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| **Need to see what type of grant/devise it is**  Is it ***Inter-Vivos, a Will, a Trust?***  \*The ability to define and categorize and determine validity |
| 1. **What are the words of purchase and words of limitation?** |
| * **Words of purchase =** means the person who acquires the interest in land * **Words of limitation =** describes the limits of the interest being created.   **Joint tenancy/Tenants in Common**   * **Joint Tenants:** Survivors of the joint tenants get the property entirely.   + **Under s.11 PLA –** default if there is any misunderstanding is to give a joint tenancy.   + Cannot speak about shares. Joint tenancy is “one for all, all for one” – there are no shares. If in dispossession there is a mention of shareholding, that contradicts the joint tenancy and chances are it will be construed as not a joint tenancy.   + **There must be:** unity of possession 1) time; 2) title and 3) interest. The co-ownership in form of joint tenancy must occur in the same instrument and done at the same time and the same interest (EIFS). * **Tenants in Common:** own interest w/ other person and when you die you can transfer your share to an heir.   **What happens when one party wants to sell and other does not?**   * **Under CL could seek partition** – could ask the court to give partition. Court has discretion. Today, statutory provision allows a court to order a sale of property in lieu of sub-dividing and dividing the proceeds. * **The jurisdiction of the courts is huge and the court does what it thinks is just in the circumstances.**   **Examples:**   * “To A for life, remainder to children of A as joint tenants” = this is okay to create a joint tenancy for the children even if they vest at different times.   **If Clear – Determine WofP and WofL - If Not Clear - Interpretation**  **Words of Limitation: (WESA) s. 41** – Property that can be gifted by will.   * A gift in a will takes effect according to its terms and, subject to terms, **gives to the recipient every legal/equitable interest in the property that the will-maker had the legal capacity to give.**   **Problems of Interpretation – Repugnancy (s.8(2) may make this inapplicable)**  **Repugnancy =** something contradictory to an EIFS. In general, cannot restrain disposal of EIFS (***Re Walker, Ceilin v Tressider***).  **Two possible outcomes:** (1) Gift to first person named prevails; gift over fails as repugnant; (2) Gift over prevails; person first named takes life estate only.  ***Re Walker*:** (EIFS left to wife – “should any portion remain undisposed of when she dies, such a remainder will be divided…” = invalid, qualification is repugnant.). **An absolute transfer of land (fee simple) cannot be accompanied by directions on how to deal with the land upon the death of the receiver (death of person holding EIFS); however, if all that is transferred is a life estate then these types of gifts are valid.**   * **If EIFS transferred, cannot add a gift-over – endeavoring to that which is impossible.**   **Two classes** **of dispossession (plus a 3rd recognized)**:  **1)** Those where an **absolute interest** in the land has been transferred, and therefore **all other desires for later use of the land are repugnant** (as is the case here);  **2)** Those where all that is originally transferred is a **life estate** and therefore the gifts after the death of the person holding the life estate are valid.  **3)** Cases where a testator transfers **a life estate** to someone, and also gives them the power of encroachment that may be exercised at any time. Can **sell that property during their lifetime**. This power must be given specifically. If this is the case, any desires about future gifts are meaningless if the property has been sold.  ***Re Shamas:* (**“Everything to wife until last kid turns 21”) = Life Estate with a right to encroach on capital (3rd category). **Look at surrounding circumstances to construe will – find intention of testator. If intention is shown, mode of expression are unimportant. Look from perspective of testator.**  ***Re Fraser*: recipient of a life estate can enjoy revenue derived from corpus and no more unless Testator expressly/impliedly indicates an intention that recipient have power to encroach.**  ***Ceilin v Tressider:*** (Standard form used to convey EIFS to wife – but with note that upon disposal/sale, any proceeds to be distributed among kids. Provision held to be repugnant). **Clear intent to give EIFS absolute, any qualifications on this are repugnant and thus invalid.**   |  | | --- | | **Interests in a TRUST:** All the interests are equitable.  Ex: **“To T in trust for the benefit of UBC until it closes the Allard Hall and then to SFU”**   * T has EIFS held in trust for UBC (beneficiary). * UBC has an equitable EIFS determinable until closes the school. |   **Words of Purchase:** The person who is to acquire the interest in the land.  **Words of Limitation:** What kind of limitation are we talking about?  **LTA s 186**: s. [186(4)](http://pm.cle.bc.ca/clebc-pm-web/manual/42775/reference/legislationPopup.do?id=6) of the Act provides that express words of transfer are not necessary to transfer a freehold estate. Under s. [186(5)](http://pm.cle.bc.ca/clebc-pm-web/manual/42775/reference/legislationPopup.do?id=6), no words of limitation are necessary to create or transfer a fee simple absolute. However, s. [186(6)](http://pm.cle.bc.ca/clebc-pm-web/manual/42775/reference/legislationPopup.do?id=6) **recognizes that words of limitation are required** to create a life estate, a determinable fee simple, or a fee simple on condition.  **If it is unclear transferor is disposing of the greatest estate he/she owns (usually a Fee Simple):**  **Wills Estates and Succession Act (WESA) 41(3)(b)** – Property that can be gifted by will  A gift in a will takes effect according to its terms and, subject to terms, **gives to the recipient every legal/equitable interest in the property that the will-maker had the legal capacity to give.**  **S.19 (2) of the Property Law Act**, unless there is contrary intention in the document, we assume that a FS interest is being transferred.   * **Inter-vivos and will.**   **[1] Is there something that produces a *possessory interest*?**  **a) Is it freehold**   |  | | --- | | **Fee Simple Absolute:**   * + - No longer need to use **“To A and his heirs”** which has caused confusion.   + **S. 186(5) LTA**, no words of limitation are necessary to create or transfer a fee simple absolute.   + **Remember if not expressly stated (unclear)**, s. 19(2) PLA, and 41(3)(b) WESA mean transferor is disposing of the greatest estate her/she owns (usually the fee simple).   Words of limitation = “To A”; “To A and his heirs”  ***Tottrup v Ottewell Estate* (***twin brothers gave estate to each other in their wills*)**:**   * **‘His heirs’ will be presumed to be words of limitation (conveying a Fee Simple) unless circumstances suggest otherwise** (provide evidence if arguing “heirs” is not a word of limitation). * **\*Where words of a will are clear,** surrounding circumstances will not be used to change meaning of will. Terms of art (classical phrasing in wills) can still apply – legislation was not getting rid of the old terms, it was just expanding the scope of possible language**.**   **If Contention in a Will look to:**  **WESA s 42** – **Meaning of particular words in a will**  (1) This Section is subject to contrary intention appearing in a will.  (2) A gift of property in a will to persons described as ‘heir’ or ‘next of kin’ of the will-making or of another person takes effect as if it had been made to the persons among whom and in the shares in which the estate of the will-maker or other person would have been divisible **if the will-maker or other person had died w/o a will**.   * + - **The property would go to all the equal close relatives.** Likely spouse first, then children and other equal relatives. |  |  | | --- | | **Fee Tail: S.10 of PLA** abolishes Fee Tails – turns into EIFS.   * Words of Limitation = **“heirs of his/her body”; “his issue”; “his offspring”; “his seed”**   **Rules of Construction Applicable to WILLS (do not apply to Inter-Vivos transfers)**. Only if unsure or unclear apply rule in wilds case.  Presumption in *Tottrup* (**that “his heirs” is a word of limitation)** can be rebutted if there are children.   * **Rules in Wild’s Case:** “To A and his heirs/children/issue”   + **If there were Children at the time the Will was drafted:**     - “A’s heirs” “and his issue” = words of purchase     - **Co-ownership** situation between A and Children.       * Then ask who are and what is the meaning of the word of purchase?       * There is a presumption that we always transfer the highest interest – **S.19(1) assume EIFS.**   + **If there were no children at the time the Will was drafted**     - “A’s heirs” = words of limitation     - A gets fee tail – this becomes a fee simple (**PLA s10**), can freely dispose of the interest.   **PLA, s.10(2):** Abolishes fee tails (which limited inheritance to direct descendants: any attempts to create a fee tails is automatically converted to FS (or greatest interests in land). |   **S. 186(6)** **LTA** recognizes that words of limitation are required to create a life estate, a determinable fee simple, or a fee simple on condition.   |  | | --- | | **Life Estate**:   * **Must be created expressly - Words of limitation** = **“For the life of…”, “for life”, “on their deceased”** * **Remember if not expressly stated (unclear)**, s. 19(2) PLA, and 41(3)(b) WESA mean transferor is disposing of the greatest estate her/she owns (usually the fee simple) * Lasts for the life of the estate holder (**life estate**), or the life of another person (**life estate pur autre vie**) * **Remember that holder if a life estate has a duty not to create certain types of waste (see below for specifics).**   **FS owner has reversionary interest** – will eventually get land back  Life Tenant entitled to possession of land, any rents or profits arising from it, and can generally use land to same extent as FS owner. |  |  | | --- | | **Fee Simple Determinable on a limiting event (creates possibility of reverter):** A determinable fee simple is an estate that determines or comes to an end **automatically** upon the happening of the event specified in the words of limitation.   * Words of limitation that **indicate duration**: **“until, upon as, as long as, while, when”.** * Once created, the grantor has a “possibility of reverter” or a possibility of acquiring a vested estate in the future. |  |  | | --- | | **Fee Simple Absolute Defeasible on Condition Subsequent (Creates Right of Entry Future Interest):**  A fee simple on condition ends only when the event specified in the condition occurs and the grantor takes steps (re-enters) to bring the estate to an end. This is potentially infinite, so long as the condition is not breached, and thereafter until the holder of the right of entry timely exercises the power of termination.   * **Words of limitation: “provided that” or “but if”, “if it happens that”** are used to create a fee simple on condition. | | **Difference between FS Defeasible on Condition Subsequent and FS Determinable:** The determination is not automatic in condition subsequent but is automatic for determinable FS. |   **[2] Is it something that creates a *future interest*?**  **Consider if Legal Future Interest or Equitable**   * ***Re Robson*** – An interest in a Will is equitable.   **FUTURE INTEREST IN THE TRANSFEROR:**   |  | | --- | | **Reversion:** Interest that remains w/ transferor who has not exhausted whole of interest by transfer. **Not subject to rules against perpetuities as reversion is absolutely vested.**   * Ex) A (owner in FS) transfers Blackacre **“to B for life”** |  |  | | --- | | **Right of Entry (FS defeasible on condition subsequent):** Arises in a transferor (transferor has right of entry to property) when he conveys an apparent absolute interest (EIFS) but adds a **condition subsequent** which will divest the interest of the transferee in favour of the transferor and his heirs.   * **Created by words of limitation –** FS on condition ends only when the event specified in the condition occurs and the grantor takes steps (re-enters) to bring the estate to the end. * **Words of limitation:** **“but if” “subject to” “on condition of”, “provided that”** |  |  | | --- | | **Possibility of Reverter (Determinable Fee Simple):** is an estate that determines or comes to an **end automatically** upon the happening of the event specified in the **words of limitation**.   * **Words of limitation that indicate duration**: **“until, upon as, as long as, while, when”.** * “To A in FS until A marries B” – A gets determinable FS Grantor gets possibility of reverter. |   **FUTURE INTEREST IN THE TRANSFEREE (3rd party):**   |  | | --- | | **Remainder (Future interest left by grantor to a 3rd party):** Future interest in respect of which possession is postponed until some **prior freehold estate expires** and which does not operate so as to prematurely determine prior estate.   * A (owner FS) transfers “to B for life and then to C and his heirs” – B gets vested life estate in possession and C gets vested remainder in FS. | | **Vested Remainders:** Property is granted to grantee and then a named 3rd party that does not have a **condition precedent** attached. | | **Contingent Remainders: If a condition precedent is added to remainder, which has yet to be met, it becomes a contingent remainder as distinct from a vested remainder**. E.g. A transfers to B for life and then to C **if** C marries D.   * **There are issues of seisin when a remainder interest is contingent!**   + **Remainder in the Form of Right of Entry (prior interest is based on condition subsequent):** “to B and his heirs, **but if** B marries X then to C and his heirs”     - Gives right of entry to C – **would be void at CL under rule 4 of remainder rules** **but saved by s 8(2) of *PLA***.     - **Words of limitation:** **“but if” “subject to” “on condition of”, “provided that”**   + **Remainder in the Form of Possibility of Reverter (prior interest is based on a determinable interest):** “to B and her heirs **until** B ceases to be a member of the Bar of the province of BC, **and then** to C”     - Gives possibility of reverter to C – **void at CL and** **NOT saved by s 8(2) of *PLA*** – B keeps interest, **BUT argue is saved by s.8(1) given the language used.**     - **Words of limitation that indicate duration**: **“until, upon as, as long as, while, when”.** |  |  | | --- | | **Condition Precedent:** Person has to meet the condition to get the property.   * **Words of Limitation: “If”** * **Interest is said to be contingent.** * **If a condition precedent is added to remainder, it becomes a contingent remainder as distinct from a vested remainder**. E.g. A transfers to B for life and then to C **if** C marries D.   Ex) **Contingent Fee Simple/Life Estate Subject to condition precedent.** |   **If an Equitable Future Interest: (remember if equitable have to say: “Equitable Fee Simple Determinable” etc).**   * ***Re Robson***: **any future interest created in a will or trust are to be treated as equitable due to WESA s.162.** **Effect of mechanism of transmission on death means that inevitably the property interests the testator leaves is going to be equitable contingent remainders.** * **Created in express trust (inter-vivos or testamentary) or a Will.** * **Creates a valid qualification on a future interest.** Avoids issues of remainder rules – as a grantor (inter-vivos) or testator can avoid issues of siesin. * Are not subject to the remainder rules or destructibility |
| 1. **Ascertain whether or not the future interests are absolute; are they vested or contingent? (usually only an issue if there is info about intentions)** |
| **\*Presumption of Early Vesting:** if ambiguity, assume that an interest is vested.  **Vesting**   * + A) **may be vested absolutely, that is it can never be lost the holder of the estate**   + Ex) “To B for life, remainder to C”   + B) **It may be vested, subject to divesting [if condition is resolutive the interest goes to someone else]** - ***Browne v Moody***   + Ex) “To B for life, remainder to C but if C ever gets drunk he loses the interest”     - C has vested interest subject to divestment     - Would include Fee Simple Determinable or on Condition Subsequent.   + C) **It may be vested, without there being any prior estate, but with a provision which purports to keep the holder of the estate out of possession – *Re Squire***   + Ex) “To B in FS but not to be used until she turns 19”   **Vested in interest** = estate given without any precondition (something not needed to be done) – fixed right to take possession in the future.  **Vested in possession** = present entitlement to enjoyment of the property (ex. Life estate).  **Interest is contingent (non-vested), and remains contingent, until:**   1. Property is identified – need to know the property; 2. Identity of the grantee (person receiving interest) is established (usually an issue when property left to unborn children); 3. The right to the interest (as opposed from right to possession) does not depend on an event occurring (***Re Squire***); **AND** 4. Exact share of each member is determined (in a class gift).   **\*Rules against perpetuities only applies to contingent interests.**  **Gift-over:** where if you do not meet the contingency, the interest you would have got if you met the contingency is gifted over to another person. “To A for life, remainder to B if he turns 30, if he does not turn 30 then to C”  **Is it Vested or Contingent?**  **3 fold approach:**   1. **The intention of the document is what is significant** (***Re Carlson –*** *wanted son maintained until met age of majority thus contingent interest*) – construe document of all the words to find out the intention. 2. **If intention is not clear** – ***Re Squire*** – the law favors early vesting. All the contingency that speaks to a future condition to acquire speaks to enjoyment of the property (have property but cannot enjoy it until you meet the conditions). ***Saunders*** – if a person has an immediate interest and there is a qualification to be met then the law is that a person can ignore the future time period and get interest as soon as you are the age of majority. 3. ***Browne v Moody; Phipps* –** if **there is a gift over** this can indicate that an interest is supposed to be vested right away – vested subject to divestment.   **Words which help indicate:**   * **Absolute gift (vested interest)**: gift to the party intended to take “**at or when**” something happens (attains age of 21) – this is not a condition precedent. This is similar to the *Phipps* decisions, where the gift is absolute and the words were used **merely for the purpose of pointing out the time which the devisee was to take** **possession.** * **Gift in this case (contingent interest):** gift to children “**who (provided, if, or, after) shall** attain age of 21” – the gift is not to the children of Mrs. Festing, but only to the children who turn 21.   **An interest is vested (get possession in future):** when no condition or limitation stands in the way of enjoyment other than natural termination of prior estate (such as a life estate) – seen in ***Browne v Moody; Phipps; Re Squire*.**   * ***Browne v Moody***: Creates a presumption of early vesting of a **remainder interest** after a life estate; the existence of the prior estate does not in itself prevent the vesting of the remainder interest**.** Future interest is vested at death of testator not death of preceding life estate. * ***Phipps*: If there is a gift-over this makes an apparent contingent interest vested**. Takes the contingency language and makes it vested, always subject to divestment – this is a rule of construction and may be excluded if it appears by the Will itself that it does not apply. (Contingent language here was the use of: “Gift to a person when or if a specific event occurs (attainment of specific age), with a gift over if the event does not occur. In such a case the interest of the donee may be treated as vested subject to divesting.”) * ***Re Squire*: Interest is vested unless condition precedent to vesting is expressed with reasonable clearness**. ***Saunders*** decisions applies when interest is vested (contingency here was just dealing with possession – “Upon the age of 30”): property was to be immediately vested, the courts prefer early vesting, and the property in question was separated from the rest of the estate. The income was to be used for the beneficiary and there was no gift-over should the grandson not reach the age.   **An interest is contingent:** if vesting is delayed pending the occurrence of some **condition precedent**, **the occurrence of which is not inevitable** – seen in ***Festing*** (contingent on turning 21); ***Carlson*** (contingent on 21).   * ***Festing***: Gift in this case (contingent interest): gift to children **“who** shall attain age of 21” – the gift is not to the children of Mrs. Festing, but only to the children who turn 21. * ***Carlson*: Gift to son contingent *upon* attaining age of 21 –** Testor intended to allow Chris to get same start in life as his other children. The **income and capital** of the estate were to be used for Chris’s education. If the court vested 45% of the **capital** with Janice before Chris was 21 this would be inconsistent w/ the Wills intention. **Distinguished from *Re Squire*** b/c Squire was dealing solely with enjoyment of the property, but here all the funds are needed to help Chris get a fair start in life. |
| 1. **What is the Kind/Type of Future Interest (Classification of Future Interests)** |
| **MUST CATEGORIZE THE FUTURE INTEREST AS EITHER COMMON LAW OR EQUITABLE.**  **Common Law Future Interests:** Reversion, Rights of Entry, Possibility of Reverter, and Remainders (4 remainder Rules)  **VESTED FUTURE INTERESTS:**   * **Reversion**: Grantor has future interest in the property. A = “To B for life”. Grantor does not give the full estate in a single gift. * **Vested Remainder:** created in 3rd person after ending of a prior life estate, that is **not** subject to a condition or limitation.   **CONTINGENT FUTURE INTERESTS:** The interest is either Right of Entry, Reverter or a Remainder.   * **Right of Entry (Fee Simple defeasible on Condition Subsequent):** Arises in a transferor when he conveys an (EIFS) but adds a condition subsequent which will divest the interest of the transferee in favor of the transferor and his heirs.   + - * + Words of limitation: **“but if” “subject to” “on condition of”, “provided that”** * **Possibility of Reverter (Determinable FS or LE):** Created by a limitation on the FS or LE.   + - * + Words of limitation that indicate duration: **“until, upon as, as long as, while, when”.** * **Remainders (suspensive condition going to someone other than grantor):** Interest in 3rd party, possession is postponed until the prior freehold estate expires (subject to the 4 remainder rules).   + - * + Contingent remainders include Right of Entry and Possibility of Reverter in a third person.         + **“**To B for life and then to C **if** C marries D”   **If Legal –** must comply with CL Remainder rules, interest is subject to natural destruction  **Equitable Future Interests:** All interests in a will (***re Robson***) are probably equitable future interests.   * Equitable remainders are not subject to remainder rules. * If it is in a trust = equitable.   + If it is inter vivos = legal   + If Equitable: Must comply w/ Rule against Perpetuities/ BC Perpetuity Act, interest is not subject to natural destruction.   **4 REMAINDER RULES**  **Applies to *Inter-Vivos* transfer (per *Re Robson –* interest in a will are equitable thus not subject to remainder rules)**  **Applies to:**   * **Vested remainders:** created in 3rd person after ending of a prior life estate, that is **not** subject to a condition or limitation. * **Contingent remainders (including Right of Entry and Possibility of Reverter created in a 3rd person):** created in a 3rd person after ending of life estate, subject to **condition precedent.**   **4 REMAINDER RULES:**   |  | | --- | | **1) A Remainder must be supported by prior estate of freehold created by the same instrument as the remainder** |  * + Prevents Gaps in Seisin     - **Note Though: S.8(1): seems to suggest that *springing interest* is gone and can comply.**   + **Example that complies w/ rule: “to B for life, then to C and his heirs if C reaches 21” –** B’s interest supports C’s. B has a vested interest, C has a contingent remainder in FS – right of entry subject to divestment.   + **What does not comply: “B and his heirs if B reaches 21” – cannot create a *springing interest* (don’t know who has the property).There is a gap in seisin (**ex. A dies, B is only 19) **– this is an invalid future interest.**   + **Leasehold interests do not support: “To B for 2 years then to C if C turns 21”** – B has a leasehold thus C gets nothing.  |  | | --- | | **2) A Remainder must be limited so as to be capable of vesting, if it vests at all, at the latest at the moment of termination of the prior estate of freehold** |  * + Can put a contingency on the remainder (“if C turns 21”) but MUST ensure you do nothing to prevent the creation of a future interest which might vest outside the termination of the prior estate of freehold   + **Wait and see doctrine – depends on whether the contingency is met. VOID if there ends up being a gap in seisin.**      - **Ex)** “To B for life, remainder to C if C turns 21”(contingency) – if C turns 21 before B dies, then valid. If B dies before C turns 21 then the remainder fails.     - **If contingency is not met, the property reverts back to the grantor (A) or into the estate – it is naturally destroyed.**   + “To B for life and 1 year after his death to C” – this is a gap and is a void disposition. Void *ad initio –* void from the beginning.  |  | | --- | | **3) A remainder is void *ab initio* if it takes effect in possession by prematurely defeating the prior estate of freehold (rule eliminated by S. 8(2) PLA)** |  * + “To my daughter for life, but if she marries X, to my son and his heirs” – under CL rule violation for the shifting interest potential.   + **S. 8(2) PLA –** Permits the creation of a right of entry remainder shifting interest.   + **This applied to Life Estate.**  |  | | --- | | **4) Remainder after a fee simple is void.** |  * + Rule is partially destroyed by **s.8(2) PLA because it allows an Right of Entry to be created in a third person -** you can give a FS w/ a condition subsequent and right of entry in remainder (“but if’s”).   + **Rule still prevents a Possibility of Reverter to a third person after a determinable FS -** Because of **s 8(2) of *PLA*** you cannot have a determinable FS w/ a possibility of reverter in remainder**,** but   + “to B and his heirs, **but if** B marries X then to C and his heirs” (remainder in form of a **right of entry**)     - Gives right of entry to C – **would be void at CL** **but saved by s 8(2) of *PLA***.   + “to B and her heirs until B ceases to be a member of the Bar of the province of BC, **and then** to C” (remainder in form of **possibility of reverter**)     - Gives possibility of reverter to C – **void at CL and** **NOT saved by s 8(2) of *PLA*** – B keeps interest     - Under **s.8(1)** could argue possibility of reverter is saved. Language is not a strong but leaves open the possibility it could be saved. |
| 1. **Evaluating the Nature of the Condition (Qualification) - Is the Actual Condition or Limitation Legal? (Marriage, human rights, anything quirky).** |
| **Testator/Grantor specifies the qualification the grantee must get into (eligibility) to get the interest or possibly lose the interest.**  **3 bases for getting rid of qualifications (contingency):**   * + **Uncertainty (***Noble v Alley*)     - “Property defeasible if don’t marry a Jew” – uncertainty b/c what is a Jew?     - **Test (if condition subsequent or determinable)**: as per ***Noble v Alley,*** must know from the beginning what is objectionable. Must be “clear and distinct.” **Test of Uncertainty is high (*Clavering v Ellison*):** Condition must be such that the court can see from the beginning precisely and distinctly on the happening of what event it was the preceding estate was to determine.       * + If leave the decision as to “who is a Jew” to a 3rd party, this may be appropriate.     - **Test (if it is a condition precedent – lower level of certainty)** as per *Canada Trust* = A CONDITION PRECEDENT WILL NOT FAIL FOR UNCERTAINTY UNLESS IT IS CLEARLY IMPOSSIBLE FOR ANYONE TO QUALIFY.       * Does not have to be that clear, there merely needs to be enough that a person can say they fit the class or not.   + **Public policy (***Canada Trust Co; MacDonald –* discussed the availability of public policy). \*Cautiousness must be taken as courts are more willing to go w/ the law than invoke public policy.     - Public policy often used to strike down marriage qualifications.     - **Racial covenants** regarding ownership of land are no longer valid as per **s.222 LTA.**     - Being protective can influence the court.     - **Consider human rights legislation, does the Charter apply, look @ motive (good or bad?).**   + **Undue restraint on alienation (***Noble v Alley*)  Valid Conditions - *Re Kennedy Estate*:  * Clauses inducing a person to **assume the name of the testator** are valid in England. * That a person **must or must not marry a person of a specified religion** is a valid condition. * That a person **must not drink liquor or play cards** or must continue steady are valid conditions. * That a person must or **must not marry a person of a specified religion** is a valid condition. * That a person must **not drink intoxicating liquor, or play cards, or continue steady** are valid conditions. * **A condition against smoking = valid condition.**   **Invalid conditions:**   * A clause inducing a child not to associate with a parent. * **Racism**   **Jarman Rules – Is the interest to be split:**  **Consequences where a condition is invalid**: A CONTINGENCY CAN BE REMOVED AS BEING ILLEGAL (***Jarman Rules***)   * **Condition precedent** – land devised upon void condition – devise itself is VOID (gift and condition void) – just the one portion is voided (ex. To Q for life, remainder to B for life, remainder to Q’s child to cohabitate with same sex partner” – would get rid of devise to child (but could argue cy-pres…). * **Condition subsequent** (or **defeasible**) – land devised upon void condition – devise is ABSOLUTE.   + Just get rid of the offending qualification. * **Personal Estate is bequeathed on a void condition:**    + Condition subsequent: strike out offending condition     - Condition Precedent: If impossible or illegal (*malum prohibitum* - wrong due to statute) then bequest absolute.     - BUT if performance is at the sole motive of the bequest, or impossibility unknown to testator, or condition was impossible due to Act of God or where illegal (*malum in se* – morally wrong (horrifically evil)) 🡪 Gift and condition is void. * **A determinable FS that is VOID operates like a condition precedent** – if condition is void the grant fails b/c the determining event is integral with the fee (*Eisenhower* 1945 NSSC).   + Courts try to construe limitations as condition subsequent as giving for the reason that it prefers to give the present occupant a FS absolute by striking out the offending condition. |
| 1. **Rules against Perpetuities: If contingent** 🡪 **Will they reach the vesting/absolute stage within the Perpetuity Period?**    * **These rules only apply to contingent as opposed to vested interests. Most often apply to equitable future interests.** |
| **Presumed that the disposition was created in a trust arising in a will.**  **Perpetuity =** long series of **equitable future interests**, not subject to destructibility or subject to the remainder rules, land rendered inalienable because no one person is absolutely entitled to it.  **3 elements:** 1) Vesting; 2) Period Vesting must take place and 3) “Certainty of Vesting” – vesting can take place only within the period.  **Step 1: Apply the Common Law Rule**  **The Modern Rule against Perpetuities (CL):** The Rule provides that an interest in land is void *ab initio* unless it must vest, if at all, not later than 21 years after some **life in being** **at the creation of the interest**.   * **If a future interest has been created, then it must vest within lives in being plus 21 years (lives in being at creation of the interest + 21).**    + **“**Lives/Life in being” 🡪 anybody in the world who is alive **at the day** the interest was created (must be alive at the time the interest is created) – can include a fetus. **Also includes any spouse (regardless if they were born at the time or not – “unborn spouse”).**   + **When is the interest created?**      - “Date of creation” for inter-vivos = day the property is transferred.     - “Date of creation” for Will = date the person (testators) dies.   + **LIFE IN BEING DO NOT NEED TO WORRY ABOUT 21 YEARS – just descendants of a life in being (who was not alive at date of creation).**   + **CORPORATIONS/SCHOOLS ARE NOT LIVES IN BEING**   \*If there is even a remote possibility that the contingent interest will not vest during this period, gift is void (under any hypothetical).  **Hypothetical:** If you kill every single person alive at the time the interest was created (kill all lives in being), can you meet the contingency after 21 years?   * **If violates the rules of perpetuities**   + Equitable interest revert back to the grantor 🡪 called a **resulting trust.**   **\*Only if it is found that the disposition does infringe the rule is it necessary to turn to the perpetuities legislation to find a potential remedy that prevents the disposition from being VOID in whole or in part:**  **Step 2:** If Void under CL rules, may be saved by **BC Perpetuity Act:**  **Draftsman may choose the period as to when the interest must vest (7):** The drafter of an instrument may substitute a period of **up to 80 years** instead of the common law period for vesting (**contingency must occur within 80 years)**. If an instrument does not name a life in being, the Act creates a presumption that the interest must vest within 80 years.   * + Want to make it clear that the perpetuity period selected ex) “within 60 years of my death.”     - Need to know that beginning date: on death? Or something else that leaves the date open?   **S.3 (Perpetuity Act): APPLICATION OF REMEDIAL PROVISIONS: The remedial provisions of this Act must be applied in the following order:**   1. **S 14 (capacity to have children):** males 14 and older, females 12 – 55 (or proof they are still fertile) are presumed to be child-bearing; can be rebutted by evidence.    * If you can show the male is sterile **(for both men/women can adduce proof they are infertile)**, this will prove he is incapable of having children. If cannot look at other remedial provisions.    * **This is important as restricting the age of having children prevents any hypothetical where a person can have a child late in life which would not meet the contingency (“fertile 80 year old woman”).** 2. **S 9 (wait and see):** gift is presumed to be valid until actual events establish that the interest is incapable of vesting with the “**period”.** (Hypothetical where a person can take outside perpetuity period – S.9 allows you to wait and see).    * **This can also apply if there are no statutory lives:** “To UBC if it ceases to operate a faculty of law”    * **S 8:** No disposition creating a contingent interest in property is void as violating the rule against perpetuities only because of the fact that there is a possibility of the interest vesting beyond the perpetuity period.    * **If S.9 does apply, the duration of the perpetuity “Period” is:** 1) Statutory Lives in Being + 21 years 2) If no statutory lives, fixed period of 80 years.    * **S.10 Set out list of people who qualify as lives in being: Statutory lives (must be alive at time or an unborn spouse**) = grantor (if inter-vivos gift, not if a will), beneficiaries and potential beneficiaries, parents or grandparents or potential grandparents of beneficiaries or potential beneficiaries, holder of any prior interest, unborn spouses.      + **At CL this was similar to a “Royal Lives Clause” –** allows to wait and see until the last life in being of identified group (identified Royal (Queen, Charles, and Baby) then get 21 years.    * **S10(1)(b):** If there are no obvious lives in being **TREAT IT AS 80 YEAR PERIOD.** 3. **S 11 (age reduction)(occurs after the “wait and see” time and the grantee will not meet it):** Where vesting is void b/c instrument **SPECIFIES AGE OVER 21** – court may reduce the age. Gift will be construed to refer to the nearest age that would prevent it from being void: **add 21 to actual age of child rather than age stipulated**.    * Age reduction only occurs if the **AGE IS ABOVE 21 (CANNOT BE APPLIED IF SAY AGE WAS SET AT 18)**. This section only applies if the interest in the first instance is created by reference to the attainment by any person of a specified **age exceeding 21.**    * **S.11(1)(b): AGE REDUCTION IS ONLY ALLOWED IF THE INTEREST WOULD NOT BEEN VOID IF SET AT 21 YEARS, IF IT WOULD HAVE BEEN VOID (UNDER A HYPO) THEN AGE REDUCTION DOES NOT APPLY.**   **Ex) “**To A for life remainder to her first **grandchild** to reach the age of 30 years.” – After applying Wait and See this would still have been VOID even if age was 21. A grandchild under a hypothetical could violate the rule even if the age was 21.   * + If grantor sets age at 25, if C exists and will not meet the contingency (21 + 2 < 25), thus age reduction allows the age set by the testator to be reduced (23 in this case).  |  | | --- | | **If Grandchild – wait and see – age reduction likely does not count b/c of s.11(d) – then go to Cy Pres**  **If Child – wait and see - age reduction – cy pres** |  1. **S 13 (general cy pres):** May vary the disposition to conform w/ rule against perpetuities where it can be discerned the general intention of the disposition (“cy-pre rule”).    * If able to show and establish what the **testator intended (and this is in conformity)**, the court may rearrange and help out.      + Argument to persuade the court and rephrase the contingency as a “last minute” approach. |
| **Residual Issues** |
| **Life Tenant:**  **Obligations of a life tenant to those entitled in Reversion or Remainder:** Those entitled in reversion or remainder are entitled to have the land pass into their possession, on the termination of the life estate, in substantially the same form as it was when received by the life tenant.  **Waste – kinds of change to the property that has a negative impact (this is a cause of action)**  **Permissive Waste:** Passive conduct which permits decay (buildings deteriorating over time). Life tenant is not responsible for this, unless expressly made so by terms of instrument creating the interest.  **Voluntary Waste**: Waste that results from activities of life tenant (actually doing something) – life tenant is responsible for this. Remedy can be damages or injunction.  Nature of voluntary waste may be stated in one of two ways: (1) Any act of life tenant which causes permanent damage to land (could include destroying a log cabin and replacing it with a modern home, could be opposite what the grantor intended); (2) Any act of life tenant which changes nature of land, whether for better or for worse. Doctrine of ameliorating waste – even though a change for better is technically waste, if it improves land it will not render life tenant liable in damages, and usually an injunction will not be awarded.   * Four categories of voluntary waste (what a life tenant CANNOT do): (1) Timber; (2) Mines and minerals; (3) demolishing or altering buildings; (4) Changing the use to which the land is put.   **Equitable Waste**: Voluntary waste that is expressly permitted, life tenant is “unimpeachable for waste” (without impeachment for waste) – not liable for permissive or voluntary waste.   * \*A court can still restrain a life tenant from using their “unimpeachable for waste” right unconscionably (with malice a person damages the property). Equitable waste is the waste not included even when a person is “unimpeachable for waste.”   **\*Vane v lord Barnard:** Life tenants are liable for equitable waste – a tenant for life may be granted the consent to commit what would otherwise be waste, thus is “unimpeachable for waste” although is generally restrained from committing equitable waste.  **\*New Westminster (City) v Kennedy:** One in possession will be restrained from using his legal power unfairly (unconscientiously) so as to destroy or depreciate the subject-matter. Case of equitable waste.  **\*Mayo v Leitovski, 1928:** Life tenant for life has the obligation to pay property taxes (problem here is life tenant had no money) and must safeguard remainder man’s rights; cannot avail herself of her position as a tax-sale purchaser to defeat reversionary interest. Life tenant can do nothing during the continuance of her estate to impair the estate in remainder, and on the other hand, the remainder person cannot do any act which will affect the life estate. \*Problem here is the interest (EIFS) went back to the life tenant |