

DEBUNKING THE SANCTITY OF PRECEDENT

DAVID M. BECKER*

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|-----------------------------------------------------------------------------------------------------------------------------------------|-----|
| I. INTRODUCTION | 854 |
| II. SOME CASES—WHAT COURTS SAY AND DO ABOUT DEVIANT LANGUAGE..... | 861 |
| A. “To B and Her Children”..... | 861 |
| 1. <i>Some General Observations</i> | 861 |
| 2. <i>The Rules in Wild’s Case—Then and Now</i> | 863 |
| 3. <i>The First Rule—Analysis of Cases</i> | 869 |
| a. <i>Standard Formulation—Fee Tail</i> | 869 |
| b. <i>Variant Formulation—Fee Simple</i> | 871 |
| c. <i>Variant Formulation—Life Estate in the Parent, Remainder in Fee Simple to the Children</i> | 875 |
| 4. <i>The Second Rule—Analysis of Cases</i> | 878 |
| a. <i>Standard Formulation—Parent and Children Receive a Fee Simple Absolute as Tenants in Common</i> | 878 |
| b. <i>Variant Formulation—Life Estate in the Parent, Remainder in Fee Simple to the Children</i> | 887 |
| B. “To B at \$N Per Year for as Long as B Resides in the City of X” | 894 |
| III. DEVIANT LANGUAGE—ASSESSING THE IMPORTANCE AND VALUE OF PRECEDENT | 916 |
| A. <i>Some Observations About Interpretive Consistency and the Circumstances in Which It Becomes Important</i> | 916 |
| 1. <i>Title Assessment</i> | 916 |
| 2. <i>Ownership Assessment</i> | 917 |
| 3. <i>Ownership Creation</i> | 918 |
| B. <i>Deviant Language—The Impact of Ad Hoc Interpretation upon Title Assessment, Ownership Assessment and Ownership Creation</i> | 919 |
| 1. <i>Ownership Creation</i> | 927 |
| 2. <i>Title Assessment</i> | 931 |
| 3. <i>Ownership Assessment</i> | 943 |

* Joseph H. Zumbalen Professor of the Law of Property, Washington University. A.B. 1957, Harvard University; J.D. 1960, University of Chicago. The author acknowledges the helpful comments of Daniel L. Keating, Frank W. Miller, R.H. Helmholz and Robert J. Lynn. The author also acknowledges the assistance and important contributions of six former students: Heather E. McIntyre, David N. Royster, Nathan C. Collins, David M. Unseth, Elizabeth A. Rice and Phillip Stanton.

| | |
|--------------------------------------------------------------------------------|-----|
| IV. HOW COURTS SHOULD INTERPRET DEVIANT LANGUAGE..... | 951 |
| A. <i>A Process for Ad Hoc Interpretation of Deviant Language</i> | 955 |
| B. <i>Illustration and Application Process for Ad Hoc Interpretation</i> | 960 |
| V. CONCLUSION | 971 |

I. INTRODUCTION

To “B and her heirs” is a familiar phrase that lawyers have used, and still use, to create a fee simple absolute. When asked to interpret this phrase, courts almost always confirm this result by relying on the precedents set by earlier court decisions to support their conclusion.¹ To be sure, this makes sense.

For the law and lawyers, the past is inescapably a large part of the present. Stability and certainty are indispensable ingredients of self-governance. Lawyers must successfully predict the application of legal principles that are relevant to their clients’ circumstances.² Without consistent affirmation of

1. By way of holding or dicta, courts will usually cite cases when they affirm the meaning of “and her heirs” as words of limitation indicating creation of a fee simple. *See, e.g., Chesnut v. Chesnut*, 151 A. 339, 340 (Pa. 1930). Sometimes, however, courts do not cite cases for precedential meaning of “and her heirs” because, within the context of the case, they view such interpretation as indisputable. *See, e.g., Gilchrist v. Empfield*, 45 A. 46 (Pa. 1900). However, there are decisions in which a court rejects the usual meaning of such language because it believes that the words of the entire instrument clearly indicate an intent to create something less. *See, e.g., In re Wettengel’s Estate*, 123 A. 488 (Pa. 1924).

2. Mr. Justice Holmes, at a dedication of a new hall at the Boston University School of Law, offered this explanation about what lawyers do:

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgements and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

Years later Karl Llewellyn explained law and lawyering in this manner:

This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*

....

... Whether about disputes, or about when wills are valid ... we come back always to one common feature: The main thing is what officials are going to *do*. And so to my mind the main

rules by courts, prediction is impossible and litigation becomes inevitable.³

thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow. In many cases that prediction cannot be wholly certain. Then you have room for something else, another main thing for the lawyer: the study of how to make the official do what you would like to have him. At that point “rules” loom into importance. . . . For judges think that they must follow rules, and people highly approve of that thinking. So that the getting of the judge to do a thing is in considerable measure the art of finding what rules are available to urge upon him, and of how to urge them to accomplish your result. . . . Rules, too, then, and their arrangement, and their logical manipulation, make up an unmistakable portion of the business of the law and of the lawyer.

KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 12-14 (2d ed. 1951).

3. See LLEWELLYN, *supra* note 2, at 13, 66. Llewellyn observed further that adherence to precedent produces efficiency in problem solving and that it minimizes the opportunity for capricious adjudication:

The foundation, then, of precedent is the official analogue of what, in society at large, we know as folkways, or as institutions, and of what, in the individual, we know as habit. And the things which make for precedent in this broad sense are the same which make for habit and for institutions. It takes time and effort to solve problems. Once you have solved one it seems foolish to reopen it. Indeed, you are likely to be quite impatient with the notion of reopening it. Both inertia and convenience speak for building further on what you have already built; for incorporating the decision once made, *the solution once worked out*, into your operating technique *without reexamination* of what *earlier went into* reaching your solution. . . . Finally, it is clear that if the written records both exist and are somewhat carefully and continuously consulted, the possibility of change creeping into the practices announced is greatly lessened. At this place on the law side the institution of the bar rises into significance. For whereas the courts might make records and keep them, but yet pay small attention to them; . . . or might even deliberately neglect an inconvenient record if they should later change their minds about that type of case, the lawyer searches the records for convenient cases to support his point, presses upon the court what it has already done before, capitalizes the human drive toward repetition by finding, by making explicit, by urging, the prior cases.

. . . .
 . . . To continue past practices is to provide a new official in his inexperience with the accumulated experience of his predecessors. . . . [E]ven though his predecessors may themselves, as they set up the practice, have been idle, ignorant, foolish and biased, yet the knowledge that he will continue what they have done gives a basis from which men may predict the action of the courts; a basis to which they can adjust their expectations and their affairs in advance. To know the law is helpful, even when the law is bad. Hence it is readily understandable that in our system there has grown up first the habit of following precedent, and then the legal norm that precedent is to be followed.

LLEWELLYN, *supra* note 2, at 64-66.

Cardozo noted that adherence to precedent should be the rule and not the exception. Among other things, he maintained:

The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149-150 (1921).

Our system of judge-based law does permit change. Old rules can mutate and new ones can evolve over time.⁴ Sometimes the process is accelerated when new principles are born and existing law is dismissed. Indeed, one should never regard these rules as absolute truths that lead inexorably to one conclusion and a single result. To be sure, case reports are dominated by decisions in which lawyers and judges have expansively applied precedential rules, sometimes in a manner that affirms everything that was declared in a seminal opinion.⁵ Nevertheless, these reports are also replete with illustrations in which a precedential rule is strictly confined to the precise facts that surrounded its origin.⁶ When this happens, a new rule—or a variation of the old one—emerges and thus becomes the predominant governing principle.

Nevertheless, consistent application of rules found in prior cases is the norm, especially when such rules are founded upon fairness and produce just results.⁷ Judicial adherence to such precedent is especially important to the law of property. Without certainty as to rules and their application, owners could not determine what they have acquired, how they can use it and what they might convey. Without adherence to precedent, these private determinations could not be made; instead, there would be constant litigation, resulting in significant costs to the interested parties and to the entire community.⁸

4. For a discussion and illustration of the process by which rules mutate and new rules evolve, see Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948).

5. Karl Llewellyn labels this technique the "loose view" of precedent, and it is used when a precedent is welcome. LLEWELLYN, *supra* note 2, at 67-68.

6. Llewellyn labels this technique the "orthodox" or "strict" view of precedent, and it is used when a precedent becomes unwelcome. *Id.* at 66-67. For a book devoted to precedent, appellate advocacy and decision making, see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

7. When, however, a rule has outlived its "just" origins, it becomes ripe for change.

But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener [sic] in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. . . . "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule."

See CARDOZO, *supra* note 3, at 150-51 (citation omitted).

8. Without consistency as to rules and their application, owners would seldom know without a

The quest for certainty in property, however, goes further because the requirements of our common-law tradition transcend the ordinary requisites of consistency. For example, one cannot create new kinds of interests and, often, one cannot attach different attributes to old ones.⁹ Interests in property cannot be configured in unlimited fashion to reflect the whims of the parties

court determination what they have acquired or how they can use or transfer it. A court determination would be a prerequisite unless one wanted to undertake the risk of a future adverse judicial decision. Either way, a system ripe with uncertainty would generate costs. These costs would derive from the constant litigation itself. But there would also be costs derived from lost opportunities because the expense of the litigation needed to clarify and ratify these opportunities would act as a deterrent. These costs would, of course, be private. Nevertheless, there would be public costs as well. Such a system would generate greater use of the courts and eventually lead to more judges, juries and courtrooms. There would also be public costs generated by lost opportunities because of the inefficiencies associated with the transfer and use of land. Uncertainty as to rules would deter development. Less development might mean less housing and factories, fewer jobs and diminished opportunities for real estate and income taxes.

9. How does one construe the following devise: "To my granddaughter Sara A. Whiton and her heirs on her father's side"? Does this create a new species of inheritable estate that passes by intestacy to only her heirs on her father's side? Relying upon the proclamations of past jurists and commentators, Oliver Wendell Holmes answered the latter question in the negative: "A man cannot create a new kind of inheritance." *Johnson v. Whiton*, 34 N.E. 542, 542 (Mass. 1893). Consequently, he held that Sara A. Whiton received a fee simple absolute, which she could convey to others. *See id.* at 542.

This pronouncement of Mr. Justice Holmes has been cited repeatedly. One treatise has offered the following elaboration and explanation of the principle that underscores this quotation:

It is conceivable that, in a matured system of law, interests in land could be created without models and with an infinite variety of legal consequences, somewhat as contracts are formed. In other words, a legal system could exist in which each grantor would make his own provisions applicable only to the individual grant—as to inheritance, whether in male or female line or alternately; as to privileges of enjoyment, whether absolute or limited according to the whims of the conveyor; as to powers of alienation, if any, whether they are to be broad or narrow. In fact the Anglo-American land law has not developed in this way. Interests are created in accordance with more or less fixed types, known as estates. Those fixed types . . . were differentiated in three distinct ways. First, as to size or duration; second, as to mode of creation; and third, as to characteristics or legal consequences. . . . [A]s the concept of estates developed, the assumption was made that the fee simple absolute was the largest interest, and that all other estates were carved out of that interest. Hence, all other estates are regarded as smaller, and as having a shorter potential duration. Each estate requires a different method for its creation, and each, when created, has different legal consequences. It is significant here, however, to note that once the estate created is found to be in one of these fixed categories, then the legal consequences of that type of estate follow as a matter of course. . . . No doubt it is extremely useful to have these ready-made patterns from which one may select the type best fitted to his needs; for it is unlikely that the man who provides for an estate of a given duration . . . considers any of the legal consequences other than the extent of enjoyment. Yet, one legal category having been selected, legal consequences, such as liability for waste, right to prevent trespasses, and power of alienation, necessarily follow. The rigidity which might be thought to accompany such a theory is avoided in substantial part by a recognition that some variations are permitted if the creator of the estate elects to indicate special limitations.

LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 61 (2d ed. 1956 & Supp. 1991) (footnotes omitted).

to a transfer.¹⁰ Their choices are restricted to specific species of ownership that have evolved over time. Interests are described and distinguished in terms of their potential duration. The law limits the durational choices one may carve out of the largest estate, one that reflects infinity—the fee simple absolute. These acknowledged choices—known as estates—may have different requirements for creation. Once a transferor makes an appropriate durational choice, certain attributes automatically attach to the estate, which may produce significant differences in freedom and benefits. The common law has allowed some variation as to duration and attributes.¹¹ Nevertheless, property interests can never stray too far from preordained pigeonholes.

The reason for restricting private choice as to property interests should be apparent. The subject matter of these relationships is not short term, and when it comes to land, one must presume that the time frame is forever. This means that there will be many transfers, many owners and many interests. Each new owner must assess what he is acquiring and what he can do with it. By severely reducing the kinds of interests one can create and the kinds of attributes one can attach to these interests, the law has greatly enhanced the predictability of ownership. Consequently, the common law of property has produced not only a tradition of consistency and stability as to rules, but also a limited menu of ownership. Both factors make the system viable. Both factors make it possible for interests to be exchanged and enjoyed without constant interpretation and supervision by courts. As a result, a heightened level of certainty has been a staple of property law, sometimes producing

10. Unlike the law of contracts, one does not have virtually unlimited freedom to create and shape property interests to fit the needs of each transfer like a glove. More specifically, only certain kinds of estates can be created. These estates are known and classified according to their potential duration. One cannot deviate from these acknowledged estates. For example, now that the fee tail has been abolished in nearly all jurisdictions, one cannot create an estate that must remain within each generation of descendants for as long as the donee's line of descent continues. Further, even if one elects to create an acknowledged estate, one might not have unlimited freedom to vary the attributes accorded that estate. For example, one creating a fee simple absolute cannot eliminate its alienability or give it qualities of inheritability that deviate from those specified in the governing statute of descent and distribution. See SIMES & SMITH, *supra* note 9, § 61.

11. For example, one can create interests—defeasible estates—that may terminate an estate before its maximum duration has elapsed. Perhaps the most common kind of defeasible estate arises out of the landlord-tenant relationship. More specifically, if *L* creates a two-year lease with *T* that is subject to termination by *L* if *T* fails to pay a monthly rental, then *T* has an estate for years subject to a condition subsequent, and *L* has a reversion coupled with a power of termination. See 2 RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 247[1] (Patrick J. Rohan ed., 1983)

One can also vary the attributes of an estate. Ordinarily, a life tenant is entitled to income from the estate but cannot invade the principal. Additionally, a life tenant cannot transfer an interest greater than the one she holds; consequently, her transferee can acquire merely a life estate per autre vie—an estate measured by the original life tenant's life. Nevertheless, one who owns a fee simple absolute can create a life estate that empowers the life tenant to transfer the underlying fee and, further, to invade the principal without becoming liable for waste. See *id.* ¶ 202[3].

rules and principles that continue even though their logic and rationale can no longer withstand careful scrutiny.

Certainty, stability and predictability also require consistent treatment of words and phrases. Since language is the medium of transfer, its consistent use and interpretation is essential to the creation of precise interests. Consequently, the evolution of specific language formats should not be surprising. Courts have crystallized phrases for creating each kind of estate and for making these species defeasible.¹² Such language patterns permit owners to create certain kinds of interests with confidence that a court will enforce their respective choices. Consistent use and affirmation of language also enables buyers to evaluate the layers of ownership that have accumulated over time and, therefore, to know exactly what they will acquire and what they can do with it.

To “*B* and her heirs” is an acknowledged language format. At one time it was the only phrase that would accomplish the creation of a fee simple absolute. Today, although it is not the only way to create such estate, “and heirs” remains a popular and reliable format for achieving this result.¹³ As a

12. For example, the language one might use to create a fee simple absolute would be: “To *B* and his heirs” or “To *B* in fee simple absolute.” To create a life estate, one might state: “To *B* for life.” See *infra* note 206. To create a periodic tenancy from year to year, one might merely say: “To *B* from year to year.” See *infra* note 207. To create an estate for years, specifically with a maximum duration of two years, one might provide: “To *B* for two years from the date of this lease.” See *infra* note 208. And to create an estate at will, one might state: “To *B*, terminable at any time and for any reason by either *A* [the lessor] or *B* [the lessee].” See *infra* note 209.

Further, to make a fee simple determinable, one might provide: “To *B* in fee simple so long as Blackacre is used exclusively for residential purposes; when and if it is used for any other purpose, *B*’s interest will automatically terminate and Blackacre will revert to *A* [the grantor], her heirs or assigns.” It should be noted that courts will ordinarily reach the same construction—a fee simple determinable—even when the grantor’s reverter is not expressed. Language of special limitation—phrases such as “so long as,” “during,” “until,” or “unless”—is generally enough to achieve creation of a determinable interest with a possibility of reverter impliedly retained by the grantor. See RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 44 cmt. 1, illus. 17 (1936). However, this is not true for the fee simple upon a condition subsequent. To assure creation of this estate one must include an express condition and a provision that gives the grantor a power to reenter and terminate upon breach of such condition. For example, one might provide: “To *B* in fee simple upon the condition that Blackacre is used exclusively for residential purposes; if and when it is used for any other purpose, *A* [the grantor] shall have the power to reenter and terminate the estate of *B*.” Although under limited circumstances courts might still find a fee simple upon a condition subsequent when the limitation fails to include a power of termination, its expression is absolutely necessary if one wishes to assure creation of such interests. See *id.* § 45, cmts. j, m, n.

13. Since the 13th century, “and heirs” were the only words of general inheritance sufficient to create a fee simple under the common law when the conveyance was by an inter vivos deed. This rigid requirement has been abrogated by statutes in nearly every jurisdiction and replaced by a presumption favoring a fee simple absolute unless there is contrary language within the deed. See 1 AMERICAN LAW OF PROPERTY §§ 2.3-.5 (A. James Casner ed. 1952 & Supp. 1962). Despite these statutory changes, it is still common practice to include the phrase “and heirs” in an inter vivos deed as affirmative evidence of an intent to convey a fee simple. See 3 AMERICAN LAW OF PROPERTY, *supra*,

result, courts are justifiably cautious about abandoning precedent and opening up this phrase to new meaning. Instead, courts continue to standardize its meaning by reinforcing the conclusions reached through centuries of decisions.¹⁴

Despite the presence of reliable formats, transferors often use language that does not embrace conventional phrases associated with particular interests. Instead, they use deviant language that is susceptible to multiple and quite different meanings. Under this circumstance, many courts still look to precedent to find the proper interpretation of such deviant language and, therefore, the solution to the dispute.¹⁵ Indeed, although the transferor's intent may motivate a court's selection of a particular precedent, judges respond as if they are constrained by precedent and they almost always seem uncomfortable without it. But should they be?

This Article addresses the question of how courts should interpret deviant language—language that falls well beyond the parameters of conventional phraseology. This Article concludes that courts should abandon precedent completely in favor of other governing factors—such as intent, custom, fairness and other policy considerations—because the benefits of ad hoc determination far outweigh the costs of inconsistent treatment of such language. To reach this conclusion, Part II first examines what courts actually say and do about deviant language in two illustrative situations, one involving consideration and the other a gift. Part III assesses the importance and value of precedent in these situations. It begins with further analysis of the reasons for interpretive consistency and the circumstances in which adherence to precedent might become important. Within the context of these situations, Part III then examines the impact of ad hoc interpretation of deviant language. Finally, Part IV recommends how courts should interpret deviant language, concluding that most cases should be governed by factors peculiar to the case and not by precedent.

§ 12.45; OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 208, 753-55 (5th ed. 1989).

14. See, e.g., *Beeman v. Stilwell*, 189 N.W. 969 (Iowa 1922); *Wayburn v. Smith*, 239 S.E.2d 890 (S.C. 1977). *Wayburn v. Smith* involved a deed that contained conflicting provisions. The "premises" portion of the deed expressly created a life estate in the grantee, with a remainder to the heirs of her body. *Id.* at 891-92. The "granting clause" mentioned the name of the grantee, but it contained no language limiting the nature of her estate. *Id.* at 892. Finally, the "habendum" clause conveyed the subject matter to the grantee "her Heirs and Assigns forever." *Id.* Apparently, South Carolina still followed the common-law rule in which a life estate arises by implication if the limitation contains no words of inheritance. The Supreme Court of South Carolina found that the deed gave the grantee a fee simple absolute. Even though the court acknowledged there was strong evidence of an intent to create merely a life estate in the grantee, it concluded that the special language of inheritance—namely, "her Heirs and Assigns forever"—has a specific meaning that courts must honor, especially when it comes to matters that affect title to real estate. See *id.* at 892-93.

15. See *infra* Part II.

II. SOME CASES—WHAT COURTS SAY AND DO ABOUT DEVIANT LANGUAGE

While this section attempts to show that deviant language formats really do arise, its main purpose is to illustrate the process courts use to construe such language and the kinds of difficulties they have had in doing this. Two examples are used. The first involves a gift and the method of transfer is almost always testamentary. The other involves a lifetime transfer—by deed or lease—that is usually supported by consideration. While these examples are not the only deviant words and phrases that appear in the case literature, they are recurrent formats that have produced significant consistency in the results judges reach and the reasons upon which they rest their decisions. Consequently, the results and underlying rationale are sufficient to constitute precedent and to support established meaning.

A. “To B and Her Children”

1. *Some General Observations*

Consider this testamentary devise by *A*: “To *B* and her children.” On its face this gift obviously poses serious problems as to its meaning and interpretation. Conceivably, this devise creates a gift only in *B* and the words “her children” describe the interest *A* gives to *B*.¹⁶ If so, there is ambiguity because the supposed words of limitation are unconventional and could describe more than one kind of estate. This phrase, however, also appears to identify who should receive this gift; more specifically, that both *B* and her children are recipients.¹⁷ If so, then it does not contain any words of limitation that explain the kinds of interests *B* and her children will receive, nor does it reveal whether possession between *B* and her children is to be concurrent or consecutive. Further, if concurrent, the language does not clarify how ownership is to be divided, nor does it explain whether the group takes as a class.

These ambiguities evoke real problems because the resolution of the foregoing issues determines the kind of interest created. Because the kind of interest created governs its attributes, it invariably provides a solution to real disputes over ownership and use. For example, if the phrase “her children” amounts to words of limitation that define the interest received by *B*, then a court might classify the resulting interest as a fee simple absolute in *B*

16. See *infra* Parts II.A.3.a, II.A.3.b.

17. See *infra* Parts II.A.3.c, II.A.4.a, II.A.4.b.

because the phrase seems close enough to one—"her heirs"—that was previously required for creation of such estate.¹⁸ This same result might be reached indirectly if the phrase creates a fee tail, which is converted by statute into a fee simple absolute in *B*.¹⁹ In either situation, this ultimate classification is meaningful because it eliminates the potential claims of *B*'s children and, in all probability, gives *B* a marketable title. In contrast, such consequence would not obtain if a court viewed "her children" as words of purchase, thereby creating interests in both *B* and her children. *B* might have only a life estate²⁰ or an undivided share of a fee simple absolute along with her children.²¹ In either instance, *B*'s children would have a significant interest in the subject matter, which would negate *B*'s ability to confer a marketable title or exercise unlimited discretion with respect to use and enjoyment.

Clearly, planners and drafters should never use the phrase "and her [or his, or their] children." The ambiguities within this phrase are patent and lead to sharply different estate classifications and resolution of disputes. No one should use language that does not clearly and definitively carry out the specific purpose and design of the estate owner. So long as there are superior language formats, one must use them. To be sure, these language formats already exist for creation of a fee simple absolute in *B*, for creation of a fee simple absolute in *B* and her children as tenants in common and for creation of a life estate in *B* with a remainder in fee simple absolute in her children.²² Nevertheless, despite the obvious problems, this phrase continues to surface in the case literature.²³ Perhaps its recurrent usage should be no surprise because not all participants in the estate transfer process are informed. Because the phrase comes close to expressions one should actually use in creating these interests, one can understand the appeal of this particular language.

Despite such appeal and recurrent use, classifying this phrase as deviant would still seem appropriate. It is a language format that does not clearly define a particular interest without regard to changes in facts that may occur

18. See *infra* Part II.A.3.b.

19. See *infra* Part II.A.3.a.

20. See *infra* Parts II.A.3.c, II.A.4.b.

21. See *infra* Part II.A.4.a.

22. For example, to create a fee simple absolute in *B*, one might provide: "To *B* and her heirs," or, where "and heirs" is no longer necessary to create a fee simple, merely "To *B* in fee simple absolute." To create concurrent interests in *B* and her children, one might provide: "In fee simple absolute to *B* and her children, as tenants in common." To create a possessory estate in *B* and a future interest in her children, one might provide: "To *B* for life, remainder to her children in fee simple absolute."

23. See *infra* Parts II.A.3, II.A.4.

after the document containing such phrase has been executed. Indeed, such language is chameleonlike in the way it varies its meaning and, consequently, can never become an accepted format for the creation of interests. Therefore, such language pattern clearly deviates from accepted usage and is properly viewed as a deviant format.

2. *The Rules in Wild's Case—Then and Now*

In addressing the phrase “To *B* and her children,” courts have relied heavily upon two rules derived from *Wild's Case*, decided in 1599.²⁴ The first rule applies only to wills that use this phrase in a devise of real property, provided further that the named recipient—for example, *B*—has no children at the date of the devise. Under these circumstances, the first rule views the apparent gift to children merely as words of limitation, thereby creating a fee tail in *B*. Consequently, the children receive nothing directly as a result of this language. While the court considered other interpretations,²⁵ it ultimately treated “and her children” as words of limitation. Consequently, the estate that came closest to fitting this description was a fee tail.²⁶

This first rule has been followed in the United States.²⁷ However, because the fee tail has been converted by statute into something else in nearly every jurisdiction, the effect of this first rule is to create other species of estates. For example, most states either convert the fee tail into a fee simple or they empower the donee in tail to make this conversion with a lifetime transfer. Other states give the donee in tail a life estate, with a remainder in fee simple absolute to those who would have next taken a fee tail at common law. In this situation, *B*'s potential children would have taken a remainder in fee simple absolute.

A number of courts have rejected the fee tail construction under the circumstances in which the first rule operates. Instead, some states have

24. 6 Co. Rep. 16b, Goldsb. 139, 1 Eq. Cas. Abr. 181 (K.B. 1599).

25. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.16. The court in *Wild's Case* considered a construction of this phrase that would have created a life estate in *B*, with a remainder to her potential children. Because the phrase contained no language of inheritance with respect to the children's gift and because such language was needed to create a fee simple absolute, the children's remainder would only have been for their lives. The court, however, rejected this construction because the gift to her children was by its terms intended to be immediate and possessory. Nevertheless, such intended gift was impossible because—under this variation—*B* did not have any children by the time of the devise. Although it did not do this, the court could have viewed this gift as one to a group—which included *B*—that was subject to partial divestment upon the birth of each of her children. See *id.* § 22.16.

26. See *id.*

27. See *infra* Part II.A.3.a.

found that *B* has a fee simple absolute as a result of this phrase.²⁸ Other states conclude that *B* has a life estate, with a remainder in fee simple absolute to her children.²⁹ Interestingly, the jurisdictions that find direct creation of a fee simple absolute in the parent have statutes that would have converted a fee tail to a life estate in such parent and a remainder in fee simple to the parent's children if a fee tail construction had been reached.³⁰ Also, those jurisdictions that find direct creation of a life estate and remainder in fee simple absolute have statutes that would have converted a fee tail into a fee simple absolute.³¹ In either case, these alternative constructions function much the same as the first rule. Presumptively, therefore, this phrase—"To *B* and her children"—will consistently receive the preferred meaning.

As indicated previously, the first rule is restricted to testamentary transfers of real property. Given the fee tail construction under the first rule, courts could not extend the rule's application to personal property because the fee tail was an estate that applied only to real property.³² Further, because special words of inheritance and procreation were necessary to create a fee tail by deed under the common law, courts could not reach that same construction with a gift of real property to "*B* and her children" if the conveyance was made by deed.³³ When the subject matter is personalty and there are no children when the disposition takes effect, some courts conclude that the parent receives an absolute interest. Others, however, have found that the parent takes a life estate and the children receive the absolute interest through a remainder. If the subject matter is realty and the transfer is by deed, one view is that today a fee tail could be found because the common-law formalities respecting its creation no longer exist. If so, the fee tail statute would then control the interests ultimately created. Other courts would reach the ultimate construction directly, finding either a fee simple absolute in the named parent or a life estate and a remainder in fee simple absolute to the parent's children.³⁴

28. See *infra* Part II.A.3.b.

29. See *infra* Part II.A.3.c.

30. Illinois is such a state. See *infra* Part II.A.3.b for discussion of the Illinois variation of the first rule.

31. Pennsylvania is such a state. See *infra* Part II.A.3.c for discussion of the Pennsylvania variation of the first rule.

32. See *SIMES & SMITH*, *supra* note 9, § 359; 5 *AMERICAN LAW OF PROPERTY*, *supra* note 13, § 22.21.

33. The language needed to create a fee tail by deed required words of inheritance—"and heirs." It also required words of procreation—"of the body." Therefore, the following limitations would create a fee tail: "To *B* and the heirs of her body" or "To *B* and her bodily heirs." See *CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY* 36 (2d ed. 1988).

34. See 5 *AMERICAN LAW OF PROPERTY*, *supra* note 13, § 22.21.

The foregoing conclusions can be affected by changes that complicate the application of this first rule. For example, is the date of the devise the time when the will is executed or is it when the will becomes effective at the estate owner's death? Originally the former date prevailed in England, but in the United States it has been the latter date that controls the determination whether or not *B* has children.³⁵ The problem can be further complicated by a devise that postpones possession to "*B* and her children" to a point in time beyond the estate owner's death—for example, "To *H* for life, remainder to *B* and her children." In this situation, the prevailing view is that the rules from *Wild's Case* govern and that the date of the devise is still the time when the will becomes effective even though the dilemma underscoring the original reasoning of *Wild's Case* is no longer present.³⁶

The second rule in *Wild's Case* applies in the event the named recipient has children at the date of the devise. In this situation, the second rule creates concurrent interests in both the parent and the children—herein, in *B* and her children. Further, because of a common-law preference for joint tenancies, *B* and her children would have held such tenancy with rights of survivorship. Because of the common-law requirement for specific words of inheritance to create a fee simple—"and heirs"—the joint tenancy held by *B* and her children would have been only for their lives.³⁷

The second rule has been widely followed in the United States although it has changed somewhat over time. For example, it now covers lifetime transfers as well as testamentary dispositions, and it also applies to both personal and real property. This differs from the rule as originally stated in *Wild's Case*, which applied to devises of land only.³⁸ Additionally, because current law presumes that concurrent interests are held in common, the jointly held interest is a tenancy in common.³⁹ Finally, because "and heirs" is no longer a mandatory requirement for creation of a fee simple absolute and because nearly all states presume the creation of such an estate, the tenancy

35. See SIMES & SMITH, *supra* note 9, § 694; 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.18.

36. See SIMES & SMITH, *supra* note 9, § 695; 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.18. The dilemma in *Wild's Case* arose because the devise created immediate interests, and this prevented the deferral of the gift to children by way of a remainder. Yet the children could not take immediately because they were nonexistent at the date of the devise. Consequently, the best solution was to treat "and her children" as words of limitation, thereby creating a fee tail that made inheritance by future children possible. If, however, the gift to "*B* and her children" was deferred, then the dilemma disappears, and a gift to *B* and to her children concurrently becomes a viable construction even though she had no children at the date of the devise.

37. See *Wild's Case*, 6 Co. Rep. 16b, Goldsb. 139, 1 Eq. Cas. Abr. 181 (K.B. 1599).

38. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.26.

39. See *id.* § 22.22.

in common held by *B* and her children is, without more, a fee simple absolute. If, however, the subject matter is personal property, the interest becomes one that is absolute.⁴⁰ The date of devise or transfer, however, remains the same under both rules, which is when the dispositive instrument becomes effective.⁴¹ Such date also remains the same even if the time for possession is postponed.⁴²

The standard formulation of the second rule,⁴³ however, is not observed in all states. Under the circumstances in which the second rule must govern, at least two states, albeit for different reasons, have opted for a life estate in the parent, with a remainder in fee simple absolute to the children.⁴⁴ One state gives the parent a life estate because if she received an undivided share in fee simple absolute, it might be diverted from the estate owner's family.⁴⁵ The other state defers the gift to the children so that all children will be included,⁴⁶ especially those born after the effective date of the transfer. The group composition resulting from the application of this construction differs from the application of the standard second rule. Under the standard second rule, because of another rule of construction—the rule of convenience⁴⁷—the

40. See *id.* § 22.26.

41. See *supra* note 35 and accompanying text; see also 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.21.

42. More specifically, suppose a devise by *A*: "To *H* for life, remainder to *B* and her children." If *B* has children at *A*'s death, *B* and her children will receive a fee simple absolute as tenants in common. This gift will include *B*'s children alive at *A*'s death and those born thereafter, provided such births occur before the death of *H*. See *SIMES & SMITH, supra* note 9, §§ 695, 701.

43. See *infra* Part II.A.4.a.

44. See *infra* Part II.A.4.b.

45. Kentucky is the state that subscribes to this variation of the standard rule and to this particular rationale. See *infra* notes 179-205 and accompanying text. For a leading case, see *Davis v. Hardin*, 80 Ky. 672 (1880), discussed *infra* notes 192-94 and accompanying text.

46. Pennsylvania subscribes to this variation of the standard rule and to this particular rationale. See *infra* notes 94-105, 160-178 and accompanying text. For a leading case, see *Chambers v. Union Trust Co.*, 84 A. 512 (Pa. 1912), discussed *infra* notes 94-103 and accompanying text.

47. In the main, construction problems regarding the closing of a class arise when, at the earliest date that distribution can be made, an increase in potential members is still physically possible. This would always be true of an immediate gift to a person and her children to take concurrently and in fee simple absolute—for example to "*B* and her children as tenants in common and in fee simple absolute." Even though the estate owner may have intended to include all potential members who may be born thereafter, the construction given by courts in this situation is apt to compel quite a different result. Unless the estate owner adequately directs otherwise, if any class member can take at the date distribution is required, the maximum class membership is fixed at that time. Relying heavily upon the estate owner's direction for distribution, courts have fixed maximum membership to determine the minimum size of the share that is then to be distributed. This necessarily means that potential class members will be precluded from sharing the gift. In the foregoing example, the class would close immediately upon its creation. Assuming *B* is then alive, all children born thereafter take nothing. This is the choice courts almost always make. They are unwilling to allow immediate distribution and still hold open the class to include afterborn members because of the administrative inconvenience caused by such a solution. In short, they find it convenient to close the class and exclude afterborn members

class would include *B* and her children alive at *A*'s death, in the event of an instrument not irrevocably effective until then. Consequently, all afterborn children would be excluded. This assumes, of course, that the gift to "*B* and her children" was not preceded by any prior possessory estate.⁴⁸

Finally, one must observe that the two rules derived from *Wild's Case* are merely rules of construction. These were not intended as rules of property; namely, rules such as the rule in *Shelley's Case* that govern remorselessly and without regard to specific intent or context.⁴⁹ If the prerequisites for

and inconvenient to include them by recovering portions of distributed shares each time a new member is added to the class. Notably, this rule will not apply and, therefore, preclude potential members when the date for first distribution cannot precede the time when new membership becomes physically impossible. For example, it would not apply with a gift to "*B* for life, remainder to her children in fee simple absolute."

For full discussion of the rule of convenience and of related principles that govern determination of the maximum membership of a class, see 5 AMERICAN LAW OF PROPERTY, *supra* note 13, §§ 22.39-22.46; SIMES & SMITH, *supra* note 9, §§ 634-651.

48. Finally, one should observe that the application of the rules within *Wild's Case* can become even more complex when the gift is to several named people and their children. Suppose for example, *A* has made a devise of Blackacre: "To *B*, *C*, *D* and their children." If none have children at *A*'s death—assuming this is viewed as the date of the devise—the application of the first rule should be apparent and clean. A court would then find a fee tail or whatever other construction previous courts had reached under the first rule. If all have children at *A*'s death, the application of the second rule is also apparent, but it may not be an easy one. For further discussion of this fact pattern and the problems it raises, see *infra* notes 106-18 and accompanying text. At the very least, there should be differences—and, accordingly, significant issues—as to how Blackacre should be shared. For example, do *B*, *C* and *D* each take an undivided third of Blackacre, which they share equally with their children? Or do *B*, *C*, *D* and all of their children take per capita equal undivided interests in Blackacre?

But assume that only *B* has children at *A*'s death. There are several different interpretations that present themselves. Unless all had children by the time of the date of the devise, a court might construe this as if none had children. In this instance, a court would then reach a construction reflecting its jurisdiction's version of the first rule—for example, fee tails or life estates followed by remainders in fee simple absolute. Alternatively, a court might decide to apply the second rule simply because one person—*B*—had children. Electing to do this, however, would not conclude problems of interpretation. The group entitled to take might be confined to *B*, her children, *C* and *D*, or the group might be open to include afterborn children of *B*, *C* and *D*. With either construction there would also be the problem of how Blackacre is to be divided. Once again, do all members of the entire group share equally? Alternatively, division could be made equally between each family unit, so that *B* and her children collectively receive the same share—in this instance, one-third—as *C* (and her potential children) and *D* (and her potential children).

Additionally, it would be possible for a court to apply the second rule to *B* and her children and the first rule to *C* and *D*. Presumably, division would be made into thirds. Under the standard second rule, *B* and her children would take a fee simple as tenants in common. And under the standard first rule, *C* and *D* would receive fee tails. The local conversion statute would then govern the estates and interests. For example, *C* and *D* might ultimately have fee simple absolutes, or they might receive life estates, with remainders in fee simple absolute to their respective children. Deviations from the standard rules could, of course, alter these results and complicate the problems of construction even further.

49. The rule in *Shelley's Case* has been summarized as follows:

If a life estate in land is conveyed or devised to *A*, and by the same conveyance or devise, a remainder in the same land is limited, mediately or immediately, to the heirs of *A*, or to the heirs of

application of a rule of property are present, a court must apply the rule, even if the entire instrument and surrounding circumstances clearly and definitively support a meaning different than the one produced by that rule.⁵⁰ Quite differently, a rule of construction achieves an approximation of what most people are likely to have intended, frequently when it is unlikely that any thought was given to the matter in question. If, however, there is concrete evidence that the transferor actually had an intent different from the one approximated, the rule of construction must give way to such specific intent.⁵¹

Courts and commentators acknowledge that the rules in *Wild's Case* are merely rules of construction.⁵² But do they actually function that way? Do courts take seriously the priority given to specific intent? Or, instead, do courts cling to precedential meaning even when the facts and context point in other directions? If courts deviate from their own rule formulations whenever they believe specific intent requires a different meaning, then these principles are actually operating as rules of construction. One cannot, however, reach this conclusion if courts repeatedly apply their rule formulations without considering intent or, even further, if they disregard intent. To be sure, such

A's body, and the life estate and remainder are of the same quality, then *A* has a remainder in fee simple or in fee tail.

LEWIS M. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 66 (1951). In applying this rule, a court must construe relevant language within the dispositive provision and it may use rules of construction to accomplish this. However, once it concludes that the transferor meant "heirs of *A*" to mean exactly that—and not, for example, "children"—and that all of the other requirements of the rule have been satisfied, a court must then rigorously apply the rule which thereby converts the remainder given to the "heirs of *A*" into one created in only *A*. And a court must follow through with this result even if application of the rule defeats intent because the language makes clear that *A* is to receive no more than a life estate. *See id.* at 77-78, 258-59.

50. Some rules of law can be modified. For example, a life tenant by law cannot commit waste; nevertheless, the instrument that creates the life estate can moderate or eliminate that constraint. Quite differently, other positive rules cannot be suspended by the parties to a transfer. The rule against perpetuities is one example, and the rule in *Shelley's Case* is another.

51. Rules of construction exist as guidelines to be followed, often said to resemble rebuttable presumptions of law. These rules approximate what people would probably intend under circumstances where in all probability no thought was given to the matter at all. Frequently, however, they reflect what people ought to intend in light of public policy considerations. Some rules, therefore, can readily be overcome with very little evidence of an intent contrary to the one upon which a specific rule rests. Others, especially those grounded upon important policy considerations, will require convincing evidence as to a different intent. Nevertheless, even with these latter rules, such intent should be decisive. *See* SIMES, *supra* note 49, at 258-260; *see also* SIMES & SMITH, *supra* note 9, § 467.

52. For commentators who observe that the rules from *Wild's Case* are merely rules of construction, see, for example, 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.24; SIMES & SMITH, *supra* note 9, §§ 693, 697, 700. For court opinions that view or apply the rules from *Wild's Case* as rules of construction, see, for example, *Coffield v. Peele*, 100 S.E.2d 45 (N.C. 1957), discussed *infra* notes 145-50; *Talley v. Ferguson*, 64 W. Va. 328, 62 S.E. 456 (1908), discussed *infra* notes 119-25.

strict adherence to precedential meaning demonstrates that the two rules from *Wild's Case* have been elevated into something more than mere rules of construction.⁵³

3. *The First Rule—Analysis of Cases*

a. *Standard Formulation—Fee Tail*

Cases within two states demonstrate a strong commitment to the precedential meaning established under the standard formulation of the first rule. In *Gilchrist v. Butler*,⁵⁴ the Supreme Court of Alabama relied upon the first rule from *Wild's Case* to find that a devise to the testator's son "and his children" created a fee tail in the son because his son had no children at the time of the devise. This fee tail was then converted by statute into a fee simple absolute in the son.⁵⁵ The court acknowledged that variations in the context in which such language appears can justify a different interpretation—for example, a life estate in the parent, with a remainder in fee simple to the children. The court also observed that, in an effort to effectuate the true intent of the testator, greater latitude of construction should be afforded the words of someone unskilled in the use of technical terms than someone acquainted with legal terminology.⁵⁶ Nevertheless, the court upheld application of the first rule in *Wild's Case*, despite the fact that the testator used different language within the same paragraph to create what appeared to be a fee simple as to another tract of land in the same son.⁵⁷ After noting that changes in language can support a different construction, especially if the son had children at the time of the devise, the court stated:

[B]ut a devise to *A* and his children, without more, *A* having no children at the time, has never, in this state, been held to create any interest in after-born children as purchasers, and "thus the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise, gives him an estate tail." . . . But, the books further say, and perhaps this is but another form of the rule . . . that it is not permissible to disregard established rules of interpretation in the absence of peculiarities in the instrument evincing

53. See, e.g., *Wills v. Foltz*, 56 S.E. 473 (W. Va. 1907). For discussion of this case, see *infra* notes 106-17 and accompanying text.

54. 107 So. 838 (Ala. 1926).

55. See *id.* at 839.

56. See *id.*

57. See *id.* at 839-40. This language reads as follows: "The land described in Middle Tennessee and western district to himself." *Id.* at 839.

the necessity for so doing in order to give effect to the donor's intention⁵⁸

Despite its concession to specific intent—especially with respect to a will written by someone unskilled in technical terms—the court made clear its observance of *Wild's Case* and its unshakable commitment to the meaning such case established. The Supreme Court of Alabama reaffirmed this commitment in a case decided forty-five years later.⁵⁹

In *Silliman v. Whitaker*,⁶⁰ the Supreme Court of North Carolina in 1896 determined that a devise in trust by the testator to his infant daughter “and all her children, if she shall have any” should be construed the same as if it had said to the daughter “and her children, if she shall have any at the death of the testator, and, if not, then to [the daughter] in fee simple.”⁶¹ In reaching this conclusion, the court denied the claim of the daughter's children—born after the testator's death—and upheld the trustee's conveyance of the subject matter, which had been ordered years earlier for the benefit of the daughter while she was still an infant. The court relied heavily upon the first rule in *Wild's Case*, which it declared had been uniformly followed. The daughter was deemed, therefore, to have received a fee simple because the fee tail had been converted into such estate. The court went on to state: “When words used in a will have received a settled judicial construction, the testator is taken as using them in that sense, unless a different intent plainly appears.”⁶² The court disregarded the phrase “if she shall have any” as evidence of a different intent to create a life estate in the daughter and a remainder in fee simple to her children. The court also observed that matters of equity and public policy reinforced this construction.⁶³

Subsequently, the Supreme Court of North Carolina relied upon the first rule in *Wild's Case* in several cases. For example, in *Ziegler v. Love*,⁶⁴ the testator devised land to his wife for life and then to his son, “and to his [son's] children or issue, but in case he should die childless and without

58. *Id.* (citation omitted).

59. *See* *Armstrong v. Smith*, 251 So.2d 216 (Ala. 1971). In *Armstrong*, the court construed a deed from the grantor to his daughter “and her offsprings.” *Id.* at 217. Although the daughter had children when the deed became effective, the court noted that these children would have taken nothing if they had not been alive at that time. *See id.* In support of this, the court included a footnote that relied upon *Gilchrist*, observing that if there were no children when the instrument became effective such interest would be viewed as an estate tail that would be converted by statute into a fee simple absolute. *See id.* at 217 n.1.

60. 25 S.E. 742 (N.C. 1896).

61. *Id.* at 742-43.

62. *Id.* at 743.

63. *See id.* at 742-43.

64. 115 S.E. 887 (N.C. 1923).

issue, then . . . to my heirs in equal degree in fee simple.”⁶⁵ The son had one child who was born after the testator’s death but before the death of the life tenant. Because of the first rule, the court concluded that the son received a fee tail that was converted to a fee simple by statute. Such interest was, however, defeasible because of the additional language.⁶⁶ In reaching this conclusion, the court ignored two important factors. First, the language involving the son’s children was separated by commas and said “and to his children.”⁶⁷ Second, possession of such gift was deferred until after the life tenant’s death. The latter eliminates the dilemma posed in *Wild’s Case* as well as any reason for treating such language as words of limitation.⁶⁸ The court’s construction eliminates the interest of the children even though the son had a child who was capable of assuming possession when the life tenant died.⁶⁹ Based upon the particular language and the intent it reflects, the court could have concluded that “children” constituted a term of purchase and ruled that the children took concurrently with the son or by way of a remainder following his life estate.

These cases, particularly those from North Carolina,⁷⁰ reveal a predilection for rigorous adherence to the first rule. Slight variations in the language format or the contextual facts have not altered the basic classification even though such variations strongly suggest another construction. This interpretation is especially prominent whenever the court finds the result reached through strict adherence to be appealing in light of the dispute presented.

b. Variant Formulation—Fee Simple

Illinois courts have departed from the standard formulation of the first rule and, instead, have found a fee simple in the parent alone if there are no children when the instrument becomes effective. This variant formulation first reflected an effort to achieve the best construction in light of local statutes and contextual facts. Nevertheless, such formulation thereafter seems to have acquired a life of its own, thereby establishing a precedential meaning that must be observed.

The devise in *Davis v. Ripley*,⁷¹ decided in 1902, involved a gift to two

65. *Id.* at 887.

66. *See id.* at 888.

67. *Id.* at 887.

68. *See supra* note 36.

69. *See Ziegler v. Love*, 115 S.E. 887, 887-88 (N.C. 1923).

70. *See, e.g., Boyd v. Campbell*, 135 S.E. 121 (N.C. 1926).

71. 62 N.E. 852 (Ill. 1902).

daughters "and their children." Neither daughter had children at the death of the testatrix. One of the daughters claimed that she received a life estate, with a remainder in fee simple to her children. She relied upon the first rule in *Wild's Case*, which would have given her a fee tail that would have been statutorily converted into the life estate and remainder interests.

The Supreme Court of Illinois, however, concluded that the daughters received a fee simple absolute.⁷² As to the first rule in *Wild's Case*, the court observed that the fee tail construction obtained because of a belief that a life estate was not intended and because the fee tail was the largest estate one could find under the common law given the language presented.⁷³ However, the court deemed decisive an existing Illinois statute that made all conveyances a fee simple in the absence of language expressly creating a lesser estate.⁷⁴ Such statute made the first rule in *Wild's Case* unnecessary and, therefore, inapplicable. In short, a fee tail construction was unnecessary to produce the largest estate possible. Quite the contrary, such construction would have resulted in a lesser estate—one for life—because of the Illinois conversion statute affecting the fee tail.⁷⁵ Consequently, such a gift to the daughters "and their children" created a fee simple in the entire group. But because there were no children alive and able to take the immediate gift, the will became inoperative as to such children and the two daughters acquired the fee simple for themselves.⁷⁶

In 1906, the Supreme Court of Illinois again addressed this problem in *Boehm v. Baldwin*,⁷⁷ reaching the same result for essentially the same reasons. The devise in this case was to: "[the testator's son] and his children provided he should have children, by his wife. But if he and his wife should have no children together and [the son] should die before his wife she shall be entitled to one-third part of the proceeds of said farm, so long as she

72. See *id.* at 853.

73. See *id.*

74. See *id.*; see also 30 ILL. COMP. STAT. 13 (West 1899).

75. See 30 ILL. COMP. STAT. 5 (West 1925). This is essentially the same conversion statute as was in effect at the time of this opinion. It states:

In cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be, and become seized thereof, for his or her natural life only, and the remainder shall pass in fee simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance.

Id.

76. See *Davis*, 62 N.E. at 853.

77. 77 N.E. 454 (Ill. 1906).

remains his widow . . . ”⁷⁸ The son never had any children and subsequently his wife survived him. The testator’s heirs at law claimed that the son received a life estate and his children the remainder in fee simple because the son had no children at the testator’s death. Upon the son’s death, the remainder failed and, therefore, the subject matter reverted to the testator’s heirs at law.⁷⁹

The supreme court rejected this position, believing that the testator clearly intended to create a tenancy in common involving the son and any children he might have. The court concluded that it made no sense to believe the testator intended the son to share the subject matter in fee if he had children and that he was only to have a life estate if he did not have children.⁸⁰ The court followed *Davis* and held that the first rule in *Wild’s Case* had been made inapplicable in Illinois because of its statute that made all such conveyances presumptively a fee simple. The court also concluded that the particular facts of this case supported such construction.⁸¹ One might, however, argue differently. Surely, the significance of the language providing what was to happen if his son did not have children is diminished if he had received a fee simple—albeit a fee simple defeasible—instead of a life estate.⁸²

Nevertheless, by 1912, the foregoing interpretation of a gift to a person “and her children” seems to have crystallized into a settled meaning.⁸³ In *Reed v. Welborn*,⁸⁴ the Supreme Court of Illinois was again asked to construe comparable language. Therein the testator made a devise to his wife for life and then to: “[his daughter], and her children, and further provide that if my wife . . . shall outlive my daughter . . . and [my daughter] shall have no children, then at the death of my wife . . . to descend to my next nearest of kin.”⁸⁵ The daughter did not have children at the testator’s death, nor did she

78. *Id.* at 455.

79. *See id.*

80. *See id.* at 456.

81. *See id.*

82. If he had received a fee simple absolute, then his wife would have been entitled to claim dower or a statutory share, which is essentially the same as what the substitute gift expressly gave her through the condition of defeasance. If, however, he had received a life estate, then she would have received nothing but for the substitute gift, which would function as an alternate contingent remainder. Consequently, with the latter construction the substitute gift has great significance; it gives his wife an interest she would not otherwise have. With the former construction, however, the substitute gift achieves little if any significance because his wife would have received essentially the same interest even if the substitute gift had been omitted.

83. *See supra* notes 84-92 and accompanying text.

84. 97 N.E. 669 (Ill. 1912).

85. *Id.* at 669-70.

have any by the time of her mother's death.⁸⁶ Thereafter, the daughter contracted to sell the subject matter and sued for specific performance after the purchaser refused title because the daughter did not have an absolute fee to convey. The purchaser claimed that the daughter received either a life estate, with a remainder in fee to her children, or a fee simple as a tenant in common with children who may yet be born.⁸⁷

The supreme court rejected the position of the purchaser and ruled that the daughter had acquired an absolute fee and, therefore, had satisfied her obligations under the contract.⁸⁸ In reaching this result, the court looked to the two aforementioned decisions and to the statute that made conveyances presumptively a fee simple in the absence of express language indicating a lesser estate. Indeed, the court said that "in view of these well-settled rules of construction" it must find that the daughter received an absolute fee.⁸⁹ If she had had children, she would have taken as a tenant in common with them. However, because she did not have children, their potential interests failed and she took to the exclusion of all others.⁹⁰

The court did not completely ignore the additional language concerning the gift over if the daughter had predeceased her mother without having had children. The court merely observed that this event had not arisen because the daughter had survived her mother. Therefore, because the daughter had no children at the testator's death, she took the entire fee simple.⁹¹ In reaching this conclusion, the court failed to consider other significance that might have been attributed to this additional language—something that should have overcome the statutorily presumed fee simple. One might wonder: why did the testator cut down his daughter's gift if she predeceased his wife without having had children? Surely, if she had had children, the testator would have wanted them to share in this gift. But why make the children's gift dependent upon when they were born, whether before his death or his wife's death? Surely, the one interpretation that would have assured inclusion of the children would have been to give the daughter a life estate, with a remainder in fee simple to her children. Assuming the daughter had contracted to deliver a marketable title, surely this kind of speculation as to other meaning should have been sufficient to raise reasonable doubt and, therefore, justify the purchaser's refusal of the daughter's title.⁹²

86. *See id.* at 670.

87. *See id.*

88. *See id.* at 670-71.

89. *Id.* at 670.

90. *See Reed v. Welborn*, 97 N.E. 669, 671 (Ill. 1912).

91. *See id.*

92. The court acknowledged that the prevailing interpretation—which gives to the daughter an

c. *Variant Formulation—Life Estate in the Parent, Remainder in Fee Simple to the Children*

Pennsylvania has combined the rules from *Wild's Case* into one formulation that differs from both of the standard rules; namely, the parent takes a life estate and the children receive a remainder in fee simple. Originally this formulation was fashioned in light of a gift to a “[parent] and her children” in which the parent had children alive when the dispositive instrument became effective.⁹³ Indeed, most of the decisions that enforce this variant formulation involve existing children. Nevertheless, Pennsylvania courts have reached the same construction when there were no children alive at the effective date of the gift.

For example, in *Chambers v. Union Trust Co.*,⁹⁴ the Supreme Court of Pennsylvania was asked to construe a devise to: “[the testator’s nephew] and to his children; but in case he should die without legal issue, then it is to go to the heirs of my father, as directed by the intestate laws of Pennsylvania”⁹⁵ Twenty-one years after the testator’s death, the nephew died testate without ever having children. Thereafter, the heirs of the testator’s father claimed ownership as against the devisees under the nephew’s will.⁹⁶ The lower court followed the first rule from *Wild's Case* and held that the nephew received a fee tail from the testator that was converted by statute into a fee simple absolute, thereby giving the nephew an interest that was devisable under his will to the defendants.⁹⁷

The supreme court reversed and found for the heirs of the testator’s father.⁹⁸ The court observed that in two earlier decisions it applied the second rule from *Wild's Case* and found that living children took concurrently with their parent.⁹⁹ The court noted, however, that a series of later cases, also

undivided fee simple absolute—arises from a rule of construction. Presumably, then, this interpretation must yield to a different construction when specific evidence supports such a meaning. Surely, the factual and language context presented in this case should be sufficient to raise reasonable doubt as to whether the prevailing rule of construction would actually obtain in a suit to quiet title. If the absence of any reasonable doubt had been a component of the daughter’s promise to sell, then the court erroneously concluded that she fulfilled the terms of her contract to sell and was, therefore, entitled to a decree of specific performance. This would be true unless, of course, the prevailing interpretation were elevated into something more than a rule of construction.

93. See *infra* notes 161-78 and accompanying text.

94. 84 A. 512 (Pa. 1912).

95. *Id.* at 513.

96. See *id.*

97. See *id.*

98. See *id.* at 515.

99. See *id.* at 513. The two early decisions are: *Graham v. Flower*, 13 Serg. & Rawle 439 (Pa. 1826), and *Shirlock v. Shirlock*, 5 Pa. 367 (1847).

involving children alive when the gift became effective, reached a different result.¹⁰⁰ In short, the supreme court previously rejected the standard rule and replaced it with its own formulation. The reason for applying the reformulated rule was essentially the same in each instance: a belief that the estate owner wanted to benefit all of the parent's children as a class, and that this could best be accomplished by giving the parent a life estate and thereby deferring distribution until such parent's death. The court knew that such a delay would assure inclusion of all children.¹⁰¹

After elaborating the formulation when there were children, the court went on to decide that the same formulation should apply when there were no children alive at the effective date of the dispositive instrument. The desire to preserve something for all the children should be exactly the same.¹⁰² Originally, when there were no children a court could only accomplish this with a fee tail.

However, where the children take in remainder,

it is immaterial whether they are, or are not, in existence at the time of the devise or at the time of the death of the testator. Therefore it is not necessary to give an artificial meaning to the devise in order to care for the interests of the children, and there is no apparent reason for adhering to the first resolution in *Wild's Case*.¹⁰³

With this decision, the supreme court unified its formulations and totally rejected those from *Wild's Case*. This formulation has become precedent that has been rigorously observed,¹⁰⁴ apparently even in situations in which the

100. See *Chambers v. Union Trust Co.*, 84 A. 512, 513-14 (Pa. 1912).

101. See *id.* at 514.

102. See *id.*

103. *Id.*

104. Nebraska also has a unified rule that gives the parent a life estate and her children a remainder in fee simple. Nebraska's rule follows the Uniform Property Act and derives from a statute that states:

When an otherwise effective conveyance of property is made in favor of a person and his children, or in favor of a person and his issue, or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested.

NEB. REV. STAT. § 76-113 (1941). One should observe that the Nebraska statute controls the interpretation of the relevant language without regard to whether or not the parent has children when the dispositive instrument becomes effective. See *Ellingrod v. Trombla*, 95 N.W.2d 635, 638, 640 (Neb. 1959).

One should note that this statute allows for a different construction when a contrary intent is effectively manifested. Nevertheless, courts may find the presumed effect of the statute difficult to overcome. In one case, the Supreme Court of Nebraska refused to reach a construction that would have produced a marketable title. Although there were facts that might have supported a different

gift was postponed for a time that would ordinarily enable all children to be born and included in the class.¹⁰⁵

interpretation, the court affirmed the statutory construction while observing that this will—which was drawn by a layman—did not have anything to the contrary within its four corners. *See id.*

Unlike the foregoing rule, the American Law Institute did not adopt a unified position. Although their position is the same in the event the estate owner does not have children when the conveyance becomes effective, it otherwise provides for a single class gift that includes the parent and her then living children. *See* RESTATEMENT OF PROPERTY: FUTURE INTERESTS § 283 (1940).

105. *See In re Keown's Estate*, 86 A. 270 (Pa. 1913). There, the Supreme Court of Pennsylvania was asked to construe a remainder in fee simple absolute that was subject to a life estate in the testator's wife. This remainder was divided among a total of six named sons and daughters,

share and share alike, and in the event of any of said children dying before my wife, the share of such deceased child shall be equally divided between my then surviving children. The shares bequeathed to my daughters is [sic] for their own separate use and that of their children should they have any

Id. at 270. The testator died first, then his wife, and thereafter one of his daughters died. Her husband, who was a devisee under her will, filed a petition for partition of the realty involved, claiming that she had received a fee simple absolute in common with the other children. The court found that the devise fell within the principle of construction announced in an earlier decision, thereby giving a life estate to the daughter and a remainder in fee simple to such daughter's children living at the daughter's death. *See id.* at 271. "The reason of the rule lies in the fact that the devise to children is to them as a class which cannot be ascertained until the death of the parent when the possibility of issue is extinct; and the parent can therefore, from necessity, take only a life estate." *Id.*

One should note that ordinarily courts are not driven by a concern for whether a class is closed before the possibility of further membership becomes physically impossible. The class simply closes at the date of first distribution, and afterborn people who would otherwise fall within the group description are excluded. *See supra* note 46 and accompanying text. If distribution under the gift is immediate and there are members currently eligible for such distribution, then the class closes at the outset. Because such a class gift does not allow for any expansion under this circumstance, the potential for exclusion seems to be the greatest. Consequently, an immediate gift to the testator's daughter and her children as a single class would not allow for any expansion beyond the testator's death. If, however, distribution is deferred, then so is the closing of the class. In this case, distribution was deferred until the death of the testator's wife—a period of time that would not have guaranteed inclusion of all of the daughter's children. Nevertheless, by deferring possession for a person's lifetime, it would have created a time period in which it became possible, if not probable, for all afterborn children to join the class.

There are other questions that can be raised as to the court's construction. For example, the testator requires all of his children to survive his wife, otherwise their interest is extinguished in favor of those who do survive. Yet what about the child who predeceases the testator's wife but leaves his or her own children who do survive? If ultimately the fee simple is to belong to the testator's grandchildren, then why make their respective gifts dependent upon whether their parent (the testator's child) survived the life tenant—the testator's wife? In short, the court's construction seems at odds with the express requirement of survivorship imposed on each of the testator's children. Such requirement suggests, of course, that another interpretation would have made more sense, for example, a construction in which each of the testator's children received a share in fee simple absolute and not for their respective lives.

4. *The Second Rule—Analysis of Cases*

a. *Standard Formulation—Parent and Children Receive a Fee Simple Absolute as Tenants in Common*

This section examines application of the second rule in jurisdictions that adopt the standard formulation of such rule; namely, where the parent and children receive a fee simple absolute as tenants in common. This section also emphasizes cases that adhere to such precedential meaning despite evidence of a contrary intent that presents a basis for abandoning such standard interpretation.

Rules of construction are often elevated to required meaning. *Wills v. Foltz*,¹⁰⁶ decided in 1907 by the Supreme Court of West Virginia, is a perfect example. There, the testator prepared his own will even though he was not a lawyer and was uneducated.¹⁰⁷ The will provided for three named people, his daughters and their children. Only one of the daughters had children when he executed his will, all three had children when he died and one had a child thereafter.¹⁰⁸ Ultimately the Supreme Court of West Virginia applied the second rule in *Wild's Case* because it regarded the testator's death as the date of the devise and because all three had children at that time.¹⁰⁹ The court also awarded ownership to the entire group—the three daughters and their children living at the testator's death—in fee simple to be divided equally among them on a per capita basis. As a result, the afterborn child did not take, nor would any other children who might be born after the testator's death. Further, the families of two of the daughters benefited more than a third because these daughters had more children and division among the entire group was per capita.¹¹⁰

In this case, the daughter with the fewest number of children contended that the devise created a fee simple absolute in the three named people.¹¹¹ In addressing this argument, the court first recited the history of *Wild's Case*

106. 56 S.E. 473 (W. Va. 1907).

107. *See id.* at 476.

108. *See id.* at 474.

109. *See id.* at 476.

110. *See id.* at 477. The three daughters were Lillie, Sallie and Minnie. By the time of the testator's death, Lillie had three children, Sallie had five and Minnie had four. Because the court found that the three daughters and their children took per capita a fee simple absolute, each member of this group received a one-fifteenth interest as a tenant in common. Consequently, Lillie and her children collectively received four-fifteenths, Sallie and her children received six-fifteenths and Minnie and her children received five-fifteenths. If, however, division were made on a stirpital basis, then each of the daughters and their respective children would collectively receive one-third.

111. *See id.* at 474.

and its acceptance as good law in West Virginia and throughout the United States.¹¹² The court recognized that several decisions treated “and children” as words of limitation, thereby defining the kind of interest given to the named parent. But the court distinguished these decisions because language and evidence existed in those previous cases that supported such interpretation.¹¹³ In addition, given the authority of *Wild’s Case* for more than three centuries, the court concluded that it could not go beyond the precedential meaning already attributed to such language by law.¹¹⁴

Consequently, the court felt obligated to apply the second rule in *Wild’s Case* and, therefore, it concluded that “and children” were words of purchase entitling the children to share the devise concurrently with their parents, with division among all of them to be made per capita—not per stirpes. The court, however, speculated as to how it would have construed the language if only one daughter had had children at the time of the devise. It rejected a jointly-held estate in fee simple for such daughter and her children in common with the other two daughters. Instead, it believed that the childless daughters would hold their shares, presumably one-third, in fee simple subject to open to include their children born thereafter.¹¹⁵

The court was not pleased that the children shared concurrently with the daughters and that two families received larger portions than the third. Indeed, the court believed that the testator intended something different.

I have struggled to come to a different conclusion. Whilst I am fixed in opinion, after patient effort to hold differently, yet I am morally, though not legally, satisfied that Foltz, a plain, unlettered man, not a lawyer, a farmer drawing the will with his own hand, without counsel, never intended to give the children of his daughters shares with their mothers. He thought it either would confer on his daughters a fee or a life estate. He did not intend to give the children of one daughter twice as much as the children of another because one had four children, the other two.¹¹⁶

Nevertheless, the court believed that it could not reach a different conclusion. “But there are plain words. ‘In the interpretation of wills the true inquiry is not what the testator meant to express but what do the words used

112. See *Wills v. Foltz*, 56 S.E. 473, 474-75 (W. Va. 1907).

113. See *id.* at 475-76.

114. See *id.* at 476.

115. See *id.* at 476-77.

116. *Id.* at 476.

express.”¹¹⁷

The court's decision clearly reflects the great weight given to the precedential meaning established in *Wild's Case*. In short, this phrase—“and children”—has developed a particular meaning over time, one which many decisions have reinforced. And this meaning must be honored by judicial adherence to it even though no knowledgeable person would—without more—use this language to create the interests courts reach.¹¹⁸ Although *Wild's Case* offers only rules of construction, the force of the precedential meaning established by these rules is extreme and not easily overcome. Although the court strongly believed that the testator intended to create different interests, it felt compelled to stay the course with past meaning. In this instance, past decisions called for concurrent interests. The court went on to divide the estate on a per capita basis even though it believed that per stirpes was better suited to the testator's intent. The court did this despite the fact that it would have made a stirpital division if only one or two of the three daughters had had children when the testator died.

Merely a year later the Supreme Court of West Virginia managed to effectuate actual intent rather than to follow blindly the second rule of *Wild's Case*. In *Talley v. Ferguson*,¹¹⁹ the court construed a trust created for the benefit of the settlor's son's wife and this son's children. The trust stated that its purpose was to provide income for the maintenance and support of the beneficiaries and to set the trust corpus free from any claims against or debts

117. *Id.* at 476-77 (citation omitted). In the end, the court attributes a fixed meaning to this language format despite evidence of a different dispositive intent. This approach seems contrary to the interpretive reality it had previously recognized and emphasized.

This short will is couched in plain language presenting little difficulty, it would be thought, and yet one who examines the matter will find it one of difficulty under the numerous authorities, more or less bearing upon it. Judge Story in *Sisson v. Seabury* . . . did not overstate when he said, “The difficulty of construing wills in any satisfactory manner, renders this one of the most perplexing branches of the law. The cases almost overwhelm us at every step of our progress; and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor. Lord Eldon has observed that the mind is overpowered by their multitudes, and the subtlety of the distinctions between them. To lay down any positive and definite rules of universal application in the interpretation of wills must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty. The unavoidable imperfections of human language, the obscure, and often inconsistent, expressions of intention, and the utter inability of the human mind to foresee the possible combination of events must forever afford an ample field for doubt and discussion, so long as testators are at liberty to frame their wills in their own way, without being tied down to any technical or formal language. It ought not, therefore, to surprise us, that in this branch of the law the words used should present an infinite variety of combinations, and thus involve an infinite variety of shades of meaning, as well as of decision.” What estate do the three daughters take under the will?

Id. at 474.

118. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.8.

119. 62 S.E. 456 (W. Va. 1908).

of the settlor's son. Years later the original trustee resigned and the settlor's son was appointed trustee. The son and his wife then executed and delivered a deed of the land subject to this trust for the purpose of securing a loan made to them. As a result, litigation was commenced to set aside this deed.

The supreme court affirmed a lower court decree, which declared null and void the deed executed by the son and his wife.¹²⁰ The court recognized the construction given to this language—"wife and children"—in *Wills v. Foltz*. Nevertheless, it believed that the settlor's intent must always govern, and in this case there was very strong evidence of her intent.¹²¹ The court rejected the argument that the settlor's daughter-in-law alone held a fee simple because such construction would repudiate the express objectives of the trust.¹²² More specifically, such a construction would forego the safeguard against having the trust corpus used to satisfy the debts of the settlor's son. This construction would also frustrate the settlor's intention to have the trust applied for the benefit and support of both the son's wife and his children. Next, the court rejected a construction that would have given a fee simple jointly to the settlor's daughter-in-law and the four children who were living when the trust was executed.¹²³ Once again, this construction would make the land alienable and reachable by the creditors of the son. In addition, it would defeat the trust's basic purpose: to support and maintain the son's wife and children throughout their lives. Finally, the construction would exclude afterborn children, which the son and his wife actually had. As a result, the court reached a construction that it believed best carried out the settlor's intent, namely, a life estate in the wife, with a remainder in fee simple absolute to the children.¹²⁴

Talley illustrates how a court can effectuate an estate owner's intent despite the presence of adverse precedential meaning. To be sure, evidence of the settlor's intent was overwhelming. Nevertheless, this court did not bind itself to past meaning, but rather sought the interpretation that led to the best result in light of everything that reflected the settlor's dispositive intent.¹²⁵

120. *See id.* at 456, 459.

121. *See id.* at 457-59.

122. *See id.* at 456-57.

123. *See id.* at 457-59.

124. *See id.* at 458-59.

125. One should note that by rejecting a fee simple held solely by the son's wife or owned concurrently and jointly with their four children, the court negated constructions that would have produced a marketable title. Instead, the court found a life estate in the wife, with a remainder in fee simple in their children. Division of ownership in this manner undoubtedly made the title unmarketable.

Some of the other jurisdictions adhere to the standard formulation of the second rule from *Wild's Case*. In at least one jurisdiction, this formulation functions almost as if it were a rule of law, as opposed to a rule of construction, and the courts sometimes refer to it in this manner.¹²⁶ Some jurisdictions, however, acknowledge that the second rule is merely a rule of construction.¹²⁷ Nevertheless, because courts within these jurisdictions rigorously apply the second rule, one might conclude that it has been elevated into something more than a guideline for interpretation of ambiguous language. Several cases from North Carolina illustrate this point.

In *Lewis v. Stancill*,¹²⁸ the Supreme Court of North Carolina construed a devise to: "my grandson . . . to him and his children, born in wedlock, forever."¹²⁹ At the testator's death, the grandson had four children. The grandson assumed possession of the land and mortgaged it. Thereafter, the land was sold under the mortgage. A question arose as to the precise interest acquired by such purchaser. The court concluded that the grandson and his four children received a fee simple as tenants in common from the testator. Consequently, the purchaser acquired a one-fifth interest as a tenant in common with the grandson's children.¹³⁰

The court observed that its decision conformed to the result uniformly reached by North Carolina courts, one followed in England for the three hundred years since *Wild's Case*. The court firmly believed that the facts of this case presented an even stronger basis for the result because of the word "forever," thus eliminating any contention that the grandson received a life estate.¹³¹ In contrast, the dissenting judge agreed as to the general proposition—the second rule—but believed that the specific language and the entire will demonstrated that the testator intended the grandson to have

126. See, e.g., *Moore v. Lee*, 17 So. 15 (Ala. 1895). Therein the Supreme Court of Alabama ruled that a conveyance to a daughter "and her children forever" did not give to the daughter a life estate with a remainder in fee simple to her children. Instead it created jointly held interests in both the daughter and her children. The court stated, "The rule of law is that in a conveyance to *A.* and his children, if *A.* have children at the time of the conveyance, the children take jointly with the parent, and afterborn children are excluded." *Id.* at 16; see also *Dryer v. Crawford*, 7 So. 445 (Ala. 1890).

127. Among these jurisdictions, some courts have considered the construction that the parent takes in common with his or her existing children—sometimes without identifying such construction as the rule in *Wild's Case*—but they have rejected such interpretation because of a firm belief that under the particular will something else was intended. For a decision in which a court concludes that the parent received a fee simple and the children nothing, see *Connor v. Gardner*, 82 N.E. 640 (Ill. 1907). For decisions in which courts have concluded that the parent received a life estate and the children took a fee simple, see *Wilkins v. Wilkins*, 206 S.W.2d 26 (Ark. 1947); *Desmond v. MacNeill*, 96 A. 924 (Conn. 1916); *Downes v. Long*, 29 A. 827 (Md. 1894).

128. 70 S.E. 621 (N.C. 1911).

129. *Id.* at 621.

130. See *id.* at 621-22.

131. See *id.* at 622.

merely a life estate, with a remainder in fee simple to his children.¹³²

Thereafter, other North Carolina cases presented the same constructional problem. For example, in *Cullens v. Cullens*,¹³³ the Supreme Court of North Carolina found it “well settled” that a conveyance to the grantor’s daughter “and her children” created a tenancy in common among the daughter and her children born by the date of the deed.¹³⁴ The court reached this conclusion on the basis of previous decisions and the precedential meaning established by them. The court, however, offered no discussion beyond the citations to these cases.¹³⁵

In *Benbury v. Butts*,¹³⁶ the supreme court construed a devise to: “my wife’s daughter . . . to her and her children and to their children’s children . . . possession to be given after the death of myself and my wife . . .”¹³⁷ The wife had died, and the daughter’s only descendants living at the testator’s death were two children. Thereafter, the daughter and her husband, but not their two children, contracted to sell a complete fee simple title to the devised land. The purchaser, however, refused to make payment, alleging a defective title. As a result, the daughter and her husband sued for specific performance.¹³⁸ The supreme court found the title defective because the daughter’s children were entitled under the will to take a fee simple as tenants in common with their mother. The court rested its decision upon precedential meaning¹³⁹ but again merely cited previous cases without discussion. It did not address the additional language—“and to their children’s children”—which seemed to suggest successive life estates and not concurrent interests.¹⁴⁰

132. *See id.* at 622 (Hoke, J., dissenting).

133. 77 S.E. 228 (N.C. 1913).

134. One should observe that the court found that the deed created a tenancy in common among the daughter and her children for life and not in fee simple absolute. It reached this construction because the conveyance was made before 1879—the year in which the legislature enacted a statute that eliminated the common-law requirement of “and heirs” for the creation of a fee simple. *See id.* at 229-30.

135. *See id.* at 229.

136. 113 S.E. 499 (N.C. 1922).

137. *Id.* at 499-500.

138. *See id.*

139. *See id.* at 500.

140. Surely this additional language could have overcome the rule of construction and supported successive life estates to the daughter and then to her children—with a remainder in fee simple to her grandchildren—instead of a tenancy in common among the daughter and her children in fee simple absolute. The result would, however, have been the same under either of these constructions. The daughter and her husband had contracted to sell a full and complete fee simple absolute to the defendant. The defendant refused to complete the purchase because the title of the daughter and her husband—the plaintiffs—was inadequate. Both the lower court and the supreme court agreed with the defendant. Because her children had not joined her in the conveyance and because they jointly owned

In *Snowden v. Snowden*,¹⁴¹ the testatrix's daughter claimed that she took exclusively a fee simple absolute because of a devise made to: "my daughter, Laura, children, her heirs and assigns . . ."¹⁴² The lower court held that the daughter and her three children received a fee simple as tenants in common. The supreme court affirmed by citing, reviewing and quoting from previous cases that addressed this question—including *Cullens v. Cullens* and *Benbury v. Butts*—and found a tenancy in common involving the parent and her children.¹⁴³ Afterwards the court added:

The word "children" is not the equivalent of heirs, and where the conveyance or devise is to a parent and children it has *always* been construed with us that they take as tenants in common.

It is true in this case the devise is to "my daughter Laura, children, her heirs and assigns," and the plaintiff contends that the use of the words "her heirs" after the word "children" gave her a fee simple. But we cannot draw that inference from the word "her," since at the death of the testatrix there might have been no children, and the use of it does not obliterate the word "children" from the devise. The children living at the death of the testatrix as tenants in common with their mother take under the above well-settled rule of law.¹⁴⁴

Despite a history of adherence to well-settled precedential meaning, the Supreme Court of North Carolina has with most recent cases tended towards ad hoc interpretation of the language format that gave rise to the rules from *Wild's Case*. For example, in *Coffield v. Peele*,¹⁴⁵ two of the testator's children petitioned for partition of a devise to: "[m]y seven children, namely: [herein each child was named]—All of my real and personally [sic] property, to be divided equally among the seven children of mine, and their children."¹⁴⁶ On appeal, the supreme court affirmed the judgment below, which granted the partition after the lower court had found that the seven

the fee simple with her, the daughter could not supply full and complete title. This result would, of course, have been the same if the daughter had received merely a life estate. Either construction justified the result that had been reached by the court. The court did not have to make a choice, and the one it did make was dicta. The court was not asked to decide a question as to title—as to actual ownership. It was, however, asked to determine whether the plaintiffs had satisfied the terms of their contract—to convey a full and complete fee simple absolute. Either the prevailing construction, a cotenancy in fee simple absolute, or an exception to it, successive life estates, demonstrated that the plaintiff's title was not full and complete and supported a result for the defendant.

141. 122 S.E. 300 (N.C. 1924).

142. *Id.* at 301.

143. *See id.*

144. *Id.* at 301 (emphasis added).

145. 100 S.E.2d 45 (N.C. 1957).

146. *Id.* at 46.

children alone held a fee simple as tenants in common. Accordingly, their children received nothing from the testator as a result of this provision.¹⁴⁷

The opinion of the supreme court began with an observation about a process of construction that resembles ad hoc interpretation:

Every will, in a sense, is unique. The same words, or those nearly similar, used under different circumstances and contexts may express different intentions, and for that reason decisions in previous cases are rarely helpful, except as they state the application of certain rules of construction, or certain broad canons of interpretation, which have become so thoroughly established by judicial pronouncement that they may be said to have passed into the definite law upon the subject. Every will is so much a thing of itself, and, generally, so unlike other wills, that it must be construed by itself as containing its own law.¹⁴⁸

The court then set out these rules of construction: ascertain the testator's intent; reconcile conflicting provisions by giving effect to the entire instrument; implement the prevailing purpose and subordinate provisions inconsistent with it.¹⁴⁹

In light of these principles, the court noted that the language of the testator first creates an interest in his children, which would without more have given them a fee simple as tenants in common. After this unequivocal devise to his children, the testator adds the language that includes their children, thus making it a provision repugnant with the gift to his seven named children. The latter provision would reduce the interest of each of the testator's children from one-seventh to one-fifty-first, thereby giving the testator's grandchildren collectively a much larger share than his children. Because children rather than grandchildren are among the primary objects of a decedent's bounty and because the primary intent of the will is to confer a fee simple upon only the seven named children, the inconsistent provision for inclusion of grandchildren must be sacrificed in favor of a devise to the children exclusively.¹⁵⁰

In the last half of this century, however, courts have continued to affirm the vitality of the rules from *Wild's Case*. *In re Parant's Will*,¹⁵¹ involved a devise to: "my niece . . . and to her children."¹⁵² At the date of the testatrix's

147. *See id.* at 49.

148. *Id.* at 47.

149. *See id.* at 48.

150. *See id.* at 48-49.

151. 240 N.Y.S.2d 558 (N.Y. Sup. Ct. 1963).

152. *Id.* at 560.

will and her death, the niece had two living children. Upon the niece's request for construction of such provision, the court was asked to determine whether she alone received a fee simple absolute or what if any interest vested in her children. The court considered three possible interpretations.¹⁵³ First, the niece alone could have received a fee simple absolute, either because "and to her children" were words of limitation or because "and" should be construed as "or" thereby giving the children a substitutional gift in the event the niece had predeceased the testatrix. Second, the niece could have received a life estate with the remainder to her children in fee simple absolute. Third, the niece and children could have taken concurrently a fee simple absolute as tenants in common. The court upheld the third construction, and in doing so it approved application of the second rule from *Wild's Case*.

The court acknowledged that New York courts had little experience with this language format and that the precise question posed was one of first impression in New York. Despite the freedom the court might have enjoyed under this circumstance, it began by recognizing the importance of "technical meaning," which it thereafter attached to the language format under consideration.¹⁵⁴ The court then went on to say:

There being nothing else in the will from which to glean an indication of testatrix'[s] intent, and the will having been prepared by an experienced draftsman, we must take the words "and to her children" as we find them and give to them "their usual and accepted meanings without enlargement and without restriction . . . and when particular or technical terms are used, particular or technical interpretation or construction follows as of course, in the absence of a clear intent to the contrary."¹⁵⁵

With this in mind, the court then refuted interpretations that would have construed the word "and" to mean "or" and the term "children" as a word of limitation. As a result, the court rejected the niece's claim that she alone received a fee simple absolute.¹⁵⁶

Having determined that the niece and her children both received interests, the court then considered the nature of these interests. After reviewing several New York cases, *Wild's Case*, and its various applications in the United States, the court concluded that because *Wild's Case* is followed more

153. *See id.*

154. *Id.*

155. *Id.* at 561 (citations omitted).

156. *See id.* at 560-62.

often than not, it must be assumed to be the law in New York.¹⁵⁷ Finally, the court buttressed its conclusion by observing that the testatrix created a class gift, which included both the niece and her children. Consequently, if the niece had predeceased the testatrix, her children were intended to share in the entire gift.¹⁵⁸ This observation, however, begs the question. Had the devise created a life estate in the niece and a remainder in fee simple to her children, a construction directly considered by the court, one could not say that a class gift was formulated for the niece and her children.

This case illustrates the power of precedential meaning even when it derives from a so-called rule of construction. The court elevated the second rule from *Wild's Case* to a technical meaning that an experienced draftsman had used to establish particular interests. As a result, the court hesitated to turn away from such interpretation without recognizing that experienced draftsman would create any of the interests it considered with the language format presented.¹⁵⁹ Indeed, the court failed to see that “to my niece and children” was a deviant format and not a standard phrase for the creation of these interests.

b. Variant Formulation—Life Estate in the Parent, Remainder in Fee Simple to the Children

Two jurisdictions, Pennsylvania and Kentucky, reject the standard formulation of the second rule from *Wild's Case*. As previously discussed, Pennsylvania has a unified formulation that applies to the circumstances in which both rules apply.¹⁶⁰ More specifically, Pennsylvania courts have found that a gift to “[a parent] and her children” creates a life estate in the parent and a remainder in fee simple to the children, without regard to whether or not the parent has children alive when the dispositive instrument becomes effective. Numerous cases have established and reinforced this meaning over time.¹⁶¹

In upholding this formulation, some courts have looked beyond past decisions and the precedential meaning ratified by them—to support the

157. See *In re Parant's Will*, 240 N.Y.S.2d 558, 562-64 (N.Y. Sup. Ct. 1963).

158. See *id.* at 565.

159. See *infra* Part III.B.1.

160. See *supra* notes 78-91 and accompanying text; see also *infra* note 161.

161. See, e.g., *In re Keown's Estate*, 86 A. 270 (Pa. 1913); *Chambers v. Union Trust Co.*, 84 A. 512 (Pa. 1912); *In re Vaughn's Estate*, 79 A. 750 (Pa. 1911); *Elliot v. Diamond Coal & Coke Co.*, 79 A. 708 (Pa. 1911); *Crawford v. Forest Oil Co.*, 57 A. 47 (Pa. 1904); *Hague v. Hague*, 29 A. 261 (Pa. 1894); *Coursey v. Davis*, 46 Pa. 25 (1863); *Meily v. Meily*, 24 A.2d 25 (Pa. Super. Ct. 1942); *Shue's Estate*, 33 Berks County L.J. 169 (Pa. Orphans' Ct. 1941).

construction they reach. In *Elliott v. Diamond Coal & Coke Co.*,¹⁶² the Supreme Court of Pennsylvania construed a devise to: “[m]y said daughter and her children forever.”¹⁶³ The testator was survived by this daughter, her husband and her children. In construing this phrase, the court acknowledged the prevailing interpretation attributed to this language format in previous decisions.¹⁶⁴ However, the facts of the case gave the court additional reasons for finding a life estate in the daughter with a remainder in fee simple to her children. “[I]t may well have been the intent of the testator to protect the interests of these grandchildren, and to guard against the possibility of his son-in-law holding the entire real estate therein disposed of as tenant by the curtesy.”¹⁶⁵ Other provisions within the will demonstrated correct technical knowledge for creation of a fee simple in the devisees. Therefore, the court firmly believed that something else must have been intended by the testator. Consequently, the court found ample support for applying the precedential meaning previously established by Pennsylvania courts.¹⁶⁶ This approach was also taken by a Pennsylvania superior court many years later.¹⁶⁷

The Supreme Court of Pennsylvania, however, has sometimes failed to account for factors that might reveal a different intention and, therefore, justification for a construction that deviates from precedential meaning.¹⁶⁸ In *In re Vaughan's Estate*,¹⁶⁹ the testator devised all of his property to his wife for life, with the remainder to be divided equally among his three children.

162. 79 A. 708 (Pa. 1911).

163. *Id.* at 708.

164. *See id.* at 708-09.

165. *Id.* at 709.

166. *See id.*

167. *See Meily v. Meily*, 24 A.2d 25 (Pa. Super. Ct. 1942). *Meily* concerned the following devise: “[T]o my Daughter . . . to her and her children in fee simple and forever . . .” *Id.* at 26. The lower court found that the daughter received from the testator a fee simple absolute and that her children took no interest. Consequently, upon the daughter’s subsequent death, the subject matter passed under the terms of her will. *See id.* at 27. The superior court, however, reversed this decision, ruling that the daughter’s life estate ended at her death with the remainder then passing directly from the testator to the daughter’s children in fee simple. The court observed that this construction had been established in Pennsylvania for many years as to conveyances in this form. *See id.* at 26-27. The lower court, while recognizing this principle, believed that other provisions within the will lifted the devise out from under the general rule. The superior court disagreed, finding that these same provisions did exactly the opposite. *See id.* at 27-28. More specifically, these provisions supported a conclusion that “and her children” were not words of limitation creating a fee simple in the daughter alone. Each of the other provisions provided for a child “and his heirs in fee simple and forever.” *Id.* at 27. Originally the gift to the testator’s daughter was expressed in the same manner. Nevertheless, an examination of the original will revealed that “heirs” was—in the testator’s own handwriting—changed to “children.” *Id.* Consequently, the court believed that something different was intended, namely a life estate in the daughter with a fee simple in her children. *See id.* at 28.

168. *See In re Keown's Estate*, 86 A. 270 (Pa. 1913); *see also supra* note 105.

169. 79 A. 750 (Pa. 1911).

He then placed his daughter's one-third interest in trust "for her and her children's sole use and benefit . . ." ¹⁷⁰ The daughter had several children alive when the testator died. After the life tenant's death, the daughter claimed her one-third absolutely to be held free from the trust. The court upheld the rulings below that the trust was an active one and, accordingly, awarded the daughter's one-third interest to the trustee. ¹⁷¹ The court first observed the precedential meaning established in Pennsylvania as to this language format. The court also noted that the testator's two sons received absolute interests but that the additional language pertaining to the daughter differentiated her interest. Consequently, the court believed that the testator intended to "prevent the property going directly into the control of his daughter, and to put its management in the trustee to preserve the remainders vested in her children." ¹⁷²

The court did not, however, account for the fact that the daughter's gift had been postponed until after the life tenant died. Originally, Pennsylvania established its variant formulation because such construction enabled the parent's children to be born and, therefore, to share in the gift. ¹⁷³ When this kind of devise was immediate, inclusion of additional children could only be accomplished by deferring their gift, with the obvious postponement being until after the parent had died. ¹⁷⁴ Such postponement was, however, unnecessary in the actual case. The daughter already had several children at the testator's death, and the devise to her and her children was deferred until the life tenant's death, thereby allowing other children to be born and also share in the gift. Consequently, the reason that originally underscored Pennsylvania's rejection of the second rule from *Wild's Case* became unnecessary under the facts of this case. Indeed, the supreme court could have concluded that the daughter and her children took a fee simple as tenants in common.

In contrast, a lower court treated the Pennsylvania formulation as a rule of construction that could truly be overcome by evidence of a different intent. In

170. *Id.* at 750.

171. *See id.* at 750.

172. *Id.* at 751.

173. *See supra* notes 94-105 and accompanying text.

174. Absent some express condition that might defer first distribution and thereby allow inclusion of children born thereafter, there is no implied time for postponement short of the parent's death; that is, there is no implied or obvious time for cutting off class membership before the birth of other children becomes an impossibility beyond the procreator's death. Consequently, if afterborn children are to be included, distribution to all children must be delayed until their parent's death, which can easily be accomplished with a life estate in the parent and a remainder in fee simple absolute for the children. Any delay to an earlier point in time requires a construction predicated upon pure fabrication as to intent, form and substance of the gift.

Shue's Estate,¹⁷⁵ the testatrix left by holographic will a mortgage to her daughter: "Grace Broad and her children."¹⁷⁶ At the testatrix's death, the daughter had three children. The testatrix also provided for another daughter: "Dorothy Kern and Gloria, her daughter."¹⁷⁷ Dorothy had only one child—Gloria. The court ruled that Grace and her children took as tenants in common. It noted the second rule in *Wild's Case* and that it was not law in Pennsylvania. Nevertheless, the Pennsylvania rule was only a rule of construction. As such, it should always give way to actual intent. The court clearly believed that the testatrix intended to create the same interests in her daughters and their respective children. It concluded that the difference in wording merely reflected the fact that Dorothy had one child—whom she elected to name—and Grace had three children—whom she could identify by group description.¹⁷⁸

Kentucky is the other jurisdiction with precedent that gives a life estate to the parent and remainder to the children in fee simple absolute. Nevertheless, its courts have given several meanings to variations of language that says essentially to "[a parent] and her children." In fact, Kentucky has evolved three related rules for construction of such limitations, which have been rigorously followed for many years.¹⁷⁹ Mainly, these rules seem to reflect differences in language and not the existence or nonexistence of children when the dispositive instrument becomes effective.

By the time *Naville v. American Machine Co.*¹⁸⁰ was decided in 1911, these rules had become well established. In this case, the court of appeals construed a devise to the testator's "daughter . . . for her to enjoy for herself and her children forever."¹⁸¹ Many years after her father's death, the daughter and her husband sold the subject matter, with additional provision in the deed that her children would quitclaim any interest they might have to the purchaser when they individually attained age twenty-one. Before all of her children reached majority, the purchaser sued to determine the kind of estate that the daughter had previously received from her father, the testator.¹⁸² The purchaser asked the court to declare it a fee simple absolute. However, the guardian ad litem for the daughter's minor children maintained that the daughter received merely a life estate, while the children took the fee simple

175. 33 Berks County L.J. 169 (Pa. Orphans' Ct. 1941).

176. *Id.* at 169.

177. *Id.* at 170.

178. *See id.* at 170.

179. *See infra* notes 180-205 and accompanying text.

180. 140 S.W. 559 (Ky. 1911).

181. *Id.* at 559.

182. *See id.*

absolute.¹⁸³

The court of appeals held for the purchaser, and it summarized the governing rules of construction as follows:

First, devises by a father or mother to a son, daughter, or blood relation, in which the language “to him and his children forever” is used; second, devises to a blood relation and his children, where the word “forever” is not used following the word “children”; and, third, devises by a husband to his wife and her children. In all those cases falling within the first class, the word “children” has been construed as meaning “heirs,” and under this construction it has been held that they took no interest in the property devised. In the second class of cases it has been held that the children took a fee, subject to the life estate of their parent. And in the third class of cases the children have been held to take the fee and the parent the life estate; the opinion in the cases falling within this class being rested, as stated, upon the idea that the testator, while wanting his wife to have the full use, benefit, and enjoyment of his property during her life, would not want it, after her death, to pass to those strangers in blood to him.¹⁸⁴

The court noted that many cases do not fall within these categories because of other relevant language within the instrument. In these situations, a court will not govern its construction by such rules. Despite this, the court held that the daughter received a fee simple absolute and her children took nothing. In reaching this result, the court relied exclusively upon what other courts have done with the word “forever,” which always controlled the result. The court did not look for language evidencing a different intent and, therefore, a different construction.¹⁸⁵ Indeed, the court could have found that “children” was intended as a term of purchase because of language that said: “for her to enjoy for herself and *her children* forever.”¹⁸⁶ One should note that the court’s interpretation is reached even though the term “forever” becomes redundant once “children” is construed as a word of limitation. Further, courts have upheld such precedential meaning even though “children” otherwise remains a word of purchase and “forever” a word of

183. *See id.*

184. *Id.* at 561.

185. *See id.* at 560-61.

186. *Naville v. American Mach. Co.*, 140 S.W. 559, 559 (Ky. 1911) (emphasis added). Once again, in Pennsylvania use of the word “forever” would not convert “children” into a word of inheritance sufficient to give a fee simple absolute to the daughter exclusively. *See supra* notes 162-67 and accompanying text.

limitation when the gift is to the testator's "wife and their children."¹⁸⁷ Therein, the construction produces a life estate in the wife with a remainder in fee simple absolute in the children.

Despite the foregoing questions as to the wisdom of such interpretation, it has obtained in Kentucky. In *Wilson v. Morrill*,¹⁸⁸ the court of appeals construed a devise to: "[the testator's grandson] and his children forever and without the right to sell or in any way dispose of it during his life or the life of his children."¹⁸⁹ This devise was subject to a life estate, and after the life tenant's death the grandson contracted to sell a marketable title. The purchaser believed the grandson only received a life estate and therefore refused to proceed. The grandson then sued for specific performance.¹⁹⁰

In finding for the grandson and granting the decree, the court relied heavily upon the precedential meaning attributed to the word "forever" when the gift is to someone (other than the estate owner's spouse) and his or her children.¹⁹¹ The court recognized that ordinarily a devise to a son or daughter "and children" produces a life estate in the parent and a remainder in fee simple for the children. Nevertheless, a long line of cases requires that the word "forever" must change this result. In affirming such precedential meaning, the court failed to carefully examine how the additional language restricting the grandson's right of sale or disposition might reflect a different construction.

Perhaps the first case in Kentucky to articulate a different rule for a devise to a "[spouse] and children" was *Davis v. Hardin*,¹⁹² decided in 1880. In its decision, the court of appeals observed that a gift to:

[A] child and that child's children, may well be supposed to have intended them to take jointly. They are all of his blood, and the natural objects of his bounty; but when a husband makes a conveyance to his wife and *their* children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself.¹⁹³

The court also emphasized that effectuating intent is important, that rules must always give way to such intent, and that it is unreasonable to apply the same rule of construction to every deed. Consequently, because the usual rule

187. See *infra* notes 192-95 and accompanying text.

188. 265 S.W. 774 (Ky. 1924).

189. *Id.* at 775.

190. See *id.* at 774-75.

191. See *id.* at 775-76.

192. 80 Ky. 672 (1880).

193. *Id.* at 673-74.

would have diverted the gift from his own child to the children of his wife's second marriage, the court believed that a life estate in the wife with a remainder in fee simple to their children was a much more reasonable construction.¹⁹⁴

By 1891, this interpretation had become settled law.¹⁹⁵ Soon thereafter, however, the court of appeals reached the same construction as to a gift that did not involve the transferor's spouse. In *Baskett v. Sellers*,¹⁹⁶ the court of appeals found that a conveyance from a father to his "daughter and son, and their children" created a life estate in his children and a remainder in fee simple to his grandchildren. The court rejected the argument that "children" was used as a term of limitation the same as "heirs." Instead, the court preserved a meaning that had been established by other courts for reasons that did not apply in this case.¹⁹⁷ Herein, the parent was the testator's child and not the testator's spouse. There was no reason to assume that an immediate absolute interest in the child would lead to a diversion from the grantor's blood line any more than a case in which the court had ruled that the spouse received a life estate and the children the absolute interest by way of a remainder. As a result, the court gave additional life to a specific construction that transcended its original rationale—an interpretation in which the language format superseded intent and context. This case became the genesis of the second rule described in *Naville v. American Machine Co.*,¹⁹⁸ namely, absent the term "forever," a gift to a blood relative and his children is construed as a life estate in the relative and a remainder in fee simple to his children. Kentucky courts have followed and rigorously applied this rule. The court of appeals has relied on this rule as recently as 1959.¹⁹⁹

Despite a predilection for rigid adherence to precedential meaning, some Kentucky decisions have demonstrated a capacity for independent construction and judgment. In *Rice v. Klette*,²⁰⁰ the court of appeals construed a devise to a son "and his children" to create a joint estate in fee simple in the son and his children. The court considered other interpretations, especially the prevailing view of a life estate in the son and a remainder in fee simple to his children. Nevertheless, the court reached a different result after carefully

194. *See id.* at 673-75.

195. *See Frank v. Unz*, 16 S.W. 712 (Ky. 1891). Application of this construction was justified the same as in *Davis v. Hardin*—otherwise at the death of the spouse the subject matter might pass to strangers who were unrelated to the transferor-estate owner. *See id.* at 712.

196. 19 S.W. 9 (Ky. 1892).

197. *See id.* at 10.

198. *See supra* text accompanying note 184.

199. *See Johnson v. Houchins*, 330 S.W.2d 114 (Ky. 1959).

200. 149 S.W. 1019 (Ky. 1912).

reviewing the entire instrument.²⁰¹ Among other things, the court observed that the testator clearly knew how to create a life estate as indicated by other provisions within his will. As a result, it firmly believed that the testator intended something else with this devise to the son and his children. In *Martin v. Martin*,²⁰² the court of appeals acknowledged that a devise to a granddaughter “and her children” would ordinarily create a life estate in the granddaughter. However, because of other gifts within the will that clearly expressed creation of a life estate and because of additional language within the terms of the gift to the testatrix’s granddaughter, the court ruled that the granddaughter received a fee simple and her children took no interest at all.²⁰³

Additionally, in *Hatcher v. Pruitt*,²⁰⁴ the court of appeals found that a devise to the testator’s “wife and children” did not create a life estate in the wife, but instead a fee simple held jointly with her children. While it acknowledged that a life estate would have been the customary construction, it also affirmed the importance of intent. It observed that although courts, especially Kentucky courts, have struggled to fix a definite rule to be followed in these cases, courts should apply these rules only after all efforts to arrive at the intent of the testator have failed. The court again rested its construction upon specific language within the will that contradicted a life estate and confirmed a concurrent interest that could be partitioned.²⁰⁵

B. “To B at \$N Per Year for as Long as B Resides in the City of X”

This section considers a transfer that is usually supported by consideration and is made during the lifetime of the transferor by deed or lease. Two major characteristics are common to each of the illustrations and cases that will be discussed. First, the language used does not clearly define a particular estate. More specifically, it does not say to “B for life” to indicate a life estate.²⁰⁶ Although the limitation may include a consideration that is to be rendered periodically, the language does not specify to “B from year to year” or “from

201. *See id.* at 1021-22.

202. 262 S.W. 1091 (Ky. 1924).

203. *See id.* at 1092-93.

204. 22 S.W.2d 133 (Ky. 1929).

205. *See id.* at 135.

206. *See* RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 18 (1936).

An estate for life is an estate which is not an estate of inheritance, and (a) is an estate which is specifically described as to duration in terms of the life or lives of one or more human beings, and is not terminable at any fixed or computable period of time . . .

Id. This definition is followed by an example that confirms the creation of a life estate when “for life” is expressly used as words of limitation to confirm the interest created in a transferee.

month to month," which would describe a periodic tenancy.²⁰⁷ The limitation does not provide a maximum duration that offers a computable point in time and, therefore, would clearly create an estate for years.²⁰⁸ Finally, the language does not give both the transferor and transferee the power to terminate the tenancy at anytime, which would produce an estate at will.²⁰⁹

Second, the language gives the tenant a power to terminate the tenancy that only she can exercise. Sometimes this power is severely restricted so that the tenant can end the tenancy only when certain conditions are satisfied. This might, for example, involve the cessation of a particular business located on the premises or the departure of the tenant from the city in which the leasehold is located.²¹⁰ Sometimes, however, the tenant's power may be unfettered so that the tenancy can be terminated whenever the tenant desires.²¹¹

Without the presence of both of these factors, courts may not find an ambiguity sufficient to make construction a problem. For example, assume that a lease contains words of limitation that clearly create an estate for years—"This lease will commence on January 1, 1995 and terminate at midnight on December 31, 1999"—but also empowers the tenant to terminate before then if she wishes to "go out of business." With this language, courts have had little difficulty finding a determinable estate for years, one that is terminable at the election of the tenant.²¹² In short, courts have been willing to say that the power to terminate does not alter the basic estate characterization when such estate has been clearly defined.

Courts have also reached the same conclusion whenever the power to terminate is reserved to the transferor instead of the tenant-transferee.²¹³ Even though such power effectively gives its recipient the power to terminate at

207. See *id.* § 20. "An estate from period to period is an estate which will continue for successive periods of a year, or successive periods of a fraction of a year, unless it is terminated." *Id.* Among the illustrations used to demonstrate creation of a periodic tenancy is: "A, owning land in fee simple absolute, leases the land to B to hold as tenant from year to year. B is a tenant from year to year from the beginning." *Id.* § 19 cmt. a (emphasis added).

208. See *id.* § 19. "An estate for years is an estate, the duration of which is fixed in units of a year or multiples or divisions thereof." *Id.* Further, "[i]t is sufficient to create an estate for years, so far as the requirement of definiteness of duration is concerned, that the duration of the estate is either precisely stated or can be exactly computed at the time when the estate become possessory." *Id.* § 19 cmt. a.

209. See *id.* § 21. "[A]n estate at will is an estate which is terminable at the will of the transferor and also at the will of the transferee and which has no other designated period of duration." *Id.*

210. See *infra* notes 219-34 and accompanying text.

211. See *infra* notes 236-50, 260-68 and accompanying text.

212. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT §§ 1.6 cmt. g, illus. 5 (1977).

213. See *id.* § 1.6 cmt. g, illus. 4.

will, and even though the other party is bound for the full duration of the defined estate, the relationship is not transformed into an estate at will. Invariably, courts view the power to terminate as a condition of defeasance and nothing more. Indeed, there is no perceived ambiguity because the estate has been clearly expressed.

In the absence of language that defines an estate, the power to terminate takes on a new significance. Without this power, a court might find a periodic tenancy if there is a periodic rental,²¹⁴ or if the agreement is written it might find a life estate or even a fee simple absolute.²¹⁵ However, with the power to terminate, a court might find a tenancy at will, an estate from period to period, a defeasible life estate or even a defeasible fee simple. These choices exist when the power is reserved to the tenant-transferee.²¹⁶ Courts are inclined to react differently, however, when the power belongs to the transferor. In this situation, courts will conclude that the power to terminate gives rise to an estate at will.²¹⁷

Over the years, numerous cases have addressed this type of situation. Despite their number, one must view the language formats within them as deviant. Whatever result a court might reach, these cases do not present a conventional format for estate creation. By definition, the language of conveyance omits the well-tested phrases normally used to create life estates, estates from period to period and estates at will.²¹⁸ This ambiguity opens the door to multiple interpretations. No matter how a court might resolve the problem, one would never expect an experienced draftsman to replace standard language with the formats these cases embrace. Two leading cases illustrate the problems courts have with these deviant patterns and how they resolve them.

In *Thompson v. Baxter*,²¹⁹ the Supreme Court of Minnesota construed a written residential lease that included a monthly rental. As to its duration the lease provided: "To have and to hold the above-rented premises unto . . . [the tenant], his heirs, executors, administrators, and assigns, for the full term of while he shall wish to live in Albert Lea, from and after the 1st day of December, 1904."²²⁰ The tenant assumed possession and, thereafter,

214. See *id.* § 1.5 cmt. d, illus. 2, 3.

215. This assumes the existence of a statute—one that exists in nearly every jurisdiction—that presumes creation of a fee simple absolute unless language within the dispositive instrument indicates otherwise. See RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 39 (1936).

216. See *infra* notes 219-312 and accompanying text.

217. See *infra* note 301 and accompanying text.

218. See *supra* notes 206-07, 209.

219. 119 N.W. 797 (Minn. 1909).

220. *Id.* at 797.

faithfully paid the rental each month while continuously residing in the City of Albert Lea. Eventually, a successor owner of the landlord's interest decided to end the tenancy immediately and, accordingly, she gave notice that would have been proper if the lease had created an estate from month to month, at will or at sufferance.²²¹ The trial court, however, found for the tenant and held that the lease created a defeasible life estate, one that would terminate upon the tenant's death or earlier in the event he left Albert Lea.²²²

The supreme court affirmed. The court first carefully examined the criteria for each of the estate classifications raised by the plaintiff and defendant. An estate at will is for an indefinite or uncertain term. This lease, however, does not satisfy such requirement because the term is not indefinite within the meaning of the law. Indeed, it is "specifically agreed upon"; it is "limited by the time defendant shall continue to dwell in Albert Lea, and this limitation takes the case out of the class of tenancies at will."²²³ The court similarly concluded that the lease did not create a month-to-month tenancy. Such a periodic tenancy also arises where no definite time is agreed upon; therefore, because this lease does prescribe a fixed term, it does not form a periodic tenancy.²²⁴ Finally, the court rejected the plaintiff's contention that the defendant was a mere tenant at sufferance. The court observed that an estate at sufferance arises when a tenant who has rightfully assumed possession wrongfully holds over beyond expiration of the term. Having already found that the plaintiff had not properly terminated a tenancy from month to month or at will because the lease did not create either of these estates, the court concluded that an estate at sufferance could not arise because the tenant had not held over beyond termination of the estate created under the lease.²²⁵

The court continued with a discussion of the tenant's contention that he held a life estate. The court first reviewed the criteria for creation of a life estate. It observed that a life estate can be created by a lease that is subject to a periodic consideration. Further, life estates can be formulated by express designation—for example, "to *B* for life"—or by a grant in general terms. Consequently, a grant merely "to *B*" may create a life estate if there is no language that defines another interest or provides a limitation in point of time. Finally, the court emphasized that a defeasible life estate can also derive from a grant that is in general terms only. If the interest created is

221. *See id.*

222. *See id.*

223. *Id.* at 797-98.

224. *See id.* at 798.

225. *See* *Thompson v. Baxter*, 119 N.W. 797, 798 (Minn. 1909).

subject to termination by a particular event and there is no limitation in point of time, such interest will be a life estate just the same as it would have been with express language of limitation that spelled out a life estate. Given these criteria, the court concluded that the language within the lease in question fell directly into the situation in which a defeasible life estate arises from a grant in general terms.²²⁶ In support of this conclusion, the court cited other decisions from several states that reached the same construction with similar lease provisions.²²⁷

This decision is striking in two respects. First, the court responded to its problem of estate classification as if the definitions themselves present clear-cut distinctions that resolve all matters of interpretation. In reality an estate at will, from month to month, and for life are descriptively alike. All three have an uncertain duration, and all three can derive from a limitation marked by such uncertainty. Given the definitions upon which the court relied, presumably a written lease simply "to *B*" could create either a life estate or a tenancy at will, but the court must select only one estate. In doing so, however, it produces a glaring contradiction. The court rejected a tenancy at will because the lease is not for an uncertain and indefinite duration. Indeed, it contains a specifically agreed upon time and is therefore limited "by the time [the tenant] shall continue to dwell in Albert Lea"²²⁸ This language does, however, satisfy the requirements of a defeasible life estate that arises from a grant in general terms. Although the estate created is subject to being defeated by a particular event, the court concluded that there is no limitation in point of time.²²⁹ On the one hand, it is not an estate at will because the estate must end at a specifically agreed upon point of time, but on the other hand, it is a life estate because it is not limited by any point in time.

The court cannot have it both ways.²³⁰ The court found itself in this bind

226. *See id.* at 798-99.

227. *See id.* at 799. In support of its construction, the court relied upon treatises, an earlier decision within Minnesota, and decisions from Ohio, Virginia, Massachusetts, New Jersey, South Carolina and New York.

228. *Id.* at 798.

229. *See id.*

230. Conceivably, there may be ways to reconcile what the court said. However, careful examination makes these distinctions problematic. For example, by "uncertain and indefinite" language (namely, that which reveals an estate at will), the court may have meant a format that contains no referable point in time whatsoever. When the court referred to language "without a limitation in point of time," it meant language without any *computable* limitation in point of time (namely, that which reveals a determinable life estate). This will, of course, explain the construction reached by the court in *Thompson v. Baxter* and in any case in which the choices include an estate at will and a determinable life estate. Indeed, the presence of a condition that does not produce a computable limitation explains the distinction in these cases. But suppose that the language at issue contains no condition of defeasance—suppose that it reads simply: "To *B*." The court in *Thompson*

because it relies upon strict rules and definitions that fail to produce firm distinctions between estates that bear some resemblance to each other. Inevitably, these distinctions break down when one is confronted with deviant language that fails to use the language norms that clearly signify different interests. The language within the lease may be unambiguous—"for the full term of while he shall wish to live in Albert Lea"—however, the same cannot be said about the estate classification. As a result, one thing seems crystal clear. The firm distinctions that exist between estates can be found within the language of creation only when conventional language guidelines are observed to formulate such interests. With deviant formats, however, distinctions grounded upon language alone cannot withstand careful scrutiny.

The other striking aspect of the decision in *Thompson v. Baxter* is the court's selective use of precedent and the absence of any serious consideration of what the parties actually intended. The opinion is laced with citations. The court's discussion of each estate and its distinguishing criteria and characteristics is supported by references to cases and treatises.²³¹ Further, having concluded that the limitation created a defeasible life estate, the court cited cases reaching the same result.²³² Finally, because the lease in question came within the rule of such authorities, the court affirmed the decision of the trial court. In short, it looked to previous decisions to support principles, rules, interpretation and result.

In contrast, the court paid little attention to intent. The court recognized that the intended duration of the parties' relationship was free from ambiguity. However, the legal effect of such language was unclear.²³³ The lease did not use conventional words and phrases that squarely placed the interest within a particular estate classification. The language used to limit duration was clear—for the time the tenant "shall wish to live in Albert Lea"—but this was not unambiguous language normally used to describe an estate for life, from period to period or at will. The court had to select from the acknowledged estates because a hybrid was not permitted.²³⁴ Therefore,

explained that an absolute life estate can arise through a grant in general terms when the language contains no limitation in point of time. Yet it is the presence of a condition that is not computable that explains the different constructions to be reached. Once the condition is eliminated, one is left with a format that qualifies as both a life estate and an estate at will. The gift to *B* is uncertain and indefinite and, therefore, qualifies as an estate at will because it contains no referable point in time. The gift to *B* also contains no computable limitation in point of time and, therefore, qualifies as a life estate. Consequently, this recasting of the court's distinction also breaks down in application.

231. See *Thompson v. Baxter*, 119 N.W. 797, 797-99 (Minn. 1909).

232. See *id.* at 799.

233. See *id.* at 797.

234. See *supra* note 10.

the court squeezed the deviant format into a familiar classification, using meaning and interpretations extracted from previous decisions to support its choice. At no time did it openly consider whether its construction made sense in light of all the facts before it. Payment of a monthly consideration may not have been theoretically inconsistent with a life estate, but was it commonplace when words of express creation were omitted? And was it commonplace for a residence to be the subject matter of a rental for life? Given all that might bear upon their intent—and perhaps other factors that ought to matter as well—did the court really believe that a life estate best fit the bargain the parties had struck?

One should also observe that this court's use of precedential meaning was very selective. Other courts had reached a different estate classification when presented with language that gave the lessee a unilateral option to terminate the lease. Based upon a principle attributed to Lord Coke, these courts concluded that if either the lessor or lessee could terminate at will then so could the other party. Stated differently, if one party has the power to terminate at will, then an estate at will arises even though the lease does not expressly confer such power upon both parties.²³⁵

*Foley v. Gamester*²³⁶ is a leading case that supports this construction. In *Foley*, the Supreme Judicial Court of Massachusetts decided a case that seemed very similar to *Thompson v. Baxter*. As before, this case involved a written lease, but with a consideration that was yearly instead of monthly. The duration of the lease was "for as many years as desired by the [lessee] from the first day of Nov. 1926"²³⁷ Soon after execution of this lease the lessor signed an additional instrument that gave the lessee the right to erect a building on the land and to remove it thereafter upon expiration of the lease. The lessee entered into possession and erected a gasoline station.²³⁸ Over two years later, on January 28, 1929, the lessor conveyed her reversion to a successor lessor. Three days later the new lessor gave the lessee notice to vacate, but the lessee refused. This notice was renewed on April 1st. At no time did the lessee exercise the power conferred within the lease and thereby manifest a desire to terminate it. Additionally, the lessee tendered rent as required by the lease, even after the new lessor's notice of termination. Eventually, the lessor commenced an action to recover possession of the land but not the buildings erected by the lessee.²³⁹ The trial court found for the

235. See *infra* notes 236-46, 251-54 and accompanying text.

236. 170 N.E. 799 (Mass. 1930)

237. *Id.* at 799.

238. See *id.*

239. See *id.*

lessor and the Supreme Judicial Court of Massachusetts affirmed on appeal.

To begin with, the court acknowledged *Thompson v. Baxter* and the many cases that support its view that a defeasible life estate is created when a tenant is given title as long as he wishes to live in a particular place.²⁴⁰ The court also said that it is *settled law* in Massachusetts that if a lessee is not bound for any definite period because he can terminate the tenancy at any time, then similarly the landlord should not be bound and should not, therefore, be prevented from ending the relation.²⁴¹ For this reason, the lessee's interest is not a life estate. Additionally, the lessee's interest cannot be an estate for years because such a tenancy requires a fixed and computable time of termination. In this instance, however, there is uncertainty and indefiniteness as to termination. Indeed, this is by definition the nature of an estate at will. If there is no certain duration as to lessee, then there must be no certain duration as to the lessor. Therefore, a lease expressly at the will of only one of the parties must be viewed as an estate at will, which puts it at the will of both parties.²⁴²

In reaching its conclusion, the court found unyielding case support for the proposition that a right to terminate at will requires mutuality.²⁴³ Nevertheless, the court deemed it necessary to distinguish several Massachusetts decisions that had reached a different result. In one case, the lease provided that the tenant's possession was to last as long "as the salt-works then intended to be erected should continue to be used."²⁴⁴ And in another, the lease provided that it would continue "so long as the lessee, his heirs and assigns shall keep the furnace and buildings on the premises."²⁴⁵ Both cases held that a defeasible life estate was created in the lessee and not an estate at will. The court went on to make this distinction: "In these cases the duration of the tenancy was to continue until the happening of a certain event; it was so limited, and would end at once when the condition was broken."²⁴⁶

The foregoing distinction does not, of course, make any sense. By the terms of the lease in *Foley*, the lessee is entitled to have the land "for as many years as desired by the [lessee]," meaning that the lessee has the power to terminate the lease. But how must this be accomplished? Presumably the lessee must objectively demonstrate such "desire" to the lessor; an

240. *See id.*

241. *See id.* at 799-800.

242. *See Foley v. Gamester*, 170 N.E. 799, 780 (Mass. 1930).

243. *See id.*

244. *See Hurd v. Cushing*, 25 Mass. 169, 174 (7 Pick) (1828).

245. *See Cook v. Bisbee*, 35 Mass. 527, 529 (18 Pick.) (1836).

246. *Foley*, 170 N.E. at 800.

unexpressed desire to end the relationship should not suffice. Surely the lease must continue, and the lessee must pay rent until some objective manifestation of such desire is made known to the lessor. This communication constitutes “the happening of a certain event,” one that would terminate the lease. Consequently, the tenant’s desire to end the lease should be no less capable of certainty and objective assessment than a determination as to when a business ceases or a lessee no longer wishes to live in a particular city. If these other cases are distinguishable, it cannot be on the basis of certainty as to the event within the lessee’s control.²⁴⁷

At the heart of *Foley*, however, is a precedential meaning established by a number of previous decisions. The court embraces this meaning while rejecting competing interpretations found in other cases. What seems to underscore the court’s preference is mutuality between the lessor and lessee that is firmly grounded in a principle of fairness.²⁴⁸ The court repeatedly states that if there is no certainty as to the lessee, then the same should be true for the lessor. What is at the will of one party must also be at the will of the other. What’s good for one, must be good for the other. Further, this principle must obtain even if the written lease is expressly at the will of one party but not the other party who has actually drafted the lease in question.²⁴⁹

Despite this invocation of mutuality and fairness, the court ignores other evidence concerning fairness that might point to a different result. Indeed, the court fails to consider the bargain in its entirety. The lease consisted of two written instruments, and the second authorized the lessee to erect a building upon the land and remove it when the tenancy ended. Relying upon this supplemental agreement, the lessee thereafter constructed a gas station.²⁵⁰ In resolving the dispute and classifying the estate created by the lease, the court gives the second instrument no consideration other than to mention its

247. One might, however, distinguish these cases on a different basis. In *Thompson v. Baxter* and the other cases distinguished by the court in *Foley v. Gamester*, the lessee’s election to terminate was governed by something more than a decision to continue the lease or end it. There had to be a reason for termination, and the kind of reason permitted in the lease was severely limited. For example, in *Thompson* the lessee had to be willing to leave Albert Lea and live elsewhere. This was the only circumstance in which the lessee was allowed to terminate. In *Foley*, however, there was no limit upon the discretion accorded the lessee. He could terminate for any reason or no reason at all other than a desire not to remain a lessee. The continuation of the lease was at his pleasure—quite literally at his will. And without any limit upon his discretion, a court might well insist on mutuality. If the lease is at the will of the lessee, then it should also be at the will of the lessor.

248. It appears that originally this construction—an estate at will—arose because the transfer was unaccompanied by a livery of seisin and, therefore, could not create a freehold estate. See *infra* note 257 and accompanying text.

249. One should note that this was the circumstance in *Foley*. See *Foley v. Gamester*, 170 N.E. 799, 799 (Mass. 1930).

250. See *id.*

existence. The court does not ask whether one can reasonably assume that a lessee would erect a building, even one that he could remove, if the lessor could terminate the lease at anytime, even immediately after construction of the building. In light of this supplemental agreement, the court fails to consider whether a tenancy at will is consistent with the reasonable expectations of both lessor and lessee. Above all, the court does not ask whether such a result is a fair and equitable interpretation of their bargain. Instead, the court blindly adheres to a principle of mutuality as to termination and totally loses sight of the rationale upon which such principle is grounded. The court embraces a principle intended to advance fairness despite the fact that such principle achieves an unfair result within this particular context. In short, this decision reflects rigorous adherence to precedential meaning at its worst.

Nevertheless, this principle of mutuality and the resultant estate at will became the majority view in the United States.²⁵¹ Courts embraced it in part because of its clarity and ease of application. Some courts continue to do so even when such principle has been attacked as antiquated and inconsistent with both the terms of the agreement and the intent of the parties.²⁵² This principle—or one related to it—is often cited by way of explanation. While it is sometimes central to the holding in a decision, it is often not because the lease is oral and does not permit implication of a defeasible life estate.²⁵³ Further, courts have applied this principle even when the discretion given to one of the parties to terminate is not merely a matter of whim or desire. More specifically, courts have found a tenancy at will even when the power given to one of the parties to end the estate requires something more than termination itself—for example, a decision to sell the reversion or discontinue a business.²⁵⁴

251. See *Garner v. Gerrish*, 473 N.E.2d 223, 224 (N.Y. 1984); *Myers v. East Ohio Gas Co.*, 364 N.E.2d 1369, 1373 (Ohio 1977); see also E.H. Schopflocher, *Option of One Party to Terminate Lease upon Condition Which Does Not Entitle Other Party to Similar Option*, Annotation, 137 A.L.R. 362, 367 (1942).

252. For a summary of the criticism of the estate at will construction and the principle of mutuality upon which it rests, see *infra* notes 255-59 and accompanying text.

253. See, e.g., *Sage v. Shaul*, 67 N.W.2d 921 (Neb. 1955).

254. See, e.g., *Morgan v. Morgan*, 218 S.W.2d 410 (Ky. 1949). This case involved a lease in which the landlord had the sole privilege to terminate in the event he wished to sell the premises or to reenter business upon the premises. The court concluded that a tenancy at will was created because the lease was at the will of the landlord and, therefore, must also be at the will of the tenant. Consequently, the landlord should have the power to terminate the tenancy for any reason whatsoever. See *Sappenfield v. Goodman*, 2 S.E.2d 13 (N.C. 1939). This case involved a lease that was to remain in force while the filling station on the premises was occupied by the tenant. Because the lease was terminable at the will of the tenant, the court concluded it was also terminable at the will of the landlord and, therefore, the tenancy created was one that was at will.

Despite the fact that a tenancy at will was once the prevailing construction of courts, this is probably not true today. Such construction has come under attack because of the principle of mutuality upon which it usually rests. Courts and commentators have observed that literal application of the principle would convert estates that are expressly created—whether it be a fee simple, life estate or estate for years—into an estate at will merely because one of the parties had been given a unilateral power to terminate such estate.²⁵⁵ Nevertheless, in light of what courts have actually done, it would seem immaterial that an expressly created estate has been made defeasible subject to the unilateral action of just the lessor or lessee. Courts will conclude that such estate is defeasible and not an estate at will.²⁵⁶

Another criticism goes back to the origins of Coke's principle and the requirement of livery of seisin in which it was rooted. Livery of seisin goes back to a time in which writings were uncommon and unnecessary to transfer an interest in land. Livery of seisin involved a physical exchange of something symbolic such as a clod of earth that was necessary for the creation of freehold estates, including the life estate. If there was no livery of seisin, then the transfer could not produce a life estate, fee simple or fee tail. Consequently, a written lease that was unaccompanied by livery of seisin left the court with only the choice of a nonfreehold estate. In such a situation courts could easily conclude that language that created an interest of uncertain duration terminable at the will of one party was an estate at will and, therefore, terminable at the will of the other. Given the choices, it was usually the best one that a court could make. Mutuality made sense because it was fair and because it was consistent with the only estate that seemed to fit the bargain.²⁵⁷

Eventually, however, livery of seisin was abandoned, and it became unnecessary for the creation of freehold estates. Without more, a lease giving a lessee the unilateral power to terminate could be construed as a life estate. Therefore, it was no longer necessary to achieve an estate grounded upon mutuality. Courts no longer had to say that such an interest must become an estate at will in which the lessor will have the same power to terminate as the lessee. Although courts could not previously find a life estate, they can do so now if they believe such construction fits. In short, the original rationale for

255. See, e.g., 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 3.30; *Myers v. East Ohio Gas Co.*, 364 N.E.2d 1369, 1372 (Ohio 1977).

256. See *supra* sources cited in note 255; see also RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.6 cmt. g, illust. 40-41 (1977).

257. For discussion of the livery of seisin explanation for the estate at will construction in these kinds of cases, see, for example, *Garner v. Gerrish*, 473 N.E.2d 223, 224-25 (N.Y. 1984); *Myers*, 364 N.E.2d at 1372. See also, e.g., 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 3.30.

the estate at will and its concomitant principle of mutuality has disappeared. Consequently, such construction should not be presumed simply because of the discretion given to the lessee as to termination of the relationship.²⁵⁸

This principle of mutuality has also been criticized because the tenancy at will is inconsistent with the language of the lease and, therefore, frustrates the clear intent of the parties. Ideally, courts must attempt to construe a lease so as to carry out the intent of the parties. If the instrument states that only the lessee has the power to terminate, then surely this must be what the parties intended. If, however, a court finds an estate at will that grants both parties the power to terminate, it denies literal effect to the terms of the lease. By failing to give literal effect, critics claim that the court frustrates the expressed and clear intent of the parties.²⁵⁹

For these kinds of reasons, many courts have rejected an estate at will and returned to the construction, a defeasible life estate, reached in *Thompson v. Baxter*. For example, in *Garner v. Gerrish*,²⁶⁰ the printed form lease for a house contained blanks that were filled in by the lessor. A monthly rental was inserted along with a duration that was to continue "for and during the term of quiet enjoyment from the first day of May, 1977 which term will end—Lou Gerrish has the privilege of termination [sic] this agreement at a date of his own choice."²⁶¹ Beyond this inserted privilege of termination, the lease also included a grace period specially given to Lou Gerrish in the event the rent was not paid on time.

Thereafter, Gerrish, the lessee, occupied the house, paid rent, but did not elect to terminate the lease. The lessor died four and a half years after the lease commenced. The executor of his estate then served notice of termination upon the lessee. After the lessee refused to vacate, the executor sued for eviction upon the theory that the lease created an estate at will because it lacked a definite term. The lessee, however, maintained that he received a defeasible life estate, terminable only in the event he elected to surrender possession during his lifetime.²⁶² The county court ruled in favor of the executor, concluding that the lease was indefinite and uncertain because it contained no certain duration and date of termination. Consequently, the

258. For discussion of why the estate at will construction in these kinds of cases can now be abandoned in light of the disappearance of the requirement of livery of seisin, see *supra* works cited in note 257.

259. For the criticism that an estate at will construction frustrates the clear intention of the parties when the lease only gives the lessee the express power to terminate, see, for example, *Myers*, 364 N.E.2d at 1372-73.

260. 473 N.E.2d 223 (N.Y. 1984).

261. *See id.* at 223.

262. *See id.*

lease did not create an estate for years or for life; instead, it formed a month-to-month tenancy that the executor could properly terminate after the lessor's death, effective after expiration of the next full month.²⁶³ In support of its construction, the county court cited a case decided over a hundred years earlier in which the court of appeals stated that a lease at the pleasure of a lessee must be at the will of both lessor and lessee.²⁶⁴ The appellate division affirmed the decision of the county court, and it did so for the same reasons.

The court of appeals reversed and dismissed the petition of the executor. The court acknowledged that Coke's principle of mutuality, and with it the construction of a tenancy at will, was at one time the majority view. Nevertheless, it observed that this view was not universal and has since been widely criticized.²⁶⁵ More specifically, the principle has outlived the doctrine of livery of seisin upon which it was grounded. Additionally, because the lease unambiguously grants only the lessee the power to terminate, a construction establishing an estate at the will of both the lessor and lessee would violate the express terms of the lease and the expressed intent of the parties.²⁶⁶ After distinguishing earlier New York decisions, the court concluded that the lease created a life estate in the lessee. Such estate would end at the latest upon the lessee's death, but it could terminate earlier if the lessee decided to quit the premises. Such unilateral power within the control of the lessee is not enough to make the estate indeterminate and, therefore, at will.²⁶⁷

One should note that this case rejects a particular construction—the tenancy at will derived from the principle of mutuality—and replaces it with another—the defeasible life estate. The court rejected the first construction because its rationale no longer made sense. Moreover, the first construction violates the terms of the agreement and frustrates the parties' intent. Nevertheless, the court replaced one rule with another, a rule that has been embraced by both commentators and the American Law Institute.²⁶⁸ Further, despite its concern for the parties' intent, the court may have affirmed a rule that will be applied as precedential meaning without any regard for actual intent.

263. See *id.* at 224.

264. See *id.* (citing *Western Transp. Co. v. Lansing*, 49 N.Y. 499, 508 (1872)).

265. See *Garner v. Gerrish*, 473 N.E.2d 223, 224 (N.Y. 1984).

266. See *id.* at 224-25.

267. See *id.* at 225.

268. See, e.g., ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT*, § 2:7 (1980); 1 *AMERICAN LAW OF PROPERTY*, *supra* note 13, § 3.30. For discussion of the position taken by the American Law Institute in its *Restatements of Property*, see *infra* notes 299-312 and accompanying text.

Suppose, for example, that the lease had concerned an apartment within a multiunit building. Further, assume that the rental payment had been reserved yearly instead of monthly²⁶⁹ and that other units within the building were subject to either a term of years (one or two years) or were from year to year with comparable rental payments. Finally, assume that all other facts were the same, especially the provision giving Lou Gerrish the power to terminate upon a date of his choice. Or recall the facts of *Thompson v. Baxter*²⁷⁰ and assume the same variations as just hypothesized for *Garner v. Gerrish*. Finally, suppose that the termination privilege expressly conferred upon the tenant had read: “for and during the term that the tenant’s employment with Widget Company, Inc. requires him to live in Albert Lea.”

The decisions in both of these cases²⁷¹ point to a defeasible life estate in the tenant. Both decisions base their construction upon matters that look like rules that reflect a meaning reinforced by precedent. The leases are in writing and livery of seisin is no longer required; consequently, there is no need to invoke mutuality as a basis for requiring an estate at will. The language itself is inconclusive because it does not clearly fit any particular estate. Both the estate at will and the periodic tenancy require that the lessor also has the power to terminate, but the leases in question empower only the lessee. The estate for years requires a computable point in time for termination, but the leases herein have an indefinite duration and, therefore, they cannot satisfy this requirement. Further, the interests cannot be defeasible fee simples because both conditions will be breached and, accordingly, divestiture must occur at the latest upon the death of each lessee.²⁷² Almost by default it becomes a life estate. Neither the annual rental nor the lessee’s unilateral power to terminate are theoretically inconsistent with the prerequisites of a life estate. It is a life estate, not because it clearly says so, but because it does not easily fit the definition of other estates and because there is nothing within the language of the limitation that contradicts creation of a life estate.

But did the parties intend a defeasible life estate? Both illustrations assume that none of the leases governing other units within the building was for life. They were either from year to year or for one or two years. An estate

269. With this change in facts, if a court were to find a periodic tenancy then the manner in which the rent is reserved—not paid—would probably govern its determination of the duration of the period. And in this instance, a year-to-year tenancy would be created. See 1 AMERICAN LAW OF PROPERTY, *supra* note 13, §§ 3.25, 3.27.

270. See *supra* notes 219-21 and accompanying text.

271. See *supra* notes 223-27, 265-67 and accompanying text.

272. More specifically, the lessee in *Thompson* cannot “wish to live in Albert Lea” after his death, nor can the lessee in *Garner* express his privilege to terminate on a date of his choice beyond his death.

for life would be a radical departure from the lessor's standard lease, and it would be at a fixed rental for the entire term of the lease—conceivably for the remainder of the lessee's life. Although the lessor's costs may increase and the rentals of other lessees rise as a consequence, the rental within the leases in question would remain constant. Absent a personal relationship between the lessor and lessee that underscored the lease and explained the lessee's windfall, a defeasible life estate does not make sense. Surely, it does not make good business sense for a lessor. What then did the parties intend, and what seems reasonable?

The other leases were basically for a year—for a single year or from year to year—or for two years. The two illustrations did not fit an estate for years, but they did fall within a periodic tenancy from year to year because the rental payments were reserved yearly. With this construction, the lessor could terminate annually, and she would not be bound for a greater time than under any of the other leases within the building. As to the lessee, he could terminate annually, but he could also terminate at any time within the year pursuant to the power conferred upon him. In short, the estate created under both leases could be construed as a defeasible year-to-year tenancy. This seems consistent with the apparent reasons for the disparate treatment of the lessees. In one illustration, the lessee bargained to get out of the lease within each year if he desired to do so. And in the other, the lessee wanted out of the lease if the terms of his employment permitted him to leave Albert Lea. A defeasible periodic tenancy, then, seems to achieve fairness and congruity with the parties' probable intent. This result, however, would not obtain among courts that elevate precedential meaning to an unyielding rule of construction.

Most courts are inclined to rely heavily upon precedent, and the preferred rule now seems to be one that favors a defeasible life estate.²⁷³ Courts that arrive at this construction frequently do so by default. More specifically, the language itself seems to preclude an estate at will and a periodic tenancy because the power to terminate is not expressly reserved to the lessor. The lease has an indefinite term, so the interest created cannot be an estate for years. Finally, it cannot be a defeasible fee simple because the condition of termination will occur at or before the lessee's death.²⁷⁴ Certainly, then, without periodic consideration, a defeasible life estate seems to be the correct fit because the outer limits of the time period embodied in the conditional language coincide with the lessee's death. The interest created must fall

273. See *infra* notes 297-312 and accompanying text.

274. See *supra* note 272.

within some estate classification, and the defeasible life estate is the only one that the language does not facially contradict. Even with a monthly or yearly rental, the defeasible life estate still can fit because a periodic consideration is not theoretically inconsistent with such an estate.

Nevertheless, one might ask: is this construction consistent with the intent of the lessor and lessee? When there is no periodic consideration, many courts will stress the intent of the parties in justifying their conclusion.²⁷⁵ These courts will examine the lease in its entirety as well as the context in which the bargain was struck. Some courts, however, will reach their construction without any reference to the parties' intent.²⁷⁶ Nevertheless, in both instances there is usually ample evidence of intent to support a defeasible life estate. As to the language itself, courts find plenty of support for a life estate; for example, "As long as they [the lessees] [wish] or until they get their home paid for, or longer if they wish,"²⁷⁷ or "To hold for the term of five years, with the privilege of holding it longer,"²⁷⁸ or "So long as they [the lessees] desire to occupy the same . . . and to hold the same for the above term rent-free so long as the lessees desire to occupy the same."²⁷⁹

Additionally, each of these cases contains something beyond the language that supports a long-term relationship and with it an estate that cannot be terminated at any time by the lessor. This might involve a conveyance of land by the lessee to the lessor in return for a place to live,²⁸⁰ or it could entail construction of a building and establishment of a business on the premises by the lessee.²⁸¹ Invariably the arrangement is an unusual one, and a life estate seems very appropriate to such lease, particularly when there is no periodic consideration. The condition precludes a defeasible fee simple, so that the

275. See, e.g., *Gunnison v. Evans*, 18 P.2d 191, 192-93 (Kan. 1933); *Ely v. Randall*, 70 N.W. 980, 981 (Minn. 1897).

276. See, e.g., *Putnam v. Davis*, 166 A.2d 469 (N.H. 1960).

277. See *Gunnison*, 18 P.2d at 192.

278. See *Ely*, 70 N.W. at 980.

279. See *Putnam*, 166 A.2d at 471. In each of these cases—*Gunnison*, *Ely* and *Putnam*—the language seems to point decisively towards a defeasible life estate. The language cannot create an estate for years because there is no computable date upon which the lessee's interest must terminate. On its face, the language should not produce a tenancy at will because the lessor has no express power to terminate. Further, the language cannot produce a periodic tenancy because it does not create such estate expressly and because it does not include a periodic consideration. Finally, a freehold estate becomes a possible construction because there is a written lease. A fee tail may be an impossible interpretation because of a local statute or an unlikely construction because the language does not expressly create or paraphrase the features of such estate. The language cannot be construed as a defeasible fee simple because the condition for termination is tied to the wishes of the lessees—something that cannot extend beyond their deaths. Consequently, the only viable interpretation is a defeasible life estate.

280. See *id.* at 470-71.

281. See *Ely*, 70 N.W. at 980-81.

estate classification must come down to a defeasible life estate or a tenancy at will. Because the language gives only the lessee discretion to terminate the lease, and because the bargain seems totally at odds with the constant uncertainty of an estate at will, there is a strong foundation in intent for a construction yielding a defeasible life estate. Indeed, one might go so far as to say it is the only reasonable construction, and that any application of the principle of mutuality to support an estate at will is pure folly.

A monthly or yearly rental, however, introduces an additional opportunity for estate classification, namely a defeasible periodic tenancy. It also may suggest that the parties did not intend to create a life estate. Although such consideration is not theoretically inconsistent with a life estate, the question remains whether the lessor really intended a lease with the same rental per month or per year for the lessee's entire lifetime. Absent a lessee's investment in buildings or improvements that would eventually revert to the lessor,²⁸² a fixed rental could reflect a significant windfall for the lessee. Consequently, a defeasible life estate becomes a more difficult choice, one that the parties' intent might not support.

Some courts find a defeasible life estate as if precedent had established strict rules that governed their construction. For example, in one case a lease stated, "The life of this lease shall be indefinite, being terminated only by the lessee's inability to pay the monthly rental, or his decision to move his business to another location."²⁸³ To accommodate the lessee's service station and garage business, he was given the privilege to alter existing buildings and to construct new ones. The cost of these improvements were to be deducted against the monthly rental, which the lessor agreed not to raise during the life of the lease. The lessee assumed possession and erected a building, and a year later the lessor gave notice of termination claiming that a month-to-month tenancy had been created.²⁸⁴ The court found for the tenant, acknowledging that at common law a lease at the will of the lessee is also at the will of the lessor. "However, when a lessee has a present subsisting interest in leased property based on an adequate consideration, the common-law rule does not apply, despite a provision in the lease that it may be surrendered at the pleasure of the lessee."²⁸⁵ The court then concluded with a discussion of previous decisions that supported this view. The court failed to

282. One might also add a further qualification. Absent a special relationship between lessor and lessee (such as parent and child) that would explain the long-term benefit conferred upon the lessee, one might find it difficult to reach a defeasible life estate on the basis of intent.

283. See *Conley v. Gaylock*, 108 S.E.2d 675, 676 (W.Va. 1959).

284. See *id.* at 677.

285. *Id.* at 678.

explain why the interest created was *subsisting* other than the presence of a consideration.²⁸⁶

In another case,²⁸⁷ a testator devised mortgaged premises on the condition that the devisee would permit another person to carry on a certain business for as long as such person desired to use it for such purpose at an annual rental not to exceed a specified amount. The will also provided that such person's privilege was personal, and his possessory interest should not extend to his representatives or assigns. The dispute that arose involving these two parties concerned payment of the mortgage.²⁸⁸ In addressing the nature of the possessory interest created by the devise, the court concluded that there was no room for doubt: it was a life estate. This conclusion was followed by a citation to a treatise and nothing more.²⁸⁹ Both of these cases contain evidence that might support an intention to create a life estate.²⁹⁰ Nevertheless, neither court makes an effort to marshal such evidence. Precedent and authority alone are more than enough to justify their construction.

There are, however, other courts that go further and buttress their conclusions with specific evidence of intent. Although they may focus

286. *See id.* at 678-79.

287. *See Thomas v. Thomas*, 17 N.J. Eq. 356 (N.J. Eq. 1866).

288. *See id.* at 357-58.

289. *See id.* at 359.

290. For example, in *Conley v. Gaylock*, neither an estate at will nor a month-to-month tenancy would have made any sense. By the terms of the lease, it was to be indefinite and only the tenant had discretion to terminate. Clearly, something long term was contemplated by the parties. The tenant was to locate his business on the premises. To facilitate this he was expressly authorized to alter the existing building or construct a new one, with a rebate of \$50 per month on his rent until he recovered the cost of these improvements. The tenant then constructed a new building, which cost nearly \$5,000, that was designed to accommodate his service station and garage business. Reasonable people do not contemplate this kind of investment—constructing a building and locating a business—without some kind of long-term expectation, at least an estate that would enable the tenant to recover his investment. Reasonable people do not make this investment—or expect it to be made—when the tenant's interest can be terminated with merely a month's notice and before such investment has been recouped through rental deductions. Yet this is exactly what the landlord tried to do, alleging that merely a month-to-month tenancy had been created. Surely, this characterization did not square with what the parties had tried to accomplish with their lease. Nevertheless, although the court may have been motivated by these special facts, it did not rely upon them in finding a defeasible life estate. Instead, it chose to rely upon precedent as its decisive beacon.

The other case, *Thomas v. Thomas*, involved interests created by will and not a lease supported by consideration. Nevertheless, it seemed quite clear that the testator had an estate of substance in mind. Apparently, the devise concerned a drug store that the tenant was already operating. Additionally, the testator bequeathed the stock and fixtures in the store to the tenant on the condition that the tenant pay all of the testator's debts respecting such bequest. Once again, one can properly conclude that reasonable people do not expect others to carry on a business and to assume debts respecting such business with a tenancy that may last no more than a year. Indeed, a defeasible life estate seemed to be a construction that was both likely and reasonable, especially since the will also said that the tenant's interest was personal and should not extend to his representatives and assigns.

squarely upon the condition that is within control of the lessee to support their inference as to intent, these courts go further and examine other factors as well. For example, in a leading case²⁹¹ decided in the late nineteenth century, the lessee agreed in writing to build a cheese house on the premises and to pay thirty dollars per year while the premises were used for manufacturing cheese. When no longer used for that purpose, the premises were to revert to the lessor, but the lessee had the privilege to remove the buildings he had erected. The lessee died ten years later, and the lessor informed the lessee's administrator that the lease had terminated. The administrator claimed the interest was tantamount to a fee simple, defeasible only when the business was discontinued. The lessor maintained that the lease created a defeasible life estate that ended upon the lessee's death.²⁹² The court examined each of the estates that might have been created: a fee simple, a tenancy at will, a life estate and an estate from period to period. Except for the tenancy at will, each may be made defeasible. The question presented was a matter of construction. Because the lessee was required to and did erect valuable buildings, which could be removed only when the premises were no longer used for the manufacture of cheese, the court found that the parties neither intended an estate at will nor one from year to year. Having regard for the language of the entire lease and that the privilege of removal was limited to the lessee personally, the court concluded that a defeasible life estate had been created.²⁹³

A more recent decision, rendered nearly a hundred years later in 1974, also illustrates a willingness to find a construction that reflects the intent of the parties.²⁹⁴ In this case, the lessees sold an apartment building to the lessor, who then leased a penthouse within the building back to the lessees. The written lease provided: "To have and to hold . . . unto the said tenant from . . . the 1st day of August, . . . 1968 until . . . the [left blank] day of [left blank] . . . 19 [left blank], at and for a rental . . . payable IN ADVANCE in monthly installments of Five Hundred and No/100 dollars per month UNTIL LEASE IS TERMINATED BY TENANT. SAID NOTICE . . . SHALL BE GIVEN BY TENANT . . . AT LEAST SIXTY (60) DAYS PRIOR TO SAID

291. See *Warner v. Tanner*, 38 Ohio St. 118 (1882).

292. See *id.* at 118-21.

293. See *id.* at 120-21. Though unstated, the court's construction was undoubtedly motivated by another factor. If the equivalent of a fee simple defeasible had been created, then the lease could last forever at the same rental, which was thirty dollars per year. Over the long-run, surely this would become unfair to the lessor and, therefore, such an interest was in all probability unintended by the parties.

294. See *Collins v. Shanahan*, 523 P.2d 999 (Colo. Ct. App. 1974).

TERMINATION DATE.”²⁹⁵ Three years later the *lessor* gave notice of termination, claiming that it was a month-to-month tenancy. The court found that the parties intended that the lease should continue as long as the lessees desired and that only a defeasible life estate was consistent with this intention.²⁹⁶ Such intention was evident in the express language of termination. It was also reflected by two other provisions within the lease. First, the portion of the printed lease that set out a specific date for automatic termination was deleted. Second, the lease described the lessees by name, followed by “or the survivor.”

In both of these cases, the court sought and found support in the parties’ intention that a defeasible life estate had been created. In the main, they examined the entire lease in an effort to identify intent and, thereby, classify the interest. Nevertheless, both courts ultimately resorted to precedent to justify their construction. In the former case, the court cited several decisions to show that it was well settled that a defeasible life estate is created when the lessee has the power to terminate upon an uncertain time.²⁹⁷ In the latter case, the court reviewed conflicting authority, including decisions giving the lessor a power to terminate just the same as the one expressly bestowed upon the lessee by language within the lease. The court was persuaded, however, that the better reasoned authorities supported a defeasible life estate when termination was solely at the will of the lessee.²⁹⁸ In the end, then, both courts were heavily governed by precedential meaning.

This construction is consistent with the one made by the American Law Institute in the *Restatements of Property*. In fact, the *Restatement* is often cited in these decisions to support the conclusions courts reach.²⁹⁹ The position taken by the original *Restatement of Property* is very direct. After defining an estate at will³⁰⁰—an estate that has no designated duration and is at the will of the transferor and transferee—the *Restatement* supplies an illustration in which only the lessor has the power to terminate: “To *B* to hold at the will of *A* [the lessor].” This transfer it says is also terminable at the will of *B* and, therefore, constitutes an estate at will.³⁰¹ By way of commentary, it

295. *See id.* at 1001-02.

296. *See id.* at 1001-03.

297. *See Warner v. Tanner*, 38 Ohio St. 118, 121 (1882).

298. *See Collins*, 523 P.2d at 1002-03.

299. *See, e.g., Garner v. Gerrish*, 473 N.E.2d 223, 224-25 (N.Y. 1984); *Collins*, 523 P.2d at 1003.

300. *See supra* note 209.

301. *See* RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 21 illus. 1 (1936); *see also id.* § 18 cmt. c, illus. 6, § 44 cmt. h, § 45 cmt. g, § 113 cmt. a, illus. 1, 2. The *Restatement's* overall test seems to be simply this: if no language is present that expressly or impliedly limits and defines the interest in terms of an acknowledged estate—for example, a fee simple or a life estate—then a power to terminate in the lessor results in the creation of an estate at will. If, however, such language is

then adds that if the power to terminate is reserved only to the lessee, the interest created is not at will. It is, instead, either a defeasible estate for life or a defeasible fee simple. And they use the following limitation to illustrate their point: "To *B* and his successors to hold so long as he and they desire."³⁰²

To make a different point, the *Restatement* also uses an illustration in which the lease is at the will of the lessee, and it concludes that the lessee receives a defeasible life estate. In a section devoted to life estates, the *Restatement* observes that the presence of a condition of defeasance in a limitation otherwise effective to create a life estate will not prevent such construction so long as the event does not terminate the estate at a fixed or computable period of time or is at the will of the lessor.³⁰³ Among the illustrations is a familiar one: "To *B*, so long as he shall wish to live in Albert Lea." The *Restatement* then concludes that *B* receives a estate for life subject to a special limitation—namely a determinable life estate.³⁰⁴

Unlike the original *Restatement of Property*, the *Restatement (Second) of Property* includes sections on the landlord-tenant relationship.³⁰⁵ Once again, in a section defining a tenancy at will—a relationship created to endure only so long as both the landlord and tenant desire—the *Restatement* comments on a lease terminable at the will of one of the parties only.³⁰⁶ To begin with, it states that, absent an unconscionable arrangement, a lease at the will of one party is not a tenancy at will. If the power is engrafted onto what would otherwise be an estate for years or a periodic tenancy, then such power merely makes the particular estate defeasible. If, however, the tenancy is not otherwise an estate for years or a periodic tenancy, then the interest created becomes some kind of freehold estate.³⁰⁷

present, then reservation of a power to terminate in the lessor merely renders the specifically defined estate defeasible instead of absolute.

302. RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 21 cmt. a, illus. 2 (1936).

303. See *id.* § 112.

304. See *id.* § 112 illus. 2.

305. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT (1977).

306. See *id.* § 1.6 cmt. g.

307. A periodic rent, without more, usually evidences a periodic tenancy. If, however, a condition at the will of one party is added, does it remain a periodic tenancy—albeit one that is defeasible? A careful reading of the *Restatement* and the Reporter's Note suggests that the answer is no. "L leases . . . land . . . from year to year . . . , with a provision that *T* may terminate the lease at any time." *Id.* § 1.6 cmt. g, illus. 8. This creates a year-to-year tenancy that can only be terminated by *L* with proper and timely notice; nevertheless, *T* can terminate the lease at any time just the same as a tenancy at will. Presumably in leasing the land from year to year, the *Restatement* refers to an express designation of such an estate and not merely the use of a periodic rent. If it were otherwise, one could never conclude that the facts of *Thompson v. Baxter* (which included a monthly rent) result in a defeasible life estate. But this is precisely the conclusion reached by the *Restatement*. See *infra* note 311 and accompanying text. Consequently, one must conclude that the *Restatement* has taken the position that a defeasible

The *Restatement* illustrates the latter point with two examples, one with a lease at the will of the lessor and the other at the will of the lessee. In the first example, “*L* leases a farm to *T* ‘for as long as *T* desires to stay on the land.’” This lease creates a determinable life estate in *T*, which will end at *T*’s death or earlier in the event she elects to terminate.³⁰⁸ In the second example, *O* owns a vacant building that he expects to demolish some time soon. Meanwhile, *O* transfers the subject matter to *A* until “*O* decides to demolish the building.” This transfer creates in *A* a fee simple determinable—terminable by *O*.³⁰⁹ In the Reporter’s Note to this section, the *Restatement* acknowledges that there is some authority to the effect that a lease at the will of one of the parties must also be at the will of both and, therefore, it is an estate at will. It refers to an annotation of related opinions, but it also specifically cites several cases that support this view, one of which is *Foley v. Gamester*.³¹⁰ Nevertheless, the Reporter’s Note states that respectable authority supports the position taken by the commentary to this section. Thereafter, it cites and discusses *Thompson v. Baxter* to confirm creation of a defeasible life estate when a lease is not otherwise an estate for years or a periodic tenancy and such lease is also terminable at the will of the lessee.³¹¹

What seems especially important throughout the *Restatement*’s discussion of estate definitions and the effect of conditions for termination—particularly its commentary and illustrations—is the certainty of the constructions it favors. The *Restatement* treats the matter of interpretation as if it were driven by unyielding rules. Although its discussion is often punctuated with caveats³¹² that recognize problems of construction requiring one to go beyond the language itself, this does not apply to its consideration of limitations at the will of the lessee. One thing seems to be clear: although specific discussion is restricted to commentary, Reporter’s Notes and illustrations, the *Restatement* rejects the principle of mutuality when the lessee has the exclusive power to terminate. A court—or anyone else—should view the *Restatement*’s conclusions as strict rules to be followed and, therefore, principles upon which one can rely. In short, according to the *Restatement* these situations do not present ambiguities that require one to broaden the factors of construction beyond the language itself. The approach

freehold is created, and not a defeasible periodic tenancy, unless the tenancy is expressly designated as periodic.

308. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.6 cmt. g, illus. 6 (1977).

309. See *id.* § 1.6 cmt. g, illus. 7.

310. See *id.* § 1.6 Reporter’s Note, at 48.

311. See *id.*

312. See, e.g., RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 44 cmt. h, § 45 cmt. g.

of the *Restatement*, then, seems to be an accurate reflection of the way courts have allowed precedential meaning to govern their interpretation of deviant language patterns.

III. DEVIANT LANGUAGE—ASSESSING THE IMPORTANCE AND VALUE OF PRECEDENT

A. *Some Observations About Interpretive Consistency and the Circumstances in Which It Becomes Important*

Judicial adherence to precedential rules is not simply a matter of symmetry; indeed, there are important reasons for its observance.³¹³ Self-governance without constant judicial intervention and supervision lies at the heart of these reasons. One could not accomplish self-governance without some predictability as to what rules a court will select and how it will apply them. As to the law of property, however, courts go even further by extending their quest for certainty to the language of conveyancing. For example, even if there were certainty as to the rules defining the nature and attributes of a fee simple, there would still be confusion if there were no language patterns that affirmed its existence. These language patterns, of course, would not emerge without consistent interpretation by courts. Judicial consistency as to language, therefore, is essential to interpretive certainty and the avoidance of confusion and litigation. Before proceeding further, however, one should carefully examine the different contexts or functions in which such certainty becomes especially important.

1. *Title Assessment*

To begin with, one who is about to acquire an interest in land must know precisely what the transferor actually owns and can convey. To accomplish this, the buyer must interpret and assess the seller's title. This requires interpretation of both the instrument through which the seller acquired his interest and all prior conveyances. For example, if a buyer has bargained for a possessory fee simple absolute, then it is important to know with certainty that the full history of ownership confirms such interest in the seller. While buyers must always make this assessment, such determination is also important to sellers. Most sellers have already made this assessment when they acquired their respective interests. Nevertheless, some sellers originally acquired their ownership through a gift, while others may have restricted or

313. See *supra* notes 2-14 and accompanying text.

encumbered their interest after its acquisition.³¹⁴ In either case, the seller must assess his title before undertaking a promise to convey. Therefore, interpretive consistency by courts as to conveyancing language will promote certainty as to meaning and, accordingly, facilitate these crucial title determinations.

2. *Ownership Assessment*

This assessment of title is also essential to important determinations of rights of use, enjoyment and transfer. For example, can one raze or remodel a building, or conversely, can one prevent it? Can one remove deposits of oil or coal, or conversely, can one enjoin it? Must one observe a provision that conditions the right to transfer his interest, or conversely, can one enforce it? Different estates offer different benefits. The owner of a fee simple absolute has the privilege to commit waste, but the owner of a life estate does not.³¹⁵ Direct forfeiture restraints upon the alienation of a fee simple are unenforceable, but they are upheld when imposed upon lesser estates—such as those for years or for life.³¹⁶ Consequently, one must assess ownership of existing interests to determine what one can do or, conversely, what one can prevent. These matters, therefore, become relevant to those who hold either

314. In most instances the seller secured his purchase money loan with a mortgage. Such an encumbrance is expected and is usually eliminated when the loan is paid with proceeds from the new sale. Nevertheless, other things may have happened since the seller became the owner that encumbered his title. Even without a title search and assessment the seller should be aware of voluntary encumbrances—for example, leases, easements, covenants and servitudes that he has created during the time of his ownership. But there may also be encumbrances that were unknown or readily overlooked—for example, judgment liens, assessment liens and mechanics' liens. The potential for these kinds of encumbrances may warrant a title assessment by the seller before placing his land on the market.

315. Although some limitations exist with respect to the fee simple defeasible, the owner of a fee simple absolute has complete discretion to remove mineral deposits, to remodel or raze buildings, to remove timber and to do anything else that may depreciate the value of his interest. The owner of a life estate, however, does not have these privileges. Indeed, a life tenant must preserve the inheritance—the fee simple—unless specific powers to encroach upon the principal have been conferred upon her. See RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS §§ 49, 138-146 (1936); RESTATEMENT OF PROPERTY: FUTURE INTERESTS §§ 187-199 (1936).

316. For example, consider this deed from *A* that provides: "To *B* in fee simple on the condition that *B* does not alienate his interest during his lifetime; if he does, then *A* shall have the right to reenter and terminate the interest of *B*." On its face *B* receives a fee simple subject to a condition subsequent while *A* retains a power of termination. This condition, however, constitutes a direct restraint upon alienation. Although it is a forfeiture restraint and is limited in time to the duration of *B*'s life, nearly all courts would find it unenforceable. With some exceptions, courts generally find that all disabling restraints and most forfeiture restraints upon alienation of the fee simple are inconsistent with the existence of the fee and, therefore, invalid. If, however, *A* had granted *B* a life estate or a term of years subject to the same condition subsequent, courts would find such forfeiture restraint valid and enforceable. See 6 AMERICAN LAW OF PROPERTY, *supra* note 13, §§ 26.19-26.23, 26.50-26.51.

possessory or nonpossessory interests.³¹⁷ Once again, interpretive certainty will facilitate such determinations of ownership and its incidents, and interpretive consistency by courts makes such certainty possible.

3. *Ownership Creation*

Finally, certainty and judicial consistency are vital in the creation of new interests. Those who own interests must inevitably—either during their lifetime or at death—confer title upon others. Sometimes the transfer is for a consideration that dictates creation of a possessory fee simple absolute in the grantee. Other times, as in the case of landlord and tenant, the consideration will lead to a lease for years. A gift, however, frequently offers the opportunity for divided ownership and for creation of possessory and nonpossessory interests in respective transferees. In each of these situations, one must create specific interests and, accordingly, formulate language needed to do so.³¹⁸ This language must always reflect those choices made by the transferor and anticipated by the transferees. The language must do so with certainty, precision and without mistake. In the event of a gift, creation of new ownership interests—and the formulation of language needed to do so—is ultimately the responsibility of the donor-creator. In the event of a sale, however, the language of creation should concern both parties and, therefore, both may be involved in its formulation.

317. Because these questions of ownership assessment derive from matters of use and transfer of the possessory interest, the assessment must necessarily focus on the nature of the possessory interest. One should note, however, that it may also involve the nature of the nonpossessory interest as well. For example, the owner of a vested remainder in fee simple absolute can recover damages from a life tenant who has committed waste. Quite differently, the owner of a contingent remainder in fee simple absolute cannot on her behalf alone immediately recover damages from a life tenant for the same acts of waste. Although the contingent remainderman can immediately secure an injunction against further waste, she cannot recover damages from the life tenant until her interest vests. *See* 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 20.23.

318. Fortunately, the law has afforded us with longstanding signposts for the creation of interests. To create a fee simple absolute, one can say exactly that in nearly all jurisdictions or one can rely on the language format used for centuries “To *B* and her heirs.” To create an estate for life, one need merely define the estate in terms of someone’s life, for example, by providing: “To *B* for life.” Further, to assure the imposition of a condition subsequent, one must expressly include a condition and right of reentry. For example, one should provide: “To *B* in fee simple on the condition that *B* does not practice law; however, if *B* does practice law, then *A* [the grantor] shall have the right to reenter and terminate the estate of *B*.”

Sometimes, however, the distinctions seem blurred and the signposts less clear and reliable. For example, courts have found that the following limitation gives *B*’s children a vested interest subject to divestment: “To *B* for life and then to *B*’s children in fee simple, if living; if none, then to *C* in fee simple absolute.” Nevertheless, a slight change in language may cause their interest to be deemed contingent: “To *B* for life and then to *B*’s children in fee simple who are then living; if none, then to *C* in fee simple absolute.”

One could, of course, adopt a system for creation of interests that did not utilize language formats. Under this system one would fashion specific interests by fully describing their duration, attributes, restrictions, and time and conditions for possession. Without accepted formats, these language formulations could produce extensive variety and, accordingly, a potential for misinterpretation and uncertainty. They would also require careful effort, time and cost. Acknowledged language formats, however, promote certainty and efficiency.³¹⁹ However, these formats will not emerge and standardize transfers without consistent judicial interpretation of specific language patterns. Consequently, without adherence to precedential meaning—one cannot achieve creative certainty with respect to the transfer and formation of new ownership interests.

B. Deviant Language—The Impact of Ad Hoc Interpretation upon Title Assessment, Ownership Assessment and Ownership Creation

Interpretive certainty facilitates assessments of title and ownership so that one can determine what one will acquire and what one can do with such interest once one acquires it. Just as important, one must also know how to convey particular interests and thereby create new ownership. In each of these situations, acknowledged language formats are essential. These formats require interpretive consistency, which necessitates judicial adherence to precedential meaning. But what should a court do with deviant language? Even with a system that reinforces and rewards the use of standardized

319. Title assessments and ownership assessments require assessments of all outstanding interests in the subject matter—namely, who holds an interest and what it is that they have. These assessments depend, of course, on the language others have used in their efforts at ownership creation. The creative choices people have are limited. Only certain kinds of estates are recognized, each having certain characteristics and attributes. Clearly, these limitations upon creative choice make the tasks of title and ownership assessment much easier. Unlimited choice, however, would make these assessments impossible. With unlimited choice, these assessments would be overwhelming. Certainty and efficiency in assessments, and with it certainty and efficiency in the transfer and enjoyment of land, are thereby promoted when creative choice is circumscribed.

The same can be said for the language formats needed to create these interests. If specific formats did not exist, then one might expect multiple forms of expressions as to the kind of interest and its attendant attributes. Proliferation of creative expressions would, of course, increase the possibility for ambiguity and confusion. And with this increase, certainty and efficiency in title and ownership assessments would be diminished significantly. Perhaps because we place great value on certainty and efficiency, language formats have evolved over time with respect to every estate one might wish to create. One knows that “to *B* and his heirs” will create a fee simple absolute, and with it *B* will have an estate of general inheritance that is potentially infinite and must also be without any direct restraint against alienation. One also knows that “to *B* for life” will create an estate measured by *B*'s life, which is subject to the doctrine of waste but capable of being directly restrained against alienation. Certainty and efficiency are promoted because *A* will assuredly *know* all of this when she creates these interests and others will *know* this when they assess either title or ownership.

phrases and meaning, one can always expect deviant language. Many transfers are accomplished without counsel and without accurate knowledge of accepted formats. Even worse, lawyers sometimes ignore these formats and thoughtlessly use deviant language destined to produce uncertainty and litigation. Frequently, a deviant phrase will repeat itself over time, pressuring courts³²⁰ to achieve consistent meaning by observing past interpretations. But should they feel constrained by precedential meaning? What are the effects of a different approach, one that disregards the past and takes an ad hoc approach to each interpretation?

Before making this analysis within the context of title assessment, ownership assessment and ownership creation, some general observations should first be made about the respective benefits of both interpretive methodologies, one grounded upon precedent and consistency and the other upon ad hoc meaning. What, then, are the principal benefits of interpretive consistency and the certainty it yields? If courts uniformly give language formats the same meaning, disputes as to specific meaning of such words and phrases should not arise. As a result, both the community and the parties can avoid costly litigation.³²¹ Further, the reduction or elimination of disputes over interpretation should enhance marketability—a policy consideration of preminent importance to the law of property.³²²

320. *See supra* Part II.

321. It should be apparent that litigation over meaning imposes public as well as private costs. Clearly, parties who find it necessary to seek the meaning of language through litigation must absorb the fees of courts and lawyers. There may be other costs as well, such as the loss in benefits attributable to delayed opportunities in the sale, acquisition, use or development of land. This loss in benefits may also affect the public. For example, developmental delays—whether temporary or permanent—could deprive a community of jobs, sales taxes, income taxes and property taxes. Finally, although there are court costs that are passed on directly to the litigants, the public bears the principal costs of the judicial system.

322. Marketability and alienability, especially as to land, are values that have been afforded great importance in the development of property law. Professor Oliver S. Rundell offered this explanation:

What public benefit can result from the exchange of legal rights or interests in land? Undoubtedly the chief benefit consists in the resulting greater utilization of the subject matter of such property. What conditions are essential to the procuring of a high degree of utilization of land? Certainly one essential condition is possession by one whose tenure is reasonably free from hazards beyond his control. Efficient use of land may require a permanent investment of capital which will not be made by one who is uncertain of his tenure. Another essential condition is the ability of the possessor to place another with like permanency of tenure on the land in his stead. For many reasons it may be impossible for the one in possession of land to be able to use it to advantage. In order that such land may be used to capacity, he should be able to dispose of it to another who can. In other words, to secure a high degree of utilization of land, it should be possessed by those having an assured interest with freedom to use at their discretion coupled with the power to convey to others a like interest. This ideal the law has with rare exception attempted to secure.

Oliver S. Rundell, *The Suspension of the Absolute Power of Alienation*, 19 MICH. L. REV. 235, 238 (1921).

The maximum utilization of land is one reason for a policy weighted in favor of alienability and

This push in the direction of marketability is especially prevalent whenever the prevailing interpretation creates a title that is appealing to the marketplace. For example, adherence to precedential meaning that results in an unrestricted, unencumbered, possessory fee simple absolute will achieve immediate marketability, while precedent that produces a life estate and

marketability. Impediments to alienation would undoubtedly slow development and the productivity of land. A landowner would hesitate to make improvements to land that could not be sold. Even if she were willing to do this, she would be unable to use the land to secure a loan needed to make such improvements. One should note that the loss of developmental opportunity is public as well as private. Invariably, nondevelopment results in fewer jobs, fewer sales and less taxes. Further, the removal of certain tracts of land from the marketplace and developmental opportunity could inflate the value of other land resources available to the marketplace. As a consequence, the developmental process could take on additional costs and, therefore, become less efficient.

This concern for maximum utilization and productivity would, of course, be less significant for interests held in trust or for subject matter consisting of stocks and bonds. In the case of a trust, the trustee will typically have a power to sell; for stocks and bonds, a private corporation or the government is the productive unit. There are, however, other factors that argue especially against the use of devices that restrain alienability. Such restrictions contribute to the concentration of wealth, something that has been a grave concern in this country. Indeed, a restraint upon alienation that makes it impossible to sell the subject matter will necessarily restrict the owner to income, thereby promoting the concentration of principal. Finally, this body of law restricting the use of devices that impair alienability attempts to prevent the world of the living from being controlled completely by the wishes of the dead. Indeed, without these limitations, the dead could control the devolution and enjoyment of their accumulated wealth for generations to come. For a discussion of the policy that underlies a preference for alienability and marketability, see 6 AMERICAN LAW OF PROPERTY, *supra* note 13, § 26.3; SIMES & SMITH, *supra* note 9, § 1117.

The foregoing policy is concerned with devices that directly restrain alienability, but it is also concerned with devices that interfere with marketability by dividing ownership in a manner that renders the subject matter unattractive to the marketplace. For example, the developmental process requires ownership of a possessory fee simple absolute in land and, as a result, such ownership has become the norm for a title that is deemed marketable. Divided ownership requires a consensus among all of the owners to sell and apportion the purchase price. Contingent interests can impede such consensus, or at least make such consensus more difficult, and divided ownership that includes remote groups of nonexistent owners will make such consensus impossible. Consequently, a policy that promotes marketability must regulate devices that directly or indirectly inhibit alienability.

This policy commitment to marketability has manifested itself in many ways. For example, it underscores specific common-law rules such as the rule against perpetuities and the general prohibition of direct restraints upon the alienation of a fee simple. See SIMES & SMITH, *supra* note 9, §§ 1101-1292. This policy also underlies modern day conversion statutes that essentially abolish the fee tail or allow the land to become marketable through a conveyance that results in a disentanglement. See 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 2.13. Further, this policy is reflected in longstanding constructional preferences and biases in favor of vested interests, instead of contingent interests, or in favor of a fee simple absolute, rather than a fee simple determinable or upon a condition subsequent. See SIMES & SMITH, *supra* note 9, §§ 248, 286; 6 AMERICAN LAW OF PROPERTY, *supra* note 13, § 21.3. Finally, this policy explains the evolution of ownership in terms of fixed models that depend upon specific methods for creation, which bear specific attributes once created. Indeed, for reasons of certainty and stability—and the marketability that this promotes—the law does not recognize estates that are hybrids. See *supra* note 8. Instead, the array of private choice is limited. These limitations facilitate title assessment, and such assessment is essential to marketability. In light of all of this, marketability and alienability are forces that have driven and shaped much of the common and contemporary law of property.

contingent remainders will not.³²³ Even if an assessment results in divided ownership or title, interpretive consistency still achieves a significant benefit that relates to marketability. Ideally, the marketplace functions best when complete ownership is unified in one person or entity. However, divided ownership creates additional transaction costs, namely, the costs of doing business with several parties who may disagree about whether to sell and the value of their respective interests.³²⁴ Nevertheless, transactions can still occur if there is interpretive certainty as to who owns what.³²⁵ To be sure, this

323. The marketplace requires a title that affords a prospective purchaser with full rights of use and transferability. This requires ownership of an unrestricted possessory fee simple absolute. Anything less may seriously impair critical attributes of enjoyment and alienability. When ownership is divided into a life estate followed by contingent remainders in fee simple, there is no single interest that offers unencumbered use or unimpaired transferability. The life tenant has an interest with severe restrictions upon use, which is difficult to transfer because of its uncertain duration. The contingent remainderman has an interest that offers no immediate claim to possession and use, and it is also difficult to market because of the uncertainty attached to it by the condition. Indeed, such remainder may be impossible to market because its potential owners have not yet been born. To be sure, if a potential buyer secures all outstanding interests—the life estate and remainder alike—she will then have a marketable interest. Yet this cannot be achieved without the costs attributable to achieving a consensus as to a decision to sell and the terms of sale. This consensus may be physically impossible if any of the necessary parties are unborn; at the very least, establishing a consensus will raise the price of doing business.

324. For example, consider a devise of Blackacre in which *A* divides the title as follows: “To *B* for life; thereafter, if *C* is alive, then to *C* in fee simple absolute, otherwise to *D* in fee simple absolute.” If *P* wishes to purchase Blackacre and secure a marketable title, then she must gain agreement with *B*, *C* and *D*. Disagreements among *B*, *C* and *D* will necessarily generate additional costs for *P*—at the very least it will take more time to consummate the transaction. And there are a number of issues over which *B*, *C* and *D* might disagree. To begin with, *B* might wish to sell because the income opportunities from a reinvestment of the sale proceeds exceed the current return from Blackacre. *C* and *D*, however, might object because they believe changes in the marketplace and prevailing law will produce a better price in the future. Even if *C* and *D* are willing to sell, they might disagree with *B* or among themselves as to how the proceeds should be reinvested. Or, *B* and *C* might favor a sale with the proceeds divided among *B*, *C* and *D* in relation to the proportionate value of their respective interests. *D*, however, might object because she believes that *C* will not survive *B*—that *C*’s interest will never vest because his lifestyle is destined to cause his death at a young age. These are just some of the disagreements that must be resolved before a sale and purchase can be effected, and each of the solutions will bear a cost that would not have existed had the title been unified in a single vendor.

325. So long as courts adhere to precedential meaning in a manner that achieves interpretive certainty for the marketplace, transactions can still be negotiated and accomplished with all of the parties holding interests in the subject matter. This assumes that there is someone with whom one can negotiate; namely, that the owners of the respective interests are ascertained. If an interest is contingent, this may be difficult but not impossible. For example, consider *A*’s devise of Blackacre: “To my husband for life; thereafter, to our then living children in fee simple absolute.” The condition of survivorship imposed upon *A*’s children raises uncertainty as to who will be entitled to possession at her husband’s death. This uncertainty may generate differences among the children as to the value of their respective interests. These differences may affect a sale—and the terms of such sale—to a prospective buyer of Blackacre while the husband is still alive. Nevertheless, all of the potential players do exist and, therefore, a consensus is possible. This, however, would not be true if the group was currently nonexistent or subject to expansion through the inclusion of members not yet born. For example, assume that *A*’s devise had been: “To my husband for life, then to our then living

certainty can only be accomplished with interpretive consistency by courts so that reliable assessments of language can be made without litigation.

One should note that the major benefits of interpretive certainty—less litigation and greater marketability—reflect values and benefits that transcend the particular assessment or creation of an interest. Interpretive certainty should not only obviate litigation and enhance marketability within the context of a current assessment or creation, it will also produce such benefits for future transactions—including those involving different subject matter.³²⁶

Having enumerated the benefits of interpretive consistency and, therefore, certainty, one should next identify the benefits of ad hoc interpretation. To begin with, it is important to recognize that these benefits will almost always arise within a different arena. Title assessment, ownership assessment and ownership creation are functions that begin outside of court. Clearly, disputes arising within these contexts may ultimately generate litigation.³²⁷ Nevertheless, by definition it is within these contexts that interpretive consistency becomes important, because here litigation can be prevented.³²⁸ These three contexts, therefore, must always be preliminary to the

grandchildren in fee simple absolute.” Assume that the offer to purchase Blackacre following *A*’s death arises before any grandchildren are born—or if there are grandchildren, before *A*’s children die and the possibility of further grandchildren has been physically eliminated. No sale will be effected without conveyance of the full fee, and this cannot be accomplished without the consent of all grandchildren who might otherwise be entitled to share in the remainder. This would, at the least, include all grandchildren born thereafter but before the time of the husband’s death.

326. Anytime a language format is given a construction consistent with the interpretation established by previous courts, precedential meaning is reinforced. This reinforcement eventually makes interpretive certainty a reality. Once this certainty has been achieved, such format offers reliable opportunities for future assessment and creation as to other subject matter. The phrase “to *B* and her heirs” is, of course, such a format. For centuries courts have consistently construed it as language of limitation that carves out a fee simple for *B*. Because of this, lawyers today know the meaning of such language when they see it within a title they must assess. They also know that if they wish to create a fee simple, this language format will assure such a construction by future lawyers and future courts.

327. Title assessment invariably begins with the sale and purchase of land. Ownership creation may be a part of such transaction, but it can also involve a donative transfer. Ownership assessment frequently arises within the context of determinations as to how land and buildings upon it may be used. These assessments and creations usually begin within the context of a transaction and without any expectation of litigation. Nevertheless, litigation may soon follow. For example, a title assessment by a purchaser that the title held by the vendor is not marketable as promised can readily lead to a suit by the purchaser for return of the deposit, or perhaps a suit by the vendor for specific performance of the contract.

328. Anytime a dispute proceeds to litigation its costs escalate rapidly and very significantly. One must assume, however, that the parties to a dispute are not fools. If interpretive consistency and certainty have become attached to a specific language format and if such certain construction benefits one party and not the other, then surely such dispute will not reach the stage of litigation. If one party is destined to win, then surely the other party will be disinclined to litigate.

intervention of courts. Quite differently, ad hoc interpretation requires judicial assessment. It assumes that all deviant language patterns are ambiguous and uncertain until courts address such words and phrases.³²⁹ Consequently, ad hoc interpretation requires a dispute and actual litigation. Ultimately, a court must construe such language and conclude the dispute over title or ownership. Whenever a court embraces ad hoc interpretation as a method for settling disputes over deviant words and phrases, it must intervene because the parties could not avoid actual litigation. In short, the benefits of ad hoc interpretation must inevitably accrue primarily within the context of litigation over title or other matters related to ownership. Conversely, these benefits will not exist within the context of private nonjudicial assessments of title and ownership, nor will they apply to ownership creation.³³⁰ The principles upon which ad hoc interpretation is predicated and applied should, however, affect the process and direction of these kinds of assessments.³³¹

329. The parties can, of course, attribute to a deviant language format an ad hoc meaning that would appeal to a court—an interpretation they hope a court would reinforce in any subsequent litigation over meaning. Nevertheless, one never knows what a future court might do within a system of ad hoc interpretation that enables each construction to be made anew.

330. Private assessments of title and ownership will not yield the benefits of ad hoc interpretation as to deviant language formats because these assessments will not produce judgments upon which one can confidently rely. Indeed, under a system governed by ad hoc interpretation, one cannot know what such language truly means until a court has settled its specific meaning. In a sense, each time a deviant language format surfaces, it must be viewed as if it is potentially unique for purposes of determining its meaning. As to matters of ownership creation, one must also observe that a process of ad hoc interpretation will not yield any benefits. Ownership creation nearly always occurs without court supervision. Further, ownership creation requires language formats upon which one can always rely. More specifically, it requires language symbols that produce a particular meaning, one that a court should always approve. This is, of course, the antithesis of an ad hoc approach to interpretation. Finally, so long as these approved symbols exist, an experienced lawyer will never use deviant language formats to create new ownership. With or without a system of ad hoc interpretation, ownership creation should always involve use of approved and longstanding formats instead of deviant formats that are susceptible to ambiguity and multiple interpretation. *See infra* notes 339-51 and accompanying text.

331. A methodology of ad hoc interpretation will, of course, generate uncertainty and, therefore, litigation to determine what interest can be sold or purchased or what use one can make of interests that are currently owned. Because language formats, particularly those that contain deviant expressions, are susceptible to interpretations different from those of the past, one cannot predict the meaning a future court might determine. In a sense, with ad hoc interpretation a meaning is not established until a court makes such determination. Nevertheless, there will often be strong evidence and with it an ability to predict and make assessments as to title and ownership. Over time the principles that guide courts in making their ad hoc interpretations should become explicit. The use of intent, fairness and custom should become apparent as well as a public concern for marketability. Sometimes these factors will lead to multiple interpretations. But sometimes within a specific factual context they may converge upon a single interpretation—even one that differs from those of the past. When this arises, the parties may not pursue litigation or they may simply defer it. At the very least, if litigation to determine actual meaning becomes inevitable—for example, because a major lender will not proceed without it—there should be little contest by interested parties. Consequently, the ride

What then are the benefits of ad hoc interpretation? To begin with, there is the matter of specific intent. Despite the use of deviant language, if positive and convincing evidence of the parties' intent is present, then courts should ordinarily effectuate such intent.³³² Intent is something courts always discuss and value highly. In fact, courts frequently speak of intent as if it were the predominant constructional force.³³³ Ad hoc interpretation, therefore, allows courts to carry out intent without being fettered by the precedential meaning given to the acts and language of others. Such interpretive methodology also enables courts to reach fair and just results that fully reflect the circumstances and context in which such deviant language is used.³³⁴ What was fair in a previous case may not be fair in a subsequent case even though the same language format appears in both.³³⁵ Once a meaning is established, interpretive certainty requires consistent interpretation of future language by courts without regard to subsequent matters of fairness.³³⁶ Ad

through court should be a smooth one with a minimum of costs.

332. In fashioning a body of law that affects human behavior, surely one ought to proceed from the premise that the purpose of law is to empower and maximize private choice and action. The operative question should always be: Why not allow people to do as they wish? Assuming that the parties' intent is clear, surely the law ought to effectuate private choice unless it conflicts with specific rules of law or public policy. If, for example, a provision violates the rule against perpetuities, then such provision ought not to be enforced as written. But if the meaning of language is clear and if the consequences of such meaning do not conflict with public pronouncements, then surely the parties ought to be permitted the self-fulfillment associated with the ownership of property and the exercise of free choice.

333. Courts and commentators frequently begin their analysis of meaning with the mantra: "Intent is the pole star of construction." For a full discussion of matters of intent and the process of construction, see SIMES & SMITH, *supra* note 9, §§ 461-73.

334. Equity, fairness and justice reflect values that ought to drive the formulation and application of every rule. These goals would seem to be especially important when the deviant language format surfaces within a dispositive instrument that is supported by consideration. *See, e.g., supra* Part II.B. In these situations, a court must be concerned with the intent of more than one person. Sometimes the intent is unclear; indeed, the parties might not have addressed the problem or they may have had different thoughts in mind. The language offers multiple interpretations and the context in which the agreement is reached may not clarify such ambiguity. Surely, under these circumstances one can expect a court to heavily weigh policy considerations. Equity, fairness and justice should always be up near the top of a list of these considerations—along with marketability and alienability. *See supra* note 322.

If, however, the transaction is donative and if there is no expressed public policy prohibition, then presumably the donor should be able to effectuate her dispositive choices even if one might regard them as unfair or unjust. Certainly this would be true if the language were unambiguous. Surely, a court should not substitute its dispositive objectives for those of the donor when her plan is unambiguous and otherwise lawful. If, however, the language and context present no clear interpretation, courts will frequently resort to rules of construction that inevitably reflect important policy considerations. For a discussion of intent and the policy priorities that may affect the process of construction, see SIMES & SMITH, *supra* note 9, § 465; 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 21.3.

335. *See supra* notes 269-73 and accompanying text.

336. Indeed, there would be no certainty outside of court as to the interpretation of a specific

hoc interpretation, however, can be driven by just results as to each case.

Once again, ad hoc interpretation emphasizes the foregoing values. However, one should note that it also permits some consideration of values and benefits that affect parties beyond the litigants themselves. To be sure, this method of interpretation allows courts to introduce different meanings to the same words and phrases. Certain choices may promote marketability, while others may not. Certain choices may facilitate development and maximum utilization of the land, while others may not.³³⁷ Marketability and full utilization of important resources have significant external benefits.³³⁸ Every time a court makes a choice that promotes these values, there are benefits that advance the interests of at least one of the litigants, future owners and the public. Consequently, in making its ad hoc interpretation, one can expect a court to at least account for these external benefits and to give the corresponding interpretive choice serious consideration.

language format unless courts give such format a meaning that can be safely predicted. Deviant constructions—even for reasons of fairness—inevitably create shades of gray in the interpretive process and thereby weaken the certainty and reliability of interpretations that are made beyond the courts.

337. For example, consider this devise: “To *B* and her children.” Some courts have concluded that *B* receives a fee simple absolute. With this construction, the subject matter is marketable and can be used for any purpose allowed by law. Other courts, however, have found a life estate in *B* with a remainder in fee simple absolute in her children. With this construction, neither *B* nor her children—while *B* is alive—can unilaterally offer a marketable title or develop the land in a manner that substantially alters existing buildings or invades the corpus of the estate. Or consider this lease from *A* to *B*: “To *B* at \$*N* per year for as many years as *B* desires.” Some courts have concluded that *B* has an estate at will. With this construction, *A* can terminate *B*’s estate at any time and, thereafter, develop the land or offer a marketable title to others. Other courts, however, have found a defeasible life estate in *B*, terminable at *B*’s death or earlier in the event *B* no longer desires to remain a tenant. With this construction, neither *A* nor *B* can unilaterally offer a marketable title or develop the land in a manner that would constitute waste. For further discussion of these examples and how particular constructions might affect the marketability and developmental capacity of the land, see *infra* notes 373-90, 408-16 and accompanying text.

338. Any time a court finds a title that achieves marketability, it confirms an ownership interest that can be readily transferred. This determination clearly benefits a current owner and those who might own the subject matter in the future. These benefits transcend the mere opportunity to profit from any particular sale or resale. Presumably, every parcel of land has a legally permissible highest and best use for which it can be developed—one that permits its owner to realize the full potential of his or her ownership. This optimum use, however, is seldom achieved or maintained without a full capacity to transfer, which is always essential to maximize profit or attract the capital and expertise of others. In short, without a marketable title one cannot expect to develop land and realize its optimum use. Each time a court finds an unencumbered possessory fee simple absolute it establishes marketability and with it the potential to realize an optimum developmental use. Conversely, each time it finds a divided ownership and title, it does not. To be sure, the former determination benefits an existing owner, but it can yield public benefits as well. Full realization of an optimum developmental use can translate into more jobs. It can also generate a higher return on real estate, sales and income taxes—specifically, it can produce increased revenues that are needed to carry out the larger interests of an entire community. For further discussion, see *infra* notes 408-13 and accompanying text.

1. Ownership Creation

While ownership usually begins with title assessment and acquisition of an interest, this discussion commences with the creation of new interests by one who is already an owner. The analysis begins with ownership creation because such analysis is easy to conduct and its conclusions are abundantly clear. In short, the benefits of ad hoc interpretation are significant, and its costs are insignificant. Indeed, these costs should be nonexistent because consistent interpretation of deviant language formats by courts achieves no benefits within the context of ownership creation.

This analysis also commences with ownership creation because within this context the need for interpretive certainty seems to be greatest. Without some mechanism for clarifying the interests created, certainty as to ownership will fail and chaos will prevail. Unless lawyers know precisely how to create each of the acknowledged interests their clients wish to convey, litigation becomes inevitable as to all forms of ownership. Consequently, it is within this context that consistency and certainty become paramount.

Language is the only viable mechanism for achieving creative certainty. As previously observed, the efficient creation of specific interests requires acknowledged language formats.³³⁹ Further, these formats cannot exist without interpretive certainty. Presumably, until these approved formats emerge, there should be pressure for consistent treatment of language patterns by courts. But what should judges do once well-known language formats have been established and reinforced for all kinds of interests? How should a court interpret language that substantially deviates from these acknowledged words and phrases? As to ownership creation, the benefits of interpretive consistency are mainly prospective. Each time a court adheres to precedent, it enforces and further ratifies a creative signpost that settles the claims of those who contest such meaning. Nevertheless, each time this happens a court is accomplishing much more. It is reinforcing a signpost upon which others can and will rely.

Inconsistent treatment of deviant language patterns should not, however, affect clearly established signposts that lawyers always use to create interests. To be sure, consistent judicial treatment of aberrational language could proliferate new creative formats if lawyers discovered these formats and found them more appealing than the standard formats already available to

339. *See supra* notes 318-19 and accompanying text; *see also supra* notes 12-14 and accompanying text.

them.³⁴⁰ Nevertheless, these additional formats are unnecessary; worst of all, they may confuse and thereby weaken traditional language patterns.³⁴¹ Conversely, inconsistent treatment of deviant language by courts will not interfere with or weaken established words and phrases. If anything, by eliminating new alternatives, ad hoc interpretation confirms and strengthens the use of long standing signposts. In short, ad hoc interpretation of deviant language imposes no lost benefits within the context of ownership creation because interpretive consistency with such words and phrases produces signposts that no one needs or would use. One can illustrate this with several examples used earlier in Part II.

As previously discussed, courts have given different interpretations to the following gift: "To *B* and her children."³⁴² Depending upon the nature of the subject matter, a court's acceptance of the rules in *Wild's Case*, the existence of children when the gift is made, and the presence and substance of a statute governing fee tails, courts have found the creation of several different kinds of interests. Suppose that *A* elected to create one of the ownership interests previously discussed. Assume further that such interest reflects the specific meaning courts within his jurisdiction have consistently attached to "*B* and her children."

The question one must ask is: would an informed lawyer use this language format to accomplish *A*'s dispositive objective? Although *A* might not actually use a lawyer to make such gift, this is still the relevant question. The benefits of interpretive consistency require advance knowledge of the creative signposts courts thereby afford. One must have this information to select language necessary to accomplish *A*'s choice of interest. Without this information the existence of established language formats becomes meaningless. Consequently, in comparing the impact of consistent and inconsistent interpretation of deviant language, one must assume that language formation and selection will be based on informed choice—

340. For example, if courts were to give the phrase "to *B* and her children" a consistent meaning that resulted in the creation of a fee simple absolute in *B*, it would add to the formats already recognized and widely used to produce such interest. For discussion of decisions that actually reach this construction, see *supra* Part II.A.3.b. More specifically, in such a jurisdiction one could create a fee simple absolute by providing either "to *B* in fee simple absolute," "to *B* and her heirs," "to *B* and her children," or, assuming a statutory presumption of a fee simple absolute, merely "to *B*."

341. Using the example described *supra* note 340, one observes that such a construction alters the natural meaning of the term "children" by making it a word of limitation instead of purchase. This same transformation occurred to the word "heirs" centuries ago. It has been given multiple meanings as a word of purchase or limitation that is heavily dependent on context. Consequently, it is subject to ambiguity. Similar treatment of the word "children" would produce the same phenomenon and thereby weaken its traditional usage as a term that unmistakably indicates a specific group of people entitled to take.

342. See *supra* Part II.A.

presumably something within the exclusive province of lawyers.

What, then, will *A*'s informed lawyer do? Will his lawyer provide: "To *B* and her children"? Surely the answer is an emphatic *NO!*³⁴³ Undoubtedly, his lawyer will want to leave no conceivable room for speculation and, therefore, he will use standardized language formats that clearly and definitively identify the interests to be created. More specifically, if *A* really intends to create a fee tail, his lawyer would provide: "To *B* and the heirs of her body."³⁴⁴ If *A* really intends to create a fee simple absolute, his lawyer would provide: "To *B* and her heirs" or "To *B* absolutely and forever."³⁴⁵ If *A* really intends to leave *B* a life estate and her children a fee simple absolute, his lawyer would provide: "To *B* for life, remainder to *B*'s children absolutely and forever."³⁴⁶ And if *A* intends to devise concurrent interests in *B* and her children existing at his death, *A*'s lawyer might provide: "To *B* and her children alive at my death as tenants in common absolutely and forever."³⁴⁷

Consider also a previous illustration, one that included a rental and a provision giving the transferee a unilateral privilege to terminate.³⁴⁸ Suppose that *A* makes the following transfer, which begins with language suggesting a lease. "To *B*, at \$*N* per month [or per year] for as many years as *B* desires." Typically, a dispute arises because *A* sells or wishes to sell her reversion; consequently, *A* or her successor wants to terminate the interest created in *B*. *B*, however, resists this and insists upon strict adherence to the terms of the conveyance. In this situation, courts have considered the possibility of a defeasible estate for years and even a defeasible fee simple. Nearly always, courts will reject these constructions. Some have concluded that *B* has a periodic tenancy, while others have found an estate at will. A great many courts, however, have concluded that *B* has a defeasible life estate. With that

343. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.28.

344. See 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 2.14. This assumes, of course, that one can still create a fee tail in such jurisdiction.

345. See RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS §§ 27, 39 (1936).

346. Good drafting always requires precise explication of dispositive choices. Delineation of interests must be absolutely unambiguous—nothing should be left to doubt. Consequently, if *A* intends for *B*'s interest to end at her death, then his lawyer must say exactly that. And if *A* intends that *B*'s children receive a nonpossessory fee simple absolute to commence in possession upon termination of *B*'s estate, then his lawyer should say exactly that. One should note further that good drafting requires even more forethought and perhaps a more complex provision. For example, one ought to consider and account for the following unanticipated events. Suppose one or more of *B*'s children die before she does. Do their interests pass to their respective successors or do the surviving children take all? Further, if *B* renounces her interest, is the children's remainder accelerated? If so, what about the interests of children who are born or die thereafter but before *B*'s death? See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.28.

347. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 22.28.

348. See *supra* Part II.B.

interpretation, *B* is entitled to remain until *B* dies or until *B* elects to terminate. Among these interpretations, only an estate at will or a periodic tenancy from month to month will give *A* or her successor possession within the near future.

Suppose that *C* (a transferor) and *D* (a transferee) elect to create one of the ownership interests discussed above with respect to another parcel of land. Assume further that such interest reflects the specific meaning courts within this jurisdiction have consistently attached to the foregoing language format. Once again, one must ask: would informed lawyers accomplish the objective of *C* and *D* with language that said—"To *D*, at \$*N* per month [or per year] for as many years as *D* desires"? Surely the answer is an emphatic *NO!* Once again their lawyers should leave no conceivable room for doubt; instead, they must use well-known standardized formats that clearly identify the interest to be created. For example, if *C* and *D* agree upon a defeasible life estate, then surely their lawyers will at least add the word *life* and then clarify the circumstances for termination by *D*.³⁴⁹ Further, if *C* and *D* agree upon an estate at will, then surely their lawyers will say exactly that and confirm it by giving both *C* and *D* the privilege to terminate at anytime.³⁵⁰ Finally, if *C* and *D* elect to create a periodic tenancy from month to month, then surely their lawyers will say that and confirm it with monthly rental payments and, perhaps, an express privilege to terminate in both *C* and *D* upon the anniversary of each period.³⁵¹ At the very least, if either an estate at will or a periodic tenancy is intended, their lawyers will want to avoid any language that seems to restrict termination to just *C* or *D*.

Clearly, neither of these deviant language patterns will appeal to lawyers who wish to create any of the interests such formats might reflect. If certainty is important to ownership creation, then one can expect informed lawyers to opt for well-known formats that have been favored over time. Consequently, interpretive certainty as to deviant language will not supply formats that

349. More specifically, assume that *C* and *D* agree that *D* will receive a life estate, that *D* will have a monthly rental, that *C* can terminate the life estate if *D* breaches such rental obligation and that *D* can terminate the life estate at any time. Consequently, their lawyers might provide: "To *D* for life, at \$*N* per month, terminable by *C* if *D* fails to pay such rental and terminable by *D* at any time and for any reason that *D* wishes." See *RESTATEMENT OF THE LAW OF PROPERTY: FREEHOLD INTERESTS* §§ 107, 112 (1936).

350. Assume that *C* and *D* agree to an annual rental obligation and that *C* and *D* will each have the unilateral right to terminate at any time. Consequently, their lawyers might provide: "An estate at will to *D*, at \$*N* per year, with *C* and *D* therefore having a unilateral right to terminate at any time during each year." See *RESTATEMENT OF THE LAW OF PROPERTY: FREEHOLD INTERESTS* § 21 (1936); see also *RESTATEMENT (SECOND) OF THE LAW OF PROPERTY: LANDLORD & TENANT* § 1.6 (1977).

351. For example, their lawyers might provide: "To *D*, at \$*N* per month, to continue from month-to-month." See *RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT* § 1.5 cmt. d, illus. 1 (1977).

lawyers actually use to create interests. As a result, such certainty achieves no benefits within this context. Conversely, ad hoc interpretation of deviant language by courts will have no adverse impact upon ownership creation.

2. *Title Assessment*

Title assessment involves a determination of what interests exist and who holds them. It usually arises within the context of a sale in which the vendor promises a perfect title, or at least an insurable one.³⁵² Consequently, someone—on behalf of the purchaser or vendor or both—must examine the full history of the realty and assess whether the vendor has or can transfer³⁵³ an unencumbered possessory fee simple absolute about which there is no reasonable doubt.³⁵⁴ If the title examination establishes certainty and the existence of a perfect title, then such determination by the parties themselves will achieve marketability without the time and costs of litigation. However, even if the assessment achieves interpretive certainty as to interests, it may not produce a perfect title. Such assessment may reveal divided ownership, in which case the title is usually unmarketable. It may also raise questions as to ownership, in which case a court may be asked to settle these issues through a suit to try and determine title. Clearly, one cannot achieve marketability without certainty as to these title assessments, and interpretive certainty as to title cannot by itself assure marketability. To be sure, it will identify owners of all interests and, therefore, facilitate a deal for the entire title. It should not, however, satisfy a contract in which the vendor alone promises to supply the

352. It can, of course, also arise when a landowner must secure a loan with a mortgage. Lenders will not extend credit and accept a mortgage without assessment of title to the land being offered as security.

353. One should note that there are circumstances in which a person may have the power to convey a fee simple absolute even when she does not hold such interest. Consider, for example, a transfer from *A* “To *B* for life with a power to sell the fee simple absolute—and reinvest the proceeds from such sale—before her death; and subject to such power, remainder to *C* in fee simple absolute.” As a result, *B* holds merely a life estate even though she has the power to sell the fee simple, and *C* holds a vested remainder in fee simple subject to such power.

354. What is a “marketable title”? Most definitions of a “marketable,” “merchantable” or “perfect” title provide little guidance as to the essential ingredients of the concept, and some beg the question itself. For example, there is this familiar definition: “a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person; one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for.” *Eggers v. Busch*, 39 N.E. 619, 620 (Ill. 1895). All should agree, however, that a marketable title requires no reasonable doubt as to undivided ownership of an unencumbered possessory fee simple absolute. See ROGER BERNHARDT, *REAL PROPERTY* 258-63 (3d ed. 1993); JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 174-75 (3d ed. 1989).

purchaser with a perfect or insurable title.³⁵⁵

Presumably, interpretive certainty for those who appraise title cannot be achieved without interpretive consistency by courts. Reliable prediction assumes that the parties can reasonably anticipate a result. In these cases it means that the parties must reasonably anticipate how a court will respond to the language appearing in transactions affecting a given subject matter. Once again, this makes sense with respect to language patterns that over time and through consistent interpretation have become the conventional formats for transfer. But what about deviant words and phrases? Will consistent interpretation of deviant language by courts ripen into interpretive certainty for vendors, purchasers, and title examiners, abstracters and insurance companies? One conclusion seems perfectly clear: none of the potential benefits of interpretive certainty that accrue within the context of title assessment—less litigation and greater marketability—will be reaped if the answer to the foregoing question is *NO*.

How then can one expect participants in the process of title assessment to respond to consistent interpretation of deviant language by courts?³⁵⁶ To begin with, such deviant language is apt to be aberrational, and its use is destined to be sporadic because lawyers will not make it a signpost for ownership creation.³⁵⁷ This ought to be true even if courts give such language a consistent meaning. Certainly this should be true when there are conventional language formats that more naturally and better express the consistent meaning courts have reached, while the deviant words and phrases do not.³⁵⁸ As a result, there will seldom be much interpretive consistency—and, therefore, much precedent—to rely upon within each jurisdiction.

Beyond the matter of infrequent use, there is another reason why interpretive consistency might not ripen into interpretive certainty for deviant language patterns. Courts almost always emphasize the importance of intent in construing ambiguous language.³⁵⁹ Courts are always aided by rules of construction, especially when there is no specific evidence of intent as to the problem involved.³⁶⁰ In the main, these rules are not external commandments

355. This would be true unless the vendor is in a position to acquire other outstanding interests and cure all defects before the time set for closing. If this can be accomplished, the vendor will satisfy the terms of her contract. This does, however, require positive action to be taken beyond the title assessment itself. Indeed, such curative action may be significant and costly.

356. One should not assume that all participants in the process of title assessment will respond the same. Surely one might expect lawyers to be more cautious than others, especially title insurance companies who can readily spread the risk of miscalculation.

357. For a discussion of ownership creation, see *supra* Part III.B.1.

358. See *supra* notes 206, 208.

359. See *supra* notes 332-33 and accompanying text.

360. There are two kinds of rules of construction—broad and narrow. Narrow rules of

as to meaning; instead, they reflect what most people would want.³⁶¹ They are, however, merely approximations and, in theory, must always yield to specific circumstances that suggest a different intent and compel a different result.³⁶² Presumably, courts take these rules and their exceptions seriously.³⁶³ Further, although courts are heavily influenced by precedential meaning, the case literature is filled with instances in which judges resort to careful and refined distinctions to overcome a principle or meaning that would otherwise force a result that makes no sense to them under the circumstances.³⁶⁴ Skilled lawyers and judges are gifted at this, and they do it all the time. Given the importance of specific intent in construction cases generally, one should anticipate a judicial predilection for rulings that distinguish away prior interpretations of deviant language formats when the

construction might include the rule in *Wild's Case*, see *supra* Part II.A, and the divide-and-pay-over rule, see *infra* note 364. Broad rules of construction include: the preference for vested interests, the preference against partial intestacy, the preference in favor of maximum validity, the preference for results consistent with public policy, the preference for keeping property among blood relatives, the preference against disinheritance of an heir and the preference for technical meaning when technical language is used. For discussion and illustration of rules of construction, see 5 AMERICAN LAW OF PROPERTY, *supra* note 13, §§ 21.2-21.3.

361. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 21.2. Rules of construction also reflect what courts believe estate owners ought to intend or the intention and result courts believe best reflects public policy. See SIMES & SMITH, *supra* note 9, §§ 465-468; see also *infra* note 420 for discussion of the rule of convenience and the public policy that underscores it.

362. The strength of these rules and what it takes to overcome them varies considerably. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 21.4; SIMES & SMITH, *supra* note 9, §§ 467, 469.

363. See, e.g., *Security Trust Co. v. Irvine*, 93 A.2d 528, 530 (Del. 1953). There, the court of chancery said:

I must first determine whether or not the remainder interest of the testator became vested at the time of his death or at the time of the death of the last life tenant In order to resolve this question the intention of the testator at the time of the drafting of the will must first be ascertained. If it should be clear that testator intended this provision of the will to take effect at some future date, then the intention of the testator, so far as it may be legally carried out, will prevail. However, in reaching my conclusion, I must accept certain well recognized rules of construction.

The law favors the early vesting of devised estates and will presume that words of survivorship relate to the death of the testator, if fairly capable of that construction. In the absence of a clear and unambiguous indication of an intention to the contrary, the heirs will be determined as of the date of the death of the testator and not at some future date. When the language employed by the testator annexes futurity, clearly indicating his intention to limit his estate to take effect upon a dubious and uncertain event, the vesting is suspended until the time of the occurrence of the event.

Id.

364. See, e.g., *Ducker v. Wear & Boogher Dry Goods Co.*, 34 N.E. 558 (Ill. 1893). In this case, the Supreme Court of Illinois had to consider application of the divide-and-pay-over rule and the result such rule would force. Although this rule had been rejected by some courts in other jurisdictions, the court elected not to repudiate it. Instead, the court engaged in constructional gymnastics to avert its application. For discussion of the divide-and-pay-over rule, see SIMES & SMITH, *supra* note 9, §§ 657-58.

clear intent indicates a different meaning.³⁶⁵ With this in mind, one might not always expect interpretive consistency to yield certainty as to what future courts will do and what judgments title assessors will make. There are two situations in which the case for interpretive certainty is weakened.

First, whenever the precedential meaning established by courts seems unnatural or is nonliteral, one might expect title assessors to react with caution. This caution might culminate in a title rejection, exception or perhaps a higher insurance premium. Whenever title assessors refuse to make the same judgment they would have made if a conventional language format had been used to create the same interests, then interpretive consistency by courts has not reached the stage of interpretive certainty. For example, consider a devise from *A* to “*X* for life, and then to *B* and her children.”³⁶⁶ Assume that following the deaths of *A* and *X*, *B* contracts to sell *C* a perfect title and that this jurisdiction has consistently upheld the rules in *Wild’s Case*. Under these rules, *B*—who was childless at *A*’s death, but has children when *X* dies—would have a fee tail. With these facts, courts have reached this conclusion because “children” is not viewed as a term of purchase; instead, it is treated as language of limitation. Finally, assume that a hundred years earlier such jurisdiction had enacted a statute that abrogated a fee tail by automatically converting it into a fee simple absolute. What conclusion will the person who makes the title assessment on *C*’s behalf reach? Is there sufficient basis for interpretive certainty; namely, for predicting what the next court will do with a title dispute over such language? Is the level of predictability certain enough to justify a conclusion that there is no reasonable doubt that *B* holds a fee simple absolute? Clearly, one might say *NO* to the last two questions. The meaning ordinarily ascribed to the term “children” involves a specific group of people rather than the kind of estate given to someone else. It does not ordinarily tell us how much, but who takes.³⁶⁷ Although the word “heirs” has been given multiple meanings,

365. Karl Llewellyn observed that the significance of precedent is always two-headed. See LLEWELLYN, *supra* note 2, at 66-69. A precedent includes the meanings accomplished through both *loose construction* and *strict construction*. See *id.* Indeed, if a court wants to avoid a rule, a judge can always strictly construe such rule, i.e., limit it to its original facts, and thereby overcome it. See *id.*; *supra* note 5.

366. For discussion of this illustration and construction, see *supra* notes 36, 54-70 and accompanying text.

367. “Words of purchase” describe who takes or receives a specific interest created by the dispositive instrument. “Words of limitation,” however, define the kind of interest created. The term “children” has sometimes been construed as a word of limitation. Ordinarily, however, it is used as a word of purchase that describes the immediate offspring of the named parent. Despite this limited definition, there are circumstances in which courts have extended such group membership to include grandchildren and even more remote descendants. For discussion of the term “children” and the multiple definitions attributed to it, see SIMES & SMITH, *supra* note 9, §§ 722-24.

including one that tells us how much and others that tells us who,³⁶⁸ this kind of dual treatment is rare. Surely, then, one should be uneasy about the continued vitality of an interpretation that gives all to *B* and disregards her children completely, even though they are clearly and prominently mentioned in the gift.³⁶⁹ One must anticipate that a future court might distinguish previous decisions and include *B*'s children in some way. Therefore, despite interpretive consistency by courts in the past, one should anticipate ongoing concern over what future courts might do with this language. With this concern that future courts might not uniformly hold to precedential meaning, one should expect *C* to have problems that lead to rejection of *B*'s title.

There is a second circumstance in which consistent interpretation by courts of deviant language might not generate interpretive certainty for title assessors. Whenever questionable principles or reasoning underscore the precedential meaning established by courts, one should expect title appraisals to reflect extreme caution. Further, such caution might ultimately result in title rejection, exceptions or higher insurance premiums. Continuing with the previous example, in applying the rules in *Wild's Case*, courts within this governing jurisdiction have previously concluded that *B* has a fee simple absolute—not because *A* created such estate in *B* directly, but because *A* created a fee tail that is subject to a conversion statute. This statute abrogates the fee tail and automatically converts it into a fee simple absolute.³⁷⁰ Whether or not a court finds this result satisfactory should depend upon how well the statutory conversion comports with what it believes *A* actually intended. Even so, the foregoing reasoning should seem preposterous. When does an estate, and the language used to reflect it, become obsolete? When should courts assume that transferors no longer intend to create a fee tail, even if the language reads to “*B* and the heirs of her body?” Surely there should be a point in time after adoption of a conversion statute when the meaning of an archaic language form is neutralized. If a conversion statute abrogates the fee tail, then surely there will come a time when the fee tail is no longer intended and, accordingly, there will no longer be estates subject to such statute. If this makes sense, then surely title assessors should proceed

368. See SIMES & SMITH, *supra* note 9, §§ 493-95, 728-37.

369. One should note that if “children” was deemed to be a term of purchase and as a result the devise was made to both *B* and to her children, *C* could still acquire a perfect title. *C* must, however, strike a bargain with both *B* and her children. The number of people with whom *C* must negotiate has increased; nevertheless, such number became fixed upon the previous death of *X*. For a discussion of the rule of convenience that governs the composition of class gifts, see *supra* note 47.

370. For cases that apply the standard formulation of the first rule in *Wild's Case* and, because of a local statute, convert the estate tail into a fee simple, see *supra* Part II.A.3.a.

very cautiously with any precedential interpretation that is predicated upon reasoning that has become obsolete and, therefore, faulty.³⁷¹

For these reasons, those who make title assessments should be very cautious about relying upon the meaning previous courts have attributed to deviant language patterns. In passing judgment on title, they might not assume that future decisions will blindly embrace the meaning given to the same language by previous courts. Indeed, they may not view interpretive consistency in the past as tantamount to interpretive certainty for the future. Therefore, without certainty as to future interpretation, title assessors are left without adequate prediction. Consequently, title rejection, exceptions or increased insurance premiums may become inevitable. Without predictability the potential benefits of interpretive consistency and certainty—less litigation and greater marketability—can never be achieved. Because interpretive consistency through judicial adherence to precedent may not yield the benefits that normally accrue from interpretive certainty, ad hoc interpretation of deviant language could arguably cause very little loss in benefits within the context of title assessment.

Title assessors, however, might respond differently to the precedential meaning courts previously assigned to deviant language formats. One could assume that consistent interpretation by courts of the same deviant language will result in interpretive certainty as to the construction they will reach in the future. Indeed, if courts adhere to precedent, title assessors will eventually abide by it as well. Assessors will have confidence in a prediction predicated upon interpretive consistency of the past and future and, accordingly, their judgment will be guided by precedential meaning. With this assumption, one must next consider the benefits of such interpretive certainty within the context of title assessments. Only then can one determine the impact of a different methodology for dealing with deviant language, namely, ad hoc interpretation.

Interpretive certainty for title assessors will not arise unless courts give consistent meaning to the same language formats. Ultimately, this will erase doubt as to who owns what interests and, therefore, discourage litigation. Ideally, it will also yield greater marketability. Upon close inspection, however, the latter is not assured. To be sure, interpretive consistency and certainty clarify ownership and aid marketability by identifying interests and

371. See *supra* note 7. One should note, however, that courts will often cling to constructions that have become anachronistic. For two opinions in which courts found a fee tail and applied their conversion statute, even though such interest had been created a hundred years after enactment of such statute that effectively abolished the fee tail, see *Bibo v. Bibo*, 74 N.E.2d 808 (Ill. 1947), and *Evans v. Giles*, 415 N.E.2d 354 (Ill. 1980).

their owners, essential functions to fixing purchase costs and the acquisition of full title.³⁷² Nevertheless, interpretive consistency and certainty cannot assure acquisition of the full title and, therefore, the existence of a perfect title. Such a title must guarantee ownership of an unrestricted possessory fee simple absolute.³⁷³ Title, however, may not be deemed marketable if ownership is divided and cannot be readily unified by purchase of all outstanding interests. Consequently, if consistent interpretation by courts of a deviant language format reveals divided ownership, one should not expect greater marketability as a benefit. Indeed, if the vendor promised a perfect title, one should not expect title assessors to make positive judgments.

For example, suppose that *A* conveys Blackacre: "To *B* at \$*N* per year for as many years as *B* desires."³⁷⁴ Suppose also that *B* faithfully pays the annual rent without manifesting any desire to terminate. Assume that *A* wishes to sell his interest to *C*, who wants immediate possession and full title. Finally, assume that past decisions by courts have given this language a consistent meaning and, therefore, a consistent estate classification, and that such adherence to precedent will yield interpretive certainty. Clearly, *A* has a reversion in fee simple absolute and is capable of conveying that to *C* immediately. However, *C* wants possession—an important factor in most transactions and, therefore, a frequent requirement of the marketplace. Consequently, *A* cannot make this bargain unless he can terminate *B*'s interest and gain possession within the near future.

As previously observed, in construing this deviant language format, many courts have found an estate at will in *B*.³⁷⁵ Given the brief notice requirements for termination of tenancies at will,³⁷⁶ this interpretation enables *A* to gain possession and consummate the sale to *C*. If *B* disputes this claim of possession, then strict adherence by a court to such precedential meaning will facilitate future transactions predicated upon promises of a perfect title. In this particular case, however, there should be no dispute, assuming courts have consistently found a tenancy at will. One must assume that interpretive certainty exists for *B* just the same as for *A* and *C*;

372. See *supra* notes 322-25 and accompanying text.

373. See *supra* notes 322-23 and accompanying text.

374. For earlier discussion of this language format and variations of it, see *supra* Part II.B.

375. See *supra* notes 235-54 and accompanying text.

376. At common law, there was no notice requirement to terminate a tenancy at will. In the United States, however, many states codified the estate at will and included advance notice requirements for termination, thereby blurring the distinction between such estate and the periodic tenancy. The notice requirements among these states vary considerably, ranging from three days to three months. For a listing of these statutes and their notice requirements, see RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.6 statutory note 3b (1977).

consequently, *B* will not resist a claim for possession.³⁷⁷ Interpretive certainty also means that both *A* and *C* will have confidence in the estate classification courts will attribute to *B*'s interest. They will *know* that *B*'s estate is at will and, therefore, with the sale of *A*'s reversion, they will *know* that *C* is entitled to immediate possession.³⁷⁸ Consequently, given this construction, interpretive certainty should yield greater marketability.

This conclusion is predicated upon both *B*'s and *C*'s recognition of interpretive certainty as to this language. *C*, however, may not want to undertake this risk. For example, *C* may not want to make a deal until *A* has secured possession from *B*. Conceivably, *B* may resist the termination of her estate and *A*'s claim to possession. In resolving this dispute, a court may or may not know about *A*'s pending contract with *C*. Regardless, its approach to the problem must be the same. The court must apply the prevailing construction, an estate at will, and will establish a marketable title in *A*. Under this scenario, the problem of title assessment should disappear. At the very least, the decree awarding possession to *A* should erase all doubt as to the effect of his prior conveyance to *B*.

Returning to interpretation of the interest *A* has created in *B*, one should note that other courts might view *B*'s interest differently and find a periodic tenancy.³⁷⁹ If courts routinely gave this meaning to such a language pattern, *A*'s deal with *C* might be jeopardized. On its face, it appears to be a tenancy from year to year, perhaps defeasible at *B*'s discretion. If the anniversary of such tenancy was merely a few months away and if there was still an opportunity for timely notice of termination,³⁸⁰ *A* would be in a position to

377. This conclusion rests upon two assumptions. First, there is nothing within the lease or contextual facts that enables a court to distinguish this case and reach a different construction. Second, it assumes that *B* is not a fool who irrationally wastes money on litigation doomed to fail.

378. A transfer of the lessor's reversion will automatically terminate an estate at will. See MOYNIHAN, *supra* note 33, at 69.

379. For the general rule governing creation of periodic tenancies by inference, see *infra* note 381. One should also note that both lower courts (the county court and the appellate division) in *Garner v. Gerrish* determined that a lease with a monthly rental and no stated term or time for termination other than "Lou Gerrish has the privilege of termination [sic] this agreement at a date of his own choice" created a month-to-month tenancy that could be properly terminated on the next anniversary of such periodic tenancy. *Garner v. Gerrish*, 473 N.E.2d 223, 223-24 (N.Y. 1984). Among the decisions discussed earlier in Part II.B, this construction is not commonplace. It is, however, theoretically possible, and under the facts presented in the hypothetical under consideration, it is also very defensible. See *infra* Part IV.B.

380. The common-law requirement as to notice to terminate year-to-year tenancies was six months. For periodic tenancies of six months or less, notice of one full period was required. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.5 cmt. f. These requirements controlled notice of termination unless the lease specifically provided otherwise. See *id.* Many jurisdictions within the United States codified their notice requirements for termination of periodic tenancies. The range of notice specified for year-to-year tenancies is considerable. Most are from one

strike a deal with *C*. If, however, the anniversary was nearly a year away, the delayed possession may be too much for *C*. If the rental had been monthly, then one must assume that a tenancy from month to month would have been the estate established through previous interpretations.³⁸¹ In light of the requirements for termination of such tenancy,³⁸² *A* could secure possession in time enough to satisfy *C*. Consequently, interpretive certainty achieved through past adherence to this precedential meaning would produce a marketable title for *A*.

Most courts, however, interpret this deviant language differently today.³⁸³ Indeed, they conclude that *B* has a defeasible life estate; namely, *B*'s interest will end at *B*'s death or earlier if *B* wishes. The privilege to terminate is unilaterally given to *B*. Yet *A* must secure possession within the near future in order to satisfy the promise of a marketable title. A reversion in fee simple absolute subject to a defeasible life estate simply will not suffice. To be sure, *A* or *C* always has the opportunity to buy out *B* and gain a surrender of her interest. But this has a cost that radically alters the bargain both *A* and *C* wish to make. Consequently, if a defeasible life estate is the precedential meaning and estate classification to which courts have adhered, it will not yield a marketable title for those who must make such determination. Quite clearly, then, under these circumstances such interpretive certainty will not afford greater marketability within the context of title assessments.

For another illustration, recall the devise from *A* to "*B* and her children."³⁸⁴ Assume that *B* is childless at *A*'s death, but that she has several

to three months, though few provide for a longer period of time. For discussion and listing of these requirements, see RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.5 statutory note 2a - b (1977).

381. The general rule is: "Where the parties enter into a lease of no stated duration and periodic rent is reserved or paid, a periodic tenancy is presumed. The period thus presumed is equal to the interval for which rent is reserved or paid to a maximum periodic tenancy of year to year." RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.5 cmt. d (1977). Therefore, if the lease between *A* and *B* provided for a monthly rental but contained no stated duration that coincided with a recognized estate, a month-to-month tenancy would become a possible construction.

382. See *supra* note 380. The requirement, therefore, for a month-to-month tenancy would be one full period in advance, but statutes within some jurisdictions would allow for a shorter time period. Assuming the notice requirement is one full period, termination could be accomplished no later than one day less than two months after the notice is delivered. Because termination must occur only on the anniversary of a period, the shortest time for termination would be one month if notice is delivered on the anniversary of such periodic tenancy. If, however, one misses the anniversary and delivers notice on a later date during the month, then the delay in termination must include the full month plus the number of days until the next anniversary. In terms of the hypothetical presented, one should note that even if termination were to require nearly two months, this should satisfy *C*'s need for immediate possession.

383. Most courts, along with the *Restatement (Second) of Property*, would find that this language created a defeasible life estate. See *supra* Part II.B.

384. See *supra* Part II.A.

children born before she decides to sell her interest to *C*, and that the deal *B* and *C* wish to make contemplates conveyance of a perfect title. Under these circumstances, many courts hold that *B* has a possessory fee simple absolute. Their conclusion rests upon “children” being a word of limitation rather than purchase. This leads to creation of a fee simple absolute directly by construing “children” the same as “heirs,” or indirectly through creation of a fee tail and application of a conversion statute.³⁸⁵ Interpretive certainty as to this result should persuade anyone who assesses *B*’s title that she is the exclusive owner of a possessory fee simple absolute and, therefore, can fulfill her promise to convey a perfect title. *B* and *C* should have complete confidence in what a future court will do. Further, any potential adverse claimants (*B*’s children) will know that *B*’s estate is in fee simple absolute and that *B*’s children have nothing whatsoever. In the event of a subsequent dispute over title, strict adherence by a court to precedential meaning will facilitate other promises of a perfect title. Quite clearly, then, interpretive certainty as to this precedential meaning will yield greater marketability.

All courts, however, might not arrive at this result. Some might begin similarly by assuming that “children” is a word of limitation that confirms a fee tail in *B*. Nevertheless, because of a different conversion statute, their construction would ultimately produce a life estate in *B* and a fee simple absolute in *B*’s children.³⁸⁶ Other courts might reach the same conclusion, but they would do so directly by construing “children” as a word of purchase. More specifically, *B*’s children would receive a direct gift from *A*—a

385. See *supra* Parts II.A.3.a, II.A.3.b.

386. Several states have a statute that gives the donee in tail a life estate and a remainder in fee simple absolute to those who would next take at common law—namely, the donee’s children (if there are any). See *supra* note 75. This is not, however, the only kind of conversion statute that suppresses marketability of the land in regard to any transfer *B* might attempt. Several states have statutes that delay conversion until the donee in tail dies. At that time, the donee’s issue receive an estate in fee simple absolute. Ohio is such a state: “All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail.” OHIO REV. CODE ANN. § 2131.08(A) (Anderson 1981). Ohio appears to be a jurisdiction that adopts the standard formulation of the first rule in *Wild’s Case*. By way of dicta, the supreme court has implied that a devise to a person and his children would create a fee tail. See *Harkness v. Corning*, 24 Ohio St. 416, 422 (1873). In interpreting the foregoing conversion statute, Ohio courts have reached conclusions that in nearly all situations would prevent any transfer of a perfect title during the donee in tail’s lifetime. To begin with, the first donee in tail, herein *B*, cannot by conveyance of a fee simple bar the entail and thereby deprive her issue of their right of succession to the inheritance. See *Pollock v. Speidel*, 17 Ohio St. 439, 448-49 (1867). Further, during the life of the donee in tail, the issue of such donee has no estate or interest in the lands entailed that they can alienate. See *Dungan v. Kline*, 90 N.E. 938 (Ohio 1910). Finally, such statute does not convert the donee in tail’s inheritable estate into a life estate. Instead, it merely restricts the entailment to the immediate issue of such donee, thereby giving them the fee simple but not until the donee’s death. See *Long v. Long*, 343 N.E.2d 100 (Ohio 1976).

nonpossessory fee simple absolute that follows the possessory life estate conferred upon *B*.³⁸⁷ This construction suppresses marketability because *B* merely has a life estate. Any conveyance of a perfect title must now include *B*'s children, a class with potential members who have not yet been born.³⁸⁸ To be sure, interpretive certainty clarifies ownership and determines with whom *C* must bargain to acquire a perfect title. But it will be a different bargain, and it will have a cost that dramatically alters the dynamics of the sale to *C*.³⁸⁹ Clearly, because the foregoing construction does not establish exclusive ownership of a possessory fee simple absolute in *B*, interpretive certainty predicated upon such precedential meaning will not yield greater marketability within the context of title assessment.

Quite differently, courts may find that this devise creates a fee simple absolute in both *B* and her children as tenants in common. They take concurrently, not consecutively, especially if *B* has children at *A*'s death.³⁹⁰ Once again, this construction suppresses marketability because *B* does not have exclusive ownership. *C* must now structure a deal with both *B* and her children. Such divided ownership involving *B* and her children might substantially affect the sale and its terms. Consequently, one cannot say that consistency and certainty concerning this particular interpretation will evoke greater marketability.

There is another reason why interpretive consistency and certainty should be devalued in construing the language presented in the latter illustration. The foregoing discussion does not focus on the transfer being donative. There are essentially three ways to accomplish donative transfers of real estate: by deed,³⁹¹ by living trust or by will (with or without a trust). In most

387. See *supra* Part II.A.3.c.

388. The rule of convenience governs the composition of class gifts. It permits potential members to join the class if born before the date of first distribution. In this illustration, first distribution cannot occur before the death of *B*, the life tenant. Because *B* cannot have children beyond her death, all of the children she will ever have will be born by the time of first distribution. Consequently, all of *B*'s children will be entitled to share the remainder in fee simple absolute. This includes *B*'s existing children and those born thereafter. For further discussion of the rule of convenience, see *supra* note 47.

389. This construction—a life estate in *B* and a remainder in fee simple absolute in her children—presents several problems that would not have arisen if the gift to “*B* and her children” had been construed to create in *B* sole ownership of a possessory fee simple absolute. The solutions for each of these problems—if they exist at all—generate additional costs for this transaction. First, all or some of *B*'s children may not wish to sell at this time. Second, *B*'s children may disagree with *B* or among themselves as to the purchase price and how it should be shared with *B*. Third, *B* may thereafter have additional children whose interests must be reflected in the transaction—something that may be impossible to achieve before they are born.

390. See *supra* Part II.A.4.a.

391. Originally, the first rule from *Wild's Case*—the rule that treats “and children” as words of limitation, thereby creating a fee tail—did not apply to transfers of real estate by deed. Today, however, courts are divided, with some applying the rule to deeds and wills alike. See *supra* notes 33-

of the cases involving this particular language format, the interest is created by a will. Because nearly all wills are prepared by lawyers, one might expect the use of deviant language to be less than with deeds. Nevertheless, the cases themselves demonstrate that lawyers are sometimes uninformed or at least make serious mistakes in drafting.

Assuming the use of a will, the process for transfer ordinarily requires court supervision, especially as to real estate.³⁹² In administering probate, a court may be asked to determine who is entitled to what interests under the terms of a will.³⁹³ Presumably, if there is any serious doubt about what a testator has created, the matter will likely be raised and settled during the course of probate and the administration of the estate. Further, if the subject matter is placed in trust, one should expect a trustee—especially a corporate trustee—to proceed with extreme caution. This caution may cause a trustee

34 and accompanying text.

392. Many probate statutes allow *ex parte* procedures that simplify the process of probate and administration, thereby allowing estate transmission to occur without significant intervention and supervision by courts. *See, e.g.*, UNIF. PROBATE CODE §§ 3-301 to -322 (amended 1993). If, however, the decedent's estate includes real property, probate and administration generally require some kind of judicial approbation, especially if one wishes to bring closure to a sale or distribution.

Suppose instead of a bank account or stock the decedent owned a parcel of land. The family does not have to have the concurrence of a third party such as the bank or the corporation for the transfer of title to the property. Unless there is administration, however, the title to the land is probably unmarketable, i.e., no one will buy it. The last deed was to the decedent. This deed is in the land records. Title to the land passes from the decedent to her devisee under the will if there is one, or in intestacy to her heirs. Without administration the link in the record chain of title is missing. Not only is the identity of the devisee or heirs uncertain, but unpaid creditors of the decedent could compel the appointment of a personal representative at a later time to reach the land to pay the creditors.

PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 167 (1987).

In jurisdictions that allow informal administration of estates, the personal representative frequently will have the power to convey a marketable title, even though there has been no judicial determination as to the interest held by the decedent. *See* UNIF. PROBATE CODE § 3-714. Additionally, when a distribution is made in kind the distributee will also have the same power to convey a marketable title. *See id.* § 3-910. Nevertheless, without a judicial determination approving distributions and the settlement of an estate, the distributee of a wrongful distribution will continue to be liable—to return the property or, if not retained, its equivalent value—to both the personal representative and the distributees to whom such distribution should have been made. *See id.* §§ 3-908, 3-909, 3-1006. The personal representative can, however, protect these distributions by securing court adjudication and approbation of distributions and the final settlement of an estate. *See id.* §§ 3-909, 3-1001, 3-1002. In any questionable case involving real estate, judicial intervention and adjudication would certainly seem the prudent way to proceed.

393. If distributees are to be protected, one would surely expect a personal representative to secure judicial construction of any problematic provision before making final distribution and closing the estate. *See supra* note 392. The *Uniform Probate Code* allows for closing an estate by sworn statement. *See* UNIF. PROBATE CODE § 3-1003. One should note that it also allows a personal representative to petition a court for construction of a will and to obtain an order approving distributions pursuant to such construction. *See id.* §§ 3-1001, 3-1002. Under these circumstances, one should expect a personal representative to take this course of action.

to seek a judicial determination, especially before the trustee terminates the trust and distributes principal.³⁹⁴ Consequently, interpretive consistency by courts in these kinds of cases will not avert judicial intervention in future situations. These other situations, ones also involving deviant language derived from wills and testamentary trusts, should require the supervision of courts. The court system will inevitably become a part of the process of transfer, requiring it to examine the meaning of such deviant language.³⁹⁵ In short, interpretive certainty without judicial intervention may become impossible under these circumstances, and no amount of judicial consistency will guarantee it. Conversely, one might conclude that ad hoc interpretation will not undercut the policy that justifies preferences for consistency and certainty. There will not be less litigation because such death transfers simply cannot exist without it.

In summary, interpretive consistency and, therefore, certainty as to deviant language seems to be a worthy goal because strict adherence to precedent will clarify who owns what and thereby deter litigation. However, it may not advance the cause of marketability. Whether it does or does not depends heavily upon the precedential meaning accorded such deviant words and phrases. If the prevailing construction reveals a unified title in fee simple absolute, then someone has a perfect title that can be marketed. This will not, however, be true of divided ownership—especially with a group that has not been fully determined. Under this circumstance, interpretive certainty will not yield the benefit of greater marketability. Consequently, because such benefit does not exist, a method of ad hoc interpretation cannot cause its loss.

3. *Ownership Assessment*

As indicated previously, ownership assessment affects a determination of what an existing owner can do or prevent.³⁹⁶ For example, can the holder of a possessory interest remove mineral deposits or raze or remodel a building?

394. Trustees are notoriously cautious, and often they should be. If a trust ultimately provides for sale of the corpus and distribution of the proceeds to those beneficiaries entitled to principal, surely a trustee will enlist court supervision whenever there is any doubt about who is entitled to share in the proceeds. And before that—if there is any doubt about whether the time has arrived for sale of the principal and distribution of the proceeds, or if there is any doubt about whether the trust is to be terminated or continued because of uncertainty as to whether a beneficiary takes income or principal—surely a trustee should and will seek a court determination and approval.

395. Interpretive consistency and the interpretive certainty it generates will, of course, expedite a probate court's determination of what interests are created under the will before it. It should not, however, eliminate the need for judicial intervention in the transfer process itself. One way or another the dispositive language within the will must receive the imprimatur of the courts.

396. See *supra* Part III.A.2.

Conversely, can the holder of a nonpossessory interest enjoy such actions? These determinations are governed by the kind of interest each owner has, because different estates offer different attributes and limitations.³⁹⁷ Consequently, one must assess ownership interests to determine what one can do or, conversely, prevent. Once again, interpretive certainty respecting the language already used to create such interests facilitates such assessment. Interpretive consistency by courts makes such certainty and determination possible.

What then is the effect of ad hoc interpretation upon ownership assessment? This determination must commence with careful reevaluation of the benefits associated with interpretive certainty—less litigation and greater marketability. To begin with, such certainty should generate less litigation. If there is no ambiguity as to the estates held by the respective owners, then there should be greater clarity as to what can be done and what can be prevented. This clarity should reduce the possibility of litigation. This assumes that consistent interpretation by courts of the same language formats will produce the certainty needed to assure ownership assessment and, thereby, to know the consequences of certain actions. Once again, within the context of ownership assessment, is this a valid assumption?

To be sure, less litigation within the context of ownership assessment requires interpretive certainty as to the interests created. Nevertheless, as suggested earlier, there are three reasons why interpretive consistency by courts may not lead to interpretive certainty and, therefore, why ad hoc interpretation of deviant language may not have a significant impact on the amount of litigation that derives from such language.³⁹⁸ First, even though such deviant language is not unique and may have been repeated in dispositive instruments from time to time, it is by definition aberrational in form. Consequently, one must assume that there are comparatively few appellate decisions that secure a specific precedential meaning. Within each jurisdiction, there should be very few if any cases on point.³⁹⁹ Second, many of these decisions rest upon principles or reasons that did not or no longer

397. See *supra* notes 315-17 and accompanying text.

398. See *supra* notes 356-71 and accompanying text.

399. As one might expect, when it comes to matters of interpretation and precedential meaning, courts are influenced most by relevant decisions within their own state. The analysis undertaken in this Article concerns deviant language formats. These are words and phrases that have not become standardized formats and are not regularly used in the creation of interests. Consequently, one should never anticipate many appellate court pronouncements on the meaning of such formats within any particular jurisdiction. Indeed, if one were to discover a handful of opinions, this would be a lot. If the number were much greater and the decisions within a given jurisdiction were to yield interpretive consistency, one might no longer classify the format as deviant. Surely, this would be true if such word or phrase had also found its way into commercial forms for wills, trusts and deeds.

make sense, and continued reinforcement of interpretive consistency would make a charade of both intent and policy. Third, these decisions frequently embrace a nonliteral meaning not normally associated with such language, especially when used by someone other than a lawyer.

The foregoing reasons suggest that, even with a decisional record of interpretive consistency, there will be many circumstances in which ownership assessment evokes uneasiness and, therefore, requires caution. Earlier it was suggested that in these situations interpretive consistency would not necessarily guarantee interpretive certainty within the context of title assessment.⁴⁰⁰ Surely, the breakdown of interpretive certainty is even greater within the context of ownership assessment. When it comes to title assessment, the title insurance company is often a principal player.⁴⁰¹ Inevitably, it has a lot at stake when it insures a title because a mistaken assessment can cost it greatly. Nevertheless, it can assume risks that individuals ordinarily must avoid. Although buyers can conceivably bargain for a purchase price commensurate with the uncertain title, insurance companies can more readily adjust the premium and spread the risk.⁴⁰²

400. *See supra* Part III.B.1.

401. There are reasons why title insurance companies have become a principal player in the assessment of title and in the land transfer process. Title assessment is often fraught with uncertainty that may raise questions of marketability. As a result, contracts for the sale of land will frequently give the vendor the option of supplying a marketable or insurable title. Indeed, title insurance sometimes becomes paramount because of the willingness of lenders and those within the secondary market of investors to rely upon it—if not insist upon it for their own protection. This is the practice in most major cities within the United States. And usually when title insurance companies assume this role, they will conduct their own searches and their own assessments. *See* OLIN L. BROWDER ET AL., *BASIC PROPERTY LAW* 862-63, 927-29, 940, 957-58 (5th ed. 1989).

402. This is, of course, the essence of insurance and what makes the business possible and profitable. Title insurance is different from other forms of insurance, however, because it attempts to identify specific encumbrances and defects through its list of exceptions. These exceptions provide the insured with important information. The insured can then attempt to have the defects cured before closing or have the purchase price reduced to reflect their impact upon the value of the subject matter. Often, however, there is a third choice. For an increased premium, the insured might be able to secure an endorsement in which the insurer insures over the specific exception. *See infra* note 404.

Historically, title insurance insured merely the existence of a particular interest or estate. A different form was needed to indemnify against losses because of an unmarketable title. Today, however, many standard forms focus on insuring against an unmarketable title. *See infra* note 403. A marketable title is something for which a person of reasonable prudence would be willing to pay fair value, and it is a title that does not make the purchaser buy a lawsuit. *See supra* note 354. Given the long history of ownership that surrounds most tracts of land, it is no surprise that many titles are shrouded with uncertainty. Even though an adverse claim and law suit may not be likely, a mere fly speck may deter a purchaser's lawyer and perhaps a court from approving a marketable title. But a title insurance company can examine probabilities as to claims and litigation in light of its own experience. And these probabilities spread out over thousands of titles and policies will often enable it to insure, especially when it can adjust premiums and exceptions to reflect differences as to probabilities and, therefore, risks. For an overview of title insurance and how it functions, see *TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW!* 3-18 (James M. Pedowitz program director, 1979).

Within the context of title assessment, actual ownership of a good title is usually at issue, and the title company is invariably there to insure the bargains.⁴⁰³

Within the context of ownership assessment, however, the holder of the possessory interest must make the assessment and assume the risk, and one cannot presume the existence of a backup insurance policy.⁴⁰⁴ Further, the assessment is an important one and a mistaken judgment can be very costly. Frequently, the assessment must be made because the owner wants to remodel or raze a building or radically change the use to which the land and building have been put. The holder of the possessory interest must have absolute confidence in the ownership assessment because the damages caused by these proposed changes may be very significant. Consequently, if

403. At an earlier time, the principal form for an owner's policy issued by the American Land Title Association ("ALTA") did not insure against unmarketability. Instead, its insurance covered the existence of a particular interest or estate described in the policy. This meant that the insurer was not automatically responsible for losses attributable to a purchaser's refusal to buy or for the costs of a suit for specific performance of the insured's contract to sell his or her estate. Insurance against unmarketability was, however, offered through Form B. If approved, such insurance would, of course, require an increased premium. One should note, nonetheless, that currently ALTA's principal form does insure against unmarketability. Nevertheless, this does not mean that all applicable title insurance policies offer this coverage. *See* JOYCE D. PALOMAR, TITLE INSURANCE LAW § 5.06 (1996).

404. To be sure, one cannot presume the existence of a title insurance policy that would immediately indemnify the owner against an adverse determination. An important purpose of title insurance is the elimination of risk. The title search conducted by the insurer is intended to reveal encumbrances, liens and defects. These problems appear as special exceptions to the insurer's coverage. Once noted, the insured-buyer can bargain with the seller for their removal or for a reduction in the purchase price. Sometimes an endorsement by the insurer that insures over the exception becomes possible. Many title insurance companies will limit these endorsements to minor defects. Some will not eliminate an exception. Inevitably, however, such endorsements increase the premium and raise the cost of insurance, perhaps prohibitively. Certainly, if the insured bargains for a marketable title—or even a possessory fee simple absolute—a defect that evidences merely a life estate may be one that cannot be overcome through an endorsement and, therefore, title insurance. The greater the uncertainty as to the interest covered by the insurance, the greater the problem as to whether a satisfactory policy will be issued. Indeed, this is a circumstance that may be endemic to all instances in which deviant language formats appear in a chain of title.

Assuming, however, the existence of such an endorsement, there may still be problems as to whether and when a loss arises. Some courts will view the promise of the insurer as a title guaranty and award the insured benefits from the time the defect is established. Most, however, view the promise as one of indemnification against contractual losses. Consequently, these courts conclude that there is no loss by reason of the mere existence of a lien or defect. Instead, they delay recovery until the insured has sold her interest and received less than she invested or until she has suffered an out-of-pocket loss. If, however, the defect produces for the insured-buyer an interest in which the bundle of rights are less than those that the insured interest would have yielded, the insured may be entitled to immediate recovery for the acquisition of a less valuable interest even though no one has made a claim based upon such defect that inflicts an out-of-pocket loss. This would be especially true of those situations in which the defect affects the insured's ability to develop the land or to make an expected return on her investment. For discussion of title insurance exceptions and the problems that arise with respect to damages and when they are incurred, see *id.* §§ 1.04, 6.06, 7.03, 9.01, 10.04(4). *See also* D. BARLOW BURKE, JR., LAW OF TITLE INSURANCE §§ 2.1, 3.2 (2d ed. 1993 & Supp. 1996).

the cases establishing precedential meaning for the deviant language format are weak and uneasy or few in number, one cannot be confident that previous interpretive consistency by courts will engender the interpretive certainty needed to make a positive assessment.

If, however, interpretive certainty is established for those charged with the task of assessment, then one must assume that there will be no litigation concerning the kinds of interests owned by claimants to the subject matter. Nevertheless, this does not mean that the parties can conduct certain activities or prevent them without litigation. Indeed, even if the holder of the possessory interest clearly has a life estate, this does not mean that the owner of the reversion or remainder in fee simple can prevent the life tenant from remodeling or even razing a building.⁴⁰⁵ Moreover, if the holder of the possessory interest has a defeasible fee simple, this does not mean that the owner of the possibility of reverter, the power of termination, or the executory interest will be unable to prevent his proposed actions.⁴⁰⁶ Although the principles that compose the doctrine of waste have been clearly expressed

405. Ordinarily, at common law the owner of a reversion or remainder in fee simple absolute could enjoin any changes a life tenant might wish to make concerning the identity of the premises. Over the years, however, some limited exceptions have arisen with respect to such changes when they enhance the value of the subject matter and, accordingly, the value of the reversion or remainder. See *infra* notes 477-80 and accompanying text. Indeed, the American Law Institute takes the position that

[e]xcept to the extent the parties to a lease validly agree otherwise, the tenant is entitled to make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances.

RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.2(1) (1977).

406. Ordinarily the owner of a fee simple—absolute or defeasible—cannot be enjoined from committing waste. Although there is authority to the contrary, the American Law Institute takes the position that under limited circumstances injunctive relief, but not damages, can be had against the owner of a possessory defeasible fee simple by the holder in fee simple of an executory interest, possibility of reverter or power of termination.

When a future interest in fee simple is preceded only by a present estate in fee simple defeasible . . . or in fee simple conditional . . . , then the owner of such future interest can obtain the appropriate prohibitive injunction against threatened conduct of the owner of the present estate when

- (a) a reasonable probability exists that such future interest will become a present interest; and
- (b) the conduct of the owner of such present estate threatens to destroy, or substantially to diminish the market value of that which the owner of the future interest would otherwise acquire upon his interest becoming a present interest; and
- (c) such conduct is either wanton or unconscionable; and
- (d) the owner of such present estate has no present absolute power to destroy this future interest and thereby to acquire for himself the economic advantages of ownership thereof.

RESTATEMENT OF PROPERTY: FUTURE INTERESTS § 193 (1936); see also *id.* § 194; *Gannon v. Peterson*, 62 N.E. 210, 214 (Ill. 1901) (holding that owner of executory interest can recover for waste only when it appears that “the contingency which will determine the fee is reasonably certain to happen,” and the waste constitutes a “wanton and unconscientious abuse of his rights”); 5 AMERICAN LAW OF PROPERTY, *supra* note 13, § 20.23; *SIMES & SMITH, supra* note 9, §§ 1664-65.

and embraced for generations, they seldom function like a litmus test.⁴⁰⁷ Indeed, their application is more evolutionary than constant. What does or does not actually constitute waste has changed over time. Often one cannot make this determination without careful consideration of the context in which it arises. In short, the determination is often shrouded with uncertainty that cannot be resolved without litigation. As a result, although ad hoc interpretation of deviant language will lead to litigation regarding ownership assessment, there will be many circumstances in which it will merely add to the issues already destined for judicial resolution.

The other principal benefit of interpretive certainty is greater marketability. Within the context of ownership assessment, however, this is usually not a factor because the issues ordinarily raise matters of use and not of transfer. To be sure, the capacity for transfer is not a goal unto itself; indeed, it is not an abstraction that society must embrace. Instead, marketability is valued highly because of benefits it facilitates or because of adverse consequences it avoids.⁴⁰⁸ For example, land is an extremely important resource in both a private and public sense.⁴⁰⁹ Over time, such

407. Referring to the development of the law of waste, the Supreme Court of Wisconsin said:

But, while they are correct as general expressions of the law upon the subject, and were properly applicable to the cases under consideration, it must be remembered that they are general rules only, and, like most general propositions, are not to be accepted without limitation or reserve under any and all circumstances. Thus the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of ameliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate. . . . [A]nd in accordance with this same principle, the rule that any change in a building upon the premises constitutes waste has been greatly modified, even in England; and it is now well settled that, while such change may constitute technical waste, still it will not be enjoined in equity when it clearly appears that the change will be, in effect, ameliorating change, which rather improves the inheritance than injures it. . . . These familiar examples of departure from ancient rules will serve to show that, while definitions have remained much the same, the law upon the subject of waste is not an unchanging and unchangeable code, which was crystallized for all time in the days of feudal tenures, but that it is subject to such reasonable modifications as may be demanded by the growth of civilization and varying conditions. And so it is now laid down that the same act may be waste in one part of the country while in another it is a legitimate use of the land, and that the usages and customs of each community enter largely into the settlement of the question.

Melms v. Pabst Brewing Co., 79 N.W. 738, 739 (Wis. 1899).

408. See *supra* note 322.

409. Quite clearly, the ownership of land has value and land is frequently the most valuable component of the owner's entire estate. This commercial value derives from the benefits such land confers. In the case of land capable of agricultural use, it offers a source for food and often housing. But it may also present opportunities for income generated by the sale of crops harvested from the land. More intensive development may, however, offer greater benefits. These could include the income stream generated by a factory or the profits from the sale of lots improved by the construction of homes. But land is also an important public resource. Public ownership offers the opportunity for intensive use in the form of public libraries or schools, or it may serve as a refuge for wild life and

resource invariably has a highest and best use.⁴¹⁰ In the absence of public regulation, this use is apt to be the same for both the private owner and the public.⁴¹¹ Nevertheless, this use may never be achieved without marketability.⁴¹² The capacity to transfer is necessary to maximize profit or to attract the capital and expertise of others.⁴¹³ In short, because marketability is inextricably connected to the developmental capacity of land, it has great importance to the law of property. Consequently, because interpretive certainty is relevant to marketability, one ought to examine the impact of ad hoc interpretation upon developmental capacity, which is perhaps the most significant benefit that marketability promotes.

Consider, once again, this devise by *A*: "To *B* and her children." What does *B* receive?⁴¹⁴ If *B* is childless at *A*'s death, many courts would apply the rule in *Wild's Case* and conclude that "and her children" amount to words of

public recreation. The public, however, also benefits from private ownership and use. Land offers opportunities for self-sufficiency and permits owners to realize personal aspirations. The development of land also creates jobs, homes, businesses and the tax base needed to support a community's needs.

410. Conceivably, there may be several uses for which a parcel of land is comparably suited. Such highest and best use or uses reflects market demand for a particular nondevelopmental or developmental purpose and the suitability of a tract for such purpose. Location, topography and geological composition are just some of the factors that will affect a tract's suitability for a particular use. Market forces may change over time. Although physical location may not change, development and other things around the tract may. With this, the attractiveness of a location may change in relation to a particular use. Consequently, it should be no surprise that at one time the highest and best use may be agricultural, thereafter it may be residential, and finally it may become industrial.

411. If, for example, land located within a particular community is being developed successfully for single family dwellings, this should reflect the highest and best use of such land so far as the marketplace and private ownership is concerned. At any point in time there may be obstacles to such developmental use, but its success over extended time should confirm it highest priority within private ownership. Further, one ought to assume that such use is consistent with the best interests of the public—namely, the community itself. To be sure, such development will produce tax revenues, but it will also shape community growth in a manner that is presumably consistent with the community's plans and aspirations. Sometimes the community will confirm such highest and best public use by zoning the land for only single family dwellings. Nevertheless, in the absence of public regulation any conclusion about a different use being a better public choice is pure conjecture. Indeed, until the public has spoken one can never be certain that public and private interests are not congruent.

412. For discussion of the advantages of marketability and the disadvantages of restraints upon the alienation of land, see *supra* note 322.

413. For example, someone who wishes to devote specific land to its highest and best use may not have the cash needed to do so. Under these circumstances, one might borrow the money that is needed to develop the project. Such a loan would require security and ordinarily this is the land itself. Without a marketable title, however, no one is going to extend credit. The security interest must be marketable so that, in the event of a default, it can be sold to payoff the debt. Unless the sale can be made and, further, can produce proceeds sufficient to liquidate the debt, a lender will not extend credit with the land used to secure the loan. Consequently, if the developer-borrower has an estate subject to a valid restraint against alienation or if she has an estate, such as a life estate, for which the marketplace has no interest, the loan will not be made. As a result, the land will be developed to its highest and best use.

414. See *supra* Part II.A.

limitation, thereby creating a fee tail in *B*. Many conversion statutes would then immediately transform this into a fee simple absolute in *B*. Some courts, of course, might treat “and children” as words of limitation that directly create a fee simple absolute in *B*. In either instance, consistent treatment of this language by courts should afford interpretive certainty for those who must assess ownership. Consequently, *B* will *know* that she can raze an existing building or remove mineral deposits with impunity. With this knowledge, *B* will not be prevented from devoting the land to its optimal use. Therefore, within this context, interpretive consistency by courts will promote the developmental capacity of the subject matter. If this is the prevailing meaning assigned “to *B* and her children,” it should also be clear that a different construction achieved through ad hoc interpretation will not only induce more litigation, it could also blunt developmental opportunities for *B* or her successors.

A fee simple absolute, however, is not the only interest courts have attributed to *B*. With respect to the foregoing language, many courts find that *B* receives a life estate, while her children have the fee simple absolute. Courts reach this result because the statute affecting fee tails makes a different conversion or because they find directly that *A* has made separate gifts to *B* and to her children, with possession consecutively and not concurrently. Assuming interpretive certainty as to this construction has been achieved for those who must assess ownership, it will be clear to *B*—and to her children born after *A*'s death—that she cannot do as she pleases. Indeed, her right to enjoy the subject matter is now severely circumscribed. Any alteration of the buildings or use of the land requires the consent of her children, and this may not be forthcoming.⁴¹⁵ To be sure, then, interpretive consistency by courts will not guarantee to *B*—or to the community—freedom of choice and, therefore, opportunities for optimal use. Conversely, given this prevailing interpretation, opening up construction to ad hoc interpretation may not make matters worse when it comes to maximizing the developmental capacity of the subject matter.⁴¹⁶

415. For generations case reports, especially those that concern construction of wills and trusts, have been filled with illustrations of family strife. These conflicts have presented many issues. Perhaps most prevalent are conflicts between immediate family members, particularly parents and their children, arising as a result of divided ownership. See *In re Kountz's Estate*, 62 A. 1103 (Pa. 1906); see also BENJAMIN M. BECKER & FRED TILLMAN, *THE FAMILY OWNED BUSINESS* 86-88, 319-28 (1975).

416. Indeed, ad hoc interpretation creates the opportunity for courts to focus on contextual evidence of other meaning and on the policy benefits achieved with such other construction. For example, if there is evidence that *A* intended a fee simple only in *B*, especially since *B* was childless at *A*'s death, then such construction will give *B* total choice as to use and thereby enhance the developmental capacity of the land.

In conclusion, within the context of ownership assessment, interpretive consistency by courts assures neither less litigation nor optimal land use. These benefits depend greatly on the confluence of other factors that may be absent in a given situation. As a result, one cannot conclude that a judicial shift from interpretive consistency to ad hoc interpretation will necessarily diminish the benefits normally associated with strict adherence to precedent.

IV. HOW COURTS SHOULD INTERPRET DEVIANT LANGUAGE

Part II presented illustrations of what courts say and do with respect to deviant language. Courts say that the most powerful force in interpreting language is intent. Frequently, however, there is no specific intent because the circumstances giving rise to the ambiguity were unanticipated.⁴¹⁷ In others, the manifested intent is to create an unrecognized interest.⁴¹⁸ Consequently, the intention ultimately found by many courts is a fabrication—a reconstruction of what should have been intended.⁴¹⁹ Furthermore, in fashioning this intent—and ultimately their constructed meaning of language—courts will always have preferences that reflect public policy.⁴²⁰ These considerations are not always made explicit. Nevertheless, if

417. See *SIMES & SMITH*, *supra* note 9, §§ 464, 466.

418. See, e.g., *Johnson v. Whiton*, 34 N.E. 542 (Mass. 1893).

419. Sometimes a court is candid enough to admit what it is actually doing.

It is frequently said in will cases that the testatrix' intention is the sovereign guide in the interpretation of a will. No one disputes the truth of this beguiling and sonorous statement but candor compels the admission that it is of doubtful utility in determining intent where there may be none. . . . If the testatrix did not think about the matter, it is difficult to say that she had an intent with respect to it. In that case the court is looking for a black hat in a dark room; if the court locates it there at all, it will be on its own head and not because of any light left by the last will and testament. . . . If courts can [not] fairly and reasonably ascertain the decedent's desire from the will, intellectual honesty requires that they say so without resorting to a fiction of intent where none existed.

Roberts v. Trustees of Trust Fund for Tamworth, 73 A.2d 119, 121 (N.H. 1950).

420. For example, suppose that *A* bequeaths \$100,000: "To the children of my good friend *B* absolutely and forever." Assume further that when *A* executes her will *B* has two children, *B-1* and *B-2*. However, by the time of her death, *B* has two additional children, *B-3* and *B-4*. Finally, one year after *A*'s death, assume that twins are born to *B*, *B-5* and *B-6*. Whom did *A* intend to include within the group of children entitled to share the bequest? For example, did *A* have in mind only the two children alive when she executed her will? Did she at least wish to include the two children born before her death—children of whom she presumably knew? Or did *A* intend to maximize the group by including all of the children *B* may ever have? One may not have any evidence of what *A* actually intended—assuming *A* had considered the matter at all. Consequently, courts have applied a rule of construction that applies by default although courts sometimes abide by it even when there is language that provides for "all of *B*'s children." This rule is known as the rule of convenience. It masquerades as a proxy for the probable intent of most estate owners. In reality, however, it is a fabrication that courts have effected to implement policy concerns about the timely and prompt administration of estates. For elaboration and discussion of the rule of convenience, see *supra* note 47. For discussion of matters of

the creative transaction is donative, courts will consider preferences for alienability, for keeping the subject matter within the donor's family, for equality of distribution within such family, for benefitting those members of the family who are natural objects of the donor's bounty, and against intestacy.⁴²¹ If, however, the creative transaction is contractual, courts might consider preferences for alienability, optimal developmental capacity of the subject matter, customary expectations and the fairness and reasonability of each interpretation.⁴²²

Superimposed upon these factors of intent and policy are past decisions and the precedential meaning attributed to the same language pattern. To be sure, courts have distinguished and thereby limited such previous interpretations. Using this technique, they have established different meaning when the circumstances pointed towards a different construction.⁴²³ Nonetheless, many judges do not openly exercise such discretion. At the very least, they must reckon with the meaning established by other courts. In many instances they respond as if their interpretive choices are encumbered by precedential meaning, especially constructions made through decisions of their highest courts.⁴²⁴ In the end, judges invariably justify and support their own interpretations with previous decisions that address the same or comparable language.⁴²⁵ Inevitably, interpretive consistency becomes an important factor in their decision making.

intent and policy in the process of construction, see SIMES & SMITH, *supra* note 9, § 465.

421. *See supra* note 360.

422. The *Restatement (Second) of Contracts* addresses the factors that affect the meaning and interpretation of agreements. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 200-208 (1981). For example, section 201 addresses the circumstance in which the parties attach different meanings to their agreement. The *Restatement* chooses whose meaning prevails according to certain criteria. *See id.* § 201. These criteria taken as a whole are predicated upon principles of fairness and reasonability as to the parties' respective interpretations in light of each party's knowledge of the other party's understanding. Section 203(a) reinforces the importance of reasonableness: "[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Id.* § 203(a). Section 206 seems tied to these same principles. It provides: "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." *Id.* § 206. The underlying principle is a familiar one: that it is only fair and reasonable to impose the cost of ambiguous or problematic language upon the party who is responsible for such language.

Section 202(5) introduces considerations related to custom: "Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade." *Id.* § 202(5). Section 207 ratifies the importance of interpretations that advance public policy: "In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." *Id.* § 207.

423. *See supra* notes 119-25, 200-05 and accompanying text.

424. *See supra* notes 106-18, 196-99, 283-90 and accompanying text.

425. *See supra* notes 291-98 and accompanying text.

This Article raises the question: should interpretive consistency through adherence to precedential meaning govern judicial construction of deviant language patterns? Stated differently, should courts feel free to supply their own meaning in light of their own judgments as to intent and relevant policy considerations? The thesis of this Article is a simple one: in these kinds of cases courts should disregard, or at least downplay, the need for interpretive consistency and the observance of precedential meaning. In light of the analysis in Part III, courts achieve only minimal benefits through consistent interpretation of deviant language patterns. Further, these benefits are not likely to become significant even when interpretive consistency by courts rises to a level of interpretive certainty for those involved in ownership creation, title assessment and ownership assessment. Indeed, the benefits of interpretive certainty are insufficient to overcome the benefits achieved through ad hoc interpretation—the application of specific intent and important policy considerations.

Before proceeding further with this analysis and conclusion, two important qualifications deserve mention. First, the foregoing thesis does not require judges to completely disregard past decisions and precedential meaning as to deviant language formats. Past opinions should always carry some weight with future constructions of the same or similar language. This should be especially true of previous decisions in which courts considered comparable contextual facts and reached results predicated upon intent and policy rather than blindly adhering to previously established meaning. Ad hoc interpretation does not require judges to avoid the past; instead, it merely advocates analyses and results that are not shackled by previous interpretations, however prevalent they might be. Consequently, the process of ad hoc construction should always include a review of past decisions. Nevertheless, if the process of construction leads a court to a different result, the court should not feel compelled to distinguish or even mention past opinions.⁴²⁶ Quite differently, if the process leads a court to the same construction, references to the past should emphasize factors relevant to judicial methodology—and the result it reaches—and not merely the specific

426. The process of ad hoc construction requires allegiance to the process and not the result. Consequently, authority ought to be found in decisions that emphasize intent, context and policy and not interpretive consistency as to result. This is, of course, easier said than done. From the moment they begin law school, lawyers must reckon with precedent. It is at the foundation of the law and, therefore, their instruction. The results courts reach in the past drive decisions of the future. Consequently, cases that attribute an undesired meaning to the same language format naturally present obstacles that the opposition will invoke and lawyers must overcome. Most lawyers will find it exceedingly difficult to argue the irrelevance of these opinions instead of engaging in the age-old technique of meticulous distinction.

interpretation itself. Modern courts may in fact actually take this direction. If so, then courts should make explicit the factors that underscore their decision making.

Second, the thesis of this Article and the application of a process of ad hoc interpretation assumes the presence of a deviant language format. Nevertheless, classifying a particular format as standard or deviant may be a difficult determination to make. Standard formats should be easy to recognize because they are language signposts for the creation of interests that have been ratified by judicial decisions and statutes over time. These are formats that lawyers know and use, and they often appear in commercial forms used to transfer ownership. Identification of deviant formats, however, is another matter. Clearly, if a format has not been seen before and is litigated for the first time, one can readily classify it as deviant. But the formats at issue in this Article are assumed to have been used and litigated enough times to produce interpretive consistency among courts and, therefore, to achieve a meaning supported by precedent.

What then is a deviant format? One might say that it is anything that is not standard. But how do language patterns become standard? Surely they do not emerge over night. Indeed, some formats are clearly standard while others are clearly deviant—especially those that no informed lawyer would ever use. But some language patterns could be on the verge of standardization and, therefore, these are formats that one might not wish to classify as deviant. This could be true for language that paraphrases the format normally used to create a particular interest. For example, if *A* wished to create a life estate in *B*, a standard format would be “to *B* for life.” Eventually, however, some might say something different even though they intended and expressed the same thought. For example, one might say “to *B* until he dies” or “to *B*, and after his death to [someone else].” Eventually, one may wish to view these alternative expressions as additional standard formats for the creation of a life estate. One might also wish to extend the standard format classification to language that directly labels an interest. For example, in time one might view language that labels an interest a “life estate” or an “estate for years” as sufficient to create exactly that. Or one might view labeling an interest as “contingent” decisive in characterizing the nature of an interest subject to a condition. The point is that new formats may evolve and eventually through use become standard. During this process of evolution there will always be difficulties in determining whether the format is currently standard or deviant. Indeed, the difference between the two may be viewed as a continuum rather than a sharply defined “either-or.” This Article assumes, however, the existence of a deviant format and the illustrations used to present the process for ad hoc interpretation clearly fall within such

classification.

A. A Process for Ad Hoc Interpretation of Deviant Language

Assuming then the existence of a deviant language format, a court should begin the process for ad hoc interpretation by looking at the language as if it were unique. More specifically, before examining previous interpretations of comparable language patterns, a judge should consider the meaning that might be given to this language if it were a matter of first impression. Most judges probably do this in every one of these cases. Surely, judges instinctively gravitate to what they think was intended or probably intended.⁴²⁷ With ad hoc interpretation, however, this process must become conscious. If the intent is identifiable and can be easily and lawfully implemented through accepted property interests, then such construction should become the ad hoc interpretation itself.⁴²⁸ However, a court should not remake the conveyance—and the understanding it reflects—just because it was inartfully expressed, even if public policy might favor the creation of another interest. To be sure, the literature of cases involving the construction of dispositive language is filled with instances in which ambiguity opened the door to ventilation of public policy instead of private intent.⁴²⁹

427. In a great many instances, however, there is no evidence of specific intent because the event that triggers the construction problem was never anticipated by the estate owner or her lawyers. In this situation the search for actual intent becomes pointless. Instead, the court must inquire into probable intent, which is really an exercise in determining what most people would have intended *or should have intended* under these circumstances it influences. Invariably, this exercise is affected by public policy and rules of construction. Indeed, it often seems as if judges search for the result that makes sense and then work backward to reach a construction that justifies that result. For further discussion and illustration, see *supra* notes 360-61, 417, 419-20 and accompanying text.

428. There is, however, a circumstance in which courts should proceed cautiously with an interpretation grounded solely upon the parties' intent. Not all language patterns are deviant; indeed, many embrace formats that have traditionally been used to create ownership interests. It should be apparent that ad hoc interpretation of these formats will destabilize their utility and ultimately deprive lawyers of reliable signposts that are needed to create interests. "And heirs," for example, is a signpost for creation of a fee simple. Although no longer essential, it is still frequently used to create such an interest. Surely, then, one ought to be concerned with a process for interpretation that is predicated upon a freelance search for particular intent whenever it undercuts the utility of creative signposts. Nevertheless, if such language has been used by a nonlawyer to mean something else—for example, when "and heirs" are intended as words of purchase instead of limitation—courts ought to heavily weigh actual intent in constructing a meaning for such language.

429. Application of the rule of convenience often illustrates the predominant influence of public policy even when there is evidence of intent that warrants a different result. This rule of construction governs the membership of a class gift by setting a limit to the maximum size of the group. Supposedly, it reflects what most estate owners would intend if they had considered a potential conflict between the time for first distribution of principal and the time in which the birth of additional members becomes physically impossible. Just as importantly, however, it reflects public policy with respect to the efficient administration of estates. See *supra* notes 47, 420.

Nevertheless, one should question the wisdom of such judicial intrusion when actual intent of the parties is clear and presumptively lawful.

In most instances involving deviant language, however, the intent will not be so obvious. Even when it is, such intent may not clearly manifest an acknowledged and accepted interest or estate.⁴³⁰ In this situation, a court cannot literally enforce and carry out the specific intent. Instead, it must find an estate that best approximates such intent. In making this selection, a court must account for factors that transcend evidence of specific intent. When a donative transfer is involved, a court might consider potential intestacy, distributive inequality among children and their families, and administrative inconveniences.⁴³¹ When the conveyance arises out of a contract, a court might invoke matters of custom, fairness and the reasonableness of the parties' respective interpretations.⁴³² In both situations, courts will invariably make their choice in light of other public considerations. More specifically, they will examine how each construction affects the alienability, the developmental capacity of the subject matter and the optimal use of important resources.⁴³³

Once again, courts will inevitably encounter and have to interpret deviant formats for which there is conflicting or even no evidence of specific intent. In many situations, however, policy considerations will clearly dictate a particular construction. But there should also be circumstances in which public policy leads to divergent interpretations. When the direction offered by intent and policy is absent or conflicting, one may wish to use precedential meaning established by previous courts as a default construction. This should be especially true for language formats that are not clearly deviant but may emerge in the future as standard signposts for interpretation and creation. If, however, intent and policy point toward a particular construction and if the language format under consideration is clearly deviant, then one should proceed further with the process of ad hoc interpretation.

A court should then make the foregoing estate classification as if the

Thomas v. Thomas, 51 S.W. 111 (Mo. 1899), is often cited because it explains the reasons for this rule and then applies it. It is especially important to note, however, that by adhering to this rule the court closed the class before its procreator died despite the presence of language explicitly indicating that *all* of his children should be included.

430. See, e.g., *Johnson v. Whiton*, 34 N.E. 542 (Mass. 1893), *Thompson v. Baxter*, 119 N.W. 797 (Minn. 1909).

431. See *supra* note 421 and accompanying text.

432. See *supra* note 422 and accompanying text.

433. *Id.* For discussion of the effect of particular constructions upon matters of alienability and developmental capacity of the subject matter, see *supra* notes 372-90, 408-16 and accompanying text. See also *infra* notes 469-81 and accompanying text.

matter were one of first impression, without regard to supportive or unsupportive precedential meaning established in previous opinions. Nevertheless, before deciding the question, a judge may want to continue the process of ad hoc interpretation by determining whether this case presents any special reasons for adhering to precedent and preserving interpretive consistency. Ultimately, one must be concerned with the impact of ad hoc interpretation upon the values that underly and support consistent interpretation of comparable language patterns. If the impact is negligible, then one should feel completely free to disregard precedent. If, however, the impact is substantial, one may still wish to disregard precedent, but only with full recognition of the costs and consequences of such action and after determining that it is justified by the benefits of an ad hoc result. To continue the analysis, a court must then examine the effect of an ad hoc construction upon matters of ownership creation, title assessment and ownership assessment.

To begin with, one should recall that in nearly all situations the judicial process of ad hoc interpretation will have no adverse impact whatsoever upon ownership creation.⁴³⁴ This is true because the deviant language pattern almost never lends itself to becoming an attractive formulation for the creation of any particular interest. This includes the construction reached through the ad hoc process itself as well as each of the alternate interpretations, especially the one previously established through precedent.

Once again, the reason should be obvious. The language format is after all deviant. It does not contain appropriate words of limitation and, therefore, it does not clearly place the interest created into an acknowledged estate. Further, if there are multiple interests, it may not clearly determine whether such interests are concurrent or consecutive in terms of possession. Quite differently, if one wishes to create ownership, one must use language of limitation clearly associated with the desired interest. For example, if one intends to create a life estate, one will use the phrase "for life," even if the life estate is to be made defeasible.⁴³⁵ Additionally, if one intends to create two interests that are consecutive in terms of possession, then one must carve out an interest of limited duration in the first taker with possession to follow in the second taker, making certain of course that the interest of the latter is

434. *See supra* Part III.B.1.

435. If one intends to create an estate for years, then she will clearly identify a computable date for termination. If one intends to create a tenancy at will or a periodic tenancy, then she will explicate a unilateral privilege to terminate the tenancy in both the landlord and tenant. One might also expressly state that the estate created is "at the will of both the landlord and tenant" if the parties intend a tenancy at will. Or if they intend a periodic tenancy, one might expressly state that the interest created is "from month to month" or "from year to year."

always clearly defined.⁴³⁶

The only conceivable exception to this conclusion might involve a language format that does not define a particular estate or arrangement of ownership interests in traditional terms but comes very close to identifying it. This might apply to language that essentially describes the critical components of an interest but yet does not contain the common words and phrases that label it.⁴³⁷ Indeed, it might involve a format that may soon emerge as a standard expression. This circumstance should not, however, arise frequently, and if it does, one might not wish to categorize such language as deviant. By definition, a deviant language format is not only used infrequently but also departs from expressions that describe standardized interests.

What about title assessment and ownership assessment? Both involve questions of interpretive certainty for the nonjudicial persons making such assessments. Once again, these determinations must be made because of several kinds of recurring questions: what can be acquired; what can be transferred; or how can one use or restrict enjoyment of the subject matter? These determinations require litigation unless there is interpretive certainty as to title and, therefore, ownership. Such certainty is impossible without interpretive consistency among courts as to the meaning they attribute to the same or comparable language formats. Clearly ad hoc interpretations of such language would seriously undermine adherence to precedent and consistent construction of these kinds of words and phrases. This inconsistent treatment would eliminate interpretive certainty and would prevent a resolution to the foregoing questions without a judicial determination as to specific meaning.

Interpretive consistency by courts, however, does not always assure interpretive certainty for lawyers and title companies who must make such determinations. Judges are trained to make distinctions. While inclined to

436. For example, if the transferor intends to give a life estate to *B* and a remainder in fee simple to *B*'s children, one would not merely wish to say: "To *B* and her children." Instead, one should provide: "To *B* for life, remainder to her children in fee simple absolute." For further discussion of this point, see *supra* notes 342-47 and accompanying text. And for full discussion of the ambiguities embodied within the phrase "to *B* and her children," and the various interpretations given to it by courts over many years, see *supra* Part II.A.

437. Suppose, for example, that *A*, the owner of a fee simple absolute in Greenacre, makes either of the following two devises: "To *B* and at his death to go to *B*'s children" or "To *B* and at *B*'s death, *B*'s land shall go to *C* and her heirs." Although *A* omitted words of limitation that specifically define *B*'s estate as one for life, the language format does clearly indicate that possession shifts to someone else upon *B*'s death and that his estate, therefore, must end at that time. This should be enough to demonstrate creation of a life estate in *B* because the language essentially incorporates the time frame for a life estate. Further, a life estate is consistent with the gift over to others at *B*'s death. Consequently, courts should be very reluctant to depart from such construction. See RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 108 cmt. b, illus. 6, 8 (1936).

embrace precedent, they can also skillfully overcome it. To be sure, their predilection for doing so is heightened whenever the facts or rationale underscoring a precedential meaning does not fit its strict application within the context upon which they must rule.⁴³⁸ This is especially true when the repeated watchword for the process of construing ambiguous language within dispositive instruments is intent.⁴³⁹ If there is evidence that a different meaning than that established by courts previously is clearly intended, then one should not expect precedential meaning to be observed blindly. Further, if policy considerations and the natural connotation of language strongly support another construction, then the expectation for interpretive consistency by future courts is surely weakened. Whenever the original reasons for a rule or precedential meaning disappear or no longer make sense, one should prepare for its abandonment.⁴⁴⁰ Consequently, whenever any of these divergent factors are present, one should not assume that adherence to precedential meaning within past decisions will ripen into consistent treatment by future courts and ultimately become an interpretive certainty for those charged with the task of assessment. Without such assurance, nothing is either gained by courts achieving interpretive consistency or lost by a substitute construction made through ad hoc interpretation.

Even if one assumes the existence of interpretive certainty in these cases involving deviant language, this does not mean it will yield the benefits associated with adherence to precedent. More specifically, adherence to precedential meaning will not necessarily produce a title assessment that makes the land marketable or an ownership assessment that facilitates optimal use and development of the subject matter.⁴⁴¹ This depends entirely upon the prevailing interpretation reached by prior decisions. If such precedential construction establishes a possessory fee simple absolute or the opportunity to realize one in the near future, then adherence to such meaning will promote the interests of marketability. If, however, such construction establishes a divided title, then it will not render the title a marketable one. In this instance, adherence to precedential meaning will not enhance marketability. More importantly, nothing will be lost by ad hoc interpretation. Indeed, something may be gained if ad hoc interpretation generates a result that promotes marketability.⁴⁴²

438. For further elaboration and discussion, see *supra* notes 359-71 and accompanying text.

439. See *supra* notes 332-33 and accompanying text.

440. See *supra* note 359-71 and accompanying text.

441. See *supra* notes 372-90, 408-16 and accompanying text.

442. See *infra* Part IV.B, especially notes 467-71 and accompanying text.

B. Illustration and Application Process for Ad Hoc Interpretation

To illustrate this process of ad hoc interpretation, consider this variation of a previous example.⁴⁴³ Suppose that *A* agrees to rent a dwelling unit to *B* pursuant to a written lease that provides: "To *B*, at \$*N* per year payable in equal monthly installments, so long as *B* continues to live in the City of Centerville." Assume that the dwelling unit is situated in the City of Centerville. Assume further that three years later *A* wishes to end *B*'s estate and thereby gives *B* adequate notice to terminate either a tenancy at will or a year-to-year tenancy. *B*, however, resists such termination and eviction. Assume also that this dwelling is one of many within a multiunit building and that *B*'s rent parallels that for other comparable units within the building. Because of rising costs and an ongoing need to revise and increase rents, each of the other dwelling units is subject to an estate for years (one or two years) or is from year to year. Finally, assume that all of the facts surrounding this lease suggest that *A* and *B* agreed to an apparently different arrangement because *B*'s job might require him to leave town at any time in the future.⁴⁴⁴

The expressed duration of the lease is clear: it is for the period of time *B* lives in Centerville. Unfortunately, no recognized interest gives the parties freedom to fix the maximum duration in this manner.⁴⁴⁵ Consequently, a court cannot conclude that *B* simply has a tenancy defined in terms of *B*'s residing in Centerville. The language that describes *B*'s interest deviates from language ordinarily used to create life estates, estates for years, periodic tenancies and estates at will. More specifically, the written lease does not appear to create a life estate. Even though *B* cannot continue to live in Centerville beyond his death—and therefore *B*'s interest cannot extend beyond then—this language contains none of the words normally used to create a life estate, such as "To *B* for life" or "To *B* until he dies."⁴⁴⁶ Further, the lease does not create an estate for years because it does not fix a maximum duration that is precisely computable in terms of time.⁴⁴⁷ Additionally, it does not specifically create a tenancy at will because the rent is periodic and because the express privilege to terminate (by leaving

443. For discussion of the case upon which this example is based, see *Thompson v. Baxter*, 119 N.W. 797 (Minn. 1909).

444. For a discussion and critique of this illustration and variations of it, see *supra* notes 269-73 and accompanying text.

445. The parties themselves are not free to fashion interests as they please. The interests they create must be solely those recognized by law. See *supra* notes 9-11 and accompanying text.

446. See *supra* note 206.

447. See *supra* note 208.

Centerville) applies exclusively to *B*.⁴⁴⁸ Finally, the lease does not specifically create a periodic tenancy. Although the rent is periodic—delineated yearly but payable in equal monthly installments—once again the express privilege to terminate belongs to *B* exclusively. By definition, the tenancy at will and periodic tenancy give both the landlord and tenant the unilateral privilege to terminate.⁴⁴⁹ Despite the absence of a clean-fitting estate classification, a court must place *B*'s interest into one of these categories.

As indicated earlier, the prevailing view of courts today is that such language creates a defeasible life estate, terminable only upon *B*'s death or earlier in the event *B* departs Centerville.⁴⁵⁰ Although some courts have found otherwise—for example, a tenancy at will⁴⁵¹—assume that the few opinions in this jurisdiction that have addressed this question have construed such language to create a defeasible life estate. Further, assume that the underlying reasons for such decisions are very formalistic and have nothing to do with any process for ad hoc interpretation. Specifically, assume that little attention was paid to special facts and circumstances that point toward one construction and eliminate others.

How then should a court construe this language? Once again, two things seem quite clear. First, although the expressed duration for the interest created in *B* is unambiguous, the estate created is not. Second, previous decisions construing this language do not offer a model for ad hoc interpretation. If, however, a court would examine this case as one of first impression, what construction should it give this lease and, therefore, what result should it reach? No estate perfectly fits the bargain *A* and *B* seem to have struck.⁴⁵² Consequently, a court must make a selection among acknowledged interests. In doing this, it must account for all relevant factors as to intent and policy.

To begin with, one should consider the interpretation that has previously prevailed in this jurisdiction—here, a defeasible life estate. Indeed, one could

448. See *supra* note 209.

449. See *supra* notes 207, 209.

450. See *supra* notes 219-35, 255-98 and accompanying text. This is also the preferred construction of the American Law Institute taken in their *Restatements of Property*. See *supra* notes 299-312 and accompanying text.

451. See *supra* notes 235-54 and accompanying text.

452. To be sure, the interest created by this language can be squeezed into two different estate classifications: a defeasible life estate because *B* cannot live in Centerville beyond his own death, or a defeasible tenancy from year to year because the rent is reserved on an annual basis. Nevertheless, this language does not contain the definitive signposts normally used to create such interests. Furthermore, even if the language form permits one to squeeze it into a particular estate, surely a court ought not to do this if such acknowledged interest does not fit the substance of the bargain as well.

conclude that this is essentially what the language already indicates: that *B* shall have possession as long as *B* lives in Centerville (and presumably pays the annual rent). One might argue that *A* should be bound by the language used. *A* created an interest that cannot last beyond *B*'s lifetime, which by definition qualifies it as a life estate. Although courts often proclaim that a grantor creates what she says and not what she might mean,⁴⁵³ clearly neither *A* nor *B* originally intended to create a life estate. The circumstances surrounding the lease strongly suggest otherwise.

A's standard leasing arrangement within the multiunit building was framed in terms of yearly units—either periodic or an estate for one or two years. The reason for the exception in *B*'s lease seemed clear: *B* wanted the ability to end the lease in the event he had to leave Centerville to maintain his job. Surely, with a history of ever-increasing costs, *A* did not intend to grant *B* a life estate at a fixed rent. Absent some special friendship between the parties, it would not make sense as a straight business arrangement. To be sure, *B* would claim in court that he is entitled to retain his tenancy for the remainder of his life. This tenancy would bind him until death unless he left Centerville. Although it may now seem attractive to make this argument, surely *B*—just the same as *A*—did not intend to create an estate that could tie him to this dwelling and rental indefinitely. Indeed, this construction does not comport with their original expectations.

Given the circumstances, such a result seems neither fair nor customary. It would not be fair to bind either party indefinitely without some special consideration reflecting such a long-term commitment, particularly when the rental seems to reflect the short-term leases of comparable units within the building. Surely, it would be unjust to bind *A* to a life estate in *B* when the terms of the entire bargain lead elsewhere. Except for the language "so long as *B* continues to live in the City of Centerville," nothing supports the creation of a life estate. Further, although leases to tenants for life are within the realm of legal history,⁴⁵⁴ they are very unusual. In the absence of statutorily controlled tenancies,⁴⁵⁵ they are perhaps unheard of within

453. See, e.g., *Burke v. Lee and Wife*, 76 Va. 386, 388-89 (1882) ("The true inquiry is, not what the testator meant to express, but what the words he has used do express.").

454. See, e.g., *Thompson v. Baxter*, 119 N.W.797 (Minn. 1909); *Garner v. Gerrish*, 473 N.E.2d 223 (N.Y. 1984).

455. There are several kinds of statutorily controlled leases that affect the termination—and therefore the duration—of tenancies subject to such statutes. For example, statutes that regulate governmentally assisted housing invariably afford tenants various kinds of protection that do not exist in private housing. Among these protections is a limitation upon the landlord's right to evict. Essentially, these statutes do not permit termination without good cause. As a result, because the landlord cannot terminate upon expiration of a term except for good cause, the tenant has an interest that is protected as to duration for the remainder of his or her life. Consequently, such estate bears

multiunit buildings.

If a defeasible life estate is not a viable construction, then what is? An estate for years (defeasible in the event *B* leaves Centerville), once again, does not seem possible. Technically speaking, the terms of the lease do not provide a computable maximum duration. Even if a court were to fabricate a term of two years—the maximum number of years agreed to by *A* for other units within her building—three years have elapsed since their lease commenced and no new arrangement has been made by the parties. At this point, *B* would have become a holdover tenant.⁴⁵⁶ Given the tender and acceptance of rent during the third year, in most jurisdictions *B* would have become a periodic tenant from year to year.⁴⁵⁷ This would have governed *A*'s right to terminate at the time she elected to give notice and regain possession.

But what about a tenancy at will? As discussed earlier, some jurisdictions have favored this construction, particularly when *B*'s privilege to end the lease does not require anything more than simple manifestation of that desire.⁴⁵⁸ The rationale is predicated upon mutuality. A lease at the will of one party should be at the will of the other as well.⁴⁵⁹ Given the circumstances, however, this seems neither fair nor intended. The lease

some of the features of a defeasible life estate. One might make a similar observation with respect to leases subject to rent-control legislation. The price controls imposed by these statutes would ordinarily become meaningless without statutory limitations upon the landlord's right to evict. In the main, these statutes forbid termination unless the landlord has just cause. What remains in the tenant is, once again, an interest that has some of the features of a life estate—or something longer if successors to the tenant are protected upon the tenant's death. For discussion of these kinds of statutorily controlled tenancies, see SCHOSHINSKI, *supra* note 268, §§ 2.9, 7.10.

456. There are two rules that govern the formation of a new tenancy in the event a tenant holds over beyond the original term. The English Rule requires mutual assent, express or implied, to a new lease. The American Rule, however, gives the landlord a unilateral right to bind the tenant to a new term even when the tenant expressly dissents. Because the tenant in this case has held over beyond the original two year term and because the tenant has tendered rent that was accepted by the landlord, the requirements for a holdover tenancy under either rule would have been satisfied. See 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 3.33.

457. Ordinarily, courts will find that the holdover tenancy is periodic and that the period is governed by the term of the original lease or by the manner in which the rent has been reserved. Therefore, because the original term was hypothesized at two years and because the rent was reserved on an annual basis, under both criteria for determining the duration of the period the tenancy should be year to year. See 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 3.35.

458. See *supra* notes 238-57 and accompanying text. The reason that expressly underscores the result in these cases is one of mutuality. More specifically, if the tenant is not bound to any period but can terminate at any time, it would seem only fair to allow the landlord the same privilege. And the estate that results from a mutual privilege to terminate at any time is a tenancy at will. This argument may make sense when the tenant can terminate at any time and for any reason. In such a situation, the tenancy is truly at the will of the tenant. However, the tenant in this case does not have such unfettered discretion. For example, if *B* (the tenant) wishes to terminate, then *B* must leave Centerville. Termination by the tenant is not, therefore, unrestricted. Indeed, it involves a major decision that transcends the wisdom of carrying on with the tenancy.

459. See *supra* notes 235-43, 251-54 and accompanying text.

contains a periodic rental, and this almost always implies something more than a tenancy at will.⁴⁶⁰ Additionally, the language within the lease—presumably prepared by *A*—expressly confers the right to terminate only upon *B*. Just as *A* and *B* undoubtedly did not intend an estate for as long as *B*'s life, surely they did not intend an estate as tenuous and uncertain as one which was at the will of either party. Given the costs of renting a unit or assuming its occupation,⁴⁶¹ surely an estate at will could present potential unfairness for either party. Sudden termination by *A* or *B*—even with thirty days notice⁴⁶²—could easily present serious hardship for landlord or tenant.

The only remaining choice is a periodic tenancy. Given the language and manner of rental, it seems to be from year to year and defeasible if *B* leaves Centerville. The trappings of such a tenancy are clearly present. The rental is periodic and is expressed in terms of an annual obligation.⁴⁶³ Further, although such estates are not usually made defeasible at the will of the tenant, no theoretical inconsistency prevents such classification.⁴⁶⁴ Just as important, this interpretation carries out their intent in a way that would have seemed fair at the outset and consistent with what was customarily being done—at least with the other leases being made by *A*. These leases were either year to year or for one or two year terms. Nothing in the circumstances surrounding the lease suggests that *B* had bargained for something more. *B*'s situation was, however, different—not because *B* needed an estate of greater duration, but because *B* needed an escape clause. It seems that *A* agreed to make the

460. When there is no stated duration that delineates a particular estate, provision for or payment of a periodic rent generally raises the presumption of periodic tenancy. See 1 AMERICAN LAW OF PROPERTY, *supra* note 13, § 3.25; see also RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.5 cmt. d, illus. 2, 3 (1977).

461. To be sure, there are always significant costs that are incident to any rental to a new tenant. The landlord's costs might begin with a suit for possession against a former tenant who holds over. He would incur costs associated with leasing and preparing the living unit for rental. This might include advertising costs as well as those imposed by a rental agent. He would also incur the cost of repairing or refurbishing the unit, something that may be required by law generally or as a prerequisite to a new lease. The tenant will also encounter termination and start-up costs. To begin with, the tenant must incur the costs of moving, which could include the cost of terminating a prior lease and forfeiting all or a portion of a security deposit. Additionally, the tenant must bear the cost of a new security deposit and, perhaps, prepaid rent as well. Finally, the tenant will have the cost of preparing the unit to meet his or her specific needs.

462. For discussion of notice requirements for termination of an estate at will, see *supra* note 376.

463. The periodic rental is, of course, the hallmark of the periodic tenancy. This will control the estate classification when there is no other language that specifically describes or defines an acknowledged interest. See *supra* note 381.

464. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.6 cmt. g, § 1.7 cmts. d, e (1977). The most common kind of defeasible periodic tenancy is one that is subject to a condition subsequent. More specifically, the tenancy is made defeasible because of a condition imposed upon the tenant—usually the payment of rent—and the landlord retains the power to terminate when and if the tenant breaches such condition.

interest defeasible so that if *B* had to leave Centerville he could end the lease without having to adhere to the strict notice requirements for periodic tenancies. This condition of defeasance would be necessary if *B* were to avoid the hardship of an ongoing rental—perhaps in excess of a year⁴⁶⁵—even though his job had taken him elsewhere. This concession by *A* makes sense within the context of a year-to-year tenancy. Indeed, both intent and policy lead directly to this construction, a defeasible periodic tenancy from year to year.

Having made this ad hoc interpretation, a court should then be ready to convert such construction into a specific result, one that terminates the tenancy of *B* and awards possession to *A*. Before doing so, however, a court might wish to examine the impact of such construction upon the values of interpretive certainty. To begin with, the foregoing construction—a year-to-year tenancy, which is defeasible in the event *B* leaves Centerville—will not adversely impact matters of ownership creation. Even if a judge adhered to a precedential meaning that resulted in the creation of another kind of estate, surely no lawyer would embrace such construction as a guideline for ownership creation.

Further, even the ad hoc interpretation reached in this case should not yield a language format that lawyers will regularly use to create defeasible periodic tenancies. The purpose of ownership creation is to clearly and unmistakably create specific interests. Because it is susceptible to multiple interpretations, no informed lawyer will ever want to select the language used in this illustration. Such language should not become more appealing simply because of a prior construction—or constructions—that enforces a specific meaning. So long as other well-known language formats unambiguously dictate formation of such interest, surely these words and phrases will remain the medium for ownership creation. In this illustration, when creating a defeasible periodic tenancy, one would expect a lawyer to make certain that the unilateral power to terminate on the anniversary of the rental payment belongs to both *A* and *B*⁴⁶⁶ or, perhaps, to describe the lease as periodic. For

465. A year-to-year tenancy can only be terminated on its anniversary, provided proper and timely notice is given. At common law six months notice was required to terminate a year-to-year tenancy. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 1.5 cmt. f (1977). This, however, has been changed in many jurisdictions by statute, especially as to residential tenancies. Typically, the period has been shortened to something that is three months or less. See *id.* § 1.5 statutory notes 2a - 2b. Consequently, if one fails to give timely notice, the tenancy will continue for the remainder of the existing period and for the next full period as well. For example, assuming that the notice requirement is three months, if either landlord or tenant decides to terminate two months before the anniversary of the year-to-year tenancy, the earliest date for termination will be as much as fourteen months later.

466. Elaboration of important features of an estate always offers further confirmation of its

example, the language of ownership creation might read: "To *B* a tenancy from year to year, at \$*N* per year, with an additional privilege in *B* to terminate immediately whenever he no longer lives in the City of Centerville." Consequently, because the language within the actual illustration will not emerge as a creative format under any of the foregoing constructions, ad hoc interpretation of such language should have no adverse impact upon matters of ownership creation.

What about title assessment? Once again, certainty as to title demands certainty as to interpretation. Interpretive certainty for title assessors cannot happen without interpretive consistency by courts, which is the antithesis of ad hoc construction. But in this illustration, the adverse impact of ad hoc interpretation upon title assessment should be minimal because the benefits of interpretive consistency through strict adherence to precedential meaning are doubtful. First, even with a pattern of interpretive consistency among previous decisions, interpretive certainty cannot be assured in this illustration. More specifically, given the existing facts, a title assessor should be very uneasy with an assumption that a future court will adhere to the precedential meaning established in prior cases. To be sure, judges have been attentive to precedential meaning and the importance of interpretive consistency. Nevertheless, even in the absence of a commitment to the process of ad hoc interpretation, judges are prone to making subtle distinctions whenever they believe that a result wedded to existing precedent makes no sense in terms of intent and relevant policy.⁴⁶⁷ If the prevailing interpretation becomes removed from contextual reality, logic and fairness, then surely the expectation for consistent interpretation should be diminished. Certainly the facts within this illustration present circumstances for weakened expectations of adherence to precedential meaning by future courts and, consequently, the case for interpretive certainty among title assessors becomes an uneasy one at best.⁴⁶⁸

intended creation. The mutual power to terminate in *A* and *B*—landlord and tenant—is, of course, a critical ingredient of the year-to-year tenancy. And in this instance, explication of this mutual power clarifies the reason for the condition that enables the tenant to terminate within any year under limited circumstances.

467. See *supra* notes 119-25, 200-05 and accompanying text.

468. Quite clearly, nothing within the facts and circumstances surrounding the lease points to a defeasible life estate. None of the other leases within the building create a life estate. Indeed, each of these arrangements is short term. A need to raise rents periodically due to escalating costs is one reason for other leases having terms that do not exceed two years. Further, the reason that existed for using different language in this lease does not support a tenancy as long as the tenant's lifetime; instead, it merely requires a relationship that can be terminated immediately if the tenant must leave Centerville. In short, to find a defeasible life estate would be unfair to the landlord and inconsistent with the terms of the lease and its factual context. For further discussion, see *supra* notes 453-55 and accompanying text.

Second, even if one could assume that interpretive consistency would evoke interpretive certainty, the benefits of such certainty—less litigation and greater marketability—would be limited. To be sure, interpretive certainty through irrevocable adherence to precedential meaning will achieve certainty of interests and, therefore, title. Thus, there should be no litigation as to deviant language formats that have already been interpreted by courts. In these instances—as with language formats that have become established guidelines for ownership creation—title assessors will know who holds what interests. Nevertheless, this does not mean that the title has been made marketable through the certainty accomplished by consistent judicial adherence to precedent. If ownership has been proliferated, then a perfect title has not been achieved. Even though buyers may now know with whom they must bargain to acquire a marketable title, the title is still viewed as unmarketable because no particular owner can transfer a perfect title.⁴⁶⁹

In this illustration, if one assumed that a future court would adhere to the precedential meaning previously accorded this language—a defeasible life estate—a title assessor would immediately know with certainty the interpretation to give such language. Consequently, a potential buyer would know that *B* holds a defeasible life estate and *A* continues to hold a reversion in fee simple (along with a possibility of reverter).⁴⁷⁰ Such buyer would know who owns what kind of interest and, therefore, with whom he must bargain to acquire a perfect title. Nevertheless, such buyer would also know that neither *A* nor *B* had a perfect title and that neither could unilaterally convey a marketable title. In short, in this illustration interpretive certainty as to title assessment—achieved through adherence to precedential meaning—would not make the title itself marketable. Quite differently, a process of ad hoc interpretation would offer the opportunity to take marketability into

469. A contract that promises a marketable or perfect title requires the vendor to convey an unencumbered possessory fee simple absolute about which there is no reasonable doubt. *See supra* note 354. To be sure, in the illustration under consideration, *A* has a fee simple absolute. It is, however, a reversion—a nonpossessory fee simple absolute—because it is encumbered by the lease extended to *B*. *B* has some kind of possessory estate. Whatever it might be, it is not a fee simple absolute or defeasible. Consequently, although *A* and *B* could collectively convey a marketable title, neither has the immediate unilateral power to fulfill such a promise.

470. *A* would have a reversion in fee simple absolute simply because *B* has received a life estate. *B*'s estate is also defeasible because of the language enabling *B* to terminate whenever *B* ceases to live in Centerville. More specifically, *B* has a determinable life estate that will terminate automatically upon such event. It is determinable because the language that circumscribes the duration of *B*'s life estate is language of special limitation. Ordinarily such language—for example, “so long as,” “during,” or “unless”—is without more sufficient to make an estate determinable. The interest that arises in *A* because of the special limitation is a possibility of reverter. Consequently, *A* will have a reversion and a possibility of reverter even though the latter interest is not made explicit in the language itself. *See* RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS § 23, 112 illus. 1, 2 (1936).

consideration. In this particular case, a construction that resulted in a defeasible year-to-year tenancy would produce a marketable title for *A* upon the anniversary of *B*'s periodic tenancy.⁴⁷¹

Finally, what about ownership assessment? What impact will ad hoc interpretation have upon determinations affecting what owners can or cannot do with respect to the subject matter? Once again, assuming there is interpretive certainty as to precedential meaning for existing owners,⁴⁷² one must ask how that construction—a defeasible life estate—will govern the decisions owners may make affecting use of the land. In this instance, although *B* will now know without need for judicial confirmation that he has a defeasible life estate, *B* will also know that his opportunities for use and enjoyment will be severely limited. Although the law of waste may require *B* to maintain the condition of the unit,⁴⁷³ he cannot convert the unit to business use, nor can he alter it in any way.⁴⁷⁴ Also, even if he could make

471. In light of an ad hoc interpretation in which a court concludes that *B* has a defeasible tenancy from year to year and that proper notice of termination has already been tendered by *A*, *A* will be entitled to possession on the next anniversary of such periodic tenancy. *A* will then have a possessory fee simple absolute (presumably not otherwise encumbered) about which there should be no reasonable doubt because of the recent court decision that established the defeasible periodic tenancy. Quite simply, this means that *A* can thereafter contract for and unilaterally deliver a marketable title.

472. "Existing owners" include both *A* and *B*. *B* has some kind of interest, and this is the subject of the dispute. Previous decisions indicate a defeasible life estate. *A* clearly retains a nonpossessory interest, specifically a reversion in fee simple absolute. If *B*'s estate is defeasible it will be determinable. Regardless of the kind of estate that has been made determinable in *B*, *A* will have a possibility of reverter in addition to the reversion. As an existing owner, *B* will want to assess what he can and cannot do with respect to use of the land. Conversely, as an existing owner *A* will want to assess which uses she can prevent and which she must permit.

473. There are two forms of waste that a tenant cannot commit, voluntary and permissive. Voluntary waste involves affirmative acts of a tenant that may decrease the value of the inheritance, the nonpossessory fee simple. See *infra* notes 474, 476. Permissive waste involves inaction on the part of a tenant; namely, a failure to perform an obligation of repair imposed by law upon the tenant. Generally speaking, a life tenant must make all repairs necessary to maintain the premises in the same condition as they were when such life estate commenced in possession. There are, however, some exceptions. A life tenant is not accountable for ordinary wear and tear, nor is he required to spend more than the income generated by the life estate in making such repairs. Historically, a tenant of a nonfreehold estate had the same duty to repair as a tenant for life. Without more, a tenant for years or from period to period had to maintain the premises throughout the term of his lease. During the last thirty years, however, courts and legislatures have shifted this responsibility to landlords through an implied warranty of habitability. Although a tenant is responsible for repairing damage that he or his family has caused, it is the landlord who has a general obligation to maintain the habitability of the premises. Courts and legislatures have not only found this duty to repair and maintain in residential leases, they have also circumscribed its elimination or modification. For a discussion of the law of waste and the implied warranty of habitability, see ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* §§ 4.1-3, 6.36-40 (2d ed. 1993). See also SCHOSHINSKI, *supra* note 268, §§ 5.18-5.20.

474. Clearly, *B* cannot make any alteration that would diminish the value of *A*'s reversion in fee simple absolute. Further, if the lease contains language that expressly or impliedly forbids alterations or a change in the use of the premises, *B* cannot make any alterations whatsoever—including those that enhance the value of *A*'s reversion. If, however, the lease contains no restrictive language, then *B* can

improvements, he would be unlikely to do so given the uncertain duration of his interest.⁴⁷⁵

In fact, none of the alternative constructions that one might reach through ad hoc interpretation would enhance *B*'s opportunity and interest in making—or even permit him to make—such improvements.⁴⁷⁶ Certainly this would be true of a tenancy at will and even an estate for two years. It would also be true for the preferred ad hoc interpretation itself: a defeasible tenancy from year to year. In each instance, the estate's duration would either be too short or uncertain to justify such investment in the unit. In the absence of a defeasible fee simple or long-term estate for years,⁴⁷⁷ a tenant in possession

improve the premises in special situations. First, such change must enhance the value of *A*'s reversion. Second, a change in circumstances must have arisen, between the date of the lease and the time in which the improvement was made, that rendered the unit totally unprofitable—if not valueless—if the original use were continued and the improvement had not been made. *See Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899); *see also* RESTATEMENT OF PROPERTY: FREEHOLD INTERESTS §§ 140-141 (1936).

475. To be sure, *B* is not going to make a substantial investment in the premises when he must gamble on the return. Even if his life expectancy exceeded the number of years it would otherwise take to assure an adequate return on his investment, this expectancy is merely an expectation and not a certain period of time. *B* may not be old enough to contemplate his mortality and, therefore, he may not view the possibility of premature death to present a real risk. Nevertheless, those from whom he must borrow funds needed to improve the premises will feel differently. Undoubtedly, they will want to secure their loans with other interests held by *B*—ones that will not terminate before *B*'s debt is fully paid. There are, however, circumstances in which a life tenant may still be willing to invest significant resources into the premises. If the remainder in fee simple is held by his children, the life tenant may elect to invest and enhance the value of the subject matter because those who will benefit at his death are the very same people to whom he would leave his estate if he had the fee simple absolute himself. *See, e.g., Brokaw v. Fairchild*, 245 N.Y.S. 402 (N.Y. App. Div. 1930), *aff'd*, 177 N.E. 186 (N.Y. 1931).

476. The American Law Institute takes the following position as to nonfreehold estates:

Except to the extent the parties to a lease validly agree otherwise, the tenant is entitled to make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances.

RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.2 (1) (1977). These changes are, of course, limited to those that are reasonably necessary in light of the reasonable use intended to be made of the subject matter. Further, if requested by the landlord, the tenant may be required to restore the property to its original condition. *See id.* § 12.2(3).

The Reporter's Note acknowledges, however, that the *Restatement's* position is inconsistent with respect to the common-law rule and probably reflects the position taken by a minority of courts today. The majority rule, therefore, may still be one that is more restrictive; namely, that material changes in the identity of the subject matter are ordinarily forbidden even though such changes may enhance its value. *See id.* § 12.2 reporter's note 1, 5; *see also Brokaw v. Fairchild*, 245 N.Y.S. 402 (N.Y. App. Div. 1930), *aff'd*, 177 N.E. 186 (N.Y. 1932); CRIBBET & JOHNSON, *supra* note 354, at 266; CUNNINGHAM ET AL., *supra* note 473, at 159-65.

477. Courts have been much more willing to approve meliorating changes in the identity of the leased premises whenever the tenant's estate is long term and such changes are necessary for a reasonable use of the subject matter. *See, e.g., Doherty v. Allman*, 3 App. Case. 709 (H.L. 1878); *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899); *See also, e.g., R. CUNNINGHAM ET AL., supra* note 473, at 162. The *Restatement (Second) of Property* emphasizes in its commentary:

has neither the power nor the incentive to make significant improvements.

One should also observe that a comparable disincentive exists for *A* under the prevailing interpretation made by previous courts. *A* will be unable to alter the use of *B*'s unit and make further development of the building during *B*'s life.⁴⁷⁸ Additionally, *A* will not be inclined to improve the unit because her claim to possession and increased benefit will be deferred indefinitely, that is, until *B* dies or leaves Centerville.⁴⁷⁹ Nevertheless, the other constructions reachable through ad hoc interpretation might enhance the position of *A* because they offer her the opportunity for possession either immediately or within the near future.⁴⁸⁰ The defeasible tenancy from year to year, for example, would give *A* possession on the anniversary of the period because the facts already assume that she has given adequate and timely

Alterations or modifications of structures on the leased property may be reasonably necessary changes in the physical condition of the leased property in order for the tenant to use the property in a reasonable manner. The shorter the balance of the term the more difficult it will be to justify as reasonably necessary substantial alterations and modifications in structures.

....

The complete elimination of a structure on the leased property by the tenant may be reasonably necessary in order to use the leased property in a reasonable manner in the light of all the circumstances.

RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.2(1) cmt. d. The *Restatement* then uses several illustrations. In one of them, the tenant has a lease for one year and is deemed to commit waste by removing a partition between two rooms to provide a larger living room. *See id.* at cmt. d, illus. 7. In another, the tenant has 89 years remaining on a 99 year lease. Because of changes in the area that have shifted normal use of land to business purposes, the tenant would be permitted to raze a residence situated on the premises and thereby convert the premises to its natural commercial use—a parking lot. *See id.* at cmt. d, illus. 8.

478. The explanation is a simple and clear one. *B* has a life estate, and with such interest *B* has exclusive possession for the remainder of his life. Without special provision within the lease itself, *A* has no privilege to even enter *B*'s unit. Therefore, without the permission of *B*—presumably, something *B* can arbitrarily withhold—*A* cannot alter *B*'s unit or convert the building to another use.

479. Even if *B* were to give *A* permission to enter the unit and improve it, *A* is unlikely to exercise this privilege. In view of the fixed rent for the remainder of *B*'s life—or until *B* leaves Centerville before then—there is little reason for *A* to increase her investment in the unit at this time. *B* may live a long time and *A* is not likely to invest further when her return on this new investment may be deferred for many years. This scenario, however, may not always govern. If *B* is willing to pay an increased rental, *A* might then agree to improve *B*'s unit. With *B*'s permission, *A* might also agree to improve *B*'s unit if such additional investment is necessary to preserve or improve the condition of the entire building. Indeed, such improvement may be necessary to secure the return on *A*'s entire investment in the building itself. For example, the installation of central air conditioning may be essential to maintaining an attractive rental facility and to making it competitive with other properties. And further, its installation may not be feasible without including *B*'s unit along with the others.

480. If a court were to conclude that *B* had merely an estate at will, *A* could terminate such interest unilaterally and immediately. Although most states have a statutory notice period for tenancies at will, such requirements are minimal. Consequently, *A* will be able to make decisions concerning the improvement, alteration and development of the subject matter virtually the same as if *A* had current possession.

notice to terminate such tenancy.⁴⁸¹

The construction, then, that a court ought to reach is a defeasible tenancy from year to year. It is the proper construction because all of the factors relevant to the process of ad hoc interpretation point clearly in this direction. Further, this result is made even better when one realizes that the values underlying interpretive certainty have not been jeopardized by abandoning strict adherence to the precedential meaning attached to such deviant language by previous decisions.

V. CONCLUSION

Adherence to precedent has been a cornerstone of our legal system. Indeed, it has always had special importance for the law of property. This body of law governs subject matter that may last forever. It must do this with clarity and consistency if acts of ownership and transfer are to happen without constant judicial intervention. Nevertheless, questions do arise that ultimately pertain to the kind of interest that is created or intended. Within this context, language and the meaning attributed to it become exceedingly important. Language, after all, has been the exclusive mechanism for establishing and defining ownership.

The judicial watchword for resolving these questions of interpretation has always been the intent of the parties.⁴⁸² Nevertheless, there have been other

481. Ownership assessment might also include attributes other than the privilege to make improvements upon the premises. For example, what about the privilege to alienate one's interest? This assessment may arise because either *A* or *B* may need to secure a loan—needed to make improvements—with a mortgage. As for *A*, who retains a reversion in fee simple absolute, the analysis is essentially the same as the one made previously with respect to title assessment. See *supra* notes 469-71 and accompanying text. Unless *A* can confer possession, she will be unable to supply a marketable title. Although *A* has a reversion that is legally capable of transfer, the marketplace will have little interest in it if she has created a life estate in *B*. If, however, *A* has conferred an estate at will, she can terminate *B*'s interest and secure immediate possession and thereby convey a marketable title. Finally, if *A* has given *B* a defeasible year-to-year tenancy, *A* may have a marketable title assuming she has provided adequate notice and the anniversary of the period comports with a transferee's need for possession. As for *B*, he clearly does not have a marketable title. If *B* has received a tenancy at will, *B* does not have an interest that is lawfully transferable. Assuming no express restraint upon alienation within the lease, *B* will have an interest that he can legally transfer in the event he has received a life estate or a defeasible year-to-year tenancy. Nevertheless, there should be little, if any, desire by the marketplace to acquire *B*'s interest, assuming that *A*'s reversion in fee simple is unavailable. The life estate will not be enough because its continued duration is uncertain at every moment in time. And the defeasible year-to-year tenancy will fail to generate a market because it can be terminated by *A* upon the anniversary of any period. In short, both estates are, as a practical matter, unmarketable because they are not a fee simple and because continued duration—and accordingly continued possession—is extremely uncertain.

482. See *supra* note 333. One should observe, however, that in many instances no specific intent exists because the transferor—who is usually the only relevant party in a donative transaction—did not anticipate the circumstances that give rise to the problem of interpretation. See *supra* note 419.

factors as well. Once again, the driving force behind the process of construction has often been the quest for clarity. As a result, judges have always valued consistency in making their respective interpretations so that others charged with ownership creation, title assessment and ownership assessment have certainty outside of the courts in matters of creation and interpretation. Indeed, judges have sought precedent both as a source and confirmation of meaning. It is, therefore, no surprise that precedent has been both relevant and sometimes controlling. At the very least, appellate opinions do not conclude without it.

To be sure, very significant reasons support this quest for certainty. Adherence to precedent promotes extraordinary efficiencies, which translate into less litigation and, therefore, less public and private cost in matters of ownership and transfer.⁴⁸³ These efficiencies may also mean greater marketability. The marketplace cannot function without knowledge and guidelines, and interpretive certainty is essential to create ownership and to assess title independent of judicial judgment. There are, however, other important values associated with the process of interpretation, values connected more closely to the parties' intent. These values are affected by the context in which the language is used and the transaction is conducted. They concern specific intent, fairness, hardship and custom,⁴⁸⁴ and they lead to a different emphasis in construction. Indeed, they must focus on the particular and, thereby, require a process of ad hoc interpretation.

The problem for courts is, of course, what they must do and when they must do it. When it comes to acknowledged language formats the answer is clear. Creation and assessment of title could not easily be accomplished without well-known words and phrases that have been ratified and reinforced again and again over time. Signposts and guidelines are absolutely essential if meaning is ever to be accomplished without constant reliance upon judicial intervention. These language formats have evolved over time, and most have existed for centuries.⁴⁸⁵ Surely, their interpretation by courts today calls for

Consequently, when courts make their interpretation on the basis of intent they are frequently reconstructing intent in light of what they believe the parties would have intended had they contemplated the circumstances and the problem thereby created. *See supra* note 419. Nevertheless, one should also note that such reconstructed intent frequently transcends probable intent by accounting for important considerations of public policy. *See supra* notes 420-22; *see also* SIMES & SMITH, *supra* note 9, § 633; W. BARTON LEACH & JAMES K. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* 333-34 (1961).

483. For discussion of the benefits of interpretive consistency and certainty, *see supra* notes 321-26.

484. For discussion of these benefits that are associated with ad hoc interpretation, *see supra* notes 332-38.

485. For discussion of some of the language formats that have evolved into reliable signposts for

consistency through careful adherence to precedential meaning.

But what about words and phrases that deviate from these established formats? Should a court be controlled by interpretations made in the past? This Article maintains that, in the main, the answer should be *NO!* It argues that a process of ad hoc interpretation should govern the construction of deviant language formats. Such process will have no adverse impact upon matters of ownership creation so long as well-known guidelines have already been established as to the formation of interests. These creative signposts will always be far superior to using deviant language formats. Lawyers will prefer them and use them regardless of the consistency courts achieve in interpreting deviant words and phrases. In short, the process for creation of ownership interests gains nothing through consistent interpretation of such language.⁴⁸⁶

This Article also maintains that little is to be gained as to title assessment and ownership assessment. Once again, judicial adherence to precedential meaning given to deviant language patterns in previous decisions may not achieve interpretive certainty for lawyers and title companies who must make their own assessments in the future. Without such certainty, one cannot claim that interpretive consistency will achieve less litigation and greater marketability. Nevertheless, even if one presumes interpretive certainty for those who assess title and ownership, this will not assure the existence of marketable interests.⁴⁸⁷ Such assurance requires a construction that produces a marketable title or one that can easily be perfected. This depends squarely upon the meaning courts previously adhered to when interpreting the deviant language format in question. Experience tells us, however, that the precedential meaning established in these cases seldom correlates with a perfect title. Consequently, nothing is gained in terms of marketability by preserving such meaning. Quite the contrary, for many of these deviant formats a marketable title can be more readily achieved through ad hoc interpretation, at least for the matter then being litigated.

In the end, this Article recommends that courts adopt a process of ad hoc interpretation for deviant language patterns. It suggests that courts should treat each construction of such language patterns as if it were a case of first impression, bowing perhaps to precedential meaning only when prior consistency has achieved interpretive certainty for lawyers and assessors with a construction that actually promotes marketability. Conceivably, this is what most courts are really doing. Despite appearances of interpretive consistency,

creation and assessment of interests, see *supra* notes 12-14.

486. For previous discussion and illustration, see *supra* Parts III.B.1, IV.B.

487. For previous discussion and illustration, see *supra* Parts III.B.2, IV.B.

maybe courts generally do what they think best,⁴⁸⁸ especially when context—particularly intent—and policy clearly point to a result that does not adhere to the meaning reached in previous decisions. At the very least, then, in these situations courts should emancipate themselves from the charade of precedential meaning and obtain their desired result. More importantly, they should do this without apology or lip service to what other courts have said or done in the past.

488. For example, one might look at what courts have done with language formats that concern the creation of interests that are determinable (with a possibility of reverter) or upon a condition subsequent (with a power of termination). The rules established by courts have been quite formal and fairly rigid. If one wishes to create a fee simple determinable and retain a possibility of reverter, then language of special limitation—“during,” “unless,” “until” or “so long as”—must be used. Such language should be sufficient, but to assure this interpretation, one ought to add language that spells out an automatic reverter upon breach of the requirement embodied in the special limitation. For example, one might say: “To *B* in fee simple so long as Blackacre is used for residential purposes only; if and when it is not used exclusively for residential purposes, Blackacre shall automatically revert to *A* [the grantor], her devisees, heirs or assigns.”

Quite differently, if one wishes to create a fee simple upon a condition subsequent and retain a power of termination, then words expressing a condition must be used. However, many courts find that this is not enough to differentiate the interest created from others that do not involve imposition of a forfeiture. Therefore, to create a condition subsequent, one should always make the power of termination explicit. For example, one might say: “To *B* in fee simple upon the condition that Blackacre is always used for residential purposes only; if and when it is not used exclusively for residential purposes, *A* [the grantor] or her devisees, heirs or assigns shall have the right to reenter and terminate the interest hereby conveyed originally to *B*.”

There have been, however, many conveyances that do not conform to the two basic formats just described. These deviations are numerous and varied. Some include merely a stated condition, while others express only a stated purpose. But in neither case is there an express consequence for violation of the condition or purpose. In short, there is no express reverter or power of termination. With this language format, courts sometimes still find a condition subsequent, but most do not. Instead they might declare the existence of a covenant or trust—namely, a legal relationship that does not involve a forfeiture. Some deviant formats, however, do include a consequence, namely a termination, that seems clearly automatic on its face. But because such termination is coupled with other indicia consistent with a condition subsequent, many courts regard such format as ambiguous and, therefore, refuse to construe the limitation as determinable. Instead, they find a power of termination in the grantor that does not yield automatic termination upon breach of the condition.

By way of synthesis, one might conclude that courts consistently will reach the same results whenever the two basic formats are used. One could go further and say that courts regard all variations that omit or confuse components of these formats as deviant formats. Finally, once courts view the format as deviant, they feel free to reach the result that they think fits best. And in making this determination, courts will account for policy—for example, they abhor forfeitures, especially automatic forfeitures—and most anything else that sheds light on probable intent—for example, the purchase price and the age and personal circumstances of the grantor.

For discussion of the law governing construction of determinable interests and possibilities of reverter and construction of interests upon a condition subsequent and powers of termination, see SIMES & SMITH, *supra* note 9, §§ 247-49, 286-87.