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The Rule in Wild's Case in North Carolina

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THE RULE IN WILD'S CASE IN NORTH CAROLINA

RONALD C. LINK†

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Reforms of North Carolina property law seem to require a rather long period of gestation between conception by the legal writer and delivery by the legislature. The Intestate Succession Act of 1960¹ did not see the light of day until almost three decades after McCall and

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1. Law of June 10, 1959, ch. 879, [1959] N.C. Sess. Laws 886 (codified at N.C. GEN. STAT. §§ 29-1 to -30 (1976)).

Langston's seminal article advocating a new statute of descent.² Webster's work on marketable title during the mid sixties³ did not bear fruit in the form of the Real Property Marketable Title Act⁴ until 1973. Several writers have advocated abolition of the Rule in Shelley's Case,⁵ "the Don Quixote of the law, which, like the last Knight errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."⁶ Their advice, however, has yet to be heeded, an inaction that leaves North Carolina in the dubious company of only three or four other states.⁷ Whatever the reasons for this curious lag between advocacy and action,⁸ it seems clear that the proponent of change ought to make his record clearly and early.

It is now thirty-one years since Long modestly recommended repu-

2. McCall & Langston, *A New Intestate Succession Statute for North Carolina*, 11 N.C.L. REV. 266 (1932).

3. Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807 (1964); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C.L. REV. 89 (1965); Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C.L. REV. 3 (1966); Webster, *Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome*, 46 N.C.L. REV. 56 (1967); Webster, *Doubt Reduction Through Conveyancing Reform—More Suggestions in the Quest for Clear Land Titles*, 46 N.C.L. REV. 284 (1968).

4. Law of April 23, 1973, ch. 255, [1973] N.C. Sess. Laws 240 (codified at N.C. GEN. STAT. §§ 47B-1 to -9 (1976)).

5. *Proposals for Legislation in North Carolina: Real Property—The Rule in Shelley's Case*, 9 N.C.L. REV. 13, 51 (1930) (prepared by members of the faculty of the University of North Carolina School of Law); Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. REV. 49 (1941); Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C.L. REV. 3 (1966). *But see* Aycock, *Survey of North Carolina Case Law—Real Property*, 44 N.C.L. REV. 1027, 1036 (1966).

6. *Stamper v. Stamper*, 121 N.C. 251, 254, 28 S.E. 20, 22 (1897).

7. Colorado, Delaware, Indiana, and perhaps Arkansas. 1 AMERICAN LAW OF PROPERTY § 4.51, at 494 n.39 (A.J. Casner ed. 1952 & Supp. 1965) [hereinafter cited as ALP]; 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1563, at 474-75 nn.53-58 (1956 & Supp. 1973) [hereinafter cited as SIMES & SMITH]. For further discussion of the Arkansas rule see *Metropolitan Life Ins. Co. v. Gardner*, 245 Ark. 746, 434 S.W.2d 266 (1968).

Indeed, in 1967 the legislature went out of its way to reaffirm the Rule. In establishing a rule that in construing conveyances the court shall give effect to the intention of parties, the legislature added a proviso that this rule should not prevent application of the Rule in Shelley's Case. N.C. GEN. STAT. § 39-1.1 (1976).

8. Reforms of obscure rules obviously lack political appeal; this is lawyer's law. Also, there is little need for precipitate action, as many rules of property do not affect many people in a given year. Cumulatively, however, archaic rules do tend to foster litigation and, in any event, to thwart the intentions of parties, requiring that action ultimately be taken.

diation in North Carolina of the Rule in Wild's Case,⁹ albeit in the context of an article entitled "Class Gifts in North Carolina." Subsequent writers have noted the Rule, but only in the course of discussing problems of draftsmanship;¹⁰ none has critically evaluated it.¹¹ It is perhaps understandable, then, that no one has pressed for abolition of the Rule. While not as celebrated as its somewhat illegitimate kin (Shelley's Case), the Rule in Wild's Case has plagued North Carolinians through more than a century of the reports, surfacing as recently as 1970.¹² Consequently, it seems advisable to focus attention on Wild's Case, critically evaluating its merit in the context of North Carolina law, as a foundation for future legislative (or judicial!) action.¹³

9. Long, *Class Gifts in North Carolina*, 22 N.C.L. REV. 297, 299-302 (1944).

10. Bolich, *Some Common Problems Incident to Drafting Dispositive Provisions of Donative Instruments*, 35 N.C.L. REV. 17, 25-26 (1956); Phillips, *Some Suggestions to Will Draftsmen: Complex Dispositive Plans in General, Class Gift Provisions in Particular*, 40 N.C.L. REV. 23, 34 n.17 (1961).

11. The North Carolina Rule is also described in J. WEBSTER, *REAL ESTATE LAW IN NORTH CAROLINA* § 44 (1971) and 2 N. WIGGINS, *WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA* § 286 (1964). Mordecai does not treat it. See S. MORDECAI, *LAW LECTURES* (2d ed. 1916). The Rule is discussed generally in 5 ALP, *supra* note 7, §§ 22.16-.25 (substantially reprinting Casner, *Construction of Gifts "To A and His Children" (Herein the Rule in Wild's Case)*, 7 U. CHI. L. REV. 438 (1940)); 3 R. POWELL, *REAL PROPERTY* ¶ 355 (1967); *RESTATEMENT OF PROPERTY* § 283 (1940); 2 SIMES & SMITH, *supra* note 7, §§ 691-702; 4A G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 2008 (J. Grimes repl. 1961); 2 H. UNDERHILL, *A TREATISE ON THE LAW OF WILLS* §§ 579-584 (1900); Brown, *Problems of Construction Arising in the Law of Property—Particularly in the Law of Future Interests*, 79 U. PA. L. REV. 385, 393-400 (1931); Carey, *Words of Limitation or Words of Purchase: Rule in Shelley's Case—Wild's Case—Miscellaneous*, 34 ILL. L. REV. 379 (1939); Note, *Real Property—Wills—Judicial Construction of "to A and His Children,"* 75 W. VA. L. REV. 296 (1973).

12. Jernigan v. Lee, 9 N.C. App. 582, 176 S.E.2d 899 (1970), *rev'd*, 279 N.C. 341, 182 S.E.2d 351 (1971). See also Tremblay v. Aycock, 263 N.C. 626, 139 S.E.2d 898 (1965); Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 552; Webster, *Doubt Reduction Through Conveyancing Reform—More Suggestions in the Quest for Clear Land Titles*, 46 N.C.L. REV. 284, 295 (1968). The *Restatement* adopts the Rule in modified form. *RESTATEMENT OF PROPERTY* § 283 (1940).

13. There is not a complete listing in the literature of North Carolina decisions relevant to Wild's Case. The digests are hopeless. The best listing is in Long, *supra* note 9, at 300 n.13, but he failed to uncover some early decisions and of course could not list decisions made after he wrote. The list compiled by this author is as follows:

First Resolution:

Griffin v. Springer, 244 N.C. 95, 92 S.E.2d 682 (1956); Davis v. Brown, 241 N.C. 116, 84 S.E.2d 334 (1954); Sharpe v. Isley, 219 N.C. 753, 14 S.E.2d 814 (1941) (*semble*); Martin v. Knowles, 195 N.C. 427, 142 S.E. 313 (1928) (*semble*); Daniel v. Bass, 193 N.C. 294, 136 S.E. 733 (1927); Boyd v. Campbell, 192 N.C. 398, 135 S.E. 121 (1926); Ziegler v. Love, 185 N.C. 40, 115 S.E. 887 (1923); Masters v. Randolph, 183 N.C. 3, 110 S.E. 598 (1922); Cole v. Thornton, 180 N.C. 90, 104 S.E. 74 (1920); Elkins v. Seigler, 154 N.C. 374, 70 S.E. 636 (1911); Silliman v. Whitaker, 119 N.C. 89,

I. THE "RULE" IN WILD'S CASE

The Rule in Wild's Case deals with the meaning of a limitation in the form "to A and his children." And yes, North Carolina, there really was a Wild's Case, decided by the Court of King's Bench in 1599 and dutifully reported by that great Elizabethan, Lord Coke himself.¹⁴ Yet the Rule in Wild's Case is not even a rule (in the sense of a rule of property); it is a resolution (in the sense of a rule of construction). Nor is it a single resolution; it is in fact two rules of construction. Both Resolutions in Wild's Case were dicta, but they have had a surprisingly long life. One may speculate that the durability of the Rule in Wild's Case owes much to the fame of its reporter, Lord Coke, just as the so-called Rule in Shelley's Case¹⁵ owes its fame to the same reporter.¹⁶ But,

25 S.E. 742 (1896); *Doggett v. Moseley*, 52 N.C. 450, 7 Jones 587 (1860) (dictum) (*semble*); *Jenkins v. Hall*, 57 N.C. 321, 4 Jones Eq. 334 (1858).

Second Resolution:

Tremblay v. Aycock, 263 N.C. 626, 139 S.E.2d 898 (1965); *Coffield v. Peele*, 246 N.C. 661, 100 S.E.2d 45 (1957); *Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948); *Sharpe v. Isley*, 219 N.C. 753, 14 S.E.2d 814 (1941) (*semble*); *Mayberry v. Grimsley*, 208 N.C. 64, 179 S.E. 7 (1935); *Buckner v. Maynard*, 198 N.C. 802, 153 S.E. 458 (1930); *Tate v. Amos*, 197 N.C. 159, 147 S.E. 809 (1929); *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928) (*semble*); *Snowden v. Snowden*, 187 N.C. 539, 122 S.E. 300 (1924); *Benbury v. Butts*, 184 N.C. 23, 113 S.E. 499 (1922); *Cullens v. Cullens*, 161 N.C. 344, 77 S.E. 228 (1913); *Tart v. Tart*, 154 N.C. 502, 70 S.E. 929 (1911); *Lewis v. Stancil*, 154 N.C. 326, 70 S.E. 621 (1911); *Whitehead v. Weaver*, 153 N.C. 88, 68 S.E. 1059 (1910); *Condor v. Secrest*, 149 N.C. 201, 62 S.E. 921 (1908); *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905); *Darden v. Timberlake*, 139 N.C. 181, 51 S.E. 895 (1905); *Weeks v. McPhail*, 128 N.C. 130, 38 S.E. 472 (1901); *King v. Stokes*, 125 N.C. 514, 34 S.E. 641 (1899); *Wilson v. Wilson*, 119 N.C. 588, 26 S.E. 155 (1896); *Helms v. Austin*, 116 N.C. 751, 21 S.E. 556 (1895); *Heath v. Heath*, 114 N.C. 547, 19 S.E. 155 (1894); *Hampton v. Wheeler*, 99 N.C. 222, 6 S.E. 236 (1888); *Hunt v. Satterwhite*, 85 N.C. 73 (1881); *Blair v. Osborne*, 84 N.C. 417 (1881); *Pollard v. Pollard*, 83 N.C. 96 (1880); *Pruden v. Paxton*, 79 N.C. 446 (1878); *Gay v. Baker*, 58 N.C. 359, 5 Jones Eq. 344 (1860); *Faribault v. Taylor*, 58 N.C. 234, 5 Jones Eq. 219 (1859); *Coakley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858); *Chesnut v. Meares*, 56 N.C. 395, 3 Jones Eq. 416 (1857); *Bridges v. Wilkins*, 56 N.C. 326, 3 Jones Eq. 342 (1857); *Moore v. Leach*, 50 N.C. 97, 5 Jones 88 (1857); *Doe ex rel. Stowe v. Davis*, 32 N.C. 310, 10 Ired. 431 (1849) (chooses tenancy in common; Wild's Case not mentioned); *Johnson v. Johnson*, 38 N.C. 334, 3 Ired. Eq. 426 (1844) (finds individual gifts, not a class gift, because of the words "to be equally divided between them and their heirs, share and share alike"; Wild's Case not mentioned); *Skinner v. Lamb*, 25 N.C. 110, 3 Ired. 155 (1842) (chooses a tenancy in common; Wild's Case not mentioned); *Ponton v. McLemore*, 22 N.C. 273, 2 Dev. & Bat. Eq. 285 (1839) (chooses life estate-remainder; Wild's Case not mentioned); *Jernigan v. Lee*, 9 N.C. App. 582, 176 S.E.2d 899 (1970), *rev'd*, 279 N.C. 341, 182 S.E.2d 351 (1971).

14. 77 Eng. Rep. 277 (K.B. 1599). Lord Coke's life and times are marvelously described in Catherine Drinker Bowen's *THE LION AND THE THRONE* (1956).

15. 76 Eng. Rep. 206 (K.B. 1581).

16. It does not appear, however, that Lord Coke was involved in Wild's Case as counsel. See Wild's Case, 77 Eng. Rep. 277 (K.B. 1599).

as will be shown, that is scarcely a reason for continuing to adhere to the Rule.

In the course of his report of Wild's Case, Lord Coke stated the following rules:

[I]f A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation, *scil.* as much as children or issues of his body; . . . but if a man devises land to A. and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life.¹⁷

17. Wild's Case, 77 Eng. Rep. 277, 278-79 (K.B. 1599). Note that in its original form the Rule was said to apply to devises to *A* and his "issue," where "issue" was used in the sense of "children," as well as to devises to *A* and his children. Gifts to *A* and his "issue" do not seem to have engendered Wild's Case litigation in North Carolina, in contrast to some other states.

The construction of a devise or gift of property to "*A* and the children of *B*" raises one large issue which in turn would seem to affect the resolution of two subissues. The larger issue is whether the devise or gift is to one class consisting of *A* and the children of *B* or to an individual, *A*, and a class, the children of *B*. The first of the subissues is whether the devise to *A* lapses if he should die before the testator. The second is whether *A* takes a share equal to the share taken by each child of *B* (per capita) or whether he takes a half and the children of *B* a half of the property (per stirpes).

One might think that the determination of the two subissues is necessarily controlled by the determination of the larger issue. If the language is construed to be a devise to a single class, then (1) the devise to *A* would not lapse, but would go to the other class members, and (2) the members of the class would all take equal shares. On the other hand, if the devise is construed to be to an individual and a class, then (1) the devise to *A* could lapse and (2) *A*, if alive, would take a one-half share not necessarily equal to (and usually greater than) that of the members of the class of which he is not a member (*B*'s children).

These seemingly consistent results, however, are not found in most jurisdictions, including North Carolina. The general rule is that the gift to *A* lapses (or invokes an anti-lapse statute) should *A* die before the death of the testator. *Henderson v. Womack*, 41 N.C. 315, 316, 6 Ired. Eq. 437, 441 (1849); 5 ALP, *supra* note 7, § 22.13; 2 SIMES & SMITH, *supra* note 7, § 616. *Contra*, RESTATEMENT OF PROPERTY § 284 (1940). See also W. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 341 n.7 (1961). In other words, for purposes of lapse the gift is treated as one to an individual, *A*, and a class, the children of *B*.

On the other hand, when the question is whether *A* takes a share equal to that of each child of *B* or whether *A* takes a one-half share, the general presumption lies in favor of a per capita distribution—*A* takes a share equal to that of each child. *Tillman v. O'Briant*, 220 N.C. 714, 18 S.E.2d 131 (1942); *Culp v. Lee*, 109 N.C. 675, 14 S.E. 74 (1891); *Whitehurst v. Pritchard*, 5 N.C. 255, 1 Mur. 383 (1810); 2 SIMES

Both Resolutions were dicta, as the language of the devise in the case was significantly different from "to *B* and his children."¹⁸ Nevertheless the Rule has generally been followed both in England¹⁹ and the United States.²⁰

The father of Wild's Case in North Carolina law is Justice Battle of the mid-nineteenth century Supreme Court of North Carolina. He first recognized and stated the Rule in the fountainhead 1850 case of *Moore v. Leach*.²¹ In that case Battle cited Wild's Case, quoted its two

& SMITH, *supra* note 7, § 615; Long, *supra* note 9, at 321-24 (1944). Nevertheless, a contrary intent will be given effect. *Pardue v. Givens*, 54 N.C. 211, 1 Jones Eq. 306 (1854); *Henderson v. Womack*, 41 N.C. 315, 6 Ired. Eq. 437 (1849). See also *Stowe v. Ward*, 10 N.C. 327, 3 Hawks 604 (1825), *rev'd*, 12 N.C. 58, 1 Dev. 67 (1826), *rev'd*, 17 N.C. 405, 2 Dev. Eq. 509 (1834) (the court held per capita, reversed itself, then reversed itself again).

Thus the answer to the question whether the gift is to a single class or to an individual and a class depends upon the purpose for which the question is being asked. Rather than approaching the problem from the gross issue of class gift or no, the cases use a finer scalpel, asking the purpose for which the classification may be relevant. For purposes of lapse, the gift is treated as one to an individual and a class; for purposes of shares, the gift is treated as one to a single class.

The inconsistent answers may cause conflict. For example, suppose there is a devise to *A* and the children of *B*, *B* having five children. *A* dies before the testator and then one of the five children dies before the testator. Does one-sixth of the gift lapse (*A*'s per capita share before he died) or does one-fifth of the gift lapse (*A*'s per capita share had he not died)? See 2 SIMES & SMITH, *supra* note 7, § 615.

Whitehead v. Weaver, 153 N.C. 88, 68 S.E. 1059 (1910), involved a gift to *A* and the children of *B*. Applying the Second Resolution in Wild's Case, the court held that *A* and the eight children of *B* were tenants in common, each taking a one-ninth share. This result was consistent with the per capita presumption reached according to the cases discussed above. Apparently no other North Carolina decision has applied Wild's Case to a gift to *A* and the children of *B*. With *Whitehead v. Weaver*, compare *Lockhart v. Lockhart*, 56 N.C. 200, 3 Jones Eq. 205 (1857) (bequest to be equally divided between the children of deceased son *A*, and sons *B* and *C*; there were three children of *A*; held, division per stirpes, not per capita, so the children of *A* take one-ninth each, not one-fifth each).

18. The devise was in the form "to *A* for life, remainder to *B* and the heirs of his body, remainder to *C* and his wife, and after their decease to their children." 77 Eng. Rep. at 277. At the time of the devise, *C* and his wife had a son and a daughter. *B* died without heirs of his body. *C*, his wife, and their son pre-deceased *B*. The son of *C* left a daughter, *D*, who claimed an interest on the theory that *C* and his wife had an estate tail. (If they had only a life estate followed by a remainder in the children, *D* took nothing because the remainder to the children of *C* and his wife was only for life—the limitation to "children" lacked words of inheritance [such as "and their heirs"], and even though the creating instrument was a will for which words of inheritance were not absolutely required, there was no manifestation of intention to give the children a fee.) The court held that *C* and his wife took a life estate followed by a remainder (for life) in their children; therefore, *D*, their grandchild, took nothing. *Id.* at 277-79.

19. 2 SIMES & SMITH, *supra* note 7, § 691 n.2.

20. See 5 ALP, *supra* note 7, § 22.16.

21. 50 N.C. 97, 5 Jones 88 (1857). *Moore v. Leach* was not the first case in which the Rule in Wild's case might have been invoked. See the earlier cases of *Doe*

Resolutions, and applied the Second Resolution to find a joint estate²² in the testator's daughter and her children when the daughter had three children at the making of the will, who all survived the testator. A year later, on the supposed authority of *Moore v. Leach*, Battle applied the First Resolution to give an absolute estate²³ in personalty to the testator's childless daughter.²⁴ During his tenure, Battle recognized Wild's Case as an issue in six cases;²⁵ by 1860 another judge had picked up his lead²⁶ and since then about forty cases have grappled with the Rule.

A. *The First Resolution*

According to the First Resolution in Wild's Case, if *A* has no children a devise "to *A* and his children" creates a fee tail in *A*. Thus the words "and his children" are treated as words of limitation in the sense of "and his bodily heirs." From the standpoint of effectuating the testator's intention to benefit *A*'s children, the fee tail construction is justifiable since the entailed estate will pass on *A*'s death to his children (if he has any who survive him).²⁷

The case for the fee tail in *A* on the ground that the entailed estate will pass on his death to his children, if any, is subject to one flaw that seems not to have been noticed elsewhere. The problem arises at common law where *A* dies leaving two or more children, at least

ex rel. *Stowe v. Davis*, 32 N.C. 311, 10 Ired. 431 (1844); *Johnson v. Johnson*, 38 N.C. 334, 3 Ired. Eq. 426 (1844); *Skinner v. Lamb*, 25 N.C. 111, 3 Ired. 155 (1842); and *Ponton v. McLemore*, 22 N.C. 236, 2 Dev. & Bat. Eq. 285 (1839), all involving potential Wild's Case language but failing to perceive the doctrine.

22. Battle found a joint estate in fee, not for life, in contrast to Wild's Case. The point is discussed in section I(B) *infra*.

23. Battle found a fee simple, not a fee tail, in contrast to Wild's Case. The subject of the gift was personalty (slaves), in which fees tail do not exist. This point is discussed in section I(E) *infra*.

24. *Jenkins v. Hall*, 57 N.C. 321, 4 Jones Eq. 334 (1858).

25. *Faribault v. Taylor*, 58 N.C. 234, 5 Jones Eq. 219 (1859); *Jenkins v. Hall*, 57 N.C. 321, 4 Jones Eq. 334 (1858); *Coakley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858); *Chesnut v. Meares*, 56 N.C. 395, 3 Jones Eq. 416 (1857); *Bridges v. Wilkins*, 56 N.C. 326, 3 Jones Eq. 342 (1857); *Moore v. Leach*, 50 N.C. 97, 5 Jones 88 (1857). Wild's Case is not mentioned in the *Bridges v. Wilkins* opinion, but a later case indicates that Battle had it in mind. *Faribault v. Taylor*, 58 N.C. at 235, 5 Jones Eq. at 220.

26. *Gay v. Baker*, 58 N.C. 273, 5 Jones Eq. 344 (1860) (Manly, J.).

27. It seems not to have been noticed that the potential interest in *A*'s prospective children could have been defeated by *A*. By the time of Wild's Case, the fictional lawsuits of the fine and common recovery had been developed to allow the tenant in tail in possession to "dock the entail" and convey a fee simple absolute. See 1 ALP, *supra* note 7, § 2.2 n.8; 1 SIMES & SMITH, *supra* note 7, § 14. Therefore, while the fee tail construction came close to creating an interest in *A*'s prospective children, it did not guarantee them one.

one of them a male. Under the canons of descent, including the doctrine of primogeniture, males would take in preference to females, and among males the eldest son would take to the exclusion of younger males.²⁸ Thus the only or eldest son would take the entailed estate; only a single child, not all children, would take upon *A*'s death. This flaw would not exist at common law where *A* leaves only daughters; they would take equally, as coparceners.²⁹ Further, in modern times the fee tail would be divided equally among all children.³⁰

Other constructions might have been employed to preserve an interest for *A*'s children. Although Wild's Case argued that "as immediate devisees they [the children] cannot take, because they are not *in rerum natura* [in existence]," this obstacle does not seem a complete barrier. For example, when there is an immediate devise to "the children of *A*" and *A* has no children, the class remains open so that all children of *A* subsequently born may take.³¹ Future interests may be created in unborn or unascertained persons, and the gift to children could have been accomplished by giving *A* an estate subject to open (subject to partial divestiture) to let in after-born children. The interest in the children would have been an executory interest, not a remainder, since it would have cut short the interest in *A*. Executory interests were made legal by the Statute of Uses in 1535, some sixty-odd years before Wild's Case, so the estate subject to partial divestiture theory was possible. It may be, however, that at the time of Wild's Case English law judges still were not comfortable with the concepts of executory interests. Indeed, even today one can find authority for the hoary canon that, since statutes in derogation of the common law are strictly construed, no limitation shall be considered an executory interest if it can possibly take effect as a remainder.³²

Another possible barrier to the executory interest construction was that, for a time after the Statute of Uses, executory interests could not be created directly but could be created only indirectly by first creating a

28. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 257-58 (2d ed. 1959); see C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 41 (1962).

29. 2 F. POLLOCK & F. MAITLAND, *supra* note 28, at 257-58.

30. T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 36 (1966).

31. 2 SIMES & SMITH, *supra* note 7, § 636, at 74. Note that if the creating instrument were a deed rather than a will, the deed could be regarded as failing for want of a grantee. *But see* 2 SIMES & SMITH, *supra* note 7, § 637.

32. 1 ALP, *supra* note 7, § 4.36, at 472; 1 SIMES & SMITH, *supra* note 7, §§ 204, 206.

passive use that was then executed by the Statute.³³ Probably the most important objection to the executory interest construction *at the time of Wild's Case* was that the estate in *A* and his children would have been only a life estate, since there were no words of inheritance.³⁴

Perhaps the major barrier to the executory interest theory is that it treats the gift as one to a class composed of *A* and his children, and under usual class gift rules if any member of the class is living at the time of the gift the class closes.³⁵ Thus *A* would take, to the exclusion of his children, and at the time of Wild's Case they would not even have had a chance to inherit from him, as his interest would only have been a life estate.³⁶ The answer to this objection is that the class gift rule, which closes the class to *A*'s children, is not a good rule. The class closing rule is based on the assumption that the testator desires as early a distribution as possible.³⁷ Nevertheless, when the subject of the gift is a parcel of realty, distribution can be made while keeping the class open to benefit as many class members as possible. There is no real hardship in distributing to *A*, allowing him the income from the property, while requiring him to hold subject to letting in after-born children.

Occasionally one finds the First Resolution defended on the ground that it avoids any executory interests that might tend to a perpetuity. This is a canard; if *A*'s after-born children were allowed to take by executory interest, clearly those interests would vest in possession,³⁸ if at all, within *A*'s lifetime, well within the period of the Rule Against Perpetuities,³⁹ and interests vesting within a single life scarcely tend to a

33. 1 SIMES & SMITH, *supra* note 7, §§ 30, 221.

34. 5 ALP, *supra* note 7, § 22.16, at 286. Compare section I(E) *infra* which discusses the question whether the Wild's Case fee tail lasted beyond the lives of *A* and his children.

35. 2 SIMES & SMITH, *supra* note 7, § 636.

36. See section I(E) *infra*. In § 692 of their treatise, Simes and Smith make some argument in favor of the class gift construction, giving *A* an absolute interest as the only living class member. The children thus would take as *A*'s heirs only if they survived *A* and he died without a will. This seems too little for the children—a mere chance of inheriting—when the deviser has manifested a clear intention that the children take an interest under his devise. 2 SIMES & SMITH, *supra* note 7, § 692, at 158.

37. See 2 SIMES & SMITH, *supra* note 7, § 634, at 70, § 636, at 71.

38. The perpetuities test for vesting of executory limitations is vesting in possession, while for other future interests the requirement is vesting in interest. See 6 ALP, *supra* note 7, § 24.20; 3 SIMES & SMITH, *supra* note 7, § 1232.

39. At the time of Wild's Case (1599), the Rule Against Perpetuities as we now know it had scarcely begun to develop. The Statute of Uses, 27 Hen. 8, c. 10 (1536), which by legalizing executory interests perhaps made the perpetuities rule inevitable, was only sixty-odd years old, and the Duke of Norfolk's Case, 22 Eng. Rep. 931 (Ch. 1682), the progenitor of the Rule, was not decided until 1682. *Norfolk's Case* did not

perpetuity.⁴⁰ From the standpoint of the related rule against suspension of the power of alienation, that power would be suspended only for a single life, that of *A*.⁴¹

The other construction that would have given an interest to *A*'s children was that *A* took a life estate followed by a remainder in *A*'s children. Wild's Case rejected this interest in the children, saying that "by way of remainder they cannot take, for that was not his [the devisor's] intent, for the gift is immediate . . ." ⁴² This argument assumes the conclusion—the issue is whether the devisor did intend an immediate gift or a remainder when he makes an ambiguous gift to *A* and his children, *A* having no children. Many writers have argued that the life estate-remainder construction meets with the testator's likely intent,⁴³ and Wild's Case actually *held* that the testator had created a life estate followed by a remainder.⁴⁴ The major defect in this construction at the time of Wild's Case was that the remainder was only for the lives of the children, since there were no words of inheritance to give a fee.⁴⁵

The First Resolution in Wild's Case initially came before the North Carolina courts in *Jenkins v. Hall*.⁴⁶ There the testator bequeathed slaves in trust "for my daughter Mary's sole use and benefit and to her

set the outer limits of the Rule, but decided only that an interest that must vest within a life in being was good.

40. There is some suggestion in Thompson's real property text that the Rule in Wild's Case is based on a policy against perpetuities: "The rule in Wild's Case is another of the complex of legal property propositions . . . which whatever their origin have the effect of avoiding a perpetuity which the law abhors by vesting the title finally at the earliest possible moment and cutting off dangling future interests." 4A G. THOMPSON, *supra* note 11, § 2008, at 563 (footnotes omitted). This assertion is sadly mistaken. Thompson's section on Wild's Case is badly done and, in view of the frequent citation of Thompson by the Supreme Court of North Carolina, *e.g.*, *Jernigan v. Lee*, 279 N.C. 341, 346, 182 S.E.2d 351, 355-56 (1971), may be the source of part of the Wild's Case confusion in this state.

41. Indeed, today the existence of interests in unborn remaindermen would not seem to prevent sale. N.C. GEN. STAT. §§ 41-11, -11.1 (1976) permit sale of real estate in which there are contingent remainders over to persons not in being and of realty or personalty when there is a class gift subject to open. Although neither section refers to executory interests, the legislative intent would seem to have been to reach such interests. Compare *id.* § 41-12, validating prior sales of contingent interests, which refers expressly to "contingent remainder, executory devise, or other limitations."

42. 77 Eng. Rep. at 279.

43. *E.g.*, 2 SIMES & SMITH, *supra* note 7, § 692, at 158. On the other hand, in many of the North Carolina cases the grantor seems to perceive through a glass, darkly, a fee tail. Devises in the form, "to *A*, her children and bodily heirs," have a fee tail flavor.

44. See note 18 *supra*.

45. See sections I(E) & I(F) *infra*.

46. 57 N.C. 321, 4 Jones Eq. 334 (1858).

children forever."⁴⁷ At the time of the case Mary had never had children, and Justice Battle held that the limitation gave her an absolute estate in the use of the slaves according to the rule laid down in Wild's Case and recognized in *Moore v. Leach*. Battle's calm reliance on Wild's Case was deceptively oversimplified; Wild's Case involved realty (slaves apparently were regarded as personalty at the time of *Jenkins v. Hall*⁴⁸) and gave the devisee a fee tail (not an absolute estate). It is not clear whether Battle gave Mary an absolute estate on the ground that fees tail did not exist in personalty⁴⁹ or on the ground that fees tail were converted into fees simple by statute.⁵⁰ Subsequent cases made it clear that, at least for realty, the First Resolution in Wild's Case created a fee tail in *A* that was then transformed into a fee simple by North Carolina General Statutes section 41-1 or its predecessors.⁵¹ Thus one is left with the marvelous paradox that a rule of construction designed to create an interest in *A*'s children by giving *A* a fee tail in fact cuts off any interest in the children by giving *A* a fee simple; a rule explicitly designed to give the children something results in their taking nothing! This blindly mechanical approach might have been avoided simply on the theory that, fees tail having been abolished in North Carolina, the First Resolution was not germane.⁵² At the least, the courts should have asked whether other constructions might have been preferable to one that resulted in a fee simple in *A*. In this regard, it is significant that by the time Justice Battle introduced Wild's Case into North Carolina law devises were presumed to be in fee; thus either the executory interest or life estate-remainder construction could have been chosen and the interests would have been in fee. One of the factors that impelled the fee tail construction at the time of Wild's Case was that any other construction would have created only life estates in the

47. *Id.* at 322, 4 Jones Eq. at 335.

48. *E.g.*, *Vass v. Freeman*, 56 N.C. 215, 217, 3 Jones Eq. 221, 223 (1857) ("When slaves or other personal chattels are bequeathed . . .") (emphasis added) (Battle, J.). See also *Lockhart v. Lockhart*, 56 N.C. 200, 3 Jones Eq. 205 (1857).

49. The Statute De Donis, 13 Edw. 1, c. 1 (1285), which gave effect to the intention of a grantor to create a fee tail, did not apply to chattels. *Floyd v. Thompson*, 20 N.C. (4 Dev. & Bat.) 478 (1834); *Nichols v. Cartwright*, 6 N.C. 107, 2 Mur. 137 (1812); 1 SIMES & SMITH, *supra* note 7, § 359; 5 ALP, *supra* note 7, § 22.21.

50. N.C. GEN. STAT. § 41-1 (1976); see section I(E) *infra*.

51. *E.g.*, *Silliman v. Whitaker*, 119 N.C. 89, 25 S.E. 742 (1896). One might surmise that one of the reasons behind § 41-1 is a desire to punish the grantor who attempts to entail property, by converting the grantee's interest to a fee simple. If so, there would be no reason to apply § 41-1 to the First Resolution in Wild's Case, since by hypothesis the testator was not trying to create a fee tail.

52. Courts in some other jurisdictions have adopted this view. See 2 SIMES & SMITH, *supra* note 7, § 696.

children⁵³; this motivating factor had disappeared by Justice Battle's time.

The preceding discussion assumes that the words "and his children" were originally intended by the testator to be words of purchase, actually giving an interest to *A*'s children as "purchasers" or takers. The First Resolution effectuates this intention by construing the words as ones of limitation. It should be noted that in either First or Second Resolution cases it is entirely possible that the testator's actual intention was to use "and his children" in the sense of words of limitation like "and his heirs" or (more likely) "and his bodily heirs." If the words were used as ones of limitation, "limiting" or describing *A*'s estate, *A* would take a fee simple or fee tail regardless of whether he had children. Wild's Case would never be reached because it applies only if one first determines that "and his children" were words of purchase. This article generally assumes such an intention, but the reader should always recognize that the testator may not have intended to give *A*'s children anything directly.⁵⁴

B. *The Second Resolution*

Under the Second Resolution in Wild's Case, if *A* has children⁵⁵ a devise "to *A* and his children" is presumed to be a gift to a class composed of *A* and his children. The duration of the estate is for life, since the devise lacks words of limitation or any other manifestation of

53. 5 ALP, *supra* note 7, § 22.16, at 285-86.

54. Conversely, it is conceivable that a grantor or devisor might use the usual words of limitation "and his heirs" in the unusual sense of the words of purchase "and his children," invoking the Rule in Wild's Case for a transfer "to *A* and his heirs." Ordinarily, however, the magic words will be given their usual meaning. *Daniel v. Bass*, 193 N.C. 294, 136 S.E. 733 (1927). Even if the words were used in the sense of "children," the result would be the same in First Resolution cases—a fee simple in *A*. Similarly, a devise "to *A* and the heirs of his body" would result in a fee simple in *A* when he had no children, whether the words were regarded as ones of limitation or of purchase (in the sense of "children").

N.C. GEN. STAT. § 41-6 (1976) creates a statutory presumption that "heirs" means children. It does not apply, however, when a precedent estate is conveyed to the living ancestor. *E.g.*, *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941); *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893). Thus § 41-6 will not pervert transfers "to *A* and his heirs" into Wild's Case problems. Even if it did, where *A* had no children the result would not change, as the First Resolution fee tail would be converted by statute into a fee simple, the usual result of a transfer "to *A* and his heirs." For a case in which § 41-6 does apply, see *Condor v. Secrest*, 149 N.C. 201, 62 S.E. 921 (1908).

55. Or a single child. In the following discussion, the word "children" includes cases when *A* has a single child.

intention to devise a fee.⁵⁶ The form of concurrent ownership is joint tenancy because of the common law preference for joint tenancies.⁵⁷

This Resolution seems not too objectionable, although it is often asserted that the average testator's likely intent is to create a life estate in *A* followed by a remainder in *A*'s children.⁵⁸ At common law, of course, the remainder in the children would have been for life only, because of the absence of words of limitation. So there does not appear to be much to choose between these alternatives; the only difference is whether *A*'s life estate is undivided or shared with the children. As *A* often will be significantly older than the children, little harm seems to be done to their interests by postponing enjoyment until *A*'s death. Furthermore, since each child's share is diluted by the shares of other children, no single child suffers a disproportionate loss.

Perhaps the most significant problems in evaluating the Second Resolution are whether the deviser in fact intends a class gift and, if so, whether *A* is to take a share equal to that of each child. The dispute concerning the joint estate and the life estate-remainder constructions really comes down to the question of whether the testator intended a class gift. It ignores the possibility that the testator intended neither but rather used the phrase "and his children" as words of limitation (in the sense, most often, of "and the heirs of his body"), not as words of purchase, even though *A* had children.

Assuming the average testator intends a class gift, one should still be careful to ask: What was the class—*A*'s children or *A* and his children? If the latter, what shares does *A* take?⁵⁹ If the former, which children share? *Moore v. Leach*⁶⁰ injected the Second Resolution into North Carolina law. There the testator devised his houses and lots in Pittsboro to his "beloved"⁶¹ daughter Eliza Ann . . . and her children, the lawful heirs of her body, . . . to her, the said Eliza Ann . . . , and her children forever."⁶² At the making of the will, Eliza Ann had three

56. *E.g.*, 5 ALP, *supra* note 7, § 22.22.

57. *Id.*

58. *E.g.*, 2 SIMES & SMITH, *supra* note 7, § 692.

59. If *A* and the children take as joint tenants, *A* must take a share equal to that of each child because of the rule that joint tenants must own equal undivided shares.

60. 50 N.C. 97, 5 Jones 88 (1857).

61. Arguably the use of the term of endearment, "beloved," indicated a primary affection for the daughter and only a secondary intention to benefit her children. If so, Eliza Ann should have taken more than a child-size interest as co-tenant. The point was not noted.

62. 50 N.C. at 97-98; 5 Jones at 88-89.

children, who all survived the testator.⁶³ The court held that Eliza Ann and her children took the property "together," apparently meaning "in equal shares." Although the opinion was not entirely clear as to whether their interest was (1) a tenancy in common or (2) in fee, later cases answered both of these questions in the affirmative. The concurrent estate is in common, since that estate is now preferred over joint tenancy,⁶⁴ and the estate is in fee, since that interest is now presumed unless a contrary intent is shown.⁶⁵

As with the First Resolution, the court did not inquire whether changes in the law since the date of Wild's Case argued for repudiation, or at least reexamination, of Wild's Case. The change in preference from joint tenancy to tenancy in common would have permitted the court to find unequal interests in *A* and the children, since tenants in common, in contrast to joint tenants, need not own equal undivided interests. The change in presumption from life estate to fee when the will lacked words of limitation probably is neutral on the choice between a concurrent estate in *A* and the children and a life estate in *A* with remainder to the children; it does weaken any argument in favor of a fee tail in *A*, because that construction is no longer necessary to create something more than mere life estates in *A* and the children.

It is significant that *Moore v. Leach*, while finding a concurrent estate, recognized the possibility of a different construction "if there be something peculiar in the will, indicative of an intention in the testator that she [the daughter] should take for life with a remainder over to the children."⁶⁶ Battle found that "something peculiar" in four out of five subsequent cases during his tenure.⁶⁷

C. Rules of Construction

It is blackletter law that both resolutions in Wild's Case are rules of

63. The opinion does not indicate whether other children were born to Eliza Ann.

64. See section I(G) *infra*.

65. See section I(E) *infra*. In *Moore v. Leach* the gift to Eliza and her children "forever" suggests a fee simple.

66. 50 N.C. at 99, 5 Jones at 90.

67. *Bridges v. Wilkins*, 56 N.C. 326, 327-28, 3 Jones Eq. 342, 344-45 (1857); *Chesnut v. Meares*, 56 N.C. 395, 396-97, 3 Jones Eq. 416, 417-18 (1857); *Coakley v. Daniel*, 57 N.C. 96, 97-99, 4 Jones Eq. 90, 91-93 (1858); *Faribault v. Taylor*, 58 N.C. 180, 181, 5 Jones Eq. 219, 220 (1858). Aside from *Moore v. Leach*, the only Second Resolution case decided during Battle's tenure which adhered to Wild's Case was *Gay v. Baker*, 58 N.C. 272, 274-75, 5 Jones Eq. 344, 346-48 (1860) (opinion by Manly, J.). Battle wrote the opinions in the four cases finding a contrary intention.

construction that yield to a showing of a contrary intention.⁶⁸ A number of North Carolina cases repeat the statement,⁶⁹ however, the decisions do not seem to respect the assertion. For example, in the recent case of *Tremblay v. Aycock*⁷⁰ the naming, granting, habendum and warranty clauses of a deed⁷¹ ran "to Lemon Lee and the heirs of his body."⁷² Following the description and preceding the habendum clause was a statement that, "The intent and purpose of this deed is to convey to Lemon Lee a life estate . . . and at his death a fee simple estate to the heirs of his body if any . . ."⁷³ At the time of the deed Lemon Lee had no children, although children were later born to him. The court held that under the naming, granting and habendum clauses Lemon Lee took an estate tail, which was converted to a fee simple by section 41-1. Alternatively, the court said that even if the words "heirs of his body" could be construed to mean "children," the estate of Lemon Lee would still have been a fee simple. The court quoted from *Davis v. Brown*:

It is settled law with us that when a conveyance is made to A and his children, if A has children when the deed is executed, he and they take as tenants in common. But if A has no children when the deed is executed, he takes an estate tail which, under our statute, is converted into a fee. G.S. 41-1⁷⁴

This result is peculiar in light of the express statement in the deed that Lemon Lee was to take a life estate followed by a remainder. Although *Tremblay v. Aycock* might be explained as an ordinary deeds case rejecting as surplusage any inconsistent statements not found in the granting clause,⁷⁵ the surplusage rule would not seem properly invocable

68. 5 ALP, *supra* note 7, §§ 22.19, 22.24; 2 SIMES & SMITH, *supra* note 7, § 693.

69. *E.g.*, *Cole v. Thornton*, 180 N.C. 90, 104 S.E. 74 (1920) (First Resolution); *Coakley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858) (Second Resolution).

70. 263 N.C. 626, 139 S.E.2d 898 (1965) (five to two decision).

71. Not a devise. Wild's Case was stated as a rule for devises. As to extension of Wild's Case to deeds, see section I(E) *infra*.

72. 263 N.C. at 627, 139 S.E.2d at 899.

73. *Id.*

74. *Id.* at 629, 139 S.E.2d at 899-900 (quoting *Davis v. Brown*, 241 N.C. 116, 118, 84 S.E.2d 334, 337 (1954) (citations omitted)).

75. Webster cites *Tremblay v. Aycock* for the proposition that a clause following the description that purports to reserve a life estate in the grantor is not effective. He then criticizes the mechanical rule of construction that, in the case of premises-habendum conflict, automatically invalidates any limiting provisions in the habendum. He also points out that the Rule makes it impossible for grantors to use printed forms when a life estate is to be reserved. Webster, *Doubt Reduction Through Conveyancing Reform—More Suggestions in the Quest for Clear Land Titles*, 46 N.C.L. REV. 284, 295-96 n.42 (1968).

against an intention-seeking rule such as the Rule in Wild's Case. Perhaps the problem in *Tremblay* was that the creating instrument was a deed, not a will as in Wild's Case. In a deed, the need for balancing the rights of two parties, grantor and grantee, may call for a more objective rule, while in a will one may focus on the testator's intention without fear of commercial prejudice to any bargaining party.⁷⁶ This somewhat facile explanation of *Tremblay* loses some force, however, when one examines other North Carolina cases.⁷⁷ Furthermore, *Tremblay* made the disturbing assertion that "[w]hen rules of construction have been settled they should be observed and enforced,"⁷⁸ and this attitude seems to prevail even in the wills cases.

It was not always so. As mentioned above,⁷⁹ *Moore v. Leach*,⁸⁰ despite its application of the Second Resolution, said that the Rule would not apply if "there be something peculiar in the will, indicative of an intention in the testator that [A] should take for life with a remainder over to the children."⁸¹ In the same term, *Chesnut v. Meares*⁸² (mentioning Wild's Case) and *Bridges v. Wilkins*⁸³ (not mentioning Wild's Case) found an intention to create a life estate in A followed by a remainder in the children. All in all, Battle found "something peculiar" to rebut Wild's Case in four⁸⁴ of his six Wild's Case decisions.⁸⁵ Gradually, however, the foundation of the Rule as one of construction began to erode. Only a handful of cases since Battle's time may in any sense be read as finding a contrary intention to rebut Wild's Case.⁸⁶ Of

76. The opinion does not disclose whether value was paid.

77. See text accompanying notes 79-103 *infra*.

78. 263 N.C. at 630, 139 S.E.2d at 900; *accord*, *Davis v. Brown*, 241 N.C. 116, 84 S.E.2d 334 (1954). This assertion seems to confuse the Rule itself with the result of applying the Rule.

79. See text accompanying note 66 *supra*.

80. 50 N.C. 97, 5 Jones 88 (1857).

81. *Id.* at 99, 5 Jones at 90. See also *Wilson v. Wilson*, 119 N.C. 588, 590, 26 S.E. 155, 155 (1896) ("The result would be otherwise if anything in the instrument indicated reasonably a different intention.").

82. 56 N.C. 395, 3 Jones Eq. 416 (1857).

83. 56 N.C. 273, 3 Jones Eq. 342 (1857).

84. In addition to the cases cited in the preceding two footnotes, see *Conkley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858), and *Faribault v. Taylor*, 58 N.C. 180, 5 Jones Eq. 219 (1859).

85. The decisions applying Wild's Case are *Moore v. Leach*, 50 N.C. 97, 5 Jones 88 (1857), and *Jenkins v. Hall*, 57 N.C. 321, 4 Jones Eq. 334 (1858).

86. See *Coffield v. Peele*, 246 N.C. 661, 100 S.E.2d 45 (1957) (devise "unto my seven children . . . to be divided equally among the seven children of mine, and their children"; *held*, the testator's children take a fee); *Griffin v. Springer*, 244 N.C. 95, 92 S.E.2d 682 (1956) (premises of deed to Bennett, party of the second part, and Bennett's children, Mary and Nona, parties of the third part; granting clause to Bennett

those cases, only one decided in 1880⁸⁷ clearly involves language in the basic form of "to *A* and his children." Most of the others involve some conflict between parts of a deed.⁸⁸ For example, some cases take the form of a granting clause "to *A*" followed by a habendum "to *A* and his children"; rejection of an interest in *A*'s children may be attributed to the rule that the habendum may not cut down a fee in the granting clause.⁸⁹ In others "children" clearly was not used as a word of purchase.⁹⁰

a life estate, at his death to Mary and Nona a life estate, with remainder to their children; *held*, Mary and Nona take life estates and their children have a remainder); *Mayberry v. Grimsley*, 208 N.C. 64, 179 S.E. 7 (1935) (premises of deed to Nonnie and her children, granting and habendum clauses to Nonnie, her heirs and assigns; *held*, Nonnie takes a fee: her children not meant to take any interest); *Tate v. Amos*, 197 N.C. 159, 147 S.E. 809 (1929) (devise to Grace, or her children; *held*, substitutional construction: Grace takes a fee if she survives testator; if not, children are substituted for her and take fee); *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928) (premises of deed to Sallie and her children, granting clause and other parts to Sallie for life and then to her heirs, executors, administrators and assigns; *held*, Rule in Shelley's Case applies and gives Sallie a fee; Wild's Case not discussed); *Weeks v. McPhail*, 128 N.C. 130, 38 S.E. 472 (1901) (superior court decree that devise to Hester and her children created a life estate in Hester followed by a remainder in her children was not appealed from; *held*, the decree is an estoppel on the parties though it may be erroneous in law; citing *Silliman v. Whitaker*, 119 N.C. 89, 25 S.E. 742 (1896)); *Blair v. Osborne*, 84 N.C. 417 (1881) (premises of deed to Araminta for life only (the deed lacking words of limitation), habendum to Araminta and her children; *held*, life estate in Araminta, remainder to children); *Pollard v. Pollard*, 83 N.C. 96 (1880) (devise of three tracts of land, two to wife for life, the other to son, daughter, and grandson as tenants in common for the life of the wife; at wife's death, all three tracts to be sold and the proceeds divided equally among the son, daughter, grandson, and their children, the children to take the share of the parent who may die before testator's death; *held*, the son, daughter, and grandson take vested estates, and the children of any who may die before the testator succeed to the share of their deceased parent); *Jernigan v. Lee*, 9 N.C. App. 582, 176 S.E.2d 899 (1970), *rev'd*, 279 N.C. 341, 182 S.E.2d 351 (1971) (devise of gift over to Berry and his heirs, if any, in the event that two prior takers die without issue; *held*, Berry and his one child take fee as tenants in common; Rule in Wild's Case does not apply because Berry and his heirs did not take an estate directly and immediately from testator; citing *Cole v. Thornton*, 180 N.C. 90, 104 S.E. 74 (1920). This theory clearly is mistaken, *see* text accompanying notes 119-31 *infra*, and the North Carolina Supreme Court did not even refer to Wild's Case in holding that Berry took a defeasible fee.).

Only one of these cases in any way touches the First Resolution, and only because in that one case, *Martin v. Knowles*, the record was silent as to whether *A* had children.

87. *Pollard v. Pollard*, 83 N.C. 96 (1880).

88. *Mayberry v. Grimsley*, 208 N.C. 64, 179 S.E. 7 (1935); *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928); *Blair v. Osborne*, 84 N.C. 417 (1881). *See also* *Coffield v. Peele*, 246 N.C. 661, 100 S.E.2d 45 (1957); *Griffin v. Springer*, 244 N.C. 95, 92 S.E.2d 682 (1956).

89. *Coffield v. Peele*, 246 N.C. 661, 100 S.E.2d 45 (1957); *Blair v. Osborne*, 84 N.C. 417 (1881). *See also* *Griffin v. Springer*, 244 N.C. 95, 92 S.E.2d 682 (1956); *Mayberry v. Grimsley*, 208 N.C. 64, 179 S.E. 7 (1935); *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928).

90. *Mayberry v. Grimsley*, 208 N.C. 64, 179 S.E. 7 (1935).

Long has read the cases as "indicat[ing] that wherever counsel are astute in pointing out the disadvantages of the rule, its application becomes uncertain."⁹¹ This view is mistaken; Long's conclusion is premised on four of Battle's decisions finding a contrary intention⁹² and on an 1881 case involving a granting-habendum conflict.⁹³ If these cases are excluded, only one of about forty cases since Battle's time has rejected a Wild's Case construction; it may reasonably be assumed that in at least some of these cases there was "something peculiar" to rebut Wild's Case and that counsel vigorously, but unsuccessfully, argued the point.⁹⁴

Thus the cases bear out the attitude expressed in *Tremblay v. Aycock* that settled rules of construction ought to be observed and enforced. A leading case, *Silliman v. Whitaker*,⁹⁵ is typical:

It is proper to say that if the devise had been to A for life, remainder to such children as may be living at her death, a very different case would have been presented. [O]r even if the devise had been to A for life, with remainder to her children. But here the devise to "B and her children (if she shall have any)" is in substance that which has been construed in Wild's case and others above cited to confer upon B, when she has no children at the death of the testator, not a life estate, but an estate tail in England and a fee simple in this country. When words used in a will have received a settled judicial construction the testator is taken as using them in that sense, unless a different intent *plainly* appears. Applying that rule, the devise here was, in legal effect, to "Sarah and her children, if she shall have any at the death of the testator, and if not, then to Sarah in fee simple," and the law hath been so written "these three hundred years," say the authorities.⁹⁶

Another well-known case, *Cullens v. Cullens*,⁹⁷ even concedes that the grantor's intention was to convey a life estate followed by a remainder but nevertheless follows the crowd of cases filing into the Wild's Case doorway:

The answers of the defendants contain no allegation that the word "heirs" was omitted by mistake and that it was the plain intention

91. Long, *supra* note 9, at 301.

92. *Faribault v. Taylor*, 58 N.C. 180, 5 Jones Eq. 219 (1859); *Coakley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858); *Chesnut v. Meares*, 56 N.C. 395, 3 Jones Eq. 416 (1857); *Bridges v. Wilkins*, 56 N.C. 273, 3 Jones Eq. 342 (1857).

93. *Blair v. Osborne*, 84 N.C. 417 (1881).

94. See sections I(H) & I(I) *infra*.

95. 119 N.C. 89, 25 S.E. 742 (1886).

96. *Id.* at 94-95, 25 S.E.2d at 743 (emphasis added) (citations omitted). See also *Cole v. Thornton*, 180 N.C. 90, 104 S.E. 74 (1920).

97. 161 N.C. 344, 77 S.E. 228 (1913).

of the grantor, William Lassiter, to convey the land to his daughter Sarah and her then living children in fee. The defendant asks for no equitable relief. But we are not prepared to say that upon the face of this deed it was the manifest intention of William Lassiter to give the land to Sarah Cullens and her then living children in fee to the exclusion of those after-born. *It was more likely his intention to convey it to Sarah herself in fee and after her death to her children, using the word "children" in the sense of heirs of her body.* But under the settled decisions of this Court the instrument fails to effectuate such purpose, and in our opinion conveys to Sarah and her children living at date of the deed an estate for life as tenants in common.⁹⁸

How does one account for the extraordinary devotion to the Wild's Case rules, even in the face of clear showings of contrary intention? One answer may be that the North Carolina courts confuse adherence to the rules of construction with adherence to the usual (but not universal) results of those rules. But one may honor the constructional rules while still finding a contrary intent to rebut the presumption created by the rules. Nevertheless, the North Carolina courts seem to be saying that the presumption always controls, a far different matter from saying that Wild's Case applies. The rules seem to be ones of property, not construction, applied despite any contrary intention and with no fundamental policy to support them.

Another explanation may be that the courts feel that rigid adherence to the results presumed by Wild's Case will discourage litigation of "A and his children" issues. The simple answer to this hypothesis is that litigation has not been discouraged.⁹⁹ Discouragement of unmeritorious litigation is one thing; discouragement of meritorious litigation another. If all rules of construction were interpreted so as to discourage

98. *Id.* at 347, 77 S.E. at 229-30 (emphasis added). The reasons for the court's view as to the grantor's likely intention do not appear from the facts. The premises of the deed ran "unto Sarah A. Cullens and her children" and the habendum "unto her the said Sarah A. Cullens and her children forever." The result of the decision was that the property reverted to the grantor's estate after the life estate, thence to his heirs (apparently Sarah). See also *Davis v. Brown*, 241 N.C. 116, 118, 84 S.E.2d 334, 337 (1954).

99. Of course, this conclusion does not automatically follow from the fact that a large number of Wild's Case disputes have found their way into the appellate reporters. Ideally, one needs to know the total number of instruments using Wild's Case language, the number of these instruments that were subjected to trial court construction, and the number of trial court decisions appealed. Nevertheless, in the absence of more definitive statistics, one may reasonably assume that the existence of forty-odd appellate decisions on a single issue indicates that litigation has not been discouraged.

litigation, there would be no rules of construction as we now know them.¹⁰⁰

A third hypothesis is that certainty in result is needed to enable the draftsman to predict the effect of his language. But certainly no draftsman intending to give *A* a fee simple (knowing *A* to have no children) would draw a deed "to *A* and his children" on the assumption that Wild's Case would give *A* a fee tail that section 41-1 would convert to a fee simple! The case against reliance is somewhat muddier with respect to the Second Resolution (when *A* has children). Certainly, however, the competent draftsman would not draw a limitation simply "to *A* and his children" because of the multitude of questions inherent in that limitation;¹⁰¹ the competent draftsman would choose other language to express the client's idea. It is not altogether clear that the incompetent draftsman would choose the "*A* and his children" formula in reliance on the result of most cases; if incompetent, he probably would not have checked the cases in advance. The lay draftsman clearly would not have relied on the cases, so we may safely inquire into his actual intention, unbound by seemingly irrebuttable presumptions.

A final hypothesis is that ironclad predictability in result gives certainty to land titles. One finds overtones of title security in *Silliman v. Whitaker*¹⁰² where a purchaser had bought forty years earlier in reliance on a trial court decree applying the Rule in Wild's Case. *Silliman* is exceptional, however, because usually no one has relied on the title and the decision is prospective. If so, it would seem that the court should search for the transferor's intention.

In sum, the North Carolina cases seem to have regarded the intention-oriented rules of Wild's Case as vehicles for reaching automatic decisions on result. This view is not justifiable unless one can say that the transferor must have intended a fee simple or a class gift. It is quite possible that the creator intended something different.¹⁰³

D. Time of Determining Existence of Children

1. Which Resolution Applies

Another matter that cuts across both Resolutions is whether the time of determining the existence of children is the making of the will or

100. This might not be Armageddon; one wades hopelessly through the present rules of construction, with none pointing a clear path.

101. See section II *infra*.

102. 119 N.C. 89, 25 S.E. 742 (1896).

103. See sections I(A) and I(B) *supra*.

the death of the testator. Obviously the same time should govern both Resolutions, else one would have either a gap unaffected by either Resolution or an overlap bringing the two Resolutions into conflict. The language of Wild's Case referred to time as follows:

[I]f A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise [B takes a fee tail] . . . but if a man devises land to A. and to his children or issue, and they then have issue of their bodies [A and his children take a joint estate].¹⁰⁴

"The time of the devise" could be taken to mean the time of making the will, especially when one's view is focused on execution by the old English doctrine that a will did not pass title to real property acquired after making the will.¹⁰⁵ On the other hand, if the testator's purpose was to give an interest to A's children, that purpose is best carried out by delaying the determination of children as long as possible. This not only gives more time for children to be born to A, but also benefits as many children as possible.¹⁰⁶

The state of the English authorities is somewhat confused,¹⁰⁷ with some authority for each time, but American courts generally have chosen the date of the testator's death.¹⁰⁸ So has North Carolina.

The choice in North Carolina of the testator's death seems not to have been advertent. The early cases did not present fact situations in which children had been born or had died in the period between the making of the will and the testator's death. In *Moore v. Leach*,¹⁰⁹ for

104. 77 Eng. Rep. at 278-79.

105. *E.g.*, T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 3, at 18 (2d ed. 1953). The modern presumption is that a will is ambulatory; it speaks as of the death of the testator. *E.g.*, N.C. GEN. STAT. § 31-41 (1976).

106. Although sometimes conflicting with other canons, one of the accepted rules for construction of class gifts is that the testator intended to benefit as many class members as possible. *E.g.*, 2 SIMES & SMITH, *supra* note 7, § 634. In the ordinary Wild's Case situation, there is no reason to postpone class closing beyond A's death, as (obviously) no more children can be born after A's death, except children *en ventre* who are allowed to take. See text accompanying note 115 *infra*.

There is, of course, a risk to the child of A in existence at the making of the will if determination of the class is postponed until the testator's death; that child may die after the making of the will, but before the testator's death, causing his share to go to other class members or to lapse (instead of going to the child's estate). This risk is outweighed by the benefits of postponing determination of the class. The children of A normally will not die before the testator, who in most cases is their grandparent. Also, under some modern lapse statutes it appears that a share will be preserved for the issue of the deceased child of A. *E.g.*, N.C. GEN. STAT. § 31-42(b) (1976).

107. Compare 5 ALP, *supra* note 7, § 22.18 with 2 SIMES & SMITH, *supra* note 7, § 694.

108. 2 SIMES & SMITH, *supra* note 7, § 694.

109. 50 N.C. 97, 5 Jones 88 (1857).

example, *A* had three children as of the making of the will, all of whom survived the testator (apparently no other children were born). The court applied the Second Resolution after discussing cases in which *A* had children *living at the death of the testator*. Later cases seemed to assume that the relevant time was the testator's death, even though the question seems never to have been argued.¹¹⁰ It is difficult to find a case squarely raising the time question, *i.e.*, a case in which the report indicates that *A* had no children at the execution of the will but had children as of the testator's death. The cases nearest the question are ones in which *A* had some children as of *T*'s death and others born later.¹¹¹ As discussed below,¹¹² the question which children take is different from the question whether children exist for purposes of determining the applicability of the First or Second Resolution.

Regardless of the dubious strength of the precedent, the choice of the testator's death rather than the execution of the will is a good one. It is consistent with the usual class gift assumption that the testator intends to benefit as many children as possible and also tends to cut down the number of cases in which the First Resolution applies,¹¹³ an altogether desirable result in North Carolina, where the fee tail in *A* is converted into a fee simple. Since the basis of the Rule is a presumed intention to benefit directly the children of *A*, the better time for determining the existence of children is the testator's death. If the time of making the will were chosen, and *A* only had children born after the will but before the testator's death, *A* would take a fee tail—converted by statute into a fee simple—to the exclusion of the children. But if the time of the testator's death were chosen, the children would share. Further, in the same case, if the time of making the will were chosen, and *A* died during the lifetime of the testator, the devise to *A* in fee simple would lapse, to the detriment of the children. But if the time of the testator's death were chosen, the gift to the children would not lapse.¹¹⁴

One wrinkle that should be noted in North Carolina¹¹⁵ is that a child *en ventre sa mere* at the time of the testator's death is regarded as

110. See, *e.g.*, *Silliman v. Whitaker*, 119 N.C. 89, 94-95, 25 S.E. 742, 743 (1896) ("at the death of the testator"); *cf.* *Doggett v. Moseley*, 52 N.C. 450, 452-53, 7 Jones 587, 590-91 (1860) ("but if [A] has children or issue when the will is made and at the death of the testator").

111. See, *e.g.*, *Cullens v. Cullens*, 161 N.C. 344, 77 S.E. 228 (1913).

112. See section I(D)(2) *infra*.

113. See 5 ALP, *supra* note 7, § 22.18.

114. 2 H. UNDERHILL, *supra* note 11, § 581. If the jurisdiction had an anti-lapse statute, the children would likely be protected.

115. This view is followed elsewhere. See 5 ALP, *supra* note 7, § 22.18 n.5.

in being for purposes of the Rule in Wild's Case. This proposition seems not too difficult to one steeped in the traditions of the Rule Against Perpetuities,¹¹⁶ but it was somewhat difficult to accept in North Carolina, particularly because North Carolina cases have extended Wild's Case to deeds as well as to devises, with nary a recognition that the Rule in Wild's Case was expressly stated as a rule for devises.¹¹⁷ The child *en ventre* cases all involved deeds, with confusion resulting from the usual rule that a deed must have a grantee. The primary case holding that a child *en ventre* cannot be a grantee is *Dupree v. Dupree*,¹¹⁸ a model of scholastic quibble that undoubtedly has influenced later North Carolina cases limiting the membership of class gifts. In *Dupree* the grantor conveyed a slave to the children of Robert and Rachel Dupree. Two children were in existence at the date of the deed, and the plaintiff apparently was conceded to have been conceived six days before the deed was delivered. The court quaintly stated the issue as whether "an atom, a thing in its mother's womb, six days old [can] acquire a right of property by a common law conveyance."¹¹⁹ The court dropped a common law bomb on the atom, holding that the child *en ventre* was barred because not *in esse*. Whatever the merits of *Dupree* (and there are few), the case certainly evidences an unusual hostility to executory interests. It was distinguished in *Gay v. Baker*¹²⁰ on the ground that in a conveyance to a trustee for the benefit of *A* and her children, the trustee could take as grantee the legal title for the benefit of the child *en ventre*.¹²¹ Almost immediately the legislature adopted a statute declaring that "an infant unborn, but *in esse*, shall be deemed a person capable of taking by deed or other writing, any estate whatever, in the same manner as if he were born."¹²² This statute was held to make the child *en ventre* a child in being for purposes of the Rule in Wild's Case,¹²³ but the *Dupree* hostility to other afterborns lingered on.¹²⁴

116. See, e.g., J. GRAY, THE RULE AGAINST PERPETUITIES §§ 220-222 (4th ed. 1942).

117. See section I(A) *supra* & section I(E) *infra*.

118. 45 N.C. 149, Busb. Eq. 164 (1852).

119. *Id.* at 150, Busb. Eq. at 167.

120. 58 N.C. 273, 5 Jones Eq. 344 (1860).

121. Although other children born after the conveyance were not entitled to share.

122. N.C. Rev. Code. 270, ch. 43, § 4 (1855) (current version at N.C. GEN. STAT. § 41-5 (1976)). See also N.C. GEN. STAT. § 29-9 (1976) (intestate succession); N.C. GEN. STAT. § 39-6 (1976) (revocation of deeds of future interests made to persons not *in esse*).

123. *Campbell v. Everhart*, 139 N.C. 502, 52 S.E. 201 (1905); *Heath v. Heath*, 114 N.C. 547, 19 S.E. 155 (1894). Query: What result if the child is stillborn?

124. E.g., *Heath v. Heath*, 114 N.C. 547, 19 S.E. 155 (1894) (under a deed to a woman "and her children," a child *en ventre* at the time of the conveyance will

In determining whether *A* has children at the time of the devise, situations may arise in which *A* has only illegitimate or adopted children. The proper inquiry is whether the testator intended such children to take; if so, *A* had "children" within the meaning of Wild's Case as a rule of construction. As an alternative ground of decision, the old case of *Doggett v. Moseley*¹²⁵ found that the testator did not intend his daughter's illegitimate children to be included in the term "issue" (assuming it to be synonymous with "children"), even though the testator was himself a bastard. There may be some modern trend toward construing class gifts as including illegitimates.¹²⁶ Although there is no decision in the context of Wild's Case, the trend is also toward including adopted children in class gift terminology.¹²⁷

One other fairly standard case is that of the postponed gift: to *X* for life, then to *A* and his children. If the normal time of determining children is delayed from the execution of the will to the testator's death in order to reduce the number of First Resolution cases and increase the number of eligible children, one would reasonably expect the time for determining children in the postponed gift cases to be the time of *X*'s death, not the testator's death. One's expectation would be reasonable, but it would not be met in North Carolina.¹²⁸ *Moore v. Leach*¹²⁹ cited postponed gift cases from other jurisdictions in apparently choosing the time of the testator's death for immediate gifts, and subsequent North Carolina postponed gift cases chose the time of the testator's death,¹³⁰

take, but children born more than a year later will not take); *cf.* *Powell v. Powell*, 168 N.C. 561, 84 S.E. 860 (1915) (deed to a parent for life with a remainder over to children conveys an interest to all children alive at the termination of the life estate, whether born before or after execution of the deed).

125. 52 N.C. 450, 7 Jones 587 (1860). Compare *Howell v. Tyler*, 91 N.C. 207 (1884), in which a bequest to the heirs of a living person, all the children of the person being illegitimate, was held to go to the children under N.C. GEN. STAT. § 41-6 (1976), which declares that a limitation to "heirs" shall be construed to mean children, unless a contrary intention appears. Note that the entire bequest would have failed if § 41-6 were not applied, whereas in the Wild's Case situation *A* may take even if his illegitimate children may not.

126. *Cf.* N.C. GEN. STAT. § 29-19 (1976) (illegitimate child may inherit from the mother and, under certain circumstances, the father); *id.* §§ 49-14 to -16 (paternity may be established by civil action).

127. A gift to "children" presumptively includes adopted children under appropriate circumstances. *Smyth v. McKissick*, 222 N.C. 644, 24 S.E.2d 621 (1943); *cf.* N.C. GEN. STAT. § 31-5.5 (1976) (after born, after-adopted or illegitimate after born children may share in testator's estate unless clearly excluded). For a recent case allowing after-adopted children to take as "issue" under their great-grandfather's will, *see* *Stoney v. MacDougall*, 31 N.C. App. 678, 230 S.E.2d 592 (1976), *cert. denied*, 291 N.C. 716, 232 S.E.2d 208 (1977).

128. Nor in other states. 5 ALP, *supra* note 7, § 22.18 n.4.

129. 50 N.C. 97, 5 Jones 88 (1857).

130. *E.g.*, *Hampton v. Wheeler*, 99 N.C. 222, 6 S.E. 236 (1888).

although it did not appear that there was any difference in the existence of children between the testator's death and X's death. In *Ziegler v. Love*,¹³¹ however, the testator devised a lot to his wife for life and at her marriage or death to the testator's son, Frederick, and to his children or issue, but in case Frederick should die childless and without issue, to the testator's heirs in equal degree. Frederick had no children as of the testator's death; a son was born to him after the testator's death but before the wife's death. The court applied the First Resolution, giving Frederick a fee tail which was converted by statute into a fee simple. The fee was defeasible, however, in the event that Frederick died childless and without issue.

It is difficult to explain the choice of the testator's death in the postponed gift cases where there is no necessity for an early determination of takers. The choice does tend to make the title alienable at an earlier date, but this reason is insufficient because the question is the testator's likely intention, not some extraneous rule of policy which yields to intention, and because it may reasonably be supposed that in most cases the life tenant is a fairly elderly spouse or child of the testator with a consequent short life expectancy.¹³² If the early choice has the effect of excluding children born after the testator's death,¹³³ it is inconsistent with the principles of the cases that reject the Second Resolution in favor of finding an intention to create a life estate in A followed by a remainder in his children. Those cases do not restrict the class of children to those in existence at the testator's death but instead allow all children of A, whenever born, to take.¹³⁴

Another explanation may be that the early choice is based on a fear of defeating the interest of a child of A who survives the testator but

131. 185 N.C. 41, 115 S.E. 887 (1923).

132. In *Ziegler v. Love*, for example, the life tenant widow died two years after the testator. *Id.*

133. Which it seems to do. See text accompanying notes 143-48 *infra*.

134. *Coakley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858). In *Faribault v. Taylor*, 58 N.C. 234, 5 Jones Eq. 219 (1858), the court stated:

The construction, which would give the property to her and her present children only, as tenants in common of the absolute interest in it, is inadmissible, both because it might, by diminishing the present and immediate interest in the wife, be an inadequate support for her during her life, and, because it would exclude from the benefit of the fund, any children she may hereafter have. The manifest intent of the testator will be much more effectually carried out by giving to the wife a life-estate, with a remainder to all the children which she now has, or may hereafter have; and as the property is bequeathed [*sic*] to trustees, in trust, for the benefit of her and her children, this construction is fully supported by the recent cases of *Bridgers [sic] v. Wilkins*, 3 Jones' Eq. Rep. 342, *Chesnut v. Mears [sic]*, *Ibid.* 416, *Coakley v. Daniel*, 4 Jones' Eq. Rep. 89.

Id. at 235, 5 Jones Eq. at 220.

predeceases the life tenant. The cases, however, seem to suggest that a child of *A* who predeceases the relevant time for determining children is entitled to a share,¹³⁵ so postponement of the time does not prejudice the rights of predeceased children. Allowing the deceased child to take is consistent with normal class gifts concepts that prefer early vesting and do not imply a condition precedent of survivorship.¹³⁶

2. Which Children Share

The preceding paragraph is based on the postulate that the time of determining the existence of children for purposes of applying the First or Second Resolution in Wild's Case does not necessarily control the question of which children share. That is, assuming that the Second Resolution applies so that *A*'s children's share, which of *A*'s children in fact share? Assume the following case: *T* devises Blackacre to *X* for life, remainder to *A* and his children. *X* dies after *T*, survived by *A*. *A* has the following children:

- B*, born before *T*'s death, who survives *T* and *X*
- C*, born before *T*'s death, who survives *T* but not *X*
- D*, born before *T*'s death, who survives the making of the will but who survives neither *T* nor *X*
- E*, born before *T*'s death and before the making of the will, who does not survive the making of the will
- F*, born after *T*'s death, who survives *X*
- G*, born after *T*'s death, who does not survive *X*
- H*, born after *X*'s death

Clearly the Second Resolution applies to give a tenancy in common to *A* and his children, but *which* children? *B* will share, but whether *C*, *D* and *E* will take are questions of minimum membership. *C*'s interest is a question of survivorship: Is there an implied condition precedent that he be alive when the co-tenancy becomes possessory? Traditionally, the "better view" in class gifts is that a class member need not survive to the time of distribution.¹³⁷ Whether *D* will take is a question of lapse,¹³⁸ an

135. See note 148 *infra*.

136. *E.g.*, 2 SICES & SMITH, *supra* note 7, §§ 654, 656.

137. *E.g.*, 2 SICES & SMITH §§ 654, 656. A similar question may arise when it is found that Wild's Case does not apply. If *A* takes a life estate with remainder to *A*'s children, must the children survive *A* in order to take? The question is the testator's intention; the better presumption would appear to be that there is no condition of survivorship implied from postponement of the time of possession. See, *e.g.*, *id.* § 655.

138. Dictum in *Hampton v. Wheeler*, 99 N.C. 222, 225, 6 S.E. 236, 238 (1888), suggests that *D* would take.

anti-lapse statute may be interpreted as preserving his interest.¹³⁹ *E*'s gift is a "void" devise; normally *E* would not take unless an anti-lapse statute applied (a) to class gifts and (b) otherwise void devises, a somewhat unusual happenstance.¹⁴⁰

The rights of *F*, *G* and *H* are ones of maximum membership or class closing. In typical class gift situations a member such as *F* would take; since the time for distribution has not arrived the class is kept open so as to benefit as many children as possible.¹⁴¹ If *F* is allowed to share, so should *G*, unless failure to survive *X* defeats his share. The answer to that question would be determined by *C*'s similar case. Finally, *H* would not be given a share, since he was born after the time of distribution, although as pointed out above,¹⁴² if the subject matter of the gift is realty there would seem to be no insurmountable bar to granting *H* a share. After all, the testator's gift was to *A* and his children, not to *A* and *some* of his children. Distribution could be made as of *X*'s death, subject to partial divestiture by shifting executory interest in *H*.

Not surprisingly, few North Carolina cases¹⁴³ deal expressly with these problems. Indeed, the possible difference between existence of children for purposes of choosing the Resolution and for purposes of taking a share seems not to have been clearly perceived. The few cases which have arisen tend to resolve questions of minimum membership (survivorship) in favor of the child who predeceases the life tenant and to decide questions of maximum membership (class closing) against the child born after the testator's death. In *Cullens v. Cullens*,¹⁴⁴ for

139. *E.g.*, 2 SIMES & SMITH, *supra* note 7, § 662; *cf.* Doggett v. Mosely, 52 N.C. 450, 7 Jones 587 (1860):

A bequest to a woman and her issue, undoubtedly gives her an absolute estate when she has no children or issue during the life of the testator; but if she has children or issue *when the will is made and at the death of the testator*, she and her children or issue, may take absolute estates as tenants in common, unless there is something in the will indicative of an intention that she will take as tenant for life, with remainder to her children or issue (emphasis added).

Id. at 453, 7 Jones at 590-91.

140. *E.g.*, 2 SIMES & SMITH, *supra* note 7, § 664.

141. *E.g.*, *id.* § 640.

142. *See* text accompanying notes 35-37 *supra*.

143. Or, for that matter, few cases or materials from other states. Class closing cases that have arisen under N.C. GEN. STAT. § 41-6 (1976) ("heirs" presumed to mean "children") appear to be inconsistent. *See, e.g.*, Cooley v. Lee, 170 N.C. 18, 86 S.E. 720 (1915); Graves v. Barrett, 126 N.C. 267, 35 S.E. 539 (1900).

144. 161 N.C. 344, 77 S.E. 228 (1913).

example, the grantor¹⁴⁵ conveyed land to his daughter "Sarah . . . and her children forever," reserving a life estate to himself and his wife, Parthenia. At the date of the deed, Sarah had three children, one of whom predeceased Parthenia. Several children were born after Parthenia's death, all of whom survived Sarah. The court held that Sarah and the three children living at the delivery of the deed took a joint estate,¹⁴⁶ even though the court believed that the testator did not intend to exclude after-born children!¹⁴⁷ Thus, *Cullens* indicates that, in terms of the schematic problem above, *C* will take.¹⁴⁸

E. Application to Deeds or Personalty

1. Deeds

Literally, the Rule in Wild's Case applies only to "devises"; *i.e.*, gifts of real property by will. It seemingly does not apply to deeds, whether of realty or personalty, or to bequests (gifts of personal property by will). Nevertheless, the North Carolina courts, which have been quite literal in applying the First Resolution to create an interest which

145. The creating instrument was a deed, not a will. *Id.* at 345, 77 S.E. at 229.

146. The deed lacked words of inheritance. *Id.* at 346, 77 S.E. at 229; *see* section I(E) *infra*. Each grantee took only an estate for his or her life, so the construction giving the deceased child an estate was relatively painless. Since the child had died before the case was litigated, the life estate had terminated and there was no messy interest to trace through the child's estate.

147. *See* text accompanying notes 97-98 *supra*. The court thus regarded the problem as all-or-nothing: a life estate-remainder, giving all children a share, or a joint estate (Wild's Case), cutting off after born children. The court did not recognize that it might have chosen Wild's Case but still have allowed all children to share. *See* text accompanying note 142 *supra*.

148. The only other apposite case is *Pollard v. Pollard*, 83 N.C. 96 (1880), in which a share was sought for the representatives of children who survived the testator but died before the life tenant. *Id.* at 98-99. The court said that ordinarily the representative would take according to *Moore v. Leach*, 50 N.C. 97, 5 Jones 88 (1857), apparently failing to recognize that *Moore v. Leach* involved an immediate gift, not a postponed one. Nevertheless, the court rejected this construction on the ground that the testator intended a substitutional construction, with *A* to take if he survived the testator and the children to take only as substitutes for *A*, if *A* failed to survive the testator. This decision appears reasonable in view of the testator's language: "[Upon the death of the life tenant] to be equally divided between [*sic*] my daughter Henrietta, my son, Elias, and my grandson Joseph A. Lewis, and their children, the children to take the share of the parent who may die before my death." *Id.* at 98. Because of this unique language, *Pollard* is not inconsistent with *Cullens*. Note that if a substitutional construction is intended, the time for determining whether to substitute could be the testator's death or the life tenant's death. In *Pollard* the testator's death was expressly chosen.

fleetingly passes through the purgatory of a fee tail into the statutory heaven of a fee simple, have been quite liberal in overlooking the narrow meaning of "devise." While this may not be a serious extension for Second Resolution cases, it is regrettable where the First Resolution is concerned.

As a matter of first impression, Casner and others have argued that the First Resolution could not have applied to deeds at common law because:

In order to create in land an estate in fee tail by deed at common law the magic word "heirs" had to appear along with the words of procreation, and its absence in the limitations governed by the first resolution prevented the creation of an estate in fee tail when a gift of land to a parent and his children was made by deed.¹⁴⁹

This statement is somewhat puzzling, since the theory of the First Resolution is that "such words [and his children] shall be taken as words of limitation, *scil.* as much as children or issues of his body."¹⁵⁰ If "issues of his body" is synonymous with "heirs of his body," the deed supplies both words of inheritance ("issues") and words of procreation ("of his body"). The authorities cited by Casner are not clear on this point.¹⁵¹ It may be that the words "heirs of the body" actually had to be used, but that is doubtful.¹⁵² Or it may be that Wild's Case meant

149. 5 ALP, *supra* note 7, § 22.21, at 297. To the same effect is 2 SIMES & SMITH, *supra* note 7, § 696, at 165.

150. 77 Eng. Rep. at 279; *see* 2 H. UNDERHILL, *supra* note 11, § 580.

151. H. CHALLIS, REAL PROPERTY 292 (3d ed. C. Sweet 1911). Simes and Smith cite *Fales v. Currier*, 55 N.H. 392 (1875) (Cushing, C.J.), which seems to argue against their thesis:

In *Ross v. Adams*, 4 Dutch. 168, cited in 1 Washb. on Real Property 93, it was held that a grant to a married woman for life, and at her death to her children of her by her husband begotten, was by the law of New Jersey an estate tail in the wife, nor would it enlarge it to a fee although the covenants in the deed were to her and her heirs generally. Washb., vol. 2, p. 560, says,— "Thus, the words 'child or children' are in their usual sense words of *purchase*, and are always so regarded unless the testator has unmistakably used them as descriptive of the extent of the estate given, and not to designate the donees. But they may be used as words of *limitation*. * *

"In a will a testator may use the word 'children' as meaning *heirs of the body*: possibly a grantor may do this, but his intention must be clearly shown. Words of purchase will be treated as such until it has been unmistakably shown that the grantor designed to use them in a different sense." 2 Washb. on Real Property, book 2, ch. 4, sec 8.

55 N.H. at 394, *cited in* 2 SIMES & SMITH, *supra* note 7, § 696, at 165 n.23. The court found a life estate in *A* with remainder to her children, reserving judgment on the question whether the remainder was for life or in fee. 55 N.H. at 394. At common law a conveyance "to *A* and his heirs, but if *A* die without issue to *B* and his heirs" created a fee tail in *A* on an indefinite failure of issue theory. *See, e.g.*, 1 SIMES & SMITH, *supra* note 7, § 522, at 521.

152. Since, for example, a fee tail could be created by a devise "to *A* and his heirs,

"issues of his body" in the definite sense rather than indefinite sense of bodily heirs, but that is inconsistent with the fee tail result for wills. The answer apparently is that the conveyance had to contain words of inheritance as to *A*, in addition to words confining succession to bodily heirs.¹⁵³

Whatever the truth of the matter, at least it was arguable that the First Resolution should not have been applied to deeds where words of inheritance were necessary to create a fee (in this case a fee tail). Justice Battle introduced Wild's Case into North Carolina law in the 1850's. North Carolina General Statutes section 39-1, which presumes a fee whether a deed contains words of limitation or not, was not enacted until 1879.¹⁵⁴ Although it appears that prior to 1879 the common law's absolute requirement of words of inheritance had been somewhat relaxed in North Carolina, still the requirement generally remained.¹⁵⁵

Not one North Carolina case has been found raising a First Resolution question for a pre-1879 deed, although pre-1879 Second Resolution deed cases do exist.¹⁵⁶ The few¹⁵⁷ post-1879 First Resolution deeds cases apply the First Resolution without noting the possible restriction of Wild's Case to wills.¹⁵⁸ The only deed case that may be read as rejecting the First Resolution does so on grounds other than that the Rule is limited to devises.¹⁵⁹ In view of the fact that the First Resolution leads to a rather anomalous fee simple result in North Carolina, one might wish that the Resolution had been restricted to devises.¹⁶⁰ The fee simple result seems particularly inept for deeds. In

but if *A* shall die without issue, to *B* and his heirs." 1 SIMES & SMITH, *supra* note 7, § 522, at 491.

153. See RESTATEMENT OF PROPERTY § 59 (1940). Note that this independent requirement of words of inheritance for deeds raises some question about Wild's Case and wills. While at common law words of inheritance were not absolutely required to create a fee by will, their absence created a presumption of a devise of a life estate. If so, how could a Wild's Case fee tail last beyond the lives of *A* and his children?

154. Law of Mar. 7, 1879, ch. 148, § 1, [1879] N.C. Pub. Laws 279 (now N.C. GEN. STAT. § 39-1 (1976)).

155. See N.C. GEN. STAT. § 39-1, Editor's Note (1976).

156. *E.g.*, *Gay v. Baker*, 58 N.C. 273, 5 Jones Eq. 344 (1860); *Chesnut v. Meares*, 56 N.C. 395, 3 Jones Eq. 416 (1857).

157. This lack of cases is understandable since it is unlikely that a grantor would convey property "to *A* and his children" when *A* had no children.

158. *Boyd v. Campbell*, 192 N.C. 398, 135 S.E. 121 (1926) (citing *Cole v. Thornton*, 180 N.C. 90, 104 S.E. 74 (1920), a will case); *Davis v. Brown*, 241 N.C. 116, 84 S.E.2d 334 (1954) (citing *Boyd* and *Cole*, *supra*).

159. *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928) (conflict between premises and other parts of deeds).

160. *Casner* is less disturbed, suggesting merely that when the ultimate result is a

a will, one might reasonably say that if the testator makes a devise to *A* and his children, *A* having no children, the testator expects children to be born later. When it turns out that no children are born, it is not unreasonable to say that, the testator's prediction having failed, he would not mind *A*'s taking a fee. But if a grantor executes a deed¹⁶¹ to *A* and his children, knowing full well that *A* has no children, he must have some intention of benefiting the children via a remainder.¹⁶² If he had meant *A* to take in fee, he would have said so.

The Second Resolution has also been extended to deeds. Here there was no great break with the past, nor was there an aggravated result to be avoided. According to Wild's Case, when *A* had children at the time of the devise, *A* and the children took a concurrent estate. However, that concurrent estate was for life¹⁶³ since the devise lacked words of inheritance to create a fee.¹⁶⁴ If the Second Resolution were extended to deeds, the result would also have been a concurrent estate for life, since words of inheritance were required to create a fee by deed.¹⁶⁵

fee simple in *A* the "more sensible approach is to go there directly and not through the channel of first creating a fee tail estate." 5 ALP, *supra* note 7, § 22.21, at 298.

It could also be argued that in the case of deeds, there being no children, the deed would fail as to such children for want of a grantee. This problem could be avoided by construing the deed as creating a life estate in *A*, remainder to the children, or a fee in *A*, subject to partial divestiture by executory interest in the children.

161. At least an immediate rather than postponed grant.

162. Or a fee tail. But the fee tail would be converted into a fee simple. Query, too, whether American grantors have much conception of the possibility of entailing their estates. Our laws were born in England, but our frontier attitudes were hostile to much of the Anglo-Saxon tradition of preserving wealth. *E.g.*, N.C. CONST. art. 1, § 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."); TEX. CONST. art. 1, § 26 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.").

163. Apparently measured by the life of each cotenant, with the share of a cotenant being divested by his death, rather than passing to the estate of the deceased cotenant until the death of the last cotenant to die. *See* 5 ALP, *supra* note 7, § 22.22, at 300-01.

164. At common law, words of inheritance were not absolutely required to create a fee by devise. In contrast to deeds, the rules for wills (the Statute of Wills, 32 Hen. 8, c. 1, not passed until 1540) were more intention-oriented and gave primacy to the testator's intention over the presence or absence of technical words. At the time of Wild's Case, however, life estates were more common than fees, and in the absence of words clearly indicating a fee it was presumed that the testator intended only a life estate. Now, of course, fees are more common and the presumption is reversed. 1 SIMES & SMITH, *supra* note 7, § 493, at 472, § 496, at 478.

165. Note here that at common law words of inheritance were absolutely required to create a fee. It was not enough that the grantor intended a fee—he had to use the technical words "and his heirs." *See* 1 SIMES & SMITH, *supra* note 7, § 493, at 472.

Nevertheless, because of the history of North Carolina statutes bearing on the necessity of words of inheritance, our courts might have refused to extend the Second Resolution to deeds. The statute, now North Carolina General Statutes section 31-38, which presumes that a devise is in fee, was first passed in 1784,¹⁶⁶ while the statute, now section 39-1, which presumes that a conveyance is in fee, was not passed until 1879.¹⁶⁷ The early Wild's Case decisions in North Carolina were made in the 1850's and involved wills. While the court might have rejected Wild's Case on the ground that its common law effect was a concurrent estate for life, while if adopted in North Carolina in the 1850's it would result in a concurrent fee, the court properly did not so reject it.¹⁶⁸ But when the question arose as to whether to extend the Second Resolution to deeds, the court might have noted that a concurrent life estate (under a deed) was substantially different from a concurrent fee (under a will). Of course, this assumes that some better construction was available, and none was. *A* could not have been given a defeasible fee, since words of inheritance were lacking, and a fee tail in *A* either was not possible due to the absence of words of inheritance,¹⁶⁹ or was not sensible due to its conversion into a fee simple by statute.¹⁷⁰ A remainder in the children (following a life estate in *A*) would have been only for life, due to the absence of the magic words.

As already indicated, the North Carolina courts have extended the Second Resolution to deeds, both those executed before¹⁷¹ and those executed after¹⁷² the statute of 1879. Indeed the applicability of the Second Resolution to deeds seems to have been assumed and never contested.¹⁷³ The North Carolina courts generally have recognized the words of limitation problem in Second Resolution deeds cases. The leading case is *Cullens v. Cullens*,¹⁷⁴ where the grantor in 1865 deeded

166. Ch. 22, § 12, 24 Stat. Records of N.C. 576-77 (1777-1778) (now N.C. GEN. STAT. § 31-38 (1976)).

167. Law of Mar. 7, 1879, ch. 148, § 1, [1879] N.C. Pub. Laws 279 (now N.C. GEN. STAT. § 39-1 (1976)).

168. This inadvertent refusal to distinguish the cases was not without merit: (1) the testator likely intended a concurrent fee and only a somewhat technical presumption kept him from it at common law; (2) Wild's Case could be regarded as neutral on the life estate-fee problem, indicating only that the question is to be decided according to the presumption in effect at the time of decision; and (3) Wild's Case established only a concurrent estate—the life estate was the result of other rules.

169. See note 153 *supra*.

170. See text accompanying notes 51-53 *supra*.

171. *E.g.*, *Cullens v. Cullens*, 161 N.C. 344, 77 S.E. 228 (1913) (1865 deed).

172. *E.g.*, *Heath v. Heath*, 114 N.C. 547, 19 S.E. 155 (1894) (1881 deed).

173. See cases cited notes 171-72 *supra*.

174. 161 N.C. 344, 77 S.E. 228 (1913).

land to his daughter and her children, reserving a life estate to himself and his wife. The premises of the deed ran to "Sarah . . . and her children" and the habendum to "'Sarah . . . and her children forever.'" The clause of warranty was from the grantor "'William . . . , for myself, my heirs and assigns'" to "'Sarah . . . and her children forever.'"¹⁷⁵ Although the case was decided in 1913, and the court noted the statute of 1879, the court held that Sarah and her children each took only an estate for his or her life, since the deed lacked the word "heirs" in connection with any grantee.¹⁷⁶ In deeds executed after the statute of 1879, the grantee and his children apparently take as cotenants in fee, although it is difficult to find a case clearly in point.¹⁷⁷

2. Personalty

The Rule in Wild's Case was stated as a rule for devises of "land." Nevertheless, the early cases applied both Resolutions to personalty; whether by accident or design, few twentieth century cases have involved personal property. As with the extension of the Rule to deeds, application of the First Resolution to personalty was not desirable.

The First Resolution, creating a fee tail in *A*, might well have been regarded as inapposite for gifts of personalty, since fees tail do not exist

175. *Id.* at 345, 77 S.E. at 229.

176. *Id.* at 346, 77 S.E. at 229; *accord*, Blair v. Osborne, 84 N.C. 418 (1881) (Second Resolution rejected in favor of life estate in *A* and remainder in children; remainder held to be for life only). Helms v. Austin, 116 N.C. 751, 752-53, 21 S.E. 556, 557 (1895), involving a pre-1879 deed, displays a somewhat different, less technical, attitude:

It is a well known rule that if two constructions can be put on a deed or any part of it, that shall be given to it which is most beneficial to the grantee. These deeds were inartificially [*sic*] drawn, using the words "heirs" and "children" indifferently, by one having no legal conception of their technical meaning, but the intent is clear. It would be unreasonable to assume that the father, in providing for his family, meant to give them only a life estate leaving the fee undisposed of, after reserving his own life estate. We are entirely satisfied from the context and from the nature and purposes of the deed that it was the intention of Ennis Staton to convey a fee simple to his wife and children, and we declare that to be the effect of each of the deeds.

In other cases, the problem seems not to have been recognized. Wilson v. Wilson, 119 N.C. 588, 26 S.E. 155 (1896) (pre-1879 deed); Heath v. Heath, 114 N.C. 547, 19 S.E. 155 (1894) (post-1879 deed). In others, the date of the deed is not indicated. Darden v. Timberlake, 139 N.C. 181, 51 S.E. 895 (1905); King v. Stokes, 125 N.C. 514, 34 S.E. 641 (1899).

177. *Cf.* Darden v. Timberlake, 139 N.C. 191, 51 S.E. 895 (1905) (deed conveying property to a husband and wife and their heirs, including the children of the wife by a former marriage, created a tenancy in common among the husband, wife and children); King v. Stokes, 125 N.C. 514, 34 S.E. 641 (1899) (deed reserving a life estate in the grantors and conveying property to *H* and upon his death to *H*'s wife and children and their heirs created a remainder in fee in common in *H*'s wife and children).

in personalty.¹⁷⁸ Courts in some other jurisdictions have so held.¹⁷⁹ It is not clear whether North Carolina applies the First Resolution to personalty. There are a few old cases involving slaves that apply Wild's Case to reach a fee simple in *A*.¹⁸⁰ The cases do not indicate, however, whether the fee simple results directly, on the theory that fees tail do not exist in slaves, or indirectly, on the theory that fees tail do exist in slaves but are converted into fees simple by statute. This distinction is important to the question, since the first theory would suggest that the First Resolution does apply to personalty, while the second theory would not support the applicability of the Resolution to personalty. In some states it was possible to create estates tail in slaves,¹⁸¹ in which case application of the First Resolution to slaves would not necessarily support application to personalty (in which estates tail do not exist).¹⁸²

Assuming *arguendo* that the First Resolution applies to North Carolina personalty, there is a kind of primitive consistency to the Rule: for realty the fee tail is perverted into a fee simple in *A*, cutting off the children, and for personalty a fee simple results from lack of entails, also cutting off the children.

As with deeds, extension of the Second Resolution to personalty seems not unreasonable. If the language "to *A* and his children" indicates a concurrent estate for land, then there is nothing in the nature of personalty which should change that result.¹⁸³ Words of limitation were not required even at common law to create fees in personalty.¹⁸⁴

178. 5 ALP, *supra* note 7, § 22.21, at 297; 2 SIMES & SMITH, *supra* note 7, § 696, at 165.

179. *E.g.*, Williams v. McConico, 36 Ala. 22 (1860); Audsley v. Horn, 53 Eng. Rep. 872 (M.R. 1858); Horn v. Stokes, 59 Rev. R. 652 (Ir. Ch. 1842).

180. Doggett v. Moseley, 52 N.C. 450, 7 Jones 587 (1860); Jenkins v. Hall, 57 N.C. 321, 4 Jones Eq. 334 (1858).

Ziegler v. Love, 185 N.C. 40, 115 S.E. 887 (1923), involved a gift of land together with the improvements, outhouse and shop upon it, but the improvements probably were regarded as attached to the land and therefore part of it.

181. Vanzant v. Morris, 25 Ala. 285 (1854); 5 ALP, *supra* note 7, § 22.21, at 297 n.1; 2 SIMES & SMITH, *supra* note 7, § 696, at 165. Slaves generally were regarded as personalty in North Carolina. B. HOLT, THE SUPREME COURT OF NORTH CAROLINA AND SLAVERY 11 (1927).

A recent North Carolina case, Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965), applies the Rule in Shelley's Case to personal property, citing as authority a number of cases decided in 1858 and before involving slaves. While extension of Shelley's Case to personalty is regrettable and is contrary to most jurisdictions, *e.g.*, *In re Trusteeship of Creech*, 130 Ind. App. 611, 159 N.E.2d 291 (1959); 1 ALP, *supra* note 7, § 4.41, the case does suggest that slaves were regarded as personalty.

182. 2 SIMES & SMITH, *supra* note 7, § 696, at 165.

183. 5 ALP, *supra* note 7, § 22.26, at 306.

184. 1 SIMES & SMITH, *supra* note 7, § 498, at 481.

North Carolina seems to regard personalty as within the Second Resolution, although there is no square holding.¹⁸⁵

3. Combinations: Deeds and Personalty

Wild's Case applied to devises of land. So far this section has considered its application to deeds of land and to bequests of personalty:

Creating Instrument:	<u>Will</u>	<u>Deed</u>
Property Transferred:	Realty (Wild's Case)	Realty (Section E(1))
	Personalty (Section E(2))	Personalty

Suppose the two variables were combined—*i.e.*, a gift of personalty by deed—would Wild's Case apply?

For the First Resolution, one has the same question as discussed with respect to bequests of personalty: since fees tail do not exist in personalty, is the Rule therefore inapplicable? It should not apply, but there is no case on point.

As to the Second Resolution, there is no obstacle to application of the Rule. Indeed, the case may be stronger for personalty than for realty; since words of limitation are not required in deeds of personalty¹⁸⁶ the concurrent estate in *A* and his children would be in fee. This

185. The clearest statement is dictum in the leading case of *Moore v. Leach*, 50 N.C. 97, 5 Jones 88 (1857), which involved land. After stating the Second Resolution, the court went on to say:

The same rule applies to bequests of personalty to a mother and her children, and if there be children living at the death of the testator, she and her children will take equally, unless there be something peculiar in the will, indicative of an intention in the testator that she should take for life with a remainder over to the children. 2 Jar. Wills, 316 and 317; *Davis v. Cain*, 1 Ire. Eq. Rep. 304; *Chesnut v. Mears* [sic], (in Equity), decided at the present term.

Id. at 99, 5 Jones at 90. It is not clear whether *Chesnut v. Meares* [the spelling of the case name in the official reporter], 56 N.C. 395, 3 Jones Eq. 416 (1857), is cited as authority for applying the rule to personalty or for refusing to apply the rule where there is a contrary intention. The headnote in *Chesnut* refers to "[a] limitation of slaves or other chattels," *id.* at 395, 3 Jones Eq. at 446 (emphasis added), but the opinion speaks only of "slaves," *id.* at 395-96, 3 Jones Eq. at 416-17. Other cases assuming the general applicability of the Second Resolution but finding a contrary intention involve slaves. *Bridges v. Wilkins*, 56 N.C. 273, 3 Jones Eq. 342 (1857); *Faribault v. Taylor*, 58 N.C. 180, 5 Jones Eq. 219 (1859). Another slave case does apply the Second Resolution. *Gay v. Baker*, 58 N.C. 273, 5 Jones Eq. 344 (1860). Perhaps the closest case is *Pollard*, 83 N.C. 96 (1880), in which the court assumed the general applicability of Wild's Case to a gift of land containing a direction that it be sold and the proceeds divided among *A* and his children. *Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948), and *Weeks v. McPhail*, 128 N.C. 130, 38 S.E. 472 (1901), involve gifts of land and personalty, with no exception to the Wild's Case discussion being made for the personalty.

186. 1 SIMES & SMITH, *supra* note 7, § 498, at 481.

would seem to be closer to the creator's intention than the life estate resulting from Wild's Case at common law. There is no square North Carolina holding.¹⁸⁷

F. Life Estate or Fee

The question whether interests given to *A* or to the children are for life or in fee is implicit in the preceding section. In sum, the answers are as follows:

First Resolution

<u>Creating Instrument</u>	<u>Subject Matter</u>	<u>Date</u>	<u>Result</u>
Will	Realty		Fee simple in <i>A</i>
	Personalty		Absolute interest in <i>A</i> (?)
Deed	Realty	Pre-1879 (pre- § 39-1)	No cases
	Personalty	Post-1879	Fee simple in <i>A</i> (!) Absolute interest in <i>A</i> (!)

Second Resolution

<u>Creating Instrument</u>	<u>Subject Matter</u>	<u>Date</u>	<u>Result</u>
Will	Realty		Concurrent estate in <i>A</i> and children
	Personalty		Concurrent, absolute interest in fee
Deed	Realty	Pre-1879 (pre- § 39-1)	Concurrent estate for life in <i>A</i> and children
	Personalty	Post-1879	Concurrent estate in fee (?) Concurrent, absolute interest in fee (?)

G. Nature of Cotenancy

According to the Second Resolution, *A* and the children took "a joint estate for life"—a life estate because of the presumption in favor

187. The closest cases are ones involving testamentary gifts of slaves. *Gay v. Baker*, 58 N.C. 273, 5 Jones Eq. 344 (1860) (applies Second Resolution); *Chesnut v. Meares*, 56 N.C. 395, 3 Jones Eq. 416 (1857) (finds contrary intention). See also *Byrd v. Patterson*, 229 N.C. 156, 158, 48 S.E.2d 45, 47 (1948) (dictum relating to a conveyance that included personalty as well as land).

of life estates in the absence of words of limitation and a joint tenancy because of the presumption in favor of joint tenancies in the absence of language clearly indicating tenancy in common. On the face of it, the question whether a concurrent estate for life is in joint tenancy or tenancy in common seems meaningless; if the tenant has only a life estate, it terminates on his death regardless of the label one puts on the interest. But there is some significance to the distinction, and the confusion arises from failure to specify whose life is the measuring life. If each concurrent owner's life estate is measured by the duration of his own life, obviously his interest terminates at his death. On the other hand, if each owner has an estate measured by the life of the last cotenant to die, in effect a life estate *pur autre vie*, then he has an interest that may last beyond his own life. Apparently this second interpretation is the one put on Wild's Case, so the question whether the concurrent ownership was joint or in common had some substance to it. The interest of a deceased cotenant could be regarded as passing (1) to his estate, (2) to his surviving cotenants by right of survivorship,¹⁸⁸ (3) to his surviving cotenants by implied cross-remainder, or (4) as terminating upon his death, without increasing the fractional share of surviving cotenants.¹⁸⁹

Under modern statutes, of course, the interest in the concurrent owners is in fee, so the nature of the tenancy has even more economic impact.

North Carolina has a curious history of joint tenancies, and for Wild's Case the problem is compounded by the life estate-fee and will-deed differentials woven into her history. In 1784 the legislature

188. *Powell v. Morisey*, 84 N.C. 421 (1881), involved a deed from *O* to five grandsons, *A*, *B*, *C*, *D*, and *E* (with no words of inheritance). *O* died leaving plaintiffs the residue of his estate. *A*, *B*, *C* and *D* later died; *E* was still alive and had conveyed his interest in the property to defendants.

Plaintiffs argued that the grandsons took only life estates for their own lives; therefore plaintiffs were entitled to $\frac{4}{5}$ of the property as residuary devisees. Defendants argued for a fee simple in the grandsons, asking for reformation of the deed to correct inadvertent omission of words of inheritance.

The court held that the estates in the grandsons were for life. It also held that the Law of June 2, 1784, ch. 22, § 6, [1791] Laws of N.C. 489-90 (J. Iredell) (now N.C. GEN. STAT. § 41-2 (1976)), abolishing survivorship in joint estates, applied only to interests in fee, not life estates. The result was that "upon the death of his companions and by virtue of the doctrine of survivorship, [*E*], as the last survivor became seized of the entire lands . . . for and during the term of his life . . ." *Id.* at 423. In other words, the measuring life is the life of the last cotenant to die.

189. Compare 2A R. POWELL, REAL PROPERTY ¶ 324 (1967) and 3 *id.* ¶ 355 with 3 W. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 300, at 141 (1947). Walsh says that when a bequest is made to two or more persons for their lives, remainder to another person on the death of the survivor of the life tenants, the life tenants are presumed to take cross-remainders.

seemingly tried to do away with joint tenancies; however, it did not take the standard paths of flatly abolishing joint tenancies or more temperately creating a presumption against them. Rather, it attacked the right of survivorship:

AND whereas in real and personal Estates held in joint Tenancy the Benefit of Survivorship is a manifest Injustice to the Families of such as may happen to die first, *Be it therefore enacted by the Authority aforesaid*, That in all Estates real and personal, held in joint Tenancy, the Part or Share of any Tenant dying shall not for the future descend or go to the surviving Tenant or Tenants, but shall descend or be vested in the Heirs, Executors, Administrators or Assigns respectively of the Tenant so dying, in the same Manner as Estates held by Tenancy in common, any Law, Usage or Custom to the contrary notwithstanding¹⁹⁰

The courts interpreted the Act of 1784 as not barring joint tenancies but rather as abolishing only the right of survivorship incident thereto. The first indication of this view is in *Vass v. Freeman*,¹⁹¹ an 1857 case finding that a bequest of the testator's estate to his mother and sister, "the whole of my estate jointly, and upon the demise of either, the survivor to have the whole in fee simple forever"¹⁹² created a joint tenancy for life, with the entire remainder to the survivor. The effect of the statute was considered at length in the 1876 case of *Powell v. Allen*¹⁹³ in which the testator devised land in 1859 to his daughter for life, and at her death to his three grandsons, Joseph, Richard, and David, "for them to use it during their natural lives . . . , and at their death. I give all the above property to their children."¹⁹⁴ Joseph and David died without children and it was held that as the surviving joint tenant Richard was entitled to the whole property for his life. Note that the life estate was assumed to be a joint tenancy (1) in the absence of words indicating tenancy in common and (2) despite the direction "at their death" to give the property "to their children"—an ambiguous phrase that might be read as mandating distribution of a share upon the death of each child leaving children.¹⁹⁵ The court refused to apply the statute to the joint life estate for two reasons:

190. Law of June 2, 1784, ch. 22, § 6, [1791] Laws of N.C. 489-90 (J. Iredell) (now N.C. GEN. STAT. § 41-2 (1976)).

191. 56 N.C. 215, 3 Jones Eq. 221 (1857) (Battle, J.).

192. *Id.* at 216, 3 Jones Eq. at 222.

193. 75 N.C. 450 (1876).

194. *Id.* at 451.

195. Of course, the word "their" could also be read as postponing distribution until the death of all of the grandsons.

It is obvious that these words cannot be made to apply to joint tenants for life. In regard to real estate, on the death of one of the tenants for life his part *cannot descend to his heirs*, but must go either to the survivor or some third person entitled to take, not by descent but by purchase, under the limitation law. In regard to personal estate, on the death of one of the tenants for life his part cannot pass to his executors, administrators or assigns, but must go either to the survivor or some third person entitled to take, not under the tenant dying, but by force of the limitation over. The word "assigns" has no signification, but evidently is a mere expletive thrown in by force of habit to accompany the words "executors and administrators;" for if the tenant dying had in his lifetime made an assignment of his part, the effect was to sever the joint tenancy, and there was no occasion for a statute to prevent his share from being acquired by the "*jus accrescendi*."

It is also obvious that the case of tenants for life does not come within the mischief which called for the enactment of the statute. The evil was that when an estate of inheritance was held in joint tenancy on the death of one, his part passed absolutely to the survivor, and *the heirs* of the tenant dying were wholly excluded; the object was to legislate in favor of *the heirs* of the dying tenant, but as far as the statute indicates, the rights of third persons taking by purchase under the limitation, and the rights of the survivor claiming under the common law rule, were not intended to be interfered with, for as between them the doctrine of survivorship works no crying hardship.¹⁹⁶

The court's first argument seems mistaken: Why cannot the part of a deceased tenant descend to his heirs or be distributed to his executor? The court appears here to be following the old common law view that life estates were not inheritable,¹⁹⁷ but that view was based on a failure to differentiate life estates measured by the life of the deceased life tenant (obviously not inheritable because they die with the life tenant) from life estates *pur autre vie*, which properly are inheritable but at common law were not.¹⁹⁸ If the decedent's life estate is *pur autre vie*, it is a descendible freehold estate and the court's rationale fails. Indeed, to assume that the life tenant's interest is measured by his own life is to assume the conclusion.¹⁹⁹

196. 75 N.C. at 453-54.

197. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 51-52 (2d ed. 1975).

198. *Id.* at 52. See also N.C. GEN. STAT. § 29-2(2) (1976) (For purposes of inheritance the term "estate" includes "an estate for the life of another.").

199. Note, too, that the statute refers to "all Estates, real and personal, held in joint Tenancy . . ." See text accompanying note 190 *supra* (emphasis added). Certainly a life estate was and is an estate in land, and the legislature appeared to intend an all-inclusive statute.

Alternatively, the court may have been looking to the nature of joint tenancy and arguing that the statute simply does not reach common law joint tenancies. The theory would be that the statutory language "the part or share of any tenant dying shall not descend or go to the surviving tenant" does not apply to a right of survivorship, which in common law contemplation is a right given to the survivor by the creating instrument; the survivor does not take any share from the deceased joint tenant, and further the interest that the survivor takes is regarded as always having belonged to him, not as a share coming partly from the deceased joint tenant. Under this theory, however, even joint tenancies in fees would escape the statute, and the courts have applied section 41-2 to fees.²⁰⁰ The draftsmen, by referring to "estates . . . held in joint tenancy," obviously intended to reach at least some joint tenancies.²⁰¹

The second argument in *Powell v. Allen*, that the case of life tenants was not within the mischief calling for the statute,²⁰² is less objectionable. The court again appears to overlook the possibility of life estates *pur autre vie*, but clearly there is more detriment to the heirs of a deceased joint tenant in losing the inheritance of a fee rather than a life estate.²⁰³

Subsequent cases have affirmed *Powell v. Allen*.²⁰⁴ It is significant, too, that the cases have continued to follow the common law presumption in favor of joint tenancies. The most emphatic statement comes in *Burton v. Cahill*,²⁰⁵ a 1926 case finding that an 1895 deed conveying land to *A* and *B* for life created a joint tenancy:

So that, in North Carolina, in a conveyance in which the four unities concur, the law favors joint tenancy, or, in other words, the common-law rule prevails in the absence of restrictive, exclusive or

200. *E.g.*, *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

201. The argument that the statute does not use apt words to describe the right of survivorship also seems to be rebutted by the appearance in § 41-2 of the phrase "or go to" the surviving tenant, which seems broad enough to reach rights of survivorship. Again, however, one could argue that upon the death of the first joint tenant there is no share "going to" the surviving joint tenant; rather, the surviving joint tenant originally owned the whole estate, subject to the equal rights of the other joint tenant, whose death has terminated his rights.

202. 75 N.C. at 453-54.

203. The standard argument against joint tenancies is that allowing the surviving joint tenant to take to the exclusion of the decedent's heirs is an unexpected, undesirable and substantial loss to the decedent's heirs. *See, e.g.*, J. CRIBBET, *supra* note 197, at 99.

204. *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926); *Powell v. Morisey*, 84 N.C. 421 (1881); *Blair v. Osborne*, 84 N.C. 417 (1881).

205. 192 N.C. 505, 135 S.E. 332 (1926).

explanatory words manifesting an intention to create a tenancy in common. The language of the deed is not ambiguous, and an examination of the entire instrument does not disclose either explanatory or restrictive words necessary to take the conveyance out of the general rule; neither is any language used which manifests an intention on the part of the grantor to create a tenancy in common.²⁰⁶

How do these cases bear on Wild's Case?

1. Deeds

Assume *A* has children. The forerunner of section 39-1, which presumes a fee in deeds lacking words of inheritance, was not enacted until 1879. Therefore, in pre-1879 deeds running simply "to *A* and his children" without the words of limitation "and their heirs," *A* and the children would take only a life estate. Further, the life estate would seem to be in joint tenancy²⁰⁷ and the joint tenancy would be unaffected by section 41-2.²⁰⁸ The North Carolina courts do not seem to have recognized this complete chain of propositions. The most significant case is *Cullens v. Cullens*,²⁰⁹ a 1913 decision involving an 1865 deed "unto Sarah and her children." The court held that Sarah and her children took only a life estate since the word "heirs" did not appear in the deed in connection with the grantees, although it did appear elsewhere.²¹⁰ The court found, however, that the life estate was held as a tenancy in common.²¹¹ This latter result is puzzling; section 41-2 is silent on the question whether a concurrent estate is in joint tenancy or in common—the statute only speaks to the effect of a purported joint tenancy once it is found that the estate was intended to be created. It does not reverse the common law presumption in favor of joint tenancy, and *Burton v. Cahill*²¹² indicates that if the four unities are present a joint tenancy results.

206. *Id.* at 509, 135 S.E. at 335. Similar statements are found in *Powell v. Allen*, 75 N.C. at 452, and *Powell v. Morisey*, 84 N.C. at 423. Although these cases all involve deeds, *Powell v. Allen* notes that the rule "has been further released" for wills by allowing such words as "to take share and share alike" or "to be equally divided between them" to create tenancies in common. 75 N.C. at 452. This relaxation reflects the usual deference to the testator's intention but is scarcely a repudiation of the common law presumption. All the announcements of the common law unities rule are made in the context of life estates but do not so restrict the dicta.

207. *See, e.g.*, *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

208. *See, e.g.*, *Powell v. Allen*, 75 N.C. 450 (1876).

209. 161 N.C. 344, 77 S.E. 228 (1913).

210. *Id.* at 346-47, 77 S.E. at 229.

211. *Id.* at 347-48, 77 S.E. at 229-30.

212. 192 N.C. 505, 135 S.E. 332 (1926). *Powell v. Morisey*, 84 N.C. 421 (1881), and *Powell v. Allen*, 75 N.C. 450 (1876), take the same view.

Apparently another line of cases has assumed that the common law presumption of joint tenancy has been reversed in favor of tenancy in common. This reversal of the common law presumption seems not to have been done consciously. Rather, one simply finds in the decisions a reference to the fact that the concurrent estate in *A* and the children was joint at common law but "now" is in common. These decisions do not cite authority for their tenancy in common assertion. Nowhere do the cases face the fact that section 41-2 is silent on the threshold question of whether the cotenancy created was joint or in common.²¹³ One thus has parallel lines of decision that, by definition, never intersect.

This is not to say that a judicial change from the presumption of joint tenancy to a presumption of tenancy in common is necessarily bad,²¹⁴ but rather to suggest that the issue ought to have been faced

213. In *Silliman v. Whitaker*, 119 N.C. 89, 25 S.E. 742 (1896), the supreme court stated the result of the application of the Second Resolution in Wild's Case in North Carolina. It stated, "(by virtue of our statutes), if there are children . . . at the testator's death, the father and children take as tenants in common instead of joint tenants. *Wheatland v. Dodge*, 10 Metc., 502; *Nightingale v. Burrell*, 15 Pick., 104 (on p. 114); 3 Jarman on Wills, 174; Schouler on Wills, secs. 555, 556." *Id.* at 93, 25 S.E. at 742. Since the applicable North Carolina statute, present § 41-2, did not convert joint tenancies into tenancies in common, but just removed the right of survivorship, the statement made in *Silliman* appears to be incorrect.

The two cases cited in *Silliman* as supporting its conclusion are Massachusetts cases: *Wheatland v. Dodge*, 51 Mass. (10 Met.) 502 (1845); and *Nightingale v. Burrell*, 32 Mass. (15 Pick.) 104 (1833). These cases do seem to indicate that in Massachusetts under the Second Resolution the parent and children would take as tenants in common, but that construction was not an issue in either case. The Massachusetts statute abolished joint tenancies and substituted tenancies in common in 1785. Neither do the treatises cited support the quoted passage, but simply support the general application of Wild's Case in the American and English jurisdictions.

The tenancy in common rule is also stated in *Hunt v. Satterwhite*, 85 N.C. 73 (1881). The court quoted J. O'HARA, ON WILLS 814 (1872): "'A devise to one and his children gives the parent an estate tail, if he has no children at the time of the devise; but if he then has children then, he takes jointly with them and, under the operation of our statute, as tenants in common.'" 85 N.C. at 75. O'HARA was a general treatise on American wills and presumably was referring to typical American statutes which reverse the cotenancy presumption, not the unusual North Carolina type of statute. The *Satterwhite* court also cited *Gay v. Baker*, 58 N.C. 359, 5 Jones Eq. 344 (1860), as support for its tenancy in common construction. That case did give the parent and children a tenancy in common, but the court relied upon the express language in the deed that read, "The whole, equitable interest in the said negroes is to belong to my daughter Elizabeth and her children in common." 58 N.C. at 360, 5 Jones Eq. at 345.

214. The commentators generally agree with the change, arguing that the right of survivorship is not anticipated by the creator. *E.g.*, J. CRIBBET, *supra* note 197, at 99. Some states have gone so far as to forbid joint tenancies, but that approach is unwarranted; if the parties understand the joint tenancy and intend a right of survivorship, there is no fundamental policy against the estate—indeed it may be useful, as a means of avoiding probate. Persistent attempts to avoid probate by means of the joint tenancy may have encouraged courts to avoid the Draconian rule forbidding joint tenancies by

squarely, especially when another line of cases reiterated the existence of the common law preference. Certainly section 41-2 did not necessarily reverse the common law presumption; indeed, the adoption of a statute tinkering with the effect of joint tenancy rather than attacking the root problem of whether the estate has been created may be regarded as an affirmation of the common law presumption.²¹⁵

The fundamental question, however, is whether and how any change in the common law rule that *A* and the children take as joint tenants should affect the application of the Rule in Wild's Case. This question seems not to have been considered in other materials.²¹⁶ For pre-1879 deeds lacking words of limitation, it would appear that *A* and the children took a life estate as joint tenants (section 41-2 not applying)—the same result as at common law. However, *Cullens v. Cullens*²¹⁷ found the life estate but presumed it to be in common. Assuming *Cullens* is controlling, the change from a life estate in joint tenancy to one in common would not seem materially to affect the creator's intention. The question is whether giving the deceased life tenant's share to his heirs or devisees instead of to the life tenants who survive him is such a substantial change that the creator would likely have preferred something other than a concurrent estate in *A* and the children (most probably, a life estate in *A* followed by a remainder in *A*'s children). The first life tenant to die most likely would be *A*, who could reasonably be supposed to be 21 years or more older than his children. According to the common law rule, upon *A*'s death the children would take *A*'s "share" as surviving joint tenants. If the tenancy has been changed to one in common, the takers upon *A*'s death would be *A*'s heirs or devisees. *A*'s heirs would be *A*'s children,²¹⁸ so

holding that prohibitory statutes do not bar the parties from creating a right of survivorship by contract.

215. On the other hand, the statute, by legislating against the right of survivorship, could be taken as a legislative judgment that rights of survivorship are not favored and therefore tenancies in common are favored.

216. See, e.g., 5 ALP, *supra* note 7, § 22.22, at 300; 2 SIMES & SMITH, *supra* note 7, § 698, at 169.

217. 161 N.C. 279, 77 S.E. 228 (1913).

218. This assumes that *A*'s surviving spouse would not be an heir; at common law a surviving spouse was entitled to dower or curtesy but was not an heir under the canons of descent (although the surviving spouse did take a share in personal property with the children as a next of kin under the statute of distribution). T. ATKINSON, *supra* note 105, §§ 6-7, at 37-50. In North Carolina the surviving spouse was made an heir in 1960 by the Intestate Succession Act, ch. 879, §§ 1, 14, [1959] N.C. Sess. Laws 886 (now N.C. GEN. STAT. § 29-2(3) (1976)). Prior to that, the spouse was entitled to dower or curtesy. See McCall, *North Carolina's New Intestate Succession Act*, 39 N.C.L. REV. 1 (1960). The surviving spouse did take an interest in personalty as next

there would be no difference in takers unless children were born to *A* or died between the time of the deed (when children were determined for purposes of Wild's Case) and the time of *A*'s death (when heirship was determined for purposes of inheritance).²¹⁹ Even if there were some difference in the class of children at the time of the creating deed and the class at the time of *A*'s death, it would not seem substantial enough to change the application of the Second Resolution. Indeed, Wild's Case with the tenancy in common construction is closer to the competing life tenant-remainder construction than is Wild's Case with the joint tenancy construction, since *A*'s share may go to his children at his death (like a remainder) rather than to his children determined as of the delivery of the deed.

The preceding discussion assumes that *A* died intestate with respect to his life estate *pur autre vie*. If *A* has an interest as tenant in common he could, of course, alienate it or devise it to someone other than his children. Nevertheless, the odds are that any alienation or devise by *A* would be to *A*'s children. Further, even under the joint tenancy presumption *A* could sever the joint tenancy and create a tenancy in common, so creation of an alienable or devisable interest in *A* by virtue of a presumed tenancy in common does not differ much from the result of the common law joint tenancy.

Note that *A*'s interest as tenant in common, while perhaps likely to pass to the same persons as the interest in joint tenancy, would be a part of *A*'s estate for purposes of administration and death taxes. In the mid-eighteenth century, however, it is doubtful whether probate avoidance was so religiously sought as in modern times, and there was no federal estate tax,²²⁰ so these considerations did not bear on the grantor's intention.

One further consideration is the difference in result between joint tenancy and tenancy in common upon the subsequent deaths of other class members. Assuming *A* dies first, the next class member to die likely would be *A*'s eldest child. Under the common law presumption,

of kin beginning in 1784. Law of June 2, 1784, ch. 22, § 7, [1791] Laws of N.C. 490 (J. Iredell). As originally stated, of course, Wild's Case applied only to realty. Even if the spouse is an heir, the problem of the spouse's share would be avoided if *A* survived his spouse.

219. As to the right of children born or dying after the date of the deed to take under the Second Resolution, see section I(D) *supra*.

220. The blessings of the federal estate tax began in 1916. Act of Sept. 8, 1916, ch. 463, tit. II, 39 Stat. 777-80 (1916).

that child's share would pass to his brothers and sisters (determined as of the date of the creating deed) who survived him, whereas under the tenancy in common the share would pass to his heirs, devisees or grantees, who might well be his children or surviving spouse. This latter result would seem to be more in keeping with the creator's likely intention than the joint tenancy; at least it is arguable that the creator would favor the child's descendants over the child's siblings,²²¹ despite the presence of an original gift to the child's siblings. If a reasonable case can be made for the result of the tenancy in common, it would seem that Wild's Case should not be abandoned as a result of the change in presumed cotenancies.²²²

221. In connection with statutes of descent, and of the choice between per capita and per stirpetal distribution, it is often argued that grandparents are fonder of their grandchildren than of their children. *E.g.*, T. ATKINSON, *supra* note 105, § 7, at 43.

222. It is generally assumed that all Second Resolution interests will be held in the same kind of tenancy—either joint tenancy or tenancy in common. Nevertheless, could not a case be made for *A* holding his interest as a joint tenant with respect to the children and the children holding their interests *inter se* as tenants in common? This would pass the parent's interest to his surviving children but would give each child a devisable, descendible interest for his own family.

What result for post-1789 deeds? Assume, again, that *A* has children. In post-1879 deeds "to *A* and his children" lacking words of inheritance, § 39-1 nevertheless presumes a fee. Also, pre-1879 deeds containing words of inheritance would create a fee. As noted above, § 41-2 applies to joint tenancies in fee, abolishing the right of survivorship. The question of the effect of § 41-2 on Wild's Case has not been considered in the North Carolina decisions, because all the opinions assume that the fee interest created is in common. *Buckner v. Maynard*, 198 N.C. 802, 153 S.E. 458 (1930) (1912 deed of real property); *Tart v. Tart*, 154 N.C. 502, 70 S.E. 929 (1911) (1906 deed of real property); *Darden v. Timberlake*, 139 N.C. 181, 51 S.E. 895 (1905) (1905 deed of real property); *Wilson v. Wilson*, 119 N.C. 588, 26 S.E. 155 (1896) (1861 deed to trustees and their heirs); *Gay v. Baker*, 58 N.C. 273, 5 Jones Eq. 344 (1860) (1819 deed of personal property). If the concurrent estate were found to be joint, how, if at all, should the impact of § 41-2 affect the application of Wild's Case?

The considerations would appear to be the same as those discussed in connection with the effect of a tenancy in common construction as opposed to a joint tenancy in the pre-1879 deeds creating life estates, with the caveat that any difference in takers would be exacerbated by the magnitude of the interest involved—a fee rather than a life estate. According to § 41-2, the "part or share of any [joint] tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common . . ." N.C. GEN. STAT. § 41-2 (1976). Thus, for purposes of devolution on death, the joint tenancy would be treated like a tenancy in common. If the change from joint tenancy to tenancy in common would not clearly affect the Second Resolution where life estates are involved, it would not seem to rebut the presumption as applied to fee interests. Alternatively, adherence to the Second Resolution might be explained on the ground that Wild's Case merely deals with the question whether a cotenancy is created, and local law determines the precise nature of the cotenancy. This explanation seems too facile; certainly a rule based on presumed intention should look to the ultimate result in takers rather than stopping at an intermediate way-station.

2. Wills

The situation for wills is less involved. Devises have been presumed to be in fee since the enactment of the Revised Code of 1784, containing the predecessor of section 31-38.²²³ That same Code also included the predecessor of section 41-2 dealing with joint tenancies.²²⁴ Thus at the time of the judicial adoption of Wild's Case in 1857 in a case involving a will, a gift "to A and his children" was presumed to be in fee. If the devise was in joint tenancy, section 41-2 destroyed the right of survivorship and property passed on death as by tenancy in common. If the devise was in common, the property obviously passed to the deceased tenant's heirs or devisees. All the cases involving devises assume that the tenancy is in common; none examines whether this alteration should affect the application of Wild's Case.²²⁵ As noted above with respect to deeds, the result of the tenancy in common would not seem materially to differ from the testator's likely intention.

H. *Rebuttal—First Resolution*

Since the Rule in Wild's Case is one of construction, it may be overcome by a showing of contrary intention. One might expect the First Resolution to be easily rebutted in North Carolina, as it otherwise results in a fee simple, not a fee tail, in the first taker. Nevertheless, no clear-cut First Resolution case in North Carolina has ever rejected the Rule, despite actual or potential arguments of contrary intention.²²⁶

223. Law of June 2, 1784, ch. 22, § 12, [1791] Laws of N.C. 491-92 (J. Iredell).

224. Law of June 2, 1784, ch. 22, § 6, [1791] Laws of N.C. 489-90 (J. Iredell).

225. *E.g.*, *Snowden v. Snowden*, 187 N.C. 539, 122 S.E. 300 (1924); *Benbury v. Butts*, 184 N.C. 23, 113 S.E. 499 (1922); *Silliman v. Whitaker*, 119 N.C. 89, 25 S.E. 742 (1896); *Hunt v. Satterwhite*, 85 N.C. 73 (1881).

226. *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928), is not contrary to this assertion. In *Martin* the premises of the deed designated "Sallie . . . and her children" as "parties of the second part." The granting clause and other parts of the deed conveyed "unto said party of the second part a life estate therein, and then to her heirs, executors, administrators and assigns," a described tract of land. Further, "[i]t is the purpose of this deed to convey the above tract of land to Sallie . . . during her lifetime, then to her heirs in fee simple, forever." *Id.* at 428, 142 S.E. at 313. Looking at the deed as a whole, the court determined that the word "children" in the premises was an inadvertence. *Id.* at 429, 142 S.E. at 313. (The deed thus ran to Sallie for life, remainder to her heirs, which limitations under the Rule in Shelley's Case gave Sallie a fee simple).

Although the Rule in Wild's Case was not noticed in *Sharpe v. Isley*, 219 N.C. 753, 14 S.E.2d 814 (1941), the result is consistent with the First Resolution. A devise to the testator's wife "Ruth . . . to her and her heirs by me", *id.* at 754, 14 S.E.2d at 815, was held to constitute a fee tail special, which by statute was converted into a fee simple. If the limitation to Ruth's "heirs by me" were regarded as one to Ruth's

Probably the strongest case for rejection of the First Resolution was *Silliman v. Whitaker*,²²⁷ where realty was devised "in trust for Sarah Ward and all her children, if she shall have any."²²⁸ Sarah was the testator's daughter and was eleven or twelve years old at his death. The court adhered to the usual presumption, arguing that the words "if she shall have any" . . . merely indicate that at the time of writing the will the testator knew his daughter had no children."²²⁹ The words were read as meaning "if she shall have any [children] at the death of the testator." Sarah's age was dismissed: "From the allegations of the complaint it appears that Sarah was eleven or twelve years of age at the testator's death, but *non constat* [it does not appear] that he might not have expected that at his death she would have been married and the mother of a child."²³⁰

The opinion in *Silliman v. Whitaker* is not persuasive. The reference to "all" her children, coupled with the phrase "if she shall have any" certainly imports an intention to create an interest in Sarah's children. It is not unreasonable to assume that the testator, at his death, knew the words of his will and persisted in a gift to Sarah and her children, knowing her to have none at the time, because he wanted after-born children to share. If Sarah had attempted to marry at age twelve, the marriage might have failed for want of her capacity,²³¹ and any children of hers would have been illegitimate and encountered some difficulty in taking.²³² The testator, therefore, must have been looking

children, the result under Wild's Case would also be a fee tail (converted by statute into a fee simple).

In *Daniel v. Bass*, 193 N.C. 294, 136 S.E. 733 (1927), Wild's Case was not applied to a devise "to my beloved sisters, Nancy Daniel and Mahala Daniel . . . to them and their heirs forever, if any. If not, to the heirs of my sisters, Mary Jane Hathaway, Celia Bass, and Sallie Rowe, to them and their assigns forever." *Id.* at 294-95, 136 S.E. at 733. The court held that "heirs" was used as a word of limitation, despite the presence of the words "if any," the gift over to the "heirs" of the other sisters, and the use of the word "assigns" in connection with the gift over. According to the court, the gift over was repugnant to the fee simple devised to Nancy and Mahala and therefore failed. *Id.* at 298, 136 S.E. at 735. One wonders what it takes to overcome the presumption that "heirs" is used in its technical sense.

227. 119 N.C. 89, 25 S.E. 742 (1896). See also *Cole v. Thornton*, 180 N.C. 90, 104 S.E. 74 (1920) ("to my daughter Alice and her children, if any") (emphasis added).

228. 119 N.C. at 92, 25 S.E. at 742.

229. *Id.* at 93, 25 S.E. at 742.

230. *Id.*

231. Under Law of February 12, 1872, ch. 193, § 2, [1871-72] N.C. Pub. Laws 328, marriage between a female under fourteen and any male was void, unless followed by cohabitation, birth of issue and death of either party.

232. Under 1 N.C. Rev. Code 237, ch. 38, rule 10 (1855) (originally enacted in 1799), an illegitimate child was considered an heir of the mother and could inherit

to future children. It thus appears that the court should have found a life estate in Sarah followed by a remainder in her children or a fee in Sarah subject to partial divestiture by executory interests in her children. Clearly the references to children were words of purchase, not of limitation.

The true explanation of *Silliman* may lie in the court's references to "public policy, which is adverse to tying up estates; and . . . justice, which would be outraged by turning out the parties who have held the realty undisturbed for forty years under *mesne* conveyances from a purchaser who bought in reliance upon the decree of a court of equity."²³³ As to public policy, the title would only be tied up until Sarah's death,²³⁴ and as to justice, the proceeds of sale presumably were still held in trust and could be paid to those losing the realty to Sarah's only child. Even if *Silliman* is good policy, it is bad logic.²³⁵

Several cases involve the effect, if any, of a gift over following the limitation to *A* and his children. In *Elkins v. Seigler*²³⁶ the devise was to Chapman for life, and after his death to Louisa, and to the child or children of her body, forever; provided if Louisa dies without leaving any children, then to testatrix' lawful heirs. The court applied *Silliman v. Whitaker* to give Louisa a fee simple, but held that her fee was defeasible if Louisa should die without leaving a child. Analyzed in light of the nature of the fee tail, this result was impossible. In order to apply the First Resolution, the words "and her children" have to be read as words of limitation in the sense of "bodily heirs," importing a fee tail. A fee tail lasts as long as there are bodily heirs—the usual form of language to introduce a gift over following a fee tail is "if she dies without issue" in which case the phrase is read as meaning an indefinite

from her, but could not claim, as her representative, any part of the estate of her lineal or collateral kindred.

233. 119 N.C. at 94, 25 S.E. at 742. Apparently the will in *Silliman* had been construed in an earlier proceeding as devising a fee to Sarah, and that decree was not appealed.

234. The relevant measure of the policy against dead-hand tying up of estates would seem to be the Rule Against Perpetuities. Under the construction the court should have reached, all interests would have vested no later than Sarah's death, a period well within the Rule. Further, if the tying up of titles is so objectionable, why did North Carolina, until enactment of the Marketable Title Act, give unlimited duration to possibilities of reverter and powers of termination? See Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807 (1964).

235. *Silliman* does not consider the effect on construction, if any, of the interposition of a trust. See section I(I) *infra*.

236. 154 N.C. 374, 70 S.E. 636 (1911).

failure of issue, *i.e.*, "if her issue (bodily heirs) fail, whenever that may occur."²³⁷ Since in *Elkins v. Seigler* the gift over was made upon death without leaving any *children*, the estate in Louisa could not be a fee tail, for the reasons that the gift over referred to a definite time (Louisa's death) and was made upon death without leaving a specific class, children (not bodily heirs).²³⁸ If Louisa did not take a fee tail, *Silliman v. Whitaker* could not be applied to convert the estate to a fee simple. If Wild's Case is not applied, one could still argue for a fee simple in Louisa²³⁹ although a life estate-remainder construction seems more in keeping with the implications of the gift over.

*Cole v. Thornton*²⁴⁰ is another case failing to analyze closely the effect of a gift over. There the will devised the testator's residuary estate to his wife for life, then to his daughter *A* and her children, but if *A* "die leaving no living issue" to other devisees. The testator's wife was dead; the daughter *A* was alive at the time of the case, but no children had been born to her. The court applied the First Resolution to give *A* a fee tail, converted by statute into a fee. The fee was, nevertheless, subject to divestiture if *A* should die leaving no living issue.²⁴¹

This result could not have been reached if the court had examined the implications of the gift over. The word "issue" is acceptable to introduce a gift following a fee tail, and in *Cole* it strengthens the case for reading the basic devise "to *A* and her children" as meaning "to *A* and her issue," but the court failed to notice the effect of North Carolina General Statutes section 41-4.²⁴² Under section 41-4 a limitation depending on the dying of a person without issue is interpreted as taking effect when the person dies not having such issue living at the time of his death. This is a definite failure of issue, in contrast to a gift over following a fee tail which by definition must be indefinite—whenever *A*'s issue (lineal descendants) fail.²⁴³ In other words, a fee tail cannot be followed by a gift over on a definite failure of issue, so section 41-4 made the court's First Resolution fee tail impossible. This is not to

237. See 1 SIMES & SMITH, *supra* note 7, § 522.

238. See *Martin v. Martin*, 52 W. Va. 381, 44 S.E. 198 (1903); *cf.* *Pells v. Brown*, 79 Eng. Rep. 504 (K.B. 1620) (to *A* and his heirs, but if *A* die without issue, living *B*, then to *B* and his heirs; held *A* takes a fee simple, not a fee tail).

239. On the theory that the gift over was substitutional—in the event of Louisa's dying without children before the life tenant (or the testator).

240. 180 N.C. 90, 104 S.E. 74 (1920).

241. *Id.* at 91, 104 S.E. at 75.

242. N.C. GEN. STAT. § 41-4 (1976) (originally enacted in 1827).

243. *E.g.*, 1 SIMES & SMITH, *supra* note 7, § 522.

suggest that the court in *Cole* could not have reached a defeasible fee construction, only that it could not have done so via Wild's Case.²⁴⁴

Finally, other instruments have contained superadded words suggesting that the word "children" was used as a word of limitation in the sense of "heirs." The deed in *Boyd v. Campbell*,²⁴⁵ for example, contained clauses running to: (1) "Pleas Clodfeler, his children, their heirs and then to his grandchildren forever;" (2) "Pleas Clodfellow his children and then to his grandchildren forever, and heirs and assigns;" and (3) "Pleas Clodfellow, to him and his children, their lives, heirs and assigns to and then to his grandchildren forever." The court considered only the question whether the grandchildren took an interest via executory limitation or remainder, found neither²⁴⁶ and gave Pleas a fee simple. Although the court did not do so expressly, it might well have found that all the words except "Pleas Clodfeler" were words of limitation giving Pleas a fee simple or fee tail (although not via Wild's Case).

In *Davis v. Brown*,²⁴⁷ a deed to "Myrtle and her children or heirs" was treated as a garden variety First Resolution case. Note, however, that "or heirs" could by *ejusdem generis* be regarded as giving "children" a meaning of words of limitation. Alternately, but not with much plausibility, the gift might have been read as substitutional: to Myrtle and her children, or if she had no children, to Myrtle and her heirs (as purchasers). Since Myrtle's heirs could only be determined at her death, it is arguable that Myrtle was to take a life estate followed by a remainder to her children, or if none, remainder to her heirs. The point was not noticed.²⁴⁸

244. Another gift over case, *Ziegler v. Love*, 185 N.C. 41, 115 S.E. 887 (1923), is truly puzzling. The devise was to the testator's wife for life then to his son Frederick "and to his children or issue, but in case he should die childless and without issue" to testator's heirs. There at least the language of the gift over jibed with the language of the prior gift, but what did "issue" mean? Was it synonymous with "children"? Did it color "children" and indicate that "children" meant "issue"? Was the entire phrase "children or issue" words of limitation for Frederick's estate? The court saw the will as a garden variety First Resolution case.

245. 192 N.C. 398, 135 S.E. 121 (1926).

246. The grandchildren did not take a shifting executory interest, said the court, because no contingency was stated on which the use would shift. They did not take a remainder because their interest followed a fee simple, not a prior particular estate. *Id.* at 402, 135 S.E.2d at 123. These arguments assumed the conclusion—that Pleas took a fee simple.

247. 241 N.C. 116, 84 S.E.2d 334 (1954).

248. *Cf. Ziegler v. Love*, 185 N.C. 41, 115 S.E.2d 879 (1927) (to Frederick, and to his children or issue); see note 244 *supra*.

That the subject of the gift was entirely or partly personalty, in which fees tail

I. *Rebuttal—Second Resolution*

Since the Second Resolution (which gives *A* and the children a concurrent estate) is not as divorced from reality as the First Resolution (which gives *A* a fee simple), one might expect fewer Second Resolution cases to find a contrary intention than First Resolution cases. This expectation is not borne out: a higher percentage of cases find a contrary intention when *A* has children (Second Resolution) than when *A* does not have children (First Resolution). Upon close inspection, a number of these cases seem not to involve pure Wild's Case language. Conversely, some cases adhering to the Second Resolution seem to ignore clear showings of contrary intention.

There are several alternatives to the Second Resolution concurrent estate: (1) a fee tail or even a fee simple in *A*, on the theory that the words "and his children" were words of limitation, not words of purchase; (2) a life estate in *A* with remainder to the children, in keeping with the testator's intention; (3) a fee simple in *A* if he survives the testator, or a fee simple in the children if *A* does not survive the testator, on a substitutional construction theory. Each of these results has been argued in North Carolina, but only the life estate-remainder and substitutional construction arguments have had much success.

The first potential words of limitation construction was, indeed, in the inaugural case of *Moore v. Leach*.²⁴⁹ The testator devised a house and lot "to my beloved daughter Eliza Ann Leach (the wife of John Q.A. Leach,) and her children, the lawful heirs of her body . . . to her, the said Eliza Ann Leach, and her children forever." In another clause, there was a devise to the testator's son George, "to him . . . his heirs and

do not exist, has not been noted as a factor. See *Masters v. Randolph*, 183 N.C. 3, 110 S.E. 598 (1922); *Jenkins v. Hall*, 57 N.C. 321, 4 Jones Eq. 334 (1858). A gift to "*A* and his children, if any," has invoked Wild's Case. *Cole v. Thornton*, 180 N.C. 90, 104 S.E. 74 (1920).

See also *Sharpe v. Isley*, 219 N.C. 753, 14 S.E.2d 814 (1941), in which the testator devised his entire estate (personalty and realty) to his wife "Ruth Lee Sharpe, to her and her heirs by me My wife is to have the exclusive and sole use of . . . my . . . property and should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple." Ruth had no heirs by testator. Wild's Case was not argued; a life estate-remainder construction was sought but rejected in favor of a fee simple absolute in Ruth.

The court did put a substitutional construction on a bequest of slaves to the testator's daughter "Nancy or her issue" in *Doggett v. Moseley*, 52 N.C. 450, 7 Jones 587 (1860). This case is hardly a repudiation of Wild's Case, as the language varied so much from "*A* and his children." The court assumed *arguendo* that "or" meant "and" but still rejected Wild's Case because Nancy had only illegitimate children.

249. 50 N.C. 97, 5 Jones 88 (1857). For a collection of cases indicating various factors bearing on intention, see Annot., 161 A.L.R. 612 (1946).

assigns forever." Eliza had children at the execution of the will and at the testator's death, and the court followed Wild's Case, noting that the devise to George showed that the testator well knew how to use words of limitation. Although one might quibble with this decision,²⁵⁰ on balance there seems insufficient evidence to rebut Wild's Case.

Instruments in some subsequent cases have a very strong flavor of words of limitation in their use of the term children, yet only one has overcome Wild's Case.²⁵¹ Several of them seem to use "children" in the sense of bodily heirs, while others even seem to use the word in the sense of heirs general. Whether failure to overcome Wild's Case is due to the early influence of *Moore v. Leach* is difficult to say.

One of the strongest suggestions of words of limitation, according to the court, is *Cullens v. Cullens*.²⁵² There the premises of the deed ran "unto Sarah . . . and her children," but the habendum and the clause of warranty ran "unto her the said Sarah . . . and her children forever." The court conceded that the grantor's "more likely intention" was to convey to Sarah in fee and after her death to her children, using the word "children" in the sense of heirs of her body, but held that "under the settled decisions of this Court" Sarah and her children living at the date of the deed took an estate for life as tenants in common.²⁵³

The court thus overlooked the fact that Wild's Case is only a rule of construction, which should have been overcome by the grantor's "more likely" intention.²⁵⁴ Other cases have rejected the fee tail construction,²⁵⁵ the most compelling case for the fee tail (or even a fee

250. The devise to George shows that the testator knew how to use words of limitation to create a fee simple absolute, not whether he knew how to use words of limitation to create a fee tail. There is some conflict in the devise to Eliza, since heirs of the body is a broader term than children, although children are a subclass of the class of bodily heirs. (The opinion does not disclose whether George had children.)

251. *Mayberry v. Grimsley*, 208 N.C. 64, 179 S.E. 7 (1935). See text accompanying note 260 *infra*.

252. 161 N.C. 344, 77 S.E. 228 (1913).

253. The statement of the court is quoted in text accompanying note 98 *supra*. Note that the court adheres to Wild's Case even when it results only in a life estate, whereas the contrary construction would have yielded a fee in Sarah.

254. See the discussion at section I(C) *supra*. The court does not explain why it thought the grantor's likely intention was a fee in Sarah.

255. *E.g.*, *Buckner v. Maynard*, 198 N.C. 802, 153 S.E. 458 (1930) (premises "to Eller Riddle and her children"; witnesseth clause "to the said Eller Riddle and children, her bodily heirs and assigns"; habendum clause "to the said . . . heirs and assigns" left blank; *held*, that the words "bodily heirs" were used as *descriptio personae* and not in their technical sense). See also *Lewis v. Stancil*, 154 N.C. 326, 70 S.E. 621 (1911) (devise "to my grandson, Joseph A. Lewis, . . . to him and his children, born in wedlock, forever." The words of limitation possibility was not considered, although two

simple) being *Benbury v. Butts*.²⁵⁶ In that case the devise was "to Dora Benbury, my wife's daughter, the house and lot . . . [described], to her and her children, and to their children's children . . ." ²⁵⁷ The initial mention of Dora alone, the comma before the pseudo habendum clause, and the reference "to their children's children" all denote that "her children" were words of limitation, yet in a short opinion the court thought it clear that Dora and her children took as tenants in common in fee.

In *Benbury* the court did not disclose whether counsel argued for a words of limitation construction, but in *Snowden v. Snowden*²⁵⁸ counsel contended that use of the words "her heirs" in a testamentary gift "to my daughter Laura, children, her heirs and assigns" resulted in a fee simple in Laura. The court, citing *Benbury v. Butts*, *inter alia*, rejected the argument: "[W]e cannot draw that inference from the word 'her' since at the death of the testatrix there might have been no children, and the use of it does not obliterate the word 'children' from the devise."²⁵⁹ The court's meaning is not entirely clear, but in any event the words of limitation construction would not have obliterated the word "children"; the construction would simply have given it the meaning the testatrix evidently intended, *i.e.*, an example of heirship.

The only case in which "children" was, in effect, treated as a word of limitation is *Mayberry v. Grimsley*.²⁶⁰ There the premises ran "to Nonnie . . . and her children" while the granting clause and habendum were "to said Nonnie . . . , her heirs and assigns." In this case of conflict the court found that the deed taken as a whole excluded the children as grantees, so Nonnie took a fee simple. Somewhat similar is *Coffield v. Peele*,²⁶¹ holding that the testator did not intend to give any interest to A's children.²⁶²

dissenting judges argued for a life estate-remainder. The phrase "born in wedlock" suggests that "children" was used as a word of purchase.)

256. 184 N.C. 23, 113 S.E. 499 (1922).

257. *Id.* at 24, 113 S.E. at 499-500.

258. 187 N.C. 539, 122 S.E. 300 (1924).

259. *Id.* at 541, 122 S.E. at 301.

260. 208 N.C. 64, 179 S.E. 7 (1935).

261. 246 N.C. 661, 100 S.E.2d 45 (1957).

262. Testator devised his entire estate "unto my seven children, . . . [a]ll of my real and personally [*sic*] property, to be divided equally among the seven children of mine, and their children." All 7 children survived the testator, as did 44 grandchildren. In this case of repugnancy, the court found it more likely that the testator intended the children to take shares of $\frac{1}{7}$ rather than $\frac{1}{61}$. *Id.* at 665-66, 100 S.E.2d at 48. *Martin v. Knowles*, 195 N.C. 427, 142 S.E. 313 (1928), also finds that "children" was not used as a word of purchase where it appeared only in the premises and not in the granting and other clauses.

In sum, the words of limitation argument rarely has succeeded in North Carolina, despite strong cases for it.²⁶³ It is difficult to discern any clear reason for this rigidity, especially when the court concedes the likely intention.²⁶⁴ The facts stated in the opinions are so sparse as to make any judgment about the testator's general plan and family relationships impossible; only the spare words of the instruments are parsed. It might also be noted that where the word "heirs" or "issue" clearly is used to mean "children" Wild's Case may be applied.²⁶⁵ Conversely, where "children" is used clearly to mean children, it will not be read as "heirs."²⁶⁶

The life estate-remainder argument has been more successful, perhaps because the courts have been willing to look at the motive for the gift or perhaps because it was successful in an early case, *Bridges v. Wilkins*.²⁶⁷ There the gift was, variously, to the testator's sisters and their *lawful issues*, to the sisters and their *children*, and to the sisters and their *progeny*. The testator had six sisters, of whom one had a child at the testator's death. This multiple gift situation—some sisters

263. Cases in other jurisdictions sometimes have accepted the words of limitation construction. See 5 ALP, *supra* note 7, § 22.23, at 301 n.14, § 22.24, at 303 n.1.

264. See, e.g., *Cullens v. Cullens*, 161 N.C. 344, 77 S.E. 228 (1913).

265. *Bridges v. Wilkins*, 56 N.C. 326, 3 Jones Eq. 342 (1857). As noted before, cases in which "issue" is read as "children," thereby invoking the Rule, are fairly common in other states. See 5 ALP, *supra* note 7, § 22.17. The Uniform Property Act, discussed in section III(C) *infra*, applies to conveyances to *A* and his "issue" as well as to *A* and his "children," suggesting that the "issue" phrase has commonly occurred elsewhere. The problem seems not to have come up very often in North Carolina. In First Resolution cases, the North Carolina result would be the same whether "issue" were regarded as carrying its usual meaning of "bodily heirs" or as meaning "children." If it means "bodily heirs" the result is a fee tail in *A*, converted by N.C. GEN. STAT. § 41-1 (1976) to a fee simple in *A*. If it means "children" the result is a fee tail in *A* via Wild's Case, also converted to a fee simple.

On its face, N.C. GEN. STAT. § 41-6 (1976) ("heirs" construed to be "children" in certain limitations) would seem to direct all transfers "to *A* and his heirs" toward Wild's Case by presuming "heirs" to mean children. As is well-known, however, § 41-6 does not apply where there is a precedent or concurrent estate to the living ancestor of the heirs. E.g., *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941); *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893). The word "heirs," therefore, is one of limitation and *A* takes a fee. Even if § 41-6 applied, in First Resolution cases the result would be the same—*A* would take a fee.

266. See *Helms v. Austin*, 116 N.C. 751, 21 S.E. 556 (1895) (deeds made between grantor and "his wife and her heirs named on the back of this deed"; on the back were endorsed the names of grantor's children; *held*, the wife and children took a fee simple); cf. *Tremblay v. Aycock*, 263 N.C. 626, 629, 139 S.E. 898, 900 (1965) ("we have found no case, in which the conveyance is merely to *A* and the heirs of his body, and *A* has children at the time, that 'heirs of the body' has been construed to mean 'children.'"); *Jernigan v. Lee*, 9 N.C. App. 582, 176 S.E.2d 899 (1970) (reading "heirs" as "children" but not applying Wild's Case), *rev'd*, 279 N.C. 341, 182 S.E.2d 351 (1971) (reading "heirs" as "heirs" to comport with testatrix's general plan).

267. 56 N.C. 326, 3 Jones Eq. 342 (1857).

having had no children (First Resolution) and one having had children (Second Resolution)—may have compelled the life estate-remainder construction as a way to resolve the fee tail-cotenancy impasse.²⁶⁸ Indeed, a subsequent case stresses the point in reconciling *Bridges* with *Moore v. Leach*.²⁶⁹ In any event, the court treated “issues” and “progeny” as synonymous with “children,” and posited that the testator did not intend to exclude the children that his unmarried sisters might have.²⁷⁰

Several cases have found the life estate-remainder construction on the basis of a perceived intention to provide solely for *A* during his (or more often, her) life. A deed of slaves to a trustee in *Chesnut v. Meares*²⁷¹ was made in consideration of love and affection for the settlor's wife, as well as for her better maintenance and support, and the trust was first declared for the wife alone—the children were not mentioned until the warranty clause. The court found a life estate in the wife because of the settlor's purpose of providing support and maintenance for her.²⁷² A similar view was taken in *Faribault v. Taylor*,²⁷³ involving a bequest of “property”²⁷⁴ to a trustee for the benefit of the testator's oldest daughter and children, free of the control of her husband. The court commented:

The construction, which would give the property to her and her present children only, as tenants in common of the absolute interest in it is inadmissible, both because it might, by diminishing the present and immediate interest in the wife, be an inadequate support for her during her life, and because it would exclude from the benefit of the fund, any children she may hereafter have. The manifest intent of the testator will be much more effectually carried out by giving to the wife a life-estate, with a remainder to all the children which she now has, or may hereafter have; and as the property is bequeathed to trustees, in trust, for the benefit of her and her children, this construction is fully supported by the recent cases of *Bridgers (sic) v. Wilkins*, 3 Jones' Eq. Rep. 342, *Chestnut v. Meares [sic]*, *Ibid.*, 416; *Coakley v. Daniel*, 4 Jones' Eq. Rep. 89. Had the bequest been a direct one to Mrs. Spivey and her children, then, under the

268. See the discussion in section I(J) *infra*.

269. *Coakley v. Daniel*, 57 N.C. 96, 99, 4 Jones Eq. 90, 93 (1858); see note 305 *infra*.

270. 56 N.C. at 328, 3 Jones Eq. at 344.

271. 56 N.C. 395, 3 Jones Eq. 416 (1857).

272. The gift was to the wife “and her children which she has, or may have, by me”; the reference to future-born children also inclined toward a life estate-remainder construction so as not to close the class to after-born children.

273. 58 N.C. 234, 5 Jones Eq. 219 (1859).

274. The headnote in the North Carolina Reports describes the gift as slaves, but the opinion describes only “a share of the estate,” “the fund,” and “the property.”

authority of *Moore v. Leach*, 3 Jones' Rep. 88, we should have been constrained to hold that the wife and children living at the death of the testator, took an absolute interest in the fund as tenants in common.²⁷⁵

This statement is remarkable in several respects. First, the argument that the tenancy in common construction should be rejected because it would exclude afterborn children is really an indictment of the Second Resolution. There was nothing unique in *Faribault* to indicate a special concern for afterborns, yet the court recognized the penalty in excluding them. Second, it is not clear why the court found a primary intention to support the daughter—was it because of: (1) the relationship between the donor and *A* (wife, daughter); (2) the subject matter of the gift (slaves or other property);²⁷⁶ (3) the imposition of a trust on the property; (4) special language in the instrument (for her support, free of her husband's control); (5) some other unstated factor; or (6) some combination of these factors? The portion of the opinion quoted appears to say that the controlling factor is the presence or absence of a trust, yet in *Hunt v. Satterwhite*²⁷⁷ a devise of realty in trust for the testator's daughter and her children was held to result in a tenancy in common. At one point the *Satterwhite* court suggested that the interposition of a trustee supports the cotenancy construction.²⁷⁸ It should be noted that there were no words superadded to "*A* and her children" to indicate primary concern with the daughter, and the court said that the life tenant-remainder cases were "based on an intent . . . gathered from other parts of the instrument."²⁷⁹ Nor did the facts that the subject of the gift was slaves and that the donee was a daughter overcome the presumption, at least when the instrument recited love and affection for the daughter *and her children*, declared that the daughter shall have the use, *together with the children*, and stated that the whole equitable interest shall belong to the daughter and her children, *in common*.²⁸⁰

275. 58 N.C. at 235, 5 Jones Eq. at 220.

276. Compare the discussion in section I(E) *supra*. According to Underhill, the life estate-remainder construction is easily found in case of gifts of personalty, especially money. 2 H. UNDERHILL, *supra* note 11, § 583, at 776.

277. 85 N.C. 73 (1881).

278. *Id.* at 76. See also *Wilson v. Wilson*, 119 N.C. 588, 26 S.E. 155 (1896) (deed to trustees for the benefit of the settlor's wife and children "and any others thereafter born" resulted in a cotenancy).

279. 85 N.C. at 76.

280. *Gay v. Baker*, 58 N.C. 359, 5 Jones Eq. 344 (1860).

The argument of a protective motive seems to have been turned around to support the cotenancy construction, at least when the subject of the gift was a family home. In *Hampton v. Wheeler*²⁸¹ the purpose of a gift of a small tract (25 acres) was seen as perhaps providing a place on which the daughter could live with her family, thereby giving the children an interest as cotenants.²⁸² Similarly, in *Wilson v. Wilson*²⁸³ a cotenancy was found to result from a deed of property (of undisclosed nature) to a trustee "for the . . . benefit of . . . Samantha . . . (wife of one of the grantors) and her two children, Delia . . . and Clara . . . and any others thereafter born":²⁸⁴

[I]t appears to have been the purpose to provide for the comfort of the children as well as the wife. The defendants' contention would strip the children of their maintenance and education at the period of life when such assistance was more needed than at any other time. We cannot impute such a purpose in the mind of the father in the absence of any language to justify it. He might be improvident and reckless, but when moved by a generous impulse to provide and secure something for his family it would be a most unusual act to disinherit the most helpless members of it.²⁸⁵

This result is particularly startling in light of the gift to children "thereafter born," which certainly supports a life estate-remainder construction. The only conclusion one may safely draw is that the cases appear to be inconsistent.

Other life estate-remainder cases are *sui generis*.²⁸⁶ Where the premises of a deed run to *A* and the habendum to *A* and his children, Wild's Case is not precisely involved, since North Carolina follows the rule that the habendum may never introduce one who is a stranger to the premises to take as grantee, but he (or they) may take by remainder.²⁸⁷

281. 99 N.C. 222, 6 S.E. 236 (1888).

282. *Id.* at 224, 6 S.E. at 237.

283. 119 N.C. 588, 26 S.E. 155 (1896).

284. *Id.* at 589, 26 S.E. at 155 (emphasis added).

285. *Id.* at 590, 26 S.E. at 155.

286. Underhill suggests an interesting theory:

If the gift is to the parent, either expressly *for life*, or at common law without *words of limitation*, and the gift to the children is to *them and their heirs*, or in any terms which would convey the fee to the children, it is evident that the testator could not have meant them to take as joint tenants. He must have intended a life estate in the parent and a remainder in fee in the children as purchasers. This would be the case where the gift was to the parent for the benefit of herself, and *after her death to go to her children*.

2 H. UNDERHILL, *supra* note 11, § 582, at 773 (footnote omitted). This kind of case does not appear to have arisen in North Carolina.

287. *Blair v. Osborne*, 84 N.C. 417 (1881).

The life tenant-remainder construction may be reached to reconcile the two clauses.²⁸⁸

Finally, in *Lewis v. Stancil*,²⁸⁹ where the majority applied the Second Resolution, two of five judges on the court dissented in favor of a life estate-remainder based on a devise "to my grandson, Joseph . . . , to him and his children, born in wedlock, forever." The dissenting judges based their reading on the language of the will and a perusal of the entire instrument,²⁹⁰ but it is difficult to tell from the opinion just what motivated them; indeed, the case for a fee tail seems stronger.²⁹¹

The third possible construction is a substitutional one. For example, in *Pollard v. Pollard*²⁹² property was to be divided upon the widow's death among the testator's daughter, son and grandson, "and their children, the children to take the share of the parent who may die before my death." The court found the testator's intention to be that the children take only if their parent died before the testator²⁹³ in order to prevent a supposed lapse.²⁹⁴ This construction seems reasonable and was also reached in *Tate v. Amos*²⁹⁵ on somewhat different language, "to Grace . . . or to her children."

*Pruden v. Paxton*²⁹⁶ is interesting for an unusual, but unsuccessful, argument. The testator devised the residue of his estate (after a life estate in the family dwelling to the wife) "to my dear wife and beloved children, to be divided among them according to law." It was argued that the widow's share upon intestacy ("according to law") was only a dower interest and that, having failed to claim even that interest, she took nothing in the residue! The court rejected the argument, noting first that the life estate in the family dwelling amounted to dower, and reasoning that the "to be divided among them according to law" clause

288. *Condor v. Secrest*, 149 N.C. 201, 62 S.E. 921 (1908); *Blair v. Osborne*, 84 N.C. 417 (1881).

289. 154 N.C. 326, 328, 70 S.E. 621, 622 (1911) (dissent).

290. *Id.*

291. In *Weeks v. McPhail*, 128 N.C. 130, 38 S.E. 472 (1901), the trial court reached an apparently erroneous life estate-remainder construction, described by the supreme court as one which "may be erroneous in law," but the decree was not appealed.

292. 83 N.C. 96 (1880).

293. *Id.* at 100. In general the more likely time for determining whether to substitute children is the death of the life tenant-widow, since distribution is not required until that time. See 1 SIMES & SMITH, *supra* note 7, § 535.

294. The court found that the existence of a lapse statute that would have substituted issue in the absence of an express substitutional gift did not overcome the substitutional construction. 83 N.C. at 100.

295. 197 N.C. 159, 147 S.E. 809 (1929).

296. 71 N.C. 446 (1878).

was merely declaratory, not of the quantity of the estate, but of how the devisees were to hold, *viz.* in severalty.²⁹⁷

In *Coakley v. Daniel*²⁹⁸ the testator divided his estate among his three children, directing equal division between his sons, Henderson and Thomas, and their heirs as gifts, and his daughter, Sarah "as a loan for the benefit of her and her children." The court was not certain of the testator's meaning but ultimately concluded that

he meant that [Sarah] should not take it to be disposed of absolutely at her pleasure, but that her interest in it was to be limited to her for life, and then it was to be for the benefit of her children. It will be noticed that the devise and bequest is not to her *and* her children, which, as she had children at the time of her father's death, would have given the property to her and them, as tenants in common, according to the case of *Moore v. Leach*, but it is to her "for the benefit of her and her children."²⁹⁹

J. Multiple Gifts

One situation in which the North Carolina result has received some favor in other quarters is that of multiple gifts—gifts to two or more persons and their children. In the leading case of *Bridges v. Wilkins*³⁰⁰ various items of property³⁰¹ were given by will to the testator's sisters and their children³⁰² with a proviso that the property should go to the sisters directly and their children, and not to their husbands. One sister was married at the time of the will and had one child born before the

297. *Id.* at 448.

298. 57 N.C. 96, 4 Jones Eq. 90 (1858), *discussed in* Pollard v. Pollard, 83 N.C. 96, 99 (1880).

299. 57 N.C. at 98-99, 4 Jones Eq. at 92-93; *cf.* Chesnut v. Meares, 56 N.C. 395, 3 Jones Eq. 416 (1857) (deed to trustee for use of mother and children when there are children living normally creates tenancy in common unless purpose of gift is to provide for the mother; then the mother takes a life estate with a remainder to the children as tenants in common). The court in *Coakley* also indicated that trusts would be construed like wills. 57 N.C. at 99, 4 Jones Eq. at 93.

300. 56 N.C. 326, 3 Jones Eq. 342 (1857).

301. The property included slaves and cash, but the opinion is not altogether clear on whether land was included. *Id.* at 326-27, 3 Jones Eq. at 342-43.

302. The language was somewhat more complex than this, using three different phrases:

Item 1: to my sisters, that may be living at the time of my death, and their lawful *issues*

Item 2: to my sisters and their children as above-mentioned, with the express condition that no property, of which I am now possessed, or may hereafter fall heir to, shall go to any but my sisters directly and their progeny, and not their husbands

Item 4: to my sisters, as before stated

The court read all phrases as being equivalent to "my sisters and their children." *Id.*

testator's death³⁰³ and another born afterward. A second sister married before the testator's death but had no children, and four sisters were single at the testator's death. The court was asked to determine whether the children took any interests and, if so, whether as cotenants with their mothers or as remaindermen after the death of the mothers. It concluded that the sisters took life estates with remainders to their children:

We have no doubt that . . . the testator meant that all the children which his sister might have should be benefitted by the bequest. . . . [H]e certainly did not intend to exclude the children which his unmarried sisters might have if they should think proper at any future time to marry and bear children. To give full effect to the will, therefore, it is necessary to adopt the construction that the sisters shall take estates for life in the slaves and other property, with remainders to their children. This . . . is supported by the case of *Ponton v. McLemore*, 22 N.C., 285.

It is very certain that the testator intended his married sister should take what he gave her for her sole and separate use. The expression that none of his property should "go to any but my sisters directly and their progeny, and not their husbands," can admit of no other fair interpretation. . . . It must therefore be declared to be the opinion of the Court that the testator's sisters take each a life-estate in the property bequeathed to them, with remainders to their children respectively, and that they take their life-estates to their sole and separate use exclusive of their husbands

. . . .³⁰⁴

303. It is not clear whether this child existed at the making of the will. See *id.* at 327-28, 3 Jones Eq. at 343-44.

304. *Id.* at 328, 3 Jones Eq. at 344-45. The court's reliance on *Ponton v. McLemore*, 22 N.C. 236, 2 Dev. & Bat. Eq. 285 (1839), appears well-placed. Although *Ponton* apparently is not cited in any other Wild's Case decision, it does, in a way, reject the Second Resolution. Property was left to a daughter as follows:

[A]nd the part which I design for my daughter, with the exception of five hundred dollars aforesaid, to my friend Henry Doggett, as aforesaid, in trust for the support and maintenance of my daughter Mary E. Avent.—The property I hereby leave in trust, for the benefit of my daughter Mary E. Avent, is to be applied at the discretion of the trustee, for the support and maintenance of Mary E. Avent and her children, and no part or parcel thereof to be subject to the debts of her husband.

22 N.C. at 237, 2 Dev. & Bat. Eq. at 286. One issue was:

whether the said Mary E. Avent and her children had any other interest in the bequests to the trustee, Doggett, beyond support and maintenance during their lives and the life of the longest liver of them; and whether, if they had any interest beyond such support and maintenance, the said Mary E. Avent had the absolute interest, or she and her children were tenants in common, or whether she was tenant for life with the remainder to her children.

Id. The court chose the life estate-remainder:

But the other question is by no means so easily answered. Taking into consideration, however, the pointed declaration of the testator, that "of the part designed for his daughter" he desires that "no part or parcel be subject to the debts of her husband;" that the bequest thereof is made to a trustee; that the

The court thus seemed to be influenced by an assumed desire to benefit after-born as well as existing children³⁰⁵ and by the inference that exclusion of the sisters' husbands limited the sisters to life estates.³⁰⁶

The life estate-remainder construction is favored by the *Restatement* on the ground that "[i]t is more reasonable to infer that the limitation was intended to create identical interests as to each named parent."³⁰⁷ The *Restatement* chooses the life estate-remainder in ordinary First Resolution cases and the cotenancy in Second Resolution ones. Casner states that most cases choose the life estate-remainder and adds, somewhat sympathetically, "[t]his result is obviously motivated by a desire to give the children born later an equal chance to share with

trusts are to be collected from intimations as to the object of his bounty in different parts of his will; that in the first part, his daughter, Mary E. Avent, is solely named as that object; and, in the latter part, his said daughter and her children are all named as such objects, we are of opinion that the testator's purpose will be most effectually promoted by holding that the bequest was made in trust for his daughter, Mary, to her sole and exclusive use for life, and after her death, then in trust for her children. This interpretation, we think, is the more strongly called for, because, if we construe the immediate beneficial bequest to be made to Mary E. Avent and her children, none of the children could take under it, but those in being at the death of the testator. This, we are satisfied, could not have been his intention.

Id. at 238, 2 Dev. & Bat. Eq. at 287.

305. *Bridges* was explained on this ground a year later in *Coakley v. Daniel*, 57 N.C. 96, 4 Jones Eq. 90 (1858); see section I(1) *supra*. *Coakley* dealt with a devise "to be divided between Sarah B. Coakley, Henderson L. Daniel and Thomas P. Daniel, share and share alike—to Henderson and Thomas and their heirs and assigns as gifts—to Sarah B. Coakley as a loan, for the benefit of her and her children." *Id.* at 97, 4 Jones Eq. at 91. This was not a multiple gift case (unless "heirs" were read as "children," a strained construction), but the court needed support for its holding that while Henderson and Thomas took absolute interests, Sarah took only a life estate followed by a remainder in her children born or to be born. The court found support for the life estate-remainder where necessary to effectuate intent to benefit all children, as in *Bridges*:

It has been suggested that the cases of *Moore v. Leach* and *Bridges v. Wilkins* were opposed to each other, because one of the sisters of the testator in the latter case had a child living at his death, and yet we held that she took a life-estate only in the property given, with a remainder to all her children as a class. But there is this manifest difference between the two cases: that in the former the devise is to one woman only and her children, she at the time being a married woman and having children, while in the latter the bequest was to all the testator's sisters and their children, most of whom were then unmarried and without children. In the case of the unmarried sisters the intention of the testator in favor of any children which they might have could only be carried out by giving the sisters estates for life, with remainders to their children respectively as a class, which would, of course, embrace all they might have during life. As the married sister was embraced in the same clause, and as no distinction whatever was indicated in the will between her and the others, the same construction was applied to her also. . . . [W]hen the intention of a testator or settlor [*sic*] of a trust requires it, the children will not take with their mother, but in remainder after her.

Id. at 94, 4 Jones Eq. at 93 (citations omitted).

306. The inference raised by exclusion of husbands was emphasized in *Pollard v. Pollard*, 83 N.C. 96 (1880).

307. RESTATEMENT OF PROPERTY § 283, Comment d (1940).

the children already born, and the life interest and remainder construction makes this possible with the least inconvenience."³⁰⁸ On the other hand, Simes and Smith argue that "[t]he reason given by the *Bridges* court [that the gift is in the form of a single phrase] would appear insufficient to . . . depart from the cotenancy construction in the case of a person who had children."³⁰⁹

Is the *Bridges v. Wilkins* view well-taken? Certainly it is surprising that a construction that is rejected in gifts to a single parent both when he has and has not children is suddenly embraced as a magic healer when the two Resolutions conflict. The question actually comprehends a number of discrete sub-questions. First, is the limitation to be construed as making a separate gift to each parent and his children or a single gift? If each gift is separate, it would seem that the same language could mean different things as applied to different situations.³¹⁰ If Blackacre were given to *A* and his children (*A* having no children) and Whiteacre to *B* and his children (*B* having children) a construction of a fee tail in *A* and a cotenancy in *B* and his children would not be unreasonable. If in single parent situations the meaning of "*A* and his children" may ebb and flow according to whether *A* has children, it would seem a more modest act in multiple gift cases to determine each named donee's interest according to whether he has or has not children. After all, in the multiple gift situation the named donees may have no close relationship to each other. This all assumes that Wild's Case is correct in mandating two Resolutions rather than a single, consistent one to govern all cases regardless of whether *A* has children, the latter result being favored in some quarters.³¹¹ If different meanings are allowed, the usual Wild's Case Resolutions should then be invoked as aids to construction.

The question of how one determines whether there are separate gifts to each parent and his children seems not to have been noticed by the cases or writers. The most important factor would seem to be the relationship of the parents and the children to the testator. If all the parents were kin and equally related to the testator, there would seem to be a good case for equal treatment. Much would depend on the family situation.³¹²

308. 5 ALP, *supra* note 7, § 22.27, at 311.

309. 2 SIMES & SMITH, *supra* note 7, § 702, at 175.

310. 5 ALP, *supra* note 7, § 22.27; 2 SIMES & SMITH, *supra* note 7, § 702.

311. *E.g.*, the proposed Uniform Property Act, discussed in section III(C) *infra*.

312. *See* the discussion of *Wills v. Foltz*, 61 W. Va. 262, 56 S.E. 473 (1907), in note 317 *infra*.

Second, assuming that the multiple parent gifts are not separate (whatever "separate" means), must the magic phrase be given a single meaning or may it still wear its chameleon skin, changing according to whether a particular parent has children? It is arguable that different meanings are still possible, but this conclusion would depend on specific factual settings.

Third, if a single meaning is to be chosen, what should that meaning be? It is conceivable that the First Resolution could control the Second (as, in effect, the *Restatement* advocates), that the Second Resolution could control the First (as one might intuit), or that one of several other constructions could control both Resolutions (as with the life estate and remainder in *Bridges v. Wilkins*).

The resolution of these issues lies in the purpose or purposes one ascribes to the creator and the law as to ancillary matters such as the necessity for words of limitation and the presumption of joint tenancy or tenancy in common. As to the creator's purposes, clearly he intends for the named parents to take. Obviously, too, he intends for the children to share for, as Wild's Case said, "the intent of the devisor is manifest and certain that his children or issue should take."³¹³ Any choice to resolve the conflict, therefore, ought to give due recognition to the interests of the children as well as the parents.

The life estate-remainder is not a bad choice in modern times. In a jurisdiction such as North Carolina the Wild's Case choice is between a First Resolution fee tail converted by statute into a fee simple in the parent and a Second Resolution tenancy in common. The fee tail-fee simple result is bad since it cuts off the children entirely;³¹⁴ the cotenancy is bad because it cuts off after-born children.³¹⁵ The *Bridges v. Wilkins* choice avoids both these difficulties and indeed may be premised on a subliminal intention to benefit all children. Thus read, it is a strong indictment of the First Resolution in North Carolina law and supports the case for repeal of it.³¹⁶

313. 77 Eng. Rep. at 278.

314. See *Knight v. O'Brien*, 202 Ala. 440, 80 So. 824 (1919), holding that both the parent without children and the parent with children received fees tail that were converted into fees simple!

315. See *Robinson v. Harris*, 73 S.C. 469, 53 S.E. 755 (1906), allowing living children to share but excluding after-born children.

316. On the specific language of the instrument involved, *Bridges v. Wilkins* also seems a good decision. The proviso excluding the sisters' husbands argues against fees in the sisters. Further, the exclusion of husbands, when at the time of the will only one sister was married, indicates that the testator anticipated changes in family situations and desired equal treatment of all sisters. The court's assumption that all parents should

Of course, the life estate-remainder is not the only alternative to the Wild's Case Resolutions; the fee simple subject to open with executory interests in the unborn children would seem a good choice, provided that some solution could be found for the title problems created by the executory interests.

The *Bridges* result rests on one additional assumption: While the will is not construed as making separate kinds of gifts, but as making similar kinds of gifts to each parent and his children, nevertheless each group composed of a parent and his children takes a share distinct from those given to other parents and children. In other words, while each parent-children group takes a life estate-remainder, those life estates and remainders are separate from the life estates and remainders of other parents and children. It might be argued that the entire gift should be held in equal shares by all parents for life with remainder to all children equally. This does not seem a likely intention, since it would require some children to await taking until the death of a parent not their own.³¹⁷

II. DRAFTING

From the materials on Wild's Case, many conclusions may be drawn. One conclusion that certainly never can be drawn, however, is that it is advisable to make a gift *in haec verba* to "A and his children." Even if A has children at the effective date of the instrument, the phrase bristles with ambiguities and, further, the creator's presumed intention of making cotenants of A and his children is subject to rebuttal. It is far better to choose phraseology that anticipates the latent questions and is not subject to rebuttal.

be treated equally makes sense when all parents were in equal degrees of kinship (sisters) to the testator.

317. A somewhat related situation has arisen in other jurisdictions. Simes and Smith state the case as follows:

Sometimes property is devised to several named persons and their children. The application of the doctrine of Wild's Case to this situation has given rise to at least two questions: First, suppose all the named persons had children living at the testator's death. Do these children and their parents all take *per capita*? To take a concrete illustration: In *Wills v. Foltz* [61 W. Va. 262, 56 S.E. 473 (1907)], it appeared that testator gave the residue of his property to A, B, and C and their children. At his death A had three children, B four children, and C five children. The question was whether the property should be divided into three equal parts, one part to be held jointly by A and her children, or whether it should be held in equal shares by A, B, C, and all the children. The court decided in favor of the latter construction.

2 SIMES & SMITH, *supra* note 7, § 702, at 174. This situation is one of the few Wild's Case variations that seems not to have been the subject of a square holding in North Carolina. Dictum in the recent case of *Coffield v. Peele*, 246 N.C. 661, 100 S.E.2d 45 (1957), indicates the equal share construction.

Casner suggests that normally a prospective transferor who verbally requests a draft for "A and his children" has in mind one of three plans: (1) an absolute interest in A; (2) concurrent interests in A and his children; or (3) successive interests in A and his children.³¹⁸ While the drafting considerations may be more complex for wills than for deeds, these three plans are a useful outline for discussion.

Under the first plan the creator intends to confine the children's benefit to what they may receive from A by descent or devise, and he mentions the children because he naturally expects them to take from their parent, A.³¹⁹ The draftsman may therefore suggest a gift of a fee simple to A, pointing out that A will be free to disinherit the children by lifetime transfer or by will.³²⁰ If the transferor then reveals that his desire is to create a primitively conceived fee tail, he will have to be advised that his wishes cannot be accomplished in North Carolina.³²¹ A limited kind of entailment might be accomplished by expressly creating a series of life estates in A and then his children, but the series normally could not be continued into unborn grandchildren without violating the Rule Against Perpetuities.³²²

An alternative method of giving A in substance a fee while creating an express interest in the children would be to give A a life estate coupled with a general power of appointment by deed or will or both, followed by a gift in default to A's children.³²³ Casner seems to favor this approach³²⁴ but the instrument would need to be carefully drawn to answer some of the questions about children raised by the successive interest plan discussed below. Additional questions would be raised if the life estate were legal instead of equitable.³²⁵ Also, the client should be advised of the estate administration, tax and other consequences in A's estate of giving him an absolute interest instead of some generation-

318. 5 ALP, *supra* note 7, § 22.28.

319. *Id.*

320. The pretermitted heir statute protects from disinheritance only after-born children who are inadvertently omitted. N.C. GEN. STAT. § 31-5.5 (1976).

321. N.C. GEN. STAT. § 41-1 (1976) abolishes fees tail and converts them into fees simple.

322. Assuming that A could have other children and that vesting of the life estates was postponed until the death of A's children. If A's after-born children were excluded, or if the gift to grandchildren were confined to those in existence when the interests were created, the gift would not violate the Rule.

323. Traditionally, a gift in default is regarded as vested subject to divestiture by exercise of the power. *E.g.*, RESTATEMENT OF PROPERTY § 276 (1940).

324. 5 ALP, *supra* note 7, § 22.28.

325. WACHOVIA BANK & TRUST, CO., NORTH CAROLINA WILL MANUAL SERVICE XVI-12 n.1 (N. Wiggins ed. 1958).

skipping plan such as a life estate-remainder, coupled perhaps with a special power of appointment.³²⁶ The new rules of the Tax Reform Act of 1976 should be considered before choosing any apparent generation-skipping plan.³²⁷ Finally, if the creating instrument is a will rather than a deed, provision will need to be made for the case of *A*'s death before the testator.

The concurrent interest plan requires the draftsman to consider several questions.³²⁸ First, what constitutes the class of concurrent owners? The class may consist only of *A*'s children or it may consist of *A* and *A*'s children. It is difficult to assay the likely desires of "most" people; perhaps most donors would prefer a single class, so that in case of lapse *A*'s share would go to his children. Second, what is the form of concurrent ownership? While North Carolina appears to have abolished most estates in joint tenancy,³²⁹ the statute has been held not to prohibit the creation of rights of survivorship by contract.³³⁰ Most people probably intend a tenancy in common.³³¹ Third, what are the respective shares of the cotenants? If the class members (whoever they may be) are joint tenants, each must own an equal undivided share. But if they are tenants in common, they may be given unequal shares.³³²

326. See text accompanying note 335 *infra*.

327. The new law imposes a tax on generation-skipping transfers under a trust or similar arrangement upon the distribution of the trust assets to a generation-skipping heir or upon termination of an intervening interest in the trust. Tax Reform Act of 1976, § 2006, Pub. L. No. 94-455, tit. I, § 101, 90 Stat. 1525 (adding I.R.C. §§ 2601-14). There is, however, a \$250,000 exemption; transfers to a grandchild of the grantor of a trust are not treated as taxable transfers except to the extent that the total amount of the transfers exceeds \$250,000 for each deemed transferor (*i.e.*, the child of the grantor who is the parent of the grandchild receiving the transfer). I.R.C. § 2613(b) (6). The new generation-skipping rules apply to a generation-skipping "trust or trust equivalent." A "trust equivalent" apparently includes legal interests under § 2611 (d)(2) ("arrangements to be taken into account . . . include . . . arrangements involving life estates and remainders . . ."). *Id.* § 2611(d)(2). See generally Stevens, *Estate Tax Benefits of Generation-Skipping Transfers Sharply Curtailed by New Rules*, 4 EST. PLAN. 78 (1977); Sweeney & Wright, *New Tax on Generation-Skipping Transfers: A New Concept; Planning Implications*, 46 J. TAX. 66 (1977).

328. For a brief discussion of class gifts, see Bolich, *supra* note 10, at 23-30 (1956).

329. N.C. GEN. STAT. § 41-2 (1976).

330. *Wilson County v. Wooten*, 251 N.C. 667, 111 S.E.2d 875 (1960); see section I(G) *supra*.

331. *E.g.*, J. CRIBBET, *supra* note 197, at 99.

332. *Id.* at 103. The possibilities up to this point begin to boggle the mind. Assume that *A* has two children, *B* and *C*. Some possibilities are:

- (1) *A*, *B* and *C* own equal shares as joint tenants;
- (2) *A*, *B* and *C* own equal shares as tenants in common;
- (3) *A* owns one-half and *B* and *C* one-fourth each as tenants in common;
- (4) *A* owns one-half as a tenant in common with *B* and *C*, who own their half as joint tenants between themselves.

Most testators probably are not so devious; a tenancy in common between *A* and the

The creator's intention on this point would seem to depend on the particular family situation, including as factors the number of children, the ages of *A* and the children, and the financial positions of *A* and the children.

Fourth, what is the effect of the death of *A* or any of his children before distribution? For wills this may involve questions of void gifts (when a beneficiary is dead at the making of the will), of lapsed gifts (when a beneficiary dies after the making of the will but before the testator), or of survivorship (when a beneficiary dies after the testator but before the time of distribution, for example, before a life tenant).³³³ Awarding a share to the dead beneficiary may increase death taxes and administration expenses in his estate, but may be desired for other reasons, for example, equality among family branches. A better solution would be to provide a gift over to the descendants of the deceased child; this would preserve equality among the stirpes but avoid subjection of the share of a deceased child to creditors' claims, death taxes or administration in the decedent's estate.

Fifth, within what time period must a child be born in order to share in the gift? This is the question of maximum class membership, which may or may not be treated differently from the question of minimum membership or survivorship. Casner points out that if the dispositive instrument is a deed, and afterborn children are to be included, it may be wise to interpose a trustee to hold legal title until all children are born in order to avoid the doctrine that immediate gifts to unborn grantees are invalid.³³⁴

Sixth, who is included within the term children—adopted children, illegitimates, grandchildren? Individual desires would seem to vary.

children in equal shares probably would be desired, but in view of *A*'s being a parent of the other class members, one might expect *A* to hold his interest as a joint tenant with the children holding in common as between themselves.

333. The draftsman should not overlook the possible problem of accrued shares. Bolich gives the following example:

The problem of end limitations and accrued shares is tricky. T leaves "the residue of my estate in trust to my wife for life, corpus at her death to my three children, A, B, and C in equal shares. Should any of them die before my wife unsurvived by issue, his portion shall pass to the survivors of the said three children in fee." If A so dies without issue his one-third goes to B and C. If B then so dies his original one-third goes to C, but his accrued share does not and belongs to B's estate. Since this is a rule of construction if you add to the above limitation that "upon the death of any one of the above named persons who dies unsurvived by issue then both his original and accrued shares shall go over to the others of the original takers under this gift" you can avoid the above result as to accrual shares.

Bolich, *supra* note 10, at 29 (footnote omitted).

334. 5 ALP, *supra* note 7, § 22.28; see sections I(A) and I(E) *supra*.

Finally, if the creating instrument is a will, provision must be made for the case where *A* has no children at the operative time.

The successive interest plan, a life estate in *A* with remainder to the children, has several questions in common with the concurrent interest plan. (1) Do the children take the remainder as a class gift, and, if so, what is the form of concurrent ownership? Presumably they take equal shares. (2) What is the effect of the death of *A* or of a child before the date of distribution? (3) Within what time must a child be born in order to share? Obviously all children of *A* are born (or *en ventre*) by *A*'s death, but are children born after the testator's earlier death entitled to take? (4) Who is included within the term "children"? Note also that the draftsman should consider the effect of termination of *A*'s life estate by means other than his death. As Phillips³³⁵ perceives it, the basic alternatives are (1) to fix the class as being *A*'s issue per stirpes living at the date of death of the testator or (2) to fix the class as being *A*'s issue per stirpes living at the date of death of *A*. The first plan creates immediately vested interests with attendant alienability, devisability and descendibility, but at a cost of subjecting the interests to creditors' claims, death taxes and administration expenses in the event of death of a class member before *A*. It also disregards the presumed basis for the testator's beneficence—common kinship—by excluding later-born children. The second plan seems preferable.

The successive interest plan would, of course, require the draftsman to provide for other contingencies such as the death of *A* before the testator (in the case of a will) or failure of any children to be born to *A* (in the case of a will or deed). Further, if *A* is given a life estate, care must be taken to avoid the common problems associated with life estates. Ordinarily legal life estates are not recommended because of the sharp conflict of interest between life tenant and remainderman. There may also be doubt as to the responsibility for taxes, maintenance and insurance.³³⁶ These problems are exaggerated when the property is personalty and therefore subject to more damage by use.³³⁷ The usual solution, at least where values justify the formality, is to make the life

335. See Phillips, *supra* note 10, at 44-47, who points out that if the life estate is prematurely terminated, as by renunciation, the draftsman needs to consider: (1) possible risk of applicability of the doctrine of destructibility of contingent remainders (if the remainder is a legal one in realty); (2) assuming no destructibility, whether the remainder is to be accelerated; and (3) if acceleration occurs whether the class simultaneously closes or whether it remains open until *A*'s actual death.

336. WACHOVIA BANK & TRUST, Co., *supra* note 325, XVI-12 n.1.

337. Bolich, *supra* note 10, at 26.

estate equitable.³³⁸ In all the plans, if the gift to *A* and the children follows a life estate in a stranger, the draftsman must consider the additional possibilities introduced by the presence of the intervening life estate.³³⁹

III. STATUS AND REFORM OF THE RULE IN WILD'S CASE

A. Status of Current Rule

Wild's Case occupies but two and one-half pages in the English Reports. The two so-called Resolutions in the case are dicta, inessential to the actual decision. Nevertheless, the impact of this small piece of English material has been large, confounding the Supreme Court of North Carolina in almost fifty decisions. In his class gifts article, Long bravely asserted that the phrase "to *A* and his children" was "so notoriously ambiguous that the trained draftsman avoids it."³⁴⁰ Perhaps the *trained* draftsman does avoid it, but there must be a number of untrained draftsmen in the woods, for the cases continue to march into the courts. As Casner remarks, it is a "reasonable guess, but a sad commentary" that lawyers have drafted some of the troublesome instruments.³⁴¹

Wild's case litigation is unfortunate because the problems are avoidable by careful analysis and drafting,³⁴² and because the Rule as interpreted in North Carolina often frustrates the creator's likely intention. According to the First Resolution, a devise to "*A* and his children" when *A* has no children results in a fee tail in *A*. This construction was due in part to the early common law preference for the fee tail, and in part to the testator's desire to benefit the children. In North Carolina, however, where the frontiersmen rejected the entailed estate with its connotations of a landed aristocracy, the fee tail is abolished and the children take nothing because *A*'s fee tail ripens into a fee simple in him. We thus suffer the marvelous paradox that a rule designed to benefit the children in fact harms them. It is said that the First Resolution generally has been repudiated in other jurisdictions.³⁴³

According to the Second Resolution, if *A* has children the devise results in a joint tenancy for life among *A* and his children. A number

338. WACHOVIA BANK & TRUST, Co., *supra* note 325, at XVI-12 n.1.

339. *See* section I(D) *supra*.

340. Long, *supra* note 9, at 301-02.

341. Casner, *supra* note 11, at 469.

342. *See* section II *supra*.

343. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 47 (1962). *See also* B. SPARKS, CASES ON TRUSTS AND ESTATES 857-58 n.2 (1965).

of writers contend that the testator's more likely intention is a life estate in *A* with remainder to the children.³⁴⁴ The North Carolina courts could have avoided the Second Resolution and reached the life estate-remainder result by holding that state law preferences in favor of tenancies in common and estates in fee rendered Wild's Case inapt. They did not do so. The Second Resolution is more widely followed in other states than the First.³⁴⁵

Both Resolutions are rules of construction that yield to a contrary intent.³⁴⁶ North Carolina decisions state this proposition, and some early cases found sufficient evidence to rebut the presumptions. Recent cases, however, display a rigid attitude toward the Resolutions, adhering to them in the face of clear evidence in rebuttal. It is difficult to explain this rigidity, especially when in other states slight evidence of a contrary intent is sufficient.³⁴⁷

Not all the local decisions are obstinately wrong. For immediate gifts, the cases determine the existence of children at the time of the testator's death (not the time of execution of the will), a result that tends to cut down the operation of the First Resolution and to benefit as many children as possible. Children *en ventre* are even regarded as lives in being. This praiseworthiness is short-lived, however, for one next encounters the rule that when the gift to *A* and his children is postponed by an intervening life estate, the time of determining children is still the death of the testator, not of the life tenant. Literally, Wild's Case did refer to "the time of the devise" as the time for determining whether *A* had children, but this reference should not control the intervening life estate situation, since the court was talking about a direct gift to *A* and the children, not a postponed one. Indeed, Wild's Case could have been held to be irrelevant to the postponed gift situation. It may be noted, nevertheless, that other states follow the same view as North Carolina in applying Wild's Case to postponed gifts and determining children at the testator's death.³⁴⁸

As to which children share, there is little North Carolina authority. The few cases tend to resolve questions of minimum class membership (survivorship) in favor of the child who predeceases the life tenant, thereby displaying a preference for early vesting. Questions of maxi-

344. *E.g.*, Bolich, *supra* note 10, at 26.

345. J. DUKEMINIER & S. JOHANSON, *FAMILY WEALTH TRANSACTIONS* XI-55 (1969).

346. *E.g.*, B. SPARKS, *supra* note 343, at 857-58 n.2.

347. 5 ALP, *supra* note 7, § 22.17, at 289.

348. *Id.* §§ 22.21, .26.

num membership (class closing) tend to be decided against the child born after the testator's death, a result that cuts against the assumed desire to benefit as many children as possible.

Although Wild's Case spoke of "devises," both Resolutions have been applied to deeds in North Carolina. This extension causes no great harm where *A* has children but does work mischief where *A* has no children and therefore takes a fee simple to the detriment of possible after-born children. Other states have extended the Second Resolution to deeds, but such extension of the First Resolution is unusual elsewhere.³⁴⁹

This state seems also to extend both Resolutions to personalty, despite the reference in Wild's Case to "devises." Again application of the Second Resolution is not absurd, but application of the First Resolution might well have been avoided on the theory that a rule creating a fee tail was irrelevant to personalty, in which fees tail do not exist. Some states have so held, although others have given *A* an absolute interest (the result in North Carolina).³⁵⁰

Penultimately, the decisions as to the exact nature of any cotenancy seem to overlook some fine points of analysis, although in result they are not bad.

Finally, in the case of gifts to a number of parents and their children, North Carolina chooses the life estate-remainder construction for all the gifts, as do most other states which have faced the issue.³⁵¹ This result is acceptable, although it seems to be a silent indictment of both the First and Second Resolutions.

In sum, as applied in North Carolina, the First Resolution is abominable, the Second Resolution is better but still does not carry out likely intention, and both have been somewhat unduly extended. The Rule has been invoked too automatically, diverting attention from: (1) whether the gift is a class gift or one to individuals; (2) if a class gift, who are the members of the class; and (3) what are the shares of class members. Despite a rigid judicial attitude, the issues continue to be litigated. People seem to persist in making these strange dispositions "to *A* and his children." Something ought to be done to resolve these cases before they come to court and in a manner that best approximates likely intention.

349. *Id.* § 22.21.

350. *Id.*

351. *Id.* § 22.27.

B. Reform

1. Judicial or Legislative

One might contend that the body that first created the Rule in Wild's Case, the judiciary, ought to be responsible for reforming it. In view of the blind acceptance of Wild's Case, despite distinguishing features, and in view of continued adherence to Wild's Case by the North Carolina courts, as a practical matter reform is unlikely to come from the judiciary. Courts often declare that, in view of the supposed reliance upon property law in the disposition of land and other valuables, judicial reform should proceed slowly in the property field.³⁵² Notwithstanding these obstacles, courts in some other states have, in effect, overruled Wild's Case,³⁵³ so it may be useful to consider whether a North Carolina court could, if so disposed, set a new course for dispositions to "A and his children."

One obstacle to judicial reformation may be the North Carolina reception statute, General Statutes section 4-1,³⁵⁴ which adopts the common law of England³⁵⁵ as of the date of the signing of the Declaration of Independence.³⁵⁶ Numerous cases have stated that "[s]o much of the common law as has not been repealed or abrogated by statute is in full force and effect in this jurisdiction."³⁵⁷ Section 4-1 has been applied in the property field to find that North Carolina follows the rule that there can be no limitation over in personal property after reservation of a life estate³⁵⁸ and that future interests in personal property can be created by will but not by deed.³⁵⁹ Curiously, section 4-1 does not seem to have been widely noted; for example, the landmark

352. J. CRIBBET, W. FRITZ & C. JOHNSON, *CASES AND MATERIALS ON PROPERTY* 63 (3d ed. 1972).

353. See cases cited in 5 ALP, *supra* note 7, § 22.23; 2 SIMES & SMITH, *supra* note 7, §§ 696, 698; and Annot., 161 A.L.R. 612, 629 (1946).

354. N.C. GEN. STAT. § 4-1 (1969) provides:

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete are hereby declared to be in full force within this State.

355. *State v. Lackey*, 271 N.C. 171, 173, 135 S.E.2d 465, 467 (1967).

356. *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971).

357. *E.g.*, *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 334, 38 S.E.2d 105, 107 (1946).

358. *Speight v. Speight*, 208 N.C. 132, 179 S.E. 461 (1935) (altered by N.C. GEN. STAT. § 39-6.2 (1976)).

359. *Woodard v. Clark*, 236 N.C. 190, 72 S.E.2d 433 (1952) (altered by N.C. GEN. STAT. § 39-6.2 (1976)).

Rule in Shelley's Case decision, *Starnes v. Hill*,³⁶⁰ did not cite the statute. As a practical matter, it may be that the statute is not taken very seriously. The North Carolina version of the Rule in Wild's Case has never been based on the reception statute; no decision even refers to section 4-1. Indeed, four early cases involving language that raised as an issue the Rule in Wild's Case did not even notice the Rule,³⁶¹ Justice Battle did not discover it until 1850. If the Rule were part of our received law, those four early cases would seem to have been bound by it.

Even if section 4-1 does apply, it would not seem to bar judicial change of Wild's Case. It has been argued that the power of a court to overrule its decisions is also a fundamental part of the common law enacted by section 4-1.³⁶² This theory is somewhat difficult if one assumes that section 4-1 impliedly enacts the Rule in Wild's Case, because the court would then be overruling not a judicial decision but a statute. The statute does appear to give another ground for refusing to give effect to the common law—if that part of the common law has "become obsolete." No case has been found in which a common law rule has been refused effect due to its becoming obsolete, but to do so would be consistent with the court's understanding of the common law.³⁶³ Although the statute's reference to obsolescence appears to relate to laws that were obsolete as of enactment, it would not be surprising if the possibility of obsolescence were regarded as a continuing one,³⁶⁴ especially since the statute has been reenacted from time to time. The North Carolina courts could very well rule that the statute that converted the estate tail into a fee simple (section 41-1 in 1784) made obsolete the First Resolution in Wild's Case. The rule was adopted to effectuate the intent of the testator, and the application of the statute defeats that intention.³⁶⁵ Of course, a court would have some

360. 112 N.C. 1, 16 S.E. 1011 (1893).

361. *Doe ex rel. Stowe v. Davis*, 32 N.C. 310, 10 Ired. 431 (1849); *Johnson v. Johnson*, 38 N.C. 334, 3 Ired. Eq. 426 (1844); *Skinner v. Lamb*, 25 N.C. 111, 3 Ired. 155 (1842); *Ponton v. McLemore*, 22 N.C. 236, 2 Dev. & Bat. Eq. 285 (1839).

362. See Note, *Municipal Corporations—Municipal Immunity From Tort Liability: Judicial Abrogation*, 5 WAKE FOREST INTRA. L. REV. 383, 387 (1969).

363. Cf. *Starnes v. Hill*, 112 N.C. 1, 14, 16 S.E. 1011, 1015 (1893) (whether Rule in Shelley's Case was abrogated by statute depends on whether it is in accord with contemporary policies).

364. In *Wilson v. Leary*, 120 N.C. 90, 94, 26 S.E. 630, 632 (1897), Justice Clark said, "That which is termed 'the common law' is simply the 'right reason of the things' in matters as to which there is no statutory enactment. When it is misconceived and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or a recent decision."

365. See *Carr v. Estill*, 53 Ky. 245, 16 B. Mon. 309 (1855).

difficulty in explaining why this obsolescence was not discovered for nearly two centuries. It would be harder to find obsolescence for the Second Resolution, although it could be argued to result from the changes in presumption from joint tenancy to tenancy in common (section 41-2 in 1784) and from life estates to fees (section 31-38 for wills in 1784 and section 39-1 for deeds in 1879). Alternatively, a court might simply find that modern testators prefer the life estate-remainder to the cotenancy, perhaps because it avoids federal estate taxes and probate in *A*'s estate, matters that are much avoided by twentieth century clients.

Aside from any legislative strictures against judicial change, is there any reason why North Carolina courts could not change the Rule in *Wild's Case*? The courts of North Carolina seem disposed to leave the hard work of property law reform to the legislature. Witness *Riegel v. Lyerly*,³⁶⁶ an absurd 1965 decision applying the Rule in *Shelley's Case* to personal property³⁶⁷ and disingenuously remarking, "Unwilling as we are to change the law of property by judicial fiat . . . [i]f public policy requires a change, we think it should be made by the Legislature."³⁶⁸ Why? A fiat is an order issued without legal authority. Does a court lack the legal authority to change court-made rules? The lack of legislative response to property decisions scarcely can be regarded as legislative enactment of the cases; the legislature may lack the time or background or interest continuously to scrutinize the North Carolina Reports for technical points of property law. Furthermore, the response of the legislature to archaic property rules has been spotty; *Worthier Title* may have been abolished³⁶⁹ but *Shelley's Case* has not. A court's deference to legislative action may, in effect, close the door on reform. Reform of the Rule would not seem to be a question on which accom-

366. 265 N.C. 204, 143 S.E.2d 65 (1965).

367. The court's suggestion that prior cases applied *Shelley's Case* to personalty is questionable; the nearest prior cases involved slaves. See section I(E) *supra*.

368. 265 N.C. at 209, 143 S.E.2d at 68.

369. N.C. GEN. STAT. § 28A-1-2 (1976) provides, "The common-law doctrine of worthier title, both the wills branch and the deeds branch, is hereby abolished." Section 41-6 earlier reduced the operation of the doctrine by creating a presumption that a gift to "heirs" of a living person means "children." Whether § 28A-1-2 is effective to abolish the doctrine in its modern form as a rule of construction, as opposed to its original form as a rule of property, is to be hoped but is uncertain: does the phrase "common-law" in the statute refer to the common law of England or to current case law? In other words, the doctrine has appeared in two forms: an English common law rule of property imposed regardless of intention and a modern (albeit misguided) American rule of construction theoretically telling us the creator's intention. Does the statute abolish the doctrine in both its forms? Compare N.C. GEN. STAT. § 28A-1-2 (1976) with Law of April 17, 1959, ch. 122, § 1, [1959] Cal. Stats. 2005-06 (codified at CAL. CIV. CODE § 1073 & CAL. PROB. CODE § 109 (West Cum. Supp. 1977)).

modation of competing interest groups suggests a political solution. Nor is it an area in which the presumably better information-gathering skills of the legislature would be needed. Publicity and notice of a new case would seem to be as wide as for a small statute. A legislative solution could, however, be more comprehensive than a judicial one.

2. Precedent and Retroactivity

The principal objections to judicial reform would seem to be *stare decisis* and retroactivity.³⁷⁰ The case against blind adherence to precedent has never been put better than by Chief Justice Vanderbilt in his celebrated dissent in *Fox v. Snow*:³⁷¹

To hold, as the majority opinion implies, that the only way to overcome the unfortunate rule of law that plagues us here [that there can be no remainder over in personal property following a life estate] is by legislation, is to put the common law in a self-imposed straight jacket. Such a theory, if followed consistently, would inevitably lead to the ultimate codification of all of our law for sheer lack of capacity in the courts to adapt the law to the needs of the living present. The doctrine of *stare decisis* neither renders the courts impotent to correct their past errors nor requires them to adhere blindly to rules that have lost their reason for being. The common law would be sapped of its life blood if *stare decisis* were to become a god instead of a guide. . . .

Particularly in the realm of testamentary construction should the courts feel free to depart from precedent when the dictates of justice and reason demand it. Even Chancellor Kent was of this opinion: "Though we are not to disregard the authority of decisions, even as to the interpretation of wills, yet it is certain that the construction of them is so much governed by the language, arrangement, and circumstances of each particular instrument, which is usually very unskillfully and very incoherently drawn, that adjudged cases become of less authority, and are of more hazardous application, than decisions upon any other branch of the law." 4 *Commentaries on American Law* *535 . . .³⁷²

Even accepting Justice Vanderbilt's propositions, it may be objected that in the property field reversal of settled rules impairs vested rights or defeats justifiable expectations of those who have relied on settled rules in planning their affairs. It is unlikely, however, that the construction given a devise to "A and his children" by the Rule in Wild's Case

370. On these subjects, see the marvelous little book by the late Professor W. Barton Leach, *PROPERTY LAW INDICTED!* (1967).

371. 6 N.J. 12, 76 A.2d 877 (1950). *But see* Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 294-99 (2d Cir. 1942) (Frank, J., concurring).

372. 6 N.J. at 23-24, 27-28, 76 A.2d at 882-85 (dissent).

has ever been relied upon by a testator because only an attorney would even be aware of such a construction, and only a grossly incompetent attorney would use the words "to A and his children" to effectuate the desired disposition of a testator. The problem of vested rights is more difficult. Vanderbilt dismissed it as follows:

There are three possible factual situations to be considered in weighing the retroactive effect of overturning this rule. First, where a will has already been the subject of legal proceedings, property rights determined by a judgment entered therein are beyond the reach of any change in the law. Such a judgment is *res judicata*. Second, where a will has been executed, but the testator is still living, or if dead, the clause similar to the one in question has not yet been construed by the courts, the "evil" caused by the overthrow of the rule will be to carry out the testator's intent. No existing will need be changed by a decision doing away with the old rule, since its overturning merely permits the expressed intent of the testator to be given effect. Third, where persons have not now, but may in the future execute wills, no harm can result from overthrowing the rule, for they have neither to forget an old rule nor to learn a new one in order to insure the carrying out of their testamentary plan. In the absence of the rule their intentions, as naturally though perhaps inexpressly expressed, will govern.³⁷³

The rule involved in *Fox v. Snow* dealt with personalty. Many of the Wild's Case decisions in North Carolina involve the title to realty.³⁷⁴ Certainly the Rule must have been considered by lawyers and title insurers in connection with many unlitigated titles. Retroactive changes of the Rule would be unfair to purchasers who have relied on such title opinions.³⁷⁵ The solution to this problem is simply to make the new rule prospective. Leach surveyed the relevant authorities, among them a number of recent United States Supreme Court cases, and concluded: "[I]t is now clear that any court can change bad law into

373. *Id.* at 27, 76 A.2d at 884-85.

374. One wonders how many of the suits were friendly ones brought to resolve a title question.

375. *Cf.* *Fox v. Snow*, 6 N.J. at 21-22, 76 A.2d at 882 (Vanderbilt, C.J., dissenting):

Despite the deleterious effects of the rule and the lack of any sound principle to support it, the majority maintains that it should not be overthrown, because it has been the long established law of this state and because overruling it "would be fraught with great danger in this type of case where titles to property, held by bequests and devises, are involved" by reason of the retroactive effect of all judicial decisions. This view, if it had been consistently applied in the past, would have prevented any change whatever in property law by judicial decisions. There would have been, *e.g.*, no rule against perpetuities, no restraints on the alienation of property, no right to redeem mortgaged premises, no foreclosure of the equity of redemption, and so on endlessly. Every change in the law by judicial decision necessarily creates rights in one party to the litigation and imposes corresponding duties on the other party. This is the process by which the law grows and adjusts itself to the changing needs of the times.

good without looking over its shoulder at the possible repercussions on prior transactions, by the device of prospective-only overruling. That block is gone, and good riddance."³⁷⁶ It would seem that this technique could be expanded to apply not only to future cases but also to past situations in which there was no reliance.

There is a kind of precedent for prospective overruling in some current North Carolina statutes. The new Administration of Decedents' Estates Act³⁷⁷ applies to estates of decedents dying after the effective date of the Act³⁷⁸ apparently without regard to whether the decedent's will was executed before that date. The life insurance trust statute³⁷⁹ applies to all trusts created before or after the effective date of the law, except those in pending litigation.³⁸⁰ The courts might apply these principles by analogy.

C. Suggested Statute

While judicial reform of Wild's Case is desirable, change likely will have to come from the legislature. Several statutory models are available. As is frequently the case in property law, the country that created the Rule, England, has in effect altered it, although the end product is not easily defined. The Law of Property Act of 1925³⁸¹ laid down that informal expressions in a will should no longer suffice to create an entailed estate but that such expressions should create absolute, fee simple or other interests corresponding to those which, if the property had been personalty, would have been created by similar expressions before the Act.³⁸² Thus a First Resolution fee tail is no longer possible by treating "and his children" as informal words of limitation corresponding to "and the heirs of his body." Just what results after the Act is a subject of some dispute in England,³⁸³ with some support for a fee simple in *A* and other support for a life estate in *A* with remainder to his

376. W. LEACH, *supra* note 370, at 24.

377. N.C. GEN. STAT. §§ 28A-1-1 to -26-9 (1976).

378. Law of February 27, 1975, ch. 19, § 12, [1975] N.C. Sess. Laws 13 (amending Law of April 12, 1974, ch. 1329, § 5, [1973] N.C. Sess. Laws 674).

379. N.C. GEN. STAT. §§ 36-53 to -54 (1976).

380. *Cf. In re Mitchell*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974). ("A statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication from its terms.") (dealing with N.C. GEN. STAT. § 31-5.3 (1976)).

381. 15 & 16 Geo. 5, c.20.

382. *Id.* § 130.

383. See Bailey, 'To A and His Issue': *The Law of Property Act, 1925, Section 130 (2)*, 9 C.A.M.B. L.J. 185 (1946); Bailey, *The Law of Property Act, 1925, S. 130 (2)*, 6 C.A.M.B. L.J. 67 (1936); Megarry, 'To A and His Issue': *The Law of Property Act, 1925, Section 130 (2)*, 9 C.A.M.B. L.J. 46 (1945).

children.³⁸⁴ The Second Resolution has not been changed.³⁸⁵ The English approach does not seem to carry out the testator's likely intention.

In the United States the Uniform Law of Property Act, a product of the American Law Institute in cooperation with the Commissioners on Uniform State Laws, abolishes Wild's Case in favor of a life estate in *A* and remainder in his descendants:

§ 13. EFFECT OF CONVEYANCE TO ONE AND HIS CHILDREN—THE DOCTRINE KNOWN AS RULE IN WILD'S CASE ABOLISHED. When an otherwise effective conveyance of property is made in favor of a person and his "children," or in favor of a person and his "issue," or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested.³⁸⁶

Kansas has passed a statute explicitly abrogating the Rule:

In the case of instruments disposing of property of which the following is a type: "A to B and his children," the doctrine of the common law known as the rule in Wild's Case shall not hereafter apply, and the instrument shall create a life interest in B and a remainder in his children. The rule here prescribed applies when the expression is "children," or "issue," or words of similar import.³⁸⁷

This section has been applied to wills executed before the date of the act

384. 3 T. JARMAN, *A TREATISE ON WILLS 1745-46* (8th ed. R. Jennings 1951); R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY 506-07* (4th ed. 1975).

385. R. MEGARRY & H. WADE, *supra* note 384, at 502.

386. UNIFORM PROPERTY ACT § 13 (Casner, Reporter); Note, *The Uniform Property Act*, 52 HARV. L. REV. 993, 999-1000 (1939). The proposed Act differs somewhat from § 283 of the *Restatement*, which theoretically stated what the law was in 1940, not what it should be:

§ 283. LIMITATION "TO B AND HIS CHILDREN" OR BY OTHER WORDS OF SIMILAR IMPORT.

When a conveyance limits property in favor of "B and his children" or by other words of similar import, then, unless a contrary intent of the conveyor is found from additional language or circumstances,

- (a) if B has a child or children at the time when this conveyance becomes effective, the named parent is a member of one class composed of himself and his children; and
- (b) if B has no child at the time when this conveyance becomes effective, the named parent is not a member of any class, but the conveyance is construed to limit a life interest in favor of such named parent and a class gift in favor of the children of such parent.

RESTATEMENT OF PROPERTY § 283 (1940).

387. KAN. STAT. ANN. § 58-505 (1976). One may speculate as to why only one state has enacted a statute on Wild's Case. The reason probably is that in some states the Rule has been abolished by judicial decisions, in others the Rule never was accepted, and in still others the phrase "to *A* and his children" has not been used persistently.

by testators dying after the act,³⁸⁸ but has not been applied to deeds delivered before the act.³⁸⁹ Such an application seems compelled by the language in the statute that it shall "hereafter apply."³⁹⁰ Kentucky and Pennsylvania have reached the same result as under the Kansas statute by judicial decision, despite the fact that the common law of England is in effect in both states.³⁹¹ The Kentucky court in *Carr v. Estill*³⁹² held that the Kentucky statute converting estates tail to fees simple had abrogated the First Resolution in Wild's Case, so that a devise "to *A* and his children" resulted in a life estate in *A* with remainder to *A*'s children.³⁹³

What statutory approach is best for North Carolina? The principal desiderata are to effectuate the likely intent of the creator and to reduce litigation. While the matter is not clear, most people seem to believe that the phrase "to *A* and his children" connotes successive ownership by the parent and children. The Uniform Act³⁹⁴ and the Kansas statute choose successive ownership. Note, too, that they draw no distinction between the existence and non-existence of children. From the standpoint of reducing litigation, the Kansas statute seems to mandate the life estate-remainder (reducing litigation at the cost of possible intention), while the Uniform Act follows contrary intent where it is "effectively manifested" (leaving the door open to litigation). Under the Kansas plan, if *A* died without having had children a partial intestacy would result, while the Uniform Act would leave open the possibility of a contrary intention. Neither statute covers a number of troublesome questions: the effect of death of a child before *A*; the

388. *Reetz v. Sims*, 177 Kan. 143, 276 P.2d 368 (1954). It is not clear whether the class remains open until the death of the life tenant. *Id.*; *Waite v. Schmidt*, 173 Kan. 353, 245 P.2d 975 (1952).

389. *Schlemeyer v. Mellencamp*, 159 Kan. 544, 156 P.2d 879 (1945).

390. The Uniform Property Act provides in § 26 that it shall not apply to conveyances effective before its enactment.

391. *Davis v. Hardin*, 80 Ky. 672 (1880) (Second Resolution); *Carr v. Estill*, 55 Ky. 245, 16 B. Mon. 309 (1855); *Chambers v. Union Trust Co.*, 235 Pa. 610, 84 A. 512 (1912).

392. 55 Ky. 245, 16 B. Mon. 309 (1855).

393. The court noted that the construction adopted in Wild's Case had been adopted to promote the intention of the testator. The court then said,

And our law having converted estates tail into absolute *fee simple* estates, it is equally clear that if we adopt the same rule of construction, the acknowledged intention will be frustrated and defeated, as the children then could take nothing under the devise. In order, therefore, to effectuate the acknowledged and manifest intent of the testator, it is obvious that a different rule of construction must be resorted to in this State.

Id. at 249, 16 B. Mon. at 313.

394. Favored by Long. See Long, *supra* note 9, at 301.

rights, if any, of adopted or illegitimate children; the shares of children; the method of holding shares; the effect of a preceding life estate; the disposition upon *A*'s death if no children are then alive. It is submitted that if the matter is worth legislation, it is worth comprehensive legislation.

With the caveat that it is easier to criticize others' drafts than to formulate one's own, the writer humbly suggests the following statute:

AN ACT TO ABOLISH THE RULE IN WILD'S CASE

Section 1. Chapter 41, entitled "Estates" of the North Carolina General Statutes, is hereby amended by adding the following section at the end thereof:

§41 - ——. **Rule in Wild's Case abolished; effect of estate to one and his children.**—(a) The rule known as the Rule in Wild's Case, both the First and Second Resolutions thereof, is abolished.

(b) When an estate or interest in real or personal property is transferred to or for the benefit of a person and his "children" or other words of similar import, whether the conveyance is immediate or postponed, the transfer is presumed to have the following attributes:

(1) The transfer creates a life estate in the person designated.

(2) Upon the death of the person designated, or upon the effective date of the transfer if the person designated does not survive the effective date of the transfer, the estate or interest in property shall be divided into separate shares of equal value, creating one share for each child of the person designated then living and one share for the then living descendants, collectively, of each deceased child of the person designated. Each share created for a child of the person designated shall go to the child, and each share created for the descendants of a deceased child of the person designated shall go per stirpes to such descendants.

(3) Upon the death of the person designated, or upon the effective date of the transfer if the person designated does not survive the effective date of the transfer, if no child or other descendant of the person designated is then living, the estate or interest in property shall go to those persons who would have taken the transferor's property (real or personal, as the case may be) if he had then died, intestate and domiciled in North Carolina, and the proportions of taking shall be determined by those laws.

(4) Except in cases governed by subsection (1), estates or interests shall be held in fee simple or absolutely.

(5) Estates or interests shall be held between two or more persons as tenants in common and not as joint tenants.

(6) The words "child," "children," "descendant," and "descendants" or other words of similar import include adopted persons, illegitimate persons, and persons born within ten lunar months after the time of distribution.

(7) If a life estate in the person designated is disclaimed, renounced or otherwise terminated before the death of the person designated, the income from the estate or interest in property shall go quarterly to the children and descendants from time to time living in accordance with the formula in subsection (2). If at any time there is no child or descendant living, the income shall be accumulated and added to principal. Upon the death of the person designated, the property shall go according to subsection (2) or (3).

(8) The words "transfer" or "transferred" include conveyances, gifts, devises and bequests.

(9) Where the transfer is made to two or more persons and their "children," upon the effective date of the transfer the estate or interest in property shall be divided into separate shares of equal value, creating one share for each person designated then living and one share for the then living descendants, collectively, of each person designated who is then deceased. Each share created for a person designated shall go according to the principles of subsections (1) through (9). Each share created for the then living descendants, collectively, of each person designated who is then deceased shall go per stirpes to such descendants. If upon the effective date of the transfer no person designated or descendant of a person designated is living, the estate or interest shall go according to subsection (3).

(10) Where the transfer is postponed, the attributes of the transfer shall be determined in accordance with the principles of subsections (1) through (9). For example, the time for determining the shares of children and descendants under subsection (2) will be the last to occur of: the death of the person designated; the termination of the postponing interest; and the effective date of the transfer.

(11) Any one or more or all of the preceding presumptions of this subsection may be rebutted by clear, strong and convincing evidence of intention to the contrary. In examining evidence of contrary intention the court shall consider, but is not limited to, the following questions: Whether the words "and his children" were intended as

words of purchase or words of limitation; whether any gift to children was intended to be substitutional, concurrent or successive; whether the gift to the person designated was individual or class; and whether shares of any individuals or class members were intended to be equal.

(c) The provisions of this section shall apply only to wills of decedents dying after [effective date of statute] and to deeds, agreements, and other written instruments executed and delivered after [effective date of statute].

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall become effective on [effective date of statute].

Some comments are in order to highlight features of the proposed statute. It applies to realty and personalty and to transfers by deed, will, trust or other instrument. In contrast to the Uniform and Kansas acts, it does not expressly refer to "and his issue" as words of similar import. This phrase, connoting as it does "bodily heirs" in North Carolina,³⁹⁵ has not been as troublesome in North Carolina as elsewhere, so it seemed advisable not to court trouble. The identity of "words of similar import" is deliberately left undefined to allow some room for testamentary intention. The statute presumes the supposed common desire, a life estate and remainder. This will avoid taxes, claims of creditors and probate in *A*'s estate. Since *A* is the parent, the children may not have to wait long for their share. The statute makes no special provisions for adjusting the conflicts between life tenant and remainderman, a problem of much broader scope than Wild's Case.³⁹⁶ Subsection (b)(2) answers questions of maximum and minimum membership. It is similar to the Phillips "open class plan"³⁹⁷ and probably is the most common modern drafting approach. In order to take, children must survive *A*, but if they do not a share is given to their descendants, if any. This preserves equality among the stocks of chil-

395. *Turpin v. Jarrett*, 226 N.C. 135, 37 S.E.2d 124 (1946).

396. Life estates are permitted in personalty. For many years, the courts of North Carolina held that life estates could be created in chattels only by will. An attempt to make a gift inter vivos or to reserve by deed a life estate in chattels, resulted in a gift or reservation of the entire interest. *Woodard v. Clark*, 236 N.C. 190, 72 S.E.2d 433 (1952); *Speight v. Speight*, 208 N.C. 132, 179 S.E. 461 (1935). The legislature changed this rule in 1953 by enacting that "[a]ny interest or estate in personal property which may be created by last will and testament may also be created by a written instrument of transfer." N.C. GEN. STAT. § 39-6.2 (1976); see *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956).

397. Phillips, *supra* note 10, at 41-48.

dren but avoids taxes and administration in the estates of deceased children. The maximum possible number of children take, since the class is not closed until *A*'s death. Distribution "per stirpes" is not defined, as the concept is (one hopes) well-settled. Unlikely, but possible, contingencies of *A*'s death before that of the creator or of failure of children and descendants at *A*'s death are covered by subsections (b)(2) and (b)(3). The gift over to the creator's next of kin (subsection (b)(3)) in case there are no descendants at *A*'s death is novel but avoids troublesome reopening of the creator's estate to dispose of an intestate or residuary share; the subsection should accord with likely intent.³⁹⁸ The statutory plan ordinarily should not encounter any 1976 Tax Reform Act problems.³⁹⁹

Subsection (b)(4) may not be needed, since deeds and devises are presume to be in fee, but is included to avoid any doubt over a matter that historically caused dispute. Subsection (b)(5) similarly avoids the historical joint tenancy versus tenancy in common problem, although the statute does not contemplate any cases of co-ownership. Both subsections are in line with current North Carolina law. Adopted illegitimates and children *in esse* are presumed to take by subsection (b)(6). Treatment of adoptees is consistent with current North Carolina law and phrasing is based on North Carolina General Statutes section 48-23.⁴⁰⁰ Illegitimates are given full rights, in contrast to current statutes which allow them to take from the mother freely but from the father only

398. The form is adapted from W. LEACH & J. LOGAN, *supra* note 17, at 459.

399. The statutory scheme will not avoid the "generation-skipping trust" provisions on the ground that the interests are legal. See I.R.C. § 2611(d)(2). Nevertheless, the \$250,000 exclusion from the new tax ordinarily will protect any Wild's Case transfers from tax upon the death of *A*. See *id.* § 2613(b)(6). It may reasonably be assumed that most Wild's Case transfers are lay-drawn and that in such cases the amount of property transferred is worth less than \$250,000.

400. N.C. GEN. STAT. § 48-23 (1976). See also N.C. GEN. STAT. §§ 29-17, 31-5.5 (1976), and the following:

References in this instrument to "child," "children," "son," and "daughter" mean lawful blood descendants in the first degree of the parent designated, and references to "issue" mean lawful blood descendants in the first, second or any other degree of the ancestor designated, provided always, however, that

1. An adopted child and such adopted child's lawful blood descendants shall be considered in this instrument as lawful blood descendants of the adopting parent or parents and of anyone who is by blood or adoption an ancestor of the adopting parent or of either of the adopting parents and shall not be considered descendants of the adopted child's natural parents, except that where a child is adopted by a spouse of one of his or her natural parents such child shall be considered a descendant of such natural parent as well as a descendant of the adopting parent

A. CASNER, *ESTATE PLANNING* 1254 (3d ed. 1961);

Halfbloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for

under limited circumstances.⁴⁰¹ The provision for children in gestation is taken from the Intestate Succession Act.⁴⁰²

Subsection (b)(7) attempts to cover acceleration and destructibility. It provides in essence for distribution of income to persons from time to time living, with ultimate distribution of principal on A's death. The simpler solution is to accelerate immediately⁴⁰³ but that would exclude after-born children.

Subsection (b)(9) takes care of the two multiple parent problems which have been litigated. It chooses a per stirpetal distribution among parents and their children rather than per capita.⁴⁰⁴ In doing so it disposes of the other case, namely what to do when some parents have children and others do not. Here it is similar to *Bridges v. Wilkins*.⁴⁰⁵ Subsection (b)(10) attempts briefly to cover postponed gifts. It expressly provides against closing the class prematurely. Finally, subsection (b)(11) allows any or all of these presumptions to be rebutted, but only by clear and convincing evidence. Several considerations are listed to sensitize the courts to matters which often have been overlooked.

determining relationships for purposes of intestate succession, but 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.

UNIFORM PROBATE CODE § 2-611; "For all purposes of this will and the disposition of my estate hereunder, the terms "children," "issue," or "descendants" shall be deemed to include persons adopted prior to attaining 18 years of age." WACHOVIA BANK & TRUST, Co., *supra* note 325, at XVI-21.

401. N.C. GEN. STAT. § 29-19 (1976); *cf.* UNIFORM PROBATE CODE § 2-611 (quoted in note 400 *supra*); A. CASNER, *supra* note 400, at 1254:

A child born to persons who are openly living together as husband and wife after the performance of a marriage ceremony between them and such child's lawful blood descendants shall be considered in this instrument as lawful blood descendants of such child's parents and of any ancestor of such child's parents, regardless of the fact that a purported divorce of one or both of such persons with reference to a prior marriage is invalid.

402. N.C. GEN. STAT. § 29-9 (1976).

403. A. CASNER, *supra* note 400, at 566 n.65:

In 1955, Illinois enacted a statute which provides that when a will is renounced by the testator's spouse, any future interest which is to take effect in possession or enjoyment at or after the termination of an estate or other interest given by the will to the surviving spouse shall take effect as though the surviving spouse had predeceased the testator, unless the will expressly provides that in case of renunciation such a future interest shall not be accelerated. The act by its express terms applies only to wills of decedents dying after it takes effect. Ill. Rev. Stat., c. 3, § 168a (1959). Consideration should be given to the desirability of including in a dispositive instrument a provision which would require solution along the lines of the Illinois statute, in the event of a disclaimer or renunciation of a prior interest. Such a provision might be as follows: "In the event that a beneficiary hereunder disclaims or renounces the interest limited in his favor, succeeding interests shall take effect as though such beneficiary had died on the date of the disclaimer or renunciation."

404. Contrary to *Wills v. Foltz*, 61 W. Va. 262, 56 S.E. 433 (1907); *see* note 317 *supra*.

405. 56 N.C. 326, 3 Jones Eq. 342 (1857).