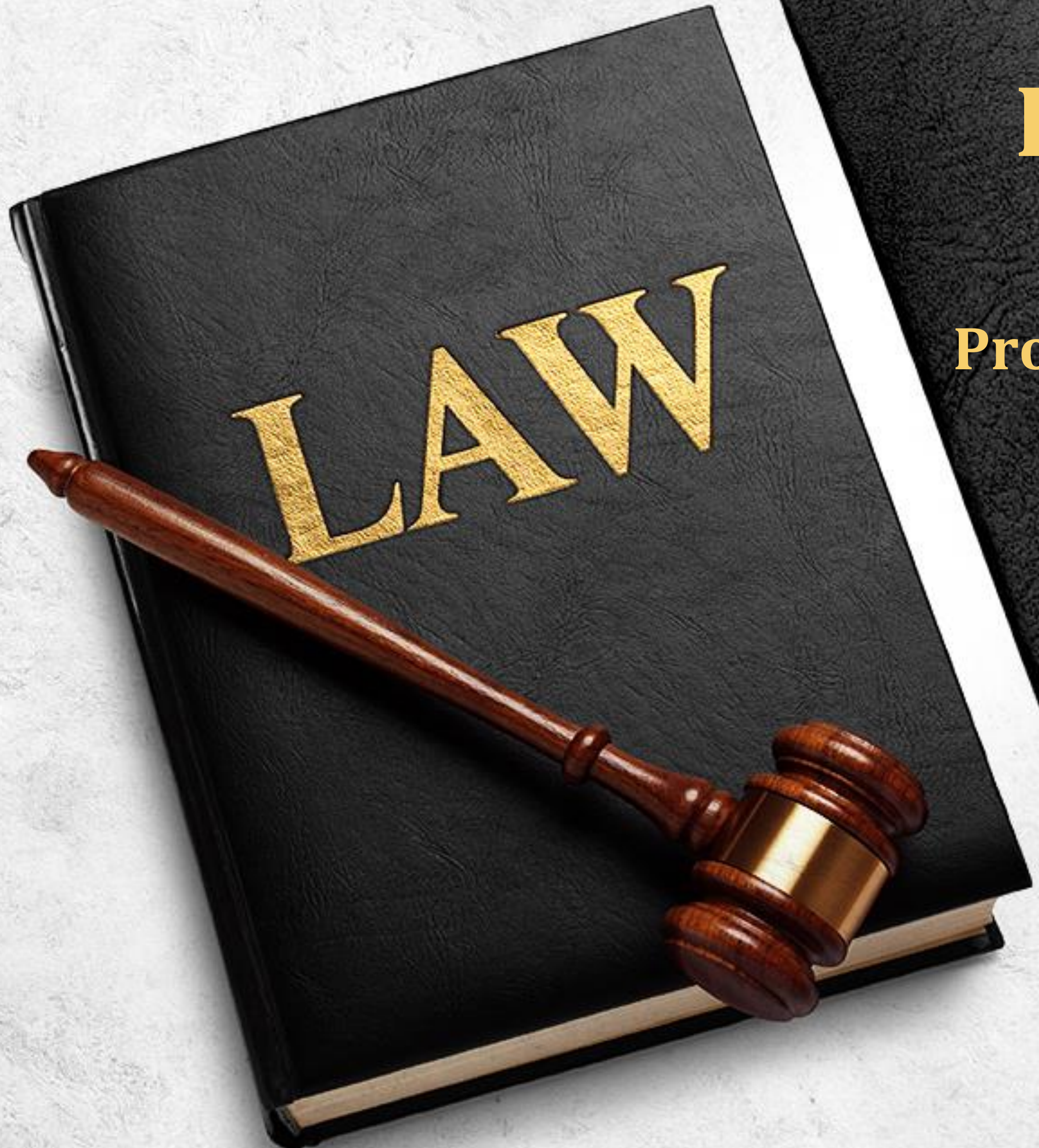


Real Property

Session 05

Prof. Marvin Longabaugh

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 follows 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.

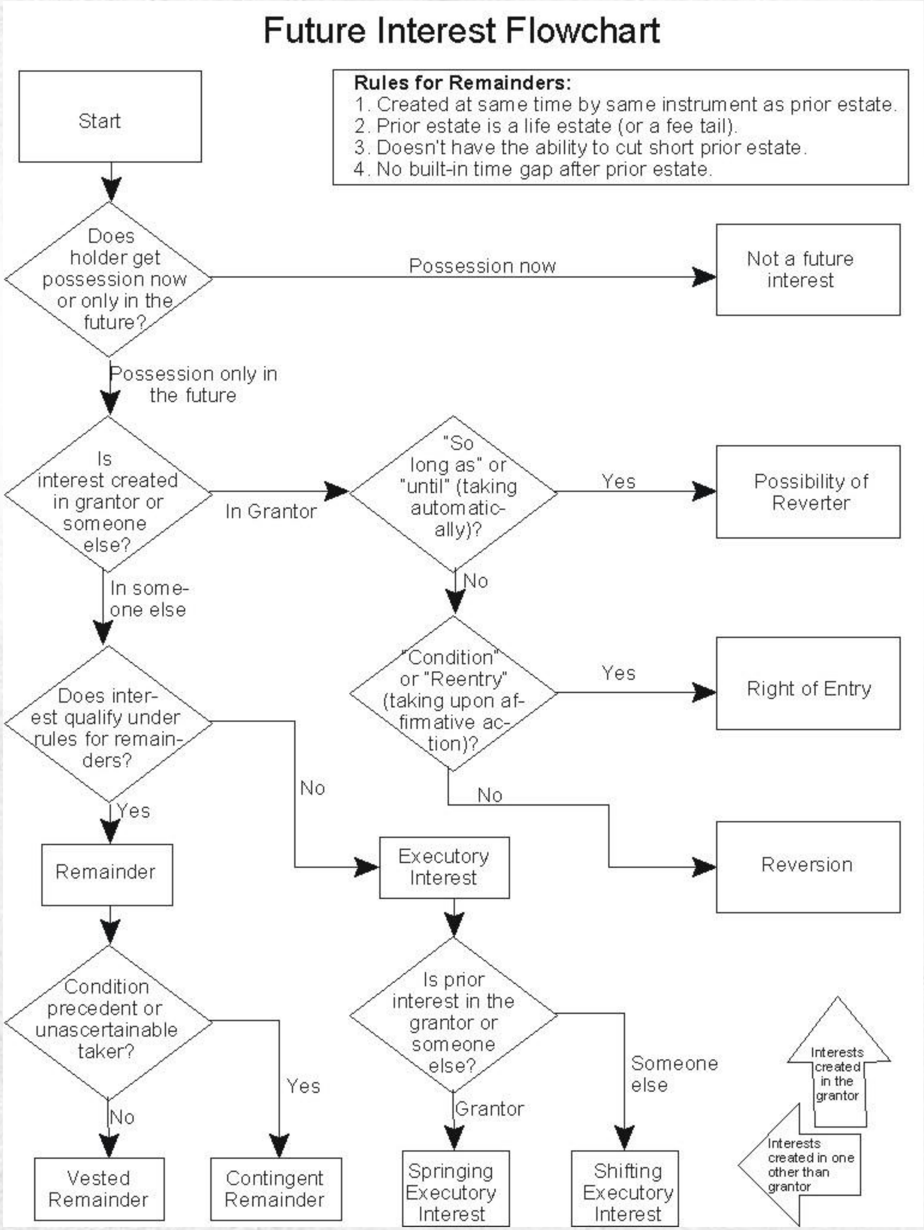
Present and Future Interests

- 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 occurrence of a specified event or condition in the future.
    - Example
      - “$50,000 to B when B graduates from National Paralegal College”

Future Interest Flowchart



Future Interests Hints and Tips

Grantor's Interests

- Always identify what type of interest the grantor retains, if she retains something.
- Memorize the following pairings (all assume that the grantor starts with a fee simple absolute):
    - If grantee gets a **life estate** or an **estate for years** (and grantor keeps the rest), then grantor retains a "**reversion**";
    - If grantee's interest is **determinable** (is to **terminate automatically** on the stated event), then grantor has a "**possibility of reverter**";
    - If grantee's interest is **subject to condition subsequent** (interest won't terminate automatically, but needs some action by grantor), then grantor has a "**right of re-entry**".

Future Interests Hints and Tips

Remainders

- Remember that a remainder is an interest that is:
  1. Created in one other than the grantor, and
  2. Follows an estate (created by the same instrument) that is certain to terminate.
  - Example: O conveys "to A for life, then to B and his heirs." B has a remainder in fee simple (a type of vested remainder).
- Read the language of the conveyance or bequest carefully to distinguish between the two main types of remainders (**vested** and **contingent**). This is vital for solving Rule Against Perpetuities problems.
  - **Contingent**: a remainder will be contingent if it meets either of two conditions:
    1. It won't become possessory until the fulfillment of a condition; or
    2. It's in favor of an unborn or on ascertained person.
  - Example: M has a son, A. A has one child, B, who has no children. M conveys "to A for life, with remainder to B's children." At the time of the conveyance, B's children, because they are not yet born, have a contingent remainder.

Future Interests Hints and Tips

Remainders

- **Vested**: if there are no conditions precedent to a person's taking, then the remainder is vested. Don't get misled by conditional language in another part of the grant.
- Example: O conveys "to A for life, but if A should ever use liquor on the premises to B for life; then to C." C's remainder is vested, since he will take either on the death of A or on the death of B, events that are certain to occur. The "liquor" contingency is a "red herring" when it comes to C's interest.
  - **Vested subject to divestment**: If a condition exists which could destroy the interest after it is vested (and maybe even after it has become possessory), the interest is "vested subject to divestment." It is easy to confuse a vested remainder subject to divestment with a contingent remainder. A clue to the former is language granting an unconditional grant followed by a "but if" clause.
  - **Vested subject to open**: Some remainders are "vested subject to open." Look for a situation where a holder of a vested interest may have to share the interest with others in his class who do not yet have vested interests. The most common example of this is a remainder to the children of a living person.

Future Interests Hints and Tips

Executory Interests

- An interest that follows an estate which may, but will *not necessarily* terminate, is an executory interest. The most commonly tested is the shifting executory interest, a subsequent estate which can possibly cut off a prior estate.
- Example: T bargains and sells "to my children, but if my friend F is still alive 30 years after this conveyance, to F." The children's estate may be cut off if F lives another 30 years. Therefore, the children have a fee simple determinable, and F has a shifting executory interest.
- If the problem **has an executory interest**, always be on the **lookout** for a violation of the **Rule Against Perpetuities**.

Future Interests Hints and Tips

Rule Against Perpetuities

- Remember the core statement of the rule: "**No interest is valid unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.**"
- Does RAP apply?
  - **Shifting executory interest**: The RAP normally applies to shifting executory interests, but not where the shifting interest is in favor of a charity, and follows a valid interest in favor of a different charity.
  - **Vested remainder**: The Rule doesn't apply to an interest that is vested. Don't mistake a vested remainder subject to a condition subsequent (not subject to the rule) for a contingent remainder (subject to the rule).
  - **Grantor's interests**: The Rule does not apply to interests maintained by the grantor. Thus it doesn't apply to reversions, possibilities of reverter and rights of re-entry.

The End