




## PRESENT POSSESSORY INTERESTS




### FEE SIMPLE ABSOLUTE

A **fee simple absolute** is the largest interest a person can have in land under the common law. The holder of a **fee simple** has absolute power to freely transfer the land. It is an estate of infinite duration. Modernly, a **fee simple** is presumed in the absence of a contrary intent.

- \* At common law, in order to create a **fee simple** specific language had to used; "to A and A's heirs". Modernly a fee simple is presumed unless a contrary intent is evidenced.

 It is called a "fee" estate, because it could last forever, or infinitely.

- \* Fee simple absolute = A to B. [ A is the grantor, B is the grantee.]

 "Fee" estates are **not** subject to the Rule vs. Perpetuities.





### FEE SIMPLE DETERMINABLE



A **fee simple determinable** is an interest in land that can be terminated by the occurrence of some event. Upon the occurrence of the **defeasible** event, the land **automatically** reverts to the grantor. A **fee simple determinable** is freely transferable, however, the grantee takes the land subject to the possible automatic forfeiture.


The **future** interest the grantor retains is called a **possibility of reverter**.

- \* **Fee simple determinable** = A to B, so long as no alcohol is consumed. (A, the grantor, retains possibility of reverter; B takes a fee simple determinable.)

 A **fee simple determinable** is created by durational language (e.g., "so long as", "during", "until" "while", etc.).

 If the defeasible event occurs (e.g., alcohol is consumed) the land **automatically** reverts back to the grantor.

- \* "Fee" estates are **not** subject to the Rule vs. Perpetuities as they are considered vested upon creation, as are **possibilities of reverter**.  

- \* If a future interest is created in a **third party**, the third party's interest is called an **executory interest**. The defeasible fee would be called a **fee simple determinable subject to an executory limitation**. See below. 



## FEE SIMPLE SUBJECT TO AN EXECUTORY INTEREST

A fee simple subject to an executory interest is an interest in land that can be terminated by the occurrence of some event. Upon the occurrence of the *defeasible* event the land will *automatically* revert to a third party. This type of interest in land is freely transferable, however, the grantee takes the land subject to the possible automatic forfeiture.

The *future* interest the third party holds is called an executory interest.

\* Fee simple subject to an executory interest = A to B, if alcohol is consumed, then to C. (A is the grantor and relinquishes all interest, B is the grantee who holds a fee simple subject to an executory interest, C is the executory interest holder.)



Usually, the terminating event in an executory limitation is uncertain to occur.



If the defeasible event occurs (e.g., alcohol is consumed) the land *automatically* goes to the third party.



“Fee” estates are not subject to the Rule vs. Perpetuities, because they are already considered vested. (Note - that the executory interest created is subject to the Rule.)

Hopefully, you have noticed that a fee simple determinable with an executory limitation and a fee simple subject to an executory limitation are suspiciously similar. The distinction is important only where the *executory interest* created is void under some law, such as the Rule vs. Perpetuities.

If the grantor intended to create a *fee simple subject to an executory limitation*, and the executory interest is void, the first taker is left with a fee simple absolute; but if the grantor intends to create a *fee simple determinable with an executory limitation*, and the executory interest is void, the original taker is left with a fee simple determinable, and a possibility of reverter implied in the grantor. Since the courts favor the “free alienability” of land, in a situation where the interest could be classified either way - argue that the court would favor classifying the interest as a fee simple subject to an executory interest, since it is more freely alienable. (The original taker is left with a fee simple absolute.)









What??



## FEE SIMPLE ON CONDITION SUBSEQUENT

A fee simple on condition subsequent is an estate in land created when upon transfer, the **grantor** reserves the **right** to terminate the interest upon the happening of a stated event. This type of interest in land is freely transferable, however, the grantee takes the land subject to the possible forfeiture.

The *future* interest the **grantor** retains is a right of entry.

- \* Fee simple on condition subsequent = A to B, but if alcohol is consumed, then A may retake. (A is the grantor and retains a *right of entry* interest, B is the grantee and obtains a fee simple on condition subsequent.)
-  The grantor **does not** automatically get the land if alcohol is consumed, grantor must exercise his **right** to regain the land.
-  Only a *grantor* may hold a **right of entry** interest.
- \* A fee simple on condition subsequent is created by conditional language, such as; “ but if”, “provided that”, “may enter”, etc.)
- \* A fee simple on condition subsequent **is not** subject to the Rule vs. Perpetuities. 
-  By majority rule, the grantor must **expressly** reserve the right to terminate the estate. Watch for this on the MBE.
- \* “Fee” estates **are not** subject to the Rule vs. Perpetuities as they are considered vested; as are **rights of entry**.  

Real property law favors the **free alienability** of land; or the ability to transfer ownership to another. Thus, if it is unclear whether an interest is a *fee simple determinable* or fee simple on condition subsequent, the courts will apply a **constructional** preference in favor of a fee simple on condition subsequent.

This is because of the general rule that *ambiguous language in a deed be construed in favor of the grantee*, plus the general assumption that a *fee simple on condition subsequent* is more freely alienable. This is because: **1)** a breach of the condition does not **automatically** terminate the estate granted and **2)** defenses such as estoppel and waiver are more likely to be successful if the grantor does not elect to terminate the estate within a reasonable period of time.

Expanding further still, if possible the courts will find the words of “condition” to be a mere covenant - which would give rise to a breach of contract cause of action, rather than a forfeiture of the estate.