

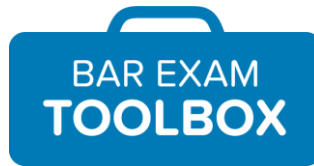
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing a topic in Property – present and future estates. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Welcome back. Today, as part of our “Listen and Learn” series, we’re discussing a topic in Property – present and future estates. Since this topic is too large to cover in one episode, today we’re just going to discuss the default property interest, the fee simple absolute and defeasible fees, along with the corresponding future interests. Stay tuned for a future episode covering life estates, reversions, and remainders. So, let’s get started.

Lee Burgess: Present estates, which are sometimes referred to as freehold estates, address who has the right to currently possess real property. A future interest, in contrast, is an ownership interest in existing real property, but the right to possession won’t commence until sometime in the future. Essentially, a future interest holder does not currently have the right to possess the property, but will earn that right upon the occurrence of a specific event or condition.

Lee Burgess: The most common form of property ownership is the fee simple absolute, which is often shortened to just the “fee simple”. This is an absolute ownership interest of a potentially infinite duration. This is traditionally what we think of when we think of property ownership. When you purchase a home, you have title to your home and that home will be passed on to your heirs, unless you sell or otherwise transfer that property to someone else. A fee simple absolute does not terminate, unless the owner dies without any heirs. When an owner dies without heirs, the property will go to the state. But in all other circumstances, when an owner dies, the property will pass on to the owner’s heirs, then to their heirs, and so on.

Lee Burgess: Present and future interests can seem very abstract at first, so let’s illustrate this with an example: O conveys Willow Lane to A. O is conveying a fee simple absolute to A, because they are conveying the entire property interest to A. A



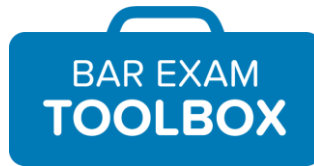
will, therefore, have absolute ownership over the property until they die. Willow Lane will then pass to A's heirs when A dies and continue on like that indefinitely, unless someone down the line dies without any heirs or the property is otherwise transferred to someone else.

Lee Burgess: Fee simple absolute is also considered to be the default form of ownership. Whenever a conveyance of property is ambiguous, such that it cannot be determined what type of interest the grantor intended to give away, it is assumed the grantor intended to convey a fee simple absolute.

Lee Burgess: An understanding of the fee simple absolute is important to our discussion on defeasible fees, because all other present and future estates are carved out of the fee simple absolute. To visualize this, think of the fee simple absolute as a pie. When an owner divides their interest in property, they are giving away pieces of that pie. All those pieces – the present and future interests – must add up to the fee simple absolute, or the whole pie. This is because the fee simple absolute is essentially the title to the entire property. So, if the owner only gives away their present estate in the property, they must retain a future interest in that property or give that future interest away to someone else.

Lee Burgess: One way an owner might carve out that fee simple absolute is through the conveyance of a defeasible fee – our main topic for today. A defeasible fee is also an ownership interest of potentially infinite duration, but unlike with a fee simple absolute, that ownership may be terminated upon the occurrence of a specific event. Essentially, with a defeasible fee, you will receive an ownership interest that will indefinitely pass on to your heirs; however, that interest can be terminated if you, or later your heirs, don't meet certain conditions or do something that is prohibited. If the specified condition happens, you forfeit your ownership interest and that interest either reverts back to the grantor or passes on to someone else. Who ultimately receives the property after your interest is lost depends on the type of defeasible fee at play, which we'll talk about in a moment. But if that condition never occurs, your ownership interest will continue on forever and pass to your heirs and their heirs, etcetera – just like with a fee simple absolute.

Lee Burgess: There are three types of defeasible fees: (1) fee simple determinable; (2) fee simple subject to condition subsequent; and (3) fee simple subject to an executory limitation. Each of these present estates creates a corresponding future interest: (1) possibility of reverter; (2) right of re-entry; and (3) executory interest. Like mentioned above, the defeasible fee and the future interest it creates are both carved out of the fee simple absolute. Each are pieces of the



whole pie, and together they add up to the entire title interest of the property, also known as the fee simple absolute.

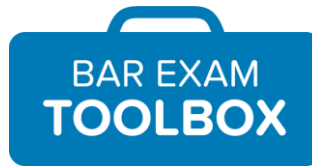
Lee Burgess: Let's start by looking at the first type of defeasible fees – a fee simple determinable. Here, the grantee holds a fee simple interest in the property until a specific condition occurs. A fee simple determinable is limited by durational language. So, you want to look for words or phrases like “so long as”, “while”, “during”, “until”, or other similar such language.

Lee Burgess: A fee simple determinable will terminate automatically when the condition happens, and the fee simple interest then reverts back to the grantor and their heirs, if the grantor has passed. Let's consider an example: O conveys Willow Lane to A, so long as the property is used as a farm. In this example, O is conveying a fee simple interest to A. A will retain that interest indefinitely, until the property stops being used as a farm. Once A or any future heirs stop using the property as a farm, the property automatically reverts back to O or their heirs. O or their heirs will then own a fee simple interest in the property once more. This is because once A's interest reverts back, there are no more pieces to carve out. The whole pie is intact again and back in O's possession.

Lee Burgess: To understand this better, let's look more closely at O's interest. When O conveys Willow Lane to A, so long as it's used as a farm, what interest does O retain in the property? O is going to retain a future interest known as a possibility of reverter. Remember, this is a future interest, because O doesn't have the right to possess Willow Lane currently. They gave that right away to A. But they retain the future right to possess Willow Lane if it ever stops being used as a farm. This is called a possibility of reverter, because the property will only revert back to O if it is no longer used as a farm. If Willow Lane continues to be used as a farm for the rest of time, then it will never revert back to O. So, that reversion is only a possibility.

Lee Burgess: Next, let's talk about fee simple subject to condition subsequent, which I'm going to shorten to just “condition subsequent” for the purposes of our discussion. Here, the grantee holds a fee simple interest in the property, but if a condition happens, the grantor has the right to terminate the estate. The key here is to look for conditional language, such as “but if”, “on the condition that”, “provided that”, etcetera.

Lee Burgess: Unlike with a fee simple determinable, a condition subsequent does not terminate automatically when the specified condition occurs. This is because the future interest the grantor retains with a condition subsequent is a right of re-entry. There is a judicial process that the grantor must go through in order to



exercise their right of re-entry and take back the property. You don't need to know the specifics of that process for the bar exam or your law school exams. You just need to know that the grantor must go to court in order to retake the property when you're dealing with a condition subsequent. Until that happens, the grantee will continue to own the land, even though the condition has occurred.

Lee Burgess: Consider this example: O conveys Willow Lane to A, but if the land is used for non-agricultural purposes, the grantor may re-enter. Here, if the land is ever used for anything other than agriculture, O can go to court and retake the property. However, if O never exercises that right of re-entry, A gets to keep their interest, even though the property is not being used for agriculture. That is the major difference between a condition subsequent and a fee simple determinable – there is no automatic reversion back to the grantor.

Lee Burgess: Our last defeasible fee is a fee simple subject to an executory limitation. Here, the grantee holds a fee simple interest in the property, but if a condition happens, the title automatically passes to a named third party. Since a fee simple subject to an executory limitation can be limited by either durational or conditional language, the key thing to look for in identifying this type of estate is that the conveyance is to a third party. With fee simple determinable and conditions subsequent, the property reverts back to the grantor, but with fee simple subject to an executory limitation, the property will pass to someone else.

Lee Burgess: Let's discuss this example: O conveys Willow Lane to A, so long as the land is used as a farm, then to B. O grants the property to A. A and A's heirs can keep the property indefinitely, so long as they use the land as a farm. When the land is no longer used as a farm, it goes to B, not back to O. B then holds a fee simple absolute and will keep the property indefinitely. It will never revert back to O. O has given away the whole pie – one piece to A and one piece to B. A forfeited their piece to B, so now B holds the whole pie.

Lee Burgess: Now, what type of interest does the third party – B in our example – hold in a fee simple subject to an executory limitation? They hold a future interest called an executory interest. An executory interest is going to cut the prior estate short upon the occurrence of a specified condition. In our example, A would have had the property indefinitely, but B's executory interest cut A's interest short when A stopped using the land as a farm. This type of interest is executory, because B isn't entitled to the property until the condition is breached. If the property continues to be used as a farm indefinitely, B will never get the property.

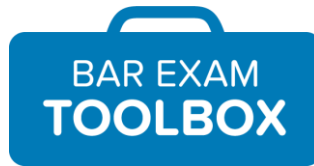


Lee Burgess: Executory interests are a little more complicated than the future interests we discussed previously. There are two sub-types of executory interests: shifting executory interests and springing executory interests. We'll start with shifting executory interests. Shifting executory interests cut short a prior estate created in the same conveyance. They essentially "shift" the property interest from one grantee to another on the happening of the specified condition. For example, O conveys Willow Lane to A, but if B returns from London, then to B. B has a shifting executory interest. If they ever return from London, they will cut A's property interest short and that interest will "shift" to them.

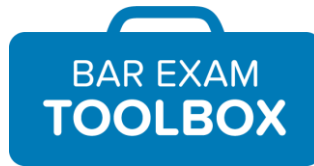
Lee Burgess: A springing executory interest can form in one of two ways. First, a springing executory interest may divest the grantor of their interest. Consider: O conveys Willow Lane to A, if A graduates law school. If A ever graduates from law school, A will divest O of their interest in Willow Lane. In contrast, if A never graduates from law school, O will retain Willow Lane indefinitely.

Lee Burgess: The second way a springing executory interest might form is if the property temporarily reverts back to the grantor to fill a gap in possession of the estate. An example of this would be: O conveys Willow Lane to A for life, and one year after A's death, to B. Here, O conveyed a life estate to A. I know we haven't covered life estates yet, but you don't need to know the specifics for the purposes of this example. Just know that O gave the property to A for the duration of A's life. Now, in this example, B does not get the property until one year after A's death. That leaves a one-year gap in the possession of Willow Lane, but we can't just leave the property unowned for the year. So, to "fill the gap", Willow Lane will revert back to O for one year following A's death. Once one year has passed, Willow Lane will "spring" from O to B, who will then hold a fee simple absolute in the property indefinitely.

Lee Burgess: Hopefully you're still with me! I know that was quite a lot of rules to take in, so let's walk through a couple of hypos to see how these rules play out with more context. Our first hypo is adapted from Question 2 on the [July 2015 California bar exam](#), but we've edited it a bit to focus solely on the present and future estate issue. Since we did not discuss restraints on alienation in this podcast episode, please ignore any potential issues related to that topic in this question. Focus solely on identifying the type present and future estate at issue. As I read through this hypo, try to keep in mind what we've learned so far today. In particular, look for that key language we talked about. Does the conveyance use conditional or durational language? Is the property passing back to the grantor or to a third party? The answers to those questions will help you identify the type of defeasible fee at play here. With that said, let's dive into the question:



- Lee Burgess: "Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny for so long as neither Martha nor Lenny make any transfer of Greenacre. In the event of such a transfer, Greenacre shall automatically revert back to Oscar.
- Lee Burgess: What property interest in Greenacre, if any, do Oscar, Lenny, and Martha possess?"
- Lee Burgess: Okay, so here, Oscar started off with the entire pie. He has a fee simple absolute. He then conveys the property to Martha and Lenny on the condition that neither transfer the property. Again, for our purposes, we're going to ignore any potential validity issues with this condition placing a restraint on alienation. We're just going to focus on what type of estates are created through this conveyance.
- Lee Burgess: The first question we want to ask is whether this conveyance uses durational or conditional language. Oscar used the phrase "so long as", which is conveying the length of time that something will last. So, this is durational language. The next question we want to ask is whether the property reverts back to Oscar or passes to someone else upon the occurrence of the condition, or whether either Martha or Lenny transfer the property. Here, the hypo specifically told us that Greenacre will "automatically revert back to Oscar" if such transfer occurs.
- Lee Burgess: So, since we have durational language and the estate will revert back to the grantor, Oscar has granted Martha and Lenny a fee simple determinable. Oscar, therefore, holds a possibility of reverter. It's a possibility, because Oscar only gets Greenacre back if Martha or Lenny transfer the property. Otherwise, Greenacre remains with Martha and Lenny indefinitely. Because Oscar holds a possibility of reverter, Greenacre will automatically revert back to him if Martha or Lenny transfer the property. He does not need to go to court to take the property back.
- Lee Burgess: Hopefully this hypothetical helped provide some context as to how these issues might play out on an exam. Let's walk through another example to be certain. This hypothetical is pulled from Question 5 on the [2011 California bar exam](#). Like with our first example, we've adapted it to reflect only the present and future estates issue, and you should ignore any potential issues regarding restraint on alienation:
- Lee Burgess: "Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris. The deed provides: 'If Blackacre, or any portion of Blackacre, is transferred to a third party, either



individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre.'

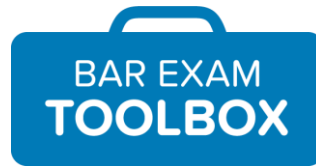
Lee Burgess: What interest in Blackacre, if any, did Andy initially convey to Beth, Chris, and himself?"

Lee Burgess: Here, Andy initially owned Blackacre in fee simple absolute, so he held the whole pie. He then conveyed a piece of that pie to Beth and Chris. What type of present estate do you think Andy conveyed here? Let's go through our "key language" questions. Did Andy use durational or conditional language here? This is not quite as clear as our first example, because the conveyance isn't written in the traditional "O to A, if..." structure. What the deed essentially says is if either Beth or Chris transfer Blackacre, Andy can retake the property. This is not conveying any sense of time, so we aren't looking at durational language here. Rather, Andy has established a condition: If Beth or Chris transfer Blackacre, they lose their interest in the property.

Lee Burgess: Now, if Beth or Chris transfer Blackacre, who gets the property – Andy or a third party? Here, the deed says "Andy shall have the right to immediately re-enter." Andy is retaining a right to retake the property, so he's granting Beth and Chris a fee simple subject to a condition subsequent. Because Andy conveyed a condition subsequent, we know that the future interest he retained is a right of re-entry. It is important to note here that the property is not going to automatically revert back to Andy if Beth or Chris transfer Blackacre. Don't let the deed's use of "immediately" confuse you. When a grantor retains a right of re-entry, they must go to court and proceed through the required judicial process to take back the property. If Andy never goes to court to retake Blackacre, Beth or Chris and/or whomever the property was transferred to will continue to possess Blackacre.

Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](https://www.barexamtoolbox.com/contact-form) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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