

Present and Future Interests: A Graphic Explanation

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Few topics bedevil more law students than the law of present and future interests. With the goal of eliminating some of the confusion, this Article highlights the basic doctrine with a new set of diagrams to represent graphically how various interests behave.¹ This Article

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1. If you need more details and have a favorite text, return to it. If not, consider these specialized sources: THOMAS P. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (1966); ROBERT LAURENCE & PAMELA B. MINZNER, A STUDENT'S GUIDE TO ESTATES IN LAND AND FUTURE INTERESTS (1981); JOHN MAKDISI, ESTATES IN LAND AND FUTURE INTERESTS (1991); CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962); LEWIS M. SIMES & ALLEN F. SMITH, THE LAW OF FUTURE INTERESTS (2d ed. 1956 & Supp. 1994); LAWRENCE W. WAGGONER, ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1993).

opens with a question many students ask and then proceeds to the core concepts in the law of present and future interests.

I. WHY BOTHER?

Many students, confronted with a seemingly impenetrable mass of concepts developed in the Middle Ages, reasonably ask why they should bother to learn this stuff. A practical reason for studying present and future interests is that these concepts are the basic building blocks for estate plans. Even if the names of the interests fade from your memory, the ideas they represent will be crucial to your abilities both to present estate planning choices to your clients and to draft documents that fulfill those clients' wishes. Moreover, even the odd-sounding names themselves are important, for they provide the vehicle for communication among lawyers, courts, and legislatures about these concepts. Law reform is in the air. Reform is not possible, however, unless we all understand what we are talking about.

A broader reason for studying this material stems from law schools' mission of training people to analyze legal problems, irrespective of the particular subject matter. The law is full of densely tangled topics, and learning how to handle those topics takes practice. The law of present and future interests provides an excellent opportunity for getting that practice: The law in this area is complicated, presents unfamiliar terminology, and requires attention to detail. At the same time, however, a basic understanding of the topic's core concepts is manageable within the confines of a law school course. Thus, a study of this topic affords students an opportunity to develop skills useful for a professional lifetime.

II. PRESENT V. FUTURE INTERESTS: DIVIDING TIME

The law of present and future interests originally developed to meet the needs of landowners. Although these concepts now apply most often to personal property held in trust, viewing the question in terms of land can help students understand the fundamentals. First, the law separates the notion of ownership from the thing owned. We

As you study the endless examples available, beware of learning to recognize various interests without really understanding how those interests operate. One way to test your understanding is to draft your own language and then figure out what interests you have created.

The idea of using graphs extensively seems to have originated with Professors Dukeminier and Johanson. For a recent version, see JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 632-40 (4th ed. 1990). For a presentation using charts, see Robert J. Hopperton, *Teaching Present and Future Interests: A Methodology for Students that Unifies Estates in Land Concepts, Structures, and Principles*, 26 U. TOL. L. REV. 621 (1995).

own "interests" in land, rather than the dirt itself. Second, the law allows us to divide our interests among different people, according to when they have the right to use the land. Third, the law treats these individual interests as if they were things in themselves. We give these interests unique characteristics and speak as if they behave in various ways.

The biggest, most complete interest is the *fee simple absolute*. If Howard owns a fee simple absolute interest in a house, he owns an interest that extends forward in time for infinity. Suppose Howard died owning the property. His fee simple absolute would not end just because he died. Rather, his fee simple would go to someone else, either by intestacy or by will. Assuming that Howard did not divide his interest, the recipient would get exactly what Howard had, an interest extending forward in time for infinity.

Suppose, however, Howard left a will dividing the ownership: He gave Ethel the right to use the house during her lifetime and Andrew the right to use the house after Ethel's death. Howard's will created both a present interest and a future interest. Because Ethel can use the house now, she has what we call a present interest.² However, Ethel's interest is smaller than Howard's was, for Ethel's interest ends at her death. Because Andrew's interest will entitle him (or someone else³) to use the house after Ethel's death, we say Andrew has a future interest. Future interests are not things people get in the future. Rather, they are things people own in the present, but which carry a right of possession in the future. Owning a future interest is somewhat like owning a ticket to next week's concert.

Future interests are really just present interests pushed into the future. When Ethel dies, whoever holds Andrew's interest will be able to use the land and will have a present interest. In the scenario here, what is now Andrew's future interest will become a fee simple absolute

2. Perhaps it helps to imagine a house with a front porch and a rocking chair. The holder of the present interest at any given time has the right to sit in that chair.

3. We might refer to these others as Andrew's "successors." "Successors" is not a term of art; it simply means those people who take what Andrew had. If Andrew died owning the interest, it would pass under his will or by intestacy. He might also have transferred it to someone else before he died.

Most future interests are fully transferable. However, some jurisdictions limit the methods by which certain kinds of future interests may be transferred. See, e.g., *Goodwine State Bank v. Mullins*, 625 N.E.2d 1056 (Ill. App. Ct. 1993) (contingent remainder not transferable by quitclaim deed), *appeal denied*, 633 N.E.2d 4 (Ill. 1994); 2A RICHARD R. POWELL & PATRICK J. RONAN, *POWELL ON REAL PROPERTY* ¶ 275[2]-[3] (1995) (rights of entry and possibilities of reverter not transferable except by release in some states). Creditors' rights in future interests closely track the transferability rules. See SIMES & SMITH, *supra* note 1, §§ 1921-1927.

because no one else holds an interest in the property. In other situations, what was once a future interest will become a present interest followed by additional future interests.⁴ When considering a future interest, look for two labels: on the outside is the term identifying the type of future interest; hidden inside, however, is a present interest waiting to appear.⁵

The notion of dividing ownership according to time allowed modern trust law to develop. In place of Ethel's right to use the house, we give her the right to receive income from a trust. In place of Andrew's right to use the house next, we give him a right to distribution of the trust principal after Ethel's death. Because the trustee holds legal title, Ethel and Andrew have equitable interests, but these interests behave in much the same way as the legal interests that were invented centuries ago.

III. PRESENT INTERESTS

To recognize that individuals were trying to do different things when they divided their property according to time, the common law invented a series of different present interests and gave them different characteristics. This section introduces these various interests and offers a graphic depiction of each to capture their principal attributes in visual form.

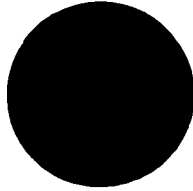
A. *Fee Simple Absolute*

In terms of dividing ownership according to time, the fee simple absolute is everything. (See Figure 1).

4. For example, Howard might have given the property to Ethel for her life and then to Andrew for his life. Because Andrew's interest will end at his death, his interest must be followed by another future interest (a reversion).

5. It may help to think of sets of hollow dolls or jars or nutshells, one placed inside another. When you open one, you find another one, and so on.

FIGURE 1
Fee Simple Absolute



At common law, deed drafters seeking to create this interest had to use words like, "To Suzanne *and her heirs*."⁶ The "and her heirs" (or "and his heirs") language was critical. Courts interpreted those words not as words of purchase indicating who got the property (Suzanne's heirs got nothing from such a grant); rather, courts treated the magic words as words of limitation describing the estate granted. The words "and her heirs" came to indicate a grantor's intention to give an estate that would extend beyond the grantee's lifetime and go on forever.⁷

The requirement of including the "and her heirs" language is almost dead, and this Article will not include it in future examples.⁸ However, the distinction between words of purchase, which indicate takers, and words of limitation, which identify those takers' interests, remains an important part of document interpretation.

6. For two reasons, this Article avoids using the abstract "A" and "B" in favor of using real names. First, using names underscores that real families create and own these interests. Second, using names may help students move from working with abstract formulae to real documents that use names.

7. Interestingly, the words were not required to pass a fee simple by will.

8. At common law, a grant "to Suzanne," without more, would give her only a life estate. However, because following the common law rule would defeat the intentions of most people, modern courts would give Suzanne a fee simple absolute.

Sometimes the old rules can affect modern cases. For a recent example, see *Burk v. State*, 607 N.E.2d 911 (Ohio Ct. App.), *appeal dismissed*, 600 N.E.2d 675 (Ohio 1992). *Burk* involved an 1852 grant of land to the State to be used for two "Lunatic Asylums." *Id.* at 912. The deed also provided that when the land ceased to be used for that purpose, "the same shall revert to the grantors." *Id.* In 1988, the State closed the facilities and sought to sell the land. Relatives of the grantors appeared, claiming the land under the reverter language. Applying the law of 1852, the court held that because the deed had not reserved an interest to the grantors *and their heirs*, the possibility of reverter was in effect only during the grantors' lives. *Id.* at 914.

B. Defeasible Fees

Sometimes grantors want to give property so that the interest can, but need not, go on forever. Defeasible fee simple estates have that feature. They are still fee simple estates because they can go on forever, but they are "defeasible" because they can be lost. Although defeasible fees generally are not used in estate planning, it is important to understand their underlying concepts.⁹ Particularly important is the distinction between the two ways in which a defeasible fee simple ends: expiration and divestment.

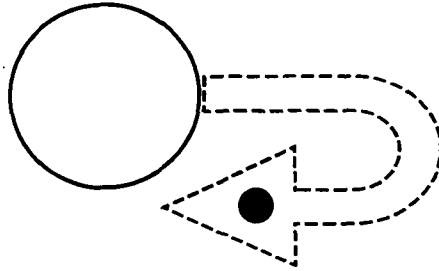
Expiration can happen if the grantor has placed a limit on the grant. For example, Shannon might give property "to the School Board so long as the land is used as a school." The School Board might keep the property forever, but if they stop using it as a school their ownership will end. Language like, "so long as," "while," and "until" is called "limitational" language because it limits the estate from the start. When used in conjunction with a fee simple's potential for infinite duration, limitational language creates a *fee simple determinable*. To indicate the limitational nature of a fee simple determinable, Figure 2 shows it as an empty circle.

To account for the fact that Shannon did not say what would happen to the property if it ceased to be used as a school, we would say she retained a future interest called a *possibility of reverter*,¹⁰ indicated by the arrow in Figure 2. If the School Board's fee simple determinable expired, Shannon would have a fee simple absolute, represented by the solid circle inside the arrow.

9. Defeasible fees sometimes are used to control land uses. See Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533 (1988).

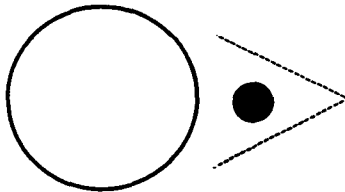
10. Future interests are discussed in greater detail later in this Article, see *infra* text accompanying notes 25-69; however, this discussion of present interests requires a reference to the corresponding future interest for the sake of completeness and clarity.

FIGURE 2
Fee Simple Determinable and Possibility of Reverter



A fee simple determinable can also be followed by an interest in someone other than the grantor. For example, Shannon might have said, "To the School Board so long as it is used for a school, and if the property ceases to be used for a school, to Beneth if she is then living." The Board still has a fee simple determinable, but we call Beneth's interest an *executory interest*. The dashed arrow in Figure 3 indicates that an executory interest is contingent, and the solid circle shows that if Beneth takes, she will have a fee simple absolute.

FIGURE 3
Fee Simple Determinable Followed by an
Executory Interest

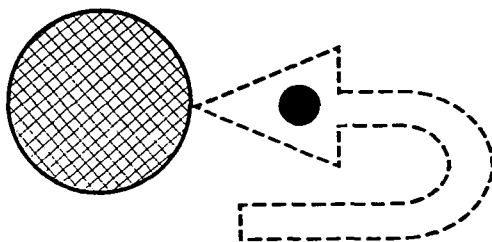


The other way for a defeasible fee simple to end is by being divested, or cut short. This result is possible if the grantor has used "conditional" language such as, "but if"; "provided, however"; or "on

the condition that." The law recognizes two types of defeasible fees that are subject to being divested. Which label we use depends upon who holds the future interest that follows.

If the grantor retains the future interest, we call the present interest a *fee simple subject to a condition subsequent*. The grantor's accompanying future interest is called a *right of entry*.¹¹ Thus, if Shannon gives property "to the School Board, but if the property is not used as a school, then I reserve the right to reenter and take possession of the property," the School Board has a fee simple subject to a condition subsequent, illustrated by the cross-hatched circle in Figure 4. Shannon has retained a right of entry, indicated by the arrow. If the Board stops using the property for a school and Shannon decides to exercise her right, she will have a fee simple absolute.

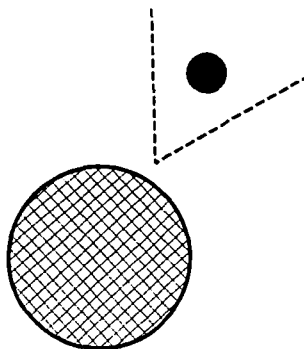
FIGURE 4
Fee Simple Subject to a Condition
Subsequent and Right of Entry



If someone other than the grantor has the future interest following a defeasible fee created by conditional language, we call the present interest a *fee simple subject to an executory limitation*. The accompanying future interest is an *executory interest*. Thus, if Shannon gives property "to the School Board, but if the property is not used as a school, then to Beneth if she is then living," the School Board has a fee simple subject to an executory limitation, illustrated by the cross-hatched circle in Figure 5.

11. Sometimes the term "power of termination" is used.

FIGURE 5
 Fee Simple Subject to an Executory
 Limitation and Executory Interest



Beneth still has an executory interest. In this case, if the Board stops using the property for a school, Beneth's executory interest will automatically divest the Board's interest, giving her a fee simple absolute. This time the executory interest arrow points in toward the present interest, indicating that Beneth's interest might divest the Board's interest.

To identify what type of defeasible fee simple estate has been created, apply a two-part test as of the time of the grant. First, ask: Is the language limitational (so long as, etc.) or conditional (but if, etc.)? If the language is limitational, the present estate is a fee simple determinable. If the language is conditional, ask the second question: Who holds the future interest? If the future interest is retained by the grantor, then the present interest is a fee simple subject to a condition subsequent. If the future interest is given to a third party, then the present interest is a fee simple subject to an executory limitation.

The distinction between an estate that expires and one that is subject to divestment can be important. Consider two of the above examples. In Figure 3, the School Board has a fee simple determinable, which is followed by Beneth's executory interest. In Figure 5, the Board has a fee simple subject to an executory limitation, and Beneth has an executory interest. In each case, Beneth must survive in order to take. Suppose Beneth dies and then the Board stops using the property for a school. If the Board initially had a fee simple determi-

nable, its interest expires when it stops using the property for a school because its interest was good only "so long as" there was a school. Because Beneth did not meet the condition of surviving, the property will revert back to Shannon.¹² On the other hand, if the Board initially had a fee simple subject to an executory limitation, its interest becomes a fee simple absolute when Beneth dies because there is no one around to divest its interest. The Board's later violation of the condition is irrelevant.

C. Life Estate

The life estate is probably the favorite estate of law students. It is both easy to recognize and easy to understand. If Cletus gives property "to Helen for life," Helen has a life estate. If the property is realty, Helen has the right to possession during her lifetime.¹³ If the gift is in trust, Helen usually will have a right to trust income during her life. Figure 6 illustrates the life estate as an empty square. The square is empty because the life estate, like the fee simple determinable, expires. Because Cletus did not identify who should take the property after Helen, we say he retained a "reversionary interest." In this case, Cletus's reversionary interest is called a *reversion*, which is illustrated by the arrow. The solid circle inside the arrow indicates that when Cletus's reversion becomes possessory on Helen's death, it will become a fee simple absolute. If Cletus had identified third

12. Most authorities discuss this question in the context of an executory interest that fails under the Rule Against Perpetuities. For a classic case, see *First Universalist Soc'y of N. Adams v. Boland*, 29 N.E. 524 (Mass. 1892). In *Boland*, a grantor created a deed in 1854 that conveyed real estate to a religious society so long as the land was used for religious purposes. *Id.* at 524. The deed also stated that if the land stopped being used for religious purposes, it was then to go to designated persons. *Id.* The court held that the 1854 deed conveyed a fee simple determinable and that the executory interest that followed was void for remoteness. *Id.* Therefore, the grantor retained a possibility of a reverter, and the religious society did not have a fee simple absolute. *Id.* See generally SIMES & SMITH, *supra* note 1, § 1241.

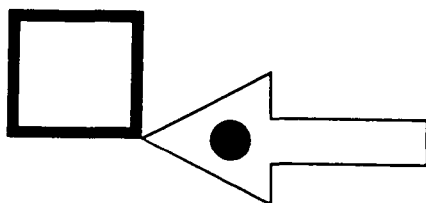
In the context of a perpetuities violation, the Second Restatement suggests that an invalid executory interest should leave a fee simple absolute, even when the present interest was a fee simple determinable. RESTATEMENT (SECOND) OF PROPERTY § 1.4 cmt. b (1936 & Supp. 1995).

The text followed the convention of most authorities and did not account for the grantor's possibility of reverter when first identifying the interests created by this grant. Perhaps we should identify both the executory interest and the possibility of reverter by analogy to contingent remainders and reversions. For more on the relationship between those latter interests, see *infra* text accompanying notes 54-56.

13. A legal life estate, like the one envisioned in the text, is useful only in rare circumstances. In almost all other situations, creating a trust and giving the beneficiary an equitable life estate will meet client needs while avoiding the problems created by dividing the legal estate. For further discussion, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 233-34 (3d ed. 1993).

parties to take after Helen's death, they would have had *remainders*, which are detailed below.¹⁴

FIGURE 6
Life Estate and Reversion



Not all life estates are as uncluttered as the standard example. Grantors can also create life estates that may end before the death of the life tenant. Like defeasible fees, these life estates can either expire or be divested.¹⁵ If Cletus says, "To Helen for life or until she remarries," he is creating a life estate determinable, sometimes called a life estate subject to a special limitation.¹⁶ Helen's interest can now expire either of two ways: her remarriage or her death. Figure 7 adds a diamond inside the life estate square to indicate the double limitations on Helen's interest. Cletus retains a reversion.¹⁷ Life estates

14. See *infra* text accompanying notes 30-69.

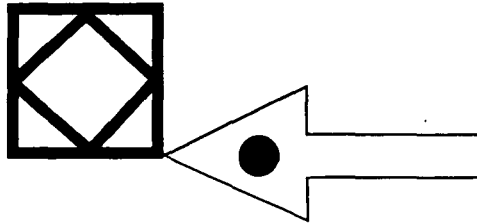
15. If you find the examples in this paragraph difficult, review the discussion of parallel defeasible fee estates. See *supra* text accompanying notes 9-12.

16. The general limitation is being alive. The special limitation is the requirement to stay single.

17. There is some disagreement about whether the grantor also retains a possibility of reverter to account for the possibility of a shortened life estate. The standard view is that Cletus retains a reversion, defined as the interest retained by a grantor who transfers a lesser quantum than he already had. See 1 AMERICAN LAW OF PROPERTY § 4.18 (A. James Casner ed., 1952); BERGIN & HASKELL, *supra* note 1, at 56-59; 2A POWELL & ROHAN, *supra* note 3, ¶ 271. Since Cletus had a (potentially infinite) fee simple and only gave away a life estate, he kept a reversion, albeit one that could take in two circumstances.

can also be subject to divestment, either by a right of entry¹⁸ or by an executory interest.¹⁹

FIGURE 7
Life Estate Determinable and Reversion

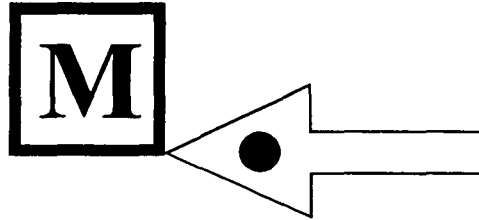


A more complicated life estate is one that a grantor creates for one person, good for the life of another. For example, Cletus might give property "to Helen for the life of Menelaus."

18. Cletus could give property "to Helen for life, but if Helen remarries, the grantor may reenter." In that case, Helen would have a life estate subject to a condition subsequent. Cletus would have a right of entry (during Helen's life) and a reversion.

19. Cletus could give property "to Helen for life, but if Helen remarries, then to Joanna at that time, and, in any case to Joanna after Helen's death." Helen would then have a life estate subject to an executory limitation. Joanna would have an executory interest (during Helen's life) and a remainder.

FIGURE 8
Life Estate for the Life of
Another and Reversion



Helen has a life estate for the life of another, illustrated in Figure 8 by the letter "M" in the square.²⁰ When Menelaus dies, Helen's estate ends.²¹

D. Fee Tail

At common law, if a grantor gave land "to Kelly and the heirs of her body," Kelly would have a fee tail.²² That interest would then pass to her children, their children, and so on until the death of Kelly's last descendant. At that point, ownership would either come back to the grantor (who retained a reversion) or move on to someone else identified in the original document (who would have a remainder). Because the fee tail promoted family dynasties and interfered with the marketability of land, virtually all states have abolished it.²³

Recognizing a fee tail and understanding the basic notion of an estate moving with the generations are important for two reasons. First, old wills or lay-drafted wills sometimes use the "heirs of the body" language. You need to know to check the applicable local

20. Traditional terminology would call Helen's interest a "life estate *pur autre vie*."

21. Alternatively, Helen could have obtained such an interest if Menelaus had a life estate for his own life, and he then gave it to Helen. She would get what he had, a life estate for Menelaus' life.

22. For a brief history, see BERGIN & HASKELL, *supra* note 1, at 28-34.

23. Delaware, Maine, Massachusetts, and Rhode Island still recognize a fee tail, but allow any current "tenant in tail" to convert the estate into a fee simple absolute. See DUKEMINIER & KRIER, *supra* note 13, at 214.

statute to see what interests those words create.²⁴ Second, documents sometimes include language like, "and if Kelly dies without issue, to Mark." Interpreting the "dies without issue" language is easier if you understand the fee tail.

IV. FUTURE INTERESTS

As we have seen, the system of estates allows grantors to divide ownership in terms of time. When creating a future interest, grantors can either retain rights in the property or give pieces of the future interest to various beneficiaries. This section first reminds you of the interests grantors can retain, and then discusses the future interests grantees own.

A. In the Grantor

Interests retained by a grantor are called "reversionary" interests. There are three: a possibility of reverter, a right of entry, and a reversion. A possibility of reverter follows a fee simple determinable. A right of entry (sometimes also called a power of termination) follows a fee simple subject to condition subsequent. Because defeasible fees seldom have any part in estate plans, their accompanying reversionary interests seldom appear. The third interest, a reversion, is important to estate planners. It is the interest a grantor retains if he creates only a life estate, or a life estate and contingent remainders. Because modern estate plans regularly create life estates and contingent remainders in trust, reversions are often present.

B. In Grantees

Grantees can hold two kinds of future interests: executory interests and remainders. The practical differences between them may be minimal,²⁵ but our common language maintains both labels. One way to help distinguish between the two categories is by assigning each a personality characteristic. Executory interests are aggressive; they go around cutting short other interests—they have hatchets. In contrast, remainders are patient; they snuggle up against a present interest and wait for its natural expiration—they have pillows.

24. A good starting place is 2A POWELL & ROHAN, *supra* note 3, ¶ 198. Some states create life estates, and other states create fee simple estates of varying kinds.

25. See J.J. Dukeminier, Jr., *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 14 (1958).

1. Executory Interests

Executory interests are future interests held by third-party grantees.²⁶ Executory interests usually take over by divesting prior interests. Developed after the Statute of Uses in 1536,²⁷ executory interests made possible the fee simple subject to an executory limitation.²⁸ They also allowed a third party to take following a fee simple determinable. This latter situation is the one exception to the rule that executory interests take possession by divesting. Because a fee simple determinable expires on its own, the executory interest has nothing to divest.²⁹ In all other cases, however, executory interests take by divesting.

2. Remainders

Like executory interests, remainders are future interests held by third-party grantees. Rather than divesting,³⁰ however, they usually wait for the expiration of a life estate.³¹ Remainders come in two types: vested and contingent.

a. Vested Remainders

A remainder is "vested" if it satisfies three tests. First, the holder of the remainder must be someone who has been born. Second, that person must be identified. Third, there can be no express or implied condition precedent to that person taking.³² Once a remainder jumps

26. The first party is the grantor, and the second party is the holder of the present interest.

27. For brief histories of these developments, see BERGIN & HASKELL, *supra* note 1, at 80-115; MOYNIHAN, *supra* note 1, at 171-206.

28. In this situation, traditional descriptions would say the present interest is subject to a *shifting executory interest* because someday the legal title may shift from one grantee (who holds the present interest) to a second one (who holds the future interest). Executory interests can also be of the *springing* variety, jumping out of the grantor to start in the future. For example, Jessica would have a springing executory interest if a grant read, "to Jessica when she graduates from college." Because the distinction has little, if any, modern importance, it is falling into disuse.

29. Here the executory interest acts just like a remainder, waiting for the natural termination of the prior estate. Common law judges could not call it a remainder, however, because by the time it came along, the definitions of remainders were carved in stone.

For a discussion of the distinction between present interests subject to divestment and present interests subject to expiration, see *supra* text accompanying note 12.

30. The one exception is that when contingent remainders vest in interest, they divest the reversion.

31. Remainders can also follow a fee tail. For a brief review of the fee tail, see *supra* text accompanying notes 22-24.

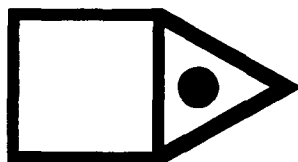
32. Reforms proposed by the Uniform Probate Code (UPC) would drastically reduce the number of vested remainders created. The UPC would impose a condition of survivorship on future interests under the terms of a trust. 8 UNIF. PROB. CODE § 2-707(b) (Supp. 1995).

through these hoops, the question remains: What type of vested remainder is it? There are three: indefeasibly vested, subject to complete defeasance, and subject to open.

i. Indefeasibly Vested

Just as a fee simple is the biggest interest, an indefeasibly vested remainder is the biggest remainder. It is really just a fee simple absolute pushed into the future. Suppose Joseph's will gives property "to Rose for life, remainder to Barbara." Rose has a life estate, shown as a square in Figure 9, and Barbara has an indefeasibly vested remainder, shown by the triangle. The solid lines indicate that the remainder is vested, and the solid circle inside indicates that someday it will become a fee simple absolute.³³

FIGURE 9
Life Estate and Indefeasibly
Vested Remainder



ii. Subject to Complete Defeasance

Just as a fee simple can be defeasible, so can a vested remainder. Many vested remainders subject to complete defeasance are really just defeasible fees pushed into the future. Others are life estates in future

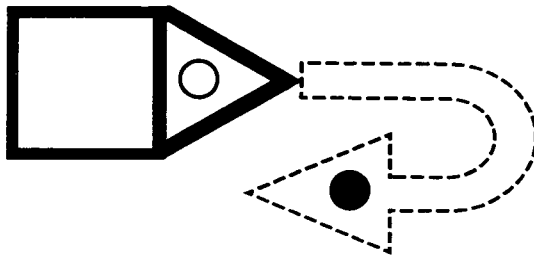
Because the remainders are subject to a condition precedent, they are contingent. Grantors can overcome the presumption of required survivorship, but only with specific language. See generally, ROGER W. ANDERSEN, UNDERSTANDING TRUSTS & ESTATES § 43[B][2][c][iii] (1994); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995).

33. Under traditional rules, if Barbara survived Joseph but died before Rose, Barbara's remainder would pass to Barbara's successors, who would then take at Rose's death. These rules may change. See *supra* note 32.

garb. Like their present interest counterparts, these remainders can end either by expiration or by divestment. By convention, we do not usually distinguish between the various sub-categories of vested remainders subject to complete defeasance. If it helps you, however, you certainly may refer to them by more detailed descriptions.³⁴

Suppose Shannon leaves the farm "to Warren for life, then to the School Board so long as it uses the land for school purposes." As Figure 10 illustrates, Warren has a life estate, the Board has a vested remainder subject to complete defeasance, and Shannon has a possibility of reverter.³⁵

FIGURE 10
Life Estate and Vested Remainder Subject
to Complete Defeasance (Expiration)



If Shannon had said, "to Warren for life, then to the School Board, but if the land is not used as a school, then to Beneth if she is then living," the Board still would have a vested remainder subject to complete defeasance.³⁶ Beneth would have an executory interest. (See Figure 11.)

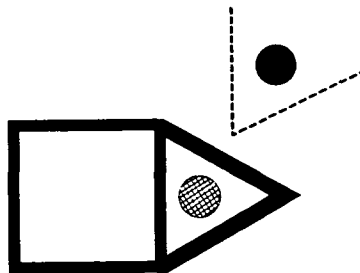
34. Consider the following descriptions: "a vested remainder in a fee simple determinable" or "a vested remainder in a fee simple subject to a condition subsequent" or "a vested remainder in a fee simple subject to an executory limitation."

35. Compare Figure 2.

36. In this instance, it would be a vested remainder subject to complete *divestment*. Defeasance is the broader term, and divestment, the narrower one.

Often remainders anticipate possible divestment during the pending life estate. For example, "to Marjorie for life, remainder to John, but if he predeceases Marjorie, to Planned Parenthood."

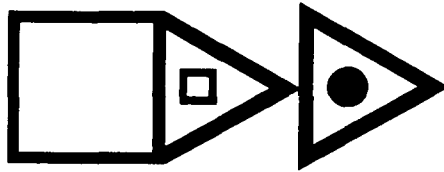
FIGURE 11
Life Estate and Vested Remainder Subject to
Complete Defeasance (Divestment)



A vested remainder subject to complete defeasance can also come in the form of a life estate. Indeed, these remainders commonly go by the name "vested remainders for life." Suppose Cletus gave property in trust, with the income "to Helen for her life, and then to Carol for her life, and after her death, distribute the principal to Brandon." Helen has a life estate, Carol has a vested remainder for life,³⁷ and Brandon has an indefeasibly vested remainder. (See Figure 12.)

37. Although Carol must survive Helen in order to enjoy the trust income, that reality is a function of the limited nature of Carol's interest (a life estate). Because survival is not an added condition precedent, we classify Carol's remainder as vested, rather than contingent.

FIGURE 12
Life Estate, Vested Remainder for Life, and
Indefeasibly Vested Remainder



iii. Subject to Open

Sometimes settlors³⁸ will give property to a group of people whose membership is not fixed at the time of drafting. Use of such a class gift allows people born after the drafting but before the time for distribution to share in the gift. For example, Sheppe may give property “to my wife Mindel for life, and then to our children.” We call the remainder to the children a class gift.³⁹ Because children born⁴⁰ later could qualify as class members, we say the class is “open” during Mindel’s life.⁴¹

Suppose Sheppe and Mindel have one child, Frieda. Frieda’s remainder is vested; we know who is getting it and there is no condition precedent. There is, however, the chance that Frieda will have to share her remainder with a later-born sibling. To account for that possibility, we say her remainder is vested, subject to partial divestment. Because this situation arises only when we have an open class, many lawyers use the shorter term “vested, subject to open.”

38. “Settlor” is one term for the person who creates a trust. Other terms are “trustor,” “grantor,” and, if a will creates the trust, “testator.”

39. Other common class gifts are to grandchildren, descendants, and nieces and nephews. For a discussion of how to determine whether a gift is a class gift, see ANDERSEN, *supra* note 32, § 41[A].

40. Adopted children might also qualify for class membership. See ANDERSEN, *supra* note 32, § 43[A].

41. Discussion of when classes close, so that later potential members do not qualify to take, is beyond the scope of this Article. See generally ANDERSEN, *supra* note 32, § 41[B].

FIGURE 13
Life Estate, Vested Remainder Subject to
Open and Executory Interest

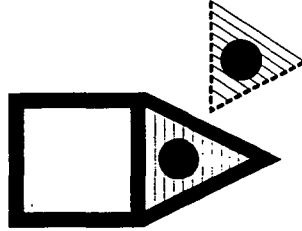
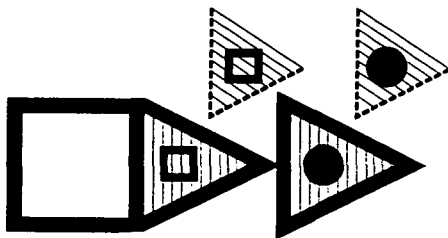


Figure 13 illustrates Frieda's remainder as a shaded triangle to indicate the possibility of its being shared. To complete the picture, we often say that the couple's as yet unborn children have executory interests.⁴² Of course, this habit is silly, because there are no children to own anything. Nonetheless, the convention is useful because it reminds us of what would happen if more children appeared. The executory interest symbols are shaded to indicate that if children do join the class, their interests will also be subject to open.

Vested remainders can be subject to complete defeasance and subject to open at the same time. This situation is common in estate plans that stretch across three generations. Suppose Sheppe gives property "to Mindel for life, then to my children for their joint lives, and then to my grandchildren." Suppose further that Sheppe and Mindel have a daughter, Frieda, and a grandson, Scott. Mindel has a life estate. Frieda has a vested remainder for life, subject to open. Frieda's unborn siblings have executory interests for life, subject to open. Scott has a vested remainder, subject to open. Scott's unborn siblings have executory interests, subject to open. (See Figure 14.)

42. They have executory interests because they take by partially divesting their older siblings.

FIGURE 14
Life Estate, Vested Remainder for Life
Subject to Open, Vested Remainder Subject to
Open, and Executory Interests



*b. Contingent Remainders*⁴³

If remainders are not vested, they are contingent. The way to identify contingent remainders, therefore, is to work through the definition of vested remainders to see if the interest in question fails one of those tests. Ask: (1) Is the holder of the remainder someone who has not yet been born? (2) Is the holder of the remainder unidentified? (3) Is there any express or implied condition precedent to that person taking? If the answer to any question is "yes," the remainder is contingent. When you identify a remainder as contingent, be sure you also identify *why* it is contingent.⁴⁴

It may seem silly to ask whether someone who holds a remainder has been born. The question is useful, however, because it helps us to identify which people will take what interests if someone is born later.⁴⁵ Consider a gift from Joanne "to Scott for life, then to his children." If Scott has no children, he has a life estate and Joanne has a reversion. To indicate that things may change, however, we

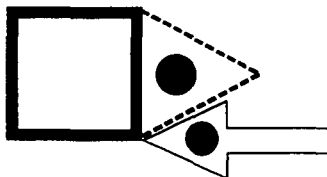
43. This is the traditional label. The Second Restatement calls these remainders "nonvested." See RESTATEMENT (SECOND) OF PROPERTY § 1.4 cmt. b (1936 & Supp. 1995).

44. That way you will know whether the remainder vests if facts change. Also, knowing why a remainder is contingent is critical to determining its validity under the Rule Against Perpetuities.

45. Recall how unborn class members can have executory interests that may partially divest vested remainders, subject to open. See *supra* text accompanying note 42.

commonly say that Scott's as yet unborn children have contingent remainders, contingent upon being born. To indicate the potential nature of their interest, Figure 15 shows the children's remainders as a dashed triangle. If Scott later has a child, the child will take a vested remainder subject to open,⁴⁶ and Joanne will lose her reversion.

FIGURE 15
Life Estate, Contingent
Remainder, and Reversion



The second way a remainder may be contingent is if the person holding the remainder is unidentified. Assume Joanne grants property "to Scott for life, then to Scott's first child to graduate from college." Assume further that Scott has a child, Taylor, who is in elementary school. Taylor has a remainder that is contingent upon being identified as the first of Scott's children to graduate from college. If Scott has other children before Taylor graduates, they too will have contingent remainders, because each can join the race to qualify. Because it is possible that none of Scott's children will graduate from college and no one will qualify, Joanne has a reversion.⁴⁷

At this point you might ask what happens if Scott dies while Taylor is in college, but Taylor later graduates. In this scenario, Scott has died while Taylor's remainder is still contingent. If the grant were of realty, the remainder would have been destroyed at common law,

46. See *supra* Figure 14.

47. A graph of this grant would look the same as Figure 15, *supra*.

and Joanne would have kept the property.⁴⁸ However, this destructibility rule, which is rooted in the doctrine of seisin,⁴⁹ does not apply to trusts and has been abolished virtually everywhere.⁵⁰ Today, Joanne almost certainly would keep the property until Taylor graduated, at which point he would take.⁵¹ If there were a trust, Joanne would probably get the income until Taylor graduated and took the principal.⁵²

The third way a remainder can be contingent is for it to be subject to a condition precedent. Assume Taylor is still in elementary school. Suppose, however, Joanne uses the language, "to Scott for life, then to his first child if that child graduates from college." This time there is no identification problem. Only Taylor can be Scott's "first child." Taylor still has a contingent remainder, this time subject to the condition precedent of graduating. Because Taylor's remainder is contingent, Joanne has a reversion. If Taylor graduates from college before Scott dies, Taylor's remainder vests, and Joanne loses her reversion.

A single remainder may be contingent for more than one reason. Suppose Joanne used the language, "to Scott for life, then to his first child to graduate from college if that child then attends law school." Scott's children would have contingent remainders, contingent upon identification (first to graduate) and a condition precedent (attending law school). Both conditions would have to be met before the remainder would vest.

Settlors should, and often do, create alternative gifts in case the favored person does not qualify to take. Often these gifts take the form of alternative contingent remainders. Imagine that our hypothetical family now has two children, Taylor and Todd. Suppose Joanne

48. At Scott's death, Joanne would get the property via her reversion because Taylor had not yet qualified to take it. Joanne would keep the property because Taylor's contingent remainder was not powerful enough to divest someone in possession.

Taylor's remainder might also be destroyed by merger. If before Scott died, Joanne gave her reversion to Scott, then Taylor's contingent remainder would be caught in the squeeze between Scott's life estate and his reversion. Not powerful enough to prevent the merger, the remainder would be destroyed.

For short discussions of the destructibility rule for contingent remainders, see BERGIN & HASKELL, *supra* note 1, at 77-78, 85-88; MOYNIHAN, *supra* note 1, at 133-37.

49. "Seisin" is the common law concept that means possession of a freehold. As a force in our law, it is increasingly irrelevant. For a brief discussion, see MOYNIHAN, *supra* note 1, at 98-102.

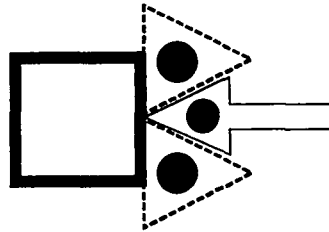
50. See POWELL & ROHAN, *supra* note 3, ¶ 272[6] & n.75.

51. At this point, Taylor's interest would be acting like an executory interest.

52. GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 163, 182 (1977 & Supp. 1988).

grants property "to Scott for life, then to Taylor if he survives Scott, and if he does not, to Todd." Scott has a life estate. Taylor has a contingent remainder,⁵³ contingent upon survival. Todd has a contingent remainder, contingent upon Taylor's non-survival of their father. To illustrate the alternative nature of the remainders, Figure 16 shows them both snuggled next to the life estate. Either Taylor or Todd will take at the expiration of the life estate. Joanne has a reversion.

FIGURE 16
Life Estate, Alternative Contingent
Remainders and Reversion



Why does Joanne have a reversion? Surely Taylor will either survive Scott and take the remainder, or not survive so Todd will take.⁵⁴ The answer, like much of the law of future interests, lies in history.⁵⁵ One way to remember the rule is to move the grant back to the time of the Wars of the Roses. At that time, first one family and then another would capture the English Crown. In such an environment, one could commit treason by backing a loser. One consequence of treason might be forfeiting one's life estates, but not one's life. Imagine Scott in the Tower of London, having forfeited his life estate. Neither Taylor nor Todd could take the land, for they had not yet survived Scott. To account for the fact that possession had to

53. Some would say an "alternative contingent remainder."

54. Because there is no requirement that Todd survive, traditional rules dictate that his successors take upon his death. For gifts in trust, the UPC would change this rule and require Todd's survival. 8 UNIF. PROB. CODE § 2-707(b) (Supp. 1995).

55. See *DUKEMINIER & JOHANSON*, *supra* note 1, at 635, problem 1.

go to someone, the law recognized Joanne's reversion. If all that history is too much, simply remember the rule: If there is a contingent remainder, there is a reversion.⁵⁶

Because settlors can give contingent remainders to classes, contingent remainders can be subject to open. Most classification schemes ignore that fact until it becomes relevant, but it is important to know if the remainder is subject to open, whether you say so or not.⁵⁷ With this knowledge, you can solve problems as facts change.

Suppose Joanne transfers land "to Scott for life, then to his children who graduate from college." While Scott is alive and his children have not yet graduated, the children have contingent remainders, subject to open. (See Figure 17.) Their unborn younger siblings have executory interests, subject to open. If one of the children graduates while Scott is alive, the child's remainder will become vested, subject to open.⁵⁸ If Scott then dies and some children have not graduated, the children who have graduated will hold fee simple estates, subject to executory interests held by their siblings who have not graduated.⁵⁹

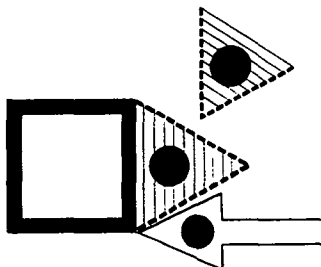
56. If a jurisdiction followed the destructibility rule, the reversion would be important. See *supra* note 48.

57. Compare the convention of not distinguishing initially between the various ways in which vested remainders may be subject to complete defeasance. See *supra* text accompanying note 34.

58. See *supra* Figure 13.

59. You could graph this situation by shading the executory interests represented in Figure 5, *supra*. The shading would show that even if these people take, they may still be partially divested later.

FIGURE 17
Life Estate, Contingent Remainders Subject to
Open, Executory Interests, and Reversion



c. Vested or Contingent?

When drafters create alternative future interests following a life estate, it may be particularly difficult to classify those interests. Usually two possible constructions appear. There may be a vested remainder and an executory interest,⁶⁰ or two alternative contingent remainders and a reversion.⁶¹ This section discusses courts' varying approaches to the problem.

The key to classification in this context is usually the first remainder. If it is contingent, then an alternative contingent remainder construction likely will follow. If the first remainder is vested, then the second interest will probably be an executory interest. Compare two examples:

Example 1

Wendy grants property to Arlyn for life, then to Glenn if he graduates from college by age 25, and if not, to Darla.

60. See *supra* Figure 11.

61. See *supra* Figure 16.

Example 2

Wendy grants property to Arlyn for life, then to Glenn, but if he does not graduate from college by age 25, to Darla.

In Example 1, Glenn and Darla get alternative contingent remainders and Wendy has a reversion. On the other hand, Example 2 yields Glenn a vested remainder, subject to complete defeasance, and Darla an executory interest. In the first example, Glenn's remainder is subject to a condition precedent. In the second, it is subject to a condition subsequent. How can we tell? Look carefully at the words.⁶² In Example 1, the "if he graduates" language directly follows Glenn's identification. In Example 2, Glenn's name is followed by a comma, and then a "but" phrase.

However picky such an approach may seem, take it seriously, for important consequences flow from the distinction between vested and contingent remainders. Sometimes looking ahead to those consequences can help with the basic classification. In particular, try killing off the life tenant before the contingency has been resolved. If Arlyn dies while Glenn is a twenty-year-old undergraduate, who takes? Start reading after the "to Arlyn for life" language. In Example 1, we read "to Glenn if" Neither Glenn nor Darla qualifies as of Arlyn's death, so Wendy takes. In Example 2, we read "to Glenn, but" Glenn has qualified, but may not be able to keep it.

To help decide difficult cases and to further other policies, construction rules may favor one conclusion over another. Classic doctrine, often repeated as if by rote, says that the law favors vested interests.⁶³ Commentators debate why and whether that principle makes sense today.⁶⁴ Of the various rationales they offer for the rule, two are worth noting here.

First, because a vested construction will tend to limit the number of future interest holders, it may make property more alienable. The rule will achieve that result, however, only in a very small number of

62. See BERGIN & HASKELL, *supra* note 1, at 72.

63. See generally SIMES & SMITH, *supra* note 1, § 573.

64. Although the principle can apply to questions other than survivorship, as a practical matter, survivorship conditions are quite common and their use dominates the debate. See generally WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 11.1, at 438-45 (1988); Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801 (1985); Edward C. Halbach, Jr., *Future Interests: Express and Implied Conditions of Survival* (pts. 1 & 2), 49 CAL. L. REV. 297, 431 (1961); Edward H. Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467 (1965).

cases.⁶⁵ In particular, the alienability rationale has no application to trusts. The trustee has legal title to the assets and can transfer them freely despite the variety of equitable interests held by the beneficiaries.

Second, a vested construction will tend to avoid cutting off one line of a family. This may be the best argument for the rule. Suppose Eva's will creates a trust for Hope for life with ambiguous remainders to her children, Carleton and Channey. Suppose also that Channey survives Eva but dies before Hope. If a court construed Channey's gift as contingent upon his surviving Hope, Channey's family may lose out.⁶⁶ If, as under the traditional rule, Channey need not survive, his family could be expected to take the remainder by his will or by intestacy.⁶⁷ There are other ways to protect Channey's family, however, without running the property through Channey's estate.⁶⁸

Most of the time, reading the words in order will tell you whether the particular language creates a vested or a contingent remainder. In marginal cases, courts are likely to repeat, and often follow, the traditional preference for a vested construction. The stone in which that preference has been carved is slowly crumbling, however, so beware of putting too much reliance upon the old rule.⁶⁹

V. PUTTING IT TOGETHER

Examining different bits of language with an eye to classifying present and future interests is rather like looking through a kaleidoscope. Every time you turn it a different way, a new pattern appears. Because the patterns are endless, generalizations are dangerous. Rare cases, by definition, will not fit common patterns. Nonetheless, the following chart may help, if you treat it as a guide, rather than a mandate.

65. "[T]he rule facilitates alienation only in cases involving legal estates in land where the interest is an indefeasibly vested estate not subject to open and where ameliorative legislation has not been enacted." Rabin, *supra* note 64, at 482.

66. If the gift were a class gift, as the surviving class member, Carleton would take Channey's share. If this were not a class gift, Channey's share would pass under a residuary clause or by intestacy. Of course, some of Channey's share could come back to his family by either route.

67. Channey might also give the property to someone else.

68. We might imply that Channey has a power to appoint the remainder or we could create alternative gifts by statute. For discussion of these options, see ANDERSEN, *supra* note 32, § 43[B][2][c][iii].

69. One recent blow comes from the UPC, which presumes that future interests in trust are contingent on the beneficiary surviving until the time for distribution. 8 UNIF. PROB. CODE § 2-707(b) (Supp. 1995).

PRESENT AND FUTURE ESTATES

| <i>Present Interest</i> | <i>Future Interest*</i> | |
|--|--|--|
| | <i>In Grantor</i> | <i>In Third Persons</i> |
| 1) Fee simple absolute ("to B & her heirs") (modern - "to B") | None | None |
| 2) Fee tail ("to B & the heirs of his body") | Reversion | Vested remainder** Contingent remainder Executory interest |
| 3) Defeasible fee estates | | |
| a) Fee simple determinable ("to B, so long as...") | Possibility of reverter | Executory interest |
| b) Fee simple subject to condition subsequent ("to B, but if...") | Right of entry (power of termination) | None |
| c) Fee simple subject to an executory limitation ("to B, but if...") | None | Executory interest |
| 4) Life estate ("to B for life") | Reversion | Vested remainder** Contingent remainder Executory interest |

* In many cases it will not be possible for both the grantor and a third person to hold future interests following the same present interest. This chart indicates some possible future interests following various present interests.

** Vested remainders may be:
 indefeasibly vested
 subject to complete defeasance
 subject to open