1. Please provide an Analytical Overview of the Topic.

In a continuing effort to protect feudal dynastic estates, wealthy England landowners and their lawyers turned from the failed fee tail to the life estate and future interest. Today, the life estate and future interest is an invaluable device for estate planning, especially useful in the context of the trust.

In analyzing future interests, it is best to focus one’s attention on the fee simple absolute as the whole estate and then equate a formula where there other estates are carved out, such as FSA=LF+FI. (In addition, the law allows for the same general idea to work if you start with estates lesser than a fee simple absolute.)

Today we start the study of future interests. There are two groups of future interests, those that are retained by the Grantor (or transferor) and those created in a subsequent grantee (or transferee). We will focus in on the Grantor’s future interest and the vested and contingent remainder. We will leave the executory interest for next Monday’s class when we return from the Fall break.

2. What is future interest?

It is a property right that gives the owner some legal right to future possessory interest in real property. It is real at the time it is granted, giving the future interest owner rights and liabilities, e.g. the right to protect against waste, can sue against injury or trespass to the property. pp. 225-6

3. What are the future interests in a Grantor?

There are three types of Grantor future interests, the reversion, the possibility of reverter, and the right of entry. **It is critical to note that all three types of future interests retained in the Grantor are usually “invisible,” in that they usually do not appear in the granting language creating either a life estate or the defeasible estate. Beware that even when not expressly stated, these future interests in the Grantor follow the creation of life estates or defeasible estates, unless the Grantor provides otherwise. They also work as the default interests when the Grantor provides otherwise but the plan to pass to a subsequent successor in title fails for some reason (such as the subsequent successor in title is dead and has no heirs).**

4. What are the Grantor’s future interest following determinable estates?

You already know that following the creation of a determinable estate (“so long as used for school purposes”), the Grantor reserves to herself the future interest
called the (automatic) possibility of reverter. This automatically exists and is vested in the Grantor, unless at the creation of the determinable estate, the Grantor provides for the future interest to pass to another grantee. You might consider the formula, $FSA(+PR) = DE$

You also know that following the creation of a subject to condition subsequent estate (“but if no longer used for school purposes”), the Grantor reserves to herself the future interest called the (optional) right of entry. This also automatically exists and is vested in the Grantor, unless at the creation of the subject to condition subsequent estate, the Grantor provides for the future interest to pass to another grantee. You might consider the formula, $FSA(+RE) = SCS$.

In both of the determinable and the subject to condition subsequent, there has been an issue as to whether the Grantor could alienate the retained future interest inter vivos or by will. Perhaps, it was thought that those retained interests were too speculative to be transferable until the triggering event occurred. They were always thought to be inheritable. Today, the majority of jurisdictions allow the Grantor to alienate the retained future interests by inter vivos transfer and by will, and of course by inheritance. See Mahrenholz, p. 208, 210, and 214.

**5. Could a Grantor create a future interest in a third party when granting a defeasible estate?**

Yes, in the last reading from yesterday, the textbook identifies two other future interests that a Grantor could create following defeasible estates. Namely, the Grantor could designate when creating a determinable estate that the possibility of reverter should pass to someone other than the Grantor. This future interest in this successor title interest holder of the possibility of reverter is called an executory interest. You might consider the formula, $FSA = DE + EI$. p. 207, fn 27 and also see pp. 237-8.

Similarly, the Grantor could designate, when creating a subject to condition subsequent that the right of retry should pass to someone other than the Grantor. This future interest in this successor title interest holder of the right of retry is called a fee simple subject to an executory limitation. You might consider the formula, $FSA = SCS + SEL$. p. 208, fn 28. (The sentence at the start of fn. 28 appears to contradict the sentence that follows.)

There are four “new” future interests introduced in the reading material. Let’s focus our attention on this. One is, like the possibility of reverter and the right of entry, retained by the Grantor. The other three future interests result from the Grantor’s decision at the time of the initial grant not to retain the successor interest in the estate, but to create a successor in title to follow at least by plan the first grant.

**6. What is a reversion and where does it come from?**
The third and perhaps most common type of future interest in the Grantor is called a reversion or reversionary interest. A reversion is what a Grantor retains when she grants an estate that is less than the estate that she owns. The most common, although not the only type of reversion, is the future interest that the Grantor retains when the Grantor grants a life estate. Consider the formula, FSA(+R)=LE. 

**Beware that because reversions are assumed to exist, they are often not expressly stated as part of granting language. So that O to A for life, means that O retains the reversion (even though the grant does not express so.)**

Today, it is quite common in a will for a Grantor to provide for the direction of the reversions, if any, such that in a “residuary clause,” in a will may provide that all reversionary interests, I will to X (whomever the Grantor wishes).

See the problems on p. 227.

7. **What is a future interest in a third party or a successor title holder?**

A remainder is a future interest in a third party or successor title holder (following the second party or primary grantee) that receives an interest at the time of the grant to the primary grantee and receives an interest that at the time of its grant may become possessory when the prior estate ends. Such that, for example, Grantor (first party) grants to A (second party or primary grantee) a life estate, then to B (third party or successor title holder) a life estate. If at the time of the grant B is dead, then the attempted creation of a future interest of a life estate in B is not valid. If B were alive at the time of the grant, the future interest in B would be valid.

8. **How are remainder’s classified and, more importantly, why are they so classified?**

Remainders are classified into three groups, vested remainder, contingent reminder, and executory interests. They are, of course, all future interests in a subsequent successor, created at the time of the grant to the prior grantee. Such as O to A, for life, remainder to B and his heirs. Consider the formula, FSA(in O)=LF(in A)+FeeSimpleVR(in B, not his heirs). The classification of future interests in third parties focus on the how the type affects marketability or certainty (can you see how). What is confusion is that one must also thing about the type of ownership interest that is being conveyed by the grantor as well. For example, FSA(O)=LF(A)+LF(B) would mean that B has a life estate remainder interest.

9. **What is a vested remainder? How does it differ from a contingent remainder?**

**Distinguishing a vested remainder from a contingent remainder is critical to success in this area of law.** The easiest way to distinguish a vested remainder from a contingent one is to master the test for determining whether a remainder is vested.
A vested remainder is the easiest and most obvious to analyze, and perhaps the least troublesome of the three types of remainder interests. Understanding it also helps us understand some of the confusion surrounding all types of remainder interests. First, what does it mean to be vested? A future interest is vested if 1) at the time of the grant, the named recipient (or third party grantee) is an ascertained person, meaning alive and clearly identified (such as Susan James, soc. sec. #444-44-4444, do not use general terms such as “my husband”) and 2) is not subject to a condition precedent (other than natural termination), in other words, can only follow a life estate. Therefore, a vested remainder might be a life estate to B, following a life estate to A. Such as the formula FSA(O)=LE(A)+LE(B).

Although most commonly, a vested remainder appears in the form of a fee simple grant to a named B person, following a life estate grant to a named A person, such as Grantor grants to my husband, John Gatemouth Jones a life estate for his life, and a vested remainder of the fee simple to our two children, Blues Jones and Jazz Jones. The problem is that in the book and on exams the granting language is less explicit, such as “to A for life, then to B and C,” which creates the same. Clearly, when practicing law, one is not required to use simple formulas but can be and should be very precise and explicit as to the true meaning of granting language.

Hence, so as not to be confused, the three classifications of remainders are more to do with their types of certainty or uncertainty of becoming possessory (or vesting) and their impact on marketability and less on the type of interest that is being conveyed, life estate, fee simple, possibility of reverter, right of entry.

A remainder to a class of persons, such as to my children, is considered vested if any member of the class is ascertained (alive at the time of the grant) and the grant does not follow a contingency (“vested subject to open”). p. 229.

10. What is a contingent remainder?

Generally, if a remainder is not vested (or an executory interest), it is a contingent remainder. A remainder is contingent where it is either made to an unascertained grantee (such as to “my husband” too generic, or to “B’s heirs” while B is still alive). It is also contingent if and when it is made to follow a contingency (either a condition precedent or a defeasible estate).

11. Why does it matter if a remainder is vested or a contingent remainder?

The law clearly considers a vested remainder to be a property interest, but had problems recognizing contingent remainders as property interests. If a grant is ambiguous, the court construes in favor of creating a vested remainder. p. 232. In addition, a vested remainder was certain to happen,
making it more marketable. A vested remainder was assignable during the
remainderman’s life, and therefore, promoted marketability and
creditworthiness. A vested remainder was not destructible as they were
vested, whereas a contingent remainder would be destroyed if they did not
vest upon termination of the prior estate. (see Destructibility of Contingent
Remainder rule, p. 241.) And most importantly, vested remainders are not
subject to the Rule Against Perpetuities, whereas contingent remainders are!
(Some state statutes still treat contingent remainder owners as lesser
property owners, e.g. may not have legal standing to sue for waste.)