

A man devised land "to my brother and his heirs until my daughter reaches the age of 25, and then to my daughter and her heirs." The daughter was three years old at the time of her father's death.

The applicable jurisdiction continues to adhere to the common law Rule Against Perpetuities.

Which of the following is the most accurate statement of the daughter's interest in the land?

- A. She has a possibility of reverter.
- B. She has a remainder interest subject to complete divestment.
- C. She has a shifting executory interest.
- D. She has no interest in the land because of the Rule Against Perpetuities.

## Explanation:

### Fee simple estates

Type		Language	Future interest
Indefeasible	<b>Fee simple absolute</b>	"To A" "To A and his heirs"	None
Defeasible	<b>Fee simple determinable</b>	Durational "so long as" "during" "until"	<i>Grantor's</i> possibility of reverter <i>Third party's</i>
	<b>Fee simple subject to condition subsequent</b>	Conditional "but if" "provided that" "unless"	executory interest <b>(fee simple subject to executory limitation)</b> <i>Grantor's</i> right of entry

A **defeasible fee** has the potential to last forever but can be cut short if a specified event or condition occurs. One type of defeasible fee is a **fee simple determinable** (FSD), which is created with **durational language** (eg, "to my brother and his heirs *until* my daughter reaches the age of 25"). The **future interest** that follows an FSD is either:

a **possibility of reverter** – in which case, the estate automatically **reverts back to the grantor** when the specified event occurs (presumed if not expressly stated) *or* an **executory interest** – in which case, the estate automatically **passes to a third party** when the stated event occurs (eg, "then to my daughter and her heirs").\*

Therefore, pursuant to the man's devise, the daughter has an executory interest (**Choice A**). There are two types of executory interests:

**Shifting** – cuts short (or divests) an estate held by a grantee, such that the estate **shifts from the grantee** to the executory-interest holder

**Springing** – cuts short an estate held by a grantor, such that the estate **springs from the grantor** to the executory-interest holder

Since the daughter's interest will cut short the brother's (grantee's) interest in the land, she has a shifting executory interest.

\*An FSD followed by an executory limitation is sometimes referred to as a fee simple determinable subject to an executory limitation.

**(Choice B)** A remainder is a future interest created in a grantee that is capable of becoming a present estate upon the natural expiration of a *life estate*, *fee tail*, or *term of years* (not seen here). The remainder is subject to complete divestment if the occurrence of a condition will eliminate the interest (eg, "then to A, but if A has no children then to B").

**(Choice D)** Under the Rule Against Perpetuities (RAP), *certain future interests* are void if they could vest more than 21 years after the death of some relevant person alive when the interest was created. But here, the daughter's executory interest does *not* violate RAP because she will turn 25 (or not) within her own lifetime.

**Educational objective:**

A third-party grantee's executory interest is *shifting* if it divests another *grantee's* estate and *springing* if it divests the *grantor's* estate.

**References**

Restatement (First) of Property § 44 (Am. Law Inst. 1936) (fee simple determinable).

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