GET A LIFE:  
What To Do When A Life Estate Shows Up On Title  
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I. Introduction

A. Life estates may appear straightforward, but a survey of relevant Virginia statutes and case law reveals that they are not so simple. Life estates are tricky. Understanding the various rules pertaining to life estates is critical to effective title examination for the abstractor, title agent and settlement agent. So that you don’t miss a thing, I suggest approaching life estates with the following steps:

II. Step 1: Look at the type of document purporting to create a life estate.

A. A life estate in real property must be created by either a will or a deed. See Va. Code § 55-2 (“No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will . . . .”).

B. A special rule pertains to deeds which must be remembered at the outset: a deed cannot be used to create a life estate in anyone other than the grantor. This is commonly known as the “stranger rule,” which has its origin in the English Common Law principle that a life estate is a reservation of rights, not a granting of rights. Since a deed to a third party would be a granting of rights, so the argument goes, a grantor could only reserve a right for himself, not a third party. See generally Shirley v. Shirley, 259 Va. 513 (2000).

C. England modified the stranger rule by statute in 1925 so that now a reservation of a life estate can vest in a third party to a deed, as well as the grantor.¹

D. In Virginia we are still stuck with the stranger rule because Virginia Code § 1-200 adopts English Common law “insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth.” Our Virginia Supreme Court has affirmed that the stranger rule is not repugnant to Virginia law, nor has it been altered by the General Assembly; therefore, it is still good law in Virginia.² Shirley, 259 Va. at 518.

E. Hypothetical: conveyance from A to B for life, remainder to C

1. The conveyance to B fails; C takes fee simple.³ And that’s why you need to know, at the outset, the type of document purporting to create a life estate.

² It is interesting to note that there are a number of Virginia cases that may have had a different result had the stranger rule been raised. See, e.g., Edmunds & Abernathy v. Pike, 136 Va. 270 (1923) (court held that deed from A to B and C for life, then to D created valid life tenancy).
³ What then could A do to create a life estate in B, remainder to C without violating the stranger rule? At least two options are possible, each using two deeds. Option 1: the first deed would be from A to A and B in fee simple. The second would be from A and B to B for life, then to C. Option 2: the first deed would be from A to A for life, then to C. The second deed would be from A to B (conveying a life estate).
III. Step 2: Recognize that Virginia law creates a presumption of conveying fee simple.

A. Once you have made the preliminary determination that the stranger rule does not apply, it is time to start from the “the point of beginning” as we are fond of saying in real estate. Where do we begin? We begin with the presumption that fee simple is conveyed in our deed or will. Our Virginia Legislature has declared that:

When any real estate is conveyed, devised or granted to any person without any words of limitation such devise, conveyance or grant shall be construed to pass the fee simple or other whole estate or interest which the testator or grantor has power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant.


B. To put it another way, this Code Section presumes that words in a deed or will shall be construed to convey the maximum interest owned (generally, fee simple). This presumption articulated by our Virginia Legislature is echoed by Virginia courts when interpreting such words of conveyance.

C. But how do we overcome that presumption of fee simple to create a life estate instead? We turn again to Va. Code § 55-11. As that section provides, we must find “words of limitation” that would suggest conveying something less.

IV. Step 3: Do you have sufficient words of limitation that demonstrate a contrary intention to create a life estate?

A. Knowing that we start from a presumption of conveying fee simple, our task is now to find limiting words that would suggest conveying something less.

B. What words are sufficient to create a life estate?


3. Unfortunately, we cannot rely on “talismanic language” to guide us; rather, we are left to the “infinite variability of human expression.” F&M Bank v. Trustees of Front Royal United Methodist Church, 35 Va. Cir. 209 (Va. Cir. 1994).

C. And yet some distinctions can be made. A survey of Virginia cases reveal two flavors of life estates: express and implied. As you will see later on in the analysis, this is a necessary distinction to make; however, “[t]he cases construing express and implied life estate are far from clear in drawing a demarcation line between the two.” Allin v. Morris, 73 Va. Cir. 202 (2007).

1. An express life estate seems to be formed when words expressly referring to the life estate are used.

   a. See, e.g., Borum v. National Valley Bank of Staunton, 195 Va. 899 (1954) (“I will, bequeath and devise all of my property, personal, real and mixed to my wife for and during her natural life . . . , and any of said
property . . . that may remain in her possession at the time of her death, I will, devise and bequeath to my heirs at law”).

b. See also Edmunds & Abernathy v. Pike, 136 Va. 270 (1923) (court finding life estate where preamble recited that A and B “shall have what is known as a life right in and to the property” and granting clause conveyed to them “for the period of their life”).

2. An implied life estate is something less.
   a. See, e.g., Robinson v. Caldwell (devise reciting “I give all my Real Estate to my wife and at her death it is to go to F. M. Robinson” held to convey a life estate); Robinson v. Robinson, 89 Va. 916 (1892) (devise reciting “I give to my children by her, and their descendants at their death, the remainder of my property” held to convey a life estate)
   b. Edwards v. Bradley, 227 Va. 224 (1984) (court held devise to daughter life estate where devise would revert to testators grandchildren if daughter attempted to encumber property or any creditor of daughter attempted to subject the property to pay daughter’s debts)
   c. Trustees of Duncan Memorial Methodist Church v. Ray, 195 Va. 803 (1954) (“I . . . request that my wife . . . take immediate possession of my home with its contents . . . and everything that stands in my name. At my wife’s death, the remainder of what may be left is to be divided equally between . . . [x] and . . . [y]); Estate of Fields v. C.I.R., T.C. Memo 1981-592 (1981) (“50% of . . . my estate I will to my Wife . . . for her use and control as long as she lives. At her death any amount of this portion of my estate remaining in her possession shall be given to my son”)
   d. Some of these cases do not explicitly call the devise or conveyance “implied,” but such reasoning is inescapable if the court determined that the devise with an absolute power of disposition created a fee simple b/c only an implied life estate can have that happen.

V. Step 4: Are such words ambiguous or unclear?

A. Once you have identified words of limitation that seem sufficient to create a life estate—either express or implied—you must ask whether such words are ambiguous or unclear. If the answer is “yes,” you may have something other than a life estate, which may change the overall analysis of your title work.

B. To aid in this determination, the courts have enumerated several guiding principles.
   1. Determining intent is paramount.
      b. “The intent of the parties must be gathered from the language they actually used, if that can be done. ‘[T]he true inquiry is not what the grantor meant to express, but what the words do express.’” Goodson v. Capehart, 232 Va. 232 (1986) (quoting Morris v. Bernard, 114 Va. 630, 633 (1913)).
c. “If the language is explicit and the intention is thereby free from doubt, such intention is controlling, if not contrary to law or to public policy, and auxiliary rules of construction should not be used.” Camp at 598; Spicely v. Jones, 199 Va. 703, 706 ((1958).

d. For an example of a life estate case resolved by ascertaining the intent of the testator, see White v. White, 183 Va. 239 (1944).

   a) Issue: An ambiguity was created when the testator devised a mansion house and surrounding property to his son “to be held by him for his natural life and then . . . the remainder, after his death, . . . to his legal heirs.” The testator further provided that “I want my wife to have a home at the mansion house with [my son], as long as she remains my widow.”

   b) Facts: After the testator died, his son married, had a child and died. Tensions soon escalated between the testator’s widow and his son’s widow, each claiming an exclusive right to the mansion. The son’s widow claimed that her infant son now owned the mansion in fee simple because the testator’s will provided that at his son’s death, the property was to go to his heirs. Testator’s widow asserted a life estate, hanging on to the words, “I want my wife to have a home at the mansion house.” In response, the son’s widow argued that testator’s widow’s life estate was measured by the son’s life, since the testator stated, “I want my wife to have a home at the mansion house with my [son].”

   c) Conclusion: Resolving the ambiguity, the court scoured the testator’s entire will and concluded that testator had an intention to provide for his beloved wife for the duration of her life and not just the duration of his son’s life.

C. But what is to be done if ambiguities cannot be ascertained by divining the intent of the grantor or testator? If the instrument remains uncertain and ambiguous, other rules of construction may be employed.

1. “[W]here two clauses are irreconcilably repugnant in a deed, the first prevails.” Camp at 598 (citing Mills v. Embrey, 166 Va. 383, 387 (1936)). And yet the one important exception to this rule is that in conflicts between the granting clause and other parts of the deed, the granting clause prevails. See Goodson (granting clause, suggesting fee simple, prevailed over deed’s preamble, suggesting life estate).

2. Remember that while employing these rules of construction to resolve ambiguities, we are to be guided by our “point of beginning,” the presumption that when real estate is conveyed, there is a bias toward finding that fee simple is conveyed. Goodson at 236 (citing cases) (“the language in a deed will be construed to pass to the grantee the greatest estate with the language employed is capable of conveying”). See also Va. Code § 55-11 (“When any real estate is conveyed, devised or granted to any person without any words of limitation such devise, conveyance or grant shall be construed to pass the fee simple or other whole estate or interest which the testator or grantor has power to dispose of in
such real estate, unless a contrary intention shall appear by the will, conveyance or grant.”)

3. For examples of what courts have deemed “ambiguous,” see Allin v. Morris, 73 Va. Cir. 202 (2007) (court held ambiguous conveyance to “Emory C. Dean and Melvie M. Dean . . . and to the survivor of them and to the heirs and assigns of such survivor forever as at common law”)

VI. Step 5: Is there an absolute power of disposal?

A. Assuming that you still have a life estate—either express or implied—after resolving any ambiguities in the deed or will, you must determine whether there is an absolute power of disposal. In other words, to put it simply, does the purported life tenant have the power to dispose of the property absolutely during his or her life?

B. Similar to the two flavors of a life estate, an absolute power of disposal may also be “explicit” or “implied.” But this seems to be a distinction without a difference.

C. The main objective here is to determine whether or not an absolute power of disposal exists, not the particular flavor.

D. What constitutes an absolute power of disposal?

1. The word “use” and similar expressions, such as “use as she pleases” or “use as he sees fit” do not constitute an absolute power of disposal. See, e.g., Bristow v. Bristow, 138 Va. 67 (1924) (“I give to my wife . . . all of my real and personal estate . . . to use as she pleases during her life and while she remains my widow”); Johns v. Johns, 86 Va. 333 (“I will and desire that my wife . . . shall have and hold all my estate during her natural life, for the benefit of herself and children, to be used as she may think proper”)

2. When the element of control is introduced, an absolute power of disposal has been held to exist.

a. See, e.g., Borum v. National Valley Bank of Staunton, 195 Va. 899 (1954) (“I will, bequeath and devise all of my property, personal, real and mixed to my wife for and during her natural life with full power and authority to consume or dispose or sell and convey all or any of said property as she may see fit in her sole discretion and any of said property, real or personal, that may remain in her possession at the time of her death, I will, devise and bequeath to my heirs at law”)

b. Estate of Fields v. C.I.R., T.C. Memo 1981-592 (1981) (“50% of . . . my estate I will to my Wife . . . for her use and control as long as she lives. At her death any amount of this portion of my estate remaining in her possession shall be given to my son”)

c. Trustees of Duncan Church v. Ray, 195 Va. 803 (testator requested wife “take immediate possession” of all his property, to pay everything that he owed and to “have full control her life time”)

d. Gardner v. Worrell, 201 Va. 355 (1959) (will provided that wife could do as she pleased with the property; sell anything she wanted to sell; and make or transfer title to anything that she did not sell)

e. Mowery v. Coffman, 185 Va. 491 (1946) (testator devised to wife “all my real and personal estate of any and every kind of which I shall die
seized and possessed . . . with full authority to dispose of any part thereof that she may deem necessary for her support and maintenance.”

E. Notably, the mere execution of a deed of trust does not constitute an absolute power of disposal unless that deed of trust is foreclosed upon. Va. Code § 55-7 (“A deed of trust or mortgage executed by the life tenant shall not be construed to be an absolute disposition of the estate thereby conveyed, unless there be a sale thereunder.”)

VII. Step 6: If there is an absolute power of disposal, apply the appropriate rule pertaining to explicit or implied life estates.

A. Remember Step 3, where you determined whether you have sufficient words to create a life estate—either express or implied? Here is where that distinction makes a world of difference.

B. Since the case of May v. Joynes, 61 Va. (20 Grat.) 692 (1871), Virginia courts have consistently held that a conveyance or devise to a purported life tenant with an absolute power of disposal was instead a fee simple interest with nothing to the purported remaindermen, the rationale being that such absolute power to dispose of the property is inconsistent with any limitation upon the estate. See, e.g., Davis v. Kendall, 130 Va. 175 (1921) (discussing cases).

C. Courts have consistently applied this common law principle until that rule was partially abrogated by Virginia Code § 55-7, which states in pertinent part as follows:

If any interest in or claim to real estate or personal property be disposed of by deed or will for life, with a limitation in remainder over, and in the same instrument there be conferred expressly or by implication a power upon the life tenant in his lifetime or by will to dispose absolutely of such property, the limitation in remainder over shall not fail, or be defeated, except to the extent that the life tenant shall have lawfully exercised such power of disposal.

D. A plain reading of Virginia Code § 55-7 would seem to indicate that the common law rule of May v. Joynes has been eviscerated completely. However, there are two limitations worth noting:

1. First, note that the evisceration only applies to the extent that the absolute power of disposition has been exercised.
2. Second, note that the Virginia Supreme Court has held that this Code Section only applies if the life estate is express, not when it is implied.

E. And so here is where the determination of whether you have an express or implied life estate makes a world of difference when there is an absolute power of disposal. We can state the rule as follows:

1. An express life estate coupled with an absolute power of disposal creates a fee simple interest in the purported life tenant to the extent the absolute power of disposal has been exercised; any remainder vests in the remaindermen.4

4 Where there is an express estate for life intended by the testator, Va. Code section 55–7 partially abrogates this rule by validating the remainder interest to the extent that the life tenant has not disposed of it. Trustees of Duncan Memorial Meth. Church v. Ray, 195 Va. 803, 80 S.E.2d 601 (1954); Borum v. National Valley Bank of Staunton, 195 Va. 899, 80 S.E.2d 594 (1954). If you have an express life estate with absolute power of disposal, the outcome

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2. An implied life estate coupled with an absolute power of disposal creates a fee simple interest in the purported life tenant; remaindermen get nothing.5

VIII. Step 7: Evaluate the impact of judgments and other liens.

A. Now that you have gone through the foregoing steps, you should know exactly who owns what. Perhaps you thought the grantee on a deed had a life estate, but now you realize that the attempt to convey a life estate failed because of the stranger rule and now title is vested fully in the remainderman. Or perhaps the words you thought were sufficient to create a life estate were ambiguous and after you employed the rules of construction above, you realize that the purported life tenant actually owns it all in fee simple. Or perhaps at first blush you seemed to have an implied life estate, but then you realized that it was coupled with an absolute power of disposal, and so your life tenant actually owns it all in fee simple. Or perhaps you had an express life estate coupled with an absolute power that was exercised over part of the subject property, so now the purported life tenant owns part of the property in fee simple and the remainderman owns whatever is left over.

B. Knowing who owns what is critical to determining what impact judgments and other liens or encumbrances may have on your title work.

C. Foreclosure

1. The simplified facts of Edmunds & Abernathy is as follows: grantor conveyed what appears to be an express life estate to A and B, with a remainder to C. C executed 3 deeds of trust on the property. The property was then sold to D pursuant to these 3 deeds of trust. At some point, B died. The Court held that A was entitled to recover possession of the property as the surviving life tenant.a

D. Taxes

1. Norfolk v. City of Norfolk, 179 Va. 495 (1942): the lien for taxes was only on the life estate and, the interest of the life tenant having ceased, the unpaid taxes were clouds upon appellant’s title.


In any city, county, district or town:

1. Taxes assessed against real estate subject to taxes shall be a lien on the property and the name of the person listed as owner shall be for convenience in the collection of the taxes. The lien for taxes shall not be limited to the interest of the person assessed but shall be on the entire fee simple estate. There shall be no

depends on whether that power was exercised. If that power was not exercised, then the purported life tenant remains a life tenant, and the purported remainderman remains a remainderman. But if that purported life tenant exercises the absolute power of disposal, then the purported life tenant becomes a fee simple owner to the extent of the exercise, and the remainderman receives whatever is left over, if anything

5 If you have an implied life estate with an absolute power of disposal, the purported grantee of the life estate actually has fee simple, and the purported remainderman has nothing. Estate of Fields v. C.I.R., T.C. Memo 1981-592 (1981) (“50% of . . . my estate I will to my Wife . . . for her use and control as long as she lives. At her death any amount of this portion of my estate remaining in her possession shall be given to my son”).
lien when for any year the same property is assessed to more than one person and all taxes assessed against the property in one of the names have been paid for that year.

2. When taxes are assessed against land in the name of a life tenant or other person owning less than the fee or owing no interest, the land may be sold under § 58.1-3965 et seq. for delinquent taxes provided the owner of record or his heirs be made parties to the proceeding for sale.

E. Judgments

1. Do judgments attach to a remainderman’s interest? The answer is “sometimes.”
2. When considering how a judgment interacts with a remainderman’s interest following a life estate, Jones v. Hill, 267 Va. 708 (2004) is instructive.
   a. Facts: When Thomas Jones died, he left a life estate to his wife Annie with an absolute power of disposal, with the remainder (if any) to be divided among his 5 children, including his son, Vaiden. Hill subsequently obtained a judgment against Vaiden and recorded it in the county land records. Vaiden then died. Approximately 1 year later, the Annie (the life tenant) also died. Hill then sought to enforce the judgment against real property originally owned by Thomas, asserting that her judgment attached to the remainder interest owned by Vaiden prior to his death.
   b. Analysis, Part 1: To determine when a remainder interest vests, the Court applied the “early vesting rule,” which provides that “where a bequest or devise is made and the property is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator, rather than contingent upon the state of things which may happen to exist at the period when the legatees or devisees are entitled to the possession of the property given.” Jones, at 711 (citing cases). Relying on this rule, the Court concluded that Vaiden’s interest vested when Thomas died. Notably, the Court stated that this vested interest was subject to the divestiture of Annie while Annie was still alive, but that Annie never exercised her absolute power of disposal to effect such a divestiture.
   c. Analysis, Part 2: Reasoning further, the Court then turned to Va. Code § 8.01-458, which provides that “[e]very judgment . . . shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes posses or entitled . . . .” A vested remainder interest is an interest to which someone is “entitled” and therefore subject to a judgment creditor’s lien. In further support of this conclusion, the Court noted that vested interests are subject to the rights of creditors, and they may be sold or inherited. Jones, at 712.
   d. Takeaway: In the end, Jones v. Hill stands for the proposition that a judgment attaches to a remainderman’s interest as long as that interest is not divested by the life tenant.
e. But suppose the facts were different. Suppose that after Hill had docketed her judgment against Vaiden’s vested remainderman interest, Annie exercised her absolute power of disposed to work a complete divestiture of Vaiden’s interest. Would Hill still have a lien on the subject property? The Court’s statements in Jones seem to indicate that Hill would not have a valid lien, but there are no direct cases on point to answer that question.

IX. Conclusion

Now that you have reviewed many Virginia cases on life estates, perhaps you feel a little less sure of yourself on this topic as you are now swimming in the deep end of the pool. Perhaps you are thinking that the title to this article should be revised from “Get a Life” to “Get a Life Preserver.” If that’s you, take heart. If you are an abstractor, just do what you do anyway—cast a wide net and report all the possibilities to the title agent. If you are a title agent and you are unsure of your analysis, just call your underwriter. And if you are the underwriter, keep swimming!