

A restaurateur's friend owned land that included a lake within its boundaries. In a writing, the friend granted the restaurateur a profit that gave her the right to access the lake for the purpose of taking fish from it. For nine years, the restaurateur took fish from the lake and served them in various dishes at her restaurant. During the tenth year, the restaurateur entered negotiations to sell the restaurant to a chef who planned to continue operating the restaurant. The terms of the profit did not address its transferability.

Which of the following would be most important in determining whether the restaurateur could assign her right to remove fish from the lake to the chef as part of the sale of the restaurant?

- A. Whether the friend and the restaurateur intended the right to be personal to the restaurateur.
- B. Whether the friend granted others the right to take fish from the lake.
- C. Whether the friend retained the right to take fish from the lake for himself.
- D. Whether the restaurateur recorded the right.

Explanation:

Profit

(right to enter another's land & remove natural resources)

	Characteristics	Transferability	Apportionability
Exclusive	Unlimited & exclusive right	Can be transferred unless profit is personal or contrary to parties' intent	If transferable, can be divided unless contrary to parties' intent or burden on servient estate unreasonably increased
Nonexclusive	Right limited by quantity, use, or time OR shared with another		

A **profit** (ie, profit à prendre) is a nonpossessory right to enter another's land and remove specific natural resources (eg, oil, gas, minerals, timber, fish). A profit may generally be **transferred (eg, assigned) unless** the profit is **personal** or transfer would be **contrary to the intent of the parties** creating the profit. A profit is personal if the relationship of the parties or other circumstances indicate that it was not intended to be transferable.

This means that the restauranteur's ability to assign her right to remove fish from the lake to the chef turns on whether the friend and restauranteur intended the profit to be personal to the restauranteur (eg, because they were friends). If so, then the restauranteur *cannot* assign the profit to the chef. But if the profit was intended to benefit the restauranteur's business, then the restauranteur *can* assign the profit to the chef purchasing her restaurant.

(Choices B & C) When someone else—including the owner of the servient (burdened) estate—enjoys the same right as the profit holder, the profit is nonexclusive. The nonexclusivity of a profit may affect whether the profit holder can divide the profit among other persons, and it may be a factor in determining whether the parties intended the profit to be personal. But it is not itself determinative of whether the profit may be transferred to another.

(Choice D) Recording the profit would protect the restauranteur if the profit is exclusive and the friend subsequently grants a similar right to a third party. However, this would not preclude the profit from being considered personal to the restauranteur and therefore nontransferable.

Educational objective:

A profit—ie, nonpossessory right to enter another's land and remove specific natural resources—may generally be transferred unless the profit is personal or transfer would be contrary to the intent of the parties creating the profit.

References

Restatement (Third) of Property (Servitudes) § 4.6 (Am. Law Inst. 2000) (transferability of servitude benefits).

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