

Real Property

Session 05

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Present and Future Interests

- Future Interests Created in Third Parties
  - Remainders
    - Vested Remainder (VR)
    - Contingent Remainder (CR)
    - Vested Remainder Subject to Open (VRSO)
    - Vested Remainder Subject to Total Divestment (VRSTD)
  - Executory Interests (EI)
    - Shifting Executory Interest (Shifting EI)
    - Springing Executory Interest (Springing EI)



Present and Future Interests

- Fundamental Rule For Remainders
  - Any future interest that can **only** come into present possession immediately upon the "natural" termination of the prior interest must be a remainder (and cannot be an executory interest).
  - The three types of present interests that terminate "naturally" (and, therefore, **always** are followed by a remainder), are the LE, TY, and FT.



Present and Future Interests

- Fundamental Rule For Executory Interests
  - A future interest that follow a prior interest that could terminate other than "naturally" must be an executory interest (and cannot be a remainder).
  - Examples include the FSSEL, determinable FT, LE, and TY



Present and Future Interests

- Vested Remainders (VR)
  - Example
    - "to A for life, then to B and his heirs"
      - In this grant, A has a LE
      - B has a VR in FSA
      - B's heirs have nothing
  - For a remainder to be a VR, the following three requirements must be satisfied:
    1. At least one of the future remainder holders (B) must be **born, alive, and ascertainable**.
    2. There are no preconditions that must be satisfied before B's interest can come into present possession, **or all preconditions have been satisfied**; and
    3. There are no subsequent events that may divest B of his interest, either partially or totally, before B comes into present possession.
  - A VR is **alienable, devisable, and inheritable.**



Present and Future Interests

- Contingent Remainder (CR)
  - B has a CR if one or both of the requirements (1) and (2) of a VR are not satisfied.
  - Example
    - "to A for life, then to B's children and their heirs"
    - What if B has no children at the time the grant is made?
    - B's (yet to be born) children have a CR



Present and Future Interests

- Vested Remainder Subject to Open(VRSO)
  - B has a VRSO if the class of future interest holders may increase in number before the future interest comes into present possession.
  - Example
    - "to A for life, remainder to B's children and their heirs"
    - What if B has the possibility of more children at the time the grant is made?
    - B's children (born and yet to be born) have a VRSO
  - When does VRSO end?
    - At B's death (no more children can issue) – then the children have a VR
    - At A's death – the VRSO becomes a VR and the class members instantaneously **come into present possession** of the property.
    - B's future children will not share in the property ownership.



Present and Future Interests

- Vested Remainder Subject To Total Divestment (VRSTD)
  - Created when the holder of the future interest (B) has satisfied the first two criteria for a VR, but the grant contains a condition subsequent that may totally divest B of the remainder interest **before** B comes into present possession of the property.
  - Example
    - "to A for life, then to B and his heirs, but if B fails to attain age 21, then to C and his heirs".
  - The trigger here is the divesting condition (B dies before turning 21) that will sweep away B's remainder and give it instead to C.



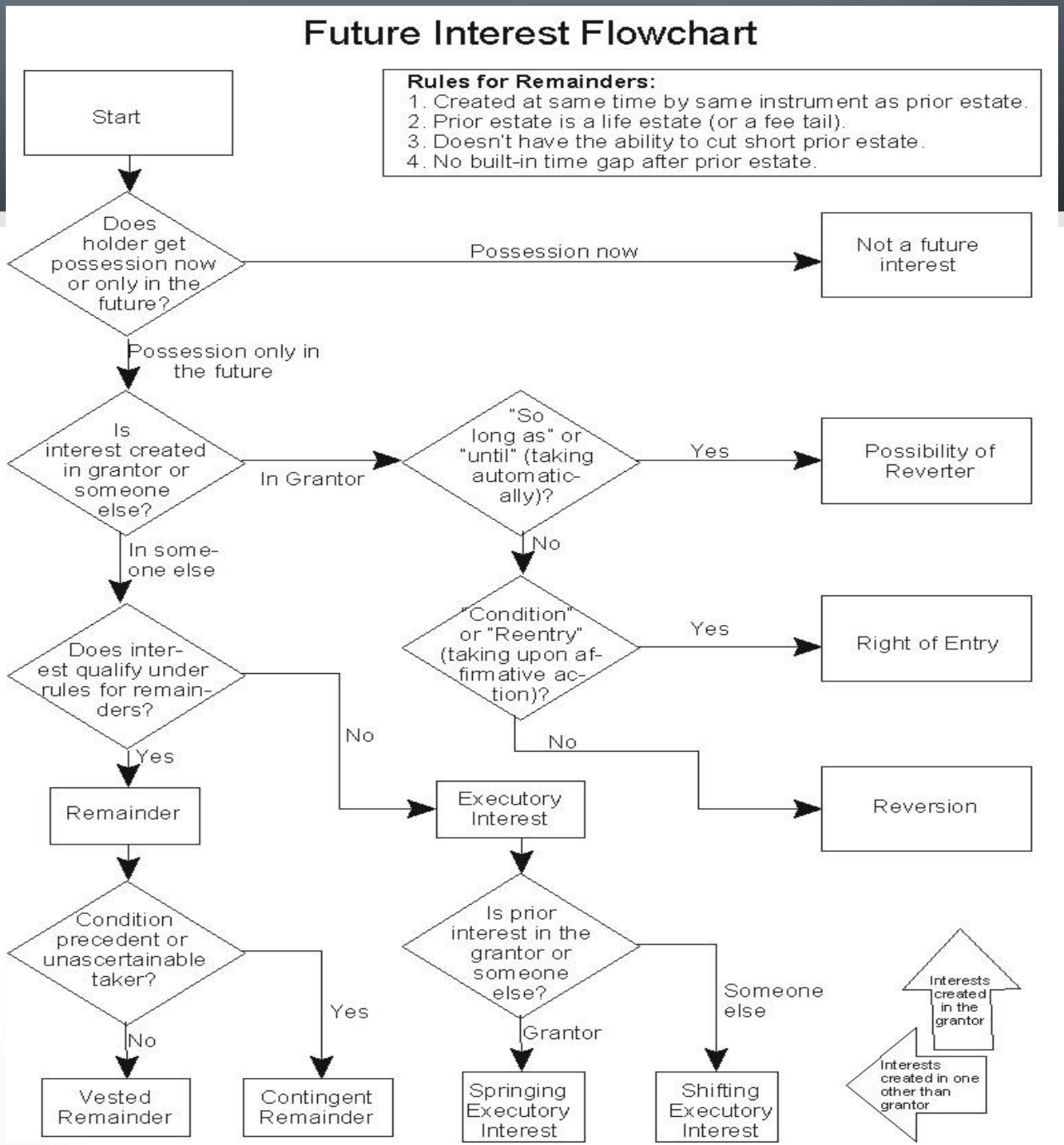
Present and Future Interests

- Executory Interests
  - A shifting executory interest comes into present possession by divesting (before its natural termination) the prior interest of **another third party.**
    - Example
      - "to A and her heirs until the property is no longer used as a farm, but if the property ever ceases to be used as a farm, then to B and her heirs"
  - A springing executory interest occurs when the **grantor O holds present possession of the property**, but B will come into possession upon the occurrenceof a specified event or condition in the future.
    - Example
      - "$50,000 to B when B graduates from National Paralegal College"



Future Interest Flowchart





Present and Future Interests
Checklist

- Determine When The Grant Becomes Effective
  - Grant Made While Grantor Is Alive?
  - Grant Made Under A Will?
- Classify The Present And Future Interests
  - Present Defeasible Fee Simple Held By A; Future Interest Held By Third Party B
    - A holds a FSSEL
    - B hold a shifting EI



Present and Future Interests
Checklist

- Classify The Present And Future Interests (cont'd)
  - Present Defeasible Fee Simple Held By A; Future Interest Held By Third Party B
    - A holds a FSSEL
    - B hold a shifting EI
  - Present Defeasible Fee Simple Held By A; Future Interest (Express Or Implied) Held By The Grantor O
    - O's retained interest is automatic
      - FSD and PR
    - Do the words of the grant indicate that O must act (enter or terminate) to reclaim present possession?
      - FSSCS and RE



Present and Future Interests
Checklist

- Classify The Present And Future Interests (cont'd)
  - Present LE, TY, Or FT Held By A; Future Interest (Express Or Implied) Held By Grantor O
    - A's LE/TY/FT Can Only Terminate Naturally
      - O holds a REV
    - A's LE/TY/FT Interest Can Be Cut Off Short Of A "Natural" Termination.
      - A's present interest is a determinable LE/TY/FT
      - O holds a REV



Present and Future Interests
Checklist

- Classify The Present And Future Interests (cont'd)
  - Present LE, TY, or FT Held By A; Future Interest Held By Third Party B
    - A's LE/TY/FT Can Only Terminate Naturally
      - B holds a remainder
    - A's LE/TY/FT Can Be Cut Off Short Of A "Natural" Termination
      - A holds a determinable LE/TY/FT
      - B holds a shifting EI
      - If B's shifting EI is of less than FSA duration, then the grantor O holds a REV



Present and Future Interests
Checklist

- Classify The Present And Future Interests (cont'd)
  - Present Interest Held By The Grantor O; Future Interest Held By B
    - O holds present possession subject to a springing EI
    - B holds a springing EI



Present and Future Interests
Checklist

- Determine The Type Of The First Remainder And Any Subsequent Future Interests
  - First Remainder Is Held By An Individual
    - Is The Individual Who Holds The First Remainder Born, Alive, and Ascertainable?
      - If not, the first remainder is a CR
    - Is There A Precondition That Must Be Satisfied Before The Individual Can Take Present Possession Of The Property?
      - If yes, but the precondition has not been satisfied,
        - The first remainder is a CR
      - If yes, but the precondition has been satisfied,
        - The individual has some type of vested remainder
      - If there is no precondition,
        - The individual has some type of vested remainder
    - Can The Individual's Vested Remainder Be Divested By A Condition Subsequent?
      - If yes, the first remainder is a VRSTD
      - If no, remainder is a VR



Present and Future Interests
Checklist

- First Remainder Is Held By A Class Of Persons
  - Is There At least One Member Of The Class Who Is Born, Alive, And Ascertainable?
    - If no, the first remainder is a CR
  - Is There A Precondition That Must Be Satisfied Before Members Of The Class Can Take Present Possession Of The Property?
    - Yes, but the precondition is not yet satisfied
      - The first remainder is a CR
    - Yes, the precondition has been satisfied by at least some of the members of the class
      - Those who have satisfied the precondition have some type of vested remainder
      - Those who have not have a CR
    - If there is no precondition,
      - The class members have some type of vested remainder



Present and Future Interests
Checklist

- First Remainder Is Held By A Class Of Persons (cont'd)
  - Can Any Or All Of The Class Members Who Hold A Vested Remainder Be Divested By A Condition Subsequent?
    - If yes, the class members who are subject to being totally divested have a VRSTD
    - If no,
      - Has the class closed?
        - The class closes and turns into a VR at the earlier of (1) no more class members can be born, or (2) the prior present interest has naturally terminated

