

[7] N.J.S.A. 46:3-15. *Rector, Wardens and Vestrymen of St. John's Church v. Eyre*, 85 N.J. Super. 422 (Ch. Div. 1964).

[8] 2 *Blackstone's Commentaries*, 113 *et seq*. (8th Ed.).

[9] See §§2.09 *et seq.*

heirs *on condition that* B shall have traveled to New York City and back." B holds a **fee simple subject to a condition precedent**, while A and A's heirs hold a **right of entry on condition broken**, also known as a **power of termination**.

In the latter, A conveys "to B and his heirs *on condition that* liquor shall not be sold on the premises." B holds a **fee simple subject to a condition subsequent**. The estate held by the grantor and the grantor's heirs is the same. B's estate comes into being at once, but it is subject to being divested if the condition is ever broken. The phrase "on condition that" is characteristic of this type of estate.[10]

§2.06. Life Estates. Life estates may be divided into two categories: **legal** and **conventional**. Legal life estates arise by operation of law, such as **dower** and **curtesy**.[11] Conventional life estates are created by conveyance or devise, and may be for the party's own life or for the life of another (life estate *pur autre vie*). If A conveys Blackacre to B for life, remainder to C, then B holds a *life estate* and C holds a *vested remainder*. Upon B's death, C is entitled to the immediate possession and enjoyment of the premises in question.

If A conveys to B for the life of C, remainder to D, then B holds a *life estate pur autre vie*, and D holds a *vested remainder in fee*. B's estate is measured by C's life, so that when C dies, D will be entitled to the possession of the land conveyed, even if B is still alive. If B dies before C, the effect is unclear; it seems that today B's interest will pass to B's heirs or devisees, until the death of C. A life estate *pur autre vie* also arises where a life tenant conveys title to a third party; *e.g.*, A conveys to B for life, and B in turn conveys to C. Since B cannot convey a greater interest than B acquired from A, C's interest is extinguished at B's death.

Life estates are usually created by phrases such as "for life" or "for the term of her natural life," etc. A husband and wife may hold a life estate as tenants by the entirety.[12] This type of estate is frequently encountered in wills, although it may be created by deed, as in the example given in the preceding paragraph. One may not, however, *reserve* a life estate in a deed to a party other than the grantor.[13]

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[10] See previous Note. *Bouvier v. Balto. & N.Y. R.R. Co.*, 65 N.J.L. 313 (Sup. Ct. 1900), *aff'd* 67 N.J.L. 281 (E. & A. 1902).

[11] See Chapter 76.

[12] *Kimble v. Newark*, 91 N.J.L. 249 (E. & A. 1917). Tenancies by the entirety are discussed in Chapter 44.

[13] See §§37.07 and 37.09.

A life estate is a valuable estate-planning tool. In some circumstances, a parent or spouse may find it advantageous to convey fee title to realty to his or her spouse or children, while reserving a life estate therein. A variation of this technique involves the use of a so-called **"lady bird" deed**, in which the grantor reserves a life estate, as well as the right to change the designated remainderman by power of appointment.[14]

§2.07. Estates for Years. An estate for years is a non-freehold estate, and is therefore sometimes treated as personalty. If A conveys to B "for the term of 10 years," B holds a *tenancy* or *estate for years*. A and A's heirs hold a **reversion**, because at the expiration of the 10-year term, possession will revert to A or A's heirs. If A conveys to B for a term of 10 years, remainder to C, B holds an estate for years, C holds a **vested remainder**, and A and A's heirs have nothing.[15] The estate for years is similar to the modern day **leasehold**, which is usually created by a lease using words of demise, such as "Landlord (or Lessor) leases (or lets) to Tenant (or Lessee)." It has been held that a tenancy by the entirety may not exist in an estate for years, even in a 99-year renewable leasehold, because estates for years are considered to be personalty.[16] However, as a result of the enactment of a statute permitting the creation of a tenancy by the entirety in personalty, the law may now be otherwise.[17]

Contrary to popular belief, a leasehold estate for a term in excess of 99 years is still a leasehold estate; it does not become a fee simple estate.[18] On the other hand, the longer the term, the more similar to a fee simple the estate becomes. Some railroad properties, for example, are leased for 999 years.[19]

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[14] See §2.20. It is believed that the term "lady bird" derives from the use of this form of conveyance by President Lyndon B. Johnson, whose wife was known as "Lady Bird."

[15] See §§2.09, 2.10, and 2.11.

[16] *Brown v. Havens*, 17 N.J. Super. 235 (Ch. Div. 1952).

[17] N.J.S.A. 46:3-17.2. Although the law has not been generally construed, it was held in *Freda v. Commercial Tr. Co.*, 118 N.J. 36 (1990) to be prospective in effect only.

[18] *Bor. of E. Rutherford v. Sterling Paper Converting Co.*, 21 N.J. Misc. 232 (Cir. Ct. 1943); 2 *Blackstone's Commentaries*, 143 (8th Ed.). Leasehold estates are discussed at length in Chapter 73.

[19] See §73.02.

§2.08. Other Non-Freehold Estates. A **periodic tenancy** is a tenancy from year to year, month to month, week to week, etc. A *tenancy at will* is an estate without fixed duration, which may be terminated at the will of the landlord or tenant at any time. A **tenancy at sufferance** is created where a tenant holds over after the agreed upon tenancy has come to an end.[20]

§2.09. Future Interests Defined. A **future interest** is an estate or interest in land which involves the right or privilege of enjoyment and possession at some time in the future. In New Jersey today (and in most states) five types of future interests are recognized:

1) Reversions
2) Remainders
3) Executory interests
4) Possibilities of reverter
5) Rights of entry for condition broken (or powers of termination)

The characteristics of each will be discussed in turn.[21]

Future interests are often classified as **vested** or **contingent**. An interest is *vested* if it is ready to take effect immediately upon the termination of the preceding estate. It is *contingent* if it cannot take effect unless and until a condition is met. An estate which is subject to a future interest is sometimes known as a **base fee** or **qualified fee**.[22]

§2.10. Reversion. A **reversion** is a future interest left in the grantor or the grantor's heirs when one or more lesser estates have been conveyed. All reversions are vested.

Example: A conveys Blackacre to B for life. B holds a life estate; upon B's death, title reverts to A (or A's heirs). A's interest is a *reversion*.

§2.11. Remainders; Vested and Contingent. A **remainder** is an interest created in a transferee which becomes possessory following the termination

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[20] *Walsh on Property*, §§156 *et seq*. (2d Ed. 1927).

[21] See *Simes on Future Interests*, §§9 *et seq*. (2d Ed. 1966) for further information.

[22] These estates are sometimes classified as estates on condition; estates on limitation; or estates on conditional limitation. *Lehigh Valley R.R. Co. v. Chapman*, 35 N.J. 177 (1961); *Carpender v. City of New Brunswick*, 135 N.J. Eq. 397 (Ch. 1944).

of a prior interest created by the transferor. Remainders may be either **vested** or **contingent**.

Example 1: A devises Blackacre to B for life, remainder to C in fee. Upon the death of B, C's interest becomes possessory. Since C's interest was not dependent on any event (other than the death of B, which must eventually occur), C holds a *vested remainder.*

Example 2: A devises Blackacre to B for life, and if C survives B, then to C and C's heirs in fee. C holds a *contingent remainder*, because C is only entitled to possession (upon the death of B) *if C survives B*. In other words, C's estate is contingent upon surviving B.

Example 3: A devises Blackacre to B for life, remainder to the heirs of B. B holds a life estate and the heirs of B hold a *contingent remainder*, because B's heirs cannot be ascertained until B's death.[23]

In the first example, the remainder interest of C *vested immediately* upon its creation (*i.e.*, upon the death of A), but C's right to enjoyment and possession of Blackacre was postponed until the death of B.[24] In the second example, C's remainder interest was *contingent* upon C surviving B, so that, upon the death of A, one could not say with certainty whether C would ever enjoy Blackacre.

Contingent remainders are subject to the doctrine of *destructibility*, which may be explained as follows:

> By its very nature a contingent remainder must take effect immediately upon the determination of the particular estate [which precedes it]; … if it cannot take effect then, it cannot vest afterwards, even though the particular estate should again come into being.[25]

So if A conveyed Blackacre to B for life and then to such of B's children as have reached age 21, and none of B's children had reached age 21 at the time of B's death,

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[23] This is sometimes expressed by the ancient maxim, *nemo est haeres viventis* (no one is the heir of a living person). 2 *Blackstone's Commentaries*, 208 (8th Ed.)

[24] *Cody v. Fitzgerald*, 2 N.J. 93 (1949); *In re Estate of Reininger,* 388 N.J. Super. 289 (Ch. Div. 2006).

[25] *Clapp & Black on Wills & Administration*, §426 (Rev. 3d Ed. 1984). Although the destructibility rule has been abolished in England and in some states, and is frequently criticized by legal commentators, it apparently remains in force in New Jersey today. *Simes on Future Interests*, §§14 *et seq*. (2d Ed. 1966)

the contingent remainder would not take effect. It was destroyed forever, even if one or more of B's children later reached age 21.

If A conveys Blackacre to B for life and Whiteacre to C for life; and if either dies without children, then to the other, cross-remainders have been created.[26] However, cross-remainders must be distinguished from **concurrent contingent remainders** (also known as **alternate remainders**). A conveyance by A of Blackacre to B for life, and if he leaves children, then to them; and if he leaves none, then to C, creates concurrent contingent remainders.[27]

It is important to distinguish a contingent remainder from a vested remainder which is subject to **divestment** (*i.e.,* a **defeasible fee**). For example, if Blackacre is conveyed to A for life, remainder to B ***if*** B survives A, but, if not, then to C, B holds a contingent remainder. However, if Blackacre is conveyed to A for life, remainder to B, ***but if*** B fails to survive A, then to C, B holds a vested remainder subject to divestment. C holds an executory interest (discussed in the next section).

A vested remainder may also be subject to **partial divestment**, as in the case of a **class gift**; *e.g.,* a conveyance to A for life, remainder to the "children" of A. At the date the conveyance is made, A has two children, B and C. But at A's death, A has three: B, C, and D. The class must open to accommodate the later-born child, D. Thus, B and C hold a vested remainder, subject to partial divestment.

§2.12. Executory Interest. An **executory interest** is a non-vested interest in a transferee which will vest only on the happening of a condition or on the occurrence of a future event. It typically follows a **defeasible fee** (*i.e.,* a fee subject to divestment). Executory interests are usually grouped into two categories, **shifting** and **springing**. A shifting interest is illustrated by the following example:

Example: A conveys Blackacre to B in fee simple, ***but if*** B dies before C, then to C in fee simple. C holds an executory interest. Since the fee title has been conveyed to B (subject to B's survival), C's interest cannot be classified as a contingent remainder.

A springing interest may be illustrated as follows:

Example: A conveys Blackacre to B in fee simple, from and after the time that B shall attain the age of 21 years. B holds a springing executory interest which will

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[26] 2 *Tiffany's Real Prop.*, §334 (3d Ed. 1939); 3 *Walsh on Real Prop.*, §300 (1947); Restatement of Prop., §115 (1936).

[27] *Clapp & Black on Wills & Admin.*, §425 (Rev'd 3d Ed. 1982).

take effect only if and when B reaches age 21. Since the fee title resides in A until B's 21st birthday, B's interest cannot be classified as a contingent remainder.[28]

It is important to avoid confusing an executory interest with a contingent remainder. Once the fee simple estate has been conveyed, there can be no remainder interest. Thus, the interest cannot be classified as a contingent remainder, because a fee cannot be limited upon a fee; *i.e.*, a remainder in fee cannot follow the conveyance of a fee simple estate. However, if the fee is divested by the happening of a subsequent event, fee title will pass to the holder of the executory interest.

§2.13. Possibility of Reverter. A **possibility of reverter** is a contingent interest in the grantor (or the grantor's heirs) which remains following the creation of a fee simple determinable. Some authorities, however, classify this interest as vested, because it is a type of reversion, and a reversion is a vested interest.[29]

Example: A conveys Blackacre to B *so long as* liquor is not sold on the premises. The use of the phrase "so long as" indicates the existence of a fee simple determinable in B. A holds a *possibility of reverter* which is contingent upon whether B sells liquor on the premises. However, our courts have shown reluctance to enforce such forfeiture provisions.[30]

§2.14. Right of Entry on Condition Broken or Power of Termination. A **right of entry on condition broken** (or **power of termination**) is a contingent interest held by the grantor (or the grantor's heirs) following the creation of a fee on condition.

Example: A conveys Blackacre to B *on condition that* the land be used for church purposes. B holds a fee subject to a condition subsequent (as evidenced by the phrase "on the condition that"); A holds a *right of entry on condition broken* (or *power of termination*); *i.e.*, if B ceases to use Blackacre as a church, A may maintain an action to eject B.

The power of termination and possibility of reverter are obviously somewhat similar. The latter was said (in ancient times) to take effect automatically, while the former required a re-entry on to the premises in question. As a practical matter today, there is little distinction, because it is likely that, in either case, the grantor will have to seek the assistance of the courts in establishing the grantor's

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[28] *Simes on Future Interests,* §11 (1951).

[29] *Simes on Future Interests*, §12 (1951); but see *Gray on Perpetuities*, §113.3 (4th Ed. 1942), *contra*. See §2.10.

[30] See §68.04.

interest and right to possession.[31] However, our courts have shown reluctance to enforce such forfeiture provisions.[32]

§2.15. The Rule in Shelley's Case. Under the *Rule in Shelley's Case*, if Blackacre is conveyed "to A for life" and later in the same instrument a "remainder to the heirs of A" is conveyed, then A receives a fee simple estate and A's heirs receive nothing.[33] The Rule in Shelley's Case has been abolished *prospectively* by statute enacted in 1934.[34] Thus, it still applies to dispositions of realty made prior to that date. In a decision construing the rule, it was held that it did not apply where the remainder was devised "to such person or persons as shall be [the life tenant's] sole heir or heirs … in fee simple," because the devise (if read literally) was not made to the "heirs" of the life tenant.[35]

§2.16. The Rule Against Perpetuities. The **Rule Against Perpetuities** [the RAP] is a common law doctrine which seeks to protect the system of land ownership against interests which vest too remotely. The RAP, which evolved from the *Duke of Norfolk's Case,*[36] may be stated as follows:

> *No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.*[37]

RAP (in some form) is in force in New Jersey today, at least as to certain donative transfers. It had been codified by legislative enactment of the **Uniform Statutory Rule Against Perpetuities** [USRAP].[38] However, it appears that USRAP was *prospectively* repealed by the adoption of the **Trust Modernization**

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[31] *Lehigh Valley R.R. Co. v. Chapman*, 35 N.J. 177 (1961); *Simes on Future Interests*, §13 (1951).

[32] See, *e.g., Johnson v. City of Hackensack,* 200 N.J. Super. 185 (App. Div. 1985). See also §68.04.

[33] 1 Co. Rep. 93b (K.B. 1581).

[34] N.J.S.A. 46:3-14.

[35] *In re Estate of Hendrickson*, 324 N.J. Super. 539 (Ch. Div. 1999).

[36] [1681] 3 Ch. Cas. 1, *aff'd* [1685] 3 Ch. Cas. 53.

[37] *Gray on Perpetuities*, §201 (4th Ed. 1942).

[38] N.J.S.A. 46:2F-1 *et seq*. (P.L. 1991, c.192, effective July 3, 1991); see *Juliano & Sons v. Chevron, U.S.A.*, 250 N.J. Super. 148 (App. Div. 1991).

Act of 1999.[39] Prior to the enactment of the legislation discussed above, the RAP was applied, for example, to an option or right of first refusal which could be exercised beyond the period set by the RAP.[40]

Note that the RAP is inapplicable (by its terms) to **vested interests**. Thus, if A conveys Blackacre to B for life, then to C for life, remainder to D, D's interest is unaffected by the RAP, because D holds a **vested remainder**. Similarly, where A conveys Blackacre to B for life, then to C for life, A's interest is unaffected by the RAP, because it is a **reversion** (and all reversions are vested). **Possibilities of reverter**, however, are also exempted from the operation of the RAP, even though they are sometimes held to be contingent (rather than vested) interests.[41] In the case of a **class gift** such as "to A for life, remainder to the children of A," the courts have adopted a so-called rule of convenience in order to avoid a violation of the RAP. The class is closed to later-born members as soon as any class member is entitled to a distribution of principal.

A commonly encountered exception to the RAP regards an option to renew or purchase *contained in a lease.* Options of this nature are exempt from the operation of the RAP.[42] But options which are *not* contained in leases are subject to the RAP's operation.[43] Another exception to the RAP is the *charitable exception.* So if there is a devise of Blackacre to the Episcopal Church so long as the land is used for church purposes, and if such use shall ever cease, to the Red Cross, the executory interest of the Red Cross is valid *because it is a charitable organization.* But if the executory interest

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[39] P.L. 1999, c.159 (effective July 8, 1999), codified as N.J.S.A. 46:2F-9 *et seq*. This statute apparently substituted a rule against suspension of the power of alienation, which is nevertheless similar to the common law RAP. See §68.06 for more information.

[40] *Ross v. Ponemon*, 109 N.J. Super. 363 (Ch. Div. 1970); *Mazzeo v. Kartman,* 234 N.J. Super. 223 (App. Div. 1989). See also *In re Lattouf's Will*, 87 N.J. Super. 137 (App. Div. 1965).

[41] See §2.13.

[42] The RAP exemption applies only if the option must be exercised during the term of the lease. Thus, an option which is exercisable after the expiration or termination of the leasehold estate is not exempt from the operation of RAP. Restatement of Prop., §395 (1944).

[43] Restatement of Prop., §395 (1944). See §§73.09 and 86.01.

had been in favor of the testator's nephew, for example, the result would be different, because executory interests are not vested and the nephew's interest might not vest within the required period.[44]

Many careful practitioners apply a **perpetuities saving clause** in order to avoid inadvertent violations of the RAP. For example, a will may provide that, notwithstanding anything which may be contained therein to the contrary, a testamentary trust will cease and determine and the last distribution of principal and income shall be made, not later than 21 years following the death of the last of the testator's children. Since the testator's children must (necessarily) be born in the testator's lifetime, the requirements of the RAP are satisfied. An alternative formulation might be: 21 years after the death of the last of the lineal descendants of Queen Elizabeth II *now living*.

Thus, a bequest made in 1926 to "my descendants who shall be living 21 years after the death of all lineal descendants of [Queen Victoria] now living" was upheld by the court as valid, notwithstanding the fact that there were 120 such descendants.[45] On the other hand, if the testator had omitted the words, "now living," the opposite result would have been reached, because of the possibility that the interests of the legatees might vest too remotely. Without the qualifying phrase "now living," the descendants of Queen Victoria might include persons born after the creation of the interest (the date of death of the testator), so that the measuring lives would have failed to meet the RAP's criterion of a "life in being at the creation of the interest."

For further information, consult Chapter 68.

§2.17. Rule Against Restraints on Alienation. The **Rule Against Restraints on Alienation** is distantly related to the **Rule Against Perpetuities** (discussed in the preceding section). An attempt to limit the ability of the owner of a fee simple estate to transfer or convey that interest is void as repugnant to the interest conveyed. In other words, since a fee simple estate is a form of absolute ownership, a restriction on the owner's ability to dispose of the land is inconsistent. For example, a provision that the fee owner could only transfer title to another member of a community association has been held invalid.[46]

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[44] *Gray on Perpetuities*, §§589 *et seq* (4th Ed. 1942).

[45] *In re Villar* [1929], 1 Ch. 243.

[46] *Tuckerton Beach Club v. Bender*, 91 N.J. Super. 167 (App. Div. 1966). See also §104.07; Chapter 33.

The restraints take three forms: disabling, forfeiture, and promissory. A *disabling restraint* exists when property is conveyed or devised with a direction that it shall not be alienated. A *forfeiture restraint* purports to create a forfeiture of the estate upon alienation thereof. A *promissory restraint* is a covenant in which the parties agree not to alienate the property.[47]

For example, a deed conveying the family farm from father to son in fee simple might contain a statement that the land may be conveyed by the son only to his children (the grantor's grandchildren), and so forth, for each successive generation. [48] Or the deed might purport to prohibit the son from transferring title to anyone other than a family member. These provisions are probably not enforceable, because they are inconsistent with the son's ability, as owner of a fee simple estate, to dispose of the property as he wishes.[49]

May a grantor prohibit the grantee from leasing or mortgaging the property conveyed? It seems that such prohibitions are probably unenforceable, because they are conceptually inconsistent with the fee simple estate held by the grantee.[50]

As noted above, restraints on alienation have been looked upon with disfavor by the courts.[51] They have been enforced, nevertheless, in connection with leasehold estates and life estates.[52] Racial, ethnic, and religious restrictions, which are illegal and unenforceable, may also be viewed as restraints on alienation.[53] Yet

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[47] 6 *Casner's Am. L. of Prop.*, §§26.1 *et seq*. (1952).

[48] Such a scheme may also violate the Rule Against Perpetuities. See §2.16.

[49] The possible ability of a grantor to circumvent the Rule Against Restraints on Alienation by conveying a fee simple determinable or fee simple conditional (rather than a fee simple absolute) estate is beyond the scope of this text. See §§2.04 and 2.05. With respect to a conveyance to a son for life, with a remainder to the son's heirs, see §2.15.

[50] Restatement (Second) of Prop., (Donative Transfers), §4.2 Illustration 19 (1983); Restatement (Third) of Prop., (Servitudes), §3.4, Comment "b" (2000).

[51] *Wrubel Realty Corp. v. Wrubel*, 138 N.J. Eq. 466 (Ch. 1946).

[52] *Cape May Harbor Vill. v. Sbraga,* 421 N.J. Super. 56 (App. Div. 2011) (restriction on leasing contained in declaration of covenants upheld).

[53] See §§68.04, 104.07, and 104.09A.

the Rule Against Restraints on Alienation does not render all restrictive covenants invalid or unenforceable.[54]

§2.18. The Doctrine of Worthier Title. This rule is based upon the ancient concept that a title acquired by *descent* (*i.e.*, by intestate succession) is worthier (*i.e.*, better or of superior quality) than a title acquired by *purchase* (*i.e.*, by deed or *inter vivos* conveyance).[55] Therefore, an attempt to create or reserve a *remainder* in heirs of the grantor by deed is void. So if A conveys Blackacre "to B for life, remainder to the heirs of A," the remainder to A's heirs is void and A holds a reversion in fee simple.[56] In theory, A's heirs will still succeed to an interest in Blackacre, but by intestate succession rather than the remainder in A's conveyance. Title will revert to A and then descend to A's heirs. This rule survives today in most jurisdictions as a rule of construction, rather than as a rule of law.[57]

§2.19. Alienation of Future Interests. The free alienation of future interests is permitted by statute.[58] This includes devises, *inter vivos* conveyances, etc. Thus, for example, the holder of a possibility of reverter may convey that interest to another party.

§2.20. Powers of Appointment. A **power of appointment** is a device by which a donor may confer upon a donee the power to appoint (*i.e.,* select) the persons who will receive the donor's property. Powers of appointment are often categorized as **general** or **special** (*i.e.,* limited). Some are exercisable only by deed, some only by will, and others by deed or will. A general power of appointment gives the donee the power to appoint anyone (including the donee) to receive the donor's property, while a special or limited power restricts the appointees to a specific group or class.[59]

Owing to their flexibility, powers of appointment are a popular estate-planning tool. Consider the following examples: A conveys Blackacre to B for life, with power to appoint the remainder. B must identify the remainderman by deed executed before B's death (when the life estate will terminate) or in B's will. Or A

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[54] See generally Chapter 104.

[55] See §5.01.

[56] N.J.S.A. 3B:3-45. *Simes on Future Interests*, §25 *et seq*. (1951); see §§2.10 and 2.11.

[57] *Fidelity Union Tr. Co. v. Parfner*, 135 N.J. Eq. 133 (Ch. 1944); *Doctor v. Hughes*, 225 N.Y. 305 (1919); Restatement of Prop., §314 (1940).

[58] N.J.S.A. 46:3-7.

[59] *Simes on Future Interests*, §55 *et seq*. (2d Ed. 1966).

conveys Blackacre to B, reserving a life estate in A, together with a power of appointment. Although B holds a vested remainder (with enjoyment postponed until A's death), the reservation of the power of appointment means that B's fee is subject to divestment, in the event A exercises the power of appointment in favor of someone other than B.[60]

The statute governing powers of appointment has been amended to authorize the holder of the power, when exercising it, to "create less than absolute interests for the benefit of one or more of the permissible appointees ..., including interests in trust and the creation of new powers of appointment ... exercisable by the one or more appointees." Furthermore, the use of words such as "outright," "fee simple," "absolutely," or "forever," in the will or other document creating a power of appointment is not deemed to prevent the holder of the power from creating lesser interests in the appointees. However, the statute may not be invoked if the will or other document creating the power specifically provides otherwise.[61] To return to the first example given above, A conveys Blackacre to B for life, with power to appoint the remainder. As a result of the statutory amendment, B may appoint C as life tenant, and D as remainderman in fee. Or B could appoint C as life tenant, granting C the power to appoint the remainderman. B could also designate a trustee to hold the remainder for C's benefit, subject to such terms as B chooses.

§2.21. Merger of Estates. When the owner of a lesser estate becomes the owner of a greater estate in the same realty, a **merger** is said to have occurred, and the lesser estate is extinguished.[62] For example, if a mortgagee accepts a deed in lieu of foreclosure, or if a tenant exercises an option to purchase the leased premises, the lease or mortgage is commonly assumed to have *merged* with the fee simple estate.[63]

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[60] See §§2.11 and 2.12. With respect to so-called "lady bird" deeds, see §2.06.

[61] N.J.S.A. 3B:3-45 (as amended by P.L. 2017, c.316, effective January 16, 2018). The amended statute applies to any instrument created before, on, or after its effective date.

[62] *Brehm v. Snyder*, 112 N.J. Eq. 517 (Ch. 1933); *Anthony L. Petters Diner v. Stellakis*, 202 N.J. Super. 11, 19 (App. Div. 1985) ("Whenever a greater and a lesser estate coincide in the same person ... the lesser estate merges into the greater."). 1 *Tiffany's Real Prop.*, §70 (3d Ed. 1939).

[63] See *Valley Nat'l Bank v. Meier*, 437 N.J. Super. 401 (App. Div. 2014) (mortgage merged with fee simple estate where mortgagor obtained assignment, rather than discharge, of mortgage); *Reibman v. Myers*, 451 N.J. Super. 32, 45 (App. Div. 2017) (marital possessory right merged with fee simple estate). For more information

However, merger is said by the courts to be a matter of intent, so it is dangerous to assume that a merger has occurred automatically in all cases.[64] The parties may defeat the presumption of merger by inserting appropriate recitals in the documents or by their conduct, etc.[65] This type of merger should not be confused with the somewhat different type of merger which may occur with business entities, as in the merger of one corporation with another,[66] or the merger of adjoining lots under Municipal Land Use Law.[67]

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about mortgages and deeds in lieu of foreclosure, see Chapters 81 through 84, inclusive.

[64] *Colquhoun' Estate v. Colquhoun's Estate*, 88 N.J. 558, 565 (1982) (merger depends on intent of the parties). See Weinstein, *Mortgages*, §13.13 (2d Ed. 2001). See also §81.19.

[65] *Gimbel v. Venino* 135 N.J. Eq. 574, 576 (Ch. 1944) ("The presumption of merger is rebuttable, and may always be overcome if the intention that there be no merger is expressly declared.")

[66] See §45.16.

[67] See §116.04.

Table of Estates or Interests & Corresponding Future Interests

Estate or Interest	How Created	Followed by (Future Interest)
Freehold Estates ↓↓		
Fee simple [absolute]	"to X and his heirs"	nothing
Fee Simple Determinable	"so long as" or "as long as"	possibility of reverter
Fee Simple Conditional	"on condition that"	power of termination (or right of entry on condition broken)
Fee Simple subject to Defeasance (Defeasible fee)	"to X and his heirs (*i.e.*, to X in fee) but if (*e.g.*) X dies before Y, then to Y in fee"	executory interest (shifting or springing)
Fee Tail [abolished by statute in many states, incl. NJ (*N.J.S.A.* 46:3-15)]	"to X and the heirs of his body"	estate to heirs or reversion or remainder (if grantee dies w/out heirs)
Life Estate (Conventional)	"to X for the term of his natural life" or "to X for life"	reversion or remainder
Life Estate (Legal)	arises by operation of law (*e.g.*, dower or curtesy)	reversion
Life Estate *per autre vie*	"to X for the life of Y" or conveyance by Y to X of Y's life estate	reversion or remainder
Non-Freehold Estates ↓↓		
Estate for Years	"to X for a term of ____ years"[1]	reversion or remainder
Leasehold	L "lets and demises" to T (modern estate for years)	reversion
Tenancy at Will	no fixed term; either party may terminate estate at will	reversion
Tenancy at Sufferance	hold-over tenant	reversion
Periodic Tenancy	*e.g.*, month-to-month tenant	reversion

[1] An estate for years or leasehold may be for a period in excess of 99 years. 2 *Bl. Comm.* 143 (8th Ed.).