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FUTURE INTERESTS AND THE MYTH OF THE SIMPLE WILL: AN APPROACH TO ESTATE PLANNING

Part Two

DAVID M. BECKER*

The purpose of Part One¹ was to demonstrate the enormous complexities which attend the planning of nearly every estate, no matter how simple the general dispositive scheme may seem. These complexities are especially evident if the estate owner elects to defer distribution of principal for a period of time; that is, whenever the future interest emerges as an essential feature of the plan. Absent adequate "provision" and effective "provision"² by the planner, these complexities will become issues of construction and, regretfully, must often be resolved by a court. No matter how dutifully courts perform the task of approximating an estate owner's intent, at best they engage in artful

* Professor of Law, Washington University. A.B., 1957, Harvard College; J.D., 1960, University of Chicago.

1. Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning—Part One*, 1972 WASH. U.L.Q. 607.

2. W.B. LEACH & J. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* 237 (1961):

The first task of the draftsman is to foresee, by drawing upon his education and experience, the eventualities which may expose the deficiencies in so rudimentary an idea, and thus be in a position to develop it into a full-grown plan of disposition competent to meet the stress of change. His second task is to express the developed thought succinctly in language drawn from a sound knowledge of English speech and a familiarity with those many technical expressions to which in a long course of history courts have given unexpected meanings. Reduced to a formula: comprehensive and astute prevision, concise and accurate provision.

guesswork. Most commonly they find themselves articulating and implementing the wishes of the "reasonable man." Because the consequences of a planning oversight are too important to be left to judicial resolution, ideally a planning solution should be the conscious choice of the estate owner. Part Two stresses the extraordinary importance of anticipating the full range of problems accompanying the elaboration of any basic plan, but additionally it develops a general approach for perceiving contingencies and eliminating oversights. The result, however, is not a "how to do it" manual for recognizing planning complexities. Although a planner is apt to encounter many of the problems raised in Part One, and might find direction from their discussion, the analysis of selected problems in Part One was illustrative only. Part Two, however, suggests an approach to problems which goes beyond those previously discussed; once again the emphasis is upon effective "prevision." Least of all, this approach—an informal methodology—is not a series of selected "forms." Generally, it does not include specific solutions to specific problems. Although these solutions, as well as the language needed to implement them, are important, the problems which require these answers must first be singled out. This is the burden of Part Two.

A. GENERALLY—DISPOSITIVE PRIORITIES

1. *Providing a Base by Which the Efficacy of Solutions Can Be Tested*

Every estate owner has a series of priorities which purportedly appear in instruments used to dispose of his estate. He is concerned not only with identifying beneficiaries but also with the subject matter and size of the gifts they receive. These priorities may relate to the takers as individuals or as a group, usually by family unit, and to the sequence in which they are to benefit. The first task, then, of every planner³

3. This should also be the task of every court making a construction, particularly one in which the question, unanswered by the language itself, is settled by a plan revealed in the entire will and surrounding circumstances. Consider this example: "To my son for life; if he dies without issue, remainder to my brother absolutely." Suppose the son is survived by issue. Clearly the remainder does not pass to the brother, but must it instead pass to the residue or by intestacy? Looking to the planning priorities found in the entire document and in relevant surrounding circumstances, it may become clear that a remainder to issue was intended and, therefore, should be allowed.

See W.B. LEACH & J. LOGAN, *supra* note 2, at 450:

The term "estate plan" has come into general use by the profession only in

should be to establish clearly these priorities. Although an estate owner may sometimes find it difficult to explain his priorities fully and clearly, it is the planner's task to probe carefully for those preferences which ultimately underlie the scheme of disposition. Beginning with the statement of a general plan and culminating in the dispositive documents, a planner, most importantly, must make certain that these priorities are reflected and effectuated at each stage of the planning process. In appraising the efficacy of his final product, a planner must compare what he has done against those priorities previously developed. At the very least, this will demonstrate whether he has succeeded in implementing his client's preferences. Just as significant, however, by pointing out which priorities are impractical or unobtainable, he may make the need for revision apparent. If a planner has done his job, there should be no foreseeable occasion when these priorities are not achieved. This is usually more easily said than done.

2. *Unraveling the Estate Plan—Eliciting Possible Eventualities and Satellite Priorities*

Another important reason for full elaboration of priorities is to test the viability of a plan by exploring improbable but possible future events. Ascertaining a client's basic preference is not a particularly difficult task,⁴ nor is it usually difficult to record these preferences in simple form. Furthermore, if the probable always occurred, for example, that a wife and children survive the husband-estate owner and that children survive his wife, a simple elaboration would suffice. But

the last twenty years. As an aid to construction it is a valuable addition, not yet shared in significant measure by our brethren in England. It suggests that a court, by examining a whole will in the context of the family relationships and property status of the testator, can deduce the scheme of disposition he had in mind; that this scheme of disposition is as much a part of "the will" as the words in which he has sought to express a series of estates to various individuals; and that, if his expressed gifts comprise an incomplete disposition to achieve his plan, the gaps can be filled in by reference to the plan itself. In this the court is not "making a new will for the testator." It is reading the will as a group of analytical realists instead of as a congress of grammarians.

For a discussion of estates by implication, see L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 841-45 (2d ed. 1956, Supp. 1972).

4. It should not, however, be underestimated. Many people are reluctant to consider the prospect of death and particularly its consequences. Indeed, eliciting basic information about an estranged child, a retarded child, or family jealousies and conflicts may be both necessary and difficult. Tact is obviously an essential tool of planning. See B. BECKER, *PSYCHOLOGICAL ASPECTS OF ESTATE PLANNING* 1-36 (Estate Planning Quarterly Booklet No. 403, 1970).

probability is not certainty, and simplicity will not assure effectuation of priorities important to the estate owner. What is possible should be the concern of the planner, for there is no guarantee of the probable.

Consider, for example, the basic priorities of a typical estate owner: to provide for his immediate family, his wife, children and grandchildren; to ensure that each family unit takes an equal share; and to make certain that his estate remains within his family. Consider further the kinds of events which, in the light of provisions commonly used to implement his plan, might affect the attainment of these priorities. Anyone who is the recipient of a gift as an individual or as a member of a class may predecease the testator and still be survived by descendants. Similarly, the holder of a future interest, nontransmissible at death, may fail to satisfy conditions which qualify his interest, thereby denying the claim of his surviving descendants. Further, the recipient of a transmissible future interest may die without surviving descendants before the date upon which possession is to commence, perhaps occasioning diversion of his interest from the estate owner's family. Additionally, an alternate contingent remainder, if used, may not account for all events comprehended by the primary condition.⁵ And, of course, the unprovided contingency may occur. Finally, the recipient of a defeasible fee, terminable only if he is not survived by descendants, may by will divert his estate from his descendants. These oversights can produce similar consequences. If an interest is nontransmissible at death and a substitute gift is not provided, or if a remainder is contingent and all contingencies are not accounted for by adequate substitutes, the occurrence of the unforeseen may preclude a family unit from taking, or at the very least can alter the size of the share planned for each family unit.⁶ Or, if an interest is made transmissible at death,

5. Consider this provision: "To my son, *S*, for life, remainder to his surviving children." Although the estate owner expects his son to have surviving children, *S* may not. This possibility is apparent and is usually covered by a substitute gift. Yet the substitute gift selected may raise another unprovided-for event. "To my son, *S*, for life, remainder to his surviving children, if none, to my other grandchildren then living." Obscured, of course, is the unforeseen and unlikely event that this son will not be survived by either his children or other grandchildren. This event can occur even though it seems remote. When realized, the above priorities could be frustrated. Suppose *S* is one of three children for whom similar provision has been made and that *S*, without children, predeceases the other two before the birth of their respective children. The remainder created with respect to *S*'s life estate fails and may pass by intestacy, thereby giving the estate owner's surviving wife a share different than that intended.

6. For example, consider these illustrations: "To my wife for life, remainder to our children who survive her." The family of a child who predeceases the wife is

it can be diverted from those the estate owner ultimately intended to share his estate. For example, if the holder of a transmissible interest is not survived by descendants, diversion of his entire share from the estate owner's family sometimes occurs, especially if the recipient is survived by a spouse. Further, even if he is survived by descendants, the holder of a transmissible interest need not provide for them by will. Even if he does, his surviving spouse, by exercising her marital rights, can remove part of the estate owner's estate from his family. In short, in each of these unanticipated situations the planning priorities will not be carried out. The gravity of the oversight will vary. The impact of the improbable is a function of the kind of priority affected and of the extent to which it has been frustrated. Nevertheless, in the main, these are consequences which could have been avoided if the critical eventuality had been foreseen.

The purpose of extracting and elaborating a client's priorities is indeed something more than finding out generally to whom he wants to leave his estate and how he wishes to leave it. If eventualities are to be anticipated and accounted for, basic objectives must first be articulated and a blueprint drawn from which the final solution is to be constructed. Foreseeing the possible requires considerable speculation that can be done intelligently only within a definite framework built from the estate owner's priorities. A basic estate plan designed to provide first for a testator's wife and then his children is not apt to reveal the full range of eventualities, which may ripen into construction problems, without a full elaboration of priorities. Neither the importance of making a gift of a future interest to children nontransmissible at death, nor the significance of making an appropriate substitute gift to a child's descendants if his interest has been made nontransmissible, can be appreciated unless it is first understood that the estate owner wishes

precluded from sharing in the remainder because it has been made nontransmissible without use of any substitute gift. "(In trust) . . . Income to my wife for life, and then at her death the principal is to be divided into as many shares as the number of children I have had and as to each share a separate trust is to be created for each child. The income from each child's trust should be paid to him for the remainder of his life. At his death, his share of principal should be sold and the proceeds distributed to his surviving issue. If such child dies without surviving issue, his share of principal should be added to the shares of my then surviving children, subject to the same provisions of their respective trusts." Suppose the testator has three children, X, Y, and Z, who survive his wife. X dies first, survived by issue. Next, Y dies without issue survived by Z and X's issue. Inadequate use of a substitute contingent interest if a child dies without surviving issue may give Z and his family a two-thirds share of the testator's estate when equality was intended.

to assure both that his estate will remain in his family and that his children or their families will share equally. In short, it is unlikely that a planner will readily perceive the need to make a gift to children contingent upon survivorship of their mother unless he has first established the importance of retaining the estate within his client's family. The search for eventualities which can seriously affect a general plan for disposition will be fruitless until a planner has first carefully isolated in which directions the search ought to take place—until he has identified those consequences his client wishes to assure or avoid.

To summarize, the comprehensive elaboration of priorities serves two important functions. First, these priorities constitute a base against which the efficacy of an ultimate plan may be examined. Secondly, they also provide a framework to expose critical eventualities and, accordingly, account for them in a final plan. Because this summary is perhaps an oversimplification of the latter objective, it should be made clear that, unlike the first objective, the emphasis is not upon isolation of priorities as such, but upon the elaborative process itself. Although critical eventualities cannot be exposed without a framework for speculation—that which the priorities supply—a full statement of these priorities is not ordinarily self-evident. The planner may begin with only this cornerstone: "To my wife and my children." The elaborative process focuses on furnishing the remaining foundation. The process becomes one of exposition of eventualities and simultaneous identification of additional priorities to meet them. The comprehensive set of satellite priorities seldom materializes at the outset. These goals are unraveled from the bindings of probable and possible eventualities which the experienced planner perceives. Building then on the simple cornerstone, a planner may contemplate the eventuality of a child's failure to survive the wife, which in turn might reveal a desire to retain the estate within the family. Beyond this, a planner may hypothesize the existence of descendants who survive the wife and their parent—the deceased child. This might reveal yet another satellite priority: equality among family units and accordingly the need for a substitute gift. And so it is that the plan is unraveled—priorities and relevant eventualities are exposed. Even though an insight into eventualities requires a framework of planning objectives, all priorities need not be isolated before one begins the task of educated conjecture—indeed they cannot. Speculation about future events frequently allows one to envision the full range of satellite priorities not otherwise apparent. What is most important is a sense of the elaborative process which in the end

produces priorities and forces a consideration of those eventualities which can disrupt a plan.

B. SOME SPECIFICS

What follows is a strategy for educated conjecture, speculation which concerns satisfaction of priorities as to who will take, when and under what circumstances they will do so, and the share they will receive. Central to much of the strategy is a consideration of common eventualities which enable the planner to focus on satellite priorities, other eventualities and, finally, ultimate solutions.

1. *Examining the Near Impossible*

It makes some sense to begin by anticipating the outlandish or even the near absurd and then to retreat to the reasonably possible. For example, consider the conjecture that follows. Suppose that not all minor great-grandchildren, for whom specific provision of a future interest is to be made by their great-grandfather, survive their father, or their grandfather—both of whom are to be given prior interests by the same limitation—or even their great-grandfather. Suppose the number of grandchildren, all of whom are to be included, increases either before or after the testator's death, even though all of the testator's children are beyond age 60 at the date his will is executed. Or suppose a recipient of a life estate or an executory interest, who is much younger than the testator, predeceases the testator or renounces his interest in the testator's estate even though what has been left to him has enormous value. Ultimate solutions to these eventualities may not be attempted either because they are infeasible or because a planner may not wish to encumber his final product with infinite provision for the highly improbable. Nevertheless, it is useful to begin with a consideration of the bizarre, for only then can one systematically and confidently eliminate the unimportant and scale down his coverage to the relevant. Working back from the highly remote to the reasonably probable would seem to be the best safeguard against unfortunate oversights. What kind of specific questions, then, ought to be considered when identifying problems which warrant solutions?

2. *Personal Enjoyment, Conditions and Substitute Gifts*

To begin with, the most serious kind of disruption of priorities can happen upon a failure of personal enjoyment—when a recipient is

either unable or unwilling to enjoy personally his share of the estate. This occurs when a taker refuses his share or fails to survive the date on which he would otherwise have assumed possession. His failure to assume possession personally—something always possible—can create a variety of problems for the planner. Quite apart from what a court would do in making a construction resolving the problem, a planner must ask several questions. What is to become of the recipient's interest? Should it be made transmissible at death and pass to successors selected by him, or should it be directed to others expressly provided for under the estate owner's will? How will other interests created by the same limitation be affected? Should they become possessory immediately if the interest which fails is a prior possessory interest?⁷ Should possession of a future interest be accelerated even if subject to an unfulfilled condition—perhaps one which is then meaningless?⁸ Further, if instead the future interest has failed, should the possessory interest be enlarged into an inheritable estate; if a fee, should it become absolute?⁹

Problems of one kind or another are always present. If a future interest has been made transmissible at death, priorities with regard to diversion of the estate from the family may be affected. If it has been made nontransmissible at death, absent adequate substitute gifts, the priority of family equality may be disrupted. The potential for this latter disruption exists in every estate plan even though conditions of survivorship operable after the testator's death are neither imposed nor intended. The specter of an unforeseen lapse is always present. Indeed

7. For example, consider this devise: "To my daughter, *D*, for life, remainder to my son, *S*, in fee simple." Suppose *D* refuses to assume possession for life, must *S* still await her death before assuming possession? Or, consider this devise: "To *B* for ten years, and, at the end of the ten years, then to *C* in fee simple." Suppose *B* fails to survive the testator, must *C* wait ten years for possession?

8. For example, consider these provisions. "To *B* in fee simple; but if *B* fails to attain 21, then to *C* in fee simple." Suppose *B* predeceases the testator after reaching age 21. Does it make sense to deny *C* an immediate possessory fee simple? "To *B* for life, and, if *C* survives *B*, then to *C* in fee simple." If *B* renounces, does it make sense to delay possession to *C* until he survives *B*? The reasons which probably underlie a testator's use of these conditions seem consistent with giving immediate possession to *C*. If consistent, it should be made explicit. Consider, for example: "To *B* for life, and whenever *B*'s estate terminates, then to *C* if living."

9. Consider these illustrations. "To *B* for life, remainder to *C* in fee simple." If *C* fails to survive the testator, should *B*'s interest be enlarged beyond a life estate? "To *B* in fee simple; but if *B* dies without surviving descendants, then to *C* in fee simple." If *C* predeceases the testator, should *B*'s interest be made absolute even if he is not survived by descendants? If not, what alternative divestiture should be provided?

the severest problems can occur if this oversight is made—who is to take if a named individual or class member predeceases the testator—and these problems can, with the same unfortunate consequences, just as easily happen to the plan which does not include any explicit conditions of survivorship. The planner who has avoided using these conditions is apt to overlook the lapse problem unless he raises this simple but important question: what happens if a recipient is unable or unwilling to enjoy personally his share of the estate?

If a plan includes express conditions operable after the death of the testator, the need for careful examination of possibilities surrounding the matter of personal enjoyment is even more significant. First, if a condition is unrelated to the life or death of a recipient of a future interest,¹⁰ or if its satisfaction requires survivorship of an event which can occur prior to possession,¹¹ the same question of personal enjoyment remains. Does the estate owner, in addition to the explicit conditions imposed, wish to make the future interest contingent on survivorship of possession? The tendency to pass over this question is common, especially when the future interest is already fettered by other conditions which naturally occupy the attention of the planner. The consequences of this oversight may be particularly undesirable if other express conditions clearly reflect an unwillingness to have the estate distributed ultimately to one unable to secure personal enjoyment of his share.¹²

10. Consider these devises: "To *B* for life, remainder to *C* in fee simple if *B* is not survived by descendants"; and "To *B* for life, remainder to *C* in fee simple if the land herein is still zoned residential only." In both illustrations *C* has a contingent remainder. In neither case must *C* survive *B*; he must, of course, survive the testator. His interest is contingent but it is also transmissible at death. *C*'s interest may vest even if he fails to survive the date of possession, *B*'s death. The express condition which must be satisfied is unrelated to *C*'s life or death.

11. Consider this illustration: "To *B* for life, remainder to *C* absolutely if he attains 21." If a minor at the date of the gift, *C* must survive to satisfy the age requirement. *C*'s interest is contingent. His remainder is nontransmissible at death until the condition is met. Nevertheless, the requirement is one that can be achieved before *B* dies. Once satisfied, *C*'s interest is vested and transmissible at death. His right to possession is no longer related to his being alive. His remainder is not conditioned upon personal enjoyment; that is, he need not survive the date of possession. If *C* attains 21 but predeceases *B*, *C*'s remainder will pass by the terms of either his will or any prior transfer he might have made.

12. Suppose the provision in question is one of several which make specific gifts, but that the others create interests expressly laced with requirements of personal enjoyment: "To *B* for life, remainder to *C* if alive and 21"; or "To my wife for life, remainder to my widowed mother, if living, for as long as she does not remarry." Un-

Secondly, since alternate gifts frequently and wisely accompany interests subject to conditions, the use of these gifts requires complete consideration of all factual circumstances which might warrant substitution for the primary interest. One important circumstance to consider is whether an alternate taker must survive any occasion, particularly the date of possession. There are at least two factual possibilities with respect to every contingency: it will or will not be satisfied. Accordingly, alternative dispositions are necessary. Suppose a specific bequest has been made: "To *A* for life, remainder to *B* if he survives *A*." *B* will or will not survive *A*. If he does, his remainder vests and he assumes control of the bequest. If he predeceases *B*, the bequest passes to those entitled to residue. However, if an explicit substitute has been made within the limitation creating the specific bequest, ". . . and if *B* survives *A*, remainder to *B*, if not then to *C*," an additional possibility is added which may require a third alternative. Surely it is conceivable that neither *B* nor *C* may survive *A*. What then? In the absence of a clear statement that *C* must also survive *A*, a court would probably find his interest transmissible at death; that is, his interest is only contingent upon *B*'s failure to survive *A*. Although there are three relevant factual possibilities, a court would probably choose between the two express solutions. But this surely does not mean that two solutions are all that is required of a planner. A client's response to questions concerning personal enjoyment and survivorship of possession may well indicate the need to provide an alternative to *C*'s taking if neither he nor *B* survives *A*.

Because the number of factual variations increases considerably when other kinds of conditions are added, the need for skillful and comprehensive use of substitute gifts becomes even greater. Once again, consider the bequest to *A*, *B*, and *C*, but suppose the gift to *B* is expressly made contingent only upon attaining 21: "To *A* for life, and then if *B* has attained 21, remainder to *B*, but if not then to *C*." Assuming *A*, *B*, and *C* are alive and that *B* and *C* are minors, one has at least these possibilities at the date of execution: *B* may attain 21 and survive *A*; *B* may attain 21 but predecease *A*; *B* may predecease the testator after attaining 21; *B* may predecease *A* without attaining

less he has some special reason for excepting the gift that does not contain these kinds of requirements, the estate owner probably intends to make personal enjoyment—survivorship—a condition of possession for each of the interests. Surely this is a matter which warrants specific consideration by both planner and client; it should not be deferred to judicial speculation.

21; *A* may die while *B* is still a minor and *B* may or may not thereafter attain 21; *C* may or may not survive *A*; *C* may or may not survive *B*; *C* may or may not survive the date *B* fails to attain 21; *C* may or may not attain 21; *C* may or may not have attained 21 at the date he might otherwise be entitled to take. The above limitation allows only two solutions about which one can be perfectly confident. If *B* attains 21 during the life of *A* and survives both the testator and *A*, the testator undoubtedly intends that *B* assume possession. Further, if *B* fails to attain 21 and predeceases *A*, and—just to be absolutely certain of what the testator's intent might be—if *C* is alive and 21 at *A*'s death, *C* is entitled to possession, although a more conventional construction might allow *C* possession if he has merely survived the testator. One can surely speculate as to what solutions the estate owner might prefer.¹³ Though he has conditioned *B*'s interest upon reaching 21, he may not similarly wish to condition *C*'s interest. Yet this kind of speculation should be confined to the courts; a planner must have definite answers and, accordingly, solution to these problems. His guesswork tells him what he must find out and his legal training tells him what he must provide. A well-planned and well-drafted bequest to *A*, *B*, and *C* should clearly dispose of all the foregoing possibilities.

Underlying this entire discussion has been the combined question of survivorship and personal enjoyment, a question which must be asked if important eventualities are to be isolated. What should be clear is that this kind of question naturally leads to other related problem areas, some of which have just been illustrated. For example, if an interest is conditioned, adequate substitute gifts should be made express, and should account for all relevant possibilities. Neither the recognition of these problems nor their solution is a simple matter. To accomplish both one might summarize with a series of questions. When should a primary taker's interest be extinguished—must he survive the date of possession in addition to satisfying other express conditions and must he

13. Indeed, our speculation may be endless. If *B* and *C* are similarly related to the testator—for example, they are both grandchildren—and are both minors at his death, would not the testator wish to treat them alike? If one must attain 21 and survive *A*, should the other? Perhaps not, since the testator clearly has created interests which are unlike. After all, possession given them is not joint but alternate. Furthermore, one can presume that this testator, as well as others, wishes to limit the possibility of intestacy. If so, some person who survives him should be given an interest transmissible at death. No one can be certain that any of the selected recipients of a future interest will survive possession or some other date subsequent to the testator's death. This alone may be sufficient reason for separate treatment of *C*.

satisfy these conditions by the date all prior interests terminate? When should an alternate gift take effect—whenever the primary beneficiary is not for any reason able to take or only when his interest fails by the date all prior interests expire? And, further, should the substitute gift be subjected to independent conditions different or similar to those imposed upon the primary gift? If so, must these conditions be met by the date all prior estates terminate? Finally, if both the primary and substitute gifts are subject to conditions not mutually exclusive, then to whom should the gift be made if neither satisfies his express contingency?

3. *Variations in Time—Termination of Supportive Estates and Fulfillment of Conditions—More About Substitute Gifts*

The use of comprehensive substitute gifts for both principal and income is essential. This should be evident whenever a condition not clearly wedded to the earliest occasion upon which a future interest may become possessory is employed; that is, the time at which all prior supportive interests are extinguished. In short, a planner must be sensitive to problems arising out of conditions which may be met or breached before or after prior interests have expired. For example, in the previous illustration, *B* may attain or fail to attain 21 before or after the death of *A*. The foregoing questions respecting this limitation inquired as to disposition of principal. Generally, must the remainder vest, if at all, by *A*'s death? More specifically, who is to receive the remainder if *B* survives *A* but attains 21 after the death of *A* or if *B* survives *A* but fails to reach 21 thereafter?

If the testator has intended that for *B* to take he must attain 21 before the death of *A* and, if he does not, an immediate gift over is to be made, the required solutions and explication of alternatives are limited to principal. In all likelihood, however, the testator, primarily having *B* in mind, would wish the future interest to pass to *B* personally whenever he attains 21, even if it follows the death of *A*. If this is so, an added problem arises. Beyond making certain that *B*'s interest will not be extinguished if he does not reach 21 by the death of *A*, and that an alternate gift will be made whenever *B* fails to attain 21, one must ask who is to benefit from the bequest after *A* has died and before *B* thereafter attains or fails to attain 21. What is to be done with income when distribution of principal is delayed beyond the expiration of prior interests? If provision is not made, it could very likely pass

to the residue or, if the gift is of the residue, pass by intestacy. Depending upon the size of the gift and the period of time it takes to determine whether *B*'s gift will vest or fail, the amount involved could be substantial. Consider contingencies which limit remainders to *B* when he attains age 40 or when he marries. In the latter situation, distribution of principal may be delayed for *B*'s entire life if he remains a bachelor. What should be done in the interim, after *A* has died and until *B* does or does not satisfy the condition, should not be left to chance. The planner must expressly provide what will happen.

4. *Class Gifts—Form as a Function of Desired Consequences*

Much has already been said about class gifts in Parts One and Two. However, this approach to estate planning contained in Part Two necessitates further observations and questions. A class gift is usually created because an estate owner has elected to make a gift to a group of people who can be described by some shorthand: "to my children"; "to my nieces and nephews"; or "to the graduating class of 1973." In most cases, the availability of an abbreviated description for those entitled to benefit should not be sufficient reason for using class gift terminology. Indeed, one must always ask: "Why make a gift to the group as a class rather than name them individually?" Class gift terminology should not be used unless there are valid reasons for doing so; that is, unless the consequences of a class gift are fully understood and desired. The abbreviated form should be used to secure those legal consequences which attend class gifts, not to save words in identifying recipients.

Generally, a class gift will be shared equally by those members who satisfy any explicit or implicit conditions—for example, survivorship of the testator—and who are born by the date of first distribution. If this is what is intended, a class gift is appropriate. However, if an estate owner wishes the group to share unequally, a class gift may frustrate his intention. If he wishes a member's interest to pass to the member's family instead of others in the class if that member fails to satisfy some condition, the class gift, without more, will not accomplish this objective. The most significant reason for using a class gift is to provide for full membership in a group which is subject to increase, particularly after the testator's death. However, if the group in mind is fixed as to maximum size, a class gift probably should be avoided. If equality is intended, initial division on behalf of each named indi-

vidual can be made. If other members of the group are to benefit upon the failure of any share, for example, if a member has died without surviving descendants, this can be accomplished by complete gifts over to those entitled to other shares. Indeed, nothing prevents a planner who has made a gift to individuals from selectively providing for the consequences characteristic of a class gift. As a general rule, if a planner refrains from using a class gift whenever maximum membership of a group is not subject to increase—for example, a gift to *A*'s children when *A* is already dead—the planner is in a better position to recognize, and therefore cope with, relevant eventualities, especially if he keeps in mind the potential failure of individually named members to satisfy conditions or survive possession and the need for comprehensive substitutes. If, on the other hand, a group is subject to increase—for example, a gift to *A*'s children when *A* is still alive and likely to bear additional children—a class gift is justifiable. Class gift terminology will save unnecessary elaboration if, of course, the estate owner wishes to include those members not yet in being. But, if this is intended, it should be recalled that a class gift will not even assure this result so long as the possibility of further membership has not been exhausted before the date of first distribution. If the estate owner desires to benefit every possible member of the group, special provision must be made to hold the class open beyond the date at which courts ordinarily fix maximum membership. Just as one can engraft some of the consequences of a class gift upon a gift to individuals, so can he remove some of the usual consequences from class gifts. Frequently he should do so. Accordingly, if the estate owner prefers a class member's interest to pass to his descendants instead of other members of the class, this preference can be, and should be, expressed.

The point, then, of this approach to estate planning as it concerns gifts to groups of individuals identifiable by an abbreviated description is simply this: a class gift evokes certain consequences and, similarly, so does a gift to a named individual. These consequences must be recognized and understood. At the very least, a planner must first determine which consequences he wishes to attribute before he uses a shorthand which produces a specific set of results. Having in mind the consequences he desires, he must then select that form which comes closest to his objectives. If a group is subject to increase, the appropriate form may be a class gift, but if maximum membership is fixed, a gift to individuals may be more desirable. Finally, once having selected the form, if all the consequences of that form are not intended,

special care must be taken to alter it. The limitation which is ultimately settled upon, the form with its engrafted exceptions, must always reflect precisely those consequences which have been previously selected.

The approach contained in Part Two has not been comprehensive. It is but a starting point or general strategy for "provision": the recognition of critical eventualities which require positive planning solutions. Nor are the particulars of this approach to estate planning novel. One way or another, every planner worth his salt asks these questions and makes these same inquiries. Yet for much of the profession, the consideration of these questions is disorganized and frequently incomplete. Haphazard prediction of future eventualities must be avoided. Every planning situation, at least initially, must be approached as if it were difficult. The myth of the simple will must be obliterated. Only by conscious, systematic and comprehensive inquiry can a planner safeguard against those events which might destroy his dispositive scheme. Because courts cannot, and therefore have not, adequately remedied what has been overlooked, and because there is no reason to expect better judicial solutions, the burden falls squarely upon the planner.¹⁴

14. One might expect the reaction of many lawyers to this planning approach to be: "How unnecessary! These eventualities referred to haven't bothered me and, so far as I know, haven't bothered any of my friends in the business. Your approach makes a big thing of unrealistic problems. Time is money to me. My time costs my clients. My clients have been well satisfied with what I've done at the price I've charged. Their wills don't require excessive planning. Further, this kind of work doesn't command the fee which the application of your methodology would require. There seems to be no justification for wasting so much time and money over events which occur so infrequently."

What can be said in reply? To be sure, the improbable does not usually become a reality. Children survive their parents, grandchildren survive children, minors attain majority, grandchildren are born within the lifetime of at least one grandparent, etc. Furthermore, when these improbabilities do occur, litigation is not inevitable. It takes two to make a fight, and despite the occasion for a dispute it doesn't always materialize. People do get along. Frequently without the filing of a petition, beneficiaries do recognize inequitable oversights and reach agreement. In short, too many lawyers—at least those who have not carefully scrutinized and accounted for the unexpected—are successful because they are lucky. Nevertheless, these unlikely eventualities do happen and when they occur it is the unforeseen detail that produces disastrous consequences, no matter how insignificant it once might have appeared. Comprehensive prevision cannot be dismissed simply because it accounts for unrealistic eventualities. Even if the possibility of litigation seems remote, it does not follow that planning for these occurrences is unrealistic. When the estate has been totally diverted from the estate owner's family or when distribution among family units has been distorted, what kind of answer is it for a lawyer to reply, "I didn't expect these events to occur." Because the

disastrous consequences which follow a materialized oversight are so costly to the estate owner and planner as well, the need for prevision is essential. This is a need which must be satisfied, especially if the costs of doing so are reasonable in the light of what is at stake.

This method for planning is intended to reveal latent problems without having to spend an inappropriate amount of time. It is an approach to prevision, systematized to make a planner's search both reliable and efficient. Once the approach is mastered and once the necessary fundamentals of future interest law are understood, what remains is to develop basic responses to those eventualities which must be considered. Initially, this may take time. However, having once developed standard solutions, flexible enough and variable enough to meet specific needs, the planner is then ready to formulate and implement a scheme which will both secure the interests of his client and reflect high professional standards—all with comparatively little effort and added cost to the estate owner.