

Spring 1983

## Issues about Issue: Some Recurrent Class Gift Problems

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### Recommended Citation

Edward C. Halbach Jr., *Issues about Issue: Some Recurrent Class Gift Problems*, 48 Mo. L. REV. (1983)  
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# ISSUES ABOUT ISSUE: SOME RECURRENT CLASS GIFT PROBLEMS\*

EDWARD C. HALBACH, JR.\*\*

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## I. INTRODUCTION

Class gift terms are regularly used to define the beneficiaries of wills and trusts. Class terminology is particularly important in future interest provisions as a means of referring flexibly to the children, more remote descendants, or other relatives of transferors and others. These class gifts, however, continue to present constructional problems and thus to involve matters of concern to practicing lawyers, judges, and legislatures.

The terms most frequently encountered are those referring to some or all of someone's issue, such as "children," "grandchildren," "descendants," and, of course, "issue." This Article examines the nature, variety, and, sum-

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\* This article is an adaptation of the author's 1982 Mortimer H. Hess Memorial Lecture for the Bar of the City of New York.

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marily,<sup>1</sup> the current handling of questions presented by these class gift terms. It then attempts to offer suggestions concerning the drafting of will and trust provisions and the development of legal rules to deal with these questions.

The obvious goals of both law improvement and attentive drafting are to (a) simplify planning or perform it more effectively, (b) lessen controversy, and (c) improve results in individual cases. Proper drafting seeks to accomplish this by fulfilling specific, actual intentions of individual clients with ease and certainty. When an instrument fails to prescribe a clear solution to a constructional issue, and when the process of interpretation fails to discover an actual intent (often because none existed), statutory or judicial rules of construction take over. The role of these rules is to supply a legally attributed "intent" through a presumption that can do no more, but should do no less, than realistically reflect probabilities of intention and social policies relevant to the type of constructional situation at hand.<sup>2</sup>

## II. CLASS DEFINITION: WHAT INDIVIDUALS AND RELATIONSHIPS ARE INCLUDED?

A variety of recurring definitional problems arise in connection with class gifts and essentially ask: What persons are encompassed by a class gift term that refers to all or some limited category of the designated person's descendants?

One general category of such cases is that in which a claimant contends that, contrary to strict definitions, a particular transferor's reference to "children" includes grandchildren, or that "grandchildren" includes great-grandchildren or other descendants, or that "issue" means only children. An examination of case results clearly indicates that, despite their usual reluctance to do so, courts can and occasionally do give class terms an interpretation that is broader or narrower than the words' literal meaning.<sup>3</sup> Aside from revealing the possibility that such flexibility of interpretation

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1. Except as necessary to the objectives mentioned in the next sentence in the text, this Article does not undertake a detailed examination of doctrine in the numerous problem areas discussed. Extensive treatments of most of these matters are available elsewhere (and cited in footnotes hereafter); where this is not so, an attempt is made here to explore, or at least open up, neglected aspects of the problem areas. A source that makes a brief treatment possible for most questions is L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* (2d ed. 1956 & Supp. 1977), with extensive pocket parts by William Fratcher, to whom this issue is dedicated. Professor Fratcher also made significant contributions as a Reporter to the Uniform Probate Code, which is cited throughout this Article.

2. For a generalized analysis of the ingredients of sound rules and the role of precedent in this area of law, and also a clue to biases that may exist in the author's treatment of the present topics, see Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921 (1964).

3. See, e.g., 4 W. BOWE & D. PARKER, *PAGE ON THE LAW OF WILLS* §§ 34.19

exists, most of these cases are relatively unimportant as a matter of either litigation volume or legal principle. They represent merely individualized use or misuse of terms. Some of these cases, however, may indirectly reflect broader problems that are of more general interest for present purposes.<sup>4</sup>

The primary definitional problems of concern in this Article are those that involve the rights of adopted persons and persons born out of wedlock. In fact, controversies involving adoptees may well be the most frequent source of litigation in the entire field of probate and trust law today, especially the future interest component of that field. Questions involving illegitimate claimants also are becoming increasingly common and can be expected to proliferate as we work our way through the implications and uncertainties of recent United States Supreme Court decisions.<sup>5</sup> Further reason to expect these problems to increase can be found in recent statistical data showing that at least one in every six American babies is now born out of wedlock, with the percentage given up for adoption apparently declining.<sup>6</sup>

#### A. *The Rights of Adopted Persons*

In any comprehensive consideration of the rights of adopted persons to take under class gifts, it is essential to recognize that adoptions occur in a variety of significantly different circumstances and that issues concerning the rights of adoptees and their descendants arise in diverse contexts. This broad variety of potential problem situations requires awareness and attention, whether in private planning, in judicial reasoning, or in making and articulating legislative policy. Too much of what is written in wills, trusts, statutes, and court opinions is deficient because of an apparent failure to have this diversity of application in mind. The result is that particular verbal formulations intended to deal with problems in this area tend to be inadequate to deal with problems in this area. If literally applied, they may

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(children); 34.21 (grandchildren); 34.22 (issue); 34.23 (descendants) (1960 & Supp. 1982-1983). *See also id.* §§ 34.9-.13 (heirs, next of kin).

4. *See, e.g., In re Welles' Will*, 9 N.Y.2d 277, 173 N.E.2d 876, 213 N.Y.S.2d 441 (1961) (discussed in text at notes 152-53 *infra*).

5. *See Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding state statute precluding illegitimate children inheriting from intestate father absent court order declaring paternity); *Trimble v. Gordon*, 430 U.S. 762 (1977) (invalidating state statute precluding illegitimate children inheriting from intestate fathers absent acknowledgment of child and marriage of parents).

6. A brief discussion of data from the National Center for Health Statistics and interviews with personnel at the Urban Institute can be found in *Babies Born Out of Wedlock*, Associated Press Wire Service, Oct. 26, 1981, reprinted in Washington Post, Oct. 27, 1981, at 7, col. 1. Latest figures show that, although such births to teenagers remain highest in sheer numbers, recent increases were greatest among women aged 20 to 24, reflecting the results of both "living together" and women wishing "to raise children [without] a long-term relationship with a man." Parachini, Los Angeles Times, Jan. 5, 1983.

even undermine the very objectives the writer probably would have had with respect to situations other than the particular one or ones contemplated at the time.

As a preliminary matter, it is essential to distinguish the present subject from the matter of intestate succession. Rules that may be appropriate for intestacy may not be appropriate for interpreting class gifts or for incorporation into class definitions. This is especially true where future interests are involved. Postponed distributions require transferor language or legal rules that, in flexible and general terms, anticipate an array of *future* adoption possibilities that may involve persons and circumstances unknown to a settlor or testator, and thus offer reasonably suitable solutions adaptable to situations in which the transferor will have no opportunity to respond specifically. Furthermore, legal rules and drafting must deal not only with persons adopted *into* a family but also with those persons born to family members and thereafter adopted by persons *outside* the family, with sensitivity in either case to recurring variations in circumstances.

### 1. Adoption "In"

By far the most frequently encountered of the definitional questions is whether class designations in private instruments should be construed to include persons who claim membership in the class by virtue of adoption. For example, in a devise to the testator's daughter, *D*, for life, remainder to *D*'s issue who survive her, does *D*'s adopted child, or her adoptive grandchildren if a child is dead, qualify as her issue for purpose of sharing in the remainder?

A quick examination of the analogous area of intestate succession, following the introduction of adoption statutes in various states beginning in the mid-nineteenth century,<sup>7</sup> suggests a gradual evolution of public attitudes. This evolution was trailed by what might be characterized as fairly widespread judicial foot-dragging whenever legislation was less than absolutely clear on the rights of adoptees. A classic case of narrow construction is a leading Florida case, *In re Estate of Hewett*,<sup>8</sup> which refused to allow adoptees to inherit from the relatives of the adopting parents despite statutory language declaring that an adopted child "shall be an heir at law and for the purpose of inheritance shall be regarded as a lineal descendant of its adopting parents."<sup>9</sup> And, on the opposite side of the continent, it was not until 1955 that legislative amendments made it inescapably clear to Califor-

7. See generally Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956). Adoption was not introduced in England until the Adoption of Children Act, 1926, 16 & 17 Geo. 5, ch. 29, but it has a long history in other legal systems including Roman law. See Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 333 (1922).

8. 153 Fla. 137, 13 So. 2d 904 (1943).

9. *Id.* at 142, 13 So. 2d at 907. Early attitudes are further suggested by *Schafer v. Eneu*, 54 Pa. 304, 306 (1867) (adopted children "are not the children of the

nia courts that adoptees are to take through as well as from their adoptive parents.<sup>10</sup>

Because additional dangers are perceived to be present, there has been a further lag in the recognition and development of adoptees' rights in the construction of private instruments. The so-called "stranger to the adoption" rule traditionally excluded, and frequently continues to exclude, adopted persons from participating in gifts to the classes into which they have been adopted, unless, in the language of the Restatement of Property, "the conveyor is the designated person" whose children are in question or unless "the conveyor at the time of the execution of the instrument . . . [knew] of the adoption."<sup>11</sup> Despite sociological data and present-day intestate succession policies reflecting a general acceptance of adoptees within the broadly defined adoptive family,<sup>12</sup> the stranger to the adoption doctrine survives in many states today.<sup>13</sup> Surprisingly few jurisdictions have enacted specific legislation eliminating this rule of construction.<sup>14</sup>

A simple example will illustrate the doctrine's application and the special concern that has made courts and legislatures hesitant to change the law to conform to policies implicit in their intestacy statutes. *W*'s will bequeaths her residuary estate in trust for her husband, *H*, for life, and provides that the remainder on *H*'s death is to be "distributed by right of representation to my then living descendants." *W*'s daughter survives both *W* and *H* and takes half of the remainder. *W*'s son survives *W* but predeceases *H*, leaving four children, three of whom were born to the son and his wife and one of whom was adopted by them after *W*'s death. In the absence of some special circumstances, the traditional stranger to the adoption rule would bar *W*'s adoptive grandchild from sharing in the remainder with *W*'s daughter and the three children born to *W*'s son and daughter-in-law.<sup>15</sup>

Some courts, recognizing that this result is likely to be contrary to what *W* would have wanted, have strained case by case to find indications of

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person by whom they have been adopted, and the Act of Assembly does not attempt the impossibility of making them such").

10. See Ch. 1478, § 1, 1955 Cal. Stats. 2690 (amending CAL. PROB. CODE § 257 (West 1956)). See generally tenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L.J. 261 (1955).

11. RESTATEMENT OF PROPERTY § 287 (1940).

12. See, e.g., M. KORNITZER, *CHILD ADOPTION IN THE MODERN WORLD* 150 (1952); Kennedy, *The Legal Effects of Adoption*, 33 CAN. B. REV. 751, 874-75 (1955); Thorson & Samuelson, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1104 (1978). See also New York Commission on Modernization, Simplification and Revision of the Law of Estates, Report No. 1.3B, at 221-22 (1962).

13. See, e.g., L. SIMES & A. SMITH, *supra* note 1, § 738.

14. *Id.*

15. See Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 978-82 (1965).

contrary intent in order to include the adopted grandchild.<sup>16</sup> This, together with an unpopular presumption, obviously serves to invite much of the litigation on this subject.

Why, then, do these courts or the legislatures in these states not replace outmoded constructional doctrine that they seemingly recognize to be contrary to the result the law ought to presume and to results now prescribed in the analogous area of intestate succession? It is obviously not because of a general belief that *W* would not want an adoptive grandchild to share in the portion of her estate that would have gone to her son had he survived, for there would be no reason on that ground to differentiate in general between testacy and intestacy. Instead, the answer apparently has to do with a special fear, applicable to future interests but not to intestacy, that a rule favoring adoptees will permit the deliberate use of adoptions—after a testator's death—to pass remainder interests to "outsiders" who have none of the actual or de facto family relationships that the testator had in mind in providing for his or her or another's issue or children. In light of the breadth of current adoption statutes,<sup>17</sup> and in light of occasional horror cases,<sup>18</sup> it is understandable that judges, legislators, and draftsmen have felt some concern about "conferring upon the designated parent [the] power, by adopting any person he may choose, in effect to appoint the subject matter of the conveyance to such a person."<sup>19</sup> An aspect of this concern is visible in the history of early New York legislation, which, from 1887<sup>20</sup> to 1964, sought to prevent "fraud" by adoptions "for the very purpose of cutting out a remainder"<sup>21</sup> that would otherwise go over to others.

In a number of jurisdictions, class gift legislation or judicial decisions

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16. *Id.* at 982-84. See, e.g., *Holter v. First Nat'l Bank & Trust Co.*, 135 Mont. 27, 336 P.2d 701 (1959).

17. See, e.g., *Adoption of Adult Anonymous*, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (Fam. Ct. 1981) (involving parties to a homosexual relationship). See also *Adoption of Adult Anonymous II*, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1982) (approving adoption of 43-year-old by 32-year-old).

18. Possibly the all-time shocker is *Bedinger v. Graybill's Estate*, 302 S.W.2d 594 (Ky. 1957), in which a life beneficiary adopted his wife and thereby enabled her to displace other claimants where the remainder was to the life beneficiary's "heirs at law" under an intestacy statute that made adopted children heirs. More recently, a 76-year-old widow adopted her 21-year-old neighbor, and the court found that this defeated her uncles' executory interests which were conditioned on her death without issue. *Evans v. McCoy*, 291 Md. 562, 436 A.2d 436 (1981).

19. 3 R. POWELL & P. ROHAN, *REAL PROPERTY* ¶ 358 (2d ed. 1968). See also *Bradford v. Johnson*, 237 N.C. 572, 580, 75 S.E.2d 632, 638 (1953); Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 901, 938 (1945) (noting "the apprehension that if adoption were accorded the same legal significance as lawful natural birth it might be employed for purposes of financial gain or as a spite device").

20. See Act of June 25, 1887, ch. 703, § 1, 1887 N.Y. Laws 909, 909.

21. *In re Walter's Estate*, 270 N.Y. 201, 206, 200 N.E. 786, 788 (1936).

(often influenced by local intestate succession policies) have overcome these concerns and have granted adoptees recognition as class members for purposes of will and trust dispositions.<sup>22</sup> Where this progress has been achieved, the result should not turn on differences in boilerplate or on probably fortuitous choice of language (e.g., "heirs of the body" or "children born" to someone) in the absence of evidence that the transferor had the question of adoption consciously in mind.<sup>23</sup> On the other hand, most of these rules reflect no particular concern for the special risks presented by the possibility of adoptions following the transferor's death.<sup>24</sup> Some statutes and decisions do, however, attempt to reconcile the competing interests in this area, and a few do so quite effectively.

A leading 1964 decision of the New Jersey Supreme Court, *In re Estate of Coe*,<sup>25</sup> recognized that, although the policies of the state's adoption statute "speak only of intestacy," these policies should "be accepted as a reflection of a common expectation and . . . as a guide to proper interpretation of a gift."<sup>26</sup> The opinion added: "We cannot believe it probable that strangers to the adoption would differentiate between the natural child and the adopted child of another . . . [but more likely would] accept the relationship established by the parent whether the bond be natural or by adoption." The fear that fraud is invited "by permitting a person to adopt someone solely to enable him to take under the will of another . . . can be dealt with upon equitable principles if the circumstances are truly compelling."<sup>27</sup> In fact, subsequent New Jersey decisions, including a 1977 Supreme Court decision in *In re Estate of Nicol*,<sup>28</sup> have excluded adult adoptees from the particular future interest class gifts in controversy on the

22. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 1-2.10 (McKinney 1981). See also *In re Estate of Heard*, 49 Cal. 2d 514, 518, 319 P.2d 637, 641 (1957) (public policy of state to give adopted child same status as biological child); *In re Trusts Created by Will of Patrick*, 259 Minn. 193, 196, 106 N.W.2d 888, 890 (1960) (not biological act but emotional and spiritual experience of living together creates family). This presumption has now become established in Missouri. See *Stifel v. Butcher*, 487 S.W.2d 24, 39 (Mo. 1972); MO. REV. STAT. § 472.010(2), (16) (1978 & Supp. 1982). See also Comment, *Eligibility of Adopted Children to Take by Intestate Descent and Under Class Gifts in Missouri*, 34 MO. L. REV. 68 (1969).

23. The Minnesota cases are particularly good in this respect; references like those in the text have not steered courts astray when the language was not found to have been used by one consciously thinking of adoption. See, e.g., *In re Trusts Created by Harrington*, 311 Minn. 403, 250 N.W.2d 163 (1977); see also *Estate of Sykes*, 477 Pa. 254, 383 A.2d 920 (1978). But there is reason for some concern about Missouri in this respect. See, e.g., *Stifel v. Butcher*, 487 S.W.2d 24, 38-39 (Mo. 1972).

24. See, e.g., *In re Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (adoption of adult person and her children).

25. 42 N.J. 485, 201 A.2d 571 (1964).

26. *Id.* at 490, 201 A.2d at 574.

27. *Id.* at 492, 201 A.2d at 575-76.

28. 152 N.J. Super. 308, 377 A.2d 1201 (1977).



basis of probable intent.<sup>29</sup>

Analogously, some statutes attempt to reconcile the objective of recognizing adoptees as full family members with concern over certain abuses of adoption. This is usually done by providing that, for purposes of construing class gifts, only persons adopted during minority are to be treated as if they were born to the adopting parents, unless the contrary is provided in the instrument.<sup>30</sup> A more recent Oregon statute may represent a better response to the problem than simply to distinguish between adult adoptions and the adoption of minors. It provides that, absent contrary intention, an adopted person is included in a class gift if adopted "as a minor or after having been a member of the household of the adoptive parent while a minor."<sup>31</sup>

Statutes and will or trust provisions that allow adoptees to participate in gifts to classes into which they have been adopted only if the adoption occurred prior to a specified age offer reasonably good means of handling this general type of adoption problem. The very virtues of simplicity and certainty they possess, however, are a source of some undesirable rigidity. Two examples, at opposite extremes of the spectrum, illustrate this deficiency. First, such a prescription would exclude a child reared from infancy by foster parents but for some reason not adopted by them until beyond the stated age. New Jersey's flexible doctrine would readily admit such an adopted person to class membership, as would the terms of the above-mentioned Oregon statute. Even that statute, however, shares the flaw of other arbitrary age provisions in that it, for example, expressly allows a childless individual to adopt the minor children of a best friend as a means of favoring that friend, who is too old to qualify personally as an adopted class member.<sup>32</sup>

## 2. Adoption "Out"

Most legislative and privately drawn solutions to construction questions involving adoptees also fail to deal with the second major category of adoption situations: persons adopted out of the family. Problems quite different from those discussed above are presented by situations in which one born or properly adopted into the particular class in question is later adopted by another parent.

Situations of this type occasionally arise when orphaned children are

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29. *Id.* at 319, 377 A.2d at 1208. See also *In re Estate of Griswold*, 140 N.J. Super. 35, 63, 354 A.2d 717, 732-33 (1976) (life beneficiary with no issue adopted second wife's adult child after settlor's death; adoptee not allowed to take remainder to life beneficiary's "children").

30. See IND. CODE ANN. § 29-1-6-1(d), (g)(2) (Burns Supp. 1983); 20 PA. CONS. STAT. ANN. § 6114(4) (Purdon Supp. 1982-1983); R.I. GEN. LAWS § 15-7-16 (1981).

31. OR. REV. STAT. § 112.195 (1981).

32. Cf. *In re Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (adoption of adult and her minor children).

adopted by a sibling of one of the deceased natural parents. This presents possibilities that range from a double share for the adoptees to having a single share divided among all of the adoptor's biological and adoptive children.<sup>33</sup>

A more common case is illustrated by the following: *H* bequeaths in trust for his wife *W* for life, remainder on her death "to my [*H*'s] then living issue, per stirpes." After the death of *H* but during the life of *W*, son *S* either dies or becomes divorced from his wife; the former Mrs. *S* thereafter remarries and her new husband, the stepfather, adopts the children who had been born to *S* and Mrs. *S*.<sup>34</sup>

Wills providing essentially that adoptees are to be treated "for all pur-

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33. Most generously, the adoptees might be allowed to take in both the natural and adoptive lines; least generously, they might take only in the adoptive line, sharing one portion with the natural children of the adoptive family. In between, they might take separately only in the natural line. A less neutral in-between result might be directed by a transferor—to have the original portions of the two lines aggregated and the total divided equally among all natural and adopted children of the enlarged family, treating all members of the family unit alike.

34. Adoption after *S*'s death should normally allow the adoptees to share in class gifts as *S*'s issue, at least if contact with *S*'s family continues. See, e.g., *In re Bissell's Estate*, 74 Misc. 2d 330, 342 N.Y.S.2d 718 (Sur. Ct. 1973). But words in statutes and documents may present problems. See text accompanying notes 35-36 *infra*. In the more widespread problem of adoption following divorce, the results of an adoptee's claims of class membership on the natural (*S*'s) side are understandably in conflict. Compare *In re Tracy*, 464 Pa. 300, 346 A.2d 750 (1975) (settlor remained in contact with grandchild), and *In re Estate of Zastrow*, 42 Wis. 2d 390, 166 N.W.2d 251 (1969) ("children of the body"), with *Commerce Trust Co. v. Duden*, 523 S.W.2d 97 (Mo. App., K.C. 1975) (instrument executed after adoption), noted in 41 MO. L. REV. 259 (1976), and *First Nat'l Bank v. Schwerin*, 54 Or. App. 460, 635 P.2d 388 (1981) (analogizing class gift situation to statutory intestacy rule precluding adoptee from inheriting through natural parent). Cf. *In re Estates of Donnelly*, 81 Wash. 2d 430, 502 P.2d 1163 (1973) (adoption by stepfather after natural father's death; adoptee not permitted to inherit from intestate natural grandparent). The Uniform Probate Code incorporates into its construction rules (§ 2-611) most of its intestacy rules in these matters, including § 2-109(1) which provides that "adoption of a child by the spouse of a natural parent" does not sever the "relationship between the child and either natural parent" for purposes of inheritance through, as well as by or from, a parent. UNIF. PROBATE CODE § 2-109(1) (1975) (emphasis added). See *id.* § 2-611.

Unlike the above situations, natural children given up for adoption in *infancy* rarely pose problems; they normally would not take as class members in the natural family. See *In re Estate of Russell*, 17 Cal. App. 3d 758, 95 Cal. Rptr. 88 (1971). Special situations, such as ongoing contact with the natural family, could well justify a contrary result. Cf. 20 PA. CONS. STAT. ANN. § 6114(4) (Purdon Supp. 1982-1983) (adoptee may take from natural relative if family relationship maintained). Unfortunately, the words of some statutes may create general doubt, even when none should exist, about results following an infant adoption.

On construction of a father's bequest to his "children," see *In re Estate of Dai-*

poses of this will as if they had been naturally born to the adopting parents," or statutes (including intestacy statutes, either used by analogy or incorporated into statutory rules of construction) employing language of similar import,<sup>35</sup> might lead to quite unsatisfactory results in these adoption out cases, at least if the language is applied literally. In the sibling adoption situation above, the words might be taken as requiring the share of a single child (the adoptor) to be divided among what began as two groups of grandchildren, regardless of how a court on its own might have thought the testator would react and regardless of whether the sibling's anticipation of such a result might inhibit adoption in such a situation. In the stepfather adoption case, a literal application would have the result of snatching the original grandchildren in question right out of the class of remainder beneficiaries.<sup>36</sup>

One body of comprehensive legislation may offer the adoptees broad protection in these types of construction situations.<sup>37</sup> Again, however, the statutory wording fails to reflect the diversity of the situations to be considered, including the common situation of a non-marital infant surrendered by a teenage mother for adoption at birth.<sup>38</sup>

Thus, adoptions out of a particular family line as well as adoptions in, with all of the varied forms and circumstances of each, must be considered by anyone attempting to articulate comprehensive rules governing the rights of adoptees. Initially, this challenge parallels the problems faced earlier in connection with intestacy statutes, most of which have finally now come to deal—explicitly if not always thoughtfully (especially on the natural side)—with questions of inheritance by, from, and through both the adoptive parents and the natural parents. The challenges presented by construction of class gifts, however, are aggravated by the necessity of dealing with events that occur after a transferor's death, inasmuch as the troublesome class gift cases usually involve future interests under instruments executed by transferors other than the adoptive or natural parents themselves. Suggestions concerning the handling of these matters will be made after the immediately ensuing material, which deals with other issues that should

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gle, 642 P.2d 527 (Colo. Ct. App. 1982) (children adopted by former wife's second husband allowed to share with children of testator's second marriage).

35. See, e.g., CAL. PROB. CODE § 257 (West 1956) (intestacy); IND. CODE ANN. § 29-1-6-1(d) (Burns Supp. 1983) (construction); R.I. GEN. LAWS § 15-7-16 (1981) (intestacy and construction).

36. See note 34 *supra*.

37. See N.Y. DOM. REL. LAW § 117 (McKinney 1977). *Id.* § 117(1) terminates an adoptee's inheritance rights "through his natural parents," but *id.* § 117(2) provides that § 117(1) "shall not affect the right of any child" to take under a "will . . . or . . . inter vivos instrument heretofore or hereafter executed by such natural parent or his or her kindred."

38. See, e.g., Accounting of Cook (*In re Best's Will*), 455 N.Y.S.2d 487 (Sur. Ct. 1982) (non-marital child adopted out as infant shares with later born marital child as "issue" under natural grandparent's testamentary trust).

also be covered in a comprehensive treatment of major definitional problems.

### B. *Persons Born Out of Wedlock*

Problems involving non-marital children, generally unadopted ones, arise in contexts almost as varied as those involving adoptees. The law's primary traditional line of distinction with respect to non-marital children has been between relationships on the maternal side and those on the paternal side, with the latter seeming to suggest the spectre of an illegitimate offspring's surprise appearance at the natural father's funeral.<sup>39</sup>

The most important litigation in this general area to date has involved intestacy. The major modern decisions have significantly, but without clarity, enhanced the child's rights on the paternal side, mainly through direct and indirect stimulus of equal protection concepts under the federal constitution. Most directly relevant are the United States Supreme Court's 1977 and 1978 decisions in *Trimble v. Gordon*,<sup>40</sup> striking down (5-4) an Illinois intestacy statute,<sup>41</sup> and *Lalli v. Lalli*,<sup>42</sup> upholding (5-4) the quite restrictive 1965 version<sup>43</sup> of a New York intestacy statute that has subsequently been

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39. Or at a probate or trust proceeding. Surprise can even occur in the maternal family if an adoption out in infancy does not sever the ties. See *Accounting of Cook (In re Best's Will)*, 455 N.Y.S.2d 487 (Sur. Ct. 1982).

40. 430 U.S. 762 (1977).

41. The statute required not only acknowledgement by the father but also marriage of the parents for the child to inherit from the father. See ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1973) (repealed 1976). Without holding legislative classifications based on illegitimacy strictly suspect, the Court required that they be substantially related to permissible state interests. Justice Powell, writing for the Court, rejected encouragement of legitimate family relationships as such an interest but approved of the aim of maintaining an efficient and accurate intestate succession system, conceding the existence of difficulties in proving paternity and dangers of spurious claims. 430 U.S. at 769-72. The statute, however, excluded "significant categories of illegitimate children" whose rights could be "recognized without jeopardizing the orderly settlement of estates or the dependability of titles." *Id.* at 771. To be valid, it would have to be more "carefully tuned to alternative considerations." *Id.* at 772.

42. 439 U.S. 259 (1978).

43. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1965) (amended 1979). The statute then allowed inheritance from the mother and her kindred, as statutes traditionally have, but not from the father or his kindred unless a court "has, during the lifetime of the father, made an order of filiation, declaring paternity." *Id.* The state court had excluded evidence of the non-marital son's relationship to and with the decedent, including the latter's notarized document consenting to the marriage of "my son" and the affidavits of others stating that the decedent had often and openly acknowledged the son. The Supreme Court upheld the statute as sufficiently related to the permissible purpose of "providing for the just and orderly disposition of property at death," reducing the frequency of "fraudulent assertions of paternity" and assuring fair opportunity to defend against "unjust ac-

liberalized.<sup>44</sup>

State courts, too, have played a role. One of the more interesting recent cases is *Lowell v. Kowalski*,<sup>45</sup> a 1980 Massachusetts decision which invalidated a statute allowing inheritance on the father's side only upon adjudication of paternity during his life or upon the parents' marriage.<sup>46</sup> It is difficult to predict how influential this decision may be elsewhere or how generally relevant it may be for present purposes because this case, too, involved intestate succession and because the court's conclusion that the sex-based classification was subject to strict scrutiny was based on the state's Equal Rights Amendment.

Strikingly lacking in recent decisions is any recognition that a state's interest in effectuating a decedent's probable intention is a permissible justification for state-drawn distinctions in this area.<sup>47</sup> Earlier recognition of that interest, however, may be found in a 1970 Minnesota decision, *In re Estate of Pakarinen*.<sup>48</sup> Even with the present uncertainties in constitutional doctrine, there should be no concern over the propriety of New York's post-*Lalli*, intent-related extensions of the non-marital child's inheritance right to situations in which the father has duly executed and filed "an instrument acknowledging paternity" (1979 amendment)<sup>49</sup> or in which paternity is "established by clear and convincing evidence and the father . . . has openly and notoriously acknowledged the child as his own" (1981 amendment).<sup>50</sup> Other important legislation dealing with the intestate succession rights of

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cusations in paternity claims." 439 U.S. at 268-71. The statute was the product of a balanced study by individuals "experienced in the practical problems of estate administration." *Id.* at 269. Justice Blackmun's concurrence found the distinctions between *Lalli* and *Trimble* unconvincing, *id.* at 277 (Blackmun, J., concurring), and a four-justice dissent properly noted the irony that existed because probabilities of intention would most likely favor the very non-maritals the New York statute excluded, the requirement of a court order making "it virtually impossible for acknowledged and freely supported illegitimate children to inherit intestate." *Id.* at 278 (Brennan, J., dissenting).

44. See text accompanying notes 49-50 *infra*. It is possible that the liberalization was in response to the irony pointed out in the *Lalli* dissent. See note 43 *supra*.

45. 380 Mass. 663, 405 N.E.2d 135 (1980).

46. *Id.* at 670, 405 N.E.2d at 141.

47. An argument that the Illinois intestacy statute could be justified as a reflection of probable intention was not considered in *Trimble* on procedural grounds, the issue not having been raised and examined in the state court proceedings. For whatever value it now has, a negative view about a presumed intent argument is expressed in a footnote in *Trimble*. 430 U.S. at 775 n.16. Such an argument would hardly have been relevant to the New York statute's provisions at the time of the *Lalli* decision. See note 43 *supra*. See also note 52 *infra*.

48. 287 Minn. 330, 336-37, 178 N.W.2d 714, 717-18 (1970).

49. Ch. 139, § 1, 1979 N.Y. Laws (codified at N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1981)).

50. Ch. 75, §§ 1, 2, 1981 N.Y. Laws (codified at N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1981)).

non-marital children has resulted from the adoption of, or has been based on, the Uniform Probate Code and the Uniform Parentage Act.<sup>51</sup>

Much less certainty, experimentation, and development is reflected in decisions and legislation on the construction of class terminology, including the constitutionality of statutory or judicially established presumptions of intention, in private instruments.<sup>52</sup> The Uniform Probate Code, however, does contain a provision that class gifts and other terms of relationship be construed "in accordance with rules for determining relationships for purposes of intestate succession," except that "a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father."<sup>53</sup> Recent legislative trends in intestate succession may prove influential in the class gift area. Again, of course, it must be remembered that the problems of construction differ and complexities are accentuated because of the increased variety of situations involved, and especially because future interests raise problems—often delayed problems—about the offspring of others, not merely of the transferor.

The result of all this is to increase the importance of informed, sensitive attention to these matters in private planning. It is not particularly difficult for testators to deal clearly and as they wish with the possible rights of their own illegitimate offspring,<sup>54</sup> at least to the extent the elements of surprise

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51. See UNIF. PROBATE CODE § 2-109 (1975); UNIF. PARENTAGE ACT § 4 (1973).

52. Potentially the most significant case in this area of construction held a statutory presumption unconstitutional when the canon of construction flatly allowed, absent contrary intent, a non-marital child to hold class membership through the mother but not through the father. *Estate of Dulles*, 494 Pa. 180, 431 A.2d 208 (1981) (dealing with 20 PA. CONS. STAT. ANN. § 6114(5) (Purdon 1975) (amended 1978)). The case relied heavily on *Trimble* and contains only a superficial note denying that *Lalli* might be more permissive. 494 Pa. at 190 n.5, 431 A.2d at 213 n.5. The particular canon then before the Pennsylvania court would not have passed even a more lenient test, but of more general significance is the opinion's strongly negative general viewpoint (based on the *Trimble* footnote discussed in note 47 *supra*) concerning whether a permissible purpose could be based on trying to give effect to a probable or typical, rather than a universal, intention of transferors.

Much of the non-constitutional case law and discussion available either focuses on the wills of the parents themselves or reflects what may be earlier judicial assessments of transferor intentions. See generally RESTATEMENT OF PROPERTY § 286 (1940); 3 R. POWELL & P. ROHAN, REAL PROPERTY ¶ 358 (rev. ed. 1981). For four common situations in which there is likely to be a finding of intent contrary to a rule that would presumptively exclude illegitimates, see RESTATEMENT OF PROPERTY § 286(2) comments d-h (1940). See also Comment, *Rights of Illegitimate Children in Missouri*, 40 MO. L. REV. 631, 649-50 (1975).

53. UNIF. PROBATE CODE § 2-611 (1975).

54. The handling of this matter is not complicated by firm legal restrictions; forced share protection (outside Louisiana) does not extend even to legitimate minor children. See, e.g., *McKamey v. Watkins*, 257 Ind. 195, 273 N.E.2d 542 (1971). But there may be problems of client candor, or need for delicacy of expression,

and pretermission are taken care of. The first of these elements is, of course, not likely to be a problem in situations involving maternity, nor is it a problem in instances of paternity adjudicated during the father's lifetime. The second is also not likely to be a source of difficulty as long as the state's pretermitted heir statute, like most, at least under ordinary circumstances,<sup>55</sup> protects only after-born children. But there are some examples of the startlingly strict application of statutes that protect pre-existing descendants, and these may cause problems in various ways.<sup>56</sup>

Both in drafting and in judicial or legislative legal development, the most significant challenge in the non-marital issue area has to do with what might be called, by analogy to the troublesome adoption problems, "stranger to the conception" situations. With respect to future interest provisions and the treatment of non-marital descendants of a transferor's children or others, it is important to remain alert to the diversity of illegitimacies and of the situations to be considered. We should also be careful not to assume that all illegitimates are family outsiders, even on the paternal side. Thus, the common, seemingly casual injection of the word "lawful" into provisions that express or define class gift terms is likely to be inadequate or even counterproductive.<sup>57</sup> This is because, in addition to situations involving traditional images of disputed paternity or surprise presented by non-marital issue who are not likely to be a transferor's intended beneficiaries, planning must be sensitive to situations in which non-marital issue are likely to be intended beneficiaries. That is, planning and drafting should take ac-

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conceivably even in the maternal family. Cf. *Accounting of Cook (In re Best's Will)*, 455 N.Y.S.2d 487 (Sur. Ct. 1982) (while testatrix "may have been reluctant to acknowledge" non-marital issue, exclusion "could easily have been accomplished" by a bequest "to 'issue of a lawful marriage' or similar language which would not acknowledge or suggest that there was in fact a non-marital child").

Where the natural parent's will was unclear, a presumption that only legitimates were included was found rebuttable by the "family circle" concept in *In re Trust of Parsons*, 56 Wis. 2d 613, 203 N.W.2d 40 (1973).

55. See UNIF. PROBATE CODE § 2-302 (1975) (protecting only afterborn children or ones the testator "believes . . . to be dead"); Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 892-97 (1960).

56. See, e.g., *Estate of Gardner*, 21 Cal. 3d 620, 580 P.2d 684, 147 Cal. Rptr. 184 (1978). In that same jurisdiction, an attempted concealment of an existing child and some delicacy of wording may have been the source of the earlier difficulty with the pretermitted heir statute in *In re Estate of Torregano*, 54 Cal. 2d 234, 352 P.2d 505, 5 Cal. Rptr. 137 (1960).

57. Not only is this language often used routinely in will and trust boilerplate, but it also appears in statutes. For example, MO. REV. STAT. § 472.010(16) (Supp. 1982) still provides that "[i]ssue of a person . . . includes all lawful lineal descendants." This was not changed at the time of an amendment in 1980 which brought a "child born out of wedlock" within the definition of "child." See 1980 Mo. Laws 446, 449 (amending MO. REV. STAT. § 472.010(2) (1978)). Also compare IND. CODE ANN. § 29-1-1-3 (Burns Supp. 1983) (defining "child" generally) with *id.* § 29-1-6-1(e) (defining "child" for purposes of construing wills).

count of the future possibility and even the present existence of technically illegitimate issue (e.g., a client's grandchildren) who are the product of defective marriages or of deliberately non-formalized relationships of couples living together, particularly in stable, long-term family arrangements.<sup>58</sup> It is one thing for a client to disapprove of a son's or daughter's lifestyle in the latter of these situations and quite another to reject the grandchildren the unsolemnized relationship brings into the family. Similarly, after a settlor has died but before a trust remainder is distributed, there are quite varied circumstances under which a child born out of wedlock in the settlor's family might, without adoption, be raised and fully accepted as a member of the broad family of descendants for whom the settlor has provided.<sup>59</sup>

One would hope, incidentally, that a few ounces of common sense would keep this category of problems from expanding to include those children born through the new (or old) biology to married couples with the consent of both.<sup>60</sup>

### C. *Suggestions for Handling These Problems*

In drafting wills and trusts, and in many efforts to develop legislation on the subject of non-marital issue, it may be constitutionally safer and more in accord with the probable intentions of transferors to abolish or diminish arbitrary sex-based distinctions between the maternal and paternal lines, and other distinctions relying on formal establishment or declaration of natural or adoptive parentage, in favor of heavier reliance upon actual behavior patterns, parent-child treatment, and informal family recognition and acceptance.<sup>61</sup> This approach has the advantage of not singling out the child born out of wedlock, because these same guidelines also

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58. For an illustrative provision calling for class terminology to include children and issue of children "born to persons . . . after the performance of a marriage ceremony between them," even if the marriage is invalid, see A. CASNER, ESTATE PLANNING 291 (rev. ed. 1982).

59. See, e.g., *In re Hoffman's Will*, 53 A.D.2d 55, 385 N.Y.S.2d 49 (1976). Such situations can range from cases of unplanned non-marital children reared by a natural parent (usually but not necessarily the mother), or by the parents or sibling of a natural parent, to cases of children deliberately conceived by unmarried women who wish to be mothers but not wives. See note 6 *supra*.

60. See UNIF. PARENTAGE ACT § 5 (1973).

61. An unarticulated version of this idea may actually be an implicit part of the underlying rationale for the traditional distinction, albeit clumsy and objectionably arbitrary (see the constitutional problem in *Estate of Dulles*, 494 Pa. 180, 431 A.2d 208 (1981)), that treats unadopted illegitimates differently on the maternal and paternal sides. A "family circle" concept would seem preferable. See, e.g., *In re Trust of Parsons*, 56 Wis. 2d 613, 203 N.W.2d 40 (1973). For adoption out situations, a Pennsylvania statute represents, even if too narrowly for most future interest situations, a significant attempt to focus on actual family relationships; the provision excepts from the rule that an adoptee "shall not be considered . . . issue of his natural parents" those situations involving interests in "the estate of a natural kin,



appear more suitable than technical or arbitrary lines of distinction in dealing with problems involving the rights of adoptees. Then, in formulating legal or planning solutions in these constructional areas, it is essential to keep in mind that the troublesome class gift situations, for which new and better solutions are particularly needed, primarily involve instruments of transfer by strangers to the adoption or conception, as the case may be.

Thus, wills and trusts might provide that class gift terms used in the instrument include persons adopted into the class if the adopted person lived for a significant period during minority as a member of the household of the adoptive parent, and that such terms also include persons born into the class out of wedlock if the person in question resided for a significant period during minority as a member of the household of the natural parent in question or the household of a parent or sibling of that natural parent.<sup>62</sup> To deal with adoptions out, further provisions might direct something to the effect that, if a class member (including a qualified adoptive or non-marital class member) is later adopted by another person either within or outside the family, that adoption is to be disregarded for purposes of the instrument.<sup>63</sup> In addition, it may be desirable to grant a disinterested trustee or other neutral person reasonable discretionary authority to determine whether a person has lived for a "significant period" during minority as a member of the household of an adoptive parent or natural relative, and

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other than the natural parent, who has maintained a family relationship with the adopted person." 20 PA. CONS. STAT. ANN. § 6114(4) (Purdon Supp. 1982-1983).

62. What might provide a sufficient basis, in policy and probable intent, for allowing a child to share in a natural parent's own estate in the absence of an indication of contrary intent might well be insufficient to provide the family bond on the basis of which to imply that the child is to share in wealth transfers within that natural family. Thus, mere acknowledgement, provision of support, and open expressions of affection by the natural parent might well be insufficient for these broader purposes without the more extensive commitment and family ties that would normally follow from residing in a household within that family. Maybe both clarification and differentiation of situations could improve the reference to a father who "receives the child into his home and openly holds out the child as his natural child" in statutes like CAL. CIV. CODE § 7004(a)(4) (West Supp. 1983). See also UNIF. PARENTAGE ACT § 4 (1973). Compare the intestate succession rights of a non-marital child if the father "openly and notoriously acknowledged the child as his own" in N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1981). A comparable approach for construction purposes is provided in UNIF. PROBATE CODE § 2-611 (1975).

63. For adoptions out *within* the family, this provides neutrality for a possible adoption decision, and it takes care of the problem, when adoption does occur, of double shares or an overextended single share (the most and least generous extremes described in note 33 *supra*). For adoption out by persons *outside* the family, this result is analogous to but, this author believes, desirably broader than UNIF. PROBATE CODE § 2-109 (1975), which provides that "adoption of a child *by the spouse of a natural parent* has no effect on the relationship between the child and either natural parent." (Emphasis added).

in assessing significance to take account of the degree of de facto relationships and acceptance established within the family.

Judicial opinions and even legislation might wisely consider an analogous approach in the handling of constructional questions concerning the rights of adopted and non-marital children, looking flexibly to the actual relationships within the family circle. Unfortunately, in the latter area current development must take place in an inhibiting atmosphere of constitutional uncertainty. Obviously, the suggested flexibility is more familiar to us as a normal aspect of the evolution of common law doctrine than it is as a feature of legislation. Even in proceeding on an essentially case-by-case basis through the courts, successful development of doctrine to some extent assumes a proper start, which is best based on adequate awareness—even if only in general terms—of the overall nature of the relevant concerns in this fairly broad subject area.<sup>64</sup> And if discretion is sometimes the better part of valor, it is neither inappropriate nor unique<sup>65</sup> for legislatures to set somewhat vague guidelines, like those suggested for private planning. These guidelines would mainly point courts, or liberate them to move, in the right direction. This is especially important if a fresh start or an adjustment of course is required in the particular jurisdiction.

The modest amount of indefiniteness that is a conscious element of this recommended approach to privately defining or legally interpreting class gift terminology is likely to have important advantages over the greater apparent certainty of other approaches. This will especially be so when the hard cases arise. In short, for the inevitable situations that cannot be specifically contemplated, we are likely to be better off allowing common sense to operate within somewhat vague but appropriate guidelines than to insist on a specificity that may quite literally call for the wrong result.<sup>66</sup>

Before concluding this discussion, it is appropriate at least to mention two related matters to which some thought and attention should be given in the future: the possible inclusion of some stepchildren and foster children in classes that refer to someone's issue or children. Might it be worth considering legislation or will and trust provisions to open slightly, under limited circumstances, the door that has generally been so tightly closed to these

64. In the adoption *in* area, a good example is the development of New Jersey law from a proper start in *In re Estate of Coe*, 42 N.J. 485, 201 A.2d 571 (1964), through the discretionary handling of *In re Estate of Nicol*, 152 N.J. Super. 308, 377 A.2d 1201 (1977). See notes 25-28 and accompanying text *supra*.

65. Compare CAL. PROB. CODE § 201.8 (West 1956) (deliberate vagueness in dealing with so-called fraud on spouse's share problem) with UNIF. PROBATE CODE §§ 2-201 to -207 (1975) (provisions set forth with great specificity).

66. Note, for example, the concern expressed throughout this Article over the dangers of literal application of language to circumstances apparently not contemplated: in text accompanying notes 34-38 *supra*, dealing with adoption; in text accompanying notes 57-58 *supra*, dealing with illegitimates; in text accompanying notes 90-91 *supra*, dealing with per capita/per stirpes problems; and in text accompanying notes 152-53 *infra*, dealing with a survivorship requirement.

individuals.<sup>67</sup> Wide variations in the degree of attachment between the immediate parties and within the broader family require caution, but stepchildren or foster children might be treated as children and descendants for class gift purposes if all of three types of requirements are met: an essentially parent-child relationship beginning during the child's minority; a continuation of the parties' close personal relationship to the date in question or throughout their joint lifetimes; and a situation in which adoption apparently did not occur because of a technical or legal obstacle rather than intrinsic limitations in the personal relationship and commitments.

### III. DISTRIBUTION AMONG ISSUE: PER CAPITA/PER STIRPES PROBLEMS

#### A. *Do Descendants Take in Per Capita or Per Stirpes Shares?*

An early class gift doctrine in England presumed that issue—all of the issue at the time of distribution—were to take per capita and not per stirpes (i.e., not "by the stocks").<sup>68</sup> That English common law rule is occasionally troublesome in this country even in modern times,<sup>69</sup> and, as we shall see, the strange history of these matters in New York is particularly colorful and revealing.

Essentially, the strict per capita rule called for all living descendants, regardless of degree or of competition with living ancestors, to take equal shares of the fund to be distributed. Thus, a per capita distribution to *A*'s issue would be made in sixteen equal shares if *A* is then survived by two of her three children, her eight grandchildren, and six great-grandchildren. Where this antiquated rule applies, the transferor's more probable wish to have distribution made per stirpes (i.e., one-third to each living child and the other third to be divided among the deceased child's issue) would be

67. See generally 2 L. SIMES & A. SMITH, *supra* note 1, § 724. Exceptional cases can be found based on peculiar dispositions or word usage. See, e.g., *In re Estate of Gehl v. Reingruber*, 30 Wis. 2d 206, 159 N.W.2d 72 (1968).

68. See, e.g., *Carrick v. Carrick*, [1918] 2 Ch. 196; *Davenport v. Hanbury*, 30 Eng. Rep. 999 (Ch. 1796). It was suspected, as early as 1797, that "in applying . . . [the rule] I am not acting according to the intention." *Freeman v. Parsley*, 30 Eng. Rep. 1085, 1086 (Ch. 1797).

69. See, e.g., RESTATEMENT OF PROPERTY—CALIFORNIA ANNOTATIONS § 303 (1940) (comment suggesting English common law rule may have been revived when statutory per stirpes presumption was dropped as earlier statutes were allocated between civil and probate codes). For illustration of a strange result, see *Stickel v. Douglass*, 7 N.J. 274, 81 A.2d 362 (1951). Cf. *In re Estate of Moses*, 58 N.J. Super. 67, 155 A.2d 273 (1959) (future interest created before 1952 legislation still subject to common law per capita presumption but presumption found rebutted). In *Mercantile Trust Co. v. Brown*, 468 S.W.2d 8 (Mo. 1971), it was argued unsuccessfully that the English rule controlled the meaning of a 1913 will. Now cf. MO. REV. STAT. § 472.010(16) (Supp. 1982) (living descendants of living descendants do not take as "issue").

fulfilled only if that intention is expressed or if other evidence is sufficient to overcome the per capita presumption.

The hallmarks of a patently unsound rule of construction are floods of litigation, unpredictable results, and judicial declarations that the rule "yields to a faint glimpse of contrary intention." This description is virtually a capsule summary of New York's experience under the per capita rule through (and, to a more limited extent, after) the first two decades of this century.<sup>70</sup> At about that time a unanimous appellate division, too candid to find anything "in the context of this will upon which to predicate an intention to give to the word 'issue' any other meaning than that . . . fixed upon it" by New York precedents,<sup>71</sup> ordered the per capita rule applied to the facts before it while pleading for the court of appeals to overrule its prior decisions.<sup>72</sup> But then, in *Petry v. Langan*,<sup>73</sup> New York's highest court simply affirmed the prior decision without opinion, leaving the correction of prior judicial error to the legislature,<sup>74</sup> which dutifully accepted the assignment. Decedent Estate Law section 47a, now section 2-1.2 of the New York Estates, Powers & Trusts Law, was enacted in 1921 and declared the per stirpes presumption to be the law of New York.<sup>75</sup>

This prospective change in the law ironically has left the courts (as well as many subsequent litigants) with the burdens of the flimsy old per capita presumption. Until pre-1921 future interests are carried out, the earlier instruments will continue to cause litigation.<sup>76</sup> At the same time, the more

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70. "Very faint glimpse" and "slight indication" language is found in most cases to which the rule applies. See, e.g., *In re Farmers' Loan & Trust Co.*, 213 N.Y. 168, 174, 177, 107 N.E. 340, 342, 343 (1914). Earlier, the court of appeals in *Soper v. Brown*, 136 N.Y. 244, 250-51, 32 N.E. 768, 770 (1892), had recognized that it "might well be doubted whether a testator actually contemplated that the children of a living parent would take an equal interest with the parent under the word 'issue,' or that the issue of a deceased child should not take by representation the share of its parent." Some cases even refused to distribute per capita among children and grandchildren when the instrument expressly called for distribution to issue "equally" or "in equal portions." See, e.g., *In re Durant's Will*, 231 N.Y. 41, 131 N.E. 562 (1921); *In re Union Trust Co.*, 170 A.D. 176, 156 N.Y.S. 32 (1915), *modified*, 219 N.Y. 537, 114 N.E. 1048 (1916). In the *Union Trust* case, the court stated that the per capita rule "has resulted in a distribution of estates . . . contrary to the testator's intention . . . [and in] great injustice among a testator's descendants." 170 A.D. at 183, 156 N.Y.S. at 37.

71. *Petry v. Petry*, 186 A.D. 738, 740, 175 N.Y.S. 30, 31 (1919).

72. *Id.* at 747, 175 N.Y.S. at 36-37.

73. 227 N.Y. 621, 125 N.E. 924 (1919).

74. *Id.* at 621, 125 N.E. at 924.

75. Ch. 379, § 47a, 1921 N.Y. Laws 1189, stated that issue take "if in unequal degree, *per stirpes*, unless a contrary intent is expressed in the will." See N.Y. EST. POWERS & TRUSTS LAW § 2-1.2 (McKinney 1981).

76. The overwhelming majority find the required "faint glimpse" to overcome the presumption, but the results are varied. Compare *In re Good's Will*, 304 N.Y.

realistic per stirpes rule now peacefully governs post-1921 dispositions<sup>77</sup>—except that human perversity has been able to provide divergent authority on the question of whether the statutory rule for “issue” also applies to its synonym “descendants.”<sup>78</sup>

Because of concern over continuing uncertainties and special problem situations, forms and commentary generally recommend that the words “issue” and “descendants” be accompanied by some reference to their taking per stirpes or by right of representation.<sup>79</sup> As we shall see, however, even these expressions are not wholly unambiguous, and further elaboration may therefore be needed.<sup>80</sup>

### B. *What Does “Per Stirpes” or “Representation” Mean?*

When it is expressly provided by instrument or law that issue are to take per stirpes or by right of representation, there is no difficulty in determining the manner in which distribution is to be made under most circumstances. As long as at least one member of each generation of descendants is living, there is no uncertainty about the generation that is to serve as the “stock” generation—that is, in determining the level at which the process of representation is to commence.<sup>81</sup> As soon as one generation is wholly re-

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110, 106 N.E.2d 36, 123 N.Y.S.2d 123 (1952), with *City Bank Farmers Trust Co. v. Massimo*, 88 N.Y.S.2d 308 (Sup. Ct. 1949).

77. Confusing additional language has required construction in a few cases. See, e.g., *In re Carpenter's Estate*, 33 Misc. 2d 444, 224 N.Y.S.2d 289 (Sur. Ct. 1961).

78. The proper answer was obvious to the court and the per stirpes rule was applied in *In re Schoellkopf*, 21 Misc. 2d 564, 197 N.Y.S.2d 833 (Sur. Ct. 1960), but not in *In re Gardiner's Will*, 20 Misc. 2d 772, 191 N.Y.S.2d 520 (Sur. Ct. 1959). On the excesses of narrow construction of statutes in derogation of common law, see Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908) (“The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which . . . it is . . . committed.”).

79. See, e.g., CALIFORNIA WILL DRAFTING PRACTICE § 9.65 (Calif. Continuing Education of Bar 1982) (“to my then-living descendants by right of representation”); D. WESTFALL, ESTATE PLANNING—DOCUMENTARY SUPPLEMENT 98 (2d ed. 1982) (“issue who survive him or her, *per stirpes*”).

80. A. CASNER, *supra* note 58, at 293-95, directs that distribution per stirpes be made by reference to the intestacy law of a selected state, with certain further specifications. This approach is also taken for some forms in D. WESTFALL, *supra* note 79, at 58-59, 80-81. Care must be exercised in referring to a state's intestacy law. The rules in a particular state may not prescribe what the client would want or they may be unclear, especially when called upon to apply to a delayed distribution in circumstances not common in intestate situations. See text accompanying notes 87-89 *infra*.

81. For example, if A is survived by one child and two grandchildren who are the children of A's deceased child, a distribution to A's issue per stirpes (or by representation) clearly calls for the child to take half and the grandchildren to divide the other half, one quarter each.

moved, however, uncertainties arise.

A simple example will illustrate the issue in the latter situation. Assume that *X* left his residuary estate in trust until the death of the survivor of his two children, *S* and *D*, with the remainder then to be distributed to his (*X*'s) issue. Assume further that the will or a local statute employs a version of commonly used statutory language (here, a combination of two New York provisions) stating that when property is to be distributed to issue,

such issue, if in equal degree of consanguinity to their common ancestor, take per capita; but if the issue are of unequal degree, they take per stirpes, unless a contrary intention is expressed. A distribution is per stirpes when it is made to persons who take as issue, in equal portions, the share which their deceased ancestor would have taken if living.<sup>82</sup>

If *X*'s three grandchildren (*S*'s child and *D*'s two children) were all alive when the trust terminated, they would clearly take a third of the trust estate apiece under this language.<sup>83</sup> But let us instead assume that one of *D*'s children is then deceased with children living. Would the trust estate now be distributed half to one grandchild (*S*'s child), a quarter to the other grandchild (*D*'s living child), and a quarter to the children of the deceased grandchild (i.e., the offspring of *D*'s deceased child)? Or are there still three primary shares, with the grandchildren serving as the stock generation and only the great-grandchildren taking by right of representation?

The latter interpretation seems more appropriate to a scheme that basically calls for equal treatment of grandchildren when all children are dead, as quite clearly the above wording does at the outset, and as seems now to be the generally preferred pattern for intestate succession.<sup>84</sup> Yet that same interpretation applied to the rest of the above-quoted language would treat it as if it directed (as literally it does not): (a) that the nearest generation of living claimants (here, the grandchildren) take per capita not only if all issue are of equal degree but even if they are not; and (b) that only those more remote, instead of all issue, take by right of representation, or by the stocks.

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82. See N.Y. EST. POWERS & TRUSTS LAW §§ 1-2.14, 2-1.2 (McKinney 1981) (language quoted in text combines above provisions).

83. If the applicable language were less clear, one of the three grandchildren (*S*'s child) might take half and the others (*D*'s two children) a quarter each, by representation. This controversy has a long ancestry and sometimes inquires into English interpretation of the Statute of Distribution, 1670, 22 & 23 Car. 2, ch. 10, and even Roman law concepts. Compare *In re Ross's Trusts*, 13 L.R.-Eq. 286 (1871), with *In re Martin's Estate*, 96 Vt. 455, 120 A. 862 (1923).

84. See, e.g., UNIF. PROBATE CODE § 2-103 (1975); MODEL PROBATE CODE § 22 (1946). The point may be put too strongly, but in *Old Colony Trust Co. v. Lothrop*, 276 Mass. 496, 500, 177 N.E. 675, 676 (1931), the court stated that "[p]er capita distribution among issue of equal degree when there are no children . . . expresses the natural impulse of mankind."

An interesting pair of decisions struggled to different conclusions with a couple of intestacy statutes, both of which read essentially like the combination of New York constructional provisions used in the foregoing example. The often-cited Massachusetts case of *Balch v. Stone*<sup>85</sup> adopted the second result mentioned above, under which the grandchildren are the stock generation and only the great-grandchildren take by right of representation.<sup>86</sup> The court in the other leading case, California's *Maud v. Catherwood*,<sup>87</sup> felt compelled by a literal reading to accept the first interpretation, under which, when all children are dead, even the living grandchildren take by right of representation when some grandchildren are dead leaving issue as of the time distribution is to be made.<sup>88</sup> In *Maud*, the court was forced to determine the intestacy statute's application to such a situation because it had been incorporated into the remainder provisions of an inter vivos trust established by S. Clinton Hastings, once Chief Justice of California, and subsequently the founder of the University of California's Hastings College of Law in San Francisco.<sup>89</sup>

In addition to the problem raised by the wording of the clause or statute in the above example, consider the effect of a simple, quite typical will provision directing distribution to issue per stirpes or by right of representation and assume that the living issue consist solely of three grandchildren, two by one deceased child and one by another. If the words are taken literally, this clause would direct that these grandchildren are to take per stirpes, even despite a modern statutory canon or judicially established presumption (probably based on the typical modern intestacy rule) that issue who are all of equal degree take per capita. Is representation of the children by the grandchildren really what the particular client desired in this situation? Is it desired by all clients of lawyers who routinely use such language in their will and trust forms? Should the form, or at least an alternative form,<sup>90</sup> be designed to provide, in effect, that the nearest generation of living distributees is to be the stock generation, i.e., the first generation at which the fund is to be divided into equal shares, with representation to take place thereafter? There are also other drafting and legislative possibilities that might be considered.<sup>91</sup>

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85. 149 Mass. 39, 20 N.E. 322 (1889).

86. *Id.* at 42, 20 N.E. at 324. See also *Healey v. Cole*, 95 Me. 272, 49 A. 1065 (1901).

87. 67 Cal. App. 2d 636, 155 P.2d 111 (1945), noted in 33 CALIF. L. REV. 324 (1945).

88. 67 Cal. App. 2d at 642, 155 P.2d at 114.

89. Where Professor Fratcher, to whom this issue is dedicated, taught as a visiting professor during the fall semester, 1976.

90. See note 92 *infra*. See also note 80 and authorities cited therein *supra*.

91. See, e.g., N.C. GEN. STAT. §§ 29-15, -16 (1966); Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U.L. REV. 626 (1971) (advocating system of "per capita at each generation"). See also UNIF. PROBATE CODE § 2-103 comment (1975).

At least until these matters become generally settled in this country by legislation or decision, prudent drafting would seem to require that instruments contain a provision not only declaring that issue or descendants take by representation or per stirpes, but also precisely defining whichever of these latter terms one prefers to use. An elaborate and precise definition that, with modest adaptation for the class gift situations, can serve as a model is provided in the Uniform Probate Code.<sup>92</sup> It would probably be adequate for instruments (or statutes) merely to provide, as some rather abbreviated intestacy statutes do, that, unless otherwise provided, if issue are of equal degree they take in equal shares, and if not then those more remote take by right of representation.<sup>93</sup> Probably the most appropriate legislative or judicial solution for construction situations is that the shares of issue are presumptively to follow the pattern of distribution to issue called for by local laws of intestate succession.<sup>94</sup> As we have seen, these tend increasingly to look to the nearest generation of living claimants as the stock generation and thus to favor equal treatment of grandchildren if all children are deceased.

### C. *An Unexplored Problem: Discretionary Trust Distributions to Issue*

Assume that, pursuant to an increasingly common type of estate plan,<sup>95</sup> the will of client *C* is to establish a "bypass" or "credit shelter" trust

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92. UNIF. PROBATE CODE § 2-106 (1975). That definition is designed for intestacy situations, but a flexible class gift adaptation might read:

Where issue or descendants are to take "by right of representation" or "per stirpes," or where the manner of distribution to such a class is not specified, the property is to be divided into as many equal shares as there are then living members of the nearest degree of living descendants and deceased members of that same degree who leave descendants then living; and each living member of that degree shall receive one share, and the share of each deceased member of that degree shall be divided among his or her descendants in the same manner.

93. See MODEL PROBATE CODE § 22(b)(1) (1946). The same general wording was later used in UNIF. PROBATE CODE § 2-103(1) (1975).

94. Intestacy principles should serve at least as general policy guides to courts in construction. See, e.g., *Mercantile Trust Co. v. Brown*, 468 S.W.2d 8, 13 (Mo. 1971). In many matters other than these share questions, however, it may be unwise for intestate succession policies to be slavishly followed in specific detail because of the different circumstances to be dealt with and the different considerations that may be involved in construing private instruments (as we saw in adoption and illegitimacy matters); but even so, the policies in both areas ought to be generally harmonious.

95. The larger marital deduction often taken under the unlimited deduction now allowed by I.R.C. § 2056 (Supp. V 1981) invites greater attention to the income and estate tax concerns of the surviving spouse and his or her estate. Thus, trusts for the non-marital share are frequently being designed so that income not needed by the survivor will be withheld, either to be accumulated for future need (especially in moderate sized estates) or, as in the facts in the text, to be sprinkled to



of the non-marital deduction portion of her estate. Assume further that the terms of the trust will authorize income that is not needed by her husband, *H*, to be sprinkled among *C*'s issue in the trustee's absolute discretion. This flexibility seems advantageous for tax reasons because, although *C*'s primary concern is for *H* and then for her two children, neither *H* nor the children (*S* and *D*, who are now in their peak earning years) expect, ordinarily at least, to have actual need of funds from the trust. *C* then dies leaving a will that is designed to carry out this general plan, and everyone's expectations concerning the needs of *H* and the children prove so far to be right.

In the years that follow, the trustee thinks that, for income tax reasons, the roughly \$24,000 of annual trust income should go to the grandchildren, all unemployed minors. *H*, *S*, and *D* seemed initially to agree that it would be best that they not receive trust income and that it would be a wise use of the trustee's discretion to avoid accumulations by distributing that income to the grandchildren. *S*, however, thinks that his one and only child should receive *S*'s "share" of the income (i.e., half), while *D* thinks that her four children and *S*'s child should all receive equal portions (one-fifth each) of the income.

As a result of this difference of view, *S* is beginning to have serious doubts about passing up his share of the income although, of course, that matter is not strictly up to him. Nevertheless, the trustee does consult with the adult beneficiaries before making decisions about distributions, and *S* thinks he could make a strong case for receiving a portion of the income. He also believes that, as long as he and *D* are alive and *H* has no need for the income, *C* would have treated her two children or their families equally and that the trust's design, induced as it was by lawyer-suggested tax planning, should be essentially neutral in its effect on the respective shares of his family and *D*'s. *D*'s contrary view is that a scheme of equal distribution among the grandchildren should be assumed as the normal pattern.

*H* rather inclines (as he thinks *C* would also) toward what he calls an in-between position. He thinks that half should go, on a more or less per stirpes basis, to each family in the absence of specific per capita needs or motives, such as providing for current or future educational costs and the like. He believes that the trustee should be able to readily identify and justify these per capita needs on a case-by-case basis. *H* also suggests that the way distribution is to be made following his death might be relevant, and *C*'s will essentially prescribes an equal division of the remainder, with half going to *D* or her descendants and half to *S* or his descendants. *H* admits, however, that he and *C* had not really talked about this with the lawyer who drew their wills.

The trustee, feeling that any one of these positions would be reasonable, is comforted only by the fact that this peaceful family is not (yet?) at

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others. See generally E. HALBACH, A PRIMER FOR THE PRACTICE OF ESTATE PLANNING 130-34 (1982).

one another's throats—but he certainly wishes *C*'s will had provided some guidance.

*C*'s lawyer probably wishes so also and may decide to talk to clients about such matters in the future when this type of discretionary trust is to be used. The lawyer also realizes that, if it is unlikely that the surviving spouse will need payments from the trust estate, separate trusts for the children, authorizing equal distributions from each trust to the spouse in the event of need, might be a wise arrangement at the outset. This could offer some additional tax advantages<sup>96</sup> and some useful flexibility in tailoring investments to the different circumstances and objectives of the various children. But does this plan really do anything more than finesse the per capita/per stirpes issue by simply assuming the result?

A generally appropriate resolution of these issues is not readily apparent,<sup>97</sup> at least on the basis of present experience, but the hypothetical views of *S*, *D*, and *H* may suggest some of the lines of argument to be considered by lawyers if, as can be expected, they continue to create this type of trust, or courts if lawyers continue to do so with little recognition of or attention to these inherent difficulties.

#### IV. FLUCTUATING CLASS MEMBERSHIP

Class gifts present two basic categories of problems involving fluctuations in class membership. Each type arises in an almost infinite variety of dispositions and factual situations, especially when the class gift is in future interest form. Again, the most urgent and common of these problems tend to involve dispositions to the transferor's or someone else's children, grandchildren, or other issue.

There are two questions that must be addressed. First, how long does a class remain open to increase through the addition of new class members? Despite the tension of apparently conflicting transferor objectives, the law on this subject is fairly uniform throughout the states, as we shall see, and experience suggests that the legal principles deal about as well as can be expected with most of the cases. Nevertheless, on the private planning side, greater awareness and imagination in drafting can handle the harder cases and can do a better job of reconciling competing client objectives.

Second, does a future interest fail if the remainder beneficiary does not survive until the time fixed for distribution, or does the future interest nevertheless take effect so that the estate, or other successor in interest, of the

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96. The separate entities will be especially helpful, despite the throwback rule of the federal income tax, if there are to be substantial income accumulations, and separate share treatment is useful in various ways, either through single or multiple trusts. See generally E. HALBACH, *supra* note 95, at 155-57.

97. The natural inclination (see note 84 *supra*) to treat grandchildren equally is initially tempting, but it may be that this is valid as a preference only when all children are dead. Also, there is much to be said for the neutrality argument and possibly for *H*'s per stirpes notion with flexible exceptions.

deceased remainder beneficiary receives the share the beneficiary would have received if living? This type of issue appears to have been the most frequent source of litigation in the entire field of will and trust construction until the recent upsurge of litigation involving the rights of adoptees. Much of the confusion and difficulty in the survivorship area can be eliminated by a clear and surprisingly simple recognition of what is at stake and what has really been going on in the cases, and by escaping from our own entanglement in meaningless property law technicalities and jargon. Of course, here too, alertness and improved drafting will help.

A. *Maximum Class Membership and the "Rule of Convenience"*

The question of how long class membership increases is confined to cases in which the source or sources of class members may still be alive when the class gift becomes distributable. Thus, *X*'s outright bequest to his own children does not pose a problem, nor does the trust he creates for *L* for life, remainder to *L*'s children. By contrast, the class closing issue is present in *A*'s bequests: to the children of her well-to-do son, who is still alive; of a fund to be divided among her living sister's children who reach age twenty-one; and of property in trust for *A*'s husband for life, remainder "in equal shares to my nieces and nephews," assuming *A* is survived by siblings. In each of these cases the law quite reasonably infers that *A* had two logical but sometimes conflicting objectives: (1) that *A* would wish to include all of the children of her son or of her siblings, whenever born; and (2) that *A* would like these grandchildren or nieces and nephews to receive their shares of her estate as soon as possible.

The so-called "rule of convenience,"<sup>98</sup> if no contrary intent is expressed, closes the class as soon as any person whose rights are dependent on the number of class members is ready to receive his or her share of the probate or trust estate.<sup>99</sup> Thus, the usual type of situation to which the rule applies is one in which a fund is to be divided among the members of a designated class; the closing occurs as soon as a member of that class is entitled (disregarding administrative delays) to distribution.<sup>100</sup> The rule also can apply, however, for the convenience of other than class members.

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98. This rule is sometimes referred to, especially in English cases, as the rule in *Andrews v. Partington*, 3 Bro. 401, 29 Eng. Rep. 610 (P.C. 1791).

99. See generally RESTATEMENT OF PROPERTY §§ 294, 295 & comments (1940). An illustrative codification is found in CAL. PROB. CODE § 123 (West 1956), which provides: "A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes all persons coming within the description before the time to which possession is postponed."

100. In fact, it is often stated somewhat too narrowly that a class closes when any member of the class is entitled to "immediate possession and enjoyment of his share." A. GULLIVER, CASES ON FUTURE INTERESTS 84 (1959).

Illustrative Applications:

Thus, when each class member is entitled to a stated dollar amount, the recipient of the residue is entitled to close the class when the testator dies or when the prior trust interests terminate.<sup>101</sup>

Once the class closes, the rule excludes all class members who are thereafter born (or, more properly, thereafter conceived or adopted);<sup>102</sup> it does not exclude potential takers who are already in being but who have not yet qualified for their shares.<sup>103</sup> Further elaboration and detailed examples can be found in various sources and are beyond the objectives of this discussion.<sup>104</sup>

Some have noted ironically that the rule of convenience is hardly convenient to those who are excluded by it.<sup>105</sup> General experience and a review of cases, however, suggest that the rule is relatively rarely called upon to exclude an actual afterborn person; it usually applies merely to cut off the possibility, often a faint possibility, of such class members.<sup>106</sup> The rule thus

(1) In *A*'s bequest (in the text) to her son's children, the class closes at *A*'s death (apparently even excluding a child conceived during administration of *A*'s estate, as in *Estate of Landwehr*, 147 Pa. 121, 23 A. 348 (1892)).

(2) In *A*'s bequest to her sister's children who reach age 21, the closing occurs as soon as a child reaches age 21.

(3) In the trust bequest for the husband's lifetime, with principal then to go to *A*'s nieces and nephews, the remainder class closes upon the husband's death.

(4) If the remainder in the last example had been to such nieces and nephews as reached age 25, the class would close at the later of the husband's death or the attainment of age 25 by a niece or nephew.

Some uncertainty exists with respect to gifts of trust income shares to a potentially growing class. Compare RESTATEMENT OF PROPERTY § 295 comment i (1940) with *Applegate v. Brown*, 344 S.W.2d 13 (Mo. 1961).

101. 2 L. SIMES & A. SMITH, *supra* note 1, § 648.

102. RESTATEMENT OF PROPERTY § 294 (1940). See also CAL. PROB. CODE § 123 (West 1956) (calling for inclusion of persons "conceived before but born after" the closing date); FETTERS, *The Determination of Maximum Membership in Class Gifts in Relation to Adopted Children*, 21 SYRACUSE L. REV. 1 (1969).

103. For example, when distribution is to be made to children who reach age 21, class closing upon the first child's attainment of age 21 excludes after-conceived children but not living children who are still under age 21.

104. See authorities cited notes 99-102 *supra*; examples in note 100 *supra*.

105. See, e.g., the widely quoted *Re Chartres*, [1927] 1 Ch. 466, 471.

106. An illustrative and interesting case is *Re Werhner's Settlement Trusts*, [1961] 1 All E.R. 184. The trust was for all "children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry." *Id.* at 186 (emphasis added). The settlor was age 38 when he created the trust and his three children were all minors. The action was brought 29 years later when the children were either dead or adults and the settlor was alive but had had no additional children since creating the trust. The court ordered immediate termination and distribution (which was long overdue) to the

permits timely distribution for the convenience of class members who might otherwise have to wait decades for hypothetical siblings who never in fact materialize. Of course, the law in this area might possibly be redesigned to operate more flexibly. If so, it should begin by at least reconsidering its traditionally irrebuttable presumption of lifelong fertility.<sup>107</sup> The present rules, however, generally appear to function quite well and to operate rather peacefully in this legal area.<sup>108</sup>

In drafting the above-described dispositions of *A*'s will, greater freedom of choice was available to *A*'s lawyer than the law would exercise as a matter of construction. This flexibility is particularly important whenever there is a realistic possibility of afterborn class members for whom the client would like to provide. For example, this would be the case if, at the time of planning *A*'s will, there appears to be a substantial likelihood of her brother or sister having children after her death, as would be the case if *A* were to die young or if a great age spread exists between *A* and one or more of her siblings. In fact, a more flexible approach is especially likely to be of importance when *A*'s will or trust is being drawn, for some reason (e.g., because of the present wealth and tax position of a child), to leave all or part of *A*'s estate directly to or for the benefit of the offspring of a son or daughter who is still in apparent child-bearing years.

The devices available in *A*'s planning for these situations include (a) the use of conservative, or possibly discretionary, partial distributions; (b) expressly establishing a class-closing time based upon the source or the class members themselves attaining a certain age; (c) establishing a class-closing time based on the passage of a stated number of years following the birth of the source's most recent child; or (d) using a combination of (a) and

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living children and to the deceased child's estate, holding the rule applicable to inter vivos as well as testamentary trusts and not finding the required clear and unequivocal evidence of contrary intent in the above-quoted language (because it was not to children "whenever born, notwithstanding the rule"). *Id.* at 190.

107. The primary applications of this much-criticized doctrine are in rule against perpetuities ("fertile octogenarian") and trust termination cases. *See* the perpetuities classic, *Jee v. Audley*, 29 Eng. Rep. 1186 (Ch. 1787); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938) (especially example 11); *see also* RESTATEMENT (SECOND) OF TRUSTS § 340 (1959) (especially comment e) (trust termination with consent of beneficiaries); 3 A. SCOTT, THE LAW OF TRUSTS § 340.1 (2d ed. 1956 & Supp. 1961) (especially text added by 1961 supplement).

108. Most of what modern case traffic there is either comes from England (where a surprising amount of controversy is generated by real or alleged fine distinctions) or involves fringe issues. *See, e.g.*, *Applegate v. Brown*, 168 Neb. 190, 95 N.W.2d 341 (1959) (potentially troublesome precedent involving class income interests, set possibly as a way of escaping the rule against perpetuities), *noted in* 44 MINN. L. REV. 1031 (1960). That case then governed the construction in *Applegate v. Brown*, 344 S.W.2d 13 (Mo. 1961). *See generally* cases collected in 2 L. SIMES & A. SMITH, *supra* note 1, §§ 634-651 (Supp. 1977); Annot., CAL. PROB. CODE § 123 (West 1956) (showing lack of true class-closing cases).

either (b) or (c). Of particular utility is still another possibility: giving the concerned child or sibling (i.e., the source) a power to appoint, terminate, or otherwise direct distributions, so that the grandchildren or nieces and nephews can take whenever the power holder believes it safe for them to do so.<sup>109</sup> This may better fix the responsibility than vesting such responsibility in a fiduciary or relying on arbitrary ages or periods. This would especially be true whenever the parent/power-holder could be expected to have the financial capacity to adjust for deficiencies in foresight.

### B. *Implied Conditions of Survivorship*

The survival questions discussed here do not involve the doctrine of lapse (i.e., death before a testator),<sup>110</sup> nor are they affected by typical anti-lapse statutes.<sup>111</sup> These questions are concerned with whether a particular remainder beneficiary, often a child or other descendant of the transferor, is required to survive beyond the testator's death (or other effective date of transfer inter vivos) to the later time of distribution.

The nature and extent of courts' reluctance to find these implied survival requirements in most forms of future interest disposition have become increasingly clear over the years.<sup>112</sup> The actual results of modern cases tend to fall into sensible and surprisingly coherent patterns, if we look at outcomes rather than dicta. Nevertheless, the amount of unnecessary, costly family controversy and the difficulties courts and litigants have in handling these cases continue to reflect an unfortunate combination of confused analysis and verbiage.<sup>113</sup> More importantly, they reflect the lack of a sound, clear theory for decisions in this vital area of constructional problems.

The foregoing generalizations are essentially valid with respect to the situation or trend in most states throughout the country, although certainly the stage of development or degree of clarity varies rather widely and a few

109. Even if the purpose of a trust that bypasses the well-to-do son or daughter is to skip a generation entirely for transfer tax purposes, this type of power in a child can be designed to conform to the special exception in the generation-skipping transfer tax for powers exercisable only in favor of the grantor's lineal descendants who are all members of generations younger than that of the power holder. *See* I.R.C. § 2613(e)(1) (Supp. V 1981).

110. *See generally* 6 W. BOWE & D. PARKER, *supra* note 3, § 50.2; *see also id.* §§ 50.21 ("void" bequests), 35.15 (lapse and class gifts).

111. *See id.* §§ 50.10 (anti-lapse statutes generally), 35.17 (applicability to class gifts). *But compare* ILL. STAT. ANN. ch. 110½, § 4-11 (Smith-Hurd 1978); 20 PA. CONS. STAT. ANN. § 6114(2) (Purdon 1975).

112. Clearly, much of this has been attributable to the work and persuasive force of the American Law Institute. *See* RESTATEMENT OF PROPERTY §§ 249-262, 296(2) (1940).

113. An extensive analysis of the case law, with its variations, complexities, and confusion can be found in 2 L. SIMES & A. SMITH, *supra* note 1, §§ 146, 575-594 (survivorship generally); *id.* §§ 652-659 (survival in class gifts).

distinctly exceptional situations exist.<sup>114</sup> The quick overview of the doctrine that follows is intended merely to provide a brief summary of general American case law and a framework for understanding and explaining the present state of that law.

*Remainder to named individual.* In *A*'s trust for *B* for life, remainder to *C*, *C*'s interest is subject to no implied condition of survivorship. If she predeceases *B*, her remainder interest is an asset of her estate, like any other property, and passes by will or intestacy to her successors in interest.<sup>115</sup>

*Remainders to multiple named beneficiaries.* The same would generally be true of *C*'s share of the remainder in *A*'s trust to *B* for life, remainder to *C*, *D*, and *E*.<sup>116</sup> Here we find a few errant decisions and quite a bit of dicta suggesting fine distinctions based on details of wording and circumstance, but subsequent decisions, especially the modern cases, almost inevitably develop exceptions or discover intentions that prevent the supposed verbal distinctions from having much influence on the outcome of cases one way or another.<sup>117</sup> A classic in the broad words of futurity category is the leading

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114. See generally Halbach, *Future Interests: Express and Implied Conditions of Survival* (pts. 1 & 2), 49 CALIF. L. REV. 297, 431 (1961). Exceptional rules have been created by statute in Illinois and Pennsylvania. See ILL. STAT. ANN. ch. 110½, § 4-11 (Smith-Hurd 1978); 20 PA. CONS. STAT. ANN. § 6114(2) (Purdon 1975); Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts Under the New Illinois "Anti-Lapse" Provision*, 1969 U. ILL. L.F. 423. A unique common law view, the "Tennessee class doctrine," and subsequent legislation, TENN. CODE ANN. § 32-305 (1977), which has (even if it probably should not have) confounded the local courts, are discussed in Comment, *Has Tennessee Abolished its Ancient Class Doctrine or Only Modified It?*, 7 MEMPHIS ST. U.L. REV. 129 (1976).

115. This, in fact, is the classic example of an indefeasibly vested remainder. See, e.g., *Bochte v. Chess*, 124 Cal. App. 2d 321, 268 P.2d 493 (1954). This is so despite the language of futurity. *Oak Park Trust & Sav. Bank v. Baumann*, 108 Ill. App. 3d 322, 326, 438 N.E.2d 1354, 1356 (1982).

116. See, e.g., *In re Estate of Martin*, 110 So. 2d 421, 423 (Fla. Dist. Ct. App. 1959) (words of futurity are important as revealing intention).

117. See, e.g., *Redman v. Ring*, 94 N.H. 195, 49 A.2d 921 (1946) (flat rejection of suggestion that words of futurity are important or revealing of intention). A broad exception, however, has been more appealing to some courts:

[I]f such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject matter . . . to use and benefit of another for . . . life . . . , the vesting of the gift in remainder will not be postponed, . . . the right of enjoyment only being deferred.

*Knight v. Pottieser*, 176 Ill. 368, 374, 52 N.E. 934, 935 (1898). And where that type of explanation for the deferral is not available, another way out can be found, either (1) because the postponed beneficiaries themselves were entitled to the income in the meantime, as in *In re Fouks' Will*, 206 Wis. 69, 238 N.W. 869 (1931), or (2)

case on divide-and-payover language, *Matter of Crane*.<sup>118</sup> This case concedes that, if a future interest distribution is postponed "for the purpose of letting in an intermediate estate," the supposed presumption favoring an implied survival requirement based on divide-and-payover wording is rebutted and "the interest should be deemed vested."<sup>119</sup> (The court's misuse of the term "vested," as if it were synonymous with "free from an implied condition of survivorship," is consistent with the long tradition of confused dicta in this area.) In all these cases, it would be about as foolish to believe that words of futurity are in some Freudian way revealing of transferor intentions as it would be to believe that the divide-and-payover rule or others like it<sup>120</sup> are anywhere a meaningful guide to decisions.

*Remainders in gift form: "children" and other single-generation classes.* As we move next to the situation involving, in essence, a trust for the benefit of *S* for life, remainder to *S*'s children, we still find that there is generally no implied survival requirement attached to the future interests of the children, despite the class gift form of the remainder.<sup>121</sup> In this type of case, more than in the previous situations, we do find decisions reaching contrary results.<sup>122</sup> We also find widespread contrary dicta that at least *reads* as if it is to be taken seriously, although these suggestions of implied conditions are usually found (sometimes only by strong inference) in cases purporting to distinguish the situation actually before the court from class gift situations. This is typified by opinions in which the court, finding no implied condition attached to a particular limitation, stresses that the remainder beneficiaries were named "as individuals" and "were not made members of a class,"<sup>123</sup>

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because the income was available to the deferred beneficiaries in the trustee's discretion in the meantime, as in *Coddington v. Stone*, 217 N.C. 714, 9 S.E.2d 420 (1940).

118. 164 N.Y. 71, 58 N.E. 47 (1900).

119. *Id.* at 76, 58 N.E. at 49.

120. Such as the notorious rule in *Clobberie's Case*, 86 Eng. Rep. 476 (Ch. 1677), which has evolved into often-recognized distinctions between bequests to someone "at" or "when he reaches" a stated age (supposedly implying a survival condition, but one which is easily rebutted) and bequests "to be paid" or "payable at" some age (no condition to be implied). See generally 5 AMERICAN LAW OF PROPERTY §§ 21.17, .18 (A. Casner ed. 1952).

121. See, e.g., *Privett v. Jones*, 251 N.C. 386, 111 S.E.2d 533 (1959); see also 5 AMERICAN LAW OF PROPERTY § 25.11 (A. Casner ed. 1952); 2 L. SIMES & A. SMITH, *supra* note 1, §§ 146, 654.

122. See discussion in 2 L. SIMES & A. SMITH, *supra* note 1, §§ 571-610. The only clear and persistent line of such decisions is represented by the Tennessee class doctrine, which continues in its original form as to pre-1927 instruments but the effect of which apparently has been modified (despite continuing confusion) by legislation with respect to post-1927 dispositions. See TENN. CODE ANN. § 32-305 (1977); Comment, *supra* note 114. Compare ILL. STAT. ANN. ch. 110½, § 4-11 (Smith-Hurd 1978), with *Waggoner*, *supra* note 114.

123. *Old Colony Trust Co. v. Tufts*, 341 Mass. 280, 285, 168 N.E.2d 86, 89-90 (1960).



or that they were "named as individuals, not as a class" and therefore were not subject to the "roll call" principle.<sup>124</sup> It was against a background of local dicta of that general character that one leading case, *In re Estate of Stanford*,<sup>125</sup> brought some clarity out of confusion and finally established in California "that the mere fact that takers of a postponed gift are described by a class designation" does not give rise to an implied condition of survival.<sup>126</sup> The opinion also pointed out that remainders of the type before the court were vested, and the mere fact that each member's interest could be partially divested to admit afterborn members of the class "would not indicate that the remainders were contingent."<sup>127</sup> What inference is to be drawn from these concluding words? That question brings us to the next step in this progression through the survivorship cases.

*Effect of conditions unrelated to survival.* Assume now that *X* devises to *Y* for life, remainder to *Y*'s issue, but "if *Y* dies without issue, then to *Z*." Even here it is unlikely that *Z*'s interest will be found to be subject to an implied requirement of survivorship. A growing majority of courts recognize, quite properly, that a future interest is not subject to an implied condition of survival merely because it is subject to some other condition precedent that makes the interest contingent.<sup>128</sup> If the other condition is in the form of a condition *subsequent*, so that the interest can be characterized as vested, courts have had little or no difficulty recognizing that no survival requirement is to be implied.<sup>129</sup> Where that other condition is *precedent* and thus the interest contingent, however, we do find a number of cases reaching a contrary result<sup>130</sup> and an even greater amount of dicta from other types of cases having to be disregarded in order to avoid implying a condition of survivorship.<sup>131</sup> Thus, the quotation from *Stanford* toward the end of

124. *Coddington v. Stone*, 217 N.C. 714, 722, 9 S.E.2d 420, 425 (1940).

125. 49 Cal. 2d 120, 315 P.2d 681 (1957).

126. *Id.* at 126, 315 P.2d at 684.

127. *Id.* at 129, 315 P.2d at 685.

128. *See, e.g., In re Ferry's Estate*, 55 Cal. 2d 783, 361 P.2d 900, 13 Cal. Rptr. 180 (1961); *In re Bogart's Will*, 62 Misc. 2d 114, 308 N.Y.S.2d 594 (Sur. Ct. 1970); *Daniel v. Donahue*, 215 Or. 373, 333 P.2d 1109 (1959); *In re Dickson's Estate*, 396 Pa. 371, 152 A.2d 680 (1959). For examples of sound results but confused reasoning or terminology, see *Hays v. Cole*, 221 Miss. 459, 73 So. 2d 258 (1954); *In re Patterson's Estate*, 247 Pa. 529, 93 A. 608 (1915).

129. *See, e.g., Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (involving remainders subject to powers of revocation); *First Nat'l Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956) (same).

130. *See, e.g., Davis v. McKown*, 131 Me. 203, 160 A. 458 (1932). The most notorious decision of this variety, *In re Coots' Estate*, 253 Mich. 208, 234 N.W. 141 (1931), was promptly overturned by 1931 Mich. Pub. Acts No. 211, *codified at* MICH. COMP. LAWS ANN. § 554.101 (West 1967). *Cf. Spence v. Second Nat'l Bank*, 126 Ind. App. 125, 130 N.E.2d 667 (1955) (alternative limitation to "children").

131. *See* text accompanying notes 132 & 136 *infra*; *see also* *First Nat'l Bank of*

the preceding paragraph influenced an intermediate appellate court in California to come to the rather extraordinary conclusion that *Z*'s interest was vested, subject to being divested should *Y* die leaving issue; the court felt liberated to find that there was no implied condition of survivorship.<sup>132</sup> The California Supreme Court reviewed the decision and also concluded that the interest was free from an implied survival requirement, but it further recognized that whether an interest is technically vested or contingent and whether it is an executory interest or an alternative contingent remainder are in reality false issues and irrelevant.<sup>133</sup> Other cases similarly have refused to imply conditions of survival in comparable situations, despite the added element that the contingent interest in question was not to a named individual (like *Z*, above) but was to a class.<sup>134</sup> Missouri's *Tapley v. Dill*,<sup>135</sup> decided in 1949, has served as a leading case in this general area, observing that other cases that "have considered contingent remainders [to be] subject to an implied condition of the donee surviving the particular estate although not [expressly] so conditioned, seemingly because subject to a condition precedent," simply are "not logically sound."<sup>136</sup>

*Multi-generational classes: "issue" and "descendants."* A true shift in treatment and prevailing doctrine finally appears when we come to *W*'s trust for *H* for life, remainder to *W*'s issue, or when we encounter *A*'s devise to *B* for life, remainder "to the descendants of *C*." In these situations, a condition of survivorship is implied from the very use of the term "issue" or "descendants." The result is supported not only by the weight of modern case authority<sup>137</sup> but also by the Restatement of Property and other major treatises.<sup>138</sup>

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*Cincinnati v. Tenney*, 165 Ohio St. 513, 519, 138 N.E.2d 15, 17 (1956) (question before court stated to be whether deceased beneficiary had "contingent remainder" which would be "conditioned upon her survival" or whether she had "vested remainder subject to [being] divested").

132. *In re Estate of Ferry*, 8 Adv. Cal. Rptr. 585 (Dist. Ct. App. 1960) (opinion withdrawn upon grant of hearing by California Supreme Court).

133. *In re Estate of Ferry*, 55 Cal. 2d 783, 785, 361 P.2d 900, 902, 13 Cal. Rptr. 180, 182 (1961).

134. See, e.g., *In re Bogart's Will*, 62 Misc. 2d 114, 308 N.Y.S.2d 594 (Sur. Ct. 1970); *Daniel v. Donahue*, 215 Or. 373, 333 P.2d 1109 (1959); *In re Dickson's Estate*, 396 Pa. 371, 152 A.2d 680 (1959).

135. 358 Mo. 824, 217 S.W.2d 369 (1949).

136. *Id.* at 830, 217 S.W.2d at 373.

137. See, e.g., *Twaites v. Waller*, 133 Iowa 84, 110 N.W. 279 (1907); *Altman v. Rider*, 291 S.W.2d 577 (Ky. Ct. App. 1956). An interesting case, recognizing this as a general rule but reaching the opposite result (i.e., no implied survivorship requirement) to avoid violation of the rule against perpetuities, is *Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co.*, 335 Mass. 407, 140 N.E.2d 201 (1957).

138. See RESTATEMENT OF PROPERTY § 295 comment g (1940); 2A R. POWELL

If judicial reasoning fails to explain and help predict the results of cases, and in fact often tends to be misleading, what *does* justify and explain what is going on in the survivorship cases? Until we reached the cases involving issue and descendants, we found, despite some false starts, a widespread and increasingly clear reluctance on the part of the courts to imply conditions of survivorship. Yet it is virtually a matter of gospel among those skilled in estate planning and in the drafting of wills and trusts that remainder beneficiaries should be expressly required to survive until the time of distribution, in order to avoid a premature risk of property being diverted outside of the family or bloodlines, unwarranted administration and tracing difficulties, and unnecessary estate and inheritance taxation.<sup>139</sup> If this is so, why should courts not *imply* such conditions where drafting failures have caused them to be omitted? The answer is surprisingly simple.

The various considerations that favor requiring survival until the time of distribution are opposed by a single overriding concern in most types of survivorship cases: the possibility of inadvertently excluding a line of descent or of wholly omitting provision for the family of a beneficiary by reason of a fortuitous order of deaths, especially when this result patently conflicts with applicable policies and probable intent. The presence of this concern makes it undesirable for a court to imply a condition of survival, and the absence of this concern frees a court to respond to the other considerations by finding that survival is required.

Thus, in holdings throughout the survivorship area, a distinction tends to be drawn, and should be drawn, between (a) gifts to what might be called inflexible or single-generation classes (typified by "children," "brothers and sisters," "nieces and nephews," and "grandchildren") and (b) gifts to flexible, multi-generational classes (e.g., "issue," "descendants," "heirs of the body," and the like; the terms "heirs," "next of kin," and the like are potentially similar but also involve considerations outside the present discussion).<sup>140</sup> However much courts may stumble around in confused verbiage and property law technicalities, as we have seen, the simple fact is that courts generally refuse to imply conditions of survivorship in cases of inflexible or single-generation classes. We have also seen that the actual results are little affected by other details of wording or context. In flexible, multi-generational cases, we imply the survival requirement from the class terms "issue" and "descendants" themselves, primarily because it is now safe to do so, thereby responding to the other considerations that favor that result. The results can possibly also be rationalized on the ground that the terms

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& P. ROHAN, REAL PROPERTY ¶ 327 (rev. ed. 1981); 2 L. SIMES & A. SMITH, *supra* note 1, § 146.

139. On the difficulties of tracing transmissible interests that have been omitted from inventories and decrees, see *In re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954). On death taxation, see Treas. Reg. § 20.2031-1(1); see also *Coddington v. Stone*, 217 N.C. 714, 9 S.E.2d 420 (1940).

140. See Halbach, *supra* note 114, at 315-20.

used are ones that not only provide for but seem to contemplate the substitution of more remote generations for the missing members of nearer generations.<sup>141</sup>

Given the limited alternatives that American courts recognize to be available in construing ambiguous or uncertain language in wills and trusts, and given the courts' associated unwillingness to "write" or "rewrite" wills and trusts,<sup>142</sup> the adaptability of the class becomes controlling virtually without regard to other incidental features of the case. If there is a remainder to the transferor's children or grandchildren and one of those class members dies before the date the interest comes into enjoyment, it is better to accept the various costs and risks involved in having that interest pass through the deceased member's estate than it would be to accept that his or her share passes to the surviving class members. The latter construction would leave nothing for the family that is likely to be left by the deceased class member,<sup>143</sup> who, quite fortuitously, may have died shortly before rather than shortly after the time of distribution.

### C. *Express Conditions of Survivorship*

A related issue is presented by express conditions of survivorship that fail to make clear the time to which the condition relates. These problems arise in a variety of specific contexts,<sup>144</sup> but they are adequately illustrated by *H*'s bequest in trust for *W* for life, remainder "to my surviving children." A clear majority of jurisdictions hold that the children must survive *W* for

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141. See *Altman v. Rider*, 291 S.W.2d 577 (Ky. Ct. App. 1956); RESTATEMENT OF PROPERTY § 295 comment g (1940).

142. American courts merely allow a choice between the limited alternatives the language will bear; they will not supply a substitute disposition. For example, in survivorship cases involving single-generation classes, either the deceased class member's interest fails and goes to the surviving class members or the member's interest passes through his estate—possibly to outsiders—without regard to his family status and the terms of his will. A court will not supply a substitute gift to the issue of the deceased class member.

Some significant recent statutes, however, introduce new possibilities by providing for substitute dispositions to issue who are not mentioned in the instrument, allowing them to take in place of a remainder beneficiary whom the statute requires to survive to the time of possession. Anti-lapse legislation is extended by ILL. STAT. ANN. ch. 110½, § 4-11 (Smith-Hurd 1978); 20 PA. CONS. STAT. ANN. § 6114(2) (Purdon 1975). Cf. TENN. CODE ANN. § 32-305 (1977) ("cure" for Tennessee class doctrine).

143. For the influence of this concern, see *Coddington v. Stone*, 217 N.C. 714, 9 S.E.2d 420 (1940); text accompanying note 152 *infra*.

144. For example, consider cases involving alternative or supplanting limitations, such as "to *B* or her descendants," or "to the children of *X* and the issue of any deceased child." To what time does the survival requirement called for by the word "or" (or by the "deceased" reference) relate? See Halbach, *supra* note 114, at 447-51. Cf. *id.* at 323-27.

their remainder interests to take effect,<sup>145</sup> but a minority view would require the children merely to survive *H*.<sup>146</sup> That is, the prevailing view would read the language as if it meant "to those of my children who survive *W*," while the minority would read it as "to those of my children who survive me."

The first of these positions is believed to give *H*'s words their natural meaning,<sup>147</sup> whereas the latter has been said to represent an excessive adherence to the law's supposed preference for early vesting.<sup>148</sup> This criticism, however, is too unsympathetic, for the real concern again is almost certainly the risk of inadvertent disinheritance of a line of descent—the same concern that we earlier saw prevents our implying a condition of survivorship in the case of a future interest to a class of children. Yet it is hard to quarrel with the majority's perception of the natural import of the language, whether from the viewpoint of the reader, the scrivener, or the transferor. Apparently, the courts' real doubt here, and a legitimate concern, is whether *H* in our example and other similarly situated transferors, or their lawyers, actually thought through the implications of the language in the event a child should die leaving issue and really intended the result that the majority construction would likely produce in actual application.<sup>149</sup>

Nevertheless, a full analysis of the considerations involved may well suggest that the majority view is preferable.<sup>150</sup> For example, after many years of uncertainty and conflicting decisions in New York, this is what was ultimately concluded in *In re Gautier's Will*.<sup>151</sup>

The moral for private drafting purposes is no doubt too obvious to belabor. For present purposes, however, the important point to recognize is that one can again readily see in this body of litigation the basic considerations that run through survivorship issues generally, in addition to seeing the tensions and doubts that exist in applying to real family situations the majority rule on the ambiguously expressed condition of survival. The reasons why, and the ways in which, judges might seek avenues of escape from this rule also can be seen in a particularly interesting case involving a

145. See RESTATEMENT OF PROPERTY § 251 (1940); 5 AMERICAN LAW OF PROPERTY § 21.15 (A. Casner ed. 1952); 2 L. SIMES & A. SMITH, *supra* note 1, § 577. See also CAL. PROB. CODE § 122 (West 1956) (statutory rule to same effect).

146. See, e.g., *Alsman v. Walters*, 184 Ind. 565, 111 N.E. 921 (1916).

147. See *In re Gautier's Will*, 3 N.Y.2d 502, 146 N.E.2d 771, 207 N.Y.S.2d 123 (1957); RESTATEMENT OF PROPERTY § 251 comment a (1940).

148. 2A R. POWELL & P. ROHAN, REAL PROPERTY ¶ 328 (rev. ed. 1981).

149. See *In re Nass's Estate*, 320 Pa. 380, 182 A. 401 (1936) (emphasizing distortion and improbable intention of having whole estate pass to child who happened to survive); text accompanying notes 152-53 *infra*.

150. See Halbach, *supra* note 114, at 442-45.

151. 3 N.Y.2d 502, 506, 146 N.E.2d 771, 773, 207 N.Y.S.2d 123, 126 (1957). *But cf. In re Mulholland's Will*, 105 Misc. 2d 354, 356, 432 N.Y.S.2d 76, 80 (Sur. Ct. 1980) (no "ambiguity or lack of clarity" concerning testator's intention that would justify "application of rules of construction").

closely related instance of suspected neglect or drafting oversight. In *In re Welles' Will*,<sup>152</sup> the minority, in a 4-3 decision, would have interpreted an explicit remainder to "grandchildren then living" as including great-grandchildren. The dissenting judges were satisfied that they could find no "intention to discriminate among the grandchildren or their families," and that the testator would not have intended "that two of the five branches of [his] direct descendants should be disinherited simply because the heads of those two branches failed to outlive" the life beneficiary.<sup>153</sup>

## V. SOME CONCLUDING OBSERVATIONS

Despite a possibly increasing awareness of all of these matters by lawyers in drafting private instruments, and despite progress in some of these areas through legislation or judicial decision, a significant array of recurring issues involving the rights of children and other descendants to take under class gifts remain very much with us. As we have seen, these problems arise in several general categories of important cases.

First, modernization of intestacy statutes has been accompanied by only limited progress in handling vital definitional problems of class gifts. Even where presumptions concerning adoptees now reflect current family attitudes and probabilities of intent generally, they are not finely tuned to the importance of de facto relationships. Furthermore, decisions have only begun to evolve principles for dealing with adoption out issues. The varied class gift problems involving persons born out of wedlock have also just begun to be explored. Again, de facto relationships of parent to child and within the broader family should be emphasized, for this approach better reflects probable intention than do the formal distinctions that may be reasonably acceptable for intestacy situations and, in a general way, for the estates of the natural parents themselves.

Second, the basic per capita/per stirpes problem of class gifts to issue is now worked out reasonably well in nearly all states. Nevertheless, statutes and precedents inadequately handle some traditional details, especially when there are no living descendants of the first generation. In addition, courts have not yet had to face up to some increasingly important problems of discretionary trust distributions among issue.

Finally, rules applicable to fluctuating class membership have progressed reasonably well in the last several decades, at least unless we are prepared to venture into considerably more flexible, fundamentally non-traditional approaches to these problems.<sup>154</sup> Class-closing issues cause little serious controversy today. Even the difficulties in the much litigated survi-

152. 9 N.Y.2d 277, 173 N.E.2d 876, 213 N.Y.S.2d 441 (1961).

153. *Id.* at 285, 173 N.E.2d at 880-81, 213 N.Y.S.2d at 445-46 (Burke, J., dissenting).

154. See note 142 *supra* on presumptions requiring survival and substituting the issue of a deceased remainder beneficiary by statutes analogous to or extending anti-lapse legislation.

vorship cases are a result mainly of unclear and sometimes confused analyses, but with a redeeming tendency to fumble through false issues to acceptable results—often on a seemingly intuitive or visceral basis. It should be promising, however, that a clear and simple principle can readily be identified to explain and guide decisions in this latter area: the danger of inadvertently disinheriting lines of descendants makes implied conditions of survival inappropriate to inflexible, single-generation class gifts. But survival requirements can and should be implied when the transferor has used multi-generation terms that provide adaptability for these contingencies.

The present state of the law and the diverse issues presented by varied dispositions to a person's descendants impose significant obligations upon lawyers in their interviewing and in the drafting of wills and trusts. Instruments should contain clauses expressly defining; (a) the extent to which class terms include persons born out of wedlock and persons adopted into or out of the class, bearing in mind that most of the troublesome questions require the planner to anticipate future events that cannot be known to the client and involve situations in which the transferor is not the natural or adoptive parent; and (b) the manner in which distribution is to be made among issue or descendants, recognizing that even the terms "per stirpes" and "by right of representation" may be ambiguous or possibly even inappropriate whenever a generation of descendants is entirely removed. In addition, proper drafting of future interests almost always requires clear language (a) calling for distribution (or appointment) among persons who are alive when the time of possession arrives and (b) describing remainder beneficiaries (or permissible appointees) in terms that are flexible enough to adapt to the deaths of potential recipients.