

An aunt owned a commercial property consisting of a one-story building rented to various retail stores and a large parking lot. Two years ago, the aunt died and left the property to her nephew for life, with remainder to her godson, his heirs and assigns. The devise of the property was made subject to any mortgage on the property in effect at the time of the aunt's death.

A year before her death, the aunt mortgaged the property to secure a loan of \$150,000. The entire principal of the mortgage remained outstanding when she died. As a result, the net annual income from the property was reduced not only by real estate taxes and regular maintenance costs, but also by the substantial mortgage interest payments due each month.

A commercial real estate developer recently proposed to purchase the property and pay off the mortgage in order to demolish the existing building and construct a 30-story office building. The nephew was willing to accept the developer's offer. However, the godson refused the offer even though he, as the remainderman, paid the principal portion of each monthly mortgage payment. The godson wanted to convert the property into a public park when he became entitled to possession.

When the developer realized that the godson would not change his mind, it modified its proposal to a purchase of the nephew's life estate. When the godson learned that the nephew had agreed to the developer's modified proposal, the godson brought an appropriate action against them to enjoin their carrying it out.

What is the godson's best argument?

- A. Continued existence of the one-story building is more in harmony with the ultimate use as a park than the proposed change in use.
- B. The developer cannot purchase the nephew's life estate, because life estates are not assignable.
- C. The godson's payment of the mortgage principal has subrogated him to the nephew's rights as a life tenant and bars the nephew's assignment of the life estate without the godson's consent.
- D. The proposed demolition of the building constitutes waste.

## Explanation:

### Life tenant's duties

<b>Duty to pay current charges</b>	Life tenant must pay all current charges due during life tenancy (eg, property taxes, mortgage interest) up to financial benefit received from property
<b>Duty to prevent waste</b>	Life tenant must prevent affirmative waste (ie, voluntary waste), permissive waste & ameliorative waste
<b>Duty to make ordinary repairs</b>	Life tenant must make reasonable repairs to preserve property

A **life estate** is a present possessory interest that terminates on the death of an individual. This interest is freely transferable (**Choice B**). But since it is followed by a future interest that will become possessory once the life estate terminates, the life tenant has a **duty to prevent waste**. There are **three types** of waste:

**Affirmative waste** – changes that *decrease* the property's value

**Permissive waste** – deterioration caused by neglect or the failure to reasonably protect the property

**Ameliorative waste** – changes that **increase the property's value** but are **not necessary** to make reasonable use of the property amid substantial and permanent changes in the local area

The future interest holder (the godson) may inspect the land for waste and may seek damages or an injunction to prevent waste. This ensures that the life tenant (the nephew) **delivers the property** to the future interest holder in essentially the **same condition** it was in when the life tenant took possession.

Here, the demolition of the building would change the condition of the property. Although the construction of a 30-story office building would likely increase the property value, there is no indication that this change is necessary. Therefore, the godson's best argument is that the proposed demolition constitutes waste.

**(Choice A)** A life tenant can use the property in any manner that does not constitute waste—even if that use affects the future interest holder's plans. Therefore, the godson's plan to use the property as a park is irrelevant.

**(Choice C)** The future interest holder is responsible for the mortgage principal, but this does not bar the life tenant from assigning the life estate or allow the future interest holder to subrogate the life tenant's rights. Instead, **subrogation** allows a third party who fully

pays off a senior mortgage with no knowledge of junior interests to take that senior mortgage's priority.

**Educational objective:**

A life tenant has a duty to prevent waste so that the property can be delivered in essentially the same condition it was in when the life tenant took possession.

**References**

Restatement (First) of Property § 140 (Am. Law Inst. 1936) (life tenant's duty to prevent waste).

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