

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

Part One*

DAVID M. BECKER**

It is frequently said in will cases that the testatrix' intention is the sovereign guide in the interpretation of a will. No one disputes the truth of this beguiling and sonorous statement but candor compels the admission that it is of doubtful utility in determining intent where there may be none. . . . If the testatrix did not think about the matter, it is difficult to say that she had an intent with respect to it. In that case the court is looking for a black hat in a dark room; if the court locates it there at all, it will be on its own head and not because of any light left by the last will and testament. . . . If courts can fairly and reasonably ascertain the decedent's desire from the will, intellectual honesty requires that they say so without resorting to a fiction of intent where none existed.¹

Estate planning literature and curricula abound today with talk of estate conservation and tax planning.² Much has been said, and surely

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

Those who have had, as I have, the pleasure of teaching a course in future interests from the casebook of Leach and Logan will readily recognize the source of some of the ideas and points of view expressed in this article. In particular, I have frequently used decisions appearing in their casebook. *Future Interests and Estate Planning*, to illustrate points made throughout the article. Hopefully the scope of this treatment goes sufficiently beyond their basic course materials to make this article worthwhile.

I wish to gratefully acknowledge the permission granted by the following authors and publishers for material appearing in the footnotes: W. LEACH & J. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* (Foundation Press, Inc. 1961); L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* (2d ed. West Publishing Co. 1956, Supp. 1972).

1. *Roberts v. Tamworth*, 96 N.H. 223, 225, 73 A.2d 119, 121 (1950).

2. A sampling of the articles listed in the *Index to Legal Periodicals* for one year (September, 1970 to August, 1971) includes the following (under the headings "estate planning," "inheritance estate and gift taxes"): Bittker, *Federal Estate Tax Reform: Exemptions and Rates*, 57 A.B.A.J. 236 (1971); Boughner, *Concept of Total Estate Savings*, 56 A.B.A.J. 1084 (1970); Friedberg, *Creative Tax Accounting for Estates and Trusts*, 110 TRUSTS & ESTATES 18 (1971); Harris, *Estate Taxation and Needs for Cap-*

will continue to be said, about the marital deduction, the use of special powers of appointment, life estates and generation skipping, gifts to minors, pension plans and deferred compensation agreements.³ Less

ital, 110 TRUSTS & ESTATES 538 (1971); Kinnebrew, *Estate and Gift Tax Reform: A Compendium of Thought*, 24 SW. L.J. 608 (1970); Morrison & Marcus, *Estate Planning Considerations for Charitable Remainder Trusts Under the Tax Reform Act of 1969*, 75 DICK. L. REV. 185 (1971); Rhodes, *Contemplation of Death—The Problem of Life Insurance Premiums*, 24 TAX LAW. 581 (1971); Woolfolk, *How to Control Spouse-Owned Life Insurance, Yet Save Tax Benefits*, 35 J. TAXATION 24 (1971); Yohlin, *Important Recent Developments in the Federal Estate and Gift Tax Areas*, 49 TAXES 328 (1971).

A review of the 1971-72 curricula of thirteen representative law schools reveals that seven have one course devoted to tax aspects of estate planning, but that six have more than one.

3. As to the marital deduction, *see, e.g.*, Bush, *Marital Deduction Pitfalls and Their Legislative Cure*, 33 BROOKLYN L. REV. 508 (1967); Crampton, *Recent Developments in Estate Tax Marital Deductions, Including the Effect of Local Laws*, N.Y.U. 26TH INST. ON FED. TAX. 1217 (1968); Finnel, *Disclaimers and the Marital Deduction: A Need for Adoption of State Legislation*, 21 U. FLA. L. REV. 1 (1968); Friedman & Wheeler, *Marital Deduction Formula Clauses*, 106 TRUSTS & ESTATES 799 (1967); Lemann, *The Marital Deduction: Planning for the Maximum Deduction*, 1965 TUL. TAX. INST. 504; Sebetic, *Marital Deduction Pitfalls*, 107 TRUSTS & ESTATES 722 (1968); Williams, *Overqualification of Marital Deduction Due to Joint Ownership and Insurance*, 21 ARK. L. REV. 23 (1967); Note, *Dollar Amount "Specific Portion" for Estate Tax Savings Drafting the Alternative to Insure Maximum Marital Deduction*, 53 MINN. L. REV. 73 (1968).

As to the use of powers of appointment, *see, e.g.*, Alessandrini, *Tax and Other Implications of Powers Measured by a Definite or Ascertainable Standard*, 4 INST. ON ESTATE PLANNING § 70.900 (1970); Coleman, *The Special Power of Appointment in Estate Planning*, 109 TRUSTS & ESTATES 920 (1970); Rusof, *Powers of Appointment and Estate Planning*, 10 J. FAMILY LAW 443 (1971); Note, *Special Powers of Appointment and the Gift Tax: The Impact of Self v. United States*, 3 VALPARAISO U.L. REV. 284 (1969).

The use of generation skipping transfers is discussed in Brown, *Generation Skipping Transfers*, 106 TRUSTS & ESTATES 997 (1967); Comment, *A Survey of Generation Skipping Transfers—The Present Rule and the Possibility of Reform*, 22 SW. L.J. 482 (1968).

With regard to gifts to minors, *see* Berry, *How to Avoid Income and Estate Tax Problems on Gifts to Minors*, 1965 TUL. TAX. INST. 454; Ziegler, *Gifts to Minors—Three Variations*, 24 TAX LAW. 297 (1971); Note, *Estate Tax Application to the Gifts to Minor Acts*, 43 IND. L.J. 142 (1967).

Deferred compensation agreements and employee benefits have been subject to much analysis. *See, e.g.*, Feldman, *Planning for Employers Payments to Widows*, 1970 TUL. TAX. INST. 37; Levine, *Estate Planning Aspects of Stock Options*, 4 INST. ESTATE PLANNING § 70.1800 (1970); Sporn, *Tax Planning for Employee Death Benefits*, N.Y.U. 26TH INST. ON FED. TAX. 1229 (1968); Wolper, *The Amplified Death Benefit Under Pension and Profit Sharing Trusts*, 3 INST. ESTATE PLANNING § 69.1600 (1969); Wren, *The Effect of the Tax Reform Act of 1969 on Pension and Profit Sharing Plans*, 5 INST. ESTATE PLANNING § 71.1400 (1971); Note, *Employee Death Benefits*,

attention, though probably not too little amongst non-lawyers who participate in the planning process,⁴ has been devoted to preparing for the obvious financial and family problems which arise principally because of the existing composition of a particular estate; financing the cost of death, making the estate more liquid, providing for sound estate management, and adjusting the disparate benefits which a family business is apt to provide the survivors.⁵ Almost unnoticed by comparison is an aspect of planning which, despite its lengthy history, is still a frequent source of litigation and unhappiness amongst claimants of an estate. One need only examine casebooks and treatises on future interests to observe that matters falling under the broad heading of "problems in construction" have occupied the attention of courts for many centuries.⁶ And yet this aspect of planning, even today, is perhaps the most significant. It involves generally the problem of explicating and implementing a client's desires concerning the devolution of his estate, desires which may not initially occur to him. It concerns who is to benefit, what are they to receive, and how and when are they to take or benefit—all in the light of what an uncertain future will

26 TAX L. REV. 329 (1971); Note, *The Generic Estate Taxation of Employee Death Benefits Beyond the Ambit of Section 2039*, 1971 WASH. U.L.Q. 585.

4. This includes, for example, trust officers, accountants and insurance underwriters.

5. Frequently estate planning articles appear in journals for non-lawyers. See, e.g., Barnett, *The Use of Preferred Stock in Estate Planning*, J. ACCOUNTANCY 76 (July 1968); B. Becker, *Problems in Providing for Payment of Purchase Price in Business Purchase Agreements*, 20 J. AM. SOC'Y C.L.U. 143 (1966); B. Becker, *Comparative Attributes of Investment Types*, 26 J. AM. SOC'Y C.L.U. 24 (1972); Crowe, *Retention or Disposal of a Close Corporation Interest at Death*, 17 J. AM. SOC'Y C.L.U. 355 (1963); Esterces, *Impact of the Securities Laws on Estate Planning*, 26 J. AM. SOC'Y C.L.U. 41 (Oct., 1972); Koltun, *Life Insurance in Estate Planning*, J. ACCOUNTANCY 87 (May 1969); Ragatz, *Subchapter S in Business and Estate Planning*, 23 J. AM. SOC'Y C.L.U. 27 (Jan., 1969); Sinton, *The Living Trust—An Aid to Financial Planning*, 21 J. AM. SOC'Y C.L.U. 32 (April, 1967); White, *Estate Planning for Closely Held Stock*, J. ACCOUNTANCY 75 (Sept., 1968).

6. See, e.g., the casebook by W.B. LEACH & J. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* (1961) [hereinafter cited as LEACH & LOGAN]. Part II, pages 237-483, is devoted to construction problems. Included in the selection of cases are Clobberie's Case, 86 Eng. Rep. 476 (Ch. 1677); and *Bedinger v. Graybill's Executor*, 302 S.W.2d 594 (Ky. 1957). See S. FETTERS & J.A. SMITH, *SIMES' CASES ON FUTURE INTERESTS* (3d ed. 1971). Part II, pages 213-477, is devoted to construction problems. Included in the selection of cases are *Weld v. Bradbury*, 23 Eng. Rep. 1058 (Ch. 1715); and *In re Bogart's Will*, 62 Misc. 2d 114, 308 N.Y.S.2d 594 (Sur. Ct. 1970).

The treatise by L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* (2d ed. 1956, Supp. 1972) [hereinafter cited as SIMES & SMITH], discusses construction problems in Part 2, §§ 441-845. Reference is made to cases spanning over three centuries.

bring. In short, it is an exercise in "comprehensive and astute prevision, concise and accurate provision."⁷ The problem of planning for death is the problem of planning for those who survive. It is here that experience in law and life is particularly instructive in developing and effectuating a scheme of disposition.

To describe this latter class of problems as one of "construction" is, however, somewhat misleading. They become construction problems only *after* facts become fixed and *after* the planning function ceases. It is only then that a claimant litigates and a judge resolves a dispute by construing a particular phrase or an entire instrument. Authoritative resolution of these disputes is not the planner's role. The planner must avoid problems of construction. He must draw upon the vast body of construction law, a potpourri of other's mistakes, and use it to develop and implement explicitly a scheme of disposition which can withstand the tensions of an uncertain future. A plan which does not produce a distribution among intended beneficiaries, in intended quantities and at intended times, and which finds its way into court, is a failure, however many tax dollars it may save. This problem—to preview fully and to provide effectively—falls on the shoulders of the lawyer. Avoidance of construction problems is not the responsibility of others who may join with him in the planning of a client's estate.

Unfortunately the importance of this responsibility, and the skill necessary to meet it, have been underestimated by law schools and the profession. Both have perpetuated the view that every graduate, regardless of the courses he has elected, is qualified to prepare at least a simple will. If by this is meant that every graduate is qualified to draft a document which contains simple terms, this view, though damning, may be justified.⁸ If, however, it is meant that there are simple plan-

7. LEACH & LOGAN 237:

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.

8. If, as a result, graduates are thought capable of planning and drafting for most estate situations, this view rests upon a false assumption: that nearly all planning situations require a dispositive instrument expressed only in simple terms. Indeed, most planning situations require something more. If, however, the above view is not predi-

ning situations for which a simple will is needed, the view rests upon a myth. To begin with, even the small estate—for which the simple will is usually reserved—may warrant the use of a future interest. To be sure, reports, legal encyclopedias and treatises serve ample notice that the law of future interests is hardly uncomplicated. Indeed, then, the very use of the future interest is apt to erase all appearance of simplicity. More important than the complexities inherent in the occasional use of future interests is the fact that the only thing simple in a planning situation is the obvious—if Blackacre is to be shared by the estate owner's three friends, *A*, *B*, and *C*, it should be given straight away to them. However, what causes construction problems, and therefore litigation, is the not-so-obvious—if either *A*, *B*, or *C* predecease the estate owner, Blackacre may not pass solely to his three friends or their families. Even the apparently simple planning situation contains problems which are not so obvious but yet extremely relevant. There is nothing simple about anticipating and providing for the not-so-obvious. Ability to distinguish the relevant is surely the hallmark of the able lawyer in all matters. The planner can never make these distinctions unless he is conscious of the need to utilize his knowledge of the not-so-obvious and is capable of applying that knowledge. The planning exercise should be essentially the same in every case. Estate plans vary only in their degree of complexity. In reality, the simple planning situation is probably nonexistent. The simple will—a document which might contain several uncomplicated provisions—should evolve only after the not-so-obvious has been considered and mastered. This is no easy matter.

The purpose of this article is twofold. First, it attempts to develop and illustrate the nature and importance of the problems which make up this last aspect of estate planning. Second, it suggests an approach to the recognition and resolution of these problems.

SOME SELECTED PROBLEMS OF "CONSTRUCTION"

Construction problems fall into two general classes: those resulting from the use of ambiguous terms, and those resulting from the failure to anticipate events which, if they occur, will affect the disposition of the estate. That latently ambiguous language has and will continue to be

cated upon this assumption, but rather recognizes that planning situations requiring only a simple will are infrequent, it gives faint praise to what every law student is prepared to do upon graduation.

used is largely, though not exclusively, a function of inherent imprecision in the set of symbols which constitutes a language. While patent ambiguity is also partly attributable to that same characteristic of languages, it is more likely to contain a component of carelessness on the part of the draftsmen, or to put it more politely, to reflect human fallibility. Compounding the problem of ambiguity are the unusual, but not always consistent, meanings which judges and lawyers have historically attached to some words and phrases, as well as the tendency of lawyers to confuse brevity with precision.⁹ The long roll of decisions which litigate the meaning of such terms as "children,"¹⁰ "issue,"¹¹ "heirs,"¹² "divide and pay over,"¹³ "payable at,"¹⁴ and "die

9. The hallmark of a well-drafted will or trust is the precise implementation of all planning objectives. The final product is adequate only when it unmistakably carries out the estate owner's wishes. Ideally this should be accomplished succinctly without wasting a sentence, a phrase or even a word. Nevertheless, the explication of complicated ideas and comprehensive schemes frequently cannot be condensed into a compact document. The directives used to implement objectives and ideas require language. The language of the law is not composed of words and phrases which always have a single meaning; rather, it is replete with multi-definitional language. A word or phrase may have many meanings, and even those words and phrases that begin with one meaning frequently expand in time to have more than one meaning. Often it is this very language which appeals to a condensation of thought. These expressions have become in many instances the "shorthand" of the law. To be sure they produce brevity—but only at the cost of precision. The document which finally embraces an estate plan must invariably express a series of ideas that achieve various and sometimes alternate objectives. Though precision can be accomplished with brevity in the elaboration of a single purpose—a single choice—it cannot be achieved in the elaboration of a multi-purpose plan. Compaction means fewer words and fewer sentences. If the ideas themselves are not simple but complicated, compaction inevitably attracts the use of multi-definitional language. Unfortunately, seldom do these "shorthand" expressions fully and unambiguously express the full range of objectives they must comprehend.

10. Consider this limitation: "To *A* for life, remainder to *A*'s children in fee simple." Does the gift to "*A*'s children" include, in addition to children actually born of *A*'s marriage, grandchildren, stepchildren, illegitimate children, and adopted children? For a discussion of this problem, see 5 AMERICAN LAW OF PROPERTY §§ 22.30-22.34 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY] and the cases therein cited.

11. Consider this limitation: "To *A* for life, remainder to his issue in fee simple." Does the gift to "his issue" include only immediate offspring, or does it include anyone who is a descendant of *A*? If the latter, do the issue take per stirpes or per capita? Further, are adopted children, illegitimate children, and stepchildren properly considered issue? Or suppose the limitation had read: "To *A* for life, remainder in fee simple to his children; but if any child of *A* fails to survive *A*, then the issue of such deceased child shall take the share his or her parent would have received if such parent had not failed to survive *A*." What bearing, if any, does the use of the word "parent" have upon the meaning which should be given to "issue"? For a discussion of these

problems and the citation of relevant decisions, see 5 AMERICAN LAW OF PROPERTY § 22.36. See also LEACH & LOGAN 471-81.

12. Consider this limitation: "To *A* for life, and then to *B* for life, remainder to the heirs of *A*." To begin with, does the limitation—"to the heirs of *A*"—constitute words of purchase and limitation referable to *A* or words of purchase which identify other remaindermen; does this language tell us how much *A* is to take or does it tell us who, in addition to *A* and *B*, are to benefit from this gift? See 1 AMERICAN LAW OF PROPERTY §§ 4.40-4.52 for a discussion of the Rule in Shelley's Case. When applied, this rule invariably frustrates the intent of the transferor by denying a remainder to the heirs of the life tenant. Another rule which produces similar frustration is the doctrine of worthier title. This doctrine also concerns the use of a phrase which includes the word "heirs." See 1 AMERICAN LAW OF PROPERTY §§ 4.19-4.23 for a discussion of the doctrine of worthier title. However, even when these rules are inapplicable, other questions can arise, each of which has been litigated. For example, do the "heirs of *A*" include *A*'s actual heirs at law? Or, are "*A*'s heirs" restricted to lineal descendants only? If the former, which statute of descent and distribution controls? In either situation, must *A*'s heirs survive any event in addition to the death of *A*? For a discussion of these and other problems, and the citation of relevant decisions, see 5 AMERICAN LAW OF PROPERTY §§ 22.56-22.62; LEACH & LOGAN 459-70.

13. Each time a future interest is provided there is always the question whether the recipient of that interest must survive a point in time, usually possession, beyond the date his interest is first created. Although from a current planning viewpoint conditions of survivorship may be desirable, courts continue their adherence to the common law bias that conditions will not be found unless clearly expressed. See LEACH & LOGAN ch. 8. At issue, then, in many construction cases is whether a condition has been made explicit.

"To *A* for life, remainder to *B* and *C* in fee simple" does not present problems for most courts. Conditional language is absent from this limitation. Therefore, *B*'s and *C*'s estate is vested absolutely; they need not survive *A*. At the death of *A*, possession will pass to *B* and *C* or their successors in interest. However, it is not surprising that over the years particular language has given courts problems in determining whether a condition of survivorship has been included. Nevertheless, it is remarkable that these problems should develop out of a phrase which seems to do nothing more than make explicit a direction otherwise implied. In the foregoing illustration, if put in the form of a trust, one can assume that a trustee, at *A*'s death, is to divide and distribute the trust corpus to the remaindermen or their successors. Nevertheless, when this direction is made explicit—"and upon the death of *A*, the trustee shall sell the trust corpus, divide the proceeds into equal shares and then make payment to *B* and *C*"—many courts have found the interest of *B* and *C* not vested but instead contingent upon their survivorship of *A*. This is the "divide and pay over rule." See 5 AMERICAN LAW OF PROPERTY § 21.21; LEACH & LOGAN 315-30. Leach and Logan state that this rule of construction has about disappeared; nevertheless, on occasion it still shows some vitality, although subject to many exceptions. See, e.g., *In re Estate of Campbell*, 250 Cal. App. 2d 576, 58 Cal. Rptr. 723 (Ct. App. 1967); 5 AMERICAN LAW OF PROPERTY § 21.24. The upshot of both the rule and its exceptions is confusion.

The reason often given for the rule is that: "Where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate; contingent, and not vested." *In re Crane*, 164 N.Y. 71, 76, 58 N.E. 47, 48 (1900). This is really no explanation at all. What does a delay in language of gift until the actual direction for distribution have to do with required survivorship of that date? Ostensibly—nothing at all! Perhaps this rule can be seen as a lingering, but presently

discredited, vestige of an ancient common law concept. Originally contingent interests were thought to have no present existence. They did not become interests in property until they vested. Until then, they were bare expectancies and, partly for this reason, incapable of alienation. Another reason was that grantor-testator presumably intended the owner of a contingent future interest to benefit only by possession. It was, therefore, assumed he made no gift until the contingency was satisfied. Consequently, the remainderman had nothing to alienate before then. For discussion of the history of contingent interests, see H. BIGELOW, *Introduction to the Law of Real Property* found in BIGELOW'S CASES ON RIGHTS AND LAND 43-48 (1945); SIMES & SMITH § 1852. Accordingly, if a contingent interest did not exist and was never given until the condition was satisfied, it would seem an easy step to say that an interest was contingent until expressly given. Therefore, if words of gift in a limitation related to a time beyond the effective date of the dispositive instrument, this gift was not substantively made until that time and the interest created was contingent. See, e.g., *Ducker v. Burnham*, 146 Ill. 9, 34 N.E. 558 (1893). If this rationale did underlie the rule, its foundation has all but disappeared. Today contingent interests, in the main, are regarded as having a present existence. Indeed, they are alienable just the same as vested interests. They are given as of the moment of creation and not vesting.

Given what the divide and pay over rule actually says and requires, it cannot be justified, because the direction alone provides no evidence of a condition of survivorship. Nevertheless, when the rule is applied today, language of direction is frequently accompanied by other language which does not by itself create a contingent interest, but does suggest a condition of survivorship. See, e.g., *In re Estate of Blake*, 157 Cal. 448, 108 P. 287 (1910). For example: "To A for life, remainder in fee simple to B and C, payable when they respectively reach age 21," would under most circumstances give to B and C an interest in fee simple absolute with enjoyment postponed until the date they attain or would have attained 21. See note 14 *infra*. This construction may seem inappropriate; perhaps what is really intended is that both B and C must survive 21 before their interests vest. Nevertheless, courts have felt constrained to find, as ruled in the past, that the phrase "payable at" evidences a vested interest. However, the interest containing this phrase can be contingent. When this occurs, it is because other language is present which overcomes the construction usually accorded "payable at." This explains, then, why a court might alter its construction of the foregoing limitation if the remainder and its distributive direction are introduced by language of "divide and pay over." When the divide and pay over rule is applied in this fashion, it operates a guise for a construction that should have obtained absent language of direction; that is, if the remainder is found contingent it is not because of language of direction but because it appears a remainderman's right to possession has really been conditioned upon reaching 21. Some might say that if this is all that the rule does today, its operation is at best salutary—it releases courts from archaic constructions accorded particular language—and at worst innocuous. This, of course, is true only so long as the rule is restricted to instances in which other explicit evidence of survivorship is present. The danger in continued lip service to this rule, however, is that it will be applied in the absence of other explicit evidence. When this happens, the rule is not innocuous, it is decisive and the construction it produces can be totally inconsistent with the probable intent of the estate owner.

14. Consider the following bequests: "To A at age 21"; "To A, payable at age 21"; and "To A at age 21, and until then all interest derived from the legacy shall be paid to A." In each of these illustrations must A actually attain 21 as a condition to possession of principal? Though all three limitations appear to require survivorship of age 21, most courts have followed the position taken by an English court many years

without issue"¹⁵ is ample evidence of the great care and knowledge that is required to record even the most fundamental direction. However, this article will not concentrate on these kinds of problems—problems of accurate provision—though their importance should not be underestimated. Every plan must be expressed; its final form is a written document. Unless the writing carries out the exact wishes of the estate owner it has failed to achieve its most important objective.

Failure to anticipate events, on the other hand, results from inattention to development of the plan rather than imprecise exposition. This kind of problem is frequently difficult to distinguish from the first: the same language can reveal both a defective plan and a defective selection of words.¹⁶ A phrase may be ambiguous not simply because

ago; that only the first limitation imposes a condition of survivorship. *Clobberie's Case*, 86 Eng. Rep. 476 (Ch. 1677). If the bequest contains a direction "to be paid at" a given event, even though the actual occurrence of that event is uncertain, the interest created will usually be regarded as vested absolutely with enjoyment in possession postponed—especially if it can be determined exactly when the event would, if ever occur. The *Restatement*, in 1940, adopted the distinctions founded by the court in *Clobberie's Case*. See 3 RESTATEMENT OF PROPERTY § 257, comments *d* and *e*. Though the rules derived from *Clobberie's Case* are clear, their application has often been confused and limitations containing the above language have been a rich source of litigation. Because these distinctions present only rules of construction and because the context in which this critical language varies, courts have not made the same construction each time these same phrases have appeared. For example, consider this limitation: "To *A*'s children, payable when the youngest attains age 21." Must a child of *A* survive 21 for his interest to vest? Further, must he also survive the date *A*'s youngest child attains 21? See 5 AMERICAN LAW OF PROPERTY § 21.19. For a discussion of the problems which attend the use of language such as "payable at" and the citation of important cases, see 5 AMERICAN LAW OF PROPERTY §§ 21.17-21.20; LEACH & LOGAN 286-315; SIMES & SMITH § 586.

15. "Die without issue" is a phrase heavily imbued with ambiguity compounded by history. It is a phrase rich with uncertainties that have become the source of much litigation. See LEACH & LOGAN 482.

Consider this devise by *T*: "To *X* for life, remainder to *A* and his heirs; but if *A* dies without issue, then to *B* and his heirs." SIMES & SMITH § 521, suggest that this ambiguous language has raised six, perhaps seven, different kinds of questions. For example, whatever "die without issue" means, does it operate to terminate *A*'s estate whenever *A* may die, or only if *A* dies before *T*, or only if *A* predeceases the date of possession? If the former, suppose *A* survives both *T* and *X* and leaves a child who dies thereafter without having had children. Is *B* entitled to possession? If *A*'s estate would become absolute, does this same result follow if *A*'s child fails to survive either *A* or *X*? Or suppose *A*, who survives both *T* and *X*, leaves grandchildren but not children. Does his interest become absolute at death? For a discussion of these and other problems, and for the citation of cases which litigate these questions, see 5 AMERICAN LAW OF PROPERTY §§ 21.49-21.57; LEACH & LOGAN 481-83; SIMES & SMITH §§ 521-47.

16. Consider this gift by *A*: "To *B* for life, remainder to *C* in fee simple; however,

the language chosen is susceptible to more than one construction, but because the idea behind it is incomplete—a consequence of inadequate prevision;¹⁷ that is, a failure to consider problems for which the selected language must provide a solution. Nevertheless, specific language is not always the focal point of these problems of prevision. A planning oversight may pervade an entire instrument. At issue here is finding the answer to a specific problem which has arisen, a problem not easily resolved by scrutinizing the entire will or trust because it is something which neither the estate owner nor his lawyer ever considered or anticipated. It is this second kind of construction problem to which most of this article is devoted.

There are at least two reasons why problems of prevision warrant special attention. First, the matter of anticipating relevant eventualities is probably the most difficult task facing a planner. It requires substantial experience in life and detailed knowledge of the law¹⁸ to detect problems which are not obvious and not likely to be encountered straightaway. It requires something more than a simple recordation of a client's plan for disposition, which may only be embryonic: "I'd like to take care of my wife first, and then at her death leave everything

if *C* dies without issue, then to *D* in fee simple." Whatever *A* might have intended by "die without issue," he has used language susceptible to several meanings. See note 15 *supra*. The language used by *A* is certainly ambiguous. Yet underlying this construction problem may be something more than the use of language with several meanings. *A* may have failed to consider various alternatives, especially those raised by each construction; for example, *C* may die before *B* without having had issue, *C* may die before *B* without issue he has had surviving him, *C*'s surviving issue may die before *B* without descendants surviving them, *C* may die at anytime without having had issue, *C* may die at any time without issue he has had surviving him, or *C*'s surviving issue may die at any time without descendants surviving them. In a given case, it may be unclear whether *A* has simply used inappropriate language or whether he has given too little attention to his plan. And, in many instances, he may have done both.

17. See note 7 *supra*.

18. It should be obvious that detailed knowledge of the law is required of every planner. Less apparent is the importance of experience in life. For example—all estate owners have priorities as to the disposition of their estate, even though not all are able to express them without appropriate inquiry by their planner. Accordingly, to guide his client at least through the problems discussed in this article, every planner must be aware of those priorities estate owners commonly have: that ultimate distribution should be made to only those capable of personal enjoyment; that equality among family units should be maintained; and that a class should include all potential members. Stated in terms of some eventualities rather than priorities, a planner must observe that descendants do not always survive their ancestor-estate owner, that children do not always survive both parents, and that grandchildren do not always survive children. However obvious these observations may seem, they are frequently at the core of those unanticipated eventualities which ripen into litigated construction problems.

to my children."¹⁹ It necessitates extensive participation in developing a scheme of distribution, an elaboration of all that life and the law may bring to bear on the ultimate objectives of the estate owner. Second, the consequences of inadequate prevision are invariably exceedingly harsh, frequently much more so than those of imprecise provision. Because the problem is usually one not anticipated by the estate owner, there is scant evidence of how he would have wished to resolve it. The solutions achieved when these problems reach the courts, despite the deference they ostensibly give to intent, are often unbending and arbitrary because judges tend to confuse flexible rules of construction with inflexible rules of property.²⁰ Further, because the absence of

19. Indeed, there are many problems which can develop from this simple plan. Just for example, suppose that: a child predeceases his father but has descendants who survive the testator; or, a child predeceases his mother, but has descendants who survive her; or a child predeceases his mother without descendants who survive her; or, all children predecease their mother; or, finally, the wife-mother predeceases the testator. None of these eventualities is really accounted for in this simple plan for disposition. Yet, any one of them can occur and present prevision problems discussed in the remainder of this article.

20. See, e.g., *Jee v. Audley*, 29 Eng. Rep. 1186 (Ch. 1787):

Several cases . . . have settled that children born after the death of the testator shall take a share in these cases; the difference is, where there is an immediate devise, and where there is an interest in remainder; in the former case the children living at the testator's death only shall take; in the latter those who are living at the time the interest vests in possession; and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the landmarks of the law; it is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. . . . I am of the opinion therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of the death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children.

Central to the decision in *Jee v. Audley* was, in default of the issue of Mary Hall, whether the bequest to the Jee daughters, then living, included daughters who might be born after the death of the testator. Even though surrounding circumstances suggested a limited construction and even though the court believed this might have been the testator's intention, class membership was extended to after-born daughters upon application of a rule of construction. Unlike the Rule in *Shelley's Case*, which is a rule of law imposed without regard to intent, the rules which govern maximum class membership are rules of construction only. Although these latter principles are frequently underscored by various societal goals, they primarily reflect what most people would do if they had considered the particular problem presented. In theory then, specific evidence of a contrary intent should always suspend the operation of a rule of construction. More specifically, the class gift to the Jee daughters should have been confined to those born by the testator's death if it clearly appeared these were the daughters he had in mind. The class should not have been held open simply because of a rule usually applied to fix the membership of deferred gifts.

What is clear is that rules of construction should not be unbending "landmarks of the law"; they must yield to the same consideration upon which they are originally

any clear indication of intent has given them room in which to maneuver, judges frequently adopt solutions that serve societal policies preferred by courts but which do not necessarily comport with the best interests of the estate owner.²¹ Though this may be a consequence of imprecise provision, the likelihood is not as great. A construction problem arising from the use of an ambiguous term may not reflect the absence of any consideration by the estate owner of the problem which has arisen. Accordingly, when there is some evidence of his

founded—the estate owner's intent. They should not be taken as inflexible mandates. Yet just how closely must they be observed? How uniform should courts be in the construction they give to language litigated before? Perhaps the most important reason for constructional consistency is simply this: the plans lawyers conceive frequently contain complex ideas; the symbols they use to express these ideas are not always unambiguous; accordingly, they need language guidelines which enable them to produce desired consequences. Most often courts are asked to make a construction when these language guidelines are available, easily applied, and well known to the profession, but, nevertheless, not used. *See, e.g.,* *Foley v. Gamester*, 271 Mass. 55, 170 N.E. 799 (1930); *Thompson v. Baxter*, 107 Minn. 122, 119 N.W. 797 (1909). It is here that consistency has no place among the controlling ingredients of a court's decision; especially when the result is not going to furnish guidelines upon which lawyers will act. Uniform treatment of "for as many years as the tenant desires" is senseless when the educated planner knows there are fully reliable methods for creating an estate at will, an estate for years, an estate from period to period, a defeasible life estate or a defeasible fee simple. The issue for courts should be simply: what was probably intended under these special circumstances? Of importance to a planner in those cases in which standard guidelines are ignored, is not the judicial solution as such, but rather the problem which was unforeseen or inadequately resolved. Accordingly, the language in these cases should be treated by courts as an aberration. The particular meaning assigned by a previous court, perhaps, should not even be influential. Surely its analysis of a problem can be considered and, if relevant to the circumstances at hand, followed; nevertheless, it must never be decisive. Consistency seems best reserved for those instances in which customary language guidelines are being sought or are in issue. This can be true for construction problems caused by inaccurate provision, but it is not usually true for problems rooted in inadequate provision.

For a useful examination of constructional rules and policies, see LEACH & LOGAN 243-52; Halbach, *Future Interests: Express and Implied Conditions of Survival, Parts I & II*, 49 CALIF. L. REV. 297, 431 (1961); Trautman, *Class Gifts of Future Interests: When is Survival Required?*, 20 VAND. L. REV. 1 (1966).

21. For a general discussion of rules of construction and their ingredients, see LEACH & LOGAN 243-52. Two policies courts further in the development and application of rules of construction, sometimes with little regard for the probable intent of the estate owner, are: that interests should vest at the earliest date possible; and that class membership should be fixed without inconvenience to the administration of estates. For a selection of cases illustrating the former policy, see LEACH & LOGAN 257-60, 266-315; and for cases illustrating the latter policy, *id.* at 364-91. See also the textual discussion on the rule of convenience contained in section C-2, *Class membership: when does it close? infra* at 678-90.

intent it cannot readily be ignored by courts in favor of whatever social objectives they may prefer.

The nature and importance of these prevision problems can best be understood by elaborating some of the questions dispositive instruments commonly fail to resolve and by illustrating the context in which these issues may arise. Many prevision problems²²—planning oversights which occur because of a failure to develop a comprehensive plan—arise because the planner has failed to account for a potential lapse, because he has failed to consider the full consequences of a taker's death before the time in which he is to gain possession of the subject matter, or because he has overlooked the fact that distribution is to be effected before the qualification of additional takers of a class gift becomes impossible or after the date in which a member of a class may have died. In short, they concern problems of lapse, survivorship-transmissibility²³ at death, and class gift membership. To be sure these circumstances, these oversights, do not comprehend all prevision problems,²⁴ but the great bulk of prevision problems that are apt to

22. It should be observed that these same problem areas can be the subject of a constructional dispute even where there has been no previsional oversight. For example, even if a planner has considered the possibility of a taker's death before the time for possession and even if a selection of consequence has been made, he must still declare accurately and unambiguously that choice. And, if he does not, litigation may become a reality. Assume *A* leaves his estate to: "*B* for life, remainder to *C* if then living; if, however, *C* has died during the lifetime of *B* without issue surviving him, then to *D*." *A* apparently intends for *C* to survive *B*—he has considered the possibility of *C*'s death before time for possession. He has also provided for *D* if *C* does not survive and is without issue. However, *A* has not unambiguously provided for *C*'s death with issue. Accordingly, *A* has made possible a construction which does not require that *C* survive *B* if *C* has issue. See, e.g., *Finch v. Lane*, L.R. 10 Eq. 501 (1870). Perhaps *A* has overlooked this eventuality—that *C* may predecease *B* but be survived by issue. Assuming, however, that he has not, it is apparent that perception of eventualities and the formation of a comprehensive plan are not enough; implementation of that plan must be equally comprehensive and, above all, absolutely clear.

23. For an explanation of what is meant by the terms "transmissibility" or "transmissible at death," as used in this article, see section A, *Transmissibility—Survivorship*, *infra* at 622-65, and particularly the text accompanying notes 27-41 *infra*.

24. For example, these oversights do not comprehend many definitional problems. Suppose *A* leaves his estate to: "My wife for life, remainder to my grandchildren in fee simple." The gift to grandchildren may create problems as to which grandchildren—those born and living as of what date? These prevision questions are discussed in section C, *Class gifts—Membership and Other Matters*, *infra* at 673-90. Not considered, however, is—who is a grandchild? Are adopted grandchildren included?

Also omitted is a broad examination of the common law rule against perpetuities and the prevision problems it generates. Included is a consideration of some survivorship

occur within the context of the "simple will" are included.

Several preliminary but important observations must be made. First, these kinds of problems frequently do not occur in isolation: a single limitation or a single phrase may sometimes suggest the presence of each of these kinds of oversights. When distribution is directed after a potential member of a class may have died, questions can arise which pertain to class gifts and transmissibility, but there may also be a lapse problem. Generally speaking, the problem falls within the class gift category. Because of this, the result is sometimes announced in the special but often meaningless jargon of class gift rules.²⁵ Neverthe-

and class gift problems and their relation to the rule. However, excluded is a full discussion of special powers of appointment and the rule against perpetuities.

Though problems pertaining to tax and financial planning (see text accompanying notes 2-5 *supra*) do raise important prevision questions, they are beyond the scope of this article.

25. The case of *Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917), illustrates how courts sometimes misconceive the issue of survivorship—transmissibility at death to be really a question of class gift or not. In *Blackstone*, the gift over of an executory interest was divided equally amongst a group of people consisting of two named individuals, whom the testatrix had raised, and her "brothers and sisters," who were ascertained and of advanced age. One of the named individuals was the only person to survive the date of divestiture-possession. That survivor claimed sole ownership of the executory interest. Representatives of the others claimed that equal division should be made among all takers or their successors without regard to survivorship. The court agreed with the latter argument. It found that whether the executory interest was conditioned upon survivorship of possession depended on whether it was a gift to a class or individuals. Accordingly, it perceived the latter question to be the central issue. Since a gift to individuals had been made, there was no required survivorship.

Perhaps in ordering equal division, the court reached a desirable result. Nevertheless, in doing so, it perpetuated principles which were either clearly wrong or made little sense. To begin with, if a nonpossessory gift is made to a class, it does not follow that the class includes only those who survive the time of possession. With regard to conditions upon possession, a class gift should be treated the same as a gift to individuals. Absent an express condition of survivorship, none should be supplied. If no condition of survivorship, minimum class membership ought to be determined when the nonpossessory interest is first created and not as of the date of possession. Consequently, the issue of survivorship-transmissibility should not have turned upon the existence of a gift to individuals or a class. The issues which should have been considered were: was there any evidence of a condition or survivorship; if so, did the interest of those who predeceased the date of possession fail or pass to the survivor? Further, in resolving the issue it did perceive, the court reinforced principles courts have seldom applied consistently. The court found a gift to individuals because the group of takers was not and could not be identified and comprehended by some general description and the number of takers was certain. That these principles must determine whether the consequences of a class gift should be attributed to a gift to a group named individually, is difficult to justify and has been repudiated by some courts. For further discussion of this problem, see text to section C-1, *A class gift: what does it mean?*, *infra* at 674-78.

less, ultimately and more precisely the question is one of transmissibility. It is, of course, true that the planner has failed to define fully the conditions of class membership, but the specific problem arises because he has failed to clarify whether a potential class member must *survive* the date of distribution. Secondly, because these planning oversights are often difficult to isolate from their frequent companion, inadequate and imprecise exposition, the problem may appear to be simply a case of ineffective implementation of the estate owner's fully conceived plan. Careful examination often reveals that the absence of a fully conceived plan of disposition rather than ambiguous language is at the heart of the problem. Even where there is evidence that the estate owner and planner did think about the general problem, it is sometimes apparent that their prevision has stopped short of the eventuality which has occurred. The language may indeed be ambiguous, but central to the ambiguity is an incompletely thought out plan; a deficiency which must be recognized.

Finally, it should be observed that similar as well as different kinds of consequences arise from different prevision problems. Though the nature of oversights may be distinguishable, their consequences can be similar, even identical. For example, the imposition of a condition of survivorship may cause a violation of the common law rule against perpetuities whether the gift be to a single individual or a class.²⁶ Similarly, the failure to close a class within the period of this rule may also cause a violation. Further, the most common consequence of a lapse or condition of survivorship which makes an interest nontransmissible and the failure to hold the class open beyond the date upon which distribution is directed, is the arbitrary and fortuitous elimination of a unit of the estate owner's family. These unfortunate results, which inevitably tend to distort distribution of a family estate, will be illus-

26. A violation of the common law rule against perpetuities can occur when a condition of survivorship is imposed without sufficient consideration of all its consequences. The rule extends to contingent interests, commonly produced by conditions of survivorship; for example, survivorship of possession or of an event independent of possession. The latter condition may cause a violation in the case of either a gift to a class or an individual. Consider these limitations, the first being a gift to an individual and the other to a class, both of which violate the common law rule against perpetuities. By his will *T* provides: "(In trust) . . . Income to my son for life, and following his death the principal shall go to his eldest child who attains 25." Unless *T*'s son has a child 25 or older at *T*'s death, the remainder violates the rule. By this will *T* provides: "(In trust) . . . Income to my son for life, and following his death the principal shall go to those of his children who attain age 25." Unless *T*'s son has predeceased *T*, and therefore can have no other children beyond the death of *T*, the remainder violates the rule.

trated and discussed in greater detail as each prevision problem is analyzed further.

A. *Transmissibility—Survivorship*

Perhaps the most common construction-prevision problem is the failure to consider whether a named taker must survive the date upon which distribution is directed before he or his successors are eligible to receive possession of his interest. Does the named taker have a transmissible interest, *one which can be transmitted by him at his death*, by devise or descent, if he fails to survive the date upon which distribution of principal would have been made to him personally had he lived?²⁷ For example, in "To *A* for life, remainder to *B* and his heirs," *B* has a future interest.²⁸ It is a remainder, it is vested, and it is

27. This section is concerned with the use of transmissible and nontransmissible future interests. Most often, an interest is made nontransmissible at death by an express or implied condition requiring survivorship of the date of possession. Nevertheless, it should be observed that an interest can still be made nontransmissible at death although not subject to a condition which demands survivorship of possession. For example, a future interest can be conditioned upon an event, not satisfied at the date the interest is created, which can be satisfied before time for possession but only while the holder of that interest survives. Consider these two illustrations. "To *A* for life, remainder to *B* if he has married." Assume that *B* is a bachelor. "To *A* for life, remainder to *B* if he has attained 21." Assume that *B* is a minor. In both examples *B* has a remainder, nontransmissible at death until he meets the condition imposed upon him; a condition which may be satisfied before *A*'s death. When he does so, his remainder becomes transmissible at death. His interest remains transmissible even though he may not thereafter survive the date of possession, *A*'s death. If, however, *B* dies without satisfying the condition, his interest is extinguished. At his death, *B* has nothing to transmit to anyone.

This section, however, is concerned primarily with conditions which do require survivorship of possession. This particular condition of nontransmissibility has been selected for careful consideration because it is so common, perhaps because it is a useful planning tool. There are two principal reasons for its popularity. First, if a recipient cannot personally enjoy use of his gift, estate owners frequently prefer to make a substitute choice themselves rather than allow the recipient to do so by will. If a "dead hand" is to control devolution of his estate, an estate owner often prefers it to be his, rather than someone else's. Second, even if an estate owner might prefer the "dead hand" choice of his recipient, considerable death taxes and costs can be saved by not making the gift a part of the recipient's estate—a fact which may be very important to the estate owner. See LEACH & LOGAN 329, 402-03.

28. The term "future interest" is widely used by practicing lawyers, teachers and judges. This terminology has been used to describe an entire body of law as well as particular interests in property. And yet, the use of the term "future" is unfortunate. The word "future" has reinforced the common misconception that a "future interest"—particularly one which is contingent—has no present existence; that is, that it exists only in the future and does not become a reality until all particular estates have ex-

transmissible. *B* acquired his interest when the gift was originally made to *A* and *B*. Possession has simply been deferred until the death of *A*. *B* may transfer his remainder to whomever he pleases during his lifetime. His transferee will assume possession at *A*'s death regardless of *B*'s failure to survive *A*. Furthermore, *B* may by will direct the devolution of the subject matter of the gift to whomever he pleases even if he fails to survive *A*. At *A*'s death, if *B* has predeceased him, *B*'s heirs, if he has died intestate, or *B*'s devisees, if he has died testate, will assume possession.²⁹ In "To *A* for life, and then if *B* survives *A*, to *B* and his heirs," once again *B* has a future interest which exists from the date the gift is made to *A* and *B*.³⁰ It is a re-

quired. A common result of this misunderstanding has been to accord "future interests" legal consequences other than those which should follow logically from their being nonpossessory rather than possessory. See, e.g., discussion of the divide and pay over rule at note 13 *supra*. What should be clear in the above illustration is that both *A* and *B* have been given estates, distinguishable only on the basis of possession and the units of time which measure their respective interests. Neither the difference in possession nor the unit of time contradicts the existence of an estate in *B* from the original date of transfer. The only thing future in *B*'s interest is his deferred claim to possession; something which does not make it any less of an estate. *B* has a present estate just the same as *A*. In these situations, perhaps it would be best to discard completely the term "future" and to refer to *B*'s present interest as simply a "nonpossessory estate."

29. It should be emphasized that only the exchange of possession occurs at *A*'s death. Those who succeed to *B*'s interest by his will or intestacy may not enjoy possession until the death of *A*. They do, however, acquire ownership of the fee simple previous to *A*'s death. Their succession to the interest formerly held by *B* occurs at *B*'s death and not *A*'s.

30. This idea, that the remainder of *B*—a future interest—presently exists just the same as *A*'s possessory life estate, is an important one and central to the estate concept. It was not, however, a notion readily or uniformly accepted in the case of a contingent interest. This explains why some anachronistic rules of law linger even though the present existence of vested and contingent interests has been generally affirmed. For example, in explaining the principles underlying the rule which prohibited the inter vivos transfer of contingent interests, SIMES & SMITH § 1852 states:

The first idea one encounters is that there are some future interests which have present existence and other future interests which do not have present existence but which come into being, as interests in property, at a future time. Reversions and indefeasibly vested remainders have always been thought of as existing property interests. But the earlier authorities sometimes treated the contingent remainder like the *spes successionis* of the heir apparent, as if it were only a bare possibility, and not the subject of present ownership. This theory has undoubtedly played an important role in the development of the law relating to the voluntary alienability of future interests. It is very easy, once the premise is accepted, to reason that any interest which is not the subject of present ownership cannot be transferred. Expressions to this effect are still to be found in current opinions. The eradication of this idea from legal thinking will be a valuable step toward a rational treatment of the subject of alienability. In the first place, the idea has been thoroughly discredited by the great bulk of modern authority in which contingent remainders, execu-

mainder which is both contingent and nontransmissible at death. Though *B* may transfer his interest to whomever he pleases while he and *A* continue to live,³¹ his interest cannot pass by devise or descent if *B* has failed to survive the death of *A*. *B* must survive *A*'s death, the time at which possession is to be exchanged, if he or his successors in interest are ever to enjoy possession. And if *B* has made an *inter vivos* transfer of his interest while *A* continues to live, the successor to *B*'s remainder will see his interest extinguished at *B*'s death if *B* has failed to survive *A*. Accordingly, the successor to *B*'s remainder will be denied possession at *A*'s death. In any case, if *B* has predeceased *A*, possession will revert to the donor or his successors in interest at *A*'s death. This is a basic illustration of a nontransmissible interest.

An interest, however, need not be contingent in order to be non-transmissible at death. In "To *A* for life, and then to *B* and his heirs; but if *B* fails to survive *A*, then to *C* and his heirs," *B* has a vested remainder³² subject to divestment in favor of *C* who has an executory in-

tory interests, and possibilities of reverter have all been endowed with the quality of alienability and have been recognized for other purposes as being the subject of present ownership.

31. Contingent remainders were not always alienable. See note 30 *supra*. Subject to certain exceptions, at common law contingent remainders were inalienable during the lifetime of the remainderman. This was a position adopted by many American courts at one time. Today, in most jurisdictions, this common law rule has been abrogated by either legislation or judicial decision. See SIMES & SMITH §§ 1852-59. Accordingly, the assertion in the above text, that *B* could transfer his interest while he and *A* were both alive, is valid in only those jurisdictions in which contingent remainders have been made alienable.

32. Decisions involving future interest problems frequently contain this statement of issue: "Is the interest contingent or vested?" All too often, this stated issue obscures the question actually before the court. Indeed, to make this the apparent issue, and to resolve it, sometimes confuses more than it clarifies. There are at least two reasons for this confusion and predilection to misstate issues.

To begin with, although the words "vested" and "contingent" are used in, and are frequently critical to, legal analysis, they are words which have more than one accepted meaning. Accordingly, intelligent analysis is confounded whenever it is not made absolutely clear which meaning is being accorded this terminology. This plurality of meaning is explained in LEACH & LOGAN 253-54:

The word *vested* is commonly used in at least four senses and *contingent* in at least three:

(1) To say that an interest is vested may mean that it has become possessory or vested in possession. This use involves no substantial difficulty.

(2) To say that an interest is vested may mean that, although it is still a future interest, it has acquired that metaphysical and artificial status which under the feudal law made it an estate rather than the possibility of becoming an estate—i.e., that it is vested in interest. A remainder is vested in this sense when it is not subject to a condition precedent other than the termination of the particular estate. . . .

terest. Although *B*'s interest is vested, it is also nontransmissible at

(3) To say that an interest is vested may mean that if the named taker dies before it becomes possessory the interest is transmissible to his estate, and that his heirs or distributees will take the interest which he would have taken had he lived. Thus it is possible to have "a vested interest in a contingent remainder," using the word vested in the sense of this paragraph and the word contingent in the sense of the preceding paragraph. Antithetically, contingent is used to denote that the interest is nontransmissible and that the named taker must survive to the time of vesting in possession. It has proved easy for courts to slip from an obvious premise that a remainder is contingent upon the occurrence of some collateral event . . . to the dubious conclusion that it is contingent in the sense here discussed and that the remainderman must be living when the estate becomes possessory. . . .

(4) Where the Rule against Perpetuities is involved, to say that an interest is vested means that it has acquired the degree of certainty which under the Rule an interest must acquire within lives in being and twenty-one years or fail. The term contingent is used to indicate that the interest has not acquired the necessary degree of certainty. In the main these usages are the same as those discussed in paragraph (2).

In the textual illustration, *B*'s remainder is characterized as a "vested" interest. The meaning accorded this word is "vested in interest" as described in paragraph (2). It should also be noted that in terms of the definitions provided by paragraph (3), *B*'s interest is contingent. Stated otherwise, *B* has a vested interest which is nontransmissible the moment he fails to survive *A*. Accordingly, if the particular question raised is one of transmissibility, to state the issue as "vested or contingent" can mistakenly invite a resolution in terms of the definitions included in paragraph (2) rather than paragraph (3).

The other principal reason for these problems arises out of the illogical distinctions made in applying the definitions described in paragraph (2)—vested or contingent in interest. LEACH & LOGAN at 53, point out: "A remainder is vested in this sense when it is not subject to a condition precedent other than the termination of the particular estate." To be sure, if a remainder satisfies this definition it is vested. Yet, even if it does not, it can still be vested in interest. See J. GRAY, RULE AGAINST PERPETUITIES §§ 101-03, 108 (4th ed. 1942). Indeed, in the textual illustration, *B*'s remainder is subject to a condition precedent other than the termination of all prior interests; nevertheless, *B*'s remainder is vested. To be vested in interest does not in fact always require the absence of a precedent condition to possession. Indeed a slight change in language, perhaps even a change in the order of the words used, may produce a change in characterization without producing any change in operational consequences. For a discussion of legal and operational consequences, see note 33 *infra*. *B* has a vested interest, but before he or his successors assume possession, he must survive *A*. Conversely, for *C* to assume possession, *B* must predecease *A*. However, suppose the limitation had read: "To *A* for life, and if *B* survives *A*, then to *B* and his heirs; if not, then to *C* and his heirs." This change in language does not vary the *operational requisites for possession*. Once again, *B* must survive *A* for *B* or his successors to assume possession, and *B* must predecease *A* for *C* to assume possession. Nevertheless, in this situation, courts have concluded that both *B* and *C* have remainders contingent in interest. Though the definition described in paragraph (2) appears founded on the presence or absence of a precedent condition to possession, this distinction has been obscured and confused by the maze of exceptions courts have developed over the years. Accordingly, even if a court has correctly viewed the question presented—"vested or contingent in interest"—the solution it articulates may be neither easy nor sensible,

death since *B*'s interest is extinguished in favor of *C* if he fails to survive *A*, in which case *B* has nothing to pass by devise or descent. A condition of survivorship has been imposed: neither *B*, nor his successors—heirs, devisees, or inter vivos transferees—is entitled to assume possession at *A*'s death unless *B* survives *A*. That *B*'s interest may be characterized as vested, and thus accorded the attributes of a vested interest,³³ does not make it transmissible at the death of *B* during the

33. This assumes, of course, that the consequential difference between vested and contingent interests is real and not fictional. If it were otherwise, attempts at distinguishing vested and contingent interests would be pointless and certainly not worth the time lawyers, judges and teachers devote to these distinctions. Accordingly, inquiry should be made as to the existence and nature of these assumed differences.

The consequential differences which have existed between vested and contingent interests can be classified in two categories—operational and legal. It is this latter category to which the above text refers. By operational consequence is meant those administrative directions of an estate owner implicit in a particular construction—contingent or vested, a condition precedent or subsequent. For example, consider the following illustration: "To *A* for life, remainder to *B* when he attains age 25; however, if *B* fails to attain age 25, then to *C*, if he is then living." If *A* dies before *B* attains age 25, who is entitled to benefit until *B* does or does not attain 25? This problem may arise whenever a condition can operate before or after all prior estates have terminated. If *B*'s remainder is characterized as vested subject to divestment, *B* is entitled to benefit until he fails to attain 25. Implicit in *B* having a vested interest is that his possession is subject only to *A*'s life estate unless and until the condition of divestment operates. If, however, his interest is deemed contingent, *B* is not entitled to benefit until he reaches 25 and income passes to others. Implicit in *B* having a contingent interest is that his possession is subject to both *A*'s life estate and the satisfaction of a precedent condition. Further, what happens if *C* is dead when *B* fails to attain 25? If *B*'s interest is contingent, the remainder will not pass to the estate of either *B* or *C*. However, it is conceivable if *B*'s interest is vested subject to divestment that the remainder will pass to *B*'s estate. See, e.g., *Jackson v. Noble*, 48 Eng. Rep. 755 (Ch. 1838). These differences, then, follow from consequences directed by the transferor as to who takes what and when. These are consequences courts perceive by understanding what lies behind the abbreviated expression used by the transferor. Classifying the condition, and accordingly the interest, enables them to infer the choice of consequence intended.

By legal consequence is meant those attributes—those incidents—which flow from something being one kind of an interest as opposed to another. For example, the benefits and burdens inherent in fee simples and life estates are distinguishable. The owner of a fee can commit waste, but the owner of a life estate cannot. Similarly, history has created incidents different in vested and contingent interests. Generally, the law has made vested interests alienable, subject to the claims of creditors, indestructible and exempt from the rule against perpetuities. In the main, contingent remainders have been inalienable, exempt from the claims of creditors, destructible and subject to the rule against perpetuities. In recent times, however, many of these differences have disappeared because of changes in local law. Indeed, in many jurisdictions the rule against perpetuities and the rules which govern claims for waste remain the only areas in which these differences in legal consequences subsist. See 5 AMERICAN LAW OF PROPERTY § 21.6. Perhaps then, just as the differences in legal

time in which *B*'s interest is nonpossessory; that is, while *A* continues to live. Just as all vested interests are not necessarily transmissible at death, contingent interests are not always nontransmissible at death. In the preceding illustration, though *C*'s executory interest is contingent, it is nevertheless transmissible.³⁴ *C*'s interest can be extinguished, but the event causing the elimination of his interest has nothing to do with the life or death of *C*. *C*'s interest may pass by devise or descent to his successors even if he has failed to survive the date of possession. *C*'s interest will be extinguished during his lifetime or thereafter only if *B* has survived *A*. Nor is this observation confined to executory interests. It holds as well for some contingent remainders. For example, in "To *A* for life, and if at the death of *A*, the premises have remained zoned for residential use only, then to *B* and his heirs; if not, then to *C* and his heirs," both *B* and *C* have contingent remain-

consequences have diminished, so should the need to determine whether an interest is vested or contingent. Yet here is the rub. So long as conditions may operate precedent or subsequent to possession and so long as the nature of conditions used by planners is not always clear, the occasions for making constructions for operational purposes only have not and will not disappear. Unfortunately, in these situations, courts have commonly made constructions reflecting ancient preferences for particular legal consequences. For example, using the previous illustration, the transferor probably did not wish to create in *B* a destructible interest. If *B*'s interest is vested, it is indestructible. Therefore, *B* must have a vested remainder and is entitled to possession until he fails to attain 25. This reasoning breaks down once contingent remainders have been made indestructible and once other legal consequential differences disappear as well. Accordingly, so should the constructional preferences which reflect these differences disappear. And yet, they haven't. See LEACH & LOGAN 255. As contingent and vested interests begin to look more and more alike in terms of legal consequences, courts should begin to make operational constructions without regard to anachronistic priorities.

34. The only express condition for possession imposed upon *C*'s interest is that *B* must predecease *A*. The literal application of this condition does not require that *C* survive either *A* or *B*; accordingly, *C*'s interest is contingent but also transmissible at death. Nevertheless, courts sometimes find an additional condition, that *C* must survive *A*, and frequently this occurs in the absence of any language or circumstances suggesting that this requirement was intended. See, e.g., *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931). Whenever courts add this unexpressed condition, they seem to be saying, though seldom directly, that inherent in any contingent interest is a condition of survivorship of the date of possession. This is nonsense. Interests should be contingent only because of conditions transferors intend. In theory, an interest, characterized as contingent, may be subject to a condition unrelated to the survivorship of any event. In making an interest contingent, a transferor can choose from the full range of conditions allowed by law. Most commonly, a selection will concern the survivorship of some event; frequency, however, should not suggest uniformity. It does not follow each time an interest is expressly conditioned upon an event unrelated to a taker's survivorship of possession, that a condition of survivorship is also intended and, therefore, should be added.

ders that are transmissible at their respective deaths, at least until a change in zoning has occurred. Neither *B* nor *C* must survive the date of possession, *A*'s death, or for that matter any event following the making of the original gift. The issue of transmissibility at death should nearly always be independent of the distinction between vested and contingent interests. An interest which is subject to a condition, whether it be precedent or subsequent, is made nontransmissible by that condition only when it requires that the taker must survive a specific event or must satisfy an obligation which can only be met while the taker is alive.³⁵

This discussion of the relation between vested and contingent interests and conditions which make interests nontransmissible at death, in addition to introducing the concept of nontransmissibility, bears more directly on the problem of exposition than on prevision. Apart from perceiving the need to make interests nontransmissible, the problem a planner confronts is simply this: because the choices courts make between vested and contingent or between transmissible and nontransmissible are neither uniform nor always a reflection of an estate owner's probable intent, but instead are often confused or irrelevant, a planner must draft with special care in making a germane choice explicit. Whether an interest is characterized as vested or contingent should not ordinarily³⁶ decide the question of transmissibility. Some courts, however, have occasionally made the consequence, transmissibility at death, depend on whether an interest is vested or contingent;³⁷

35. See, e.g., the illustrations in note 27 *supra*.

36. See note 40 *infra*.

37. See, e.g., *Security Trust Co. v. Irvine*, 33 Del. Ch. 375, 93 A.2d 528 (1953).

In cases like *Irvine*, a court is asked to decide whether a future interest passes to the estate of a designated taker who fails to survive the date of possession. In so doing, these courts must obviously decide whether a condition of survivorship was intended, even if not clearly expressed. According to some courts, the answer to this question depends on whether this interest is contingent or vested. If vested, the interest passes to the estate of the deceased taker. The limitations appearing in these cases provide for an alternate gift, which presents whatever evidence there is of required survivorship—for example, "remainder to *A*, *B*, and *C*; the issue of any deceased taker to receive his parent's share." What courts fail to recognize is that conditions of survivorship may be found under either a construction of alternate contingent remainders or of vested remainder subject to divestment if death precedes the date of possession.

The danger of such oversight is simply this. In resolving the question squarely before it—must a taker survive the date of possession—ideally a court should predicate its answer on whatever evidence there is of survivorship. Only these circumstances—those which relate to survivorship—should dispose of the issue before it. However, once a court equates this question of survivorship with the issue of vested or contingent

vested interests are transmissible, contingent interests are not. The danger to the planner is that he may commit the same error by assuming that an interest can be made nontransmissible simply by making it contingent or transmissible by making it vested. Because this practice is founded upon a faulty assumption—that transmissibility is a direct function of vestedness—not shared by commentators or most courts, nontransmissibility should never be sought by the use of a label only. In short, the planner's solution in every jurisdiction does not rest with the production of an interest with a particular character—contingent or vested—but with his precise and comprehensive elaboration of desired consequences. The importance of rejecting labels to direct the devolution of an estate, and thereby avoiding occasion for judicial use of constructional pigeonholes, will be emphasized and explained further. At this point, it should be sufficient to add: that distinctions developed to distinguish vested and contingent interests are frequently uncertain and ambiguous³⁸ and sometimes irrelevant and pointless,³⁹ especially with regard to the issue of transmissibility;⁴⁰ and that the matter of

interest, it adds a new dimension to its determination—the long standing bias in favor of vested interests. It is then apt to weigh particular circumstances evidencing survivorship against the historical predilection of courts for vested interests. When this occurs, courts do more than obscure the fundamental question before them. They invariably make a construction which comports with history, thereby finding an interest transmissible at death at least under special circumstances—perhaps without any regard for what was probably intended.

38. See T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 69-84, 125-37 (1966); LEACH & LOGAN 253-332; SIMES & SMITH §§ 131-66.

39. See 5 AMERICAN LAW OF PROPERTY § 21.6.

40. As indicated in note 37 *supra*, when a limitation creating a future interest does not make clear whether survivorship of possession is required, whether that interest is *vested* or *contingent* should be irrelevant if, by implication, it may be found transmissible or nontransmissible under either construction. Similarly, and quite obviously, the question of *vested* or *contingent* interest may be irrelevant to the issue of transmissibility at death where a condition of survivorship of possession is perfectly clear. For example, compare these two limitations: "To A for life, remainder to B; however, if B does not survive A, then to C"; "To A for life, and then if B survives A, to B; if not, then to C." Most courts would characterize B's remainder as vested subject to divestment in the first example, but contingent in the second. However, B does not have an interest transmissible at death in either case. In both limitations, for B or his successors to assume possession, he must first survive A. It should be noted, however, that there are circumstances in which the *vested-contingent* distinction is quite relevant to a determination of transmissibility at death. This is true of those cases in which a construction producing transmissibility cannot be reached without finding an interest vested, or conversely, nontransmissibility cannot be found without a contingent construction. For example, consider a limitation which does not provide for an alternate gift: "To A, payable at age 21." If A's interest is vested, it must be vested absolutely with enjoyment postponed until A attains or would have attained age 21.

transmissibility is, or should always be, of special importance to the estate owner, for nearly everyone prefers to see that only those take who are able to enjoy the estate personally.⁴¹ Stated otherwise, nontransmissible interests are frequently desired, and reliance upon labels—interest characterizations—is an uneasy and uncertain way to accomplish this.

What then are some of the prevision and other provision problems which exist with respect to transmissibility at death—the survivorship of a specific event, usually the date of possession? Suppose *A* has stated only that he wishes to care for his wife first and then provide for his children equally. His lawyer may draft a will which leaves his entire estate: “To my wife for life, and after her death to my children and their heirs.”⁴² Both the estate plan and will appear to be commonplace and simple. Assume that as of the date in which *A*'s will is executed his wife and three unmarried sons, *X*, *Y*, and *Z*, are alive. *A*'s children have been given a remainder in fee simple which is vested and transmissible at death.⁴³ Neither *X*, *Y*, nor *Z* must survive *A*'s

It cannot be vested and nontransmissible at death—vested subject to divestment if *A* fails to attain 21—because there is no provision for an alternate gift, that is, there is no expression of to whom the divestiture should be made. If vested, the age directive cannot create a condition. Similarly, *A*'s interest cannot be transmissible at death and contingent. If initially contingent, it can only be because *A* must survive age 21 and this makes his interest nontransmissible at death until then. The moment *A*'s interest becomes transmissible at death—when he attains 21—it is no longer contingent but rather vested.

41. See note 27 *supra*.

42. As stated previously, Part One considers three related problem areas: survivorship-transmissibility; lapse; and class gifts. Though examined in three separate sections, their analysis cannot be isolated. For example, discussion of the class gift first appears in the section on survivorship-transmissibility. The class gift is not only common to survivorship-transmissibility questions, oftentimes it serves as the best illustration of the prevision and provision problems confronting the planner in this area. Yet the discussion of class gifts in this first section is more than by way of illustration; indeed, it bears directly on the question of minimum class membership. The section on class gifts, however, is devoted principally to two other kinds of problems. It continues the discussion of transmissibility-survivorship problems regarding limitations containing clear requirements of survivorship but ambiguous expressions of a class gift. Additionally, this section takes up the question of maximum class membership, when members may emerge or qualify after the date of distribution. The section on lapse problems also deals with class gifts and survivorship. Necessarily, it concerns the matter of minimum class membership. However, it adds to the discussion contained in the section on survivorship-transmissibility by concentrating on problems caused by the death of a potential class member before, rather than after, the demise of an estate owner-testator.

43. The terms of this limitation seem to be unmistakably clear; its meaning is unambiguous. Accordingly, the above construction should be indisputable. There are, however, occasional constructional aberrations, sometimes caused by judicial reliance on

wife in order for their transferees, heirs, or devisees to assume possession at her death.⁴⁴ Because *A*'s lawyer failed to consider the possibility that one or more of *A*'s children might predecease his wife, two undesirable consequences may follow. If *X* predeceases his mother and is survived by children able to take at her death, *X*'s share of *A*'s estate would be subject to estate and inheritance taxes and probate costs on two occasions before possession passes from *A*'s wife to *X*'s children.⁴⁵ If *A*'s estate is sizeable, the failure to make the remainder to the children nontransmissible with a substitute gift to grandchildren⁴⁶ could be costly. In any event, regardless of the size of *A*'s estate, it is fair to assume that he would like his estate to remain within his family for

certain principles that are erroneous on their face or when applied out of context. For example, if a court were to follow literally the reasoning in *Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917), discussed in note 25 *supra*, it might construe the above limitation in this manner. If the remainder is to a class, it is only to those members who survive the date of possession. If the remainder is to individuals, then there is no survivorship requirement. In this case, the remainder is "to my children" and, therefore, is a class gift. Consequently, it is contingent and nontransmissible at death.

44. *A*'s children must, however, survive *A* because of the lapse doctrine, which is discussed in the next section. Looking to the date a will "speaks," the testator's death, this doctrine presumes that a person then dead is not intended or able to receive his gift. Accordingly, every testator is assumed to make all transfers subject to this condition of survivorship. Consequently, though survivorship of *A*'s wife is not required, the claim of *X*, *Y*, or *Z* fails if he does not survive *A*.

45. These costs accrue because *X*'s children ultimately claim possession of something which has passed through two estates. At *A*'s death he owned an inheritable interest which became part of his estate and, therefore, subject to the death costs. That part of his estate which remained, after satisfaction of these costs, then passed by the terms of his will. *A* gave to *X* an inheritable and transmissible interest which became part of *X*'s estate at his death. At *X*'s death, his share of *A*'s estate was, once again, subject to death costs, even though *X* never enjoyed possession of the share given him by *A*. His nonpossessory share was, nevertheless, inheritable and transmissible and, therefore, included in his estate. See LEACH & LOGAN 329. Consequently, what ultimately reaches *X*'s children by the terms of *A*'s and *X*'s wills, has been twice diminished by the imposition of these death costs.

46. For example, consider this testamentary provision: "To my wife for life, and after her death to such of our children who survive both of us. If a child does not survive both of us, then the share he would have received shall go to his descendants, then living, per stirpes." Here, the possessory share *X* would have received, if he survived his mother, passes directly to *X*'s children. In the hypothetical which begins in the text at note 42 *supra*, if *X* left his transmissible interest to his children, then in that illustration and this one, *X*'s children would be entitled to possession at the death of the life tenant. Yet the death costs are less in this example, when *X* is not given a transmissible interest. *X*'s share is not inheritable—is not transmissible by him at his death—until he survives the date of possession. If he does not survive, the succession of his children is not to his interest but to the interest of *A*, they take directly from him and not *X*. The remainder originally shared by *X* does not pass through his estate.

as long as the law and practicality will allow. Consider the case of *X* predeceasing his mother, survived only by his wife, to whom he leaves his entire estate. Would *A* wish to give *X* freedom to dispose of his share if *X* was not survived by descendants? Yet because these possibilities were never fully exposed or developed, or because *A*'s lawyer was preoccupied with simplicity, *A*'s estate can pass from his family even though *A*'s line of descent has not been exhausted. Further, it should be pointed out that if prolonged retention within his family was a foremost objective of *A*, making the remainder to his children subject to a condition of survivorship would not suffice. So long as *A*'s children are given a fee simple—an absolute interest—they can divert *A*'s estate the moment they survive their mother.⁴⁷ *A*'s intent, then, is best achieved by denying his children an inheritable estate and by deferring ultimate ownership until their deaths; that is, the absolute interest will pass only to grandchildren. Nevertheless, some of the risk of diversion could have been eliminated by providing for a gift to other children or their surviving descendants if a child predeceases *A*'s wife and is not survived by descendants.⁴⁸

47. Given the above limitation, "To my wife for life, and after her death to my children and their heirs," though the life tenant's interest is theoretically alienable, it is unlikely that she will divest her interest. And, even if she does, it is only for her life and probably not a major concern of *A*. However, there is less likelihood, and in fact no assurance, that the use of *A*'s estate will remain within his family beyond the death of his wife. *A*'s children have been given a remainder in fee simple absolute. At their mother's death, their absolute interest becomes possessory and, therefore, more marketable. There is nothing that requires them to retain it or to devise it to members of *A*'s family, including their respective children. To give the children an interest contingent on survivorship of possession merely makes their remainder less marketable during the term of the life estate. However, for those who survive—for those ultimately entitled to possession—their opportunity for diversion is then the same as a remainderman whose interest was never contingent. The key, then, to retention of *A*'s estate within his family is to defer, for a longer period of time, the gift of an inheritable interest; more specifically, to give his children a life estate rather than a fee simple. To illustrate, consider this change in the above limitation: "(In trust) . . . to my wife for life, and following her death equal division should be made of principal into as many shares as there are children I have had. A single share shall then be put in trust for each child, the income from which shall be given to such child, for life. At the death of a child, his trust will terminate and his share shall then pass to those of his surviving descendants he appoints by will. If a child fails to make such appointment, his share shall pass per stirpes to his surviving descendants. If, however, a child dies without surviving descendants, his share shall then be added to the trusts of my other children who survive him or who have descendants who survive him."

48. Several choices are available to the planner in this situation, each of which serves *A*'s hypothesized objectives (minimizing death costs and preserving family control) differently.

Suppose, however, that *A* had made the remainder to his children nontransmissible: "My entire estate to my wife for life, and then at

First, the remainder to *A*'s children may be made nontransmissible at death while nonpossessory by requiring survivorship of *A*'s wife: "To my wife for life, and thereafter, to my children then alive and their heirs." Because it avoids passage of the remainder through the estate of any child who predeceases the date of possession, this limitation can reduce death costs. See note 45 *supra*. However, it does not assure retention of *A*'s estate within his family beyond the death of his wife. Additionally, it makes possible a distortion of benefits, probably unintended by *A*. The families, including descendants, of those children who predecease their mother cannot benefit from this gift.

Second, the remainder to *A*'s children may be made nontransmissible at death while nonpossessory by requiring survivorship of *A*'s wife, but with provision for a substitute gift to the descendants of any deceased child: "To my wife for life, and thereafter, to my children who are then alive and their heirs, the descendants then alive of any deceased child to take per stirpes the share that child would have taken had he survived my wife." See note 46 *supra*. The effect of this limitation on *A*'s hypothesized planning goals is essentially the same as the first limitation set out. It does, however, avoid distortion of benefits among members of *A*'s family by creating a substitute gift in the living descendants of a deceased child.

Third, the interest given *A*'s children may be made nontransmissible at death, whether nonpossessory or *even possessory*, when a child dies without surviving descendants: "To my wife for life, and thereafter, to my children and their heirs; however, if a child dies without surviving descendants, whether before or after termination of the life estate, his interest shall be divested in favor of my children and other descendants, then living, per stirpes." This limitation does not save death costs if a child is survived by descendants. His interest becomes absolute at death and passes through his estate to his successors in interest, whom *A* would hope are the child's descendants. However, death costs are saved if a child dies without surviving descendants. His interest is then divested, leaving him without an inheritable share of *A*'s estate. Nevertheless, these savings are probably not the primary reason for *A*'s termination of his child's interest. The divestiture assures, for the most part, that *A*'s estate will not be removed from his family by a deceased child under circumstances diversion is most apt to occur—when a child dies without surviving descendants. Nevertheless, because a child's interest becomes absolute at death, if survived by descendants, diversion from *A*'s family has not been precluded. Though *A* might expect his deceased child to provide for descendants, his child can do otherwise; for example, leave all to his wife. However, unlike the previous examples, if a child is going to divert *A*'s estate, it is unlikely he will do so until his death. By making each child's interest nontransmissible if not survived by descendants, by making his interest defeasible for his entire life, *A* has given him a fee simple which is not readily marketable during his life and, therefore, not apt to be diverted until death.

Fourth, the interest given to *A*'s children may be made nontransmissible at death, whether nonpossessory or *even possessory*, when a child dies with descendants surviving him: "To my wife for life, and thereafter, to my children and their heirs; however, if a child dies survived by descendants, whether before or after termination of the life estate, his interest shall be divested in favor of his surviving descendants, per stirpes." Making a child's interest nontransmissible, if survived by descendants, saves death costs. It also assures that each child's share of *A*'s estate will pass to his child's surviving descendants. An opportunity for diversion occurs, however, when a child

her death, to such of my children in fee simple who survive her." *A*'s children have at *A*'s death a contingent remainder which is nontransmissible.⁴⁹ Each of *A*'s children must survive their mother before he is entitled to assume possession. If only one survives, he takes the entire estate; if none survive their mother, the remainder will pass by intestacy. Furthermore, if any child has conveyed his remainder during his mother's lifetime, the transferee's right to possession would still be conditioned upon this child's survivorship of his mother.⁵⁰ The interest acquired by the transferee would be no greater than that held by the child. Because the children's interest has been made nontrans-

dies without surviving descendants. In this event, because a child is given a transmissible interest he can transfer his share of *A*'s estate to others during his lifetime, subject, of course, to this condition of divestment. Yet, just as in the fourth example, because his interest is defeasible for his entire life, it is not likely he can or will divert *A*'s estate until his death. Accordingly, this limitation makes it highly probable that *A*'s estate will remain within *A*'s family until his children die.

Finally, the remainder given to *A*'s children may be limited to a life estate, with a gift of the fee simple deferred until the next generation. This choice probably best achieves *A*'s hypothesized objectives. See note 47 *supra*.

49. This limitation does not contain any ambiguity in language if *A*'s wife survives *A*. That *A*'s children have been given a contingent remainder, conditioned upon survivorship of possession, is indisputable. Their interests are nontransmissible at their respective deaths until they survive the date of possession. This construction would not have been so clear if the language in the above limitation had been varied slightly: "To my wife for life, and then at her death, to my surviving children in fee simple." This limitation has not been uniformly construed to give the children a remainder contingent upon survivorship of *A*'s wife. The ambiguity which has produced disagreement concerns that point in time to which the requirement of survivorship is referable. Is it the death of *A*, or is it the death of *A*'s wife? The most sensible interpretation would seem to be the death of *A*'s wife. The lapse doctrine requires, even in the absence of express language of survivorship, that the remainder pass only to those children, or their successors, who survive the testator, *A*. Except for the remote possibility that this language might be intended to avoid operation of an anti-lapse statute, to say this condition of survivorship is referable to *A*'s death is to make it meaningless surplusage probably unintended by *A*. Nevertheless, some courts, in similar cases, have found that this language does not require survivorship of the date of possession. See, e.g., *Alsman v. Walters*, 184 Ind. 565, 106 N.E. 879 (1915); *Sturgis v. Sturgis*, 242 Mich. 52, 217 N.W. 771 (1928); *DeWitt v. Searles*, 123 Neb. 129, 242 N.W. 370 (1932), appearing in LEACH & LOGAN 398 n.45. The construction reached by these particular courts should indicate the kinds of problems which accompany the effectuation of what appears to be an easily attained objective—making a remainder nontransmissible at death.

50. This assumes that contingent remainders are alienable. At common law, subject to certain exceptions, contingent remainders could not be transferred during the lifetime of the remainderman. This rule has been changed in most jurisdictions, particularly where the subject matter is land. Nevertheless, it persists in some form in a number of states. See 1 AMERICAN LAW OF PROPERTY § 4.67; SIMES & SMITH §§ 1852-55, 1857-59.

missible, no portion of the estate will be subjected to death costs by reason of a child's death unless that child has assumed possession and personally had benefit of the estate. If *X*, a child of *A*, fails to survive his mother, he has no interest which will become a part of his estate and therefore subject to estate and inheritance taxes and probate costs. Further, because the remainder has been made nontransmissible, the opportunity to divert the estate out of the family has been reduced while *A*'s wife continues to live.⁵¹ Only those children who survive, or those entitled to take through the surviving children,⁵² qualify for possession at the death of *A*'s wife.

Nevertheless, this solution, adopted to minimize estate shrinkage and to maintain estate ownership within the family,⁵³ reflects an incomplete

51. Obviously diversion of *A*'s estate from his family cannot be accomplished by *X* if he fails to survive *A*'s wife, the time for possession. Further, while his mother is alive, the market for *X*'s contingent remainder is not very great. Because of this, the opportunity for diversion, and, therefore, its likelihood, is reduced during that period of time. Nevertheless, the occasion for diversion from *A*'s grandchildren, and therefore *A*'s family, is not diminished once *X* survives *A*'s wife. The remainder given to his children is in fee simple, an interest they can control absolutely beyond their deaths once they satisfy the condition of survivorship. A child whose interest has vested might divest himself of personal benefit during his lifetime or not leave his share to descendants at death. It is probably this latter diversion which concerns *A* the most. That *X* can and might confer the use or benefit of *A*'s estate on others for only his life, probably should not alarm *A*. *A* is most likely concerned with a transfer by *X* which diverts *A*'s estate from his family with finality—a transfer which governs the devolution of *A*'s estate beyond *X*'s death. Indeed, *A* may feel that *X* should be privileged to cash-in his interest, but only for the units of time which reflect the share of the estate *A* intended to provide him. However, *A* may feel quite differently about *X* cashing-in units of time which reflect shares *A* hoped would pass to others. This seems to suggest, of course, that the gift of a life estate to his children, rather than a fee simple, best serves the objectives assumed for *A*.

52. For example, suppose contingent remainders are alienable in this jurisdiction and that *X* has transferred his remainder to *T* during the lifetime of *A*'s wife. Thereafter, assume *X* survives his mother. *T*, the successor to *X*'s interest, and not *X*, would acquire possession at the life tenant's death.

53. To be sure, the occasion for diversion of *A*'s estate by *X*, for example, has been reduced. *X*'s ultimate control over his share rests upon his survivorship to the time of possession. If he predeceases his mother, *X*'s power to transfer is extinguished. Nevertheless, this condition may not be directed to those circumstances in which *X* will actually divert *A*'s estate from his family. Indeed, this condition may be totally unrelated to the likely circumstances for diversion. Why assume that *X* is more apt to disinherit his family if he predeceases his mother than if he survives her and assumes possession? In fact, there may be greater justification for the opposite assumption. The market for possessory interests is obviously greater than for nonpossessory interests. It would seem that if the opportunity for diversion is enhanced, then so is its likelihood. *X*'s opportunities are greatest only after he survives possession, not before. What should be crucial to *A* is whether *X* has retained his share of *A*'s estate

plan and is very likely to evoke a consequence inconsistent with the probable wishes of the estate owner. By eliminating *X*'s privilege of testamentary disposition if he predeceases his mother, and by failing to provide for a substitute gift to *X*'s descendants, *A* has precluded a portion of his family from receiving a share of his estate.⁵⁴ Whether *X*'s children may ever take depends in part upon whether *X* survives his mother.⁵⁵ It seems unlikely that *A* would have wished that the devolution of his estate to living members of his family should depend upon whether their ancestor, his child, managed to survive his wife. Surely *A* would wish to include all family units. Yet by making the remainder fully nontransmissible without use of a substitute gift to descendants, by making it subject to the untimely and fortuitous death of a child before that of his surviving parent, *A* has allowed for distortion of his plan of allocation.

Suppose that *A* had recognized this potential distortion of his plan for equality and wished to avoid it. Perhaps the most obvious method would be to limit the circumstances in which the remainder is made nontransmissible at death.⁵⁶ Consider this choice of language: "To

at his death. If he has, like most parents, *X* probably will not disinherit his children. *X*'s diversion or dissipation of *A*'s estate, if it should occur, will most likely arise out of a lifetime transfer of a possessory interest. Therefore, the probability of *X* retaining his share would seem to be greatest in the situation in which he has never assumed possession. If then, *A* has intended to protect against diversion, the nature and focus of this condition of survivorship is misplaced.

54. *X*'s interest is extinguished when he fails to survive his mother. Possession passes to only those children who survive her. Even if *X* leaves everything to his family they cannot share in *A*'s estate. *X*'s family is left out, but this is not all that might happen as a result of this condition. Consider these possible circumstances which, though unlikely, are not very remote. Assume only one of *A*'s children survives possession and that, though this child is married, he is the only one without children. This surviving child, then, has been given complete control over the devolution of *A*'s estate. Who is most likely to benefit from what remains of *A*'s estate at the death of this surviving child? Most likely, it will be this child's wife and not *A*'s descendants still alive.

55. Whether *X*'s children ever receive the remainder left them depends on whether *X* survives his mother *and*, in addition, transfers his interest to them. This transfer may be *inter vivos*, testamentary or by intestacy. Accordingly, unless *X* survives, his power to transfer is extinguished.

56. There are, of course, other ways to avoid this distortion, choices which do not increase the circumstances in which a child's interest is transmissible at his death. In the limitation appearing in the above text, the remainder is vested subject to divestment. Each child has an inheritable interest which becomes absolute and transmissible at death if he or his descendants survives possession. If a child's descendants survive possession, that child has an interest he can leave them. A similar result, though not identical, can be achieved by making each child's remainder contingent not vested;

my wife for life, and then after her death to my children and their heirs; but if any child dies before my wife without descendants who survive her, then his or her interest shall be distributed in equal shares to my other child or children alive at my wife's death, and the descendants, per stirpes, then living of any other child who fails to survive my wife." The children have been given a vested remainder subject to divestment in favor of those children or their descendants who survive *A's* wife. Assuming the condition of divestment is construed literally, the remainder, even though vested, appears nontransmissible at death if: 1) a child fails to survive *A's* wife; 2) that child does not have descendants who survive *A's* wife; and 3) there are other children or descendants of *A* who survive his wife.⁵⁷ Conversely, a child's remain-

conditioned on his survivorship of possession, but with provision for a substitute gift to his descendants who survive possession—the death of *A's* wife. For example: "To my wife for life, remainder in fee simple to those of my children then living; the descendants, then living, of any deceased child shall take the share he would have taken had he survived my wife."

57. "To *A* for life, remainder to *B* in fee simple" gives *B* a vested remainder. This vested remainder can be made subject to divestment in favor of an alternate taker. Ordinarily, because the remainder is vested, it will not be divested in the absence of an alternate taker who qualifies for possession. It may be said that the primary taker, *B*, retains his interest until the conditions are met by which the alternate taker can displace him. See *Phipps v. Ackers*, 8 Eng. Rep. 539 (H.L. 1835); *Finch v. Lane*, L.R. 10 Eq. 501 (1870). This position makes obvious sense when the condition of divestiture relates solely to events concerning the alternate taker. "To *A* for life, remainder to *B* in fee simple; however, if my daughter, *C*, becomes a widow, then to *C* in fee simple." *B's* remainder is vested and remains so until *C* is eligible to take. When *C's* interest fails, because she is survived by her spouse or because she renounces or predeceases the testator, *B's* fee simple is then absolute. However, unlike the remainder to *B* in this example, the remainder to *A's* children, in the text, involves more than one condition. Further, some of these conditions do not relate to events concerning the alternate takers, the other children and their descendants. For an alternate taker to assume possession, three conditions must be met: that alternate taker must survive the life tenant, a condition which relates to him; the primary taker must predecease the life tenant, a condition which relates to the primary taker; and finally, the primary taker's descendants must predecease the life tenant, a condition which relates to neither taker—although, if the primary taker has never had descendants, this last condition can be said to relate to him. This suggests a basis for another position. Perhaps, if any of the multiple requisites for divestiture do not pertain to the alternate taker, then the breach of these particular conditions should terminate the primary taker's interest even though the substitute gift cannot take effect. See *Doe dem. Blomfield v. Eyre*, 50 Eng. Rep. 99 (Ch. 1848); cf. *Jackson v. Noble*, 48 Eng. Rep. 755 (Ch. 1838). Both cases appear in LEACH & LOGAN at 443. Stated otherwise, if an event for termination is expressed which relates to the primary taker, whose interest is then defeasible, the transferor must mean to divest that interest when that event occurs. For example: "To *A* for life, remainder to *B* in fee simple; however, if *B* predeceases *A*, then to *C* in fee simple if *C* survives *A*." Without regard to *C's* life or death,

der is transmissible at death if: he or his descendants survive *A*'s wife; or no other child or descendant of *A* survives *A*'s wife—that is,

B's interest is meant to terminate if *B* predeceases *A*. In theory, this position presents certain problems. An interest which is vested should remain such until divested; that is, vested until ended or terminated. Absent language of special limitation ("so long as," "until," "during," or "unless"), a vested interest should not be divested without an express gift over. Accordingly, if a substitute gift fails because the expressed multiple requisites are not fully satisfied, or because the alternate taker predeceases the testator or renounces his interest, a divestiture cannot obtain without a court first supplying an otherwise unexpressed alternate gift. Courts, however, are generally reluctant to create estates by implication. The event for termination is insufficient by itself. An act of divestiture nearly always requires explication of those eligible to displace the vested interest.

These, then, are two of the positions courts have assumed: the remainderman whose interest is vested holds all that the alternate donee does not take; if a condition referable to events concerning the primary taker is breached, his interest must be divested. Both positions, however, seem to overlook the obvious, but instead focus on factors which should not be decisive. The purpose served by the condition should be most important, something not always reflected by the relationship of the condition to the primary and alternate takers. Conditions of divestment are utilized for many reasons. For example, consider these two conditions of defeasance: "To *B* in fee simple; however, if *B* ever practices law, then to *C*'s descendants who survive *C*"; and, "To *B* in fee simple; however, if *B* dies without having had descendants, then to *C*'s descendants who survive *C*." Assume in the first illustration, that *B* practices law and that *C* dies without surviving descendants and in the second illustration, that *C* dies without surviving descendants and *B* without having had descendants. Each of these limitations contains conditions referable to both *B* and *C*'s descendants. In neither case can the alternate gift be carried out as expressed—*C* does not have surviving descendants. Perhaps the result in each case should be the same; *B*'s interest should become absolute or possession should revert to the transferor. Yet, if one speculates as to the reason for these conditions, a difference in result is suggested. Why was the condition in the first illustration used? Probably because the transferor intensely disliked lawyers or at least wished to deter *B* from practicing law. His selection of *C*'s descendants as alternate takers does not seem motivated primarily by a desire to benefit them, but rather his choice is a necessary incident of the deterrent underlying the condition appended to *B*'s interest. Accordingly, his intention should be to divest *B*'s interest even if the substitute gift fails. Therefore, a construction giving to *B* an absolute interest would be inconsistent with these assumptions as to intent. Why was the condition in the second illustration used? To begin with, the transferor probably intended to benefit *B* and thereafter *B*'s family. If *B* had a family, he wished to allow *B* to make his own choice. He expected, of course, that if *B* had a family he would not disinherit them. Yet if *B* had no family, a different choice concerning the devolution of the transferor's estate had to be made. This choice the transferor preferred to make himself. He could no longer rely on *B*'s selection; that is, that *B* would choose those who fall within the ambit of benefit desired by the transferor. Accordingly, *C*'s descendants were selected to succeed to *B*'s interest. The transferor's intention was not to penalize *B*, as such, but rather to benefit another under certain circumstances. Perhaps, then, if these expressly selected alternate takers cannot benefit, the transferor would no longer be concerned with divesting *B*'s interest in favor of himself, who, if dead, could no longer make his own alternate choice. Therefore, in this situation, the

a divestiture will not occur in the absence of an alternate taker. At the very least, no child, or those who take from him, will be deprived of a share in *A*'s estate so long as he or his descendants survive *A*'s wife. By limiting the occasion for nontransmissibility, an existing unit of *A*'s family will not automatically be precluded from sharing in *A*'s estate simply because a child of *A* has died unexpectedly before *A*'s wife. Yet, by making a deceased child's remainder interest transmissible if he has descendants who survive *A*'s wife, this limitation may create problems similar to those considered with respect to the very first example in which the remainder was made fully transmissible at death, ". . . and after her death to my children and their heirs." If *X* fails to survive his mother, but has descendants who do, his interest is transmissible at death and may be given by him to anyone he pleases. Though in most cases *X* is apt to provide for his family, nothing requires him to leave his share of *A*'s estate to his descendants. The occasion for diversion of the estate without *A*'s family has been reduced,⁵⁸ but the possibility remains.⁵⁹ Further, even if *X*'s descendants

better construction might be that *B*'s estate becomes absolute. See LEACH & LOGAN 442-48.

58. In the first example, "To my wife for life, and after her death to my children and their heirs," the children's remainder is vested absolutely and fully transmissible. Any child, for example *X*, can convey his interest to anyone at anytime during his life or at death. The existence of descendants is irrelevant to *X*'s power of transfer and so is survivorship of possession—the death of *A*'s wife. These powers of transmissibility given *X* are curtailed somewhat in the above provision (see text accompanying note 56 *supra*) which make his remainder defeasible. *X* can transmit an interest which endures beyond his death if either he or his descendants survive possession, or, if *A*'s descendants do not survive possession. The power to transfer has been eliminated in that instance when *X* has no descendants to whom he can leave his nonpossessory interest, one in which the probability for a diversion is great. Because *X*'s powers of transmissibility have been circumscribed, the occasion for diverting *A*'s estate beyond *A*'s family is less than before.

59. As indicated, *X*'s interest is transmissible at death if either he or his descendants survives possession, or, if *A*'s descendants do not survive possession. Accordingly, though *X* is survived by descendants or other members of *A*'s family, there are circumstances in which he can transmit his interest at death beyond *A*'s family. Implicit in the use of this condition of defeasance by *A* is an assumption undoubtedly shared by most planners. If a person is survived by descendants, because they are usually among those favored by him, they become primary recipients of his estate. Generally, this assumption seems justified. Certainly it underlies the legislative choices appearing in statutes of descent and distribution. Perhaps, if one were to examine all wills probated over the last one hundred years, this assumption could be supported by actual experience. Nevertheless, there are always exceptions. Indeed, casebooks on property, trusts, wills and future interests amply illustrate the many instances in which this assumption is not borne out. Comprehensive estate planning should account for the unusual as well as the usual.

are to take under *X*'s will, because his interest has been made transmissible it will be subject to death costs.⁶⁰ Consequently, unnecessary estate shrinkage will ensue because *X* has never had personal benefit of his share of *A*'s estate and *X*'s descendants succeed directly to the possession of *A*'s wife.

What this suggests, once again, are problems engendered by an incomplete scheme of disposition, a planning oversight, the solution to which is suggested by the very language of the last example. We began with a simple statement of *A*'s estate plan: "I wish to care for my wife, and then after her death I want to provide for my children equally." On its face his idea seemed simple enough, one which could be carried out by recording *A*'s stated wish, almost verbatim. But this was not the case. The idea was only the embryo of an adequate and effective plan. Many contingencies had to be explored and resolved. This burden rests properly on the lawyer. He must ask the right questions, for he rarely enjoys the luxury of trial and error.⁶¹ Comprehensive elaboration of a scheme of disposition should occur as part of the initial planning process, not through subsequent wills or codicils.⁶²

60. Death costs are, of course, imposed regardless of whether *X* leaves his estate to his descendants. They attach because he owns at his death an interest which will endure beyond his life. His interest becomes a part of his estate; it is transmissible at death. Accordingly, in addition to any state taxes, the decedent's interest is undoubtedly subject to estate taxation under INT. REV. CODE OF 1954, § 2033:

§ 2033. Property in which the decedent has an interest

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

See generally C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES §§ 4.1, 4.7, 4.9 (2d ed. 1962); 2 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION § 14.05 (1959).

Furthermore, the decedent's estate is subject to probate costs, particularly the executor's or administrator's fee. Their compensation is directly proportionate to the size of the estate itself. See, e.g., MO. REV. STAT. § 473.153 (1969).

61. Most plans and planning decisions are not irrevocable, because the instruments used to implement them can be amended or revoked. Indeed, the most common device for effectuating an estate plan is a will, an instrument without legal consequence until the moment of death. By nature, it is something which can be replaced. Changes in circumstances, which warrant revision of an estate owner's plan, frequently follow the execution of his will. To be sure, it is sound practice for a lawyer and client to review periodically these changes, so that both the plan and will reflect the present and future rather than the past. Nevertheless, this opportunity for revision is not always presented. Once the testator dies, further planning is precluded. Indeed, a testator can die anytime, even the moment after execution of his first will. Speculation concerning what might have or should have been is then futile.

62. Ideally, every plan should be conceived without reliance upon an opportunity for revision. Nevertheless, before an estate owner's death, unforeseen eventualities can

When asked the right questions, what objectives, then, might *A* reveal beyond simply—"to my wife and then my children." *A* first wants to provide for his wife, deferring distribution of principal until her death.⁶³ Thereafter, he wants to provide for all his children, he does not wish to preclude any family unit because of a child's untimely death. Further, he wants to create equal shares amongst children or their family units. He wants to minimize estate shrinkage and avoid death costs, but only if this can be accomplished without interfering with his basic plan. Finally, he wishes to keep the estate within his family as long as possible. Stated another way, if a child survives *A*'s wife, only then should he have complete freedom to divert his share.⁶⁴

occur which sometimes profoundly affect his family situation. Hopefully the opportunity for revision is present. If so, changes, in both the plan and the instruments which implement it, should be made. For example, it was assumed that *A* wished to provide for his three children *equally*. This objective reflects what *A* desires at the outset and would continue to desire during his lifetime if the relative needs of his children remain unchanged. Suppose, however, *A* lives for many years and after the death of his wife his obligations are reduced considerably. Suppose further, that *X* and *Y* are successful and become independently wealthy. *Z*, however, becomes an invalid after bearing three children. Surely *A* might wish to revise the family priorities contained in his will and, perhaps before his death, even make substantial gifts to *Z* and his children.

63. There are, of course, problems inherent in creating a life estate for *A*'s wife and delaying distribution of principal until her death. First, *A* has given his wife a life estate supposedly for her support and maintenance. The income produced from *A*'s estate may be insufficient to satisfy even her most basic needs, therefore, the gift of a life estate, without any further powers, may not accomplish *A*'s objectives. A power of sale might be needed to allow reinvestment in property which bears a higher rate of income. Further, for her effective support, perhaps even a limited power to invade principal should be added.

Second, because the creation of a life estate in *A*'s wife gives her possession, the security of the remainder given *A*'s children necessarily depends upon her capacity to manage the estate. Although the law of waste affords some measure of protection to remaindermen against incursions into principal, rights created by doctrines of waste are frequently meaningless unless the remaindermen are vigilant. Furthermore if the life tenant is given a power of sale, the security of the remaindermen's interest also depends on her ability to realize a profitable sale and successful reinvestment.

Finally, a delay in distribution of principal to remainderman until after *A*'s wife dies may not coincide with their actual need for use of principal. The longer *A*'s wife lives, then the greater is the probability that the benefits of *A*'s estate will be unavailable to his children in their time of need. This risk is always present when distribution of principal is made referable to the needs of the life tenant only and not both life tenant and remaindermen alike. Ideally, then, provision should be made for those occasions in which acceleration of a remainderman's interest is desired.

64. Further discussion with *A*, however, might reveal a desire to impose, upon ultimate distribution of principal, additional restrictions consistent with *A*'s primary objective: to provide for his children and their families after the death of his wife.

But if neither that child nor his descendants are alive and able to enjoy the estate personally at the death of *A*'s wife, *A* wants that child's share to go only to those of *A*'s descendants who survive. The priorities as to each share of the remainder seem to be: 1) to a child if he survives *A*'s wife; 2) if he doesn't survive, to his descendants who do; and 3) if neither survive, then to *A*'s other children or their descendants alive at *A*'s wife's death. The problem with the last illustrated provision—as a planning solution—is that the second priority is not made explicit and therefore may be frustrated. As written, if *X* predeceases *A*'s wife but has descendants alive at her death, *X* probably has an interest transmissible at death and can transfer his share to anyone he pleases. Yet one may ask, why has *A* conditioned a gift over to other children upon the failure of a deceased child to have descendants alive at *A*'s wife's death if he did not intend the descendants to take directly from *A* if they survived their father and then their grandmother? Having in mind that his child will have lived longer and, therefore, should be able to evaluate events subsequent to *A*'s death, perhaps *A* wished to give that child discretion to benefit members of his own family in the light of their respective needs. Whether this was *A*'s reason for making a child's interest transmissible under these circumstances is unclear. What is clear is that *A* has not thought the matter through. If he had, he might have accomplished this same objective and still assured passage of the estate to the deceased child's descendants by use of a special power of appointment.⁶⁵ *A*'s oversight cannot be viewed

For example, *A* might wish to delay distribution of principal until a time beyond the death of his wife. This delay could be for another generation—until the death of his children, or instead, until each child attained a specified age. Either of these choices necessarily complicates the disposition of *A*'s estate. At the very least, by increasing the number of people whose life or death or attainment of a particular age affects distribution of *A*'s estate, the eventualities to be anticipated and provided for have also been increased. Originally, distribution could focus on the death of *A*'s wife. These additional restrictions change this, the scope of concern is enlarged. For example, by deferring distribution of principal until the death of *A*'s children, attention must now be directed to the consequences which should ensue from the deaths of all but the last child. These complications are inevitable any time one proliferates the number of potential takers or the sequence of relevant deaths. Although these added restrictions, in principle, may better fulfill the wishes of *A*, implementing them is not an easy matter. Indeed, it is a task ripe with occasion for oversight. See text accompanying notes 72-115 *infra*.

65. For example, consider the following limitation, which decreases the chances for diversion from *A*'s family and includes the descendants of a child who predeceases *A*'s wife, but permits the deceased child to determine the interests received by his children: "(In trust) . . . Income to my wife for life, and, at her death, principal in

simply as a failure to consider fully the circumstances in which he might choose to divest his children of their remainder. He has not contemplated who is to take in all events if his children are unable to take personally. The matter of "who" is inseparable from the issues of "when" and "whether."

This oversight also presents itself in the following limitation, a slight variation of the previous illustration: ". . . to my children in fee simple, *if they survive my wife*; but if any child dies before my wife without descendants who survive her, then his or her share shall be distributed to my other children alive at my wife's death, or their descendants by representation then alive if my other children have failed to survive my wife." Recognition of this particular oversight has led some courts to hold the remainder nontransmissible in the event a child has failed to survive the date of possession and to find an implied alternate gift to the deceased child's surviving descendants. Though there is some authority for characterizing the remainder in this last variation as vested subject to divestment, and nontransmissible at death only if the deceased child does not have descendants alive at the wife's death,⁶⁶ other courts have regarded the remainder to the children as contingent and fully nontransmissible if a child does not survive the date of possession, with alternate gifts to other children or their descendants or by implication to the deceased child's descendants if they survive.⁶⁷ What in fact a court might do under these circumstances—when presented with either the original limitation or its variation—is not always clear.⁶⁸

equal shares to my children. If a child fails to survive my wife, then his share of the principal shall pass to such of his descendants who survive my wife as he appoints by will. In default of his exercise of this power, then his share of the principal shall pass, per stirpes, to such of his descendants who survive my wife. If, however, he predeceases my wife without descendants who survive her, then his share of the principal shall pass to my other descendants alive at my wife's death, per stirpes."

66. See the selection of cases presented by LEACH & LOGAN 267-85. In particular, see *Phipps v. Ackers*, 8 Eng. Rep. 539 (H.L. 1835); *Finch v. Lane*, L.R. 10 Eq. 501 (1870).

67. See, e.g., *In re Estate of Blake*, 157 Cal. 448, 108 P. 287 (1910).

68. What is clear is that courts are more inclined to find an implied alternate gift to the deceased child's descendants if the remainder to the children is construed to be contingent. If the evidence weighs heavily in favor of a contingent remainder, the more likely, then, is the occasion for an implied substitute. Perhaps this is because any inference of an executory interest, and accordingly divestiture of a vested remainder, theoretically entails more extensive judicial revision of a decedent's will. If the remainder to A's children is vested, a literal construction of the condition of divestment used by him does not technically produce an oversight. If a child predeceases A's wife, but is survived by descendants, the express gift over to others fails. Even though his plan does not deal explicitly with this eventuality, courts are disinclined to say that

At first glance there appears to be a "provisional" ambiguity. In reality a planning oversight has left the matter uncertain. By failing to consider all eventualities and by failing to make an explicit choice of consequence—should the descendants of a deceased child receive an alternate gift or not—the estate planner has left an important decision to the courts by default. Even where one can accurately predict how a court will make its construction, its choice, though perhaps consistent with a legacy of vestedness or other judicial priorities,⁶⁹ may be totally

he has overlooked it, once the children's remainder is characterized as vested. An interest is vested until it is divested by the provision creating the alternate gift. A primary taker is said to receive all that the alternate taker is not entitled to receive. *See, e.g.,* Phipps v. Ackers, 8 Eng. Rep. 539 (H.L. 1835); Finch v. Lane, L.R. 10 Eq. 501 (1870). Thus, if the express substitute gift fails because a deceased child has surviving descendants, by inference from the limitation itself, his interest is absolute. It passes to the successors selected by him, not those selected by *A*. Accordingly, if a court does otherwise when the remainder is vested, if it finds a substitute executory interest in surviving descendants, it does not fill a void where *A* fails to dispose of his entire estate. Instead, it is rejecting the solution apparently directed by *A* in favor of another it believes *A* would have preferred had he given the matter sufficient consideration. If, however, the remainder given the children is contingent, conditioned upon survivorship of *A*'s wife, it becomes more difficult to say that *A* provided any solution at all, certainly not in the limitation itself. The deceased child's estate cannot take, since he predeceased *A*'s wife, and the express gift to others fails, because the deceased child was survived by descendants. Absent the implication of a substitute gift, the oversight can be resolved, not by looking to the limitation itself, but by passage of the remainder to the residue or by intestacy. If the subject of the limitation in question is residue, it is difficult to say that implication of a substitute gift, to prevent intestacy, involves judicial revision of *A*'s solution. Though intestacy is a solution to the oversight, it is seldom the choice of one who attempts to distribute his entire estate by will. In these instances, courts simply appear to be filling a void, an eventuality *A* himself has not settled in the instrument which disposes of his estate.

69. LEACH & LOGAN 243-44:

Stare decisis is a judicial habit of mind. Hence that hybrid thing, the "rule of construction."

An examination of the cases to come will indicate that three ingredients enter into the composition of most of such rules in varying proportions. First, and quite justifiably, the rules tend to represent a crystallization of judicial views as to how the normal testator, having the general plan of disposition disclosed in this will, would wish his property distributed in the events which have occurred. . . . Second, and justifiably enough, the rules tend to further certain policies of the law quite unconnected with the actual or probable intent of the testator—for instance, the policy that interests shall become vested at a date as early as possible . . . the policy favoring simplicity and promptness of administration of decedent estates. . . . Third, and not at all justifiably, some of the rules tend to impose upon the modern American present the dictionary of the medieval English past, the salient examples being the indefinite construction of "die without issue" . . . and the rules of construction surrounding Shelley's Case

See also discussion of the constructional preference for vested interests in LEACH & LOGAN 255 n.6.

different than the option the estate owner might have elected had he considered the matter thoroughly.

What appeared originally to be a simple planning problem is not simple at all. At the very least, *A*'s lawyer should have made clear in the will *A*'s choice of alternate takers. This would have required a full statement of the circumstances in which a child's interest was to be divested. Earlier, the use of a contingent and nontransmissible remainder was rejected because of the potential for unfairness and distorted distribution amongst *A*'s children's families. The solution suggested to overcome this problem relied on the use of a vested remainder, nontransmissible only under special circumstances. There was, however, another less complicated choice consistent with priorities that *A* was assumed to have. *A* could have created a contingent and fully nontransmissible remainder, as previously illustrated, but could also have provided for a substitute gift to a deceased child's descendants. For example, "To my wife for life, and after her death to such of my children in fee simple who survive my wife; however, if a child has failed to survive my wife, but is survived by descendants alive at the death of my wife, then the share such deceased child would have received had he survived my wife is to go per stirpes to his descendants alive at the death of my wife." Only if and when he survives his mother—after he has assumed possession—will a child's interest become transmissible at death. Those who take at the death of *A*'s wife will necessarily be surviving children and surviving descendants of deceased children. The remainder will fail only if *A*'s line of descent has exhausted itself at the death of his wife. The estate has been conserved, equality maintained, and diversion without the family minimized. Nevertheless, this solution may not be ideal.⁷⁰ Clearly it does

70. This solution utilizes alternative contingent remainders, and their use presents certain problems, particularly when an age requirement is added. For example, consider the following limitation: "To my wife for life, and after her death, to such of our surviving children in fee simple who attain age 21; however, if we have no surviving children or if all our surviving children fail to attain age 21, then to . . . (here follows whatever substitute gift *A* might wish to make)." The remainder given to each of the children is contingent, *Festing v. Allen*, 152 Eng. Rep. 1204 (Ex. 1843), conditioned upon a requirement that might not be satisfied until after the death of *A*'s wife. The substitute gift is also contingent, conditioned upon an event, the literal failure of *A*'s surviving children to satisfy the age requirement, which also may not happen until after the death of *A*'s wife. The problems which occur arise out of the possible separation in time between termination of the prior estate and fulfillment of all conditions. Though an age requirement is used in this example, most conditions which could be satisfied after the death of *A*'s wife would illustrate the same problems.

not achieve all that *A* might have wished had he been carefully guided through the maze of choices and consequences. By making the remainder nontransmissible at death and by inflexibly fixing the substitute gift to a deceased child's descendants equally and by representation, *A* has denied a child who predeceases *A*'s wife an opportunity to act in the light of events occurring between his father's and his own death. A child who predeceases *A*'s wife, having no interest at death in *A*'s estate, could not distribute his share as he perceived to be the needs of his descendants. This could have been accomplished, however, by creating in *A*'s will a special power of appointment.⁷¹

It should by now be apparent that even a simple scheme of disposition may contain ambiguities which are nearly always the result of incomplete planning. These problems may be compounded significantly by the inclusion of other directions of the estate owner in this same dispositive provision. The introduction of the least bit of sophistication, oftentimes a reflection of some but not enough knowledge

What problems, then, might develop from a condition not joined to the termination of prior estates? So long as the common law doctrine making contingent remainders destructible is in force, both the remainder to the children and the substitute gift fail if the life tenant is survived by minor children only. See, e.g., *Festing v. Allen*, 152 Eng. Rep. 1204 (Ex. 1843). The primary remainder to the surviving children is destroyed because the age requirement has not been satisfied by the termination of the supportive estate. Additionally, the substitute gift will also fail unless it is made expressly alternative to the primary remainder; that is, unless the limitation designates that the substitute gift vest if the children are unable to take for any reason. The limitation in its current form does not do this. Accordingly, the substitute contingent remainder, which is not fully alternative, fails if *A*'s wife is survived by a child. If that child has reached 21, the substitute gift fails because the primary remainder vests. If that child is a minor, then both remainders are destroyed.

Today, however, most nonpossessory interests are indestructible, either because the common law rule has been abrogated or because it is readily circumvented. Nevertheless, even if the foregoing interests are indestructible, by their terms they still might not vest until some time after the death of *A*'s wife. Which, if any, of the surviving children may attain 21 might not be known then until after the life tenant's death. What remains unanswered is: who is to obtain benefit of the subject matter until either interest vests? Should income pass to the surviving minor children, to the substitute takers, to the residue, or by intestacy if this is a gift of residue? Or, should it be accumulated and added to principal for the benefit of those remaindermen eventually able to take? Indeed, the use of age requirements is popular. Clearly this problem, engendered by the age requirement, can arise. Obviously it is one to be considered and expressly resolved.

71. See the illustration of a special power of appointment appearing in note 65 *supra*.

For a discussion of powers of appointment, and a survey of problems involved in their use, see *Leach & Logan* 488-668. See also *SIMES & SMITH* §§ 871-1100.

by the planner, may lead to serious construction problems that must ultimately be resolved by a court. For example, suppose *A* had two additional thoughts about the settlement of his estate, probably at the suggestion of his lawyer—both of which related to matters of survivorship and transmissibility. Consistent with his wishes about estate retention within the family, he elected to defer ultimate distribution of principal until the death of his children. Further, recognizing the inability of many people to manage an estate, *A* also elected to delay distribution to a taker until he had attained a given age, for example 21, believing that a person of that age possesses sufficient maturity to make intelligent decisions.⁷²

The age requirement, probably more than any other example, illustrates the combined presence of prevision and provision problems. That the estate owner has not considered fully the significance of a taker's failure to survive the required age ordinarily lies at the heart of the matter. And even if he has, the language used does not always make it absolutely clear what is to happen if the taker does not attain the designated age. Each of the following limitations has been the subject of much confusion and litigation: "To *X* at 21"; "To *X* payable at 21"; "To *X* when he attains 21"; "To *X* when he attains 21, income to be paid to him until then";⁷³ and "To *X* when he reaches 21, but if he dies before reaching 21 without issue surviving him, then to

72. The use of an age requirement for this purpose assumes a direct relation between age on the one hand, and maturity, capacity, and sound judgment on the other. Yet these abilities are not always a function of age; at least, attainment of age 21 does not uniformly mark their arrival. Nevertheless, the selection of age 21 for distribution is common. Perhaps this is so because it frequently signifies the age of majority, because it frequently avoids a violation of the rule against perpetuities, or because it accommodates a desire to see designated takers enjoy benefits given them when their needs may be greatest, during young adulthood rather than old age. The best solution, but most cumbersome and complex, would be to give a trustee discretion to determine individual capacity and need. If, however, uniform distribution dates are preferred, it would seem best to stagger distribution upon attainment of several ages, especially if the size of each share is substantial. See, e.g., the dispositive scheme used in *Wardwell v. Hale*, 161 Mass. 396, 37 N.E. 196 (1894).

73. The words "when," "at," "if," "provided," and "in case" are usually regarded as language of condition; that is, the event they introduce, if uncertain, must occur before possession can be achieved by the person to whom the gift is made. Nevertheless, despite these recurrent judicial declarations, courts have found otherwise; concluding in some cases, that the interest is vested and further, in others, that the occasion for distribution, ostensibly an uncertain event, postpones payment but not absolute vesting. See generally LEACH & LOGAN 286-315; and, in particular, *Hanson v. Graham*, 31 Eng. Rep. 1030 (Ch. 1801). See also SIMES & SMITH § 586.

Y”); or “Income to X until he arrives at the age of 21, and when X has arrived at the age of 21, the principal shall be paid to him, but if X should die without issue before he receives the principal, then to Y.”⁷⁴ In most of these situations⁷⁵ courts have regarded as unclear⁷⁶

74. The special problem raised by the last two limitations above arises when X dies under the designated age, but survived by issue. Does the gift to X vest absolutely, thereby becoming part of his estate? Does it pass to the substitute taker, Y, or, by implication, to X's surviving issue? Does it pass to the residue or, if it is the residue, by intestacy as an incomplete disposition of the testator's estate? Each of these solutions has attracted courts at one time or another. For a general discussion of these and related problems, see LEACH & LOGAN 266-315. See also notes 57 and 68 *supra*.

75. No violation of the common law rule against perpetuities occurs in any of the above illustrations if the age requirement is the only condition and is imposed on someone in being at the testator's death. Moreover, even if the age requirement is imposed upon someone not in being at the testator's death, there is no violation if it cannot be satisfied more than 21 years beyond the death of someone alive at the testator's death. For example, if A defers ultimate distribution of his estate until the death of his children, there is no violation even if his estate is left to those grandchildren who attain 21. However, an age requirement of more than 21 might cause a violation of the rule. For example, consider this attempt by A to extend his “dead hand” control over his estate: “(In trust) . . . To my wife for life, remainder to my children equally for the life of the last of my children to die. After the death of all my children, the principal shall be sold and the proceeds divided equally among those of my grandchildren who then or thereafter attain age 25.” If survived by children, this gift to grandchildren violates the common law rule against perpetuities even if A has a grandchild already 25 at his death.

It should also be observed that the constructional choice made by a court in a given situation can be affected by the presence of a particular construction which violates the common law rule against perpetuities. Over the years, many courts have announced that their construction is independent of any consideration of the rule against perpetuities. Nevertheless, there have been many decisions which can be explained only by the fact that the rejected construction would have violated the rule. See, e.g., *Kevern v. Williams*, 58 Eng. Rep. 301 (Ch. 1832). Indeed, in recent times, both courts and commentators alike have stressed the constructional importance of a potential violation of the rule. The effect of the rule is a constructional ingredient never to be overlooked. See LEACH & LOGAN 372-76.

76. To the contrary, it can be argued that in most of these situations, the issue of vestedness, the need to survive a designated point in time, is not really unclear at all. The meaning of “To X when he attains 21” seems obvious. Because the occasion for distribution is inherently uncertain, X must attain 21 or his interest fails. The inclusion of the word “payable,” or even a gift of interim income, does not seem to make this meaning less clear. If X need not attain 21 for his interest to vest, why then is this age requirement included? Is it used simply to defer payment until X, if alive, would be capable of managing his gift? If this is so, then it is the particular age requirement itself, and not the added word “payable,” which evidences that his interest is vested and transmissible at death. However, it seems unlikely that capacity to manage is the only reason for an age requirement, especially where the designated age is well beyond 21 or where the subject matter is a specific bequest or devise and a gift of the residue has been made to others. Oftentimes the age requirement seems used

whether the estate owner has simply deferred possession and management of the principal until the taker reaches or would have reached the designated age, or has made the gift nontransmissible at death by conditioning possession and control upon survivorship of 21.⁷⁷

In the first four examples, courts have frequently distinguished between the use of the words "when" or "at" 21, without more, and "payable at" or "payable when." Generally, inclusion of an age requirement is said to condition the time of and control over distribution upon actual attainment of the designated age. However, insertion of the word "payable" often leads courts to conclude that possession and control have been delayed without any condition of survivorship.⁷⁸ This same transformation of a nontransmissible contingent interest into a fully transmissible and absolutely vested one may also be accomplished by a gift of income⁷⁹ to the person whose interest is subject to

to defer ultimate distribution of the estate for a time and to assure delivery to those capable of management and personal enjoyment. Nevertheless, the historical preference for vestedness and the rules this bias fashions have created a particular constructional context which courts frequently find ambiguous. See SIMES & SMITH §§ 573-77.

77. "To X (payable) when he attains age 21" creates the above provisional ambiguity. The inclusion of a prior estate may add yet another question, one attributable to inadequate provision. Consider this limitation: "To Y for life, remainder to X (payable) when he attains age 21." Suppose X attains 21 but predeceases Y. If X must attain 21 before his interest vests, must he also survive Y? A literal construction would require only attainment of 21, in which case X's remainder would pass to his selected successors. The only condition which seems expressed is that X must attain 21. Yet, by using this age requirement, if the testator meant to defer ultimate distribution and personal enjoyment, surely he would not wish X's interest to vest unless he also survived Y. Clearly this should have been considered and expressly covered. In the absence of any other language of survivorship, the foregoing literal construction seems most probable. Nevertheless, courts have sometimes assumed the existence of this unexpressed condition, that X also survive Y. And, on occasion, they have come close to suggesting that every contingent interest, whatever the nature of the express condition, carries with it a requirement of survivorship of possession. See, e.g., *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931).

78. These rules, however, merely furnish constructional guidelines; that is, their application creates a presumption of vestedness which can be overcome by other language. For example, when coupled with words such as "when" or "at," a gift of intermediate income or the use of the word "payable" may make an interest vested and transmissible at death. However, this may not be true when income or "payable" accompanies "provided," "in case" or "if and when." See SIMES & SMITH § 586.

79. A gift of income may sometimes cause this change in characterization even when full distribution is not directed but only an amount needed for maintenance. See LEACH & LOGAN 286-315. See also SIMES & SMITH §§ 586-588. To illustrate, consider this gift: "(\$50,000 in trust) . . . Income to X until he attains 21; when X attains 21, the trust shall terminate and the principal distributed to him." The gift to X is presumed vested and transmissible at death. This same construction might obtain if

the age requirement.⁸⁰ Further, in the absence of the word "payable" or a gift of income, courts have sometimes refused to require actual attainment of a designated age if there is a different kind of reason primarily responsible for the delay in distribution—one unrelated to survivorship by the taker; for example, to allow the creation of a possessory estate for the benefit of someone else.⁸¹

X was allowed only so much of the income as needed for his support and maintenance. However, if this limitation upon income, by way of maintenance or otherwise, empowers the trustee to spray it among companion members of a class taking pursuant to the same provision, then a different construction should follow. For example, "(\$50,000 in trust) . . . Income shall be devoted to the support and maintenance of the children of *Y* until they reach age 21; the principal, in equal shares, to the children of *Y* when they attain 21 respectively."

[I]f the gift is to a class, and the trustee has the privilege in his discretion of distributing all the income to one or more members of the class and withholding it from the rest, then there is no presumption that the gift is vested in any member of the class by reason of the intermediate gift of income.

SIMES & SMITH § 588, at 38.

80. Though inclusion of an intermediate gift of income or a direction "to be paid" usually creates a presumption of vestedness, their impact on other questions is not always the same. For example, suppose that in a gift to *X* with a 21 age requirement, he fails to attain 21 after the testator's death, but that his interest is vested absolutely because of a gift of income or the word "payable." Is payment made to his selected successors immediately or when he would have attained 21 had he lived? Courts have held that payment must be deferred until the age requirement would have been satisfied if intermediate income is not given or accumulated for *X*. See, e.g., *Roden v. Smith*, 27 Eng. Rep. 383 (Ch. 1744). See also SIMES & SMITH § 589.

81. For example, consider these gifts by *A*: "To *Y* for 21 years, then to *X*"; "To *Y* until he attains 21, then to *X*"; and "To *Y* until *X* attains 21, then to *X*." Courts may treat each of these gifts to *X* alike. *X*'s interest is vested with enjoyment postponed until the termination of *Y*'s estate. If the duration of *Y*'s estate is fixed without regard to an event referable to anyone's life, as in the first illustration, surely *X*'s interest is not contingent. There is no condition precedent to *X*'s possession other than the natural termination of *Y*'s estate, which is upon an event certain to occur. The expiration of 21 years presents no condition at all; if it did, all future interests would be contingent. Therefore, *X*'s remainder is vested absolutely.

The same might be said of the gift to *X* when *Y* attains 21. Does *A* intend for *X* to have possession even if *Y* fails to reach 21? It would seem that *A* wants *X* to have possession at the end of a period of time, one which is calculable from the original date of transfer. *X* is given ultimate use of principal, before then, however, *Y* is to benefit during his minority. For what reason, then, has *X*'s possession been deferred? It is probably because *A* wishes to care for *Y* while he remains a minor. Therefore, actual survivorship of *Y*'s 21st birthday, by either *Y* or *X*, seems irrelevant to the possession intended for *X*. Similarly, a court might find the interest of *X* vested absolutely in the last of the above illustrations. Conceivably, the only difference between the last two examples, between the gifts to *X* when *Y* attains 21 and when *X* attains 21, is the person to whom the calculable point in time is referable. Perhaps this factual distinction should not properly produce a difference in consequence. The use of the preceding estate in both cases suggests that possession to *X* has been

The problem which arises in the first four illustrations usually is whether a condition of survivorship was intended in addition to a postponement of enjoyment. The final two examples present a more complicated problem, one which already has been discussed within a slightly different context.⁸² That a condition of survivorship was intended in both examples seems implicit, but because the substitute gift over is incomplete, courts are apt to find *X*'s interest only partially nontransmissible at death.⁸³ The reason is that there is no express disposition if *X* fails to attain 21 but is survived by issue. That is to say, *X* has a vested interest subject to divestment only if he does not attain 21 and is not survived by descendants. At issue, of course, is whether the estate owner intended to provide directly for *X*'s descendants if *X* does not attain 21. Should a substitute gift be found by implication? Courts, however, sometimes find it difficult to resolve the question in these terms. The only issue they seem to see is whether *X*'s interest is contingent or vested. Confronted with a historical bias for vestedness and language appropriate to such a conclusion, courts have been reluctant to reject the enormous weight given by their predecessors to gifts of income, order of language, and the use of substitute gifts over.⁸⁴

deferred simply to allow benefits for another. In both situations, the event upon which *X*'s possession commences is inherently uncertain. Admittedly, in the former illustration, this uncertainty is insufficient to make *X*'s interest contingent. Careful scrutiny suggests that what appears to be uncertain was unintended. This can also be said of the last example, once it is understood that the uncertain event is not meant to condition *X*'s remainder, but rather to mark the limits of a prior possession carved out for another. See *Phipps v. Ackers*, 8 Eng. Rep. 539 (H.L. 1835). See also *SIMES & SMITH* § 586.

82. See text accompanying notes 56-69 *supra*.

83. See notes 57, 68, 74 *supra*.

84. Over the years courts have sought solutions to particular problems by determining whether the interest involved was vested or contingent. In their attempts to be consistent, they have developed certain guidelines known as rules of construction. Sometimes, however, these guidelines have become something more than a posture for interpretation. The repeated significance courts attribute to specific factors—that is, gifts of intermediate income, substitute gifts and the position of the interest in relation to language of condition—on occasion has given their application the appearance of an unalterable rule of property. See *LEACH & LOGAN* 253-329. When these factors are present, particularly all three, courts invariably find the interest to which they refer vested. If vested, certain consequences or solutions then follow almost as a matter of course.

This practice creates at least two kinds of problems in situations like those presented by the final two illustrations discussed above in the text. To conclude that *X*'s interest is vested nearly always binds a court to a single result when *X* fails to reach 21 but is survived by issue. If vested, *X*'s interest becomes absolute the moment he is survived by issue. Once vested, his interest is not divested absent the occasion for an express

The survivorship problems caused by age requirements are more complicated than those which concern simply the matter of surviving the termination of all prior estates. Still, they are survivorship problems. The perception of the age problem is not more difficult, but its resolution is. The selection of language which will postpone possession or control until a designated age is or would have been reached, rather than condition possession upon actual attainment of that age, is tricky business,⁸⁵ especially if one is unaware of the constructional

divestiture. See notes 57, 68 *supra*. To the extent, then, that courts make a vested construction when faced with an intermediate gift of income or a substitute gift, they lock themselves into a particular result even though it may not comport with what the transferor might have intended. When this occurs, judicial solution inevitably divorces itself from the policy underlying rules they purport to apply, principles of interpretation which supposedly reflect probable intent.

There is, however, another problem created by this practice, one more fundamental and, perhaps, more serious. It concerns an assumption that the solution to a specific problem lies in a determination of vestedness. The problem above, in fact, rests with the disposition of the gift if *X* fails to reach 21 but is survived by issue. Why shouldn't this be the ultimate question raised and further resolved by examining the entire instrument and all surrounding circumstances? Why make a vested-contingent determination instead of focusing immediately and exclusively on the dispute actually before the court? Three reasons can be given for making this formal interest classification the cornerstone of a solution: because language guidelines are involved and, therefore, constructional consistency is required (see note 20 *supra*); because an operational meaning or solution can clearly be derived from a constructional characterization; or, because a legal consequence is in issue, in which case courts may be more concerned with implementing public policy than with effectuating individual intent (for a discussion of legal and operational consequences, see note 33 *supra*). Certainly, then, if none of these reasons can be supported by the particular language, facts or problem, there is no justification for predicating a solution upon a constructional characterization. Those gifts to *X* in the above text, involving both the age requirement and substitute gift to *Y*, arguably present such occasion. If so, a solution to the question, who takes if *X* is survived by issue, which binds itself to a vested-contingent determination is not addressed to the real problem and, therefore, not apt to reflect consideration of those facts which should control.

85. See notes 73, 76 *supra*.

Consider also the last illustration in the text accompanying note 74 *supra*, which contains language raising the age-survivorship requirement. In construing a limitation similar to this, the Supreme Court of California found *X*'s remainder contingent on reaching age 21 and, by implication, that his surviving issue took alternatively when *X* failed to attain 21. *In re Estate of Blake*, 157 Cal. 448, 108 P. 287 (1910). Underscoring this decision was the divide and pay over rule, a rule which illustrates the difficult task of implementing an age requirement. See note 13 *supra*. Though the *Blake* decision was later disapproved in *In re Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957), its rationale was revived thereafter in *In re Estate of Campbell*, 250 Cal. App. 2d 576, 58 Cal. Rptr. 723 (1967). In *Campbell*, the court found a direction for vesting did more than designate time for payment or distribution; it imputed a condition of survivorship. Though the solutions found for the particular problems raised in *Blake*

hang-ups history has wrought. Past decisions have revealed many constructional surprises, and the language which has produced these surprises has frequently been part of a provision which includes an age requirement. Unless a planner is aware of these constructional vagaries and knows which language permits him to avoid these surprises, he will be unable to assure a certain result. "Comprehensive prevision" will not suffice. A planner must also be skilled at "precise provision." And this may require full knowledge of ancient symbols.⁸⁶

and *Campbell* may be sound, the constructional rules derived from them make more difficult the work of a planner. More specifically, application of the divide and pay over rule, especially in cases like *Blake* and *Campbell*, creates these problems. First, it diminishes the utility of language guidelines developed from judicial construction of other words, phrases and provisions. For example, by reducing the significance of a gift of income and the importance of a phrase such as "payable at" with respect to the question of vestedness, the divide and pay over rule makes more difficult the creation of an interest intended to be transmissible at death but with possession delayed until a particular age. Indeed, the effect of *Campbell* upon language guidelines is potentially even greater than *Blake*. By imputing a requirement of survivorship to a direction for vesting, it adds considerably to the confusion already surrounding the term "vest." Second, application of the divide and pay over rule can add unexpected consequences to explicit statements directing an executor or trustee in the performance of his responsibilities. A planner who does nothing more than properly elaborate "upon the death of *B*, the trust is to terminate and the proceeds divided in equal shares and paid to . . ." might find thereafter that he has unwittingly included a condition of survivorship. Even though the divide and pay over rule is no longer as vital as it once was, it is recognized often enough to make directions for payment, whether at a given age or upon some other event, a most delicate affair.

86. Indeed, it does not take a law student very long to realize how deeply rooted is the symbolic language of property law, both past and present. Case reports are filled with decisions turning on the presence or absence of special language which, over the years, has received a particular and sometimes fixed meaning. Consider the history of the phrase "and his heirs," words needed to create a fee simple. Though the importance of these words has diminished, this has not been true for many of the other common law language requirements. For example, even today, use of the special limitation can be essential to the creation of a determinable interest. Similarly, the expression of a power of termination is usually necessary to make an interest defeasible at the option of the transferor. See SIMES & SMITH §§ 247-49, 286-87. It is not surprising, nor altogether unfortunate, that these particular language forms have been sustained for so many years. Perhaps, as an original matter, it should be debated whether words of special limitation, such as "during," "until" or "unless," really explain that an interest has been made automatically terminable in favor of a transferor. Nevertheless, once the debate is ended, it would be appropriate for certain words to achieve a fixed meaning; one which affords draftsmen reliable language guidelines for accomplishing their objectives. What can, however, be criticized is occasional judicial recognition of technical meanings which have become anachronisms. For example, the phrase "and the heirs of his body" symbolized the creation of a fee tail at common law, an estate abrogated in most jurisdictions. See 1 AMERICAN LAW OF PROPERTY §§ 2.13-2.14. Nevertheless, many years after a statutory change in the common law, some courts still give this

Before moving on to *A*'s other direction, another kind of problem which frequently arises within the context of an age requirement must be discussed. The condition of survivorship discussed earlier concerned survivorship of the termination of all prior estates. The use of an age requirement, or any other requirement unrelated to the time for termination of a prior interest,⁸⁷ introduces the possibility that the condition may be satisfied before or after the expiration of all preceding estates. If the duration of prior interests is uncertain, if it is conceivable for them to expire the very day after their creation, surely it is possible that the age question will not be resolved until after all prior estates have ended. Consider this illustration: "To *B* for life, and then to such of *B*'s children who survive him⁸⁸ and attain 21; if none survive him or attain 21, then to *C*." In this situation neither actual survivorship of 21 nor postponement of possession is really at issue. The remainder given to a child of *B* is clearly nontransmissible at death. His interest is extinguished if he fails to survive *B* or age 21. Nor are the consequences of a failure to attain 21 at issue if *B* has but one child who attains 21 and then survives him nor if *B* has no children who survive him. Yet despite the absence of these survivorship problems, there are other constructional difficulties which may arise because of a planning oversight. For example, what happens if *B* dies survived by children, none of whom has attained age 21? Suppose they attain 21 thereafter? Are their interests destroyed if the rule respecting the destruction of contingent remainders persists in this jurisdiction?⁸⁹ If so, can *C* take? Suppose *B*'s children survive him

language technical significance, thereby creating an unrecognized estate which is automatically converted by statute into something else. See, e.g., *Bibo v. Bibo*, 397 Ill. 505, 74 N.E.2d 808 (1947). Indeed, it makes no sense at all to retain a fixed technical meaning, or to preserve a language guideline, once its referable interest form has disappeared.

87. Consider these examples of conditions unrelated to the termination of the prior estate: "To *A* for life, remainder to *B* when he marries; however, if *B* fails to marry, then to *C*"; "To *A* for life, remainder to *B* when he graduates from law school; however, if *B* fails to graduate from law school, then to *C*."

88. The language "who survive him" is important. Its absence would allow for speculation whether a child who had attained 21 but predeceased *B* held an interest transmissible at his death. For a discussion of this problem, see note 77 *supra*.

89. Assume in this case that the gift is not made in trust, that the subject matter is real property and that the common law doctrine making contingent remainders destructible is still enforced or, at least, not expressly abolished. See *SIMES & SMITH* §§ 200, 201, 207, 209. Accordingly, the interest of each child who does not attain 21 by the termination of all prior and supportive estates, in this instance *B*'s death, might be destroyed. Those children who attain 21 by *B*'s death, and survive him, share the en-

and thereafter fail to attain 21, can *C* then take?⁹⁰ Or is his interest also destroyed? Quite apart from the presence of this rule, should the same requirement be inferred: for a child to take, he must survive *B* and not only attain 21 *but do so before B dies*; and for *C* to take, all children must predecease *B*. That is, all conditions must be met by the time of *B*'s death before either the children or *C* may take. Further, even if this requirement is not imposed either by law or by implication, even if the age requirement can be satisfied after *B*'s death, who is to benefit until it is known whether any of *B*'s surviving children attain 21? Are either *B*'s children or *C* entitled to income pending the fulfillment of the condition? Or does the income pass to the residue or by intestacy? If the estate owner's attention had been directed to this basic question—suppose *B*'s children are minors at the date of *B*'s death—and to the problems which might ensue, these issues would never have arisen. The solutions are simple enough.⁹¹ Surely they

tire remainder. There is, however, sound authority for saying no child's interest is destroyed if one is eligible to take; that is, if *B* is survived by a child who has already reached 21. See SIMES & SMITH § 205. Finally, if at *B*'s death all his surviving children are still minors, their remainder fails even though they subsequently reach 21. See note 70 *supra*; SIMES & SMITH § 204.

90. Clearly *C* cannot claim possession if any of *B*'s children can; that is, if any child attains 21 and thereafter survives *B*. However, suppose the remainder to *B*'s children fails because *B*'s surviving children are minors. See note 89 *supra*. *C*'s interest is a remainder, it is contingent and, therefore, possibly destructible. *C*'s remainder must vest upon the termination of all supportive estates. The following questions must be answered: is *C*'s remainder truly alternative to the remainder in *B*'s children; can *C* take if, for any reason, the primary remaindermen cannot; or, can *C* claim possession only if all children fail to predecease *B* or fail to attain 21 whenever that might occur? If the latter, then *C*'s contingent remainder is extinguished the moment *B* is survived by a child, whether that child is or is not 21. Accordingly, both remainders can fail at *B*'s death even though *B*'s children do or do not attain 21 thereafter. See, e.g., *Festing v. Allen*, 152 Eng. Rep. 1204 (Ex. 1843). See also note 70 *supra*. It might be argued, however, that *C* is really given two interests: a remainder, if *B* is not survived by children; and, an executory interest, if *B*'s surviving children do not attain 21. If so, then *C*'s interest avoids destruction by the common law rule. See SIMES & SMITH § 204.

91. The destructibility rule could have been avoided by using a trust or by using executory interests instead of, or in addition to, remainders. Or, the alternate gift to *C* could have been saved by having it vest in the event *B*'s children were unable to take for any reason. After overcoming the destructibility problem, the matter of interim use or income requires specific direction. Who is to benefit before either of the contingent interests vests? If *B*'s surviving minor children are intended to benefit until they respectively attain 21, provision for income should and can easily be made for them, especially through the use of a trust. This direction for income to *B*'s children offers several alternatives. For example, should all annual income be distributed or only that needed for their support? Should income, when distributed, be divided equally or

would have been utilized had there been no oversight. The alternative to making an explicit choice is really no option at all. It tempts disaster.⁹² In resolving these problems courts have tended to base their decisions on whether the future interest, here created in the children of *B*, was vested or contingent.⁹³ This eventuality, that the condition might not be satisfied until well after all prior estates had terminated, should have been anticipated and expressly resolved. It should not have been left to chance that the eventuality would never occur or to the resolutions courts reach by drawing dubious distinctions between contingent and vested interests.⁹⁴

sprayed among children according to criteria established by the testator? Should undistributed income be added to principal for the benefit of all who ultimately share in the principal? Having considered these and other choices a selection can be made which does not present especially difficult problems.

92. Consider the case of *A*, who is childless, unmarried and prefers not to leave his estate to collateral relatives. Accordingly, the residue, nearly all of his estate, is left to: "my good friend, *B*, for life. And, after *B* has died, then to such of *B*'s children who attain 21. And for want of *B*'s children who attain 21, then, and in that case, the residue of my estate shall go to the Boy Scouts of America." The interests given *B*'s children and the Boy Scouts are remainders and contingent. If destructible, they might both fail if *B*'s only children are minors at his death. Consequently, if both remainders fail, the residue then passes by intestacy to *A*'s heirs at law whom *A* wished to exclude from his estate. Further, if indestructible, no provision is made for current use of the residue after the death of *B* but before either of the remainders vests. In theory, while their interests are contingent, income does not belong to them. Once again then, a part of the residuary benefits can pass by intestacy to those ostensibly precluded by the execution of *A*'s will.

93. If the remainder to *B*'s children is vested, but nontransmissible at death because subject to divestment, then following the death of *B*, a minor child's remainder is indestructible and he can claim benefit of his interest until he fails to attain 21. See, e.g., *Phipps v. Akers*, 8 Eng. Rep. 539 (H.L. 1835); *Edwards v. Hammond*, 83 Eng. Rep. 614 (K.B. 1683). Because it is vested, the subject matter is his upon *B*'s death. Until it is taken away, until it is divested, the estate belongs to him and the other children, and so do the benefits derived from its use. However, if the remainders to the children and *C* are contingent, they might be destructible or, at the very least, the remaindermen might be denied current benefit of the gift until the required conditions have been satisfied. That which is contingent is not given until the condition is met; until given, the principal does not belong to the remaindermen, and they can claim no benefit of the principal. See *Hoblit v. Howser*, 338 Ill. 328, 170 N.E. 257 (1930); *Festing v. Allen*, 152 Eng. Rep. 1204 (Ex. 1843).

94. If the remainder to *B*'s children is vested subject to divestment, then they have an indestructible remainder and *C* has an indestructible executory interest. Additionally, pending their failure to satisfy the age requirement, *B*'s children have use of the estate after the death of *B*. These conclusions do not follow if the interests given to *C* and *B*'s children are remainders and contingent. The distinctions drawn in these cases between vested and contingent interests frequently rest upon slight differences in language, seemingly unrelated to the ultimate questions of destructibility and interim benefit-income. "To *B* for life, remainder to *C* when he attains 21; but in the event *C*

The other possibility that *A* might have considered was to make ultimate distribution to his grandchildren instead of his children. To so delay ultimate distribution would both permit retention of accumulated wealth within his family and prevent successive death costs. This objective, perhaps more than any other, is susceptible to complications,⁹⁵ particularly survivorship and transmissibility problems. In achieving this goal the common law rule against perpetuities may cause some difficulty. If *A* makes an inter vivos rather than a testamentary transfer, if he creates a special power of appointment in his children, or if he imposes on his grandchildren a condition which may be satisfied beyond the period of the rule then there may be a violation.⁹⁶ Because the consequences of a violation may be enormous,⁹⁷ it is impor-

does not attain 21, then to *D*." In this instance, most courts find *C*'s interest vested but subject to divestment. "To *B* for life, and when *C* attains 21, remainder to *C*; if *C* does not attain 21, then to *D*." In this case, they find *C*'s remainder contingent. "To *B* for life, remainder to *B*'s children who attain 21; but if *B*'s children fail to attain 21, then to *D*." Courts have found this remainder to *B*'s children contingent. "To *B* for life, remainder to *B*'s children, if they attain 21; but if *B*'s children fail to attain 21, then to *D*." In this case, the remainder to *B*'s children may be vested subject to divestment. See LEACH & LOGAN 266-83. See also A. KALES, KALES ON FUTURE INTERESTS §§ 333-35 (2d ed. 1920); SIMES & SMITH §§ 148-49.

95. For an excellent development of the problems surrounding provision for three or more children and their respective families, see LEACH & LOGAN 404-24.

96. In each of the following illustrations, *A*'s gift of principal to his grandchildren can violate the common law rule against perpetuities. 1. "(By inter vivos trust) . . . Income to my wife for life, thereafter income to my children for life, and upon the death of my last child to die, then to my grandchildren absolutely." 2. By the terms of a testamentary trust, after providing for successive life estates in his wife and children, *A* gives his last child to die a special power to appoint principal among *A*'s grandchildren. This power is exercised in the following manner. "(By will) . . . To such of *A*'s grandchildren absolutely who attain 25." 3. "(By testamentary trust) . . . Income to my wife for life, thereafter income to my children for life, and after the death of my last child to die, to such of my grandchildren absolutely who graduate from college."

97. A violation of the common law rule against perpetuities usually voids only the remote interest. Other separable interests are administered as if the void gift did not exist. If however, the valid and invalid are inseparable, an entire provision may be stricken. Further, if the void interest is critical to the testator's scheme of disposition and if, as a result of this violation, it can reasonably be assumed he would have preferred intestacy, other valid provisions may also fail. This principle, one of "infectious invalidity," sometimes has been applied even without clear evidence of testamentary preference for intestacy. For a discussion of the consequences of a violation of the rule, see R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 135-41 (1966); SIMES & SMITH §§ 1256-64.

Absent operation of a principle, such as "infectious invalidity" or "cy pres," which adjusts the dispositive scheme (see R. LYNN, *supra* at 138), a violation can direct the estate to unintended beneficiaries or, at the very least, distort the dispositive plan.

tant to consider the application of the rule even if a planner may not find it difficult to avoid its operation.⁹⁸ Indeed, if a satisfactory solution is to be achieved,⁹⁹ the precise problem must first be perceived before it can be overcome by specific provision. Another source of problems is the failure to make explicit which events, if any, a taker must survive before he is entitled to benefit. It should be apparent that these questions of transmissibility and survivorship are bound to be more complicated than those discussed before. They are also more serious—at least because they are more apt to materialize into real disputes with unpredictable consequences. By delaying principal distribution and adding a successive future interest, the points in time, and their combinations, to which conditions of survivorship may be found referable have been increased. Accordingly, there is a greater proba-

Consider these examples: 1. After several specific bequests, a widower divides his residue into thirds, "One-third for the children of my deceased son *X* who attain 25; one-third for the children of my son *Y* who attain 25; and one-third for the children of my son *Z* who attain 25." *X*'s children attain 25, and, therefore, acquire their one-third share of the residue. *Y* and *Z* survive their father, but none of their children have reached 25. The gifts to their children violate the common law rule and, therefore, pass by intestacy, presumably to *Y* and *Z* and the children of *X*. If so, the children of *X* ultimately received five ninths of their grandfather's residue, not one third as originally intended. 2. A childless widower leaves his entire estate: "To my good friend *B* for life, remainder to his grandchildren." At the death of the testator, *B* is alive, has children and is without grandchildren. The gift to *B*'s grandchildren can violate the common law rule. If so, it passes by intestacy to relatives not included in the testator's will.

98. For example, each of the gifts to *A*'s grandchildren contained in note 96 *supra*, could have been saved: *in the first illustration*, by providing "then to those grandchildren absolutely born within 21 years of my death, my wife's death or the death of the last of my children and grandchildren, now alive, to die"; *in the second*, by changing the exercise of the power "to such of *A*'s grandchildren absolutely who attain 25 within 21 years of *A*'s wife's death, my death, or the death of the last of *A*'s grandchildren, alive at his death, to die"; and, *in the last*, by providing "then to such of my grandchildren absolutely who graduate from college within 21 years of my death, my wife's death, the death of the last of my children to die or the death of the last of my grandchildren, alive at my death, to die."

99. Perhaps the use of a "savings provision" offers the most convenient solution to a common law perpetuities problem. See note 128 *infra*. However, in reality many of these "savings provisions" do not offer a solution at all. In a sense, they do not avoid a violation; instead they provide consequences different from those a technical violation produces. Oftentimes these different consequences are not ideal; in fact they can be less desirable than those which would apply in the absence of the particular "savings provision." The easiest approach is not always the most appropriate. The best solution requires first a perception of the precise possibility for violation and, then, a provision which expressly circumvents it, reserving use of the "savings provision" only for cases of miscalculation. See note 98 *supra*; R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 152-53 (1966).

bility that these issues of survivorship will be encountered. If a condition is conceivable some unhappy heir is bound to litigate it. By expanding the number of occasions in which a choice can, and therefore should be, exercised, opportunities for oversight, litigation and judicial misconstruction and innovation are enlarged considerably. Finally, an estate owner who considers extending his "dead hand" control, sometimes to a generation he may never know, might wish to amend his previous priorities. For example, he may not wish to extend stirpital equality to a third generation even though he might wish to preserve it for a second generation.

These problems, and others as well, can be viewed and analyzed best by examining some provisions frequently used by planners. There are two basic ways, both requiring use of a trust, of implementing *A*'s plan for distribution: "I'd like to take care of my wife first, next my children, and then after their death leave everything to my grandchildren." Consider these two limitations: 1) "(In trust) . . . Income to my wife for her life, and after her death, all of the income to my children for their lives, and after all my children have died, the trust is to terminate and the principal should be sold and the proceeds divided amongst my grandchildren";¹⁰⁰ 2) "(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 had¹⁰¹ 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, the principal should be sold and the proceeds distributed to his surviving issue. If such child dies without surviving issue, the

100. For cases illustrating this scheme of disposition—income concurrently to more than one person and, at the death of all life tenants, remainder in fee to another—see, e.g., *Kiesling v. White*, 411 Ill. 493, 104 N.E.2d 291 (1952); *Addicks v. Addicks*, 266 Ill. 349, 107 N.E. 580 (1914); *Old Colony Trust Co. v. Treadwell*, 312 Mass. 214, 43 N.E.2d 777 (1942). For other cases and a discussion of some problems attending this plan, see 5 AMERICAN LAW OF PROPERTY § 21.35; SIMES & SMITH § 843.

101. The clause "as the number of children I have had" is used to avoid problems sometimes arising out of other language; for example, "into as many shares as I have children surviving me," or "into equal shares for my sons, *X*, *Y*, and *Z*." In the first illustration, suppose *A* is survived by *X*, *Y*, and the children of *Z*. Could the surviving children of *Z* claim successfully the share that clearly would have been theirs had *Z* died immediately after *A*? See note 133 *infra*. In the latter illustration, suppose *A* is survived by *X*, *Y*, *Z*, and *W*, a daughter born after the execution of his will. Absent a remedial statute, could *W* claim successfully that an equal share should be put in trust for herself and, thereafter, her surviving issue just the same as *X*, *Y*, and *Z*? See note 138 *infra*.

principal should be added to the shares of my then surviving children, subject to the provisions of their respective trusts."¹⁰² What follows are some of the more serious questions that might arise in the administration of these trusts.

Though the estate owner's basic objective is the same in both examples, these limitations may not operate in precisely the same manner. They may produce entirely different dispositions which suggest different kinds of prevision problems. The first example creates problems which cannot be avoided.¹⁰³ It illustrates perfectly the danger of oversimplification. Unless all of *A*'s children die simultaneously, which is unlikely, this question will occur: what is to happen upon the death of all but the last child? More specifically, what is to come of a child's share of income or the principal which provided his share of the income? Does *A* wish to defer final distribution to the next generation of takers so long as any of his children are still around?¹⁰⁴ Should distribution of principal be accelerated proportionately as each child dies? Should a deceased child's share of the income be accumulated and added to the principal? The provision itself suggests answers to these questions, solutions which may be unsatisfactory upon further consideration. By the terms of the limitation, none of the principal can be distributed until after all children have died. Further, it seems to direct that all income be distributed and not accumulated. Even if the

102. For cases illustrating this scheme of disposition, see, e.g., *In re Cary's Estate*, 81 Vt. 112, 69 A. 736 (1908); *In re Bilham*, [1901] 2 Ch. 169; *Wake v. Varah*, 2 Ch. D. 348 (1876); appearing in *Leach & Logan* at 410-20. For other cases and a discussion of some problems attending this plan, see generally SIMES & SMITH §§ 773-74.

103. See, e.g., *The Union & New Haven Trust Co. v. Sellek*, 128 Conn. 566, 24 A.2d 485 (Sup. Ct. Err. 1942); *Old Colony Trust Co. v. Treadwell*, 312 Mass. 214, 43 N.E.2d 777 (1942). See also SIMES & SMITH § 843. The problems hereafter described in the text are real; they have been litigated. At one time or another, courts have made constructions adopting each of the suggested alternatives. What a court will do with income after one, but not all, of the children dies, cannot be predicted easily. Cross remainders to the survivor or survivors is, perhaps, a desirable construction. It is certainly a possible construction; however, so is intestacy.

104. There are, of course, many reasons for withholding distribution of principal until all children die. Even though he leaves principal to grandchildren, *A* foresees, perhaps, a real need to devote full use of the income to surviving children. The care of his children may be of primary importance to *A*. In that situation, acceleration of principal distribution might jeopardize the security planned for them. There are, however, other reasons for accelerating a proportionate share of principal when a child dies, or, at least, continuing payment of income to that child's estate. Suppose this deceased child is survived by minor children and, further, that he was their source of financial support. Indeed, his surviving children, *A*'s grandchildren, could be denied a share of *A*'s estate at a time of great need.

language was not quite as explicit, an accelerated distribution of principal would not be feasible if there was an express or implied condition that it is to go to only those grandchildren¹⁰⁵ who survive all children.¹⁰⁶ If income cannot be accumulated, and if principal distribution cannot be accelerated, then should income be shared by only those children who continue living, with one child eventually succeeding to all of the income? Or should a deceased child retain a transmissible share of income, a life estate for the life of the surviving child? This would mean that the deceased child's share of the income would remain a part of his estate until all children had died. Or should a deceased child's interest pass to the residue or by intestacy? Further, who should take principal in the alternative if *A*'s children bear no grandchildren to *A* or, in the event of a condition of survivorship, if no grandchild outlives the last child to die? If nothing is provided, the entire principal will pass to the residue or by intestacy. Finally, precisely to which descendants and in what portions should distribution be made after all children have died? Should principal pass to only those who survive the date of distribution? Does grandchildren comprehend other descendants, for example, great-grandchildren? Because this class of takers is more remote from *A* than his children, and because he is less apt to know them and less likely to have strong feelings about the preservation of stirpital equality, should provision be made for per capita distribution? All of these questions raise options available to the estate owner, and each option reflects a judicial solution to an actual construction problem. Because the estate owner would not be equally pleased with each result, surely he should have made an express choice.

The second example raises problems which, though not as certain to occur, are not improbable. Unlike the first, the second expressly preserves stirpital equality among children and their family units by divid-

105. It should be observed that the ultimate gift of principal is made to *grandchildren* in this illustration and to *a child's issue* in the other. See text accompanying notes 100, 102 *supra*. In both cases, *A* may have only his grandchildren in mind. On further reflection, however, he might wish to include grandchildren, great-grandchildren or, perhaps, all surviving descendants. If the latter, after determining whether distribution should be made to survivors per stirpes or per capita, this choice must be made explicit.

106. In the illustration used (see text accompanying note 100 *supra*) there is language—"the principal should be sold and *the proceeds divided amongst* my grandchildren"—which occasionally has been found to create a requirement of survivorship. For a discussion of the divide and pay over rule, see LEACH & LOGAN 323-29; SIMES & SMITH § 593. See also notes 13, 85 *supra*.

ing the estate into as many shares as the number of children the estate owner has had. It also provides for immediate benefits to issue of a child at his death. Distribution of principal is not deferred until after all children have died. There is a clear declaration of what is to be done with a child's interest at his death. Further, ultimate distribution of a principal share is made to those issue—probably descendants generally and not simply grandchildren¹⁰⁷—who merely survive their immediate life tenant. Finally, as in the first limitation, there is no alternate gift if *A*'s children bear no issue or if none outlive the surviving child. However, the consequences of this last omission are not likely to be as serious as a failure of grandchildren to satisfy a possible condition in the first illustration that they survive all children.¹⁰⁸ A complete failure of all principal shares, and accordingly passage with the residue or by intestacy, would not occur unless all children died without their respective issue surviving them. A child's surviving issue would at least assume his share without regard to how long they lived thereafter.¹⁰⁹

What construction problems, then, inhere in the second illustration? Assume that *A* is survived by his wife and three sons, *X*, *Y*, and *Z*. Suppose that *X* dies survived by issue who subsequently predecease *A*'s wife. To whom does *X*'s share pass?¹¹⁰ Is the interest of his issue

107. Obviously the gift to "issue" in this context precludes ascendant and collateral relatives. Absent other language to the contrary, most courts would not restrict "issue" to immediate offspring, but would instead extend the gift to descendants whatever their degree of relationship—children (*i.e.* *A*'s grandchildren), grandchildren, great-grandchildren, etc. See note 11 *supra*. Nevertheless, if *A* intends to include descendants generally and not confine the gift to his children's immediate offspring, a term other than "issue" should be used. "Descendants," without more, may not be an adequate substitute since it does not eliminate another ambiguity also involved in gifts to "issue." Is division to be made among a child's descendants per stirpes or per capita? See SIMES & SMITH §§ 743-46. Clearly *A* must select terminology which makes his choices explicit: immediate offspring or descendants generally; per stirpes or per capita; adopted or naturally born, etc.

108. This does not mean an alternate gift is unnecessary. Indeed, if his children bear no issue or if none outlives his surviving child, *A* might not be pleased with the consequence. That neither these events nor their consequences will occur should not be left to chance. Obviously, *A*'s choice of a substitute must be ascertained and then expressed.

109. Additionally, it should be observed that no failure of any child's share would occur if *A*'s last child to die has surviving issue.

110. It is not always clear to which point in time a condition of survivorship refers. This question can also arise in a construction of the first illustration. For example, suppose that limitation contained this express condition: ". . . and after all my children have died, the trust is to terminate and the principal should be sold and

fully nontransmissible at death? To what point in time is "surviving issue" referable?¹¹¹ Must *X*'s issue survive *A*, *X*, and *A*'s wife? Stated another way, must they survive the date of principal distribution? If so, these conditions obviously should have been made explicit. Assume, however, that this problem has not occurred, that each of *A*'s children survives his mother. Suppose that *X*, who is the first child to die, is survived by issue. Next, *Y* dies without surviving issue. To whom does the remainder of *Y*'s trust pass?¹¹² Given *A*'s preference for stirpital equality, one might conclude properly that he intended *Y*'s share to be divided equally between the trusts of *X* and *Z* and to pass subject to the terms of their trusts: one half of *Y*'s share should be added to *Z*'s trust, income to be paid to *Z*, and the other half should be given to *X*'s issue, excluding, perhaps, those who survive *X* but not *Y*. Yet the limitation calls for a gift over to "my then surviving children, subject to the provisions of their respective trusts." If construed literally, *Z* would succeed to *Y*'s entire interest. Further, if the last of the children to die, *Z*, is not survived by issue, something more than stirpital equality has been jeopardized. Even if *Z* is survived by issue of other children, a strict construction—there are no *surviving* children—would find an incomplete disposition and accordingly *Z*'s share would become part of the residue or pass by intestacy. Some courts, however, have rejected this strict construction and construed "surviving children" to mean "other children," particularly when a limitation contains a provision not present in this illustration. On these occasions an ultimate gift over, which frequently begins "if none of my children are survived by issue," has been heavily relied upon as the basis for this nonliteral construction.¹¹³ This ultimate gift over has been deemed conclusive

the proceeds divided amongst my *surviving* grandchildren." Which event or events must grandchildren survive: *A*'s death; both *A* and his wife's deaths; or the date of possession? If, however, the condition arises by implication, or is supplied by the 'divide and pay over' rule, its reference to only the time for division and payment, the date of possession, is clear. See note 106 *supra*.

111. Courts have disagreed about which point in time this survivorship requirement refers. See note 49 *supra*.

112. See, e.g., LEACH & LOGAN problem 6 at 420.

113. *Wake v. Varah*, 2 Ch. D. 348 (1876):

But the next provision in the will supplies the necessary clue. It is as follows: "And, in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor." From this it is evident, not only that the testator intended to provide, and considered that he had provided, in the previous portions of his will for all possible events in which any of his children might have sued, but also that it was his intention, if there was any such issue, whether of one child or more, that that issue should become entitled to his property.

evidence that the omission was a mistake and that a strict construction was obviously unintended. It should be noted, however, that amending "surviving" to read "other" does not solve everything. The solution to this oversight is not quite that simple, for the oversight comprehends something more. Suppose, once again, *X* is the first to die. He is survived by issue who subsequently predecease both *Y* and *Z*. Next to die are *Y*'s children, followed thereafter by *Y*. Who is entitled to take *Y*'s remainder? Does it pass entirely to *Z*'s trust or to both *Z* and the deceased issue of *X*? Stated another way, must a child's issue, in order to succeed to another child's share, survive only their parent, only the other child¹¹⁴ or both their parent and the other child? Should it matter whether any other children or issue are alive? Undoubtedly, *A* would intend to benefit only those issue of *X* who survived *Y*.¹¹⁵

If the clauses in the will which have given rise to the questions in this cause had been omitted, and this concluding clause had followed immediately after the original gift to the children and their issue, there could not have been any doubt but that cross limitations should be implied between the testator's children and their respective issue. . . .

If this be so, can the fact that the provisions to which allusion has been made are interposed between the original gift and the gift over, make any difference? I think not. These provisions, insufficient as they are to effect the testator's full intention, not only do not contain anything inconsistent with an implication of cross limitations, but, on the contrary, so far as they go, they give effect to them.

See also In re Bilham, [1901] 2 Ch. 169.

114. For example, suppose *X*, the first to die, was not survived by issue. Thereafter, the issue of *Y* die and then *Y*. Clearly, the estates of *Y*'s issue do not acquire the remainder to *Y*'s original share. It is added to *Z*'s share. But what about *X*'s share which, at his death, was divided equally and added to the shares of *Y* and *Z*? Does that part of *Y*'s share which accrues upon *X*'s death pass to *Y*'s deceased issue? The limitation itself appears to say no: the added principal must pass "subject to the same provisions of their respective trusts" which require that issue survive their parent. Therefore, the remainder created in *Y*'s entire share is added to *Z*'s share. However, this solution would not be so clear had the limitation read: "'(A)nd, after the decease of each of such survivors, the said trustees . . . shall stand seised . . . of the . . . accruing share of my said property to which such survivor for the time being shall become entitled for his . . . life under the trusts aforesaid,' in trust for his . . . issue as therein mentioned; 'and in case all my said children shall die without having issue as aforesaid. . . .'" *Wake v. Varah*, 2 Ch. D. 348 (1876). This language allows for an argument on behalf of the estates of *Y*'s issue. However, even here, it is unlikely that *A* would want *Y*'s deceased issue to benefit from *Y*'s accrued share unless they also qualified for *Y*'s original share.

115. In question here is the consequence of the demise of *X*'s issue between the deaths of *X* and *Y*. The number of *X*'s issue who were alive and able to take *X*'s share at his death may diminish by the time *Y* dies. Do only those surviving *Y* succeed to his share? However, this is not the only kind of problem which can arise. The gift of *X*'s share is to his issue, not his children. Presumably, issue can include de-

It is unlikely that *A* would condition the remainder of *Y*'s share to *Y*'s issue upon survivorship of *Y* but would not similarly condition the gift over to *X*'s issue. If this were so, that the conditions upon the claim of *X*'s issue to *Y*'s share were at least as great as those applicable to *Y*'s issue, the provision which provides for cross gifts would require considerably more than a change from "surviving" to "other." Additionally, if an ultimate gift over was included, it too would have to be carefully drafted. A gift over "in the event none of my children are survived by issue" would be inadequate. Rather it might read: "If, however, any child is not survived by issue, other children or their issue, then"

This selection of transmissibility-survivorship problems is only illustrative, but each example has found its way to court at one time or another. Occasionally, even frequently, a court has imputed an unlikely intent to an estate owner. For this reason alone, these problems should have been avoided. In most instances the plan was incomplete and usually its implementation was unskilled. Both are the responsibility of the lawyer.

B. *Lapse*

The lapse problem best reveals planning oversights and lays to rest the myth of the simple will. Surely there are lawyers who have never encountered a lapse or renunciation and therefore have disregarded the

scendants. Though *X* cannot have children beyond his death, he can have descendants—grandchildren, great-grandchildren, etc. Therefore, the class of remaindermen who might take through *X* can increase as well as decrease between the deaths of *X* and *Y*. Some or all of *X*'s children, who succeeded to his share, may predecease *Y*. However, *X* may also have descendants born after his death who thereafter survive *Y*. Just as one might conclude *A* did not intend to leave *Y*'s share to *X*'s issue who survived *X* but not *Y*, one can justify an inference which includes *X*'s after-born descendants who survive *Y*, in the gift over of *Y*'s share. What *A* probably intends is that *X*'s issue be defined separately on each occasion for distribution; that is, principal passes to those alive who can be described as issue—descendants at the time of distribution. This is not, however, the construction a court might make. To begin with, courts are reluctant to alter initial maximum class membership determinations when periodic distributions of principal are directed. See note 144 *infra*. Additionally, because *Y*'s share, if added to *X*'s share, passes "subject to the same provisions" of *X*'s trust, the remainder on *X*'s accrued share must go to "his *surviving* issue." Strictly construed, only those alive at *X*'s death are his survivors. Indeed, this narrow interpretation might justify a construction which closes the class of issue at *X*'s death. Because of this, if, when planning his estate, *A* intends membership in the accrued gift to *X*'s issue to remain open until the deaths of *Y* or *Z*, without surviving issue, explicit provisions for class redefinition must be made,

problem in formulating even sophisticated plans. This practice is unwise. The lapse problem is relevant and deserves express consideration: because it is latent in every will; because its occurrence is unpredictable, beyond anyone's control and apt to destroy an estate owner's scheme of distribution; and because its resolution initially is relatively simple but can become impossible thereafter. In short, the problem is a simple one only when the planner is aware of it and knows well the alternatives available to him. Though simple, and perhaps infrequent, it must be accorded full consideration by every planner.

To begin with, the concept which underlies this problem should be explained. It has always been assumed that a decedent does not intend to leave any portion of his estate to a dead person. To some extent this seems an outgrowth of the conceptual difficulty courts have had with gifts to a person nonexistent at the effective date of transfer.¹¹⁰ Accordingly, courts presume a condition that every devisee or legatee must survive the date of a testator's death. If a taker is not alive at the time a will is executed, his gift is deemed void. If a taker is alive at the date of execution but does not survive the testator, his gift is said to lapse. The consequence is the same; the gift fails.

It should be obvious to the planner that the lapse problem warrants nearly the same prevision and consideration that is required of other related situations. Central to the problem of lapse is what should be done and what courts have done, if an interest fails for any reason. At issue is the failure of a designated taker to assume personal enjoyment. Indeed, this was the focus of the section on transmissibility-survivorship. But because it concerned future interests or at least eventualities and conditions of survivorship conceivably operable after the testator's death, it was treated separately. The circumstances under consideration in this section apply just as easily to absolute posses-

116. Thomas Jarman attributes the lapse doctrine to the fact that a will is inoperative until a testator's death and, therefore, can confer no benefit on one nonexistent because of previous death. Jarman finds this a corollary of the proposition that a deed cannot operate in favor of a grantee dead as of the date of transfer. 1 T. JARMAN, A TREATISE ON WILLS 293-93a (1st ed. 1845).

The term "lapse" as used in this article refers primarily to the death of a devisee or legatee after the execution of a will but before the testator dies. It should be noted, however, that technically speaking "lapse" includes other kinds of failures; for example, a renunciation. See T. ATKINSON, WILLS § 140 (2d ed. 1953). The choice of a restricted meaning is made in this article because death after execution of the will but before the testator presents the most common example of a lapse and because separate terminology facilitates factual isolation of occasions for failure. This latter task is deemed essential to comprehensive prevision. See text following note 119 *infra*.

sory interests as they do to future interests. These eventualities comprehend gifts which are void, lapsed, unlawful, or renounced immediately by the devisee-legatee.¹¹⁷ In all cases, the failure is operable "at the estate owner's death"¹¹⁸ and never because of eventualities which occur afterwards. Of course, it would have been possible to consider all failures—all circumstances which prevent personal enjoyment—in one section.¹¹⁹ Nevertheless, one can justify separate treatment of gifts which are void, lapsed, unlawful, or renounced because their distinctive time for operation provides a convenient focal point for the lawyer in systematically sorting out what he must do in formulating a comprehensive plan. Above all, a planner must see the problem of failure at the estate owner's death, but it is easier to recognize it when one begins his prevision with particular fact patterns and common eventualities rather than dry doctrine.

Suppose *A* has made a gift to "*B* in fee simple" and that before he dies *A* does not amend his will even after he learns of *B*'s death. What undesirable consequences of this lapse might be avoided by provision of a substitute gift? If *B* was within the class of relatives comprehended by a lapse statute and if *B* left a descendant alive at *A*'s death, the gift to *B* would not fail but be preserved for the benefit of his descendants.¹²⁰ It should be noted, however, that a lapse statute never

117. For example, consider this unlawful gift—"[R]emainder to the children of *B* (a bachelor at the testator's death) who attain 25." This remainder violates the common law rule against perpetuities. Also, consider this kind of renunciation—a widow's election to take her statutory share instead of what is provided under her husband's will. For further examples of renunciations, illegal gifts and other kinds of failures, see LEACH & LOGAN 425-26.

118. For purposes of analysis, a renunciation made within the period of probate shall be regarded the same as if it had been made at the testator's death.

119. Perhaps it would be more useful to have included all failures in a single section, one which considered potential failures, their consequences and their solutions. Beyond the problem of whether there is a failure, the questions common to each situation are: has the problem been foreseen; has any alternative been selected; and, if so, is the alternative sufficiently comprehensive? Indeed, though the occasions for failures may differ, their solutions nearly always require the use of adequate and explicit substitutes.

120. N.Y. EST., POWERS & TRUSTS LAW § 3-3.3 (McKinney 1967):

(a) Unless the will provides otherwise:

(1) Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, per stirpes.

(2) The provisions of subparagraph (1) apply to a disposition made to issue, brothers or sisters as a class as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred

really eliminates or resolves the problem confronting the planner. To begin with, *B* may not be a relative covered by the statute. To avoid a lapse, *A* must then make his alternate choice explicit. And even if *B* falls within the statute, *A* cannot rely on the statute to save the gift to *B*; after all, *A* can hardly predict whether *B* will have descendants alive at the death of *A*. Further, the statute presumes that a special group of survivors of a particular group of devisees or legatees falls within the ambit of those the estate owner intended to benefit. This presumption excludes testate successors and collateral survivors of relatives within the particular group covered by the statute but includes their descendants. Proceeding upon this assumption, it preserves some gifts and thereby rectifies the estate owner's failure to make an alternate choice explicit. The assumptions which underlie the lapse statute may be justified in the long run: *A* intends to preserve gifts for only closely related takers which will benefit only their surviving descendants. Yet the planner must always find out whether his client is the exception. Indeed his client may reject these assumptions. For example, he may prefer a substitute taker other than descendants, or he may wish to preserve a gift not saved by the lapse statute. A planner must raise the lapse question and make his client's choice explicit. To rely on a lapse statute is to plan by default; it is in fact not to plan at all.¹²¹ Absent a class gift and an operable lapse statute, lapsed specific devises or bequests pass as part of the residue, while gifts of residue pass by intestacy. The former consequence may not reflect the wishes of the estate owner, especially if it gives to some a larger share of his estate¹²²

hereunder upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.

(b) As used in this section, the terms "issue", "surviving issue" and "issue surviving" include adopted children and illegitimate children; for this purpose, an illegitimate is the child of his mother and is the child of his father if he is entitled to inherit from his father under 4-1.2.

121. Obviously the best planning procedure requires that a lawyer periodically review a client's will with him, particularly after the death of a designated taker. Though this practice affords the best solutions, it is unreliable because it usually requires that the client, who best knows who has predeceased him, initiate the process. Since clients cannot or do not always respond to this instruction, this review is not always accomplished. Therefore, while preparing his will, a client must be made to understand, at the very least, the possibility for lapse and what might be its consequence if a substitute provision is not made.

122. Most often, residue is left to those who are to benefit most from an estate. In this situation, an estate owner should have little difficulty with accretions to residue attributable to the lapse of a specific gift. Nevertheless, the nature of the asset may suggest otherwise. For example, he might prefer to have stock in a closely held corporation pass to others already given or owning shares in the same company. Here the

or gives to residuary takers a particular asset he might think inappropriate for them to have.¹²³ The latter consequence introduces the added risk that a portion of *A*'s estate might pass to heirs at law specifically precluded from taking under the terms of his will. The consequences, then, of a lapse of an absolute possessory fee simple given to an individual can as severely violate and distort an estate plan as any failure attributable to renunciation or illegality.

The problems caused by the failure of a possessory interest less than an absolute fee, or of a future interest, are in a sense more complicated and serious. They are more complicated because the limitation offers additional dispositive options; they are more serious because, if left to judicial construction, these options may be ignored. Perhaps distribution to the residue or by intestacy is even less to the liking of the estate owner. Ownership of the subject matter of the gift has been divided into possessory and nonpossessory estates. However, only part of the property interests carved out of the subject matter fails. Ordinarily, there are others who have had or will have a claim on its enjoyment. Because the estate owner has had them in mind, it is sometimes fair to assume they would have been given priority over takers of the residue or heirs at law who might benefit from the failure. This fact of divided ownership has made it all the more difficult to anticipate judicial resolution of the problem.¹²⁴ Because the outcome is less predictable, and potentially less desirable, the need for explicit prior resolution becomes even greater.

Suppose *A* left a gift: "To *B* for life, remainder to *C* in fee simple." If *B* elects not to take under *A*'s will, what consequences follow? Should the income pass to the residue, pass by intestacy or be accumulated and added to principal until *B* dies? Or should the remainder to *C* be accelerated and *C* allowed to assume possession upon *A*'s death? If, in addition, the remainder to *C* is contingent, should the condition be applied just as if *B* assumed possession?¹²⁵ What if *C* repudiated

objection to additional residue probably concerns the kind of lapsed gift rather than its size. However, the size of the lapsed gift can become critical when the scheme of distribution makes it clear that the residuary taker is not intended to benefit most from the estate. This may be true of an ultimate gift to charity of what little remains after the specific needs of others are met. The lapse of a sizable specific gift may produce for the charity added benefits never considered or desired by the estate owner.

123. See, e.g., *Roberts v. Tamworth*, 96 N.H. 223, 73 A.2d 119 (1950).

124. See, e.g., the selection of cases and problems appearing in LEACH & LOGAN ch. 11, and particularly § 3.

125. For example, consider: "To *B* for life, and if *C* survives *B*, then to *C* in fee simple." If *B* renounces, must *C* survive *B* for *C* or his successors in interest to take?

his interest, or suppose *C* predeceased *A*? A court would undoubtedly allow *C*'s remainder to pass to the residue or by intestacy. Yet is there any indication—and surely a planner ought not to speculate—that *A* would have wished to enlarge the interest of *B*, and under these circumstances have given him a fee simple? Might this be more acceptable than a gift of the remainder to the residue or by intestacy? Suppose further, *A* had made a gift: "To *B* in fee simple; but if *B* dies having practiced law, then to *C* in fee simple." Here judicial resolutions become still less predictable. Is *C* entitled to take if *B* predeceases *A* without ever having practiced law? Suppose *B* renounces and thereafter dies having or without having practiced law. The question presented is both whether and when is *C* entitled to assume possession in fee simple. Consider also the consequence of a failure of *C*'s executory interest and not *B*'s, if *B* survives *A* and thereafter practices law. Would *A*'s choice or a court's construction be apt to vary if the condition of defeasance had read: ". . . but if *B* dies without descendants surviving him then to *C* in fee simple"? Should *B*'s interest become absolute even if he practices law or is not survived by descendants?¹²⁶ Finally suppose the selected condition of defeasance violates the common law rule against perpetuities: "To *B* in fee simple;

For a discussion of these problems, see LEACH & LOGAN 425-41. Though courts are reluctant to "remake" wills and thus to ignore a condition precedent to possession, surely they should not hesitate to make an enlightened construction if the condition no longer makes sense or concerns only the taker whose interest has failed. For example, consider this limitation: "To *B* for life, and thereafter, if *C* has paid *B* \$10,000, to *C* in fee simple." Suppose *B* renounces. Does it make sense to require payment to *B* before *C* can assume possession? For a discussion of the entire problem of acceleration of future interests, see SIMES & SMITH §§ 791-804.

126. See LEACH & LOGAN ch. 11, § 3. In particular, see problems 9, 10 and 11, at 448. The editors imply that the construction for courts to make, or the solution for planners to express, should distinguish between conditions primarily intended to divest and conditions primarily intended to substitute another. If a condition is used to control activities of a taker, it is used primarily to encourage or deter and not to benefit others, a divestiture should be made even when the executory interest fails. This situation is illustrated by the first example. However, if a condition is used because the estate owner prefers to benefit others under certain circumstances, then a divestiture should not be made if the executory interest fails. Stated otherwise, if an alternate benefit is central to a condition, most likely a divestiture is unintended, and therefore should not occur, if that particular benefit cannot be conferred. The second example approximates this situation. If *B* dies without surviving descendants, *A* seems to have said: "I prefer that the gift pass to *C* rather than those selected by *B*." If his particular preference cannot be effectuated, the likelihood of *A*'s intending a divestiture seems reduced considerably. For further discussion of a related problem, see note 57 *supra*. For a discussion of the entire problem concerning the failure of a future interest, see SIMES & SMITH §§ 821-31.

but if the land is ever used for the manufacture, distribution, or retail sale of alcoholic beverages, then to *C* in fee simple." The effect of the rule is to make the interest in *B* absolute at *A*'s death, for any other conclusion would frustrate its purpose.¹²⁷ Though the policy of the rule is clear, it is not at all clear that *A* would have preferred this result if he was unable to implement the limitation as written. For example, he may have elected to limit the condition to *B*'s lifetime or to give *B* a life estate. The obvious solution is to draft a limitation which does not violate the rule. Yet a practice common to many planners is to draft without careful consideration of the rule, while relying on a savings clause to preserve the gift in the event it does violate the rule. The effect of some of these standard clauses is to make the rule an actualities test rather than a possibilities test. The effect of a violation is, however, the same as in the previous example: those currently in possession receive an absolute interest.¹²⁸ Surely, if asked, *A* may have had other ideas. In each of the preceding examples, some person mentioned in the limitation can, on the basis of *A*'s probable intent, make a case superior to the claims of takers of the residue or intestate heirs. Yet in many of these situations, it is doubtful that a court would uphold their claim. The lure of the literal interpretation, even against the weight of common sense, has been overwhelming.

The use of class gifts eliminates two failure problems endemic to individual gifts: it prevents one kind of schematic distortion, that some may be given particular articles of property they were never intended to have; and, by reducing the likelihood of intestacy, it can eliminate a

127. The common law rule is intended to prevent remoteness in vesting and thereby eliminate conditions which make the subject matter unmarketable indefinitely. A rule which voids the interest of *C* because the condition is too remote achieves nothing if, upon the same remote event, it instead allowed divestiture in favor of *A*. See LEACH & LOGAN 442 n.15. See also SIMES & SMITH § 825.

128. See, e.g., CONTINENTAL ILL. NAT'L BANK & TRUST CO. OF CHICAGO, SUGGESTED WILL AND TRUST FORMS, Form 1, art. V, § 6, at 3 (1964); NORTHERN TRUST CO., WILL AND TRUST FORMS, Form 1, § 6, at 17 (1969). These two provisions, part of a form which creates a trust, state that no trust shall endure for 21 years beyond the death of the last to die of either the testator or those beneficiaries alive at his death. Then at the end of that period, distribution of principal should be made by the trustee to the beneficiaries entitled to income immediately before termination of the trust.

But cf. Leach & Logan, *Perpetuities: A Standard Savings Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961). When a perpetuities challenge arises, their savings clause grants the trustee power to modify the instrument so as to effect a distribution which best approximates the testator's intent. See generally SIMES & SMITH §§ 1293-97.

departure from the estate plan by a gift to someone who was never intended to benefit at all. It does not, however, avoid the possibility of unequal distribution when it appears equality was intended; that some members of a family may be given a disproportionate share and that survivors of a branch of the same family, not expressly precluded from benefiting, may take nothing. In fact, a class gift increases the potential for this kind of schematic distortion because a lapse statute may not operate to save the interest of a class member whose interest has failed. Suppose *A* leaves his entire estate to "my children in fee simple." Once again, assume *A* has three children, *X*, *Y*, and *Z*. If *X* predeceases *A*, the lapse statute may not preserve *X*'s interest even though he has descendants who survive *A* and who would take had *X* been individually designated. Most courts tend to hold that a lapse statute, unless it expressly includes class gifts, will not save the interest of a class member who predeceases the testator.¹²⁹ This is especially true of a gift which is void—*X* is dead at the time *A* executes his will—and not simply lapsed.¹³⁰ Because *X* is not mentioned by name, and in some sense has never been a member of the class, courts have found it more difficult to find that *X*'s descendants fall within the scope of those intended to benefit from the class gift. If the gift had been to *X* by name, it would at least be possible to say *A* had *X* in mind and somehow intended to benefit his descendants even though *X* was dead at the time *A* executed his will. Thus, even though *A* has apparently provided for stirpital equality and even though *X*'s descendants probably fall within the ambit of those *A* intended to benefit, *X*'s descendants will not share in *A*'s estate and stirpital inequality will obtain; *Y* and *Z* take the entire gift. Some courts, however, recognizing this potential departure from *A*'s probable desires, apply lapse statutes to class gifts.¹³¹

Even if a gift is to relatives within the scope of a lapse statute said to comprehend class gifts,¹³² it would be unwise for a planner to rely on

129. Some, however, reject this position completely; others reject this position when the statute is needed to prevent a technical lapse. For a discussion of the three constructional approaches courts use, "lapse," "intention," and "equality of distribution," see 5 AMERICAN LAW OF PROPERTY § 22.49.

130. See 5 AMERICAN LAW OF PROPERTY § 22.50.

131. See 5 AMERICAN LAW OF PROPERTY §§ 22.49-22.50 for a discussion of the "equality of distribution approach."

132. Whether a given lapse statute comprehends class gifts is, of course, irrelevant if a gift has been made to a group, even if identified individually, which is beyond the scope of the statute; for example, "To *A*, *B*, and *C*, the children of my good friend *D*."

this statute. That the estate owner might wish to exclude descendants of a class member whose interest has lapsed, or that he might prefer to preserve a member's interest even if he is without descendants alive at the estate owner's death, is surely possible. The need for an express solution is obvious, even in the case of a "simple" gift to children; its form, however, is not so obvious. Consider this substitute gift: "To my children in fee simple; the descendants, alive at my death, of any child who has predeceased me shall take such child's share." This alternative seems appropriate; it merely incorporates the solution embodied in a lapse statute applicable to class gifts. Nevertheless, it is not without problems. It may not preserve the interest of a class member who is dead at the time the will is executed.¹³³ This provision for substitution sometimes has been construed to be limited to descendants of class members who die between the date the will is executed and the date of the testator's death. Because that construction is possible, the planner must take great care in drafting an appropriate substitute gift. Accordingly, though solutions to lapse problems are, by comparison, less difficult, something more than "comprehensive prevision" is required. The planner must do more than anticipate the eventuality. His expert training must alert him to the provisional traps and pitfalls which mark the law of estates and future interests. The gift becomes a simple one only if the planner is fully versed as to what may happen and what must be done. Simplicity should not be judged by the number of words it takes to accomplish a particular objective. Brevity is achieved only after the complexity is perceived and overcome.

C. *Class Gifts—Membership and Other Matters*

Essential to any discussion of the complexities inherent in planning the "simple" estate is a consideration of class gifts. There are at least a few reasons for its importance. "Children" and "grandchildren"—taking by that description—are frequent beneficiaries of estates. Accordingly, the class gift is commonplace and so are its problems. Additionally, these problems are seldom uncomplicated. For example, class gifts can, and do frequently, combine most survivorship and lapse problems previously considered. Furthermore, construction problems in-

133. For a case which discusses this problem, see *McAvoy v. Sammons*, 140 Ind. App. 552, 224 N.E.2d 323 (1967). This decision, upon a careful reading, seems to suggest that the case for including descendants of a member dead at the execution of the will is reduced considerably if the gift has been made to a class not related to the estate owner.

volving class gifts are frequently resolved by rules which incorrectly reflect the probable intent of an estate owner. To summarize, because class gift problems are frequent, complex, and sometimes poorly resolved by courts, they warrant special attention.

Many problems having to do with, and illustrated by, class gifts have already been discussed. In the main, the earlier discussion of class gift problems dealt with the failure of a class member to survive a particular event. In class gift terminology, when is minimum membership determined? Usually at issue was whether there was a condition of survivorship and, if so, was adequate provision made for an alternate gift. On the whole, survivorship problems in class gift situations should not be appreciably different from those created by gifts to individuals. For this reason, their discussion will not be repeated in this section devoted exclusively to class gifts. This section concentrates primarily on two other problem areas, one general and the other quite specific. First, what is a class gift and what are the consequences of a gift being made to a class? Second, what construction problems arise when, by the terms of a dispositive instrument, distribution is to be effected before the possibility of additional members has become physically impossible? In short, what determines the maximum membership of a class?

1. *A class gift: what does it mean?*

What is a class gift and what legal consequences commonly flow from making one? This discussion begins with the latter question because clarity is frequently advanced by considering consequences before definitions. If a devise, not to a class but to an individual, is made by *A* in this form: "To *B* for life, and then if *C* survives *B*, to *C* in fee simple," and if *C* fails to survive *B*, his remainder will pass to the residue or by intestacy. The same would probably¹³⁴ be true of the interest of *X* in the following nonclass gift: "To *B* for life, and then the remainder shall be divided into two equal shares; one share to my good friend *X* if he survives *B*, and one share to my uncle *Y* if he survives *B*." *Y* would not succeed to *X*'s interest. However, if the remainder is a class gift—"To *B* for life, and then to such of *B*'s children in fee simple as survive him"—the consequence would be differ-

134. It would be true unless, as courts sometimes do, the consequence of a class gift were applied without regard to whether the gift was to a class or individuals. See note 140 *infra*.

ent. The interest a child of *B* would have received if he had survived *B*, will be shared equally by those children who do survive *B*. The use of a class gift does not involve simply a shorthand description of a group of takers as an alternative to describing each of them by name. Because a substitute gift is inherent in every class gift, its use avoids many failures by way of the residue or intestate distribution. Furthermore, class terminology permits a gift to be made to a group of people not alive or not fully ascertained until after the will has been executed or even after the testator has died. For example, the remainder to the children of *B* would not be restricted to those children born before the death of the testator or the execution of his will. It would, because it is a class gift, comprehend all children born before the death of *B*, excluding, of course, any child who does not survive *B*. In short, a class gift does not fix identities of those who are to take at the date a will is written. At the very least it defers this until the testator has died, and in some cases, defers it beyond his death. The definitional question, of class gift or not, arises then when the consequences of class and individual gifts serve the interests of different parties; for example, when the interest of one of several takers named in the same gift fails for any reason and there is no express provision for a substitute gift. This failure may occur because of an inability to meet an express or implied condition of survivorship, because of a lapse,¹³⁵ or because of a renunciation. The solution, as many courts see it,¹³⁶ depends on whether the gift is to a class or to individuals.¹³⁷ If to in-

135. To illustrate, consider this specific devise of a testator ("*T*"): "To *X*, *Y*, and *Z*, being all the children of my good friend *A*." Assume that *X* predeceases *T*. This makes possible a dispute between *T*'s residuary takers and *A*'s other children—*Y* and *Z*. *Y* and *Z* could claim the entire gift, the residuary takers could claim one third. Central to this dispute is whether the specific devise creates a class gift. If a gift to individuals, the interest of *X* has lapsed and passes to the residue.

136. See, e.g., *Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917). See *SIMES & SMITH* § 613.

137. There are, however, occasions when courts permit the tail to wag the dog. Consider this provision in *T*'s will: "To my brother *B* for life, remainder to *X*, the sole child of my deceased brother *C*, and the children of *B*." Assume that both *B* and *X* survive *T* and, thereafter, that *B*, childless at *T*'s death, bears two children, *Y* and *Z*. Further, of those described in the remainder, assume only *Y* and *Z* survive *B*. Since *X* is dead, does his estate succeed to his share of the remainder? Some courts might regard the class gift question as the ultimate issue: if a class gift, *Y* and *Z* take all; if a gift to individuals, *X*'s interest is transmissible at death and passes to his estate. See, e.g., *Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917), discussed in note 25 *supra*. Viewing this problem in this manner is surely erroneous. The ultimate question is whether any requirement that the remaindermen survive *B* exists by impli-

dividuals, a portion of the gift will not pass under the terms of the provision. If a class gift, the subject matter is shared by those members of the class eligible to take. Therefore, the ultimate issue is whether the limitation creates a class gift. Similarly, the decision whether a gift is to a class may be at issue when the rights of another potential member, one who was born afterwards or who was overlooked, are involved.¹³⁸ If a class gift, the overlooked or later born member is included.

What then is a class gift? The essentials of a class gift which appear most frequently in definitions used by courts are: a common characteristic amongst the takers; possible fluctuation in the number of takers; and, perhaps, equal distribution amongst those entitled to share.¹³⁹ In a limitation to "B for life, and then to his children," the remainder would seem to satisfy these requirements and therefore be a class gift. However, a specific bequest to "X, Y, and Z," who are some of the

cation. If it does, only then does a class gift question arise. See SIMES & SMITH §§ 655-56. Whether a class gift has been made should not govern the survivorship issue. Gifts of future interests to individuals and classes can be made either transmissible or nontransmissible at death. A class gift does not automatically connote a condition of survivorship any more than does a gift to an individual. That some courts have mistakenly assumed otherwise is, perhaps, understandable. There are three important reasons for using a class description: to save words; to include potential takers; and to build in substitute gifts if a member's interest fails. Lapses occur frequently and a class gift ordinarily will prevent a failure by allowing other members to share the whole. It is easy, but false, to assume that the built-in substitute is every estate owner's primary reason for use of a class description and, that because a class can prevent a failure, such an estate owner intends the occasion for failure extended beyond a lapse.

138. For example, consider the problems arising from this provision: "To B for life, remainder in fee simple to his children, X and Y." Is Z, a child born to B after the testator's death, entitled to share in the remainder? Is Z entitled to share if he was alive, but unknown to the testator, at the date his will was executed? See SIMES & SMITH § 612-13. See also *Walker v. Case*, 211 Ark. 1091, 204 S.W.2d 543 (1947).

139. *Blackstone v. Althouse*, 278 Ill. 481, 488, 116 N.E. 154, 157 (1917):

A class, in its ordinary acceptance, is a number or body of persons with common characteristics or in like circumstances or having some common attribute, and, as applied to a devise, it is generally understood to mean a number of persons who stand in the same relation to each other or to the testator. A definition of such a devise generally approved is as follows: "A gift to a class, has been defined as a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other proportion, the share of each being dependent or its amount upon the ultimate number of persons." (I T. Jarman on Wills, — 6th ed. — 232 [*sic*, 262 in 6th ed.].)

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A devise is not a gift to a class where at the time of making it the number of devisees is certain and the share each is to receive is also certain

testator's nephews, would not meet this test; nor would a gift to "my brother B and the children of my deceased brother C" or to "B and his children." Nevertheless, in each of these last three illustrations courts have sometimes applied the consequences of a class gift even though none falls within the accepted definitions. In doing so, consistent with their view of the testator's intent, some courts have chosen the special consequences of a class gift while acknowledging the absence of a gift which satisfies class criteria.¹⁴⁰ Others have accomplished the same end by elasticizing the definition so as to comprehend takers described in the limitation.¹⁴¹ Indeed, looking only to what courts have actually done, it becomes possible to say that any gift to a group of people—however unrelated they may be, or however unabbreviated their description may be—can produce the consequences of a class gift.

If then class criteria can be ignored or elasticized, perhaps the definition is irrelevant or meaningless, and, therefore, worthless. That this is so should not really be undesirable to those litigating the construction of a limitation. It makes for better results. What should be important to courts is simply whether a testator intended the consequences of a class gift.¹⁴² If evident, these consequences should attach. From the view of the planner, however, here lies further evidence that the simple

140. See, e.g., *In re Moss*, [1899] 2 Ch. 314, *aff'd sub nom.* *Kingsbury v. Walter*, [1901] A.C. 187. Cf. *Manier v. Phelps*, 15 Abb. N.C. (N.Y.) 123 (1884). See also SIMES & SMITH §§ 613, 616.

141. See, e.g., *Roberts v. Tamworth*, 96 N.H. 223, 73 A.2d 119 (1950). See also SIMES & SMITH §§ 614-15.

142. *In re Moss*, [1899] 2 Ch. 314, 317.

The practical question which we have to decide on this will is, Who are the persons now entitled to the share of the testator in the Daily Telegraph newspaper?

. . . We hear about classes, and gifts to classes, and definitions of classes. You may define a class in a thousand ways: anybody may make any number of things or persons a class by setting out an attribute more or less common to them all and making that the definition of the class.—But after all, whether you call this a class or whether you call it a number of persons who are treated by the testator as if they were the class, appears to be merely a matter of language. One is very reluctant to frame definitions unless one can make a law to accord with the definitions, which judges cannot do. Now what is to be done with the share of this lady who died? The testator says it is to be equally divided between her and the children of Emily Walter, to be equally divided between them all. If some of them are dead, are the shares of those who are dead to go to those who survive, or are they to go to someone else? That is the practical question; and whether you call the persons a class or "in effect" a class . . . or whether you call them a number of persons who are to be treated as a class, is quite immaterial. The guiding question here is, What is to be done with this Daily Telegraph share which is to be divided amongst these legatees?

will is but a myth. Adequate planning requires something more than the formulation of ideas; obviously, it also requires that these ideas be implemented. To accomplish the latter objective, planners find useful language guidelines affirmed by courts which produce predictable results. These decisions on class gifts have said in effect: what sometimes appears to be a class gift will not be treated that way; and the same is true of what appears to be a gift to individuals. They affect the planner in two ways: they force a consideration of the consequences of a class gift in relation to the gift that is to be made; but they also make unreliable language guidelines he may have regarded as standard. The impact of the first should be negligible; it is something he must always consider as a matter of course. The impact of the second, however, may be significant. When language guidelines are erased or made unreliable, their continued use may produce unpredictable results—the nemesis of every planner. In place of these guidelines a planner may need to elaborate the lengthy consequences desired. Short of this, he is left with only the use of those guidelines unmistakably consistent with both the rest of the will and all surrounding circumstances.

2. *Class membership: when does it close?*

Suppose *A* has left the residue of his estate in trust: "Income to my wife for life; following her death the principal is to be sold and the proceeds distributed to my grandchildren in equal shares." Assume that *A* is survived by his wife and three young sons, *X*, *Y*, and *Z*, but not grandchildren. If grandchildren are born thereafter, which of them will be entitled to share in the remainder? The determination of class membership is a vexing problem. To be sure, it is not because courts have been uncertain in their construction. Though the result is not always clear, courts have developed over the years a body of law—rules of construction—which they consistently apply in deciding "which grandchildren." Frequently, however, these rules control even if they conflict with a decedent's probable answer to the question—"which grandchildren." This body of law is a reflection of probabilities; yet testators are individuals, not statistics. Nevertheless, most planners do not avoid these problems by providing an express answer to the question, probably because they fail to realize the question might arise—a planning oversight once again.

In a sense, one aspect of this question has already been discussed. Apart from the fact of birth, the most common requirement for admis-

sion to a class is survivorship. Sections A and B, transmissibility-survivorship and lapse, concerned matters which bear directly on the issue of minimum membership. In the foregoing illustration, for example, the class of grandchildren may or may not include those who are born and die before the death of *A*'s wife. Is their interest transmissible at death; is there an implied condition of survivorship? These are issues that bear directly on the matter of minimum membership, but they have already been considered. Here, however, emphasis is on another aspect of the problem though one which is not entirely separable from the question of minimum membership. That aspect is the determination of maximum membership—when does the class close?

In the main, construction problems regarding the closing of a class arise when, at the earliest date distribution can be made, no member is eligible to take, or because an increase in membership is still possible. Suppose, for example, that in the preceding illustration, only *X* had children by the date of his mother's death but *Y* and *Z* might bear children. Or suppose *A* had no grandchildren born prior to his wife's death, but grandchildren were born thereafter over a twenty year period of time. Which grandchildren would share in the remainder? All grandchildren of *A* whenever they might be born? Perhaps this is what *A* intended, or would have wished had his planner raised the issue with him. Yet the construction given by courts in this situation is apt to compel a quite different result. Unless *A* directs otherwise, if a grandchild is able to take at the date distribution is called for, the class closes at that time. Relying heavily upon *A*'s direction for distribution, courts have fixed maximum membership to determine the size of a grandchild's share then entitled to take. And this necessarily means that potential members of the class will be precluded from enjoying an interest in their grandfather's estate.¹⁴³ In short, grandchildren born after the date of first distribution take nothing.¹⁴⁴ The rea-

143. This, of course, is untrue of a limitation which expressly protects interests of after born members even though a prior distribution is allowed; for example, a provision which holds back some portion of a previously determined share until the occasion for additional members becomes impossible. For further discussion of these types of provisions, see note 163 *infra*.

144. Consider, however, a gift of income in which the rule of convenience is applied differently (see note 145 *infra*); that is, the class is defined separately for each periodic payment. In short, after-born members are included, but not for distributions which precede their eligibility. "Ordinarily, in a gift of income, no rule of convenience need be considered; for no inconvenience is experienced by admitting new members to the class after distribution has begun. The corpus is not being distributed and the income

sons courts give for this position are certainly open to question. Courts have, for the most part, been unwilling to inconvenience themselves by exercising continuous supervision over a share which has already been distributed. Accordingly, they have refrained from making distribution subject to partial recall in the event others thereafter become entitled to share in the gift, thus reducing the size of each recipient's distributed share. Further, courts have been reluctant to ignore completely an estate owner's direction for distribution to members of a class occurring before possibility of added membership becomes extinct. To hold the class open long enough to include all potential members, which in the illustration would be until all of A's children died, would require either making distributions subject to partial recall, a choice courts believe is both impractical and inconvenient, or withholding distribution until further membership became an impossibility, a choice courts regard as a flat-out repudiation of the estate owner's intent.¹⁴⁵ Accordingly, courts have adopted what they consider a com-

can be distributed each year to those members of the class then entitled. It would seem that the testator's probable preferences in the matter would thus be given full effect. If . . . a testator would normally wish to include all possible members of the class in the absence of any circumstances indicating a contrary intent, here is a situation where that wish can be carried out without any inconvenience." *SIMES & SMITH* § 649. See also *In re Wenmoth's Estate*, 37 Ch. D. 266 (1887). One would think that a provision for periodic distribution of principal should be treated similarly; that is, a separate class determination made for each period of distribution. Courts have not, however, always seen this analogy to the gift of income. See, e.g., *Baylies v. Hamilton*, 36 App. Div. 133, 55 N.Y.S. 390 (1899). For a discussion of this problem, see *SIMES & SMITH* § 640.

145. This dilemma and its resolution—the rule of convenience—has been explained as follows in *Thomas v. Thomas*, 149 Mo. 426, 435, 51 S.W. 111, 113 (1899):

It is contended by plaintiff that the testator by using the expression "should any other children be born to my said son, I will that all of his children divide equally share and share alike the said one-third of my estate," intended that all of the children of David Nelson Thomas, whether born and living at the time he directed the first distribution of this third of his estate or subsequently should share therein. In other words the contention is either that the direction of the testator to distribute to each of his said grandchildren the portion given to him or her upon his or her reaching his or her majority must be ignored as a minor consideration, and the division of this estate be deferred until the possibility of issue becomes extinct in David Nelson Thomas, which is not deemed to be possible so long as he lives. . . .

Or, if the legacies are distributed in accordance with the will, restitution by those who have received their legacies must be made from time to time as other children happen to be born afterwards—an extremely inconvenient, if not impracticable, course.

To make each part of the will consistent with the whole, the courts have sought to prevent a violation of the intention to give to all of the children by applying the word "all" and "children born" to all of those in esse at the

promise, an accommodation of intent known as the rule of convenience. In the foregoing example, *A* is regarded as having intended and thus having by implication stated: “. . . to those of my grandchildren born prior to the date set for first distribution.” And if only *X* had children by the date of his mother’s death, only they would take. That this reflects the probable intent of *A* is surely questionable. The rule, thus, may be convenient for the court, convenient for members eligible to take, but it is surely *inconvenient* for those not born in time and therefore excluded.

The foundation upon which the rule of convenience rests is hardly sound. Additionally, its application is occasionally unsound or unclear because of the sometimes unfounded premise that eligible members will be able to take at the earliest time distribution might occur. Indeed some decisions which implement this rule rest upon assumptions related to probable intent that must be regarded as absurd fictions. If, for example, *A* had made an immediate gift to his grandchildren—simply “to my grandchildren in fee simple,” by the rule of convenience those alive at his death would have taken the entire gift. But suppose, as in the illustration, *A* had children but no grandchildren alive at his death. What then? Does the first-born grandchild take all? He is, after all, no less entitled to distribution by terms of the limitations upon the vesting of his interest, which in this case is his birth, than had he been born prior to *A*’s death. Nevertheless, under these circumstances, courts have attributed a different intent to the estate owner not because of a difference in the language of the limitation, but because of this variation in supporting facts.¹⁴⁶ If at *A*’s death the class membership is nonexistent, *A* can be said to have looked to the future for the purpose of closing the class and making distribution. Both distribution and maximum membership are deferred until the possibility of further grandchildren has become extinct; that is, until all of *A*’s children have died. Further, if no grandchild survives *A*, he may still have looked to the future even if he had grandchildren alive at the date his will was executed. Conversely, if *A* had no grandchild alive at the date his will was executed, but is survived by grandchildren born before his death, *A* did not look to the future and distribution occurs

period of distribution. This determination was reached from an anxiety to provide for as many children as possible with convenience.

See also 5 AMERICAN LAW OF PROPERTY §§ 22.40-22.41.

146. See, e.g., *Weld v. Bradbury*, 23 Eng. Rep. 1058 (Ch. 1715). See also 5 AMERICAN LAW OF PROPERTY § 22.42, at 355-56. SIMES & SMITH § 637 nn. 8, 11.

upon his death and the class is closed to grandchildren born thereafter.¹⁴⁷ Though the terms of the gift suggest that distribution is to be immediate and not deferred until the death of *A*'s children, whether the class is to be held open beyond the death of *A* is said to depend upon *A*'s intent, and this is a function of whether there are grandchildren able to take at *A*'s death.¹⁴⁸ This assumption is a doubtful reflection of *A*'s probable intent. Is it clear that *A*'s answer to "which grandchildren" will depend on the presence or absence of grandchildren at his death? In most cases an estate owner is primarily interested in providing for as many potential class members as the law permits. He is also interested in having distribution made to those entitled to take in accordance with his directions; if someone has satisfied all conditions, and there are no outstanding possessory interests, an estate owner might believe it unfair for him to wait until the possibility of further membership has been exhausted. Yet courts have held that if class membership is nonexistent but still possible at the date distribution would otherwise have occurred, *A*'s concern about delaying distribution for those subsequently able to take is foregone in favor of holding the class open until the potential for additional members has been exhausted. However, if one or more members are able to take upon *A*'s death, even if less than those who might eventually have comprised the entire class, *A*'s intent is now thought to be quite different; his desire that all his grandchildren share in the gift has become subordinate to his desire not to delay distribution indefinitely for those able to take at his death. When potential members may be added after the date of distribution, courts find it inconvenient to administer both objectives, that all potential members be included and that distribution not be delayed. Which objective controls is made a variant of factors

147. See generally SIMES & SMITH §§ 636, 661. See also 5 AMERICAN LAW OF PROPERTY §§ 22.42, 22.48.

148. This would not, however, be true if the gift had been of a specific sum immediately to each grandchild; for example, "\$10,000 to each of my grandchildren." In this situation, the class will not ordinarily be held open beyond *A*'s death even if he has no grandchildren. If no grandchild exists at *A*'s death, the gift fails. Once again, the rule of convenience is responsible for this construction. To hold the class open would delay distribution of residue or, if distribution of residue is made, would require the inconvenient recovery of residue already given out. See *Rogers v. Mutch*, 10 Ch. D. 25 (1878). See also SIMES & SMITH § 648. Cf. *Parker v. Leach*, 66 N.H. 416, 31 A. 19 (1890); *In re Earle's Estate*, 369 Pa. 52, 85 A.2d 90 (1951); *Defflis v. Goldschmidt*, 35 Eng. Rep. 727 (Ch. 1816). For a discussion of planning solutions applicable to gifts per capita and of a gross sum alike, see note 163 *infra*.

supposedly but probably not considered by the estate owner because he did not regard these objectives as mutually exclusive.

These court-created fictions may be compounded when distribution is not immediate but deferred. Consider the original example of *A*'s gift to his wife and then his grandchildren. Or consider either of these illustrations: "To my grandchildren, payable to each of them when they attain or would have attained age 21"; "To such of my grandchildren who attain the age of 21." In the original example, suppose *A* has no grandchild born before his death and only his son *X* has children by the time of the death of *A*'s wife. Or, in the next illustration, suppose *A* has no grandchild at the date of his death and that some, but not all, of his grandchildren eventually born are alive at the date his first-born grandchild attains or would have attained 21. Finally, assume with respect to the last limitation, that *A* has one minor grandchild alive at his death who does not attain 21 and, further, that not all grandchildren who eventually attain age 21 are born before a grandchild first reaches age 21 after *A*'s death. How should a court construe these class gifts in the light of these facts—which grandchildren? Has *A* looked to the future in any of these cases? Has he intended, because *at his death* there was no grandchild in being or at least none whose interest had vested, to defer distribution and defer closing the class until all his children had died?¹⁴⁹ In the first example, it might make more sense for a court to close the class upon the death of the life tenant, if there are grandchildren able to take; but if not, at the death of the last of *A*'s children to die. Similarly, in the second example, a court might close the class when the first-born grandchild attains or would have attained 21.¹⁵⁰ Finally, in the last example, a court might close the class when a grandchild, first-born or not, first reaches age 21.

Perhaps it can be said that the results courts reach in these cases follow not so much from what they firmly believe is the intent of *A*, but from their reluctance to allow gifts to fail combined with a selection of reasonable and practical alternatives. For example, if *A* has pro-

149. See *Armitage v. Williams*, 54 Eng. Rep. 135 (Ch. 1859). Though the problem presented was somewhat different, see also *Male v. Williams*, 48 N.J. Eq. 33, 21 A. 854 (Ch. Ct. 1891).

150. This is, of course, the date distribution would have been made and the date the class would have closed if a grandchild had existed at *A*'s death. Particularly in this situation, perhaps the absence of grandchildren at *A*'s death is not reason for altering the principle usually applied to determine maximum membership—that the class must close at the earliest date distribution can be made.

vided for an immediate gift to a class and knows that the class is non-existent at the date he prepares his will and may be without members at his death, he is said to look to the future if the foregoing possibility becomes a reality. Absent a substitute gift, he probably does not want the gift to fail, a wish courts will implement if the gift is of a gross sum to be divided among members of the class.¹⁵¹ But how far into the future will courts look? The only choice, short of exhaustion of the possibility of further members, is the birth of the first class member. This choice is usually rejected, probably because of its built-in unfairness. *A* has, after all, intended to make a gift to a class and not the first-born member. It is unlikely that he would desire to close the class at a time when only one member of the group intended to take could benefit. If, however, *A* has not provided for an immediate gift, but has given a remainder to the class or has deferred payment until a period of time has elapsed or a condition has been satisfied, other intermediate choices become available. Once again, the reasons for not permitting the class gift to fail immediately upon *A*'s death should obtain, but with greater justification. The gift is deferred and an intent to delay distribution made explicit by the terms of the limitation—perhaps because *A* wished to allow time for creation of the class. However, does *A* intend the class be held open until all his children die even if most, or perhaps all, of his grandchildren might be born by the time the life tenant dies, by the time his first-born grandchild attains or would have attained 21, or by the time a grandchild first reaches 21? Each of these closing dates—two for each illustration—avoids a failure, which should therefore appeal to courts. However, the intermediate dates may offer something which is not available in the case of an immediate gift: an equitable accommodation of *A*'s objectives. Conceivably, only a few of his eventual grandchildren may qualify if an intermediate closing date is enforced by a court. That this will happen, however, is neither certain nor even probable. These solutions seem at least as fair as those determined by the rule of convenience when eligible class members exist at an estate owner's death. Nevertheless, what is clear is that whichever choice a court adopts, if it bases its decision on *A*'s intent, it is an intent the court has fabricated for itself. This is inevitable each time courts face issues to which estate owners have given insufficient consideration.

151. A different result, however, might obtain if the gift is of a specific sum to each class member. See note 148 *supra*.

The rule of convenience is inadequate. It presupposes a single intent for all estate owners. If it achieves a measure of constructional consistency, it is at the cost of good sense. Yet even if it is sensible, because it makes the date of distribution a critical determinant of intent, its operation is sometimes complicated, requiring considerable speculation in its application. To the extent a date of distribution is not expressed and cannot be readily determined, certainty is unobtainable. A gift "to the children of *B*" or to the "children of *B*, payable at age 21 respectively" does not present serious problems. The date for distribution seems quite clear; by implication it is to be immediate in the first example; and at age 21 in the second example. By the rule of convenience these class gifts to the children of *B* would be closed at those times if there were members alive at the date these interests were created. Similarly, a court might find little difficulty in applying the rule of convenience to this contingent interest: "To such of *B*'s children who attain age 21." It would seem that, because a child's interest is conditioned upon attaining 21, he is not entitled to benefit from the gift until he satisfies the condition; that no distribution of income and certainly not principal can be made to a child who is yet a minor. When a child does in fact attain 21, he is entitled to his share and the class will close.¹⁵²

Complications ensue, however, the moment the latter limitation is transformed into a vested interest subject to divestment.¹⁵³ This is

152. It can, however, be argued that in this situation the class should not close until *B*'s death and that distribution should not be made before then, unless at the testator's death *B* already has a child 21 years of age. If *B* was childless at the testator's death, a court, theorizing that the testator had looked to the future, might hold the class open until *B*'s death. Based on this same theory, they might similarly extend class membership to all of *B*'s children even if *B* had minor children at the testator's death. The gift to *B*'s children existing at the testator's death is uncertain because of the condition. The uncertainty is only slightly different than that surrounding a gift to a class non-existent at the testator's death. Because of this, perhaps it still can be said that the testator has looked to the future—to all of *B*'s children. This reasoning, however, rests upon an uneasy assumption made with respect to the testator's intent. A more appropriate assumption would be that the testator did not want the gift to fail because children were unable to take immediately at his death and that the class should be held open and distribution delayed for a reasonable time whether *B* was childless or had minor children—held open, for example, until a child attained 21. See text accompanying notes 146-57 *supra*.

153. It should be noted that only a slight change in language makes the contingent interest given *B*'s children vested subject to divestment: "To the children of *B*; however, if any child of *B* fails to attain 21, then his interest shall go to those children who do attain 21."

especially true of those conditions which may not be satisfied until a taker is old or dead. If an immediate class gift is made vested subject to divestment, its members are at least entitled to income from their respective shares until their interests become absolute. But when are they entitled to distribution of their respective shares of principal? Stated another way, when are they entitled to control and use of principal? Ordinarily distribution is deemed immediate—when the interest vests; yet, perhaps, distribution should not occur until such interest becomes indefeasible.¹⁵⁴ Should distribution be immediate if the divestiture is conditioned upon an event which must happen reasonably soon after creation of the interest? Compare, however, this limitation: “To the children of *B*; but if any child of *B* ever engages in the practice of law, then his share is to go to *C*.” Although the children of *B* are the primary beneficiaries of this gift, the estate owner clearly wishes to deter them from practicing law, for if they do, their share is divested in favor of *C*. Should their claim to immediate control of principal be denied just because they may practice law at anytime thereafter? Should distribution—more specifically, use and control—be deferred until the condition can no longer be broken, with the result that, if they have not practiced law, distribution will be made not to them personally but to their estates? Does it make sense for an estate owner to deny primary takers control of their respective shares for their entire lives just because, if they do practice law at some point, it may be difficult for *C* to chase them down and retrieve whatever part of their share of the corpus has not already been dissipated? Perhaps not. Perhaps distribution should be immediate. These are questions courts must

Courts have sometimes said that a class gift, when vested subject to divestment, closes immediately upon the testator's death without regard to the date of distribution. As a general rule of construction, this makes little sense. Absent specific language which clearly supports this construction, there is insufficient reason to reject the distribution test simply because the interest is vested subject to divestment. *See SIMES & SMITH* § 647. Surely the form of the above limitation, without more, does nothing to negate the intent usually assumed—to include all who may satisfy the class description.

154. A condition of defeasance, as a general matter, may not prevent a class member from demanding and assuming possession before his interest becomes indefeasible—in which case the class closes even though distribution of a defeasible interest is made. *See 5 AMERICAN LAW OF PROPERTY* § 22.42 at 359-60. Nevertheless, the time for distribution must, in each situation, ultimately reflect the transferor's intent. *See 5 AMERICAN LAW OF PROPERTY* § 22.40. To be sure, then, there are occasions in which a condition of divestment should demonstrate an intention that distribution be delayed; for example, when the subject matter is personal property.

frequently answer, but are, of course, questions the estate owner should have resolved. The case for immediate use and control would seem to be even stronger in this limitation: "To the children of *B*; however, if any child dies without descendants surviving him, then his share is to go to the other surviving children." Here the gift over is not intended to deter certain activity. Perhaps the estate owner is less concerned with securing a divestment if the condition is broken.¹⁵⁵ Indeed it is arguable that in these situations, the date for distribution of principal ought to depend on the subject matter of the gift. For example, the risks of dissipation and recovery of corpus would seem to be less with land than with cash.

Speculation about distribution of vested interests subject to divestment becomes even more abstruse when the contingency, though it can be satisfied or broken long before death, may not be answered for some time after creation of the defeasible interest. Consider these limitations: "To the children of *B*, but if any child of *B* fails to attain age 50, then his interest is to go to *C*"; or "To the children of *B*, but if any child fails to marry during his lifetime, then his interest is to go to *C*." Should *B*'s children be denied use and control of principal until they attain age 50 or until they marry? To be sure, when called upon to make a construction courts must answer these questions. However, judges cannot be certain their answer coincides with the estate owner's intent. Furthermore, until they make their choice the date for distribution remains uncertain. It is this uncertainty which makes the rule of convenience sometimes difficult to apply, and thus further diminishes its appeal.

The issue of maximum class membership, as just observed, is quite complex when its resolution is related to the question of minimum membership. The opening of a class, that is, when its minimum number is determined, of course depends on the existence of a member. It also depends on the nature of any contingencies attached to that member's interest which may make his interest either contingent or vested subject to divestment.¹⁵⁶ Occasionally, minimum class mem-

155. Looking only to the condition itself, perhaps the estate owner is simply interested in making a substitute choice if a child dies without immediate family who might otherwise succeed to his share. In this situation, rather than allow *B*'s child to select anyone, the estate owner has manifested his own preference.

156. Consider these two limitations which apparently include the same age requirement: "To *B* for life, then to such of the children of *B* who attain 21"; "To the children of *B*, but if any child fails to attain 21, then his share shall go to those who do

bership may not be determined until after a maximum number has been fixed.¹⁵⁷ At other times a class may open and close simultaneously. Ordinarily, however, a class will open before it closes.¹⁵⁸ In these situations, too, the determination of minimum membership may affect a determination of maximum membership and thereby introduce further problems. These are situations in which minimum membership depends on a condition not satisfied by any member immediately upon creation of the interest. If a condition imposed upon class membership has not or cannot be satisfied by some member when the limitation first takes effect, it is always possible that no one will have qualified at the earliest date distribution might otherwise have occurred. In that case, the class will then be held open; perhaps until possibility of further membership has been exhausted.¹⁵⁹ For example, suppose *A* makes a gift: "To *B* for life, and then to such of *C*'s children who do not predecease *B*." Assume that *C* has children at the date of the gift, all of whom fail to survive *B*, and that *C* bears other children after the death of *B*. Absent this condition of survivorship, the class would open at the date of the gift and close at *B*'s or *C*'s death, whichever occurred first. The minimum membership would be fixed from the very beginning and so would the date for distribution. In the foregoing illustration, however, the class could not open until *B*'s death and if none of *C*'s children were then alive, the class might not close until *C*'s death. The minimum membership herein is not fixed from the very beginning and so the dates for distribution and closing the

attain 21." In the former example, the children of *B* receive a contingent remainder; in the latter, their remainder is vested subject to divestment. In both illustrations, minimum membership is not determined until a child of *B* attains 21. Perhaps this would not be true if *B* had only one child who failed to attain 21. In the latter example, minimum membership might then be determined as of the death of *B*. See note 57 *supra*.

157. For example, a class can close before it opens if the procreator of a class predeceases fulfillment of a condition attached to the class gift, or if use and control (distribution) are allowed before fulfillment of a condition of divestment. To illustrate—"(by will) . . . To my wife for life, and then to such of our children who survive her," or "To the children of *B*; but if any child dies without surviving descendants, then his share shall go to *B*."

A class will, of course, open and close simultaneously in the following illustrations: "To *B* for life, remainder to those children who survive him"; or, assuming *B* has children at the testator's death and that distribution is to be made then, "To *B*'s children."

158. This is particularly true if an unconditioned future interest is given to a class: "To *B* for life, remainder to his children." The moment *B* has a child the class opens. It will not close until *B*'s death, which is also the date for distribution.

159. See text accompanying notes 146-51 *supra*.

class are uncertain as of the time *A* makes his gift. When these events occur they can surely inconvenience those of *C*'s children who may have to wait many years for distribution—until *C* dies. But this is not a new problem, nor is it the whole of the problem. Although this factual sequence seems remote, the problem is real. If a perpetuities rule predicated on possibilities rather than actualities applies, a condition which defers determination of minimum membership and, accordingly, maximum membership, may invalidate the entire gift.¹⁶⁰ If the date at which the possibility of further membership is exhausted is potentially beyond the period allowed by the rule, the entire gift must fail. Whether a class can possibly be held open that long may depend upon a condition, the existence and nature of which may be subject to debate. Is there any condition at all; if so, what does it require? It is here that problems are ripe even when a violation of the common law rule against perpetuities is not at stake. Indeed the uncertainties inherent in determining the date for distribution and maximum membership are sometimes compounded by the vagaries which surround the existence and nature of conditions, particularly those of survivorship. To be sure these uncertainties may not be without ramification. The consequence of inadequate provision may be tragic, for it can lead to destruction of a specially conceived estate plan.

160. In the above illustration, the class gift to *C*'s children will not open until *B*'s death because of the express condition. Because *C* has children when the gift is made, and because one of *C*'s children is apt to survive *B*, the class will probably close at *B*'s death even if *C* survives *B*. Obviously, the class can close no later than *C*'s death. It will close then if *C* predeceases *B*, or if *C* survives *B* but none of his children do. In the latter case, the class will not be fully determined until *C* dies—perhaps many years after the death of *B*. This possibility, though remote, is accounted for in the application of the common law rule against perpetuities. Nevertheless, the above limitation does not violate the rule since the class will be fully determined by the death of *C*. However, if instead, the class gift had been to *C*'s grandchildren, the condition which defers minimum membership makes uncertain the determination of maximum membership and thereby causes a violation of the rule. If *C* is alive when the gift is made, the rule is violated even if *C* has grandchildren but no children at that date. It is possible that the express condition may eliminate existing grandchildren and those born before *B*'s death; it is also possible for *C* to bear other children. Accordingly, it is possible for maximum membership to be delayed until the last of *C*'s children dies. This child may be unborn when the gift is made and he may die more than 21 years after all others then alive also die. The condition affecting minimum membership makes possible a class determination beyond the period of the rule. This is all that is needed for a violation. Accordingly, whether *C*'s existing grandchildren eventually survive *B* is unimportant—so long as the operable rule is predicated on possibilities rather than actualities. The class gift to *C*'s grandchildren still violates the rule and must fail.

The complexities of the class gift, common to even the simple planning situation, are not a myth. Solutions to these problems do not come easily nor can they be uniform. For example, the obvious solution to the dilemma which underlies the rule of convenience is to create a limitation which holds the class open until additional membership is impossible and defers distribution until then.¹⁶¹ At times this may serve an important purpose, especially if the estate owner clearly desires to reserve control of the corpus indefinitely. If this is not his wish, however, those he intends to benefit may be denied their share at a time most important to them. Further, if the procreators of a class do not consist entirely of lives in being, the danger of a perpetuities violation is always present.¹⁶² Nevertheless, choices as to the opening and closing of a class gift should not be allowed to occur by default. Though solutions may require exceptional prevision and provision, they are not unobtainable. They must be formulated and implemented.¹⁶³

161. Even the language used by lawyers to implement this simple solution has not escaped litigation. A delay in distribution which produces an inconvenient postponement of benefits to eligible takers may appear unwise, and therefore unintended, to a court asked to make a construction. Consequently, it may shorten the delay in distribution and close the class earlier; for example, it may understand "when every grandchild attains 21" to mean "when the youngest grandchild in being attains 21." For a discussion of this problem, see *Mainwaring v. Beevor*, 68 Eng. Rep. 266 (Ch. 1849). See also cases appearing in LEACH & LOGAN 385 n.37.

162. Consider this devise: "To the grandchildren of *B* when the last of *B*'s children dies." If *B* survives the estate owner and if "*B*'s children" does not exclude children *B* might have thereafter, the common law rule against perpetuities is violated—even if *B* already has children and grandchildren. If the class must stand as a unit, its full determination may not occur within the period of the rule. *B* may have another child who may survive all other children and bear a grandchild more than 21 years beyond the death of any life in being at the estate owner's death. Though the likelihood of this is remote, it is still a possibility and therefore the rule is violated. See *Kevern v. Williams*, 58 Eng. Rep. 301 (Ch. 1832), for a limitation requiring consideration of this problem.

163. For example, central to any solution governing maximum membership is both provision for all potential members and distribution to those who are eligible without unreasonable delay. These two objectives may be sought in several ways. Consider the following suggestions. 1) Distribution can be made as each taker becomes eligible, with his share determined as if maximum membership was then fixed. Each taker to whom distribution is made before the potential for additional members is exhausted, would then be required to furnish a bond securing return of whatever is needed to accommodate members born thereafter. See, e.g., *Parker v. Leach*, 66 N.H. 416, 31 A. 19 (1890). 2) Distribution can be made as each taker becomes eligible but on the basis of what is calculated to be the probable class size when the possibility for further members is exhausted. This suggestion would also require provision for readjustment if

Thus far, this article has attempted to illustrate some prevision and provision problems common to most planning situations. It has suggested that even the simple scheme is ripe for judicial construction unless a lawyer has fully accounted for relevant eventualities. To simply point out the complexities of estate planning is not enough. These complexities not only must be understood, they must be resolved. An approach to their resolution is, thus, the burden of the next part.

the calculated maximum membership exceeds the ultimate class size. *See, e.g.,* Defflis v. Goldschmidt, 35 Eng. Rep. 727 (Ch. 1816). 3) Distribution can be made periodic instead of all at once, with the last to be made when the potential for new members is foreclosed. Each distribution would then require a separate class determination much the same as a gift of income; that is, maximum membership would be fixed for each distribution only.

