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The Testator's Intent--Vague Meanings of Clear Sounding Phrases

Londo H. Brown
West Virginia University College of Law

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LONDO H. BROWN*

One of the greatest dangers that a lawyer faces is the danger that he may not recognize that there is a real problem involved when a client calls upon him for advice. Once the lawyer sees that there is a problem and is able to correctly diagnose the problem, the solution of the problem is usually relatively easy. In other words, there is more danger that the lawyer will overlook the problem than that he will fail to find the proper solution after he has found the problem. Furthermore, he may create a problem in drafting legal instruments if he does not know that a particular problem exists in the area of law involved.

As an example, a client may inform his lawyer that he–the client–is the executor of a will which devised and bequeathed the residue of the testator's estate to the children of the testator's son, John. The client may inform the lawyer that John survived the testator, but is now dead, having had five children, all of whom survived him. The client-executor asks the lawyer how the estate should be divided. If the lawyer does not see that there is a problem concerning class gifts involved, he may think, as most laymen do, that a gift in a will to the children of John means a gift to the children of John. As a lawyer familiar with class gifts knows, this may or may not be true. It would mean a gift to John's children if all of them were alive at the testator's death, but if some of the children were born after the testator's death they would be excluded and would not share in the gift[1] unless all the childdren were born after the testator died, in which case all the children would share.[2]

Does a gift in a will to the descendants or issue of the testator mean a gift to the descendants or issue of the testator who survive him? The answer to this question is that a gift of this type is generally not a gift to all such descendants or issue.

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* Professor of Law, West Virginia University.

[1] Dawson v. Christopher, 122 W. Va. 543, 11 S.E.2d 175 (1940).

[2] 5 AMERICAN LAW OF PROPERTY § 22.42 (Casner ed. 1952).

There are many other problems of construction which arise when apparently innocent words are used in a manner to suggest that there is really no problem involved. A devise of real property is made in a will to John, but if he die without issue, to Richard. Does this mean that Richard gets the property if John survives the testator and then dies without surviving issue? This is certainly not the case in all jurisdictions. Would it make any difference if John had had issue, all of whom predeceased John?

Suppose that a testator devises property to his widow for life, remainder to John and Mary, or the survivor of them. Does this mean that if Mary should survive John she then owns the entire property? The answer is that it may or may not mean that, depending upon other circumstances.

It is the purpose of this article to point out several construction problems which, on the surface, may not seem to be problems at all, to attempt to show what the problem is in each situation, and then delve into the possible solutions. Authority for the suggested solutions may not appear immediately therewith, but, in such cases, will appear in the discussions following thereafter.

I. Gifts to Heirs, Issue or Descendants

Gifts to heirs have often been made in wills. Since the gifts are often composed of personal property as well as real property the courts have had to determine whether the testator meant those persons who would take real estate by descent, or those who would take personal property so far as personal property to be disposed of by the will was concerned. Real property descends to heirs and personal property is distributed to next of kin in most jurisdictions. While this has made some difference in the past, most statutes of descent and distribution today provide that real and personal property go to the same persons.

West Virginia Code § 42-1-1 (Michie 1966) provides that real property shall descend first to children and their descendants, but if there be no children or descendants of any children, to the wife or husband. If there be none of these, then the real estate descends to other specified relatives.

The West Virginia statute pertaining to the distribution of personal property[3] provides that personal property shall be distributed to and among the same persons as real estate is directed to descend, except that if the intestate left a surviving spouse, such spouse takes one-third, with surviving issue, if any, taking the other two-thirds. If there is no surviving issue, the surviving spouse takes all the personal property.

Thus, it is only where there is a surviving spouse and surviving issue that there is any difference between those who take real and personal property in West Virginia. The Supreme Court of Appeals of West Virginia has tended to treat gifts to heirs in wills as including gifts to next of kin if personal property has been involved.[4] However, if a testator should devise and bequeath the residue of his estate, real and personal, to his heirs at law and should leave surviving descendants, and a widow who did not wish to renounce the will and take her statutory share, the court may have to decide the point. As a matter of fact, the lawyer would like to have the point decided in order to advise the widow in regard to whether she should renounce the will. The descendants would be the heirs at law, while the widow and the descendants would be the next of kin. Whether the widow would receive under the will a share of the real property and a one-third share of the personal property making up the residue of the estate would be a material point to consider. The Virginia Supreme Court of Appeals has determined that, where there is a gift of blended real and personal property to heirs at law, the persons answering that description take, although the court indicated that if the gift to the heirs at law was all personal property the term would be construed as distributees.[5]

The words "issue" and "descendants" are treated by most courts as being almost synonomous. The West Virginia court has stated that "the word 'descendant' in its technical sense comprises issue of every degree" and that the word "descendant" is "similar in meaning to the word 'issue' ".[6] For that reason these words will not be dealt with separately herein.

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[3] W. VA. CODE § 42-2-1 (Michie 1966).
[4] See, *e.g.*, Lively v. Griffith, 84 W. Va. 393, 99 S.E. 512 (1919).
[5] Allison v. Allison's Ex'rs, 101 Va. 537, 44 S.E. 904 (1903).
[6] Wheeling Dollar Sav. & Trust Co. v. Stewart, 128 W. Va. 703, 712, 37 S.E.2d 563, 568 (1946).

Where there is a gift in a will to the issue or descendants of the testator or some other person, and there are more than one generation of descendants who would qualify if that word were given its full meaning, are all such descendants entitled to share? In other words, do such descendants take per capita or per stirpes? Suppose that the gift is to testator's descendants and he is survived by two children, each of whom have two children. It cannot be said that the testator did not leave six descendants. Should the estate be divided into six shares and a share be given to each of the six descendants, or into two shares which are given to his two children? Futher, suppose that a third child of the testator's had predeceased him, leaving six children. Should the estate then be divided into twelve shares and one share given to each of testator's twelve descendants?

There is a split of authority on this point, some courts holding that all descendants take per capita and other courts holding that there shall be a per stirpes distribution.[7]

Since the word "descendants" is equivalent to "issue" and "issue" is equivalent to "heirs of the body", it is submitted that a per stirpes distribution is to be preferred. Thus, in answers to the questions posed above, the two children should take all the estate in the first supposed case, and in the second case the two surviving children should take one-third of the estate each and the six children of the deceased child should take the other third to be divided equally between them.

The Supreme Court of Appeals of West Virginia has favored a per stirpes distribution in a case where a testatrix directed that her stock and real estate be sold and divided equally. The majority of the court decided that she meant that the proceeds should be divided equally among her distributees. The court stated:

> Who are her distributees? The statute points them out. A testamentary direction for division of money among distributees involves a proposition closely analogous to a devise of land to heirs or to descendants.

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[7] 4 PAGE, WILLS § 36.15 (Bowe-Parker ed. 1961).

> In all cases which have come to our attention in this connection, whether there be involved realty or personality, or both, the courts have favored a *per stirpes* basis of division. . . .[8]

The fact that the testatrix provided that the proceeds were to be divided equally did not mean that there should be a per capita distribution according to the court. In disposing of that point the court stated:

> Having regard to the different degrees of relationship of those benefiting from her bounty, the language "divide equally" cannot reasonably be taken to mean that grandnieces should share equally with a sister—such would be the result *per capita.* Circumstances considered, the direction for equal division should be construed to require a distribution in conformity with the law of intestacy, that is to say, equally in accordance to stocks; and not an unnatural distribution "by the head." Where beneficiaries are of different degrees of relationship, a bequest to them, at large, should not be interpreted to mean that each shall share equally with every other one, unless the wording of the will clearly indicates such intention on the part of the maker of the instrument.[9]

The West Virginia court apparently takes the view that the West Virginia Legislature has made a will for everyone through the intestacy laws, and that the Legislature has further provided that a person can change this will by following certain procedures and making one of his own; however, the individual's will changes the Legislature's will only to the extent the individual makes it clear he wants the latter changed.

In another case the court stated:

> The statute of distribution governs in all cases where there is no will; and where there is one, and the testator's intention is in doubt, the statute is a safe guide.[10]

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[8] Jones v. Hudson, 122 W. Va. 711, 714, 12 S.E.2d 533, 534 (1940).

[9] *Id.* at 713-14, 12 S.E.2d at 534.

[10] Lively v. Griffith, 84 W. Va. 393, 399, 99 S.E. 512, 514 (1919). See also Collins v. Feather, 52 W. Va. 107, 43 S.E. 323 (1902), where the court admitted that the weight of authority is to the effect that beneficiaries in a will take per stirpes unless the language in the will is such as to indicate that the testator intended a per capita distribution. But the court refused to apply that rule where the gift was to four named children and the grandchildren of a deceased child, the children of another deceased child being otherwise provided for in the will.

The West Virginia court has also looked to the statutes of descent and distribution in other cases to help it in the construction of wills.[11]

II. Die Without Issue

Testator devised Blackacre to his son, John, but if John should die without issue, Blackacre was to go to the testator's surviving grandchildren. Two problems are involved. The first, and the one to be treated here, is the meaning of the phrase "die without issue." The second, to be dealt with later in this aticle, the meaning of "surviving grandchildren". Both these phrases appear innocent and clear at first glance, but both have caused the courts considerable trouble.

The word "issue" has a clear meaning. It means lineal descendants, and in geneology it connotes a common bloodstream.[12] But does "die without issue" mean die without leaving descendants or die without having had descendants? In other words, does one "die without issue" if he has had children, all of whom predecease him without leaving descendants? The answer appears to be that he does "die without issue" in such case.

The mere birth of issue to a person in such case should not be, and generally is not, regarded as eliminating the possibility that such person may die without issue.[13] When used in a will the term "die without issue" is considered equivalent to the technical expression "heirs of the body". The courts, in searching for the testator's intention, have usually thought he intended that in case the first taker had no issue to whom the property could descend the property was to go to a substitute taker.

West Virginia Code § 36-1-13 (Michie 1966), quoted below, appears to make it clear that in West Virginia one must die not having issue living at the time of his death, or in gestation and born alive thereafter, in order to die without issue. Then, it would appear to follow logically that if John, the devisee in the above

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[11] See, *e.g.*, Wheeling Dollar Sav. & Trust Co. v. Stewart, 128 W. Va. 703, 37 S.E.2d 563 (1946).

[12] Fletcher v. Flanary, 185 Va. 409, 38 S.E.2d 433 (1946).

[13] 5 American Law of Property § 21.55 (Casner ed. 1952).

hypothetical problem, should ever die without leaving any descendants surviving him, the gift over to the grandchildren would become effective. However, this is not the situation in many jurisdictions, perhaps the majority thereof.

When must John die without issue for the gift over to take effect?

It has been held that there are four different times when a person may die without issue so that a devise or bequest in a will which is to take effect if the first taker should die without issue will actually take effect, and each of these holdings have, or have had, a substantial following. Such a devise or bequest may take effect if the first taker should die without surviving issue:

1. Prior to the death of the testator, but not thereafter.

2. In case there is an intervening life estate—as where the estate devised or bequeathed subject to the condition is a remainder—prior to the termination of the life estate, but not thereafter.

3. At the death of the first taker.

A fourth time that such a gift could take effect is at the time the line of the first taker should run out. This time will be discussed first in this article.

Die without issue can, and originally did, mean that one would die without issue if his line ever ran out. The phrase was considered as creating a fee tail to the same extent as if the testator had used the term "heirs of the body." Thus, one could die without issue if in some succeeding generation all his descendants died without leaving descendants. This is known as the indefinite failure of issue construction, and was the common law rule. Most states have changed this construction by statute by this time. West Virginia Code § 36-1-13 (Michie 1966) provides as follows:

> Every limitation in any conveyance or will disposing of real or personal property, contingent upon the dying of any person without heirs, or heirs of the body, or issue of the body, or children, or offspring, or descendant, or other relative, shall be construed as a limitation, to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or

descendant, or other relative, as the case may be, living at the time of his death, or en ventre sa mere at the time of his death and born alive thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the conveyance or will creating it.

A similar statute in Virginia has been construed by the Supreme Court of Virginia to change the indefinite failure of issue construction to a definite failure of issue construction so that the phrase "die without issue" means that you look to the time of the death of the first taker to ascertain whether he died without issue.[14]

But in many jurisdictions following the definite failure of issue construction, our John could die without leaving surviving issue and the limitation over to the substitute takers would not take effect. That is because those jurisdictions construe the phrase "die without issue", when used in a will, to mean "die without issue before the testator dies." There are two very good reasons for such a construction. The first such reason is that this is probably what the testator had in mind, and the court is always attempting to ascertain the intent of the testator in such case. Since the testator probably realized that the will might not take effect for many years after it was executed, and he probably further realized that many things could occur in the interim, he could very well have meant that if John should not survive him and should leave no descendants who survive him, he wanted Blackacre to go to his grandchildren. Under many anti-lapse statutes,[15] should John die before the testator, leaving descendants who survived the testator, those descendants would take Blackacre. The testator may well have wanted John, who was apparently the first object of his bounty, to have Blackacre in fee if John should survive him and want John's issue to take Blackacre if John did not survive him and some such issue did survive him, and want the gift over to take effect only if John should not survive him and none of John's issue should survive him. He may well have been thinking of the time when the property would pass to John, the point of distribution, when he used the term "die without issue."

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[14] Daniel v. Lipscomb, 110 Va. 563, 66 S.E. 850 (1910).
[15] See, *e.g.*, W. Va. Code § 41-3-3 (Michie 1966).

The second reason that many courts favor the construction that the testator intended the phrase "die without issue" to mean "die without issue before the testator dies" is because courts favor an early vesting of estates. This would mean that upon surviving the testator, John would take an estate in fee simple rather than a fee simple subject to divestment by a condition subsequent—his dying without issue at some future time. He would have an estate which would be freely alienable in the sense that there would be a market for it. If it were an estate subject to a condition subsequent there would be few purchasers willing to take the chance of John's subsequent death without issue unless they could buy the property for a price considerably less than its true and actual value. Of course, John would have a vested estate under this construction should he survive the testator, but the estate would be subject to divestment, an estate far less alienable in a practical sense than a vested estate in fee simple. A purchaser, in order to obtain the fee simple absolute, would have to purchase the shifting executory interest owned by the grandchildren as well as the fee simple subject to a condition subsequent owned by John. This may be difficult to do as all such grandchildren may not yet be born.[16] Furthermore, John may die without issue and there be no surviving grandchildren, in which case the reversion which was left in the testator's estate would no longer be subject to divestment and would become the fee simple.

A lawyer practicing in the northern panhandle of West Virginia must be very careful when advising clients in cases of this type. Since Pennsylvania and Ohio are so close by, he must be especially careful to ascertain where the client lives in the case of personal property or where the land is located in the case of real property.

If Pennsylvania law is applicable to his client's case, and the first taker has survived the testator, the first taker has the entire interest in the property. The Pennsylvania court has long followed the rule that, where a gift is made in a will to a person followed by a provision that in case of the death of the person without issue another is to take the property, it shall be construed to mean death without issue before the testator dies.[17]

[16] See W. Va. CODE § 36-2-1 to -13 (Michie 1966), which provides for the sale of such an interest through a court proceeding.
[17] *In re* Haydon's Estate, 334 Pa. 403, 6 A.2d 581 (1939); Mickley's Appeal, 92 Pa. St. 514 (1880).

If Ohio law is applicable the opposite result would prevail. The Ohio court follows the view that where a gift in a will to a person is coupled with a provision that if the person die without issue the property is to go to another, the words "die without issue" are interpreted as referring to the time of the death of the first taker unless a contrary intent is clearly manifested.[18]

If West Virginia law is applicable, the lawyer will have no case in point on which to rely. However, the West Virginia court has followed the "death without issue at anytime" view of the Ohio court without having considered the issue.[19] The point was raised in one case,[20] and may have been decided. But the court after raising the point, slipped to another point very quickly without coming to grips with it. At any rate, the court went along with the view that the limitation over took effect if the first taker died without issue at any time. In another case where the point was raised by counsel the Court stated:

> The language employed in the framing of this contingency cannot be construed, as contended for by the plaintiff, as referring to the death of Paul Brookover only in event he should die before the testator died. If this item stood alone, the contention thus urged would possibly be better grounded, but, it must be read and considered in conjunction with all the other provisions of the will. The general context of the will indicates, we think, beyond doubt, the testator was undertaking to stipulate definitely as to the devolution of the property devised and bequeathed to Paul Brookover, in event Paul, subsequent to the death of the testator, should die without issue. . . .[21]

If the testator has provided for a life estate before the gift to the first taker of the fee, there is still another point of time to which he may have had reference. If the gift in the will was to testator's wife, Mary, for her life, with the remainder to go to John, but if John should die without issue the property was to go to testator's grandchildren, the testator may have meant it was

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[18] Cook v. Crabill, 110 Ohio App. 45, 164 N.E.2d 425 (1959); Steinbrenner v. Dreher, 140 Ohio St. 305, 43 N.E.2d 283 (1942).

[19] See, *e.g.*, Wilson v. Drake, 135 W. Va. 502, 64 S. E. 2d 601 (1951); Stephenson v. Kuntz, 131 W. Va. 599, 49 S.E.2d 235 (1948).

[20] Dent v. Pickens, 61 W. Va. 488, 58 S.E. 1029 (1907).

[21] Brookover v. Grimm, 118 W. Va. 227, 238, 190 S.E. 697, 703 (1937).

to go to the grandchildren if John should die without issue before the life tenant died. Again it is plausible to believe that he was thinking of the time the possession of the property was to pass to John, the point of distribution.

Some of the courts which have followed the theory that the phrase "die without issue" refers to the time of the death of the first taker whenever it occurs in the case of an immediate gift—one where the taker is entitled to possession at the death of the testator or when testator's personal property is distributed—have shifted to the view that, in the case of a mediate gift—one following a life estate—the phrase refers to the time of the death of the life tenant.[22] If this view were followed, then in the last illustration given John would take a fee simple absolute if he survived Mary, the life tenant, and the estate would not be divested if he should later die without issue.

In both the *Wilson* and *Stephenson* cases, cited above,[23] the West Virginia court was faced with gifts by will to one person for life with the remainder to another with a limitation over to a third person if the remainderman should die without issue. Without discussing the matter in either case the court held that the remainder which, on the death of the life tenant, had become the fee was defeated upon the death of the remainderman without issue subsequent to the death of the life tenant. It may be that West Virginia Code § 36-1-13 (Michie 1966), quoted above, makes this construction mandatory.

It should also be noted that there is ground for holding that the death of the life tenant is the time referred to when the phrase "die without issue" is used in a deed involving a life estate as well as in a will. In the case of a deed conveying an estate entitling the grantee to immediate possession, the only time to which the grantor could be referring in using such a phrase is the death of the grantee, the first taker.

It should be noted that if the term "die without issue" is held to mean die without issue before the testator dies, or before the life tenant dies in case there is an intervening life estate, and the first taker survives the testator, or the life tenant where there is a life

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[22] 5 AMERICAN LAW OF PROPERTY § 21.53 (Casner ed. 1952).

[23] Wilson v. Drake, 135 W. Va. 502, 64 S.E.2d 601 (1951); Stephenson v. Kuntz, 131 W. Va. 599, 49 S.E.2d 235 (1948).

estate, the limitation over fails. The fee becomes indefeasibly vested in the first taker in such cases.

In the hypothetical case posed at the beginning of this section of this paper there was a gift over to surviving grandchildren. It was suggested at that point that there was a problem involved as to the meaning of the term "surviving grandchildren." The next section of this paper will deal with that problem.

III. Condition of Survivorship

Where there is an immediate gift in a will to a group of persons such as the testator's surviving grandchildren, almost all courts hold that the term means the grandchildren surviving the testator.[24] All grandchildren alive at the testator's death take an immediate indefeasibly vested interest. But when the gift to surviving persons follows a life estate, or some other preceding interest, there is a split of authority. The majority of the courts look to the point of distribution in such case, as do most courts in the case of an immediate gift.[25] In the majority of jurisdictions where there is a gift to Mary for life with the remainder to testator's surviving grandchildren, those grandchildren alive at Mary's death would take indefeasibly vested interests. But there is authority to the effect that even here "surviving" will be construed as referring to those surviving the testator's death.[26]

The Supreme Court of West Virginia has taken a fairly firm stand on this issue in several cases.[27]

In the *Neal* case[28] the court stated:

> The old rule referring survivorship to the death of the testator, though another period be intended, is not the rule in this state. The more modern rule obtains here, that survivorship will be referred to the event plainly intended by the

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[24] 2 Tiffany, Real Property § 380 (3d ed. 1939).

[25] Simes & Smith, Future Interests § 577 (2d ed. 1956).

[26] 2 Tiffany, Real Property § 380 (3d ed. 1939).

[27] See Wilson v. Drake, 135 W.Va. 502, 64 S.E.2d 601 (1951); Prichard v. Prichard, 83 W. Va. 652, 98 S.E. 877 (1919); Neal v. Hamilton Co., 70 W. Va. 250, 73 S.E. 971 (1912); Dent v. Pickens, 61 W. Va. 488, 58 S.E. 1029 (1907).

[28] Neal v. Hamilton, *supra* note 27.

testator, whether that event be before, at the time of, or after the death of the testator.[29]

Syllabus point 3 to the *Prichard* case[30] reads as follows:

> Where, under the provisions of a will or trust instrument, a gift to a class, here described as "surviving grandchildren," is postponed to a particular time, or pending the termination of a preceding estate, generally survivorship is to be referred to the time when the property or fund is divisible, and those members of the class then living will take the whole, unless the particular language used confines the gift to those in existence at the date of the instrument or at the death of the testator or donor.[31]

Referring back to the hypothetical problem posed at the beginning of the preceding section of this paper, where Blackacre was devised to John but if he should die without issue to the testator's surviving grandchildren, an attempt will now be made to construe the gift.

Assuming that John survived the testator, he would have an indefeasibly vested estate in Blackacre in those jurisdictions construing "die without issue" to mean die without issue before the testator dies. The limitation over to the grandchildren would fail in such case. In jurisdictions construing the phrase to mean die without issue at any time, upon surviving the testator, John would take a fee simple subject to a condition subsequent. If he should later die leaving surviving issue, the fee would become indefeasibly vested in the persons then owning it, claiming through John. If John should later die without leaving surviving issue, testator's grandchildren surviving John's death would take.[32]

Gifts are sometimes made in wills to the survivor of several persons or a class of persons, and the courts have had to determine the meaning of the word "survivor" when so used.

In one case where there was a gift of a remainder to a named group of persons and "the survivors or survivor of them" the court

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[29] *Id.* at 260, 73 S.E. at 975.
[30] Prichard v. Prichard, 83 W. Va. 652, 98 S.E. 877 (1919).
[31] *Ibid.*
[32] See Dent v. Pickens, 61 W. Va. 488, 58 S.E. 1029 (1907), where the Supreme Court of Appeals of West Virginia so held. See also 2 TIFFANY, REAL PROPERTY § 380 (3d ed. 1939).

held that the members of the group took estates which were subject to defeasance upon their death leaving surviving members, and the last survivor took an estate in fee simple.[33]

But that case is not in accord with the general rule. In such case, again, most of the courts will look to the time of distribution. Thus, if the gift is to take effect at the testator's death—an immediate gift—the word "survivors" will prima facie be construed as referring to the time of the testator's death, and the members of the group who are alive at that time take indefeasible interests.[34]

Where the gift is not an immediate gift, but a mediate one, there being a life estate or some other particular interest carved out, there is a split of authority as to whether the members of the group take indefeasibly vested interests if they survive the testator or if they survive the termination of the preceding estate. But the prevailing rule is that they must survive the termination of the preceding interest to take such interests.[35]

In a West Virginia case where the gift was a remainder to two nieces and to "the survivor or survivors of them," the Supreme Court of Appeals held that both nieces had satisfied the condition of survivorship when they survived the life tenant.[36] The court stated that if either of them had predeceased the life tenant, the survivor would have taken the entire estate.

Since there were only two remaindermen in the West Virginia case and the testator used the words "the survivor or survivors of them", he must have had in mind the survivor or survivors at his death or at the death of the life tenant, and not a gift to the ultimate survivor. If the gift had been to the remaindermen "and the survivor of them", a closer question on that point would have been presented. Since this was one of the cases in which the court, without discussing the point, determined the phrase "die without issue" meant die without issue at the death of the first takers, the court may have held that the survivor of the two should take the entire property if the gift had been to them or the survivor of them. The

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[33] Nelson v. Iglehart, 205 Md. 129, 106 A.2d 115 (1954).
[34] 2 TIFFANY, REAL PROPERTY § 380 (3d ed. 1939).
[35] SIMES & SMITH, FUTURE INTERESTS § 577 (2d ed. 1956).
[36] Wilson v. Drake, 135 W. Va. 502, 64 S.E.2d 601 (1951).

issue as to the time to which survivorship referred was raised by counsel in the case, but apparently the issue as to the time to which "die without issue" referred was not raised. The determination of both of these issues should depend upon the testator's intent.[37] The court in the West Virginia case so stated so far as the issue of survivorship was concerned.[38] In another case the court stated:

> It was a general rule that in the construction of wills, words of survivorship should be deemed to refer to the death of the testator. This principle, deemed too narrow and restrictive, has yielded in later years to more flexible interpretation of such testamentary provisions. Under the modern rule, "survivorship will be referred to the event plainly intended by the testator, whether that event be before, at the time of, or after the death of the testator."[39]

IV. Gifts to Descendants Per Stirpes

Perhaps one of the most common situations a lawyer has to face when drafting a will is to provide that if the testator's spouse does not survive him the testator devises and bequeaths the residue of his estate to his children, but if any child should predecease the testator, leaving descendants who do survive the testator, such descendants shall take the share such child would have taken had he survived the testator, per stirpes.

Many lawyers have attempted to express the same idea by providing that in such case the testator devises and bequeaths the residue of his estate to his descendants living at the time of his death, per stirpes. The meaning of this clause is not completely clear even though it has been used again and again by lawyers.

If at the time of the testator's death he has two children surviving him as well as one or more grandchildren who are the children of a deceased child of the testator, all lawyers would probably agree that the residue would be divided into three shares, one going to each of the two surviving children and the third going to the children of the deceased child to be divided equally between them.

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[37] Brookover v. Grimm, 118 W. Va. 227, 190 S.E. 697 (1937).
[38] Wilson v. Drake, 125 W. Va. 502, 508, 64 S.E.2d 601, 605 (1951).
[39] Brookover v. Grimm, 118 W. Va. 227, 238-39, 190 S.E. 697, 704 (1937).

But there is disagreement among lawyers with whom the writer has talked concerning the result when such a clause is used and the following situations occur:

(a) At the testator's death all of his children are dead and the then living descendants of the testator consist of one grandchild, the child of a deceased child of the testator; two grandchildren, the children of another deceased child of the testator; and three grandchildren, the children of third deceased child of the testator.

(b) At the testator's death all of his children are dead and the then living descendant's of the testator consist of one grandchild, the child of a deceased child of the testator; two grandchildren, the children of another deceased child of the testator; and two great-grandchildren, the then only living descendants of an only child of a third deceased child of the testator.

Some lawyers say that in situation (a) the estate would still be divided into three shares, and a share given to the child or children of each of the deceased children of the testator. One grandchild would get a third, two grandchildren would share another third, and the remaining third would be divided between the three children of the third deceased child of the testator. Thus, one grandchild would take twice as much as some of the grandchildren and three times as much as other grandchildren.

Those same lawyers say that in situation (b) the estate would also be divided into three shares, one share to go to the one grandchild lucky enough not to have any brothers or sisters surviving the testator, one share going to the other two grandchildren, and the third share going to the two great-grandchildren.

While there is some support for such views, it is submitted that the better and majority view is to the contrary in each instance. In situation (a) the residue should be divided equally—per capita—between the grandchildren, each taking a one-sixth share. In situation (b) the residue should be divided into four shares, one share going to each of the surviving grandchildren and the remaining share going to the great-grandchildren. Thus, the grandchildren would each take one-fourth and the great-grandchildren would each take one-eighth.

While there is no clear West Virginia authority on these issues,

what authority there is appears to support the latter views. The West Virginia Code § 42-1-3 (Michie 1966) provides as follows:

> Whenever the children of the intestate, or the brothers and sisters of the intestate, or the uncles and aunts of the intestate, or the brothers and sisters of any of the intestate's lineal ancestors of the same degree, come into partition, they shall take per capita, or by persons; and where, a part of them being dead and a part living, the descendants of those dead have right to partition, such descendants shall take per stirpes, or by stocks, that is to say, the shares of their deceased ancestors; but whenever the persons entitled to partition, other than those whose shares are definitely fixed by the statute of descents, are all in the same degree of kindred to the intestate, they shall take per capita or by persons.

At a time when this state was a part of Virginia a case involving the predecessor of this statute was before the Virginia court.[40] The statute at that time did not include language similar to that of the last clause of the existing West Virginia statute, and the court decided that it did not expressly control in regard to the fact situation before it. The court decided the case in accordance with the common law, but looked to the statute for some guidance.

In that case the intestate had a brother and a sister who predeceased him. The brother had one child, and that child survived the intestate. The sister had four children, two of whom survived the intestate and two of whom predeceased him. One of those who predeceased the intestate had two children who survived him and the other had six who survived. Thus, there were three nieces and nephews and eight great-nieces and great-nephews who survived the intestate. It was argued that the niece who was the sole child of intestate's brother should take one-half the estate and the other half should be divided between the descendants of the sister. The court held that the estate should be divided into five equal parts, of which each niece and nephew who survived the intestate should each take one part; one part should go to the two children of the deceased niece; and the other parts to the six children of the other deceased niece. Judge Carr ,who wrote the majority opinion, stated:

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[40] See Davis v. Rowe, 27 Va. (6 Rand.) 355 (1828).

> I would divide the inheritance into as many parts, as there were members of the grade nearest the intestate, of which any survive, taking the survivors, and those who have died leaving issue.[41]

In speaking of the Virginia case,[42] one authority states:

> It is a just inference from this decision, that if a grandfather dies intestate, having had two children, A. and B., both of whom died before their father, but A. leaves one child, and B. six children, the estate of the grandfather will descend to all the grandchildren equally, and the child of A. will only get a seventh part, although if A. had been alive, and the other brother dead, A. would have received a moiety and the other moiety would have been divided between the six children of B., and so of all other case of like kind.[43]

In *Overton v. Heckathorn*,[44] a case involving the intestate distribution of property, the West Virginia court, in speaking of the above quoted statute, stated in the syllabus that the statute did not go beyond classes of persons having living representatives. The court further stated in the syllabus that the statute takes "the nearest class having one or more living representatives, and, if some of that class are dead, their descendants take the shares their ancestors would have received, had they survived the intestate." The statute at the time the case was decided was not different in principle from the existing statute.

The court in the *Overton* case followed the Virginia case. The court was construing the above quoted statute and in speaking of the decree of the lower court, which it affirmed, the court stated:

> The decree construes and applies the statute, in exact accord with the construction an earlier one received at the hands of the court in *Davis v. Rowe*, 6 Rand. 355, the decision in which would be as authoritative here, as if it had been rendered by this court, under the same statute and upon a like state of facts. When it was rendered, the Code of 1819 governed, and the law of descents and distributions was verbally altered in

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[41] *Id.* at 376.
[42] Davis v. Rowe, *supra* note 40.
[43] 6 M.J. *Descent and Distribution* § 23 (1949).
[44] 81 W. Va. 640, 95 S.E. 82 (1918).

> 1849, by the insertion of a clause in sec. 3 of ch. 123 of the Code of 1849, at the instance of the Virginia Revisers, which they said, in recommending its adoption, was intended for express adoption of the interpretation put upon the previous statute by a majority of the court, in *Davis v. Rowe.* That clause says: "But whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita or by persons." As so amended, the statute has been retained and continued in this state.[45]

While the quoted statute was designed to govern the descent and distribution of intestate property, it has considerable effect in the case of testate distribution of property because, in the absence of an expressed intent to the contrary, the courts often construe a will by which property is to be divided among a specified class as contemplating a division in conformity to the statutes of descent and distribution of their jurisdictions.[46] In *Giles v. Von Cain,*[47] a case involving the distribution of property under a will, the Supreme Court of Appeals of West Virginia stated:

> All of the authorities hold that the rule of the statute of descents and distribution is to be followed unless a different intention is made to appear, but the same authorities hold that this rule will readily yield to the force of extrinsic circumstances casting light upon the testator's intent and expressed in the context tending to show an intention inconsistent with it.[48]

In the West Virginia case, where the residue of the testator's estate was devised and bequeathed to the heirs of his three deceased sons, to be divided equally between such heirs, the court held that such heirs were to take equally even though one son had one heir, a second had one heir and a third had three heirs. The court in that case stated:

> In the case here the beneficiaries under the will, namely the heirs of the deceased sons named, all stood in the same degree of relationship to the testator. It can not be assumed that he

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[45] *Id.* at 642, 95 S.E. at 83.
[46] 4 PAGE, WILLS § 36.8 (Bowe-Parker ed. 1961).
[47] 93 W. Va. 632, 117 S.E. 488 (1923).
[48] *Id.* at 635, 117 S.E. at 489. See also Jones v. Hudson, 122 W. Va. 711, 12 S.E.2d 533 (1940); Collins v. Feather, 52 W. Va. 107, 43 S.E. 323 (1903).

> preferred any one of them above another. If he had left no will, his estate, by the very terms of our statute, section 3, chapter 78 of the Code, would have gone to these three sets of grandchildren per capita and not per stirpes. The last clause of that section says: "Whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita or by persons."
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> . . . .
>
> There is nothing in the context of the will, nor is there anything alleged in the bill, except as to the phonograph and records disposed of to Lavis Combs, to evince that the testator intended to discriminate between his grandchildren; quite the contrary, for his direction was that his estate, except the phonograph, was to be divided equally between them. His will, which is the law of the case, is in consonance with the statute, which is founded on justice and equity.[49]

In an early West Virginia case involving a will, the court, by dictum, appeared to state that beneficiaries under a will, being of the same class, would take equally even though they may receive more or less than the share that their ancestors would have taken had they survived to the point of distribution.[50] In that case the will gave the residue of testator's property to William McCoy, 3d, but if he should die without lawful issue, to the testator's brothers and sisters then living and the heirs of those who were dead as the law of Virginia directed. The testator died in 1835, and William McCoy, 3d, died in 1861 without lawful issue. It was alleged, but not proved, that all the testator's brothers and sisters, ten in number, were dead in 1861, and it was alleged, but not proved, that all twenty of their children were alive at that time. One of these children, a niece of testator and the sole child of one of his sisters, contended that she was to receive one-tenth of the estate, based upon a per stirpes distribution. The court did not decide how the estate was to go since it did not have sufficient proven facts before it to do so, but the court did state:

> If therefore the law be correctly stated in the answer, it may still be true, that the only heirs at law of Gen'l William

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[49] Giles v. Von Cain, 93 W. Va. 632, 635, 117 S.E. 488, 489 (1932).
[50] McCoy v. McCoy, 29 W. Va. 794 (1887).

> McCoy at the death of Wiliam McCoy 3d were his nephews and nieces, who all stood in the same relation to him, and the distribution according to the law of Virginia would be *per capita* not *per stirpes,* and the interest of Lucinda Rexroade was not the share of her mother, Sarah McCoy, one of the brothers and sisters of Gen'l McCoy. . . .[51]

When the early Virginia case was decided the Virginia statute did not, as does the West Virginia law, specially provide for the cases where all the individuals of any of the classes named were dead, leaving issue.[52] But, as has been shown, it was decided in Virginia that in such case the distribution should be per capita if the issue is the same degree of relationship to the intestate.[53]

In another Virginia case the court stated:

> It is also true that in the ordinary course of descent a living sister is preferred to the sons and daughters of dead brothers, and to give effect to this the division in a proper case is per stirpes and not per capita. . . .[54]

An authority on the law of wills states:

> If the devisees or legatees stand in unequal degrees of relationship to the testator the law favors a construction which results in a distribution per stirpes among the beneficiaries.[55]

> If a gift is to "heirs" and they stand in an equal degree of relationship to their ancestor, it is said that a per capita division is required.[56]

Relatives of equal degree included in the same gift usually take per capita although of different stocks, but those of different degree included in the same gift usually take per stirpes, all in absence of a contrary intent expressed or implied in the will.[57]

Where a per stirpes distribution is to be made it is necessary to

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[51] *Id.* at 816.
[52] See 6 M.J. *Descent and Distribution* § 23 (1949). The early Virginia case referred to is Davis v. Rowe, 27 Va. (6 Rand.) 355 (1828).
[53] Davis v. Rowe, *supra* note 52.
[54] Murchinson v. Wallace, 156 Va. 728, 737, 159 S.E. 106, 110 (1931).
[55] 4 PAGE, WILLS § 36.8 (Bowe-Parker ed. 1961).
[56] *Id.* at § 36.14.
[57] 96 C.J.S. *Wills* § 712 (1957).

determine who are the heads of the respective stirpes, and there is often a question as to whom or what class is to be taken as the stirpes or root. Where the division is to be per stirpes, it has been held that the stirpes or root begins with, or the persons who are the root are, those who, by the terms of the will, are the first possible takers of the testamentary gift.[58]

In most cases it is easy to infer from the terms of the limitation who are to be taken as the stirpes or root. But in cases where no such inference can be drawn from the terms of the limitation, as in the case of "my descendants," the heads of the respective stirpes are the possible takers who are the oldest generation in which there is at least one member living at the time distribution is to be made.[59]

The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association has considered this problem to some extent. In one of its publications it prescribes the form of a trust which sets up a life estate, with the principal payable upon the death of the life tenant "to the Grantor's then living descendants, in equal shares *per stirpes.*"[60] In its comments on the forms it states:

> The words "in equal shares *per stirpes*" are sufficient to cover the usual intention that there shall be equal shares for each person of the same generation and an equal share for the children of a deceased person in that generation.[61]

The Supreme Court of Ohio had before it a case substantially in point when it decided *Kraemer v. Hook.*[62] In that case the testator provided at the termination of a trust setting up certain life estates the trust estate was to be distributed per stirpes among his heirs at law determined as if the testator's death had occurred at the time the trust was terminated. At the time provided for the distribution of the trust estate, the generation with living members closest in relationship to the testator was one composed of his

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[58] *Id.* at § 707.

[59] Patchell v. Groom, 185 Md. 10, 43 A.2d 32 (1945); RESTATEMENT, PROPERTY § 301, comment h (1940); *id.* § 303, comment f.

[60] TWEED & PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING (rev. ed. 1959).

[61] *Id.* at 156-57.

[62] 168 Ohio St. 221, 152 N.E.2d 430 (1958).

nieces and nephews. There were eleven living nieces and nephews and seven deceased nieces and nephews who had descendants living. The court held that the trust estate should be divided into eighteen equal shares, each living niece and nephew to get a 1/18th interest and a 1/18th interest to go to the descendants of each deceased niece and nephew. In its opinion the court stated the following rule of law:

> [W]here, as in the instant case, by using the general phrase, "heirs at law," the roots or stirpes of a per stirpes devise or bequest are not specifically designated, such roots or stirpes will be found to be in the nearest generation of heirs at law of the decendent, having living members at the time heirship is determined, according to the applicable statutes of descent and distribution, and that generation shall comprise the "root generation."[63]

While the law in regard to the issue is far from clear, it is a fair inference from the authorities cited and quoted herein that the limitation "to my descendants living at the time of my death, per stirpes" when used in a will means that the descendants in the generation having living members nearest in relationship to the testator at his death shall take equal shares, and if some members of that generation are deceased, leaving descendants who survive the testator, those descendants are to take the share their ancestors would have taken, had they survived the testator.

V. Conclusion

It appears that it is reasonable to conclude that there are situations, arising from the language testators often use in wills where the courts are attempting to find the intentions of the testators where there were in fact no intentions at all. A testator, having executed his will many years before his death and when the situation was entirely different from the situation existing at his death, had no intent concerning the latter situation because he had an entirely different situation in mind when he executed his will. Had the testator actually had in mind the situation which existed at his death when he executed his will, he very probably would have

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[63] *Id.* at 233, 152 N.E.2d at 439.

expressed his intention differently than the way it was expressed in his will.

The court, in such situation, may say that the intent of the testator is the polar star which it will use as a guide in the interpretation of the words used by the testator, and then find an intent which never existed in the testator's mind.

The Supreme Court of Ohio, in expressing itself on this subject, stated:

> In extreme cases, in England, as well as in certain jurisdictions in America, the courts, under the guise of doing what the court imagines the testator would have done had he foreseen the situation, have gone a long way toward the substitution of the will of the court for that of the testator. . . .[64]

In such a situation, the court is in a dilemma; should it let a devise or bequest in a will fail because it is too indefinite, or should it attempt to determine what the testator would have intended had he actually foreseen the situation that existed at his death? If a person fails to execute a will and dies intestate, the legislature or other law making body of the state having jurisdiction over his property has determined by its laws governing the descent and distribution of property where and to whom that person's property shall go. In effect, the law-making body has made wills for those who fail to make their own. But, a person has the right to change the will so made for him by making his own will. If he has done so, the court should do what it can to make that will, and not the will of the law-making body, dispose of the testator's property.

The court, while making a decision as to a particular will in such a case, is in reality establishing a rule of construction which will be applicable to similar situations in the future. A rule of construction, unlike a rule of law, is not applicable where a contrary intent is manifested, and should not be used by a court to supplant such intent. Such a rule should operate as a presumption which is rebutted when there is evidence that the testator actually intended otherwise.

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[64] Union Sav. Bank & Trust Co. v. Alter, 103 Ohio St. 188, 203, 132 N.E. 834, 839 (1921).

Where the intent of a testator is not clear as applied to a particular fact situation, a rule of construction can be a lawyer's best friend. If the rule is available for his use, so that he knows with reasonable certainty how the court will interpret a particular phrase as applied to the particular situation, he can advise his client without the necessity of asking a court to construe the will under consideration.

Thus, if the lawyer represents a client who is interested in purchasing real estate the title to which is derived by the present owner from a will devising it to him, the will providing that if he should die without issue the real estate is to go to another, the lawyer should be able to properly advise his client. If the jurisdiction in which the real estate is situate has established as a rule of construction that such a phrase means that the title is to shift from the first to the other person only if the first taker should die without issue before the testator dies, and the first taker, [present owner] has survived the testator, the lawyer can advise his client that the present owner has the fee simple title. On the other hand, if the law of the jurisdiction involved has established the rule of construction that the phrase means the land is to go to the other person if the first taker should, at his death, leave no surviving descendants, the lawyer can advise his client that the present owner has only a fee simple subject to a condition subsequent. The client could be advised that in purchasing the real estate he would be taking a calculated risk, depending upon the likelihood of the present owner later dying without issue.[65]

In many of the situations considered in this article the courts have had to determine the time to which particular language referred. "Die without issue" when? "Survive" until what time? A gift to John's surviving children means a gift to those children who survive to what time?

It is submitted that a court in considering such situations should look to the time the possession of the property involved is to go to the recipient as a guide to the time to which reference is made—the point of distribution. If the gift is of property that is to go to the

[65] See Brown v. Brown, 89 W. Va. 339, 109 S.E. 815 (1921), where the court held that the owners of the future interest following such a fee were not entitled to an injunction against waste. The court reasoned that since the first taker had nine children, most of whom were adults with children of their own, the likelihood of the first taker dying without issue was very remote.

devisee or legatee at the death of the testator — and personal property for this purpose is thought of as going to the legatee at the death of the testator although actual distribution may be delayed — there are advantages to a construction which fixes the testator's death as the time to which reference is made. If the gift is not an immediate gift such as that described in the preceding sentence, but a mediate one, there being a life estate or some other particular interest preceding the time when the devisee or legatee is entitled to possession of the property, there are advantages to a construction which fixes the time the taker is entitled to possession — the point of distribution in such case — as the time to which reference is made.

While these rules of construction are fine aids for a lawyer to have available, they are of no use to him unless he knows that there is a problem involved when he is asked by his client for advice in regard to the provisions of a will. Such rules are only solutions to problems, not guides to be used in finding whether a problem exists. The lawyer must be alert to the fact that innocent sounding language may present a problem.