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Forfeiture of a Public School: A Need to Control the Defeasible Fee

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FORFEITURE OF A PUBLIC SCHOOL: A NEED TO CONTROL THE DEFEASIBLE FEE

Most states[1] allow a landowner to deed a plot of land to a school district subject to the condition that the district use the property for a public school purpose. Under such a deed, the land reverts back to the grantor or his heirs if the conditioned use ceases.[2] Changing conditions often force school districts to close schools built on land acquired in this fashion. When this occurs the district must either reopen the school, incurring considerable expense, or risk the forfeiture of a publicly financed building.[3] Declining enrollments and dwindling public resources have forced school systems to choose between these alternatives. Moreover, demographic and fiscal trends suggest that this problem will recur.[4]

This Note explores judicial and legislative efforts to control the effects of defeasible fees[5] when the condition is placed upon school property.

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1. A minority of states have enacted laws to limit or abolish the fee simple determinable and the fee upon a condition subsequent. *See infra* note 109.

2. Conditional grants of land are called "defeasible fees." There are two basic types of defeasible fees: determinable fees, *see infra* notes 12-14 and accompanying text, and fees subject to condition subsequent , *see infra* notes 15-16 and accompanying text.

DeHart v. Ritenour Consol. School Dist. 663 S.W.2d 332 (Mo. Ct. App. 1983) provides a typical example. In *DeHart* the deed conveyed land subject to the following conditions:

> 1. That the Property shall be used for Public School Building . . . .
> 2. That the school shall be called the "LEWIS DEHART SCHOOL."
> 3. That if the property is not used for . . . school purposes, or if at any future time the name should be changed, then said property shall revert to the above grantor herein or her heirs.

Id. at 333. The school closed in 1982 due to declining enrollment, and the grantor's heirs sued to compel forfeiture. The court construed the deed as creating a fee upon condition subsequent. *Id.* at 334. The court held, however, that the district's practice of storing school supplies in the school constituted a "school purpose." The school district thus retained its fee subject to the conditions imposed. *Id.* at 335.

3. The school district in *DeHart* must either reopen an unnecessary and financially burdensome facility or continue to use the school as a warehouse. It can never sell the property to recapture its investment without breaching the condition, thereby forfeiting the land. *Id.* at 334-35 (rejecting district's claim that it possessed a fee simple absolute due to its "substantial compliance").

4. Current enrollment projections indicate overall enrollment in public schools will continue to decline into the mid-1980's, with high school attendance dropping well into the 1990's. The number of high school graduates will decrease twenty-six percent from 1979 to 1991. AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, DECLINING ENROLLMENT—CLOSING SCHOOLS: PROBLEMS AND SOLUTIONS 12-15 (1981).

5. The courts enforce these future interests to permit a property owner to condition the future use of his property when he transfers it. Simes, *Elimination of Stale Restrictions on the Use of Land,* 1954 A.B.A. SEC. REAL PROP. PROB. AND TR. L. PROC. 4, 5. Grantors usually create future interests to benefit adjacent landowners, to retain a "gambler's chance" of recovering the property, or to

Part I discusses defeasible fees from an analytical and historical perspective.[6] Parts IIA and IIB examine the traditional legal devices courts used to prevent forfeitures,[7] part IIC considers the equitable principles the judiciary could adopt to deal with the problem,[8] and part IID reviews existing and proposed statutory solutions.[9] Finally, part III proposes a legislative solution to relieve school districts of these burdensome perpetuities.[10]

I. ANALYTICAL AND HISTORICAL PRECEPTS

The determinable fee and the fee upon a condition subsequent represent two types of restrictions grantors can attach to their land.[11] The determinable fee ends immediately upon breach of the limitation.[12] The

benefit from the restriction as part of the consideration for the conveyance. Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees,* 27 TEX. L. REV. 158, 167 (1948); *see generally* Brake, *Fees Simple Defeasible: The Purposes They Serve with an Appraisal of Their Utility,* 28 KY. L.J. 424 (1940).

6. *See infra* notes 11-41 and accompanying text.

7. *See infra* notes 42-60 and accompanying text.

8. *See infra* notes 61-92 and accompanying text.

9. *See infra* notes 93-107 and accompanying text.

10. *See infra* notes 108-41 and accompanying text.

11. For the purposes of this Note, "defeasible fees" refers to only the fee on condition subsequent and the determinable fee. *See supra* note 2.

12. The determinable fee operates as follows: The grantor's conveyance contains a possibility of reverter conditioned upon a specified event. If the stated event occurs, the ownership of the land reverts back to the grantor or his successors in interest, who need not take any affirmative action to reassert title. Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 254-55, 139 A.2d 291, 298 (1958); RESTATEMENT OF PROPERTY § 44 (1936); 2 R. POWELL, POWELL ON REAL PROPERTY ¶ 187 (1968).

Generally, words expressing a period of time such as "while," "during," or "so long as" creates a determinable fee. Hagaman v. Board of Educ., 117 N.J. Super. 446, 451, 285 A.2d 63, 65 (1971); Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 256, 139 A.2d 291, 296 (1958); RESTATEMENT OF PROPERTY § 44 comment 1 (1936); 2 R. POWELL, POWELL ON REAL PROPERTY ¶ 187 (1968). Express words of reversion are not necessary. RESTATEMENT OF PROPERTY § 44 comment a (1936); L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 29 (1966); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 286 (2d ed. 1956); Browder, *Defeasible Fee Estates in Oklahoma,* 4 OKLA. L. REV. 141, 142 (1951).

Despite this general rule, the judicial dislike for forfeiture has caused some courts to deny the existence of a condition of defeasance on the ground that the conveyance contained no reverter clause. Board of Trustees of Ruston Cir. of Methodist Episcopal Church, South v. Rudy, 192 La. 200, 205-06, 187 So. 549, 551 (1939) (express reversionary provision necessary to create "restrictive title"); *In re* Copps Chapel Methodist Episcopal Church, 120 Ohio St. 309, 312, 166 N.E. 218, 219 (1929) (reversionary clause necessary to create a determinable fee). Thus, although words of reverter are technically unnecessary, because the grantor conveyed less than he had, a careful draftsman should include such language. *See* W. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 29 (1961); *see generally* Agnor, *Creation of Defeasible Fees,* 15 GA.

grantor's possibility of reverter[13] automatically ripens into a fee simple absolute.[14] In contrast, a breach of the condition terminates a fee upon a condition subsequent[15] only if the holder of the right of entry asserts his interest.[16]

Courts traditionally have disfavored these conditional estates.[17] Con-

B.J. 20, 27-29 (1952); Note, *Property—Fee Simple Determinables—Distinguishing Characteristics,* 71 W. VA. L. REV. 367 (1969).

13. A possibility of reverter is the future interest remaining in the grantor after he, as owner of land in fee simple absolute, conveys a determinable fee. L. SIMES & A. SMITH, *supra* note 12, § 281. Reversionary rights can only exist in the grantor or his heirs. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 96 (1962). In most states, the possibility of reverter can pass by both descent and devise and is otherwise freely transferable. *Id.* at 102. *But see* ILL. REV. STAT. ch. 30 § 37b (1983) (making the possibility of reverter nondevisable). It is not subject to the Rule Against Perpetuities. *See infra* note 29 and accompanying text.

14. C. MONYNIHAN, *supra* note 13, at 96; L. SIMES & A. SMITH, *supra* note 12, § 283.

15. A fee of a condition subsequent gives the grantor, or whoever holds the right of reentry (or "power of termination" in the *Restatement* terminology) the right to enter and reclaim the estate when the event tolling the condition occurs. Hagaman v. Board of Educ., 117 N.J. Super. 446, 452, 285 A.2d 63, 66 (1971); Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 254-55, 139 A.2d 291, 296 (1958); Bethlehem Township v. Emrick, 77 Pa. Commw. 327, 331-33, 465 A.2d 1085, 1088 (1983); RESTATEMENT OF PROPERTY § 45 (1936); 2 R. POWELL, POWELL ON REAL PROPERTY ¶ 188 (1968).

Grantors generally use words such as "provided that," or "on the condition that" to create a fee on a condition subsequent. DeHart v. Ritenour Consol. School Dist., 663 S.W.2d 332, 333 (Mo. Ct. App. 1983); RESTATEMENT OF PROPERTY § 45 comment 1 (1936); L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 31-32 (1966). Such language, however, is usually not in itself sufficient to create a condition subsequent. The grantor must also expressly reverse the right to reenter and terminate the estate. Hagaman v. Board of Educ., 117 N.J. Super. 446, 452, 285 A.2d 63, 66 (1971); RESTATEMENT OF PROPERTY § 45 comment j (1936); 2 R. POWELL, POWELL ON REAL PROPERTY ¶ 188 (1968). Courts may imply a power of termination from words of forfeiture. *See* DeHart v. Ritenour Consol. School Dist., 66 S.W.2d 332, 334 (Mo. Ct. App. 1983).

When a conveyance diverges from the standard language of a determinable fee or fee upon a condition subsequent, determination of the estate intended becomes nearly impossible. Even where the grantor employs the proper words, the resultant estate is not certain. M. MCDOUGAL & D. HABER, PROPERTY, WEALTH, LAND 285 (1948), *quoted in* Williams, *supra* note 5, at 161 n.9.

Commentators disagree over whether the differences between these two fees are substantial enough to warrant recognition. For an argument that the courts should ignore slight doctrinal differences, see McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform,* 55 HARV. L. REV. 1077, 1088-96 (1942); *see also* Dunham, *Possibility of Reverter and Power of Termination—Fraternal or Identical Twins?,* 20 U. CHI. L. REV. 215 (1953).

16. While the possibility of reverter ripens automatically upon breach of the condition, the holder of the right of entry must act affirmatively to terminate the granted estate. RESTATEMENT OF PROPERTY § 405 (1936); C. MOYNIHAN, *supra* note 13, at 98; L. SIMES & A. SMITH, *supra* note 12, at 330. Rights of entry are both descendible and devisable, C. MOYNIHAN, *supra* note 13, at 109, but otherwise are inalienable. *Id.* at 107-08.

17. Savanna School Dist. v. McLeod, 137 Cal. App. 2d 491, 494, 290 P.2d 593, 595 (1955) ("conditions are not favored in the law because they tend to destroy estates") (quoting Gramer v. City of Sacramento, 2 Cal. 2d 432, 437-38, 41 P.2d 543, 545 (1935)); Roberts v. Rhodes, 231 Kan.

ditional estates limit the use of land into perpetuity by threat of forfeiture,[18] impairing alienability[19] and preventing efficient and economical use of a valuable resource.[20] In addition, the number of the holders of the reversionary interest, usually grantor's heirs, increases with each generation, splintering the ownership of the reversionary interest so that clearing title becomes difficult or impossible.[21] Finally, the breach may

74, 77, 643 P.2d 116, 118 (1982) ("[f]orfeitures are not favored in the law"); Holbrook v. Board of Educ., 300 S.W.2d 566, 567 (Ky. Ct. App. 1957) (". . . the law does not favor forfeitures . . . [and therefore] a deed will not be construed to create a conditional estate unless the language clearly evinces such an intent."); L. SIMES & A. SMITH, *supra* note 12, at 299-300.

18. Rights of reentry and possibilities of reverter are generally exempt from the common law Rule Against Perpetuities in the United States. *See infra* note 30 and accompanying text.

19. Though land under the limitation "for school purposes only" is only an indirect restraint on alienation, the grantee can only sell the land to another school district without risking forfeiture. *See* Comment, *Stale Future Interests: Can Texas Pass a Constitutional Reverter Act?,* 9 ST. MARY'S L. REV. 525, 537 n.78 (1978). Thus, the threat of forfeiture would discourage anyone wishing to purchase the land for prohibited uses, thereby depressing its market value. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 251 (1940). In addition, banks will not accept a mortgage on such property because the threat of forfeiture impairs the mortgage's security. *See* Trustees of Schools v. Botdorf, 6 Ill. 2d 486, 492, 130 N.E.2d 111, 114-15 (1955). For a general discussion of the problems raised by conditional fees, see Fitze, *Problems Relating to Stale Reverters and Restrictions,* 38 NEB. L. REV. 150 (1959).

20. *See* Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land,* 11 FORDHAM L. REV. 303, 303 (1962) (defeasible fees limit land to uneconomical use unless the grantee pays an outrageous sum to loosen the restriction); Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate,* 17 VAND. L. REV. 1437, 1438 (1964) (permitting the grantor to tie up land usually only injures the community); Comment, *Future Interests—Effect of Change of Conditions on Rights of Entry and Possibilities of Reverter Created to Control the Use of Land,* 53 MICH. L. REV. 246, 246-47 (1954) (defeasible fees prevent the most appropriate use of land as conditions change). *But cf.* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 40-54 (1955) (productive use argument does not justify restrictions on the length of contingent future interests).

When use is long-standing, the holder of the future interest may not even be aware of the condition. Yet the fear of forfeiture still threatens the holder of the fee and prevents the optimal use of the land.

21. In Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N.E.2d 922 (1950), a conveyance for church purposes terminated after ninety years. More than one hundred persons held fractional shares of the reversion. The value of the fractional shares of the descendants ranged from $774.20 to $6.45. Almost half of the sale proceeds went to pay for attorney fees and a geneaologist. W. LEACH & J. LOGAN, *supra* note 12, at 46.

Leach and Logan describe an additional hypothetical case in which a corporation holds a possibility of reverter. After the corporation dissolves, the reverter ripens into a fee. In that situation, the court must trace the descendants of each shareholder and give them a portion of the land or proceeds. *Id.* at 46 n.16 (citing Addy v. Short, 47 Del. 157, 69 A.2d 136 (1952)). *But cf.* ILL. REV. STAT. ch. 30, § 37(d) (1983) (voids possibilities of reverter and rights of reentry when corporation dissolves).

The splintering of the possibility of reverter or right of reentry diminishes the effect of any policy arguments for forfeiture. The general public will lose a valuable asset while the grantor's heirs

be unintentional or unavoidable. Nevertheless, the nature of the fee requires courts to enforce the crude and severe remedy of forfeiture.[22] Despite these objectionable features, courts usually enforce defeasible fees.[23]

The American law governing defeasible fees derives from the English common law of estates.[24] In England, placing conditions on the use of land became an accepted practice by the late thirteenth century.[25] Widespread use of conditional estates created a tension between the societal need for marketable land and the individual's desire to control the disposition of his property.[26] Judicial attempts to balance these interests led to the Law of Property Act of 1925,[27] which effectively abolished all condi-

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receive nearly worthless fractional shares. In addition, the land remains unmarketable unless every one of the tens or hundreds of the grantor's heirs combine to convey the full fee.

22. "[A reversion's] all or nothing character has an inherent potential for working inequity, since it provides no occasion for comparison of the severity of the remedy with the gravity of the breach." Springmeyer v. City of South Lake Tahoe, 132 Cal. App. 3d 375, 380, 183 Cal. Rptr. 43, 46 (1982); *see also* Walsh, *Conditional Estates and Covenants Running with the Land,* 14 N.Y.U. L. REV. 162, 173-77 (1937).

23. *See infra* notes 94-96 and accompanying text (discussing judicial reluctance to deny the legal effect of a defeasible fee).

24. Notwithstanding the theory of future interests, the common law of estates and its concept of fragmented ownership forms the foundation for such basic and useful devices as the trust and the power of appointment. Browder, *Future Interest Reform,* 35 N.Y.U. L. REV. 1255, 1255-57 (1960). For a complete history of the development of the common law of estates, see F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898) and Bordwell, *English Property Reform and its American Aspects,* 37 YALE L.J. 1 (1927).

25. II F. POLLOCK & F. MAITLAND, *supra* note 24, at 23.

26. An overview of English property law shows that the "distinguishing freature of the evolution of property law has been the desire to make land more freely alienable and less fettered with restrictions." Comment, *supra* note 19, at 537. In 1285, the Statute De Donis Conditionalibus, 13 Edw. I. c.1, sanctioned the creation of a perpetual fee tail. The common recovery fiction of Taltrum's Lease, Y.B. 12 Edw. IV, c. 19, in 1797, established a means of barring the tenant in tail and the reversioner or remainderman. The Statute of Uses, 27 Henry VII, c.10, appeared less than one hundred years after Taltrum's Lease. As construed in Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1920), it provided a method of creating an indestructible executory device. Rogers, *supra* note 20, at 1438-39.

The modern Rule Against Perpetuities (the Rule) limited the enforceability of future interests to those that "must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. GRAY, RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942). In England, the Rule limited rights of entry and possibilities of reverter in the common law, *see, e.g., In re* Trustees of Hollis' Hosp. and Hogues' Contract, 2 Ch. 540 (1899) (right of entry); Hooper v. Corporation of Liverpool, 88 Sol. J. 213 (Lancaster Palatine Court 1944) (possibility of reverter), and by statute, *see* Perpetuities and Accumulations Act, 1964, ch. 55 (adopting the "wait and see" approach); *see also* RESTATEMENT OF PROPERTY §§ 370, 372 (1944); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1236 (2d ed. 1956) (discussing the Rule's English application). American courts failed to apply the Rule similarly to the same future interests. *See infra* note 30.

27. 1925, 15 & 16 Geo. 5, ch. 20.

tional interests in land.[28]

America adopted the English view favoring free disposition of land.[29] Unlike their English counterparts, however, American courts did not apply the Rule Against Perpetuities to limit rights of entry or possibilities of reverter.[30] Moreover, when American courts adopted the system of estates developed under English law, they apparently refused to consider statutes such as *Quie Emptores*,[31] which limited those estates. Adoption of such limiting doctrines might have led American courts to abolish the

28. The Law of Property Act limited the use of all estates in land, except the fee simple absolute and the term of years absolute, to equitable interests under a trust. *Id.* § 4. The act effectively eliminated rights of reentry and possibilities of reverter as legal interests in land. *See* Bordwell, *supra* note 24. The Act preserves common law future interests in chattel, while eliminating the restraints these interests impose on land. The trustee has the power to improve, lease, mortgage, and convey the land in fee simple absolute, without fear of forfeiture or litigation. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests,* 1972 DUKE L.J. 517, 547-48; *see generally* Bordwell, *supra* note 24; Crane, *The Law of Real Property in England and the United States: Some Comparisons,* 36 IND. L.J. 282 (1961).

Not surprisingly, commentators have suggested similar statutes for application in the United States. *See* Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Actions,* 85 HARV. L. REV. 729 (1972).

29. Browder, *supra* note 24, at 1257. The American attitude towards property, especially land, contained "a very deeply engrained . . . desire that every owner of land should be free to use and distribute it as he pleases." Rogers, *supra* note 20, at 1437; *see also* Bostick, *Loosening the Grip of the Dead Hand: Shall we Abolish Legal Future Interests in Land?,* 32 VAND. L. REV. 1061, 1100-01 (1979). Any attempt to reform the use of future interests involves divesting donors of their accustomed freedom, a formidable task. *See generally* Fellman, *The European Background of Early American Ideas Concerning Property,* 14 TEMP. L.Q. 497 (1940). For a biting criticism of attempts to justify the exclusion of possibilities of reverter and rights of entry from application of the Rule, see W. LEACH & J. LOGAN, *supra* note 12, at 40-42.

30. *See, e.g.,* School Bd. of Scott Co. v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950).

In refusing to apply the Rule, courts have usually reasoned that rights of reentry and possibilities of reverter are existing property rights owned by living and theoretically ascertainable persons who together with the holder of the fee, can convey a merchantable title. Fratcher, *supra* note 28, at 528; Comment, *supra* note 20, at 247 n.3. *But see supra* note 21 and accompanying text (shares of reversionary interest often become fractionalized).

Another commentator sets out three additional reasons cited by American courts. First, the law in England at that time was so confused that there was no clear position for the American courts to adopt. Second, many American courts considered the right of reentry and possibility of reverter as vested and therefore not limited by the Rule. Third, these interests are not alienable and therefore do not represent a great restraint on free disposition of land. Cook, *Rights of Entry, Possibilities of Reverter, Resulting Trusts and the Rule Against Perpetuities,* 15 TEMP. L.Q. 509, 517-21 (1941). Rejecting each of these reasons, the author concluded that the courts really exempted defeasible fees from the Rule to encourage the charitable, donative transfer. *Id.* at 521-22.

31. 1290, 18 Edw. I, ch. 1. *Quia Emptores* effectively ended subinfeudation by allowing the owner of an estate in fee simple absolute to convey all his interest by merely paying a small sum to his overlord. 2 R. POWELL, POWELL ON REAL PROPERTY ¶ 177 (1966).

determinable fee.[32]

Stewart v. Blain[33] illustrates the formalistic approach taken by American courts. In *Stewart*, the grantor conveyed land "for the purpose of erecting a schoolhouse . . . .," on condition that the land would revert back to the grantor or his heirs if the county ever removed the schoolhouse. After twenty-five years, the county closed the school and sold the land with the schoolhouse. A Texas court held that the deed conveyed a determinable fee, which terminated when the county sold the schoolhouse.[34] The court rejected other constructions of the deed as disingenuous or hypertechnical interpretations that would thwart the clear intention of the grantor.[35] A modern court might have used several constructional devices to preserve the district's estate.[36]

32. Very few cases have held that *Quia Emptores* abolished determinable fees. *See* 1 H. TIFFANY, REAL PROPERTY § 93 (2d ed. 1920). For the competing views on this issue, compare J. GRAY, RULE AGAINST PERPETUITIES 712 (4th ed. 1942) (the determinable fee is a form of subinfeudation and therefore is abolished by the statute) with Powell, *"Determinable Fees,"* 23 COLUM. L. REV. 207, 212-17 (1923) (the fee simple determinable survived the statute).

33. 159 S.W. 928 (Tex. Civ. App. 1913).

34. *Id.* at 929.

35. *Id.* at 930-31. Another early case exhibiting this strict approach is Gray v. Blanchard, 25 Mass. (8 Pick) 283 (1829). In *Gray*, the grantor conveyed land upon the condition that the grantees not place windows in the north wall of a house for thirty years. *Id.* at 284. Eighteen years later, when the grantees breached the condition, the court declared a forfeiture. The court considered the grantees' claims that the condition was useless and that the forfeiture was a harsh remedy legally irrelevant. *Id.* at 290. The court was obviously uneasy with the law it felt compelled to apply: "We therefore see no ground on which, consistently with the rules of law, we can deny demandant's claim. It is a harsh proceeding, on his part, but it is according to his contract, which must be enforced if he insists upon it." *Id.* at 292.

36. *See infra* notes 45-57 & 79-92.

In *Stewart*, the court could have used several constructional devices to avoid a forfeiture. First, the conveyance stated it was "for the purpose of erecting a schoolhouse." The court could have held that, in the absence of words of special limitation, the statement does not create a condition on the title of the land. *See infra* notes 42-46 and accompanying text. Second, the court might have held that the statement of consideration that preceeded the limiting language created only a covenant. *See infra* notes 47-52 and accompanying text. Third, because the reversion only became effective upon "removal" of the schoolhouse, the court could have required actual physical removal of the building from the land to breach the condition. *See* Wichita Falls Grain Co. v. Taylor Foundry Co., 649 S.W.2d 798, 800-01 (Tex. Ct. App. 1983) (actual, permanent removal of structure required to trigger right of reentry). Finally, the court could have read the reversionary language as merely creating a fee upon condition subsequent. *See infra* notes 79-83 and accompanying text. Under this construction, the court could have denied forfeiture for failure to reenter within a reasonable time. *See infra* notes 84-89 and accompanying text, or because the right of reentry died with the grantor, *see infra* note 60 and accompanying text.

While the court in *Stewart* may have been technically correct in finding a defeasance, the widespread use of such constructional devices indicates the social unacceptability of these forfeitures.

Commentators[37] criticized this deferential approach because it resulted in many inequitable forfeitures.[38] Courts soon responded with ingenious and occasionally strained efforts to mitigate the undesirable results of literal enforcement of the conditional deeds.[39]

Judicial aversion to forfeiture increases when the government makes publicly financed improvements on the land conveyed.[40] Recent increases in the number of school closings due to declining enrollment and fiscal crisis have intensified judicial and legislative efforts to avoid forfeiture in these circumstances.[41]

II. EXISTING LEGAL RESPONSES

A. Judicial Construction: Finding No Condition of Defeasance

When construing deeds, courts generally disfavor constructions that result in forfeiture.[42] A court will not find that a deed creates a conditional estate unless the grantor clearly expressed his intent to condition the grant.[43] In addition, a court will resolve all doubt in favor of the grantee.[44] Thus, if a grantor conveys the land "for school purposes" or "upon the condition that" that property sustain a school, a court probably will hold that the language merely expresses the grantor's motive,

37. *See* Chaffin, *supra* note 20, at 304, 307-14; Goldstein, *supra* note 19, at 254.

38. *See supra* note 22 and accompanying text.

39. *See infra* notes 42-92 and accompanying text.

40. "The law raises every intendment in favor of a charity, against the grantor of those claiming under him. Public schools intended for the children in the neighborhood are favorites in this State, and must receive the protection and support, as far as is reasonable, of the public tribunals." McKissick v. Pickle, 16 Pa. 140, 148 (1851).

41. *See supra* note 4.

42. Courts do not favor forfeitures at law or in equity. *E.g.,* Humphrey v. J.C. Jung Educ. Center, 714 F.2d 477, 480 (5th Cir. 1983); United States v. Charter Real Estate Co., 226 F. Supp. 285, 288 (D.R.I. 1964) (court will only find disfavored condition if express); Rose v. Directors of School Dist., 162 Kan. 720, 726, 179 P.2d 181, 186 (1947) (the law does not favor a construction resulting in a forfeiture); Bethlehem Township v. Emrick, 77 Pa. Commw. 327, 336, 465 A.2d 1085, 1090 (1983) (the law abhors forfeiture upon conditions subsequent; courts will strictly construe restrictions on the forfeiture).

43. Springmeyer v. City of South Lake Tahoe, 132 Cal. App. 3d 375, 380, 183 Cal. Rptr. 43, 46 (1983) (the precise event that triggers reversion must be plain in the deed, otherwise the court will read the deed to preclude reversion); Martin v. Grutka, 151 Ind. App. 167, 173, 278 N.E.2d 586, 590 (1972) (clear showing of intent to convey less than the full fee needed to create conditional estate); Holbrook v. Board of Educ., 300 S.W.2d 566, 567 (Ky. 1957) (court will not construe deed to create a conditional estate unless the language clearly evinces such intent).

44. Springmeyer v. City of South Lake Tahoe, 132 Cal. App. 3d 275, 381, 183 Cal. Rptr. 43, 46 (1983) (if a reasonable construction avoids reversion, the court must adopt it). *See* Chaffin, *supra* note 20, at 316.

purpose, or "understanding."[45] Such a deed conveys the whole fee free of any condition of defeasance.[46]

When the words of the deed raise doubts as to the grantor's intent, courts may avoid forfeiture by interpreting the limiting language of the deed as a covenant instead of a condition.[47] Courts may refuse to enforce covenants because of impossibility[48] or because of a change in surrounding conditions.[49] Landowners may sue in equity to remove covenants as clouds upon their titles.[50] Also, courts may void covenants if the restriction no longer benefits the surrounding property.[51] Finally, even if a court does enforce the covenant, the remedy for breach is at most dam-

45. *See* Roberts v. Rhodes, 231 Kan. 74, 77-78, 643 P.2d 116, 119-20 (1982) (citing cases); RESTATEMENT OF PROPERTY § 44 comment m (1936); R. POWELL ON REAL PROPERTY ¶ 188 (1968).

In *Roberts* the grantor deeded land to a school district "only for school or cemetery purposes." The court held that the words merely stated an "understanding" of the purpose of the conveyance, and did not limit the fee. 231 Kan. at 80, 643 P.2d at 120. The *Roberts* court also relied upon the district's longstanding fulfillment of the "understanding." Basing its holding on the case's "facts and circumstances," the court stated that a grant for school purposes that does not use language of limitation, "conveys fee simple title when the land has been accepted and used by the grantee for school purposes for more than sixty years." *Id.*

46. *See* Trone v. Nelson, 89 Ill. App. 3d 1000, 1004, 412 N.E.2d 172, 175 (1980); Roberts v. Rhodes, 231 Kan. 74, 77, 643 P.2d 116, 119 (1982); Hughes v. Gladewater County Line Indep. School Dist., 124 Tex. 190, 194, 76 S.W.2d 471, 475 (1934); 68 AM. JUR. 2D Schools § 64 (1973).

47. This may be the method courts use most commonly to avoid finding a defeasance. Humphrey v. C.J. Jung Educ. Center, 714 F.2d 477, 482-83 (5th Cir. 1983) (courts will construe anything less than a clear and specific condition subsequent as a restrictive covenant despite provisions for a right of reentry); MacDonald Properties, Inc. v. Bel-Air Country Club, 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367, 371 (Cal. Ct. App. 1977) (courts disfavor condition subsequents and often construe them as covenants); Board of Educ. v. Edgerton, 244 N.C. 576, 578, 94 S.E.2d 661, 663-64 (1956) (if restrictive language is at all ambiguous, it creates only a covenant, not a condition); Malloy v. Newman, 649 S.W.2d 155, 159 (Tex. Ct. App. 1983) (if a court can construe a restriction as either a condition or a covenant, it prefers the covenant construction). *See* R. POWELL, POWELL ON REAL PROPERTY ¶ 188 n.16 (1968); Note, *Terminating Conditions Unlimited in Time,* 27 IND. L.J. 245, 247 n.5 (1952). *But see* Murray v. Trustees of Lane Seminary, 1 Ohio Op. 2d 236, 240, 140 N.E.2d 577, 582 (1956) (court found a fee upon a condition subsequent despite use of the word "covenant").

48. Comment, *supra* note 20, at 247 n.5.

49. Humphrey v. C.J. Jung Educ. Center, 714 F.2d 477, 480 (5th Cir. 1983) (changed circumstances will not void a right of reentry, but may invalidate a restrictive covenant); Blakely v. Gorin, 365 Mass. 590, 604, 313 N.E.2d 903, 912 (1974) (restrictive covenant unenforceable because change in conditions made it obsolete). *But see* Loeb v. Watkins, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968) (court uheld and enforced restrictive covenant; dissent argues covenant had become "absurd, futile, and ineffective"); *see generally* Simes, *Elimination of Stale Restrictions on the Use of Land,* 1954 A.B.A. SEC. REAL PROP. PROB. AND TR. L. PROC. 4, 6 (discussing doctrine of changed circumstances).

50. McArthur v. Hood Rubber Co., 221 Mass. 372, 376, 109 N.E. 162, 164 (1915).

51. RESTATEMENT OF PROPERTY § 537(a) (1940).

ages, rather than a mandatory forfeiture.[52]

In *Savanna School District of Orange County v. McLeod*,[53] for example, the grantors deeded land to a school district for public school purposes only, with ownership to revert to the grantors if the land was used for other purposes.[54] When the school district abandoned the building forty-five years later, the grantors' heirs sued, arguing that the land had reverted back to them. The court denied their requested relief on several grounds.[55] The court's principal rationale was that the words of limitation in the deed expressed a mere promise or a covenant because a statement of consideration immediately preceded the conditional language.[56] The court then determined that the school district had fulfilled the covenant and thus that the plaintiffs had lost any claim under the deed.[57]

The *Savanna* court's holding is not supported by the language of the deed. The grantor's use of express words of reversion strongly suggests that he intended to create a defeasible fee.[58] The court, however, imposed another interpretation to justify a result that appears in fact to rest on considerations of fairness and public policy.[59] *Savanna* illustrates

52. In Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804 (Tex. Civ. App. 1963), the court stated that the principal difference between a covenant and a condition was that a covenant's remedy is an action for damages, while the condition's remedy is forfeiture of the estate. *Id.* at 807.

Courts have also construed conditional language as creating only an easement, Fleck v. Universal-Cyclops Steel Corp., 397 Pa. 648, 651, 156 A.2d 832, 834 (1959), or a trust, United States v. Certain Land in the City of Cape Girardeau, 79 F. Supp. 558, 561 (E.D. Mo. 1948), *aff'd sub nom.*, Carmack v. United States, 177 F.2d 463, 466-67 (8th Cir. 1949). Courts rarely use these constructions, however, when interpreting grants conditional on school uses.

53. 137 Cal. App. 2d 491, 290 P.2d 593 (1955).

54. The granting clause in the deed read:

> Said land is hereby conveyed . . . for public school purposes only, and it is expressly understood and agreed that as a consideration for this conveyance said party of the second part shall build and maintain a public school building on said land, and that the title and ownership of said land shall revert . . . upon a failure . . . to erect and maintain a building thereon to be used exclusively for public school purposes.

Id. at 492, 290 P.2d at 594 (emphasis added).

55. The court held that the right of reentry was personal to the grantor because the reverter clause contained no words of inheritance. *Id.* at 496, 290 P.2d at 596. In addition, it held that the term "maintain" did not require the district to preserve the schoolhouse forever, but only that it use the property for school purposes. *Id.* at 495, 290 P.2d at 596.

56. *Id.* at 496, 290 P.2d at 596.

57. *Id.*

58. *See supra* note 54 (language of deed); notes 11-16 and accompanying text (discussing defeasible fees).

59. "Such results must rest either upon a judicial conviction that conveyancers use language of condition without an awareness of its reasonable meaning, or upon a belief that the social policy hostile to forfeitures requires frustration of the conveyor's manifested intent." R. POWELL, POWELL ON REAL PROPERTY ¶ 188 (1968). The grantor's express use of a clear reversionary clause negates

how far a court may go to deny the grantor's intent and provide relief to the grantee in the face of apparent language of defeasance.

Finally, if the reversion does not mention the grantor's heirs, the court may hold that the death of the original grantor extinguished the restriction. For example, reversion to "the party of the first part" or "the grantors herein" will usually lead a court to find that the condition has expired.[60]

B. Judicial Construction: Finding No Breach of Condition

A conveyance that contains words of specific condition or limitation and provides for a reversion or right of entry usually creates a defeasible fee.[61] Courts, however, may still deny forfeiture if they find that the grantee's action did not breach the condition.[62]

For example, a technical and inadvertent violation may not constitute a breach of the condition.[63] In *Mills v. Evansville Seminary*,[64] the grantor conveyed land on the condition that the grantees use it for a seminary, expressly providing for reversion when that use terminated.[65] The trustees of the seminary later closed and sold the seminary. When the grantor threatened to reenter the purchaser quickly reconveyed the land to the trustees, who restored the seminary. The court denied forfeiture

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the inference that he did not intend a forfeiture. Therefore, *Savanna* must rest upon the second explanation.

Arguably the *Savanna* court distorted the conveyance in an effort to effectuate the grantor's intent. Under certain compelling circumstances such as long periods of compliance, a court may feel that the grantor would not desire a forfeiture. Although grantors use defeasible fees to control their devise, strict enforcement would yield a harsh result that was clearly beyond the grantor's contemplation. *Cf. infra* note 105 (discussing *Cy pres* and administrative deviation doctrines).

60. Alamo School Dist, v. Jones, 182 Cal. App. 2d 180, 190, 6 Cal. Rptr. 272, 278 (1960) (only "party of first part" can repurchase on breach; thus, the deed created a contingent opinion that expired at grantor's death); Savanna School Dist. v. McLeod, 137 Cal. App. 2d 491, 496, 290 P.2d 593, 596 (1955) (reverter "to party of first part" held to expire at death of grantor). *But see* Hawthorne v. Illinois Cent. Gulf R.R., 374 So. 2d 813, 816 (Miss. 1979) (reverter to "the grantors herein" did not make the reservation personal to the grantors).

61. *See supra* notes 11-16 and accompanying text.

62. *See infra* notes 63-76 and accompanying text. A finding that the grantees did not breach the condition does not free the land; the condition or limitation remains, with its attendant negative effects on alienability, marketability, and the efficient use of resources.

63. In McKissick v. Pickle, 16 Pa. 140 (1851), the grant was for schoolhouse, religious use, or burying ground only. The court held that renting the schoolhouse to a tenant was only a temporary diversion, not rising to the level of a breach. *Id.* at 148.

64. 58 Wis. 135, 15 N.W. 133 (1883).

65. *Id.* at 139, 15 N.W. at 133.

because of the insubstantial nature of the breach.[66]

Courts may also interpret the "for school purposes" condition to permit subsequent use of the property for purposes other than actual classes. Thus, courts have held that a grantee can retain land conveyed "for school purposes only" when the grantee uses the land for teacher offices,[67] a school parking lot,[68] storage of school supplies,[69] or a school bus stop.[70] In addition, temporary abandonment of classroom use does not violate the condition.[71]

Similarly, courts often interpret the term "permanent"[72] or "maintain"[73] as only requiring the grantee to erect a permanent structure, not

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66. *Id.* at 142-44, 15 N.W. at 135. The court stated:

> [W]e do not think the plaintiffs can claim the property for condition broken, for there has been no total abandonment of it for seminary purposes . . . . True, [the trustees] conveyed away the property, and did acts quite inconsistent with the due performance of their duty. But they have retraced their steps, and are now using the property for the purpose designated by the grantors.

Id. at 142-43, 15 N.W. at 135. Though no forfeiture resulted, this case is a striking example of how rights of reentry can tie up the use of land. *See also* Board v. Nevada School Dist., 363 Mo. 328, 251 S.W.2d 20 (1952) (court found no breach, but also did not invalidate the condition).

Ignorance of a restriction may also be a valid defense to an action for forfeiture. Bonniwell v. Madison, 107 Iowa 85, 89, 77 N.W. 530, 532 (1898) (grantor's failure to tell grantee of a condition precluded enforcement upon breach); Rose v. Hawley, 118 N.Y. 502, 517, 23 N.E. 904, 906 (1890) (encroachment by grantee's building into a restricted area held not a breach because it was impossible for grantees to tell if a breach had occurred).

67. Board of Educ. v. Hunter, 190 Ga. 767, 768, 10 S.E.2d 749, 750 (1940).

68. *In re* School Dist. of Pittsburgh, 30 Pa. 566, 571, 244 A.2d 42, 45 (1968).

69. DeHart v. Ritenour Consol. School Dist., 663 S.W.2d 332, 335 (Mo. Ct. App. 1983); Ballantyne v. Nedrose Pub. School Dist., 177 N.W.2d 551, 553 (N.D. 1970).

70. McCullough v. Swifton Consol. School Dist., 202 Ark. 1074, 155 S.W.2d 353 (1941).

71. Board v. Nevada School Dist., 363 Mo. 328, 336-37, 251 S.W.2d 20, 25 (1952) (no classes for one year was a temporary cessation of school use, not an abandonment); Locke v. Union Graded School Dist., 185 Okla. 471, 472, 94 P.2d 547, 548 (1939) (noncontinuous use as a school due to small number of children nearby did not constitute abandonment).

72. In Mead v. Ballard, 74 U.S. 290 (1869), the grantor conveyed land to an institution on the condition that the institute "permanently" locate on the land, and expressly provided a reverter clause. The buildings burned down ten years after their construction. The grantors brought suit to enforce the reversion. The Supreme Court denied their claim, holding that "permanent" does not mean the grantee must build and rebuild, but only that the construction be done with an intention of permanence. *Id.* at 204. Therefore the grantees were owners in fee simple absolute. *Accord* Texas & Pac. Ry. v. Marshall, 136 U.S. 393 (1890) (railroad's contractual obligation to establish "permanent" terminal in city fulfilled when railroad constructs and operates terminal for eight years).

In DeHart v. Ritenour Consol. School Dist., 663 S.W.2d 332 (Mo. Ct. App. 1983), the court also implied that if the deed of land for school purposes included language such as "permanently locate,' [or] permanently establish,' " the grantees would have satisfied the condition when they established a school building in permanent form. According to the court, the condition did "not require perpetual use of the buildings for the stated purposes." *Id.* at 335.

73. Board of Comm'rs of Trego Co. v. Hays, 93 Kan. 829, 831-32, 145 P. 847, 848 (1915)

as permanently conditioning title on the continued existence of the building. In *Holbrook v. Board of Education*,[74] the conveyance to the school board required the board to erect and maintain a schoolhouse before the end of five years. Forty years later, the school board closed the school. The grantor's heirs brought an action to force the school to reconvey the land. In finding for the school district, the court noted that the deed did not require the school board to maintain the schoolhouse "forever" or "always."[75] It concluded that the grantor intended the condition of maintenance to last only five years.[76]

The *Holbrook* court's approach deliberately clouds the meaning of words that normally and unambiguously create a perpetuity. *Holbrook* illustrates the courts' general hostility toward defeasible fees,[77] and the lengths to which they will go to forestall a socially unconscionable forfeiture. Unfortunately, however, this approach leads to uncertainty in conveyancing and may deny the grantor's reasonable expectations.[78]

Moreover, when the conveyance clearly and unavoidably creates a condition of defeasance, the courts prefer to construe the grant to create an estate subject to a condition subsequent, rather than a determinable fee.[79] Accordingly, in *Priddy v. School District*,[80] a school district acquired a plot for "so long as [it is] used for a schoolhouse site."[81] The land was to revert if the grantees ever abandoned this use. Although the deed's language appeared to create a determinable fee,[82] the court found only a condition subsequent; the court never considered the possibility of

(grantees' erection and use of school for eleven years satisfied condition that county erect and maintain a school on the land; grantors lost all rights in land); *see also* McArdle v. School Dist. of Omaha, 179 Neb. 122, 130, 136 N.W.2d 422, 427 (1965) (provision requiring reversion of property if grantees ever "refuse" or "neglect" to use land for school purposes held not applicable when use discontinued by necessity).

74. 300 S.W.2d 566 (Ky. Ct. App. 1957).

75. *Id.* at 568.

76. *Id.*

77. *See supra* notes 17-22 and accompanying text.

78. Note, *supra* note 47, at 248.

79. Hagaman v. Board of Educ., 117 N.J. Super. 446, 453-54, 285 A.2d 63, 67 (1971) ("if a choice is between an estate in fee simple determinable and an estate on condition subsequent, the latter is preferred"). A condition subsequent is less objectionable because the forfeiture is not automatic. R. POWELL, POWELL ON REAL PROPERTY ¶ 188 (1966); *see* Bordwell, *supra* note 24, at 444.

80. 92 Okla. 254, 219 P. 141 (1923).

81. *Id.* at 255, 219 P. at 142.

82. The court construed the following limiting language as creating a condition subsequent: "As long as used for a schoolhouse site. If it is ever abandoned as a schoolhouse site, said land shall revert to [the grantor]." *Id.* at 255, 219 P. at 143 (emphasis added). For a discussion of language creating determinable fees and conditions subsequent, see *supra* note 11-16.

a determinable fee.[83]

A condition subsequent requires the holder of the right of entry to take affirmative action to enter and reclaim the property.[84] A court that is able to characterize a future interest as a right of entry may prevent a forfeiture by finding that the claim was not presented in a timely fashion. For example, the court may find a breach of the condition, but deny the forfeiture because the plaintiffs failed to assert their right of entry within the time provided by the statute of limitations.[85] In states without a statutory time limit on the exercise of a right of entry, a court may still require the holder of the right to act within a "reasonable time."[86]

An example of judicial imposition of a limitation period occured in *Faust v. Little Rock School District*.[87] In *Faust*, the deed required the city to use the land to erect a hospital, workhouse, or any other public building conducive to the public good.[88] The city conveyed the land to the local school district in 1870. When the school district decided to sell the property in the 1950's, heirs of the grantors alleged that the district's

83. The grant contained the proper words of limitation and an express reverter provision. Such language creates a determinable fee. *See supra* note 12 and accompanying text; *see also* Stewart v. Blain, 159 S.W. 928, 930-31 (Tex. 1913) (court ignored the language of the deed and adopted the "four corners" method of deriving intent from the deed as a whole).

In Mahrenholz v. County Bd. of School Trustees, 93 Ill. App. 3d 366, 417 N.E.2d 138 (1981), an Illinois court construed a grant, which contained the language "this land to be used for school purposes only; otherwise to revert to grantors herein," as creating a fee simple determinable. *Id.* at 369, 417 N.E.2d at 140. In Illinois, neither possibilities of reverter nor rights of reentry are transferable by deed or will. ILL. REV. STAT. ch. 30, § 37b (1983). The holder of the possibility of reverter conveyed all of the future interest in the land to the plaintiffs. The court denied the plaintiffs' claim of ownership because the school district had not yet broken the condition, and because the attempted conveyance of a reversionary interest was void. 93 Ill. App. 3d at 369, 417 N.E.2d at 141. Thus, where possibilities of reverter are inalienable, and the breach of the limitation occurs after a conveyance of the grantor's future interest, finding a determinable fee may frustrate an action in ejectment.

84. *See supra* note 16 and accompanying text.

85. *See, e.g.*, Sanford v. Sims, 192 Va. 644, 66 S.E.2d 495 (1951).

86. *See* Orleans Parish School Bd. v. Campbell, 241 La. 1029, 1045-46, 132 So. 2d 885, 891 (1961) (Hamlin, J., dissenting) ("our law does not favor the claims of those who have long slept on their rights, and who . . . suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief . . .") (quoting Lafitte, Dulfilhot Co. v. Godchaux, 35 La. Ann. 1161, 1163-64 (1898)); Metro Pk. Dist. v. Rigney, 65 Wash. 2d 788, 399 P.2d 516 (1965) (a delay of sixty years to reenter is unreasonable; the condition expired); Williams, *supra* note 5, at 177 n.64; Comment, *supra* note 20, at 262. *Cf.* Withers v. Pulaski, 415 S.W.2d 604 (Ky. 1967) (grantees abandon schoolhouse after one hundred years; court holds entry twenty-six days into new school year is too soon to show a school is not kept in the house, even though grantee has transferred children to new school).

87. 224 Ark. 761, 276 S.W.2d 59 (1955).

88. *Id.* at 762, 276 S.W.2d at 60.

decision breached the condition and sought to assert their right of entry. The court concluded instead that the 1870 conveyance from the city to the school district breached the condition. Therefore, the court held, the heirs' silence for over eighty years barred their right of entry.[89]

Similarly, courts rely on estoppel and waiver to deny a forfeiture.[90] A holder of a right of entry who induces the holder of the fee to breach the condition by assurances that he will take no action is estopped from asserting his right of entry.[91] Furthermore, when the holder of a right of entry tolerates continuing violation of a condition subsequent in silence, a court may deny forfeiture on the grounds that the holder waived his rights.[92]

C. Equitable Avoidance of Forfeiture

A court confronted with a clear expression of the grantor's intent to condition a plot of land may have some latitude to apply equitable principles in deciding the effect of the breach.[93] The courts have been hesitant, however, to invoke equity to deny the legal effect of a condition, particu-

89. *Id.* at 766, 276 S.W.2d at 64.

90. 1 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 204-07 (3d ed. 1939).

Neither estoppel nor waiver is available to deny the operation of a reversion. Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958); Goldstein, *supra* note 19, at 272; Williams, *supra* note 5, at 177; Note, *supra* note 47, at 247 n.6. Estoppel and waiver are unavailable in cases of reversions because the reversion occurs automatically upon breach of the limitation. *See supra* notes 12 & 13. Estoppel cannot occur because the grantees need not act to assert ownership upon a breach. For the same reason, the grantor cannot waive his interest by failing to act.

91. Goldstein, *supra* note 19, at 266. In addition, the courts will deny forfeiture when an act by the holder of the right of reentry prevents the grantee from complying with the condition. Williams, *supra* note 5, at 178.

92. Goldstein, *supra* note 19, at 265; Annot. 39 A.L.R.2d 1116 (1959). In Trustees of Common School Dist. v. Patrick, 102 S.W. 237 (Ky. 1907), the grantor conveyed land on condition that the school district maintain a schoolhouse thereon under threat of reversion to the grantor. The school district removed the schoolhouse with the donor's knowledge. The donor took no action to assert his right to possession. Seven years later, the district rebuilt the school on the property with the grantor's knowledge. Upon suit by the district to clear title, the court held that the grantor waived his right to compel forfeiture when he allowed the district to rebuild the school without asserting his interest. *Id.* at 238.

The use of waiver and estoppel is more an application of contract than property law. Comment, *supra* note 20, at 263.

93. *See infra* notes 97-105 and accompanying text. At least one commentator has argued that equitable principles have no application to determinable fees. Williams, *supra* note 5, at 172 (automatic termination of determinable fee precludes application of equitable principles). *But see* Goldstein, *supra* note 19, at 271-75 (any technical differences between determinable fees and fees on a condition subsequent that might preclude the application of equitable principles to determinable fees are a "heavy dose of nonsense").

larly if no evidence points towards waiver or estoppel.[94] Courts seeking to impose equitable considerations must overcome centuries of precedent[95] and the judiciary's traditional reluctance to substitute its own judgment for the grantor's intent.[96]

A few courts, however, have reconsidered defeasible fees in light of equitable factors. These courts have reasoned that a change in conditions may make specific enforcement of the condition inequitable, or even void the entire limitation. The California Court of Appeals was the first court to find that changed conditions nullified the limitations of the grantee's estate. In *Letteau v. Ellis*,[97] the grantor placed a condition in the deed forbidding blacks from owning or occupying the property. The court refused to grant a forfeiture despite a clear breach of the condition. Instead, the court held the condition invalid and unenforceable because "public policy"[98] demanded that individual property rights yield to the common good. The Letteau court expressly employed the public policy doctrine to accomplish what other courts had done indirectly through constructional devices.[99] This case established principles that courts could apply in cases involving grants to schools.[100] Courts, however,

94. Bostick, *supra* note 29, at 1090. *See supra* notes 90-92 and accompanying text (discussing estoppel and waiver). Two possible explanations for this judicial hesitance are that the widely varying statutes hinder development of judicial doctrine, and that courts doubt the propriety of substituting their judgment for the original conveyors'. Bostick, *supra* note 29, at 1090.

95. Comment, *supra* note 20, at 248.

96. Bostick, *supra* note 29, at 1090; Walsh, *supra* note 22, at 193.

97. 122 Cal. App. 584, 10 P.2d 496 (1932).

98. The court stated:

> We find it needless to follow appellant's arguments on the technical rules and distinctions made between conditions, covenants, and mere restrictions . . . . A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights. The only obstacle met has been . . . the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly labeled as property rights by a process of academic relation are now considered merely personal and have been subjected to the common good.

Id. at 588-89, 10 P.2d at 497.

99. "A frank approach is substituted for the sophistry entailed in calling a condition a covenant, a trust or an easement." Goldstein, *supra* note 19, at 271.

Interestingly, the most innovative efforts to protect the grantee from forfeitures have come from California, whose growing population has put the greatest pressure on its land resources and has created the greatest need for flexibility in land use. W. LEACH & J. LOGAN, *supra* note 12, at 69 n.31.

100. In *Letteau*, the court held that evolving social conscience and public policy intervened to negate a clear expression of the grantor's intent. 122 Cal. App. at 588-89, 10 P.2d at 497. Similarly, public policy argues against inequitable forfeitures in school situations. This is particularly true if the grantee has complied with the condition for a long time, has erected valuable improvements on the land, and is compelled by declining enrollments to close the school. *See* DeHart v. Ritenour

seem loath to apply this approach.

The courts have adopted the equitable doctrine of changed conditions to deny the forfeiture of school property in only one instance.[101] In *McArdle v. School District of Omaha*,[102] the grantor conveyed land to the school district on condition that the district erect a schoolhouse on the land. The deed expressly provided for reversion if the district ceased the prescribed use of the land.[103] The district built a school, which it used continuously for ninety-seven years until a new highway cut off student access to the site and forced the district to close the school. The grantor's heirs sued for reversion. The court denied the plaintiffs' claim on legal and equitable grounds. First, the court determined that the district had not breached the condition because the words of the reversionary clause—should the school board ever "refuse" or "neglect" to operate a school on the site—contemplated a cessation by design, not by necessity.[104] Then, rather than leave the community with an empty school under a constant threat of forfeiture, the court also invalidated the whole reversionary clause on equitable grounds. The court held that the district's extended compliance and the changed conditions rendered enforcement of the provision inequitable.[105]

Consol. School Dist., 663 S.W.2d 332 (Mo. Ct. App. 1983); *supra* notes 2 & 3 (discussing *DeHart*). The harshness of this increases when the forfeiture merely creates nearly worthless fractional shares in descendants far removed from the grantor. *See* Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N.E.2d 922 (1950), *supra* note 21 (discussing *Brown*). Just as fairness and public policy overcame the court's inclination to respect the grantor's intent in *Letteau*, so should they mandate a denial of forefeiture of school property that threatens the public interest.

101. In several cases, mostly in California, sufficiently changed conditions have worked to nullify reversionary interests and prevent forfeiture. Most of these cases, however, concerned conditions prohibiting the sale or consumption of alcoholic beverages. The courts in most cases combined the doctrine of changed circumstances with a finding of waiver due to inconsistent enforcement of the condition. *See* Townsend v. Allen, 114 Cal. App. 2d 291, 250 P.2d 292 (1952); Alexander v. Title Ins. & Trust Co., 48 Cal. App. 2d 488, 119 P.2d 992 (1941); Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937); Bernstein v. Minney, 96 Cal. App. 597, 274 P. 614 (1929); Cole v. Colorado Springs Co., 152 Colo. 196, 381 P.2d 13 (1963).

Other courts have noted, in dicta, the availability of the doctrine of changed conditions to prevent enforcement of a right of reentry. MacDonald Properties v. Bel-Air Country Club, 72 Cal. App. 3d 693, 140 Cal. Rptr. 367 (1977) (changed conditions made enforcement of building restriction condition inequitable); Arrowhead Mut. Service Co. v. Faust, 260 Cal. App. 2d 567, 67 Cal. Rptr. 325 (1968) (condition subsequent limiting land use to single family residences enforceable as surrounding changes in the community were minimal).

102. 179 Neb. 122, 136 N.W.2d 422 (1965).

103. *Id.* at 124, 136 N.W.2d at 424.

104. *Id.*

105. *Id.* at 128, 136 N.W.2d at 428.

The trust doctrine of *cy pres* provides a useful analogy to the doctrine of changed circumstances.

Few other courts have used equitable considerations to deny a forfeiture.[106] Perhaps because the courts have been unable or unwilling[107] to control rights of entry and possibilities of reverter, state legislatures have begun to limit the use and effect of defeasible fees.

D. Legislative Response

A statutory scheme can create some predictability in the enforcement of defeasible fees while mitigating the undesirable effects of possibilities of reverter and rights of entry.[108] At least fifteen states have statutes specifically regulating defeasible fees.[109] Generally, these statutes apply four separate strategies, usually in some combination. Under the first approach, the statutes declare that conditions which provide no benefit to

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When compliance with the purpose of a charitable trust becomes impossible, inpracticable, or illegal due to a change of circumstances occuring after the trust is established, courts may redirect the trust's proceeds to another charitable beneficiary in order to effectuate the trust's general charitable purpose. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). *See* Board of Educ. v. Rockford, 372 Ill. 442, 451, 24 N.E.2d 366, 371 (1939); Estate of Rood, 41 Mich. App. 405, 415-17, 200 N.W.2d 728, 734-35 (1972).

Courts have used *cy pres* and the relaxed doctrine of "administrative deviation" to continue charitable trusts in favor of educational institutions despite their direct violation of trust restrictions. *Id.* at 449-54, 24 N.E.2d at 370-72 (court allowed city to sell property deeded in trust when, after eighty years of compliance with trust restrictions, shifting population and obsolescence made continued operation of a school on the property impracticable); *see also* Dartmouth College v. City of Quincy, 357 Mass. 521, 529-34, 258 N.E.2d 745, 751-53 (1970) (*cy pres* not applicable because charitable purpose not literally impossible, but "administrative deviation" doctrine permits trustees to avoid trust restrictions); RESTATEMENT (SECOND) OF TRUSTS § 381 (1959) (administrative deviation doctrine permits a trustee to violate trust's terms when unforeseen circumstances substantially impair the purpose of the trust but do not render performance impossible).

106. In Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist., 30 Cal. App. 3d 579, 106 Cal. Rptr. 467 (1973), the court invoked equitable considerations to convert a school district's defeasible fee to a fee simple absolute. The court noted that the district had operated the school for 78 years, and had invested substantial public funds in the building. The court concluded that it would be unreasonable to assume the school district owned anything less than a fee simple absolute. *Id.* at 586, 106 Cal. Rptr. at 471.

107. Judicial attempts to provide an ultimate solution to the problems created by defeasible fees have been unprincipled and inconsistent. R. POWELL, POWELL ON REAL PROPERTY ¶ 188 (1968); Chaffin, *supra* note 20, at 304-05. *See supra* notes 43-106.

108. Simes, *supra* note 5, at 4.

109. CALIF. CIV. CODE §§ 885.020-.070 (West 1982); CONN. GEN. STAT. §§ 45-97 to 98 (1981); FLA. STAT. ANN. § 689.18 (West 1969); ILL. ANN. STAT. ch. 30, §§ 37e, 37f (Smith-Hurd 1983); IOWA CODE ANN. §§ 614.24-.25 (West Supp. 1983); KY. REV. STAT. ANN. §§ 381.218-.223 (Baldwin 1983); ME. REV. STAT. ANN. tit. 33, §§ 103-06 (West 1983); MD. REAL PROP. CODE ANN. §§ 6-101-105 (1983); MASS. GEN. LAWS ANN. ch. 184, § 3 and ch. 260, § 31A (West 1983); MICH. STAT. ANN. §§ 26.46, .49(11)-.49(15) (Callaghan 1984); MINN. STAT. ANN. § 500.20 (West Supp. 1984); NEB. REV. STAT. §§ 76-2,100-2,105 (1978); OHIO REV. CODE ANN. §§ 5301.49-.51 (Page 1980); OR. REV. STAT. §§ 105.770-.774 (1983); R.I. GEN. LAWS § 34-4-19-24 (Supp. 1983).

the grantor are unenforceable.[110] The second type of provision imposes specific time limits within which the defeasance must occur, and extinguishes the future interest thereafter.[111] The third also limits the duration of reversionary interests, but permits the holder of the interest to preserve it by periodic rerecording.[112] The fourth combines the Rule Against Perpetuities and an absolute time limit by converting to an absolute fee any defeasible fee whose contingency: (1) can occur beyond the period of the Rule, and (2) does not actually occur within the time limit.[113]

These statutes seek to eliminate stale restrictions on land while permitting the grantor some latitude to control the ultimate use of his property. Several state statutes, however, exclude public schools from the benefit of these improvements. California,[114] Connecticut,[115] Florida,[116] Kentucky,[117] Michigan,[118] Oregon,[119] and Rhode Island[120] exempt convey-

110. CALIF. CIV. CODE § 885.040 (restriction expires if it confers no substantial benefit on the holder, or if enforcement would not serve the purpose of the restriction, or due to changed conditions); MICH. STAT.ANN. § 26.46 (Callaghan 1974) (conditions which do not provide substantial benefit to the holder of the right to enforce the condition are unenforceable); MINN. STAT.ANN. § 500.20 (West Supp. 1984) (conditions which provide no or nominal benefit to the grantor are not a basis for forfeiture).

111. *See, e.g.*, ILL. REV. STAT. ch. 30, § 37e (1983) (forty-year limit applied prospectively); NEB. REV. STAT. §§ 76-2,102-2,105 (1978) (thirty-year period of validity applied both prospectively and retroactively).

112. *See, e.g.*, CALIF. CIV. CODE § 885.030 (West 1982) (rerecording required every thirty years to preserve interest); N.Y. REAL PROP. LAW § 345 (McKinney 1968) (future interest expires automatically after thirty years unless holder rerecords interest between twenty-seven and thirty years after creation and thereafter between nine and ten years after previous rerecording).

113. *See, e.g.*, CONN. GEN. STAT. §§ 45-97-98 (1981); MICH. STAT. ANN. §§ 26.49(12) & .49(14) (Callaghan 1984). Michigan's statute, however, allows extension of the time limit by periodic rerecording. *Id.* § 26.49(15).

114. CALIF. CIV. CODE § 885.040 (West 1982) (exempts grants made for no consideration).

115. CONN. GEN. STAT. § 45-9 (1981) (exempts conveyances for public purposes).

116. FLA. STAT. ANN. § 689.18(5) (West 1969) (exempts any conveyances made, inter alia, to any educational corporation or association).

117. KY. REV. STAT. ANN. §§ 381.219-.222 (Baldwin 1983) (provisions of the act do not apply to fees for public, charitable, or religious purposes).

118. MICH. STAT. ANN. § 26.1191 (Callaghan 1982) (grants for educational purposes are not invalid for indefiniteness or for contravening the Rule Against Perpetuities).

Michigan, however, allows the holder of the fee to petition to have the court remove the condition of the grant whenever the use of the property for school purposes becomes impossible or impractical to fulfill by reason of changed conditions. MICH. STAT. ANN. § 26.1211-.1213 (Callaghan 1982).

119. OR. REV. STAT. § 105.774 (1983) (exempts grants made in favor of educational corporations or associations).

120. R.I. GEN. LAWS § 34-4-20 (Supp. 1984) (exempts grants, gifts or devises for public purposes).

ances made for charitable purposes, including those made to schools, from their restrictions on conditional fees. Legislators employ this exemption to encourage grants to charitable causes.[121] Restrictive covenants and charitable trusts, however, offer a grantor alternative methods of achieving this purpose;[122] therefore it is unlikely that limiting the operation of defeasible fees would deter charitable giving. These exemptions arose in the nineteenth century, when the effect of conditional fees on the general welfare was either unknown or ignored.[123] Modern circumstances[124] suggest that legislatures should eliminate these exemptions.

Commentators have proposed other statutory solutions.[125] One commentator has suggested applying the Rule Against Perpetuities to possibilities of reverter and rights of entry.[126] The Rule, however, does not provide a perfect solution. It would allow the grantor to tie the term of the condition to a life in being plus twenty-one years. Thus, the limitation may last one hundred years or more, which may be much longer than the condition's usefulness.[127] Additional problems appear in attempting to apply the Rule retroactively. Before the statute was enacted a grantor would not know to tie the condition to a life in being. If there is no life in being at the creation of the interest, the interest has a maximum life of twenty-one years, which is a rather short upper limit.[128] Fi-

121. Cook, *supra* note 30, at 521.

122. *See* Bostick, *supra* note 29, at 1099.

123. Cook, *supra* note 30, at 522.

124. Gray argued that courts should place similar restrictions on defeasible fees and charitable trusts:

> As an original question it would seem to have been well if determinable charitable trusts had been inhibited as well as determinable fees, and as when a man gives property to A in fee, he must give it to him forever, so when he gives it in charity he ought to be obliged to give it forever. But the law seems settled otherwise.

J. GRAY, THE RULE AGAINST PERPETUITIES § 603i (3d ed. 1915). *See supra* notes 1-4 and accompanying text.

125. *See* L. SIMES & C. TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 201-17 (1960). The authors discuss several existing and proposed statutory schemes. Their Model Act, *id.* at 214-16, incorporates a thirty year limit on possibilities of reverter and rights of reentry coupled with a recording provision to preserve these interests when they otherwise would become invalid. *Cf.* Williams, *supra* note 5, at 181 (urging a more "efficient" judicial solution).

126. Walsh, *supra* note 22, at 194-96.

127. Chaffin, *supra* note 20, at 321.

128. L. SIMES & C. TAYLOR, *supra* note 125, at 204.

Thirty years is the usual outside limit on possibilities of reverter and rights of reentry. Legislators select it because it theoretically equals the period of one generation. Then the number of the grantor's or devisor's heirs will not be so great that obtaining releases becomes highly impractical. Note,

nally, the uncertainty surrounding the period of the Rule would often require litigation to establish title.

III. A PROPOSED SOLUTION

Solving the problem faced by school districts that hold land subject to conditions does not require abolition of the fee simple determinable or the fee upon a condition subsequent. The conditions and limitations imposed by these defeasible fees may serve useful purposes.[129] If a community has constructed a school at great expense and has used it for many years, however, mandatory forfeiture is inequitable. The courts are not impotent to remedy such a situation,[130] but the availability of judicial relief is too uncertain.[131] Even if the judiciary were to adopt the equitable principles employed by the *Letteau*[132] and *McArdle*[133] courts, relief would be available only upon a showing of sufficiently changed circumstances.[134] This approach in turn raises the question whether declining enrollments and lower budgets constitute changed circumstances.

The answer to the disorganization at the court level obviously lies in legislative action. Courts have generally upheld the constitutionality of retroactive legislation.[135] Thus, legislatures can act to remedy the effects

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A Proposed Statutory Limitation on the Duration of (1) Possibilities of Reverter, (2) Conditions Subsequent, and (3) Equitable Restrictions, 15 WIS. L. REV. 121, 124 (1940).

129. "It cannot be asserted that conditions subsequent and determinable are *mala per se.* In many cases, and perhaps in most cases, they may serve proper social and economic ends." Williams, *supra* note 5, at 180. For a discussion of the salutory uses of defeasible fees, see Brake, *supra* note 5. For some examples of purely whimsical and capricious conditions, see Scott, *Control of Property by the Dead,* 65 U. PA. L. REV. 527, 535-37 (1917).

130. *See supra* notes 42-107 and accompanying text.

131. *See supra* notes 58-59 & 78 and accompanying text.

132. *See supra* notes 97-99 and accompanying text.

133. *See supra* notes 102-05 and accompanying text.

134. *See* MacDonald Properties v. Bel-Air Country Club, 72 Cal. App. 3d 693, 140 Cal. Rptr. 367 (1977) (insufficient showing of changed conditions to make inequitable enforcement of building restriction condition); Arrowhead Mut. Service Co. v. Faust, 260 Cal. App. 2d 567, 67 Cal. Rptr. 325 (1968) (condition subsequent limiting land use to single family residences enforceable as surrounding changes in the community were minimal).

135. Blackert v. Dugosh, 12 Ill. 2d 171, 145 N.E.2d 606 (1957) (reverter statute held constitutional as applied to a possibility of reverter in land originally conveyed for school purposes); Cline v. Johnson Co. Bd. of Educ., 548 S.W.2d 507 (Ky. 1977) (upholding the constitutionality of Kentucky's retroactive reverter act); Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904 (1971) (upheld the retroactive provision of the state's reverter statute against claims that it violated the due process and contract clauses). *But see* Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954) (retroactive portion of Florida's reverter statute declared unconstitutional as impairing the obligations of a contract).

of preexisting defeasible fees. Legislation restricting defeasible fees must extinguish conditions or limitations after a stated term of years.[136] This approach would solve the basic problem of uncertainty while still giving some consideration to the desires of the grantor.[137] Statutory recording acts[138] are inadequate, because rerecording can extend an interest into perpetuity.[139] Finally, the statute should not exempt conveyances to schools, because the community requires the same relief from the effects of conditions of defeasance as a private party.

A statutory limit on the duration of reversions and entry rights, if coupled with a judicial application of equitable "change of conditions" principles,[140] would encourage the use of other less onerous devices for conditioning grants for schools.[141] This solution would properly balance the individual's desire to condition a donation and the need to protect important public resources.

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136. *See supra* notes 109-13 and accompanying text. Not only does a specific time limit eliminate much of the litigation otherwise necessary to clear a title, but it also eases the responsibilities of the conveyancer by limiting his title search for reversionary interests to a clearly established maximum number of years. *Report of the Committee on Improvement of Conveyancing and Recording Practices,* A.B.A. SEC. REAL PROP., PROB. & TR. LAW 75 (1957).

137. *Id.* at 78.

138. *See supra* note 112 and accompanying text.

139. *See Report, supra* note 136, at 80.

140. *See supra* notes 97-105 and accompanying text.

141. *See* Bostick, *supra* note 29, at 1099; *supra* note 122 and accompanying text.