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Eroding the Common Law Paradigm for Creation of Property Interests and the Hidden Costs of Law Reform

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ERODING THE COMMON LAW PARADIGM FOR CREATION OF PROPERTY INTERESTS AND THE HIDDEN COSTS OF LAW REFORM

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I. INTRODUCTION

Some things in law change frequently and often dramatically.¹ For some areas, however, change is infrequent, and, when it does occur, its pace seems almost glacial. More often than not, the evolution of property law falls into the latter category.² This is good—not bad—because of the heavy dependence property places upon certainty and, therefore, the consistency achieved by courts and legislatures.

At the core of property, its ownership, and its concepts, is real estate. Indeed, most of property law has been forged and shaped by the law of real property. Because land lasts forever and so does its history, the marketplace could not function without clarity and stability as to ownership. To be sure, stability requires predictability as to use and enjoyment, but it also requires predictability as to creation and transfer. The latter is, of course, connected to specific language and the consistency the law must attach to methods of expression and dispositive commands.³

The last twenty-five to thirty years have, however, produced relatively rapid and even staggering changes in the law of property. Some of these

1. For example, beginning approximately forty years ago, residential landlord-tenant law changed dramatically over a period of twenty years, and in terms of property history, this was the equivalent of an overnight revolution. These changes were accomplished firstly by courts and then legislatures, and the most important change concerned the landlord's implied warranty of habitability. For an excellent summary of this body of law, see Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status* 16 URB. L. ANN. 3 (1979).

2. For example, consider the history of the Fee Tail and its precursor known as the Fee Simple Conditional. The latter estate existed until the year 1285. In that year, because of a statute, the Fee Simple Conditional was replaced by the Fee Tail, thereby solidifying the rights of both the entail and the reversioner. Thereafter, it took over two hundred years for courts to sanction a process involving a fictitious law suit that permitted the tenant in tail to extinguish the rights of both the entail and the reversioner. Three hundred years later, this process was codified in England, and tenants in tail were then permitted by deed to convey a fee simple absolute to another. Finally, it took another century for nearly all states within the United States either to adopt legislation patterned after the English model or to adopt legislation that abolished the Fee Tail by converting it into other kinds of estates. For a summary of the history of the Fee Tail, see CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 48–53 (3d ed. 2002).

3. Property law is replete with words and phrases used in the creation of interests that have consistently received specific meaning. Conveyancers need sign posts by which they can reliably create the estates their clients desire, and courts have responded with code language needed to achieve such certainty. 'To B **and her heirs**' illustrates such code language. On its face, '**and heirs**' appears to be language of purchase, but over time courts viewed it as language of limitation needed to create a fee simple absolute. Today, this language is no longer needed to create a fee simple. Nevertheless, when used, courts will consistently give it the same construction as they did hundreds of years ago. See MOYNIHAN & KURTZ, *supra* note 2, at 34–42. One should note, however, that courts sometimes place a premium on interpretive consistency even when interpretive certainty is neither necessary nor desirable. See David M. Becker, *Debunking the Sanctity of Precedent*, 76 WASH. U. L.Q. 853 (1998).

changes arose out of court decisions that quickly eroded long-standing common law principles, while others emerged from statutes immediate and full-blown.⁴ Many of these changes were inspired by groups devoted to law review and reform, such as the American Law Institute and the Commissioners on Uniform Laws. Some of their changes patched-up; some tinkered or fine-tuned, and others revolutionized.⁵ The latter are not, however, always obvious. Among them is § 2-707 of the Uniform Probate Code (hereinafter referred to as § 2-707).⁶

The authors of § 2-707 make two simple revisions of existing law with respect to all trusts. First, § 2-707 requires the beneficiaries of all future interests to survive the time for distribution even though the trust does not express this condition of survivorship or any other.⁷ Second, § 2-707 substitutes in place of a deceased beneficiary his or her descendants who survive distribution, and it does this even though the trust contains no language to support this or any other substitute gift.⁸ These changes are presented in the form of rules of construction.⁹ Nevertheless, these rules always apply unless they are expressly repudiated in a manner permitted by the statute.¹⁰

Through § 2-707 its authors target poorly conceived and drafted trusts, namely, trusts that ignore core values within the mainstream of estate planning. These values are twofold: everyone wants to avoid unnecessary

4. The reformation of landlord-tenant law arose from both court decisions and legislation. *See supra* note 1. Reformation of the Common Law Rule Against Perpetuities, including its revision and in some instances its abolition, occurred largely during the last half of the twentieth century, and it was accomplished almost entirely by statute. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 3.22 (3d ed. 2000).

5. The reformation of the common law rule against perpetuities during the last part of the twentieth century presents illustrations of each of these kinds of changes. On the one extreme are statutory changes that merely fine tune by, for example, restricting provisions with unnamed spouses to lives in being and thereby eliminating perpetuities violations produced by the remote possibility of an unborn spouse. At the other extreme are statutes that replace the possibilities test with one predicated upon actualities, provide for discretionary reformation in the event of a violation, and replace the life in being with a fixed term of years in measuring the period of valid enforcement. For a thorough discussion of a statute that makes all three of these changes, see Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 *REAL PROP. PROB. & TR. J.* 569 (1986). For a summary discussion of the full range of reforms, see David M. Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance Upon Statutory Reform and Saving Clauses Is not Enough*, 64 *WASH. U. L.Q.* 287, 356–65 (1986).

6. *See* UNIF. PROBATE CODE § 2-707 (amended 1993), 8 *U.L.A.* 194 (1998).

7. *See id.* § 2-707(b).

8. *See id.* § 2-707(b)(1)-(2).

9. *See* UNIF. PROBATE CODE § 2-701 (amended 1991), 8 *U.L.A.* 181 (1998). As a rule of construction, § 2-707 can be overcome by evidence of a different intention held by the settlor of a trust.

10. *See infra* notes 77–90 and accompanying text for discussion of the restricted methods for overcoming § 2-707's rules of construction.

death costs, and everyone wants to keep their estate within their family and its constituent branches. As a result, skilled and experienced lawyers always expressly incorporate the condition and substitute gift imposed by § 2-707.¹¹ Proponents claim, therefore, that § 2-707 does not affect the word products of informed planners. Instead, it merely rewrites poorly designed trust provisions and thereby produces a result that all estate owners would prefer if they had been asked the right questions and given the right choices.¹²

On its face, the effect of § 2-707 seems to be entirely salutary. Nevertheless, several commentators have criticized it severely. For example, one challenged the wisdom of its new default construction, especially without empirical proof that estate owners prefer it over the one long established by the common law,¹³ and I challenged the conclusion that § 2-707 will not affect the work and word products of skilled and experienced lawyers.¹⁴ Although these criticisms address different problems, each is implicitly concerned with the profound impact of § 2-707 upon a body of law and the way it is practiced—indeed, an impact that reaches well beyond the particular condition of survivorship and substitute gift imposed by § 2-707.

This article focuses and expands upon this transcendent impact. It elaborates how § 2-707 has made a major change in the common law paradigm for creation of property interests. This article predicts that the changes imposed by § 2-707—and any others it might spawn—will inevitably create serious problems because these changes impair a system of expression that is logically sound and has worked successfully for many centuries. In conclusion, it sounds a warning about all law reform and its

11. See Edward C. Halbach Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1132–33 (1992); Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2310–13, 2321–22, 2338, 2350–51 (1996). As a result of its condition of survivorship and substitute gift, § 2-707 should save estate owners from the negligence of lawyers who fail to ask the right questions and create the right provisions. Indeed, once one assumes that the implied condition of survivorship and the substitute gift imposed by § 2-707 would be preferred by essentially all estate owners and that an estate plan that provides otherwise could only arise because of neglect, lack of forethought, mistake, or inadvertence, surely one could then characterize the lawyer responsible for such an estate plan as negligent. Consequently, § 2-707 protects the public against bad trusts and bad lawyering.

12. See Waggoner, *supra* note 11, at 2310, 2313, 2338, 2349–51.

13. See generally Jesse Dukeminier, *The Uniform Probate Code Unopens the Law of Remainders*, 94 MICH. L. REV. 148 (1995).

14. See generally David M. Becker, *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. REV. 339 (1999).

hidden dangers, especially law reform which reflects the views of a select group, that alters the way lawyers must think, design, and draft.

II. THE COMMON LAW PARADIGM AND ITS EFFECT ON THE CREATION OF INTERESTS

A. *The Common Law Paradigm*

The common law of property is complex,¹⁵ and the logic underlying its system for the creation of interests is no exception. Central to this logic is the notion that certain interests—estates—are measured and distinguished in terms of time. The holder of an estate commands a level of ownership that is described and classified in terms of acknowledged units of time. Such interest belongs to its owner until it expires or until she transfers it. As to the latter, whatever she holds remains hers until her unit of time has been exhausted by conveyances that add up to her quantum of ownership. As a result, one always creates—and therefore drafts—by addition. This addition continues until the transferor’s claim over time has been fully exhausted. Creation by addition is an inevitable consequence of the estate concept which allows for creation of possessory and nonpossessory interests that are defined by time units that are less than the whole. And this has had a direct bearing on how command thoughts for the transfer of property are formulated and how they are interpreted.¹⁶

The foregoing principles—that a property interest is owned until it is transferred to others or until its defining unit of time expires—are accompanied by related principles. More specifically, in transferring one’s interest, or any portion of it, nothing is conveyed until one lawfully creates

15. The law of property is complex and difficult to master for many reasons. For example, with terms like “fee simple,” “fee tail,” and “vested subject to open,” it often reads like a foreign language to students. Further, certain words and phrases are assigned non-literal and often unnatural meaning. Within one context, “heirs” describes a group of people designated to receive an interest, but in another context, it describes the kind of interest those other than the heirs themselves are eligible to take. This leads to confusion, which also arises with the phrase “die without issue.” When given an “indefinite failure of issue” construction, the phrase leads to a fee tail instead of merely a condition of defeasance attached to a fee simple. Further, when the Rule in Shelley’s Case and the Doctrine of Merger are applied to a devise to “B for life, remainder to the heirs of B,” the heirs of B receive nothing while B takes the entire gift in fee simple absolute instead of the life estate clearly designated by the terms of the devise. Some of this complexity derives from policy and some from special interests. But all of it derives from history and none of it seems connected to logic. For a brief discussion of this terminology, these phrases, and these rules, see STOEBCUK & WHITMAN, *supra* note 4, §§ 2.2, 2.10, 3.8, 3.16.

16. For further discussion, see, for example, GRANT S. NELSON, WILLIAM B. STOEBCUK, & DALE A. WHITMAN, *CONTEMPORARY PROPERTY* 219–23 (2d ed. 2002).

an interest in another person or entity. Further, in creating such interests, one must begin with a blank slate—namely, a zero base for creation. With respect to transfers that must be in writing, nothing is created until it is expressed. If a particular interest is intended for a specific person, such interest does not exist without expression—without some basis for creation that is grounded in language.¹⁷ Because ownership can be divided both in terms of time and possession, multiple interests can be created simultaneously. This is accomplished by adding further to the zero base from which one always begins. If, however, one does not expressly add to the possessory interest which has a limited duration that is less than the estate held by the transferor, a reversion is retained, and it exists throughout the time of non-possession. Eventually the conveyed interest will exhaust itself in time, and, as a result, possession will revert to the transferor. Because nothing more has been stated, nothing more is created. If an interest isn't there, then it isn't there, and, therefore, it doesn't exist. To be sure, there are exceptions, but the latter summary reflects the general rule, and courts hold steadfastly to it.¹⁸

This principle can be readily illustrated. To begin with, assume that A owns Blackacre in fee simple absolute; therefore, A's claim to Blackacre—on her behalf and on behalf of her successors—will last forever. A's dispositive base is zero or a blank slate. Stated differently, A's dispositive base is nonexistent and, therefore, remains at zero until A makes some kind of effective transfer of ownership. For example, B—who is unrelated to A—has no interest in Blackacre unless and until A executes a writing—operative during A's life or at her death—that expressly creates an interest in B.

Assume next that A does exactly that with a deed that provides “to B for life” and nothing more. Because no one else is mentioned in the deed, A has not relinquished her fee simple absolute. Only one interest has been added to the dispositive zero base or blank slate, and it is an estate of limited duration. Interests created by this deed do not add-up to A's claim on ownership over time. No other interest is expressed; therefore, none exist in anyone other than A. Consequently, A holds a reversion and upon B's death, possession reverts to A.¹⁹

17. Generally, nothing exists by way of transfer to another without words that identify who the transferee is and the quantum of estate she receives. In the presence of silence, courts will often supply the latter but not the former. Courts will seldom fabricate a gift without evidence derived from language and a context to support it. *See infra* notes 20, 64.

18. *See infra* notes 20, 64.

19. One should carefully observe, however, that only possession reverts to A and not A's ownership interest, namely, A's estate in fee simple absolute. Upon creation of B's estate for life, A's

To continue this illustration, assume that A adds a second interest to the blank slate: “remainder to C for life.” To be sure, there has been an addition to the dispositive base. The original blank slate has been filled in with two successive life estates. Once again, however, this interest has a limited duration and the interests created by A’s deed do not add up to A’s claim on ownership measured over time. No other interests are expressed, and, therefore, none exist. So A continues to hold a reversion, and possession will revert to A upon the deaths of both B and C.

Quite differently, suppose that the remainder to C states: “to C absolutely and forever.” Once again, without this declaration, C owns nothing in Blackacre; with it, however, C receives a fee simple absolute. A has moved beyond the blank slate and added two estates to the zero base from which she began. In this instance, however, these estates equal the unit of time A has had through her ownership of a fee simple absolute. Stated differently, A has drafted by addition, thereby creating time units that amount to a fee simple. Consequently, A’s transfer of ownership is complete. She has no reversion and, therefore, retains no interest in Blackacre.

Courts will also hold to this equation of creation by addition—a process that begins with a zero base and does not recognize interests until they are designated and, therefore, exist—even when the language and context might support a probable intent to create an interest that otherwise has not been expressed. Indeed, courts are very reluctant to depart from the precept: if it’s not there, then it doesn’t exist. For example, consider this illustration in which A makes the following specific devise: “To B for life, remainder to C in fee simple absolute if B dies without children who survive him.” Building upon a zero base, A has expressly created interests in both B and C. The time units for B and C add up to A’s fee simple just the same as in the previous illustration. The remainder to C in fee simple is, however, conditioned upon B’s death without surviving children. Consequently, the interests created by A will add up to her own estate only if this condition is satisfied. If it is, then A’s reversion is extinguished and she retains nothing.

What happens, however, if B leaves children who survive him? Clearly, C cannot take. Technically speaking, A’s reversion is not extinguished by C’s remainder unless the condition to C’s interest is

possessory estate became nonpossessory, but it remained an existing estate even though possession was relinquished and deferred until a later time. A’s estate is commonly referred to as a future interest, but it is not a future estate. Throughout B’s lifetime A’s estate exists and with such existence A has immediate rights, including protection from waste and the capacity to transfer her reversion to others.

satisfied. In this instance, however, it has not been satisfied. If no other gifts are raised by this devise, because A's disposition is incomplete the subject matter will revert and pass with A's residue in the event B is survived by children. One might speculate that A—or her lawyer—has overlooked this circumstance. Indeed, this seems to be an oversight, either in planning or drafting. Either way, one might conclude that A would want the remainder to pass to B's living children instead of the residuary takers under A's will. Nevertheless, courts will not easily reach this result because the dispositive equation did not include an express interest for B's children. Stated otherwise, A did not add B's children to her zero-based dispositive provision. The additions to the blank slate A began with included only B and, under certain circumstances, C. As to other unmentioned interests, once again, if they are not expressly there, then they do not exist, and courts are loathe to correct oversights by rewriting wills. To be sure, some courts will reach a different result because of a firm belief that the facts, logic, and language inevitably point to a remainder in B's living children. Nevertheless, this is never accomplished without a steep uphill climb.²⁰

Once again, courts will not find interests until they are expressed. These interests, however, need not be fully elaborated; indeed, sometimes a short-hand expression will suffice. For example, suppose that A creates a testamentary trust that provides: "Income to H, my husband, for life; upon his death, the trust shall terminate and the principal shall be distributed one-half to B, my brother, if then living and one-half to C, my dear friend, if then living." What happens if B survives H but C does not? Does the share that C would have had belong to B or does it revert back and thereby pass with A's residue to someone else? Most courts would find in favor of the residuary taker. A cross remainder to B is unexpressed; therefore, it does not exist. Absent some other expressed gift—absent further addition to the dispositive equation that focuses squarely upon the failure of either B or C to survive H—this portion of the remainder must fail and, accordingly, pass with the residue.²¹

20. See LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 532, 841–42 (John A. Borron, Jr., ed., 3d ed. 2002). For discussion of the approach courts take in the creation of future interests by implication in other kinds of situations, see *id.*, §§ 843–45.

21. Cross remainders would provide "that B should take the entire principal if B survived H but C did not, and that C should take the entire principal if C survived H but B did not." Sometimes courts will find cross remainders by implication. Ordinarily, however, they will not do so in the situation hypothesized. See *id.* § 843. If a court were to find that A had created a class gift in B and C, then B would be entitled to the entire principal. This construction, however, is extremely unlikely because of these particular facts: B and C were both named; B was a brother, and C was merely a friend; and their

Suppose, however, that the trust contained a different provision for ultimate disposition of the principal. Assume that it stated: “(U)pon his death, the trust shall terminate and the principal shall be distributed in equal shares to my brothers then living.” Assume that A has two brothers, B-1 and B-2. Clearly, if both survive H, they will share equally in the distribution of principal. What happens, however, if B-1 survives H but B-2 does not? Is the answer the same as the one in the original variation of this illustration? Does the share that B-2 would have had fail and pass with the residue? The answer is no, and all courts would award the entire principal to B-1.

Their rationale would rest upon the nature of the gift of principal and the terminology used to confirm it. Courts will conclude that the remainder creates a class gift. The essence of every class gift is elasticity, a capacity to expand its membership or contract its membership or both. In this instance, although potentially there can be two class members at A’s death, the class is not fully defined until H’s death. Consequently, when B-2 dies he drops out, and the entire principal then belongs to a class that only has one member by the time H dies. Quite differently, one might view the class gift as containing a built-in substitute gift to qualifying members; indeed, something that functions like cross remainders. However one views the class gift phenomenon, one cannot say that B-1’s claim to the entire principal derives from something unexpressed. Quite clearly, it derives from unambiguous class gift terminology. To be sure, substitute gifts and cross remainders are not fully elaborated; nevertheless, they are clearly presented through this well accepted short-hand.²²

One should also note that the principle of creation through additions to a zero-based blank slate applies to conditions as well as interests. Again, the dispositive slate is blank. The creative starting point is not subject to an overlay of conditions yielding uncertainty as to possession any more than it is subject to preordained interests. Stated differently, conditions concerning possession do not exist unless expressed. Once again, if they are not there, then they do not exist.²³ This pronouncement is reflected in

fractional interests were described and presumably fixed. All of this supports a finding that A was not group-minded and, therefore, did not intend a class gift. *See id.* §§ 612–13, 615.

22. For discussion of the significance and consequences of a class gift determination with respect to the shares and composition of the group, see *id.* § 613.

23. Nevertheless, there are courts that have lost their way and deviated from this basic precept. Sometimes these departures from prevailing law are tied to a specific language format, even those that give no hint of the condition courts supply. *See infra* note 28. Sometimes, however, deviant courts fabricate a condition without any tie to a symbolic language format, for example, when distribution of principal is deferred for a period of years and with that alone a condition of survivorship automatically

many ways, especially as to the body of law that distinguishes contingent and vested interests, because for an interest to be contingent, it must be subject to some condition that injects uncertainty. At the outset, however, one must understand that nonpossessory estates are automatically subject to a series of assumed conditions affecting possession, which, most of the time, remain unexpressed. For example, every nonpossessory estate is dependent upon the planet Earth not being destroyed and our system of private property still governing matters of ownership and transfer. To be sure, these kinds of conditions introduce uncertainty as to possession and they are always present. Nevertheless, fulfillment of such conditions is a common sense predicate to everything involving the law of property and, for this reason, they are completely disregarded and, therefore, never viewed as enough to construe an interest as contingent.

One must, however, recognize and specifically account for another kind of assumed condition by adjusting the blank slate and its zero base. Possession of every nonpossessory estate is dependent upon the termination of all prior possessory estates. Sometimes this requirement is expressed; however, most of the time it is not. Clearly this presents a condition affecting possession and it may even infuse uncertainty respecting the time in which it will occur. This requirement, however, is never enough to raise a condition that permits characterization of the nonpossessory estate as contingent²⁴ because one could never create and have a system of possessory and nonpossessory estates without it. All estates are measured in terms of time and each is defined in terms of its potential duration which, with the exception of the fee simple, must inevitably come to an end. Consequently, any division of ownership into possessory and nonpossessory estates will always delay possession of a future interest until a point in time, one that coincides with the expiration of some possessory estate or estates or finite period of time that has been added. Every nonpossessory estate is dependent upon this event. It is an inevitable condition every time one formulates a future interest in which

arises. *See, e.g.*, *Smell v. Dee*, (1707) 91 Eng. Rep. 360. *See also* SIMES & SMITH, *supra* note 20, § 587. Further, some courts have found an unexpressed condition of survivorship merely because of the presence of another expressed condition having nothing to do with survivorship. Each of these fabrications has been criticized. *See, e.g.*, SIMES & SMITH, *supra* note 20, § 594; *see also* *Evan v. Giles*, 415 N.E.2d 354, 357 (Ill. 1980).

24. "A remainder is contingent if, in order for it to come into possession, the fulfilment of some condition precedent other than the determination of the preceding freehold estates is necessary." JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 101 (4th ed. 1942). This is the classic first step in determining whether an interest is contingent, and its statement appears in probably the most famous work ever devoted to the law of future interests.

possession is triggered by the natural termination of prior possessory estates—that is, termination upon completion of a particular estate’s full potential duration. As a result, this ubiquitous condition that all prior possessory estates must terminate—even when expressed—should never be viewed as a new and added condition affecting possession, and certainly it should never be viewed as enough to create a contingent interest.²⁵ Nevertheless, this requirement can be a source of confusion and it is sometimes mistaken for a condition enough to render an interest contingent. Therefore, to clarify the principle for imposing or determining the existence of conditions, one should probably amend this component of the common law paradigm by making the requirement for termination of prior estates explicit.

Accordingly, one should say: All conditions **respecting possession beyond requiring the natural termination of prior possessory estates** must be expressed.²⁶ This is the adjusted blank slate from which one begins to create conditions, and for a condition to exist it must be expressly added to this zero base.

With some exceptions,²⁷ this is also the way one determines the existence of vested interests. For an interest to be contingent it must be

25. If possession is expressly conditioned upon termination of a prior estate that is certain to end, such a requirement is invariably viewed as merely stating the obvious and is therefore inconsequential surplusage, which is insufficient to yield a contingency, such as a requirement of survivorship, and thereby render the interest contingent. See SIMES & SMITH, *supra* note 20, § 585.

26. Words of condition must be expressed in the sense that they are grounded in specific language or context. If unexpressed, there must at least be a basis for clear implication within the limitation itself or within the dispositive instrument. Conditions cannot be fabricated or imagined. Some things, however, are always assumed and usually they involve common sense; for example, birth is always a factual requisite to ownership of an interest by people and, therefore, birth translates into a condition. For further discussion, see SIMES & SMITH, *supra* note 20, §§ 131–66.

27. See GRAY, *supra* note 24. One should note, however, that the presence of a condition (beyond the termination of prior possessory estates) that must be satisfied at or before the natural termination of prior possessory estates does not always signify the presence of a “condition precedent” and therefore a contingent interest. Stated differently, conditions that must function precedent to possession are not always viewed as “conditions precedent.”

Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested.

Id. § 108. One should observe that this test changes the meaning otherwise given to “condition precedent” and “condition subsequent.” This test focuses squarely upon the order of language and not on the operative effect of the condition itself. This can be illustrated with the following devise from A: “To B for life, remainder to C in fee simple; if, however, C predeceases B, then to D in fee simple absolute.” For C’s remainder to become possessory, C must survive B. This is a condition that coincides with B’s death, which is the natural termination of the prior possessory estate. Under these circumstances it represents a precedent requirement to possession and not a condition subsequent to possession because C ordinarily cannot have possession until B’s death, which is the operative time for

subject to a condition, and if there is no condition precedent to possession other than the natural termination of prior possessory interests, then the interest must be vested. To illustrate, assume once again that A makes the following transfer: “To B for life; thereafter, remainder to C in fee simple absolute.” There is only one apparent requirement for C’s interest to become possessory, namely, termination of B’s estate at B’s death. Because nothing else is expressly added to the zero base, one must conclude that there are no other conditions. If termination of B’s estate at B’s death were enough to make C’s interest contingent, then all remainders would become contingent. Once again, because courts do not view the natural expiration of prior possessory estates as a basis for finding a condition and, thus, a contingent interest, and because no other condition is expressed, the slate for creation of conditions is still blank. The dispositive base respecting conditions has not moved beyond zero; therefore, C has an indefeasibly vested interest.

Suppose, however, that A were to add an express condition: “(T)hereafter, remainder to C in fee simple absolute if then living.” In this instance, the dispositive equation for conditions has moved beyond its zero base. One condition has been added: C must survive the death of B. It is, however, the only condition because the written equation expresses no others. For example, there is no added condition that C must attain age twenty-one, that C must marry, that C must graduate from college, or that C must be licensed to practice law. Once again, there are rare departures from the principle that conditions do not exist unless expressed, and often they reflect judicial misunderstanding of basic concepts and the paradigm for creation itself. Nevertheless, these deviations invariably derive from some kind of language format, even though a literal understanding of the language would not ordinarily yield the existence of another condition.²⁸

application of the condition. Nevertheless, because the condition appears in a clause after specific creation of the remainder in C, C’s remainder is classified as vested subject to divestment, and D receives a contingent executory interest. Using precisely the same conditions, however, one can alter the classification, thereby producing alternative contingent remainders in C and D. This can be accomplished by inserting the requirement of survivorship into the clause that first expresses an interest in C. “To B for life, and if C survives B, then to C in fee simple; if, however, C does not survive B, then to D in fee simple absolute.” See SIMES & SMITH, *supra* note 20, § 147.

28. One deviation is known as the “divide and pay over rule,” a rule that primarily applies to class gifts. Consider this testamentary trust created by A: “Income to B for life; thereafter, principal to B’s children.” With this gift there is an implied direction that at B’s death the trust will be terminated and that the principal will then be distributed equally to B’s children. And because the trust contains no express requirement of survivorship, an equal share would be distributed to the representative of any child of B who predeceased B. If, however, this implied direction had been actually expressed within the terms of the trust—for example, “upon the death of B the principal shall be sold and the proceeds then divided and paid over to the children of B”—some courts would find in that express

Further, when they are implied, in the absence of specific code words or phrases, there must be overwhelming evidence to support such condition. To be sure, then, the presence of one condition does not mean the implication of others any more than the complete absence of conditions supports the implication of any particular condition.²⁹

In the preceding illustration, there is one express condition to possession and it involves survivorship of the time for possession—namely B’s death. Once again, the presence of this condition does not support the existence of others. The rationale for this conclusion—that specific conditions must be expressed by addition to the zero base, coupled with a dispositive equation that contains no express conditions other than the one for survivorship—should support a principle with broader application: namely, an expressed condition does not, without more, support the implication of any other condition. If the situation were reversed, this would mean that the presence of some other kind of condition should not yield a requirement of survivorship of possession if survivorship were unexpressed. This conclusion would be consistent with the common law paradigm that builds interests and conditions upon a blank slate. Nevertheless, it is not the conclusion courts universally reach, and once again these deviant results invariably reflect misunderstanding and misconception as to basic principles.³⁰

More specifically, suppose that the remainder to C in the previous illustration had been changed to read: “(T)hereafter, remainder to C in fee simple absolute if C has graduated from college by the time of B’s death.” This limitation contains only one condition—that C must graduate from college by the time of B’s death. Because it is the only expressed addition to the zero base for conditions, there should be no others. More specifically, there is no express requirement that C must also survive B; therefore, such condition should not exist. Consequently, if C were to graduate from college during B’s lifetime, C’s interest should then become indefeasibly vested and ultimately pass to C’s successors even though C

direction for payment a basis for implying a requirement of survivorship of B. Their conclusion is always tied to such language, but their underlying reasoning is tenuous if not tortured. For discussion of the “divide and pay over rule,” see SIMES & SMITH, *supra* note 20, § 593. See also W. BARTON LEACH & JAMES K. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* 323–29 (1961).

29. See SIMES & SMITH, *supra* note 20, § 594.

30. For example, see *Drury v. Drury*, 111 N.E. 140 (Ill. 1915). In this case, the Supreme Court of Illinois concluded that a contingent future interest created in a class was necessarily subject to a requirement of survivorship to the time of possession even though the condition that rendered the interest contingent did not express such a requirement. *Id.* at 142. Subsequently, the Supreme Court of Illinois repudiated this rule. See *Evan v. Giles*, 415 N.E.2d 354, 357–58 (Ill. 1980) (internal citations omitted).

thereafter failed to survive B. Indeed, the presence of a single condition—even one that can only be satisfied during the remainderman’s lifetime—does not automatically produce a further requirement that the remainderman must also survive to the time of possession. Nevertheless, some courts are tempted to go further and impute such a requirement of survivorship.³¹

Additionally, the presence of an express condition that does not involve any kind of survivorship should not automatically yield a condition that does require survivorship. For example, consider this limitation: “To B for life, remainder to C in fee simple absolute if a Democrat is then President of the United States.” Although C’s interest is clearly contingent, the condition itself is not in any way dependent upon the life or death of C. Strictly interpreted, the remainder can vest in C or her successors without regard to whether she is alive or not at B’s death. The limitation expresses only one condition. Nothing more has been added to the blank slate; consequently, nothing more exists or is ordinarily found when a court must make its construction. Therefore, if a Democrat is President when B dies, C or C’s successor’s interest becomes possessory, and if a Democrat is not President when B dies, C or C’s successor’s interest fails.

The problem, however, becomes a bit more complicated when a limitation expressly requires one remainderman to survive possession but not the other. For example, consider these alternative contingent remainders: “To B for life; thereafter, if C is then living to C in fee simple absolute, if C is not living then to D in fee simple absolute.” Clearly, C’s remainder is subject to an express requirement of survivorship, but D’s is not. Strictly interpreted, D’s remainder is alternative to C’s; that is, if C’s remainder fails because she does not survive B, D’s remainder vests and possession passes to D or his successors. Stated differently, C’s failure to survive B is the only express prerequisite to D’s possession. Nothing else is expressed, and so nothing more has been added to the zero base for creation of interests and conditions.

Nevertheless, there are courts that sometimes find otherwise, namely, that two conditions exist for D. One is expressed—that C must predecease B—and the other is implied—that D must also survive B. These kinds of cases illustrate perhaps the most common breach of the common law paradigm, and often there is support for it among commentators. Invariably, this breach occurs because a court infers from the language and context that a requirement of survivorship for D was really intended by the

31. *See supra* note 30.

estate owner, and, therefore, its omission was clearly an oversight. In these cases, the inference is usually fact specific and not automatic. Despite the absence of specific language of survivorship to support this condition, courts have ruled that such a condition has been added to the blank slate. But in doing so, they generally must tie their conclusion to something that evidences its inclusion. Once again, nothing exists beyond the zero base without something to support it. For this reason, one might not view the implication of a requirement of survivorship for D as a real breach of the paradigm itself.³²

B. Some Important Exceptions

The foregoing description of the system for creation of interests and conditions would be incomplete if one did not acknowledge the existence of some rules—often ancient—that can alter meaning. These principles—derived from statutes and the common law—present an overlay that

32. Often the addition of an unexpressed requirement of survivorship reflects a court's fundamental misconception of what it means to say that an interest is contingent. In the above example, D's remainder is contingent in interest because of the express precedent condition that C must fail to survive B. But there is no express condition that renders D's interest nontransmissible in the event D predeceases B. Without more, D's interest is transmissible at death and will pass to D's successors with ultimate possession still dependent upon whether C fails to survive B. Sometimes, however, courts will use the term "contingent" as an equivalent for nontransmissibility at death. They will assume that if something is contingent in interest, it must also be nontransmissible at death and, therefore, impliedly subject to a requirement of survivorship even though such requirement is unexpressed and is not the basis for characterizing the remainder as contingent in interest in the first place. Courts are most inclined to make this mistake when the contingent interest involves a class gift. See *supra* note 30. Many courts and commentators have, however, criticized this view. See SIMES & SMITH, *supra* note 20, § 594.

There are, however, circumstances in which a court has very good reason to infer a condition of survivorship and, therefore, to find a contingency beyond the express requirement that otherwise makes the nonpossessory estate contingent in interest. Consider this specific devise from A: "To B for life, then in fee simple to the children of B who survive B; if none, then to C for life, then in fee simple to the children of C who survive C." Assume that B has one child, B-1, and that C has one child, C-1. Assume further this is the order of their deaths: A, C, C-1, B-1 and then finally B. Upon B's death, B-1's estate cannot take the remainder because she has not survived B. C's estate cannot take the alternative contingent remainder because C's life estate has ended. But what about C-1's estate? To be sure, it is subject to two express contingencies. B's children must survive B, and C-1 must survive C. Both conditions have been satisfied. There is no other express requirement. Does a result that favors C-1's estate, however, make sense? Would A want the subject matter to become a part of C-1's estate even though B-1 outlived C-1? One must remember that B's children had a higher priority in this dispositive scheme than C's children; after all, they were the recipients of the primary remainder in fee simple. Yet a literal application of all conditions yields a result for C-1's estate and not B-1's estate. Surely, this is something most estate owners would not prefer, especially respecting non-residuary gifts. Consequently, a court would have very good reason for finding a condition that C's children must survive B as well as C and, therefore, allow the remainder to pass with the residue. For a decision that finds an implied requirement of survivorship under similar circumstances, see *Irish v. H.J. Profit*, 330 N.E.2d 861 (Ill. App. Ct. 1975).

controls language and the meaning it ultimately establishes. More specifically, they vary conditions and sometimes interests, and they do so even though there is no specific support for these changes within the language or context. The consequence in each instance is that the express language used does not mean what it seems to say, thereby compromising the integrity of the blank slate and the common law paradigm for creation of interests.³³ The common law doctrine of lapse, which requires beneficiaries under a will to survive the testator, presents an excellent illustration of these rules.³⁴ Anti-lapse statutes, which exist in nearly every state, do not eliminate this requirement. Instead, they provide a substitute gift to the living descendants of a limited group of beneficiaries.³⁵ To illustrate, assume that A devises Blackacre: “To B in fee simple absolute.” The effect of the doctrine of lapse is to change the devise: “To B in fee simple absolute if living at my death.” Assuming that B is a child of A, the added presence of an anti-lapse statute changes the devise even further. The combined effect of the doctrine and the statute is the same as if the original limitation had read: “To B in fee simple absolute if living at my death. If not, then to the then living descendants of B by right of representation.”³⁶

As indicated earlier, § 2-707 applies to future interests held in trust, and it was intended to parallel the results achieved by the common law and anti-lapse statutes as to lapsed gifts.³⁷ There is, however, an important difference in the reasons that underlie their respective requirements of

33. One example would involve a transfer from A to: “B and her heirs.” The literal meaning would suggest a gift to B and also to her heirs. But over time the phrase “and her heirs” came to be regarded as words of limitation indicating that B was to receive a fee simple absolute. And, over time, it became the predominant language format for expressing exactly that command.

34. A lapse arises when a beneficiary in a will, who is alive when the will is executed, dies before the testator. The interest fails because of the axiom that the recipient of a present interest must presently exist. In short, one cannot make a devise to a dead person. Consequently, the devise fails unless provision is expressly made within the instrument for a substitute gift. See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 (2d ed. 1953); see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. a (1998).

35. Section 2-603(b) of the Uniform Probate Code, for example, includes deceased devisees (beneficiaries) who are grandparents, descendants of grandparents, or stepchildren of either the testator or the donor of a power of appointment exercised by the testator’s will, and it preserves such lapsed devise for the benefit of the devisee’s descendants who survive the testator. UNIF. PROBATE CODE § 2-603 (amended 1993), 8 U.L.A. 164 (1998). Among the states, there are some significant differences within the group of devisees for whom a lapsed devise is preserved, but there are comparatively few differences with respect to the group substituted for the deceased devisee. For a summary of the differences among state laws concerning lapse, see RESTATEMENT (THIRD) OF PROP., *supra* note 34, § 5.5, statutory note.

36. This is essentially the effect produced by the Uniform Probate Code. See UNIF. PROBATE CODE, § 2-603(b)(1).

37. See generally Waggoner, *supra* note 11.

survivorship. The lapse doctrine derives from something conceptual. Testamentary interests are created at death, and one cannot give to people who are dead and, therefore, nonexistent. They must exist before they can receive, and one who is already dead can never receive the gift.³⁸ This conceptual problem does not arise for persons who do not predecease the testator but die before the time for possession, and so § 2-707 does not impose its survivorship requirement of a time beyond the testator's death for this reason. Instead, § 2-707's condition reflects an assumed choice that most people under most circumstances would prefer because they wish to avoid or conserve death costs and because they want their estate to remain within their family and its constituent branches.³⁹ Section 2-707 does not make future interests without requirements of survivorship and substitute gifts conceptually impossible; indeed, it allows for their creation.⁴⁰ It does, however, revise the language of many instruments that deviate from the dispositive formats established by sophisticated and experienced estate planners. Its overlay reflects imputed choice and not basic conceptualization deemed necessary to a system of testamentary transfer.

Lapse is not, however, the only doctrine or rule that establishes an overlay affecting the zero base and blank slate for creation of interests. Although they are now abrogated in nearly all jurisdictions, the Doctrine of Destructibility of Contingent Remainders and the Rule in Shelley's Case are common law rules that always alter apparent meaning.⁴¹ The former requires contingent remainders to vest at or before the termination of all prior supportive freehold estates; otherwise they are destroyed. More specifically, consider this conveyance by A: "To B for life, then to C when she attains age thirty." Presumably, A intends for C to take if she attains age thirty either before or after the death of B. The rule of destructibility, however, changes this meaning by destroying C's remainder at B's death if she is alive but not yet thirty. The rule effectively revises the language the same as if it had read: "To B for life, then to C if she attains age thirty by the time the prior estate terminates."⁴²

38. See *supra* note 34.

39. See *supra* note 11.

40. See *infra* notes 106–14 and accompanying text for discussion and illustrations of how one overcomes the requirements of § 2-707.

41. For a brief explanation of these two rules and a discussion of their current status, see STOEBUCK & WHITMAN, *supra* note 4, §§ 3.10, 3.16.

42. As previously stated, § 2-707 reflects imputed legislative choice based upon assumed intent of the estate owner and not upon a need to overcome conceptual obstacles derived from logic or history like the underpinnings of the doctrine of lapse. See *supra* note 34. The doctrine of

The effect of the Rule in Shelley's Case is even greater. It applies whenever a freehold estate—almost always a life estate—is created in an ancestor and such estate is followed by a remainder in such ancestor's heirs or heirs of the body. The effect of the rule is to transform the remainder into an added gift to the ancestor in fee simple or in fee tail. For example, consider this devise of land by A: "To B for life, remainder to his heirs." As written, this language gives B merely a life estate. The remainder in fee simple is to a group of people who might potentially qualify as B's heirs, and it is characterized as a contingent interest because of the requirement of survivorship inherent in the term "heirs." The Rule in Shelley's Case completely eliminates the gift to the heirs and the conditions attached to it; instead, the remainder belongs to B without any condition whatsoever. It effectively revises the language the same as if it had said: "To B for life, remainder to B in fee simple." After applying the doctrine of merger, the gift then becomes: "To B in fee simple." Clearly, this is something A did not intend to say or create. Nevertheless, the Rule in Shelley's case applies because it is a rule of property and not a rule of construction that must give way to evidence of a contrary intent.⁴³

The common law offers other examples as well, particularly, rules that set limits to how individuals can encumber the interests they create. Two of these rules can be illustrated with a single example. Consider this transfer of Blackacre by A: "To the Centerville School District in fee simple provided such School District never transfers or conveys Blackacre to any other person or entity; if and when this absolute prohibition upon transfer or conveyance occurs, the School District's interest shall terminate forthwith and be given over to C in fee simple absolute." On its face, this limitation creates in the School District a fee simple subject to a contingent executory interest that is given to C in fee simple absolute.⁴⁴

destructibility is another example of a principle that derives from history and the conceptual challenges it presented. At its core was the concept of seisin and two of its characteristics: first, that there could be no livery of seisin *in futuro*, and second, that seisin could not be held in abeyance. See MOYNIHAN & KURTZ, *supra* note 2, at 169–77.

43. Rules of construction must give way to evidence of contrary intent. Section 2-707 presents a rule of construction. See *supra* note 9. The rules that govern distinctions between vested and contingent interest and the composition of class gifts are also rules of construction. The Rule in Shelley's Case and the Common Law Rule Against Perpetuities, however, are rules of property that must apply even if one does not intend their application. Nevertheless, one should observe that there are times in which the distinction becomes blurred because often courts will apply a rule of construction even in the face of contrary intent. And, conversely, there are circumstances in which courts will bend the interpretation of language to avoid the application of the Rule in Shelley's Case and the Common Law Rule Against Perpetuities.

44. The School District has a possessory interest with words of limitation that make it a fee simple. However, it cannot be a fee simple absolute because of the condition of defeasance that cuts

Two rules, however, must be satisfied under these circumstances; if either is violated, then the condition of divestment and the executory interest it introduces will fail. More specifically, the common law forbids direct restraints upon alienation—even when they take the form of a forfeiture—imposed upon a fee simple, especially when such restraint is unlimited in scope and time.⁴⁵ In this instance, the condition of defeasance imposed upon the School District constitutes a direct restraint. Because it is attached to a fee simple and is direct and unlimited, it is unenforceable and, therefore, the gift to C must fail. As a result, the School District's fee simple defeasible becomes absolute.

Quite apart from inclusion of an unenforceable direct restraint, the foregoing condition also introduces a violation of the common law rule against perpetuities.⁴⁶ In this instance, the condition that forbids transfer is unlimited in time. Indeed, it can occur well beyond the deaths of A and C or anyone else alive at the time A executed his deed transferring ownership to the School District and C. Vesting of the executory interest created in C depends only upon a breach of the express condition—that the School District never transfers Blackacre to anyone. It does not require that C, or anyone else, be alive when the condition embodying the restraint upon alienation is violated. With this in mind, there is a perpetuities violation. More specifically, it is possible for C to die and devise her interest to C-1, a child born after A's conveyance was made. Additionally, everyone else alive at the time of the conveyance—including A—can die thereafter, and the School District might then breach the condition more than twenty-one years later. As written, the executory interest would then vest in C-1 beyond the period of time allowed under the common law rule against perpetuities. As a result, the executory interest held by C-1 fails, and the School District's fee simple becomes absolute.

short the estate in the event Blackacre is ever conveyed. Because the giftover is to a third party, someone other than the transferor, C receives an executory interest rather than a possibility of reverter or a power of termination.

45. For full discussion of the various kinds of direct restraints and their validity, see SIMES & SMITH, *supra* note 20, §§ 1136–71.

46. In this illustration, although C's contingent executory interest violates the common law rule against perpetuities, it may not violate the Uniform Statutory Rule Against Perpetuities. The former rule presents a possibilities test which is tied to a measuring period consisting of lives in being plus twenty-one years. If there is any possibility for remote vesting, C's interest violates the rule, and it must fail. The latter rule, however, presents an actualities test which is tied to a measuring period consisting of ninety years. An interest does not violate this rule unless after waiting for ninety years from the time it is created vesting has not occurred but may still happen at a later time. See UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1(a)(2), 1(b)(2), 1(c)(2) (amended 1990), 8B U.L.A. 236 (1998). Consequently, if the forbidden transfer by the School District occurs within ninety years, the condition and divestiture will be enforced, and C or C's successors will then assume possession.

The foregoing rules superimpose upon the blank slate for creation an overlay of negatives that breach the common law paradigm in which silence means nothing.⁴⁷ This overlay affects the zero base upon which lawyers build interests and conditions cumulatively. Unless these negatives are removed or overcome through skilled planning and drafting, creative language formats may not yield meanings lawyers intend to achieve. This overlay—also derived from the common law—often rested on reasons that had become obsolete. Because of this and the frustration of intent that inevitably resulted from their application, most of these rules have been moderated or eliminated. Both the Rule in Shelley's Case and the Doctrine of Destructibility of Contingent Remainders have been abrogated in nearly all jurisdictions.⁴⁸ Additionally, the Rule Against Perpetuities has been reformed in nearly all jurisdictions so that it is not nearly as harsh regarding both the requirements for a violation and its consequences.⁴⁹ As a result, over the last century, the body of negatives has been significantly reduced and the common law paradigm and its zero base have been restored and greatly strengthened. Indeed, the slate for creation remains essentially blank so that interests and conditions still do not exist without a clear basis in language or context.

C. The Effect of the Common Law Paradigm on the Way Lawyers Create Interests

As one might expect, the systems lawyers use for the creation of interests derive from the common law paradigm. Lawyers begin with a zero base and they cumulatively build upon it the dispositive transfers their clients intend. In effectuating such transfers, lawyers do not, however, have unlimited discretion. Only certain kinds of estates are recognized and, therefore, can be created.⁵⁰ These interests often require certain language formats to assure their formation.⁵¹ Once created, these

47. To be sure, the Doctrine of Destructibility and the Lapse Doctrine, along with its modern day anti-lapse statute counterpart, intrude upon the meaning of silence and the existence and scope of conditions, thereby breaching the common law paradigm. One should, however, observe that the Rule in Shelley's Case, the Rule Against Perpetuities, and the Rule Against Direct Restraints go even further by altering both the literal and intended meaning of language.

48. See *supra* note 41.

49. For a summary of the reformation of the Common Law Rule Against Perpetuities, including its revision and in some instances its abolition, see STOEBUCK & WHITMAN, *supra* note 4, § 3.22.

50. The fee simple absolute is the largest estate, mainly because it is of potentially infinite duration. The fee simple can, however, be subdivided but only into a limited and fixed number of smaller estates. This rigidity—with exceptions—also extends to the attributes that attend each of these estates. For further discussion, see SIMES & SMITH, *supra* note 20, § 61; see also *infra* note 52.

51. Historically, creation of the fee simple by deed required a particular language format. And if

estates have certain attributes that can be varied within limits.⁵² With this in mind, the process for transfer begins with a blank slate—a dispositive base set at zero—and upon this slate one must build by adding the particulars of the intended transfer. This process uses positives and not negatives; indeed, it builds interests and the conditions attached to them by addition and not by subtraction.

For example, assume that A begins with absolute ownership—a fee simple absolute—in a tract of land and wants to dispose of it completely. L, A’s lawyer, must transform A’s choices into reality, and she accomplishes this through expressed positives—expressed estates—that ultimately add up to A’s fee simple. In a sense, the process resembles creation of a shopping list that will match the amount of money one has to spend. L must formulate this list through positives that express what A wants and not through negatives that reject things A does not desire. If A wishes to invest full title in B by giving him a possessory fee simple absolute, L will not accomplish this by using negatives that set out all of the interests A does not intend. L will not say: “To B, not for life, not in fee tail, not for years, not from period to period, and not at will.” Instead, the fee simple will be created through positive affirmation by using language formats that confirm such estate.

Further, if A wishes to condition B’s use of the land and make his fee simple subject to forfeiture, L must do so affirmatively. Without an express condition of defeasance such restriction does not exist. If it is not there in writing, then it is not there in substance. Indeed, L must take great care to express the species of defeasible estate A desires. Without symbolic language or full and accurate elaboration of the condition and the consequences of its breach, courts will not reach a construction that

the transfer involved a devise, this same format was preferred and almost always assured creation of the fee simple. More specifically, the format required the phrase “and heirs” in addition to designation of the person or persons who were to receive the fee simple. *See supra* note 3.

52. For example, alienability is considered an essential feature of the fee simple. Indeed, one court has observed that without such attribute, the interest under consideration could not be a fee simple at all but rather a mongrel estate unrecognized by law. *See generally* *Mandelbaum v. McDonell*, 29 Mich. 78 (1874). Consequently, direct restraints against alienation imposed upon a fee simple have been deemed unlawful and, therefore, unenforceable. Nevertheless, conditions that indirectly restrain alienability have been permitted. As a result, forfeiture conditions that limit the manner in which land is used are enforceable. For example, a devise by A to “The Young People’s School so long as the land is used exclusively for a children’s preschool program; if and when not so used, the estate herein created shall automatically terminate and the land shall revert to A, her heirs and assigns” would be enforceable even though such condition significantly diminished the marketability of the land while owned by the grantee or its successors. For a brief summary of these principles, see NELSON, STOEBUCK, & WHITMAN, *supra* note 16, at 284–86.

renders the fee simple subject to forfeiture.⁵³ But if the required language is present, then A has not conveyed away her interest completely. She retains the fee simple absolute by way of a possibility of reverter or a power of termination.⁵⁴

If, however, A wants to give B a lesser estate, then—once again—L must accomplish this through positive affirmation. L must not say: “To B, but not in fee simple.” Instead, L must say: “To B for life.”⁵⁵ Without more, this does not exhaust A’s estate, which is in fee simple absolute. Accordingly, A retains a reversion and if she wants to avoid this, then the

53. Two important biases exist when courts must determine whether an instrument has created a defeasible estate. First, courts are loathe to find a forfeiture and, therefore, they will not find a defeasible estate unless the language properly fashions such an interest. Indeed, they much prefer to find some other legal relationship, such as a covenantor trust, and on occasion, they may even treat conditional language as precatory. For example, ordinarily, creation of a fee simple determinable requires language of special limitation (so long as, during, until, unless, etc.), and to ensure such construction, one should also add language that spells out a reverter that becomes possessory in the transferor automatically upon breach. Further, creation of a fee simple upon a condition subsequent ordinarily requires language of condition coupled with an express power of termination in the transferor that offers the option of recovering possession after the breach. Without more, language of condition or purpose will not suffice. If these requirements for creation are not fully met through use of the appropriate symbolic phrases, most courts will not find a fee simple defeasible. Second, if compelled to find some species of defeasible estate, courts much prefer to find a forfeiture that’s optional rather than automatic. Consequently, language that does not meet the rigid requirements for creation of a fee simple determinable ordinarily will be construed to be a fee simple upon a condition subsequent even though the limitation seems to reflect an intent to create a fee simple determinable. More specifically, if the limitation presents language of condition or purpose coupled with a declaration that upon breach the transferee’s interest shall become null and void and then revert to the transferor, many courts will find that the forfeiture is optional and not automatic. For full discussion, see SIMES & SMITH, *supra* note 20, §§ 247–49, 286–87.

54. Whether A retains a possibility of reverter or a power of termination depends upon the kind of defeasible fee simple she creates in B. If A creates a determinable fee simple in B, an estate that automatically terminates upon breach of the condition attached to B’s estate, then A retains a possibility of reverter. If, however, A creates a fee simple upon a condition subsequent in B, an estate subject to optional forfeiture upon breach of the condition, then A retains a power of termination. In either case, the species of defeasible estate created in B and the kind of interest retained by A will depend almost entirely on the language format used by A. See *supra* note 53.

55. When language designates a transferee without describing the interest received, courts always need a default construction of some kind that categorizes the kind of estate created. Under early common law, the life estate was the default interpretation if the transfer satisfied the requirements for creation of a freehold estate. For example, if a deed provided for a transfer from “A to B,” then without more B would have received a life estate. The transfer lacked words of limitation and without the required symbolic phrase—“and his heirs”—the conveyance would not effectively invest a fee simple of any kind in B. If not a fee simple, and if not declared to be some other kind of estate through additional language, it was by default assumed to create a life estate in B.

Today, however, the predominant default construction is the fee simple absolute. See 1 AMERICAN LAW OF PROPERTY § 2.4 (A. James Casner ed., 1952) [hereinafter AMERICAN LAW OF PROPERTY]. Ordinarily, if the formalities required for the conveyance of a freehold estate have been satisfied, creation of a fee simple absolute is assumed unless the language clearly indicates creation of a lesser estate. Once again, this default construction does not arise without positive affirmation of a transfer to someone, and skilled drafting will also utilize positive affirmation to define the kind of estate created.

list of estates created must include a fee simple that will vest and become possessory in some person or entity at some time. Putting this within a familiar context, A may have in mind a testamentary plan in which she expresses a desire to care first for her husband, H. Nevertheless, she ultimately wants her children to benefit from this tract of land and the other assets she owns. This presents a scenario that calls for a trust, with her husband to have an income interest for life and her children to have the principal absolutely and forever.

Often, however, the process for creation is reversed. A begins with an idea of who is to have the subject matter absolutely. Further discussion, however, sometimes reveals a desire to benefit others as well, for example, family members whose needs might be more immediate and more acute. Consequently, possession of the fee simple—or in the case of a trust, distribution of the principal—must be deferred through the creation of prior possessory interests. In each instance, these prior interests must be affirmatively expressed. If they are not, then silence represents a gap in time, especially if possession of the fee simple has been deferred. This gap or failure to divest all of A's interest is then viewed—as it nearly always is—as an incomplete disposition. As a result, this portion of A's original interest essentially stays where it has been; namely, it still belongs to A.⁵⁶ If A is to divest her estate, then A must exhaust such ownership and she must sequence gifts through affirmative expressions that properly add up to the full measure of her estate—a possessory fee simple absolute.⁵⁷

Returning to the example involving A, her husband H, and their children, A may wish to include some conditions and substitute gifts after considering the impact of death costs and the possibility that the subject matter may be diverted from her family through the estates of deceased children. More specifically, L might recommend that the gift of principal to the children should be subject to a condition of survivorship of the death

56. For example, if A were to make a specific devise of Blackacre to "B and her heirs upon the expiration of twenty years following my death," then silence as to who benefits during the twenty-year period of time would constitute a gap in the dispositive design. Presumably Blackacre would remain a part of A's estate and, accordingly, belong to the residue until twenty years had elapsed.

57. If A, who has a possessory fee simple absolute, elects to convey a fee simple absolute to C with possession deferred until a specific event occurs, complete disposition of A's interest would require creation of an additional interest or interests that add up to the full time in which C's possession has been deferred. For example, if A defers possession of C's fee simple absolute until twenty years have expired, A must fill in the twenty-year gap with other estates. A ten-year estate in B would not suffice, and so A must respond with another estate or estates that last an additional ten years. Nor would a life estate in B suffice because B might die before the twenty years has expired. In this instance, A must fill in the potential gap by creating estates that are certain to last until C's possession commences.

of H; for example, “after the death of H, the principal shall then be distributed to my then living children absolutely and forever.” This would remove it from the estates of deceased children, thereby avoiding estate taxes at their respective deaths and preventing them from passing their remainder to those outside of A’s family.⁵⁸ With this condition and nothing more, the share of any deceased child would be absorbed in the class gift that remained for the survivors.⁵⁹ One should note, however, that this gift becomes incomplete if all of A’s children were to predecease H. No affirmative expression exists and because of this possibility, the disposition is incomplete and A retains a reversion in fee simple. Therefore if all children predeceased H, the principal would then revert to A and pass with the residue of her estate.

Neither of these results may fully satisfy A. If a deceased child has living descendants, she may favor these descendants over other surviving children. Further, she may not want the subject matter of the trust to pass with the residue in the event the gift of principal were to fail completely. Consequently, L must inform A of the possible misdirection of principal and the gap that might render the disposition incomplete, explain the choices A has, and then affirmatively set out the dispositive design A elects. Once again, these choices must be made through positive expressions that add to the zero base from which L begins to build A’s choices. As a result, L must identify the gap—especially those that seem remote, such as all of A’s children predeceasing B—and then set out to whom the principal should pass under these circumstances. For example, assuming A opts for a substitute gift to living descendants of a deceased child and a gift over to a charity in the event B is not survived by any of A’s descendants, L might add the following language: “. . ., the living

58. By conditioning the future interest given to children upon the death of H, A has removed the principal from the gross estate of children who do not survive. Conversely, if the future interest were transmissible at death because it was not subject to a requirement of survivorship, it would be included within the estate of a deceased child just the same as any interest that had become possessory before such child’s death. *See* 26 U.S.C. § 2033 (2000). Further, because the expenses incurred in estate administration are ordinarily a function of the size of the estate, and because the estate of a child who predeceased H would not include a share of the principal, such requirement of survivorship would also offer savings regarding these death costs. Finally, because of this condition of survivorship, the share of any child who predeceased H would belong to children who survived H. Consequently, such condition would also assure retention of the principal within A’s family as to the shares of children who predeceased H. This would not be true, however, in the absence of a requirement of survivorship. Although a child cannot circumvent the statutory share of his surviving spouse, and although he must satisfy the requirements of a pretermitted heir statute, he can devise his transmissible future interest just the same as he could have devised it if he had survived the time for possession and distribution of principal, which means in the end that such child can divert his share from A’s family.

59. *See supra* note 22 and accompanying text.

descendants of any deceased child to take his or her interest by right of representation; further, if B is not survived by any of A's descendants, the principal shall then pass to 'X' charity."

This strategy for creation is inevitable whenever conditions are imposed. For every contingency that is added, one must account for both its compliance and its breach. If a future interest in Z, a person, is made contingent upon survivorship of the time for distribution, one must build an express consequence—an express alternative—in the event Z fails to survive such point in time.⁶⁰ Further, if one adds additional conditions, such as attainment of age twenty-five, then one must provide an answer for the various combinations of compliance and breach that can arise. To be sure, the common law affords a result by default.⁶¹ Once again, courts are disinclined to supply unexpressed conditions or find unexpressed substitute gifts. Further, if a gap exists because of a failure to anticipate the circumstance and explicate a solution, the subject matter reverts. As a result, sometimes the future interest will fail altogether, and at other times

60. There are, however, some circumstances that one might view as an exception because the limitation already contains an unexpressed built-in solution in the event a future interest fails because a condition is not satisfied. Consider, for example, this specific devise by A of a defeasible fee simple: "To B in fee simple; however, if B dies without surviving descendants, then to C in fee simple absolute if then living." Suppose that C survives A but predeceases B and, thereafter, that B dies without ever having had descendants. Some courts would treat B's fee simple as if it were determinable and automatically cause the subject matter to revert to A's estate. Others would, in the absence of a condition or other contextual facts confirming an intent to terminate B's interest under these circumstances, find that B's interest becomes absolute. They would observe that B's fee simple is subject to an executory interest and is not by its terms determinable. Consequently, that which is vested remains vested until and unless the precise occasion for divestiture arises. That circumstance has not occurred—C did not survive B—and, therefore, B's interest remains exactly where it is. Silence continues to mean nothing in the sense that the interest stays put unless and until something else by way of a substitute gift is expressed or made abundantly clear. For further discussion, see SIMES & SMITH, *supra* note 20, § 824.

61. Suppose, for example, that the principal were to pass at H's death to "such of my then living children who attain age twenty-five absolutely and forever." As written, to become eligible, a child must satisfy both conditions. This much is clear: a child is excluded from the group gift if she attains twenty-five before the death of H but does not survive H. Similarly, she is excluded if she survives H but does not thereafter attain age twenty-five. Those who do satisfy both requirements are entitled to share the entire gift of principal. What happens, however, if the last to die survives everyone involved—H and A's children, including those who have already joined the class by satisfying both conditions—but does not attain age twenty-five? Presumably, this share will be absorbed by the gift to children who have previously qualified. Yet this may not be the result desired by A under these circumstances. A might prefer a giftover of such presumptive share to another person or group. The logical choice would be the then living descendants of deceased children. Indeed, A might want to assign the highest priority to this group for any child who had descendants but did not qualify as a class member. Addition of this kind of choice increases the complexity significantly because one must always account for the failure of either condition or both conditions in explicating a dispositive selection. For a related illustration, see *In re Bilham*, 2 Ch. 169 (1901).

it remains in abeyance until the condition is met or can never be satisfied.⁶²

Once again, because conditions heighten the importance of previewing the full range of alternatives they occasion, the common law paradigm calls for meticulous building of express conditions and substitute gifts that respond to every possibility. In the end, one must make certain that the express dispositive components appearing on the slate—which begins as blank and has a zero base—add up to the full measure of what the transferor holds and wishes to convey.⁶³ Although the conditions themselves may negate interests otherwise created, the dispositive equation itself is always accomplished through positive expressions. In short, nothing moves by way of disposition unless expressed.⁶⁴ Accordingly, the process for creation must inevitably focus on exactly that. One must set out the basic idea, anticipate the gaps or oversights in the design, and then fill them with further expression.

62. For example, consider a devise from A that creates a life estate in B, followed by remainder to C in fee simple, which is subject to a condition with a substitute giftover to D. If C's remainder is contingent, and if the condition cannot be fulfilled beyond the death of B (such as a requirement that C survives B), then the substitute gift to D should control if C does not satisfy such condition. If, however, one adds a second condition not fulfilled by the time of B's death, but capable of fulfillment after the death of B (such as attainment of age thirty), or if such condition is the sole contingency, then the giftover to D will not control unless C's interest is deemed to fail and the gift to D by its terms must take effect in the event C's interest fails for any reason. In the absence of such language, a court might have both C's and D's interests fail either because of the rule of destructibility applicable to contingent remainders, *see supra* note 41, or because the provision contained language indicating that full compliance must occur by the time of B's death. If the interests of C and D do not automatically fail for either of these reasons, vesting will be held in abeyance and the subject matter will temporarily revert back to A's estate until C does or does not attain age thirty after the death of B. These results—failure and reversion back to A's estate or abeyance and temporary reversion back to A's estate—will obtain if the remainder to C is classified as contingent. If, however, it is deemed vested subject to divestment, the subject matter (and with it the benefits of interim income) will remain in C until C does or does not attain age thirty. In the event of the former, C's interest becomes absolute, but if the latter occurs, C's interest will then be divested in favor of D.

63. Usually this adds up to the full measure of the transferor's interest. There are, however, instances in which the full measure of what the transferor wishes to convey is less than the estate she holds. This would be true when the gift is non-residuary and the residue is intended to be the ultimate repository for certain contingent interests that have failed because their dependent conditions have not been satisfied.

64. This is usually accomplished through clear delineation of specific interests. However, it sometimes arises by implication as a result of ambiguous language. Nevertheless, courts are reluctant to fabricate unexpressed interests. Implied interests are almost always grounded upon some kind of language and the estate design it evidences.

III. SECTION 2-707 AND ITS IMPACT ON THE COMMON LAW PARADIGM AND THE CREATION OF INTERESTS

A. *Illustrations of How and When § 2-707 Deviates From the Common Law Paradigm*

Section 2-707 invents conditions and substitute gifts not found in clearly expressed trusts, and in specific instances it yields distributions to people who were never intended to benefit. But the impact of § 2-707 is even greater because of the way it alters the common law paradigm for the creation of interests. Indeed, if lawyers do not preempt its application to the trusts they draft, it can lead to profound changes in the way interests are created and dispositions are made. As described earlier, § 2-707 presents merely two changes to the law of future interests, but they are very significant.⁶⁵ First, it requires beneficiaries of all future interests created by trust to survive the time for distribution, and it does this even though such condition is neither expressed nor implied. Second, for a beneficiary who fails to satisfy this condition of survivorship—whether expressed or imposed by § 2-707—§ 2-707 fabricates a substitute gift to the living descendants of such deceased beneficiary, and it does this even though such gift is not expressed or implied. The latter change tracks the pattern of substitute gifts created by the anti-lapse provision under the same Code. Unlike most anti-lapse statutes, however, application of § 2-707 is not limited to certain groups of relatives, but instead it applies to all beneficiaries—even those who are unrelated to the estate owner.⁶⁶

These changes can be illustrated. Consider the following testamentary trust created by A: “Income to B for life; following B’s death, the principal shall be distributed to C absolutely and forever.” Because no requirement of survivorship by C is expressed, then none exists under the common law paradigm; consequently, the principal will pass at B’s death to C if living or, if dead, to C’s successors.⁶⁷ Under § 2-707, however, C must survive the death of B—the time for distribution—otherwise C’s

65. See *supra* notes 7–8 and accompanying text.

66. Section 2-603(b), the anti-lapse provision of the Uniform Probate Code, is limited to devisees who are grandparents, descendants of a grandparent, or stepchildren of either the testator or the donor of a power of appointment exercised by the testator’s will. See *supra* note 35. Most anti-lapse statutes similarly confine protection of lapsed devisees to relatives. Some, however, protect lapsed devisees created in all devisees. See RESTATEMENT (THIRD) OF PROP., *supra* note 34, § 5.5, statutory note 3.

67. One should note that C could convey C’s interest before B’s death through an *inter vivos* transfer or (in the event of C’s death) through a testamentary devise. Consequently, C’s successor could acquire C’s interest in the principal before the trust had terminated and before possession had been conferred.

interest will fail.⁶⁸ Because of § 2-707, one must now interpret the foregoing trust provision the same as if it had said: “(F)ollowing B’s death, the principal shall be distributed to C absolutely and forever if then living.”

If A had expressed this same survivorship requirement—and nothing more—under the common law paradigm, the gift of principal would have reverted back to A’s estate if C predeceased B. The only remainder created by A was in C. Because the trust contained no substitute gift, disposition of the principal was incomplete, and, accordingly, the subject matter must revert. If the creative slate elaborates no substitute gift, then the slate must remain blank in this regard. If it is not there, then it does not exist. Nevertheless, under § 2-707 this result would not obtain. It fabricates an automatic substitute gift to the living descendants of the deceased beneficiary.⁶⁹ Consequently, if C predeceases B and leaves descendants alive at B’s death, the principal will pass to them. Therefore, once one combines the two main requirements of § 2-707, the original trust provision must be interpreted the same as if it had said: “(F)ollowing B’s death, the principal shall be distributed to C absolutely and forever if then living. If C predeceases B, then the principal shall be distributed to C’s descendants alive at B’s death to take by representation.”

As previously discussed,⁷⁰ if the trust principal had been left to a class—for example, A’s siblings—a requirement that class members must survive B would not cause the gift of principal to fail unless all members predeceased B. Because a class gift implicitly carries with it a built-in substitute gift to class members who satisfy all requirements for inclusion, A’s siblings who survive B would always be entitled to receive the entire principal. Class gifts are used because of their elasticity, something that gives them a capacity to expand and contract in size.⁷¹ The rules of

68. See UNIF. PROBATE CODE, § 2-707(b) (amended 1993), 8 U.L.A. 194 (1998). Even with a statutory substitute gift to C’s descendants, see *infra* note 69, one should carefully observe that C’s privilege to own and transmit the absolute interest in the principal is terminated the moment C fails to survive B. C’s claim to an interest that lasts forever, and with it the ability to control its ownership following his death, fails and is extinguished completely even though C’s living descendants will take in his place. C’s descendants do not take directly from C. They take as a result of a statutory choice made on behalf of A just the same as if A had expressed it herself. The statutory requirements of survivorship and the substitute gift to C’s living descendants cut off and displace C’s interest, and as a result, the descendants take as successors to A and not C.

69. See *id.* § 2-707(b)(1), (b)(3).

70. See *supra* note 22 and accompanying text.

71. In all likelihood a class gift to A’s “brothers and sisters absolutely and forever who are alive at B’s death” would present a class gift subject to contraction only and not expansion. Given the fact that A is the estate owner, and quite clearly into adulthood, expansion of the class of brothers and sisters has undoubtedly become impossible or improbable because A’s parents may not be alive or

construction, therefore, that govern their composition seem to be an accurate reflection of what people intend. Indeed, if A had provided that the gift of principal were to be distributed to “my brothers and sisters absolutely and forever who are alive at B’s death,” one might justifiably assume that A intended to restrict the gift to surviving siblings and not to include the surviving descendants of deceased siblings.

Once again, however, § 2-707 alters this result.⁷² If there is no express requirement of survivorship, then § 2-707 adds such condition along with the substitute gift to descendants. But § 2-707 also goes further in stating that express conditions of survivorship are not, without more, enough to overcome its requirements.⁷³ This means that language that otherwise restricts a class to surviving members will not be interpreted in that manner. Instead, those who survive must share the principal along with the living descendants of those who did not.

One should also observe that the foregoing requirement—that words of survivorship are not enough to overcome § 2-707’s rules of construction—superimposes a condition of survivorship of the time for distribution even when the trust includes express conditions of survivorship that are unrelated to the time for distribution.⁷⁴ Consider this testamentary trust that disposes of the residue of A’s estate: “Income to H, my husband, for life; thereafter, the principal shall be distributed to D, my daughter, if she attains age thirty. If, however, she does not attain age thirty, then the principal shall be distributed to the Washington University School of Law.” Suppose D attains age thirty but predeceases H. Once again, the common law paradigm begins with a blank slate. If a condition is expressly added to the zero base, then the slate is no longer blank. Nevertheless, the paradigm only accounts for the announced condition. Unexpressed requirements simply do not exist. Consequently, having attained age thirty, D would acquire an indefeasibly vested interest that

likely to have additional children. If, however, A’s gift of principal were to “B’s children absolutely and forever who are alive at B’s death” and B had expectations of more children, then the class gift to B’s children would be subject to expansion and contraction. For example, assume that when the gift is made by A, B had two children, B-1 and B-2. Assume thereafter that B-1 predeceased B and that B had two additional children, B-3 and B-4. Because A had used group terminology that signified creation of a class, and with it had wanted to attach the consequences of a class gift, courts would assume that A intended to make all the children B might have eligible for membership. Consequently, following creation of the gift the group would expand and B-3 and B-4 would become eligible for inclusion. However, because B-1 failed to satisfy the requirement of survivorship, he would be dropped from the group which would contract and ultimately include only B-2, B-3, and B-4.

72. See UNIF. PROBATE CODE § 2-707(b)(2), (b)(3).

73. See *id.* § 2-707(b)(3); *id.* § 2-707 ex. 6.

74. See *id.* § 2-707(b)(3).

would pass to her successors in interest without regard to whether she thereafter survived H.

This is not, however, the result commanded by § 2-707. Absent additional evidence,⁷⁵ § 2-707 would control, and its statutory requirement that the beneficiary of a future interest must survive the time of distribution would not be averted. Under § 2-707, it is not enough that A apparently contemplated survivorship, but only expressed a condition pertaining to age. The statutory fabrication involving a requirement of survivorship of the time for distribution will alter the landscape of the creative slate—no matter how many other conditions are expressed—unless it is repudiated in a manner permitted under the statute.⁷⁶ The foregoing changes caused by § 2-707 have great significance because they infuse conditions and substitute gifts into trusts even though the expressed additions to the creative slate reveal no evidence of or basis for their existence.

To be sure, because § 2-707 is merely a rule of construction, one can create a trust that deviates from its requirements. More specifically, the statutory substitute gift to the living descendants of a deceased beneficiary of a future interest can be preempted by the express creation of an alternative future interest.⁷⁷ For example, reconsider the foregoing illustration in which the future interest is subject to an express requirement of survivorship of the time for distribution and possession: “Income to B for life; following B’s death, the principal shall be distributed to C absolutely and forever if then living.” Once again, if C predeceases B but leaves descendants who survive B, § 2-707 compels distribution of principal to such descendants instead of reverting back to the estate of A, the transferor. If, however, A had expressly created an alternative future interest in D—for example, “if C is not then living, the principal shall be distributed to D absolutely and forever”—such alternative gift should preempt the statutory substitute gift to C’s living descendants.

75. See *supra* note 9. In all probability, the additional evidence needed to overcome the statutory requirement for survivorship of the time of distribution must include either explicit negation of such condition or a blanket negation of § 2-707 and all of its requirements. See *infra* notes 103–12 and accompanying text.

76. Once again, § 2-707 presents merely a rule of construction. See *supra* note 9. Presumably, then, this far-reaching statutory requirement of survivorship can be overcome with language that repudiates it. Nevertheless, by clearly expressing what is not sufficient to overcome the condition requiring survivorship of the time for distribution, the statute sets ground rules that seem to dismiss techniques based upon clear inference. Consequently, one must develop unambiguous techniques of repudiation that work successfully and without fail. See *infra* notes 103–12 and accompanying text.

77. See UNIF. PROBATE CODE § 2-707(b)(4) (amended 1993), 8 U.L.A. 194 (1998).

One must, however, recognize that § 2-707 imposes several important qualifications to preemption that ultimately restrict and prevent it from occurring and, therefore, tamper even further with the common law's paradigm for the creation of interests. To begin with, all alternative future interests are subject to the same statutory condition of survivorship of the time for distribution even though the language does not include⁷⁸ or even support such requirement.⁷⁹ For example, in the foregoing illustration, assume that the trust involved A's residuary estate, and that A's "end gift" of principal was the one to D. Once again, under the common law paradigm, a condition does not exist unless expressed. A's substitute gift to D is predicated upon one condition only—that C is not alive at B's death. Consequently, if both C and D predeceased B, the remainder will vest in D and the principal will pass to D's successors in interest.

Section 2-707, however, dictates a different result. And that result will depend upon whether C and D have descendants and whether D is a descendant of C.⁸⁰ To begin with, under no circumstances will the principal pass to D's successors as it would under the common law. Further, even though A's substitute gift to D is intended as an "end gift"—a final catch-all receptacle—the principal would pass to A's heirs at law if neither C nor D left descendants alive at B's death.⁸¹ And these heirs at law would be determined as if A had died at the time of B's death. Clearly, this would yield a result at odds with not only the common law paradigm

78. Section 2-707 requires that the designated beneficiary of an alternative future interest be entitled to take in possession or enjoyment. *See id.* § 2-707(b)(4). Because an alternative future interest is still a future interest, it cannot take effect in possession or enjoyment without satisfying § 2-707's universal requirement of survivorship of the date for distribution.

79. This requirement of survivorship would apply even though the alternative future interest constituted the end gift of the residue and failure of such interest might yield an intestacy. Intestacy is, of course, a result that courts presume estate owners do not prefer.

80. Assuming that C has living descendants but D does not and that both predecease B, C's descendants would take the principal because D's alternative future interest would not become eligible to supersede the substitute gift to C's descendants. *See supra* note 78. If, however, D has living descendants but C does not, then D's descendants would take the principal. C's primary remainder would fail because C failed to survive and had no substitute living descendants. D's alternative future interest would fail because D did not survive. However, because the statute provides a substitute gift to living descendants for all future interests in which the beneficiary fails to survive, such substitute gift to D's descendants would take effect. *See* UNIF. PROBATE CODE § 2-707(b)(1). Assume, however, that both C and D predecease B and that both leave living descendants. In this event, a very complicated provision controls the determination as to which setoff living descendants prevails. This determination is ordinarily made in favor of the descendants of the holder of the primary future interest—C's descendants—unless D's remainder qualifies as a younger-generation future interest, for example, if D were a child of C. In that event, the descendants of D would take the principal. *See id.* § 2-707(c).

81. If there are no surviving takers because neither C nor D survives B and because neither C nor D has descendants then living, § 2-707 provides that the principal is to pass to A's heirs if the trust was created by a residuary devise in A's will. *See id.* § 2-707(d).

but with A's intent as well, especially if A's will did not include any of the heirs who might ultimately benefit under his residuary trust.⁸²

This requirement of survivorship imposed by § 2-707 upon the beneficiary of the alternative future interest is not, however, the only prerequisite to preemption of the substitute gift to living descendants of a deceased beneficiary of a future interest. Returning to the previous example, assume that the trust does not involve the residue, which in this instance is devised outright to D absolutely and forever. Nevertheless, in this illustration the result would seem to be the same because the giftover, in the event C does not survive B, is expressly made to the residue. With this in mind, the trust would provide: "Following the death of B, the principal shall be distributed to C absolutely and forever if then living, and if C is not then living, the principal shall be distributed and pass with the residue to the residuary taker." Assume that C predeceases B, but leaves descendants who survive B. Further, assume that D also survives B. Who is entitled to the trust principal?

Clearly, because C has predeceased B, C does not have an interest under the trust that is transmissible at death. The terms of the trust indicate that the principal must pass to the residuary taker, D. This would be consistent with the result reached under the common law paradigm. Once again, if there is a condition of survivorship that is breached, absent an express substitute giftover the remainder fails. A substitute gift is nonexistent until and if it is expressed. Accordingly, the disposition is incomplete, and the principal reverts and passes with the residue. The language within the provision itself expresses a substitute gift, but it is to the residuary taker. Accordingly, it merely spells out what would otherwise occur under the common law paradigm, but in doing so it clearly reveals A's intent and determination that D should take by way of substitution for C.

Section 2-707, however, alters this result. Section 2-707 does classify the residuary gift as a future interest,⁸³ but it expressly precludes it from becoming an alternative future interest capable of preempting the statutory substitute gift to living descendants of the primary beneficiary—C.

82. If none of the beneficiaries of A's lifetime transfers and under A's will—including the residuary trust—were potential heirs at law, one might readily assume that A did not view his family as the objects of his estate. And it would be no stretch to assume that A wanted to exclude them. To be sure, a statement saying exactly that might be enough to overcome § 2-707(d) because, after all, it only establishes a rule of construction. *See supra* note 9. Nevertheless, one cannot know for certain what a court would conclude. Consequently, at the very least, this circumstance would invite litigation between D's successors and the heirs of A.

83. *See* UNIF. PROBATE CODE § 2-707(d)(1) (amended 1993), 8 U.L.A. 194 (1998).

Further, this preclusion obtains under § 2-707 even when a nonresiduary devise specifically provides—as in this illustration—that a failed gift shall pass with the residue.⁸⁴ Consequently, despite the explicit direction that the residuary taker, D, is to receive the principal in the event C predeceases B, the remainder will instead pass to C's surviving descendants. They will prevail even though the language states otherwise and even though the trust contains no substitute gift on their behalf or even mentions them.

One should note that the foregoing departure from the common law paradigm presents something qualitatively different from the previous illustrations. Each of the others deviated from the paradigm's blank slate; namely, as a general rule, unexpressed conditions and gifts do not exist. Without some basis in language or context, courts will not add conditions or gifts beyond what is clearly expressed. And in the previous examples, § 2-707 adds conditions or gifts or both, but it is under a backdrop of silence. One would have assumed their nonexistence only because of silence—nothing upon the inscribed slate reflected their presence. In this example, however, § 2-707 goes further. To be sure, it fabricates a nonexistent substitute gift to C's living descendants, but it does this in the face of an express substitute gift over to the residuary taker, D. By negating the force of the preemptive provision that favored the residue, § 2-707 does more than add to the creative slate; indeed, it emasculates what is clearly inscribed.

This is not, however, the only instance in which § 2-707 functions in this manner. Indeed, it does essentially the same thing with respect to gifts-in-default of the exercise of powers of appointment. Consider this testamentary trust created by A: "Income to my brother, B-1, for life; thereafter, principal to such of our then living siblings as he appoints by his last will, and upon his failure to make a complete or effective appointment in favor of living siblings, the principal shall pass to our then living siblings absolutely and forever." Assume that B-1 survives A and exercises his testamentary power in favor of his only sisters, S-1 and S-2—"principal to my sisters absolutely and forever who are alive at my death." Also, assume that S-1 and S-2 predecease B-1, but both leave descendants alive at his death. Finally, assume that A's other siblings—two brothers, B-2 and B-3—both survive B-1. Who is entitled to share the principal upon B-1's death?

84. *See id.* § 2-707(a)(1).

Under the common law paradigm, the answer is clear: it would be B-2 and B-3. B-1's appointment does not fully and effectively dispose of the principal. The siblings he selects fail to satisfy the requirement of survivorship that limits the substance of B-1's power to appoint and is reaffirmed by the appointment itself. Therefore, the appointment fails. Absent a giftover, the directions inscribed upon the creative slate would have been exhausted, and, consequently, the devise would fail and pass to the residue. This failure would not, however, occur because A has anticipated this circumstance and provided for an alternative gift—namely, the gift-in-default. This gift does not include the living descendants of the deceased beneficiaries to whom the appointment was made. Both the appointment and the gift-in-default are limited to living members of a specified group—A's siblings. Descendants of siblings are not provided for and not even mentioned. Within the group prescribed by the gift-in-default, there are living members—B-2 and B-3—and, accordingly, they become substitute takers by way of explicit provision on their behalf.

This is not, however, the result reached under § 2-707; indeed, the surviving descendants of S-1 and S-2 will take to the exclusion of B-2 and B-3. Once again, words of survivorship attached to a gift of a future interest to a group are not, without more, enough to overcome the automatic statutory substitute gift to living descendants of a deceased beneficiary within such group.⁸⁵ Consequently, the terms of the power and the appointment to the sisters that condition principal upon survivorship of B-1 will not overcome the automatic statutory substitute gift to the living descendants of deceased sisters. Nevertheless, under § 2-707 an express alternate future interest is ordinarily deemed sufficient to displace the statutory gift to descendants.⁸⁶ Once again, this gift-in-default should preempt the statutory substitute because the event upon which it is predicated has occurred: B-1's appointment to his living sisters has failed because neither sister survived him. Nevertheless, § 2-707 determines otherwise because it does not permit a gift-in-default to take effect so long as there are surviving takers under the appointment who qualify, and these takers include those who are specified—the living sisters—and those who are not—namely, their living descendants.⁸⁷ Consequently, once again § 2-707 adds an unexpressed substitute gift to the living descendants of deceased sisters in the face of an express giftover to others. Once again, by negating the force of the preemptive gift-in-default, § 2-707 does more

85. *See id.* § 2-707(b)(2), (3).

86. *See id.* § 2-707(b)(4).

87. *See id.* § 2-707(b), (c), (e)(1). For further explanation, see Becker, *supra* note 14, at 386–90.

than add unexpressed gifts to the creative slate. Instead, it goes further and negates what is clearly inscribed and, presumably, clearly intended.

Because of § 2-707, the bottom line is that even though one clearly expresses what the estate owner means, dispositive language will not always mean what it says. Indeed, § 2-707 does more than substitute one default construction for another.⁸⁸ Instead, it substitutes a non-literal construction in place of literal meaning based upon affirmative expression and not mere silence. Further, it forces such non-literal meaning into a particular language format even though, as a draftsman after adoption of § 2-707, one would never use such language format to express the non-literal meaning required by the statute.⁸⁹ In doing so, § 2-707 severely damages a precept for the expression of any command thought and, perhaps, the most important precept for the creation of property interests. Essentially, one must always express dispositive commands clearly and definitively, thereby avoiding phrases and language formats that are incomplete or ambiguous.⁹⁰ The damage inflicted by § 2-707 is clear. It undermines this precept by destroying a format that is clear and unambiguous and converting it into something that is hidden or, at least, unapparent.

Once again, two observations stand out. First, § 2-707 imposes radical departures from the common law paradigm for the creation of interests. It accomplishes this by inventing unexpressed conditions and interests and by negating clearly expressed alternative gifts. It begins by altering the meaning of silence, and then it goes further and subtracts existing

88. For discussion of § 2-707 as a new kind of default construction, see *infra* Part IV.A.

89. For further explanation, see *infra* notes 123–28 and accompanying text.

90. Specific commands and thoughts should never be shrouded by ambiguity. The full range of problems and solutions respecting dispositive designs and provisions must be anticipated and resolved through directions accomplished with unambiguous language formats.

The nemesis of the profession in drafting instruments of this type is obscurity, an illegitimate relative of the proper instinct for conciseness. No one questions the truism that an idea is best expressed in the fewest words; but far too often simplicity of expression is the cloak for incompleteness of thought. The first task of the draftsman is to foresee, by drawing upon his education and experience, the eventualities which may expose the deficiencies in so rudimentary an idea, and thus be in a position to develop it into a full-grown plan of disposition competent to meet the stress of change. His second task is to express the developed thought succinctly in language drawn from a sound knowledge of English speech and a familiarity with those many technical expressions to which in a long course of history courts have given unexpected meanings. Reduced to a formula: comprehensive and astute prevision, concise and accurate provision.

LEACH & LOGAN, *supra* note 28, at 237. Unfortunately, there have been hundreds of cases that litigate the meaning of short but ambiguous phrases that fail to do the job because of inadequate prevision and provision. For example, for a discussion of the checkered history concerning the simple phrase “to B and her children,” see SIMES & SMITH, *supra* note 20, §§ 691–702.

additions to the zero-based blank slate. Second, with these changes to the paradigm, § 2-707 significantly alters the meaning of unambiguous trusts and consequently plays Russian Roulette with an estate owner's dispositive design and the actual intent that underlies it.

B. The Effect of § 2-707 Upon What Lawyers Must Do When They Plan and Draft

Under the common law paradigm, lawyers have always known that if they want to create an interest on behalf of a particular beneficiary, then they must clearly express such interest. Further, if they wish to condition such gift, then such condition must also be expressed, and so must all substitute gifts that are to take effect in the event such condition is not satisfied.

This has been radically changed by § 2-707. The default construction no longer amounts to silence equaling nothing in terms of interests and conditions; instead silence now includes unexpressed conditions and substitute gifts. To be sure, the common law paradigm has been profoundly altered. Before going further with a critique of this modified paradigm, one should first examine the impact of these changes upon what lawyers must do when they plan and draft. If the impact is, as a practical matter, nonexistent or negligible, then concern for theoretical changes may become of little or no consequence. If, however, the impact is significant, one should seriously scrutinize these changes or any others that appreciably weaken the theoretical model used for the creation of property interests.

To begin with, one should observe that § 2-707 undoes a significant body of law affecting future interests that has evolved over centuries. The law is replete with case after case discussion and reliance upon a presumption of early vesting. When in doubt, courts will reach a vested construction and, almost never, will they find a contingent interest in the absence of supportive language or contextual facts.⁹¹ Further, if there is an express condition, courts have observed again and again that, wherever possible, such condition—usually survivorship—will be interpreted as referable to the time of creation, namely, the testator's death in the case of a will.⁹²

91. For a collection of cases illustrating this presumption and judicial predilection for finding vested interests, see LEACH & LOGAN, *supra* note 28, at 255–315; see also SIMES & SMITH, *supra* note 20, § 573; 5 AMERICAN LAW OF PROPERTY, *supra* note 55, § 21.3.

92. See, e.g., *Ross v. Drake*, 37 Pa. St. 373 (1861). See also SIMES & SMITH, *supra* note 20,

The common law, however, has gone even further in its effort to mute the creation of contingent interests and requirements of survivorship. Indeed, there are circumstances in which courts have converted a direction for distribution upon an inherently uncertain event into an indefeasibly vested interest, with payment postponed until the event occurs or would have occurred had the beneficiary continued to live.⁹³ For example, courts have concluded that a gift “to B at age 30” is a contingent interest, which is subject to the requirement that B must actually attain age thirty. If, however, the gift had said “to B payable at age 30” or “to B at age 30, with income payable to B until B reaches age 30,” the gift would then be construed as a vested interest. Having made this construction, courts then could only conclude that such interest was indefeasibly vested because of the absence of language of divestiture in favor of others if B failed to attain age thirty. Given this choice, actual attainment of age thirty was no longer a prerequisite to distribution. Instead, courts concluded that it merely reflected a time for distribution, without regard to whether B survived or failed to survive age thirty. Accordingly, if B attained age thirty, distribution would be made to B at that time; if B did not, however, distribution would be made to B’s successor, usually his estate, when B would otherwise have attained age thirty.

Whatever one may think of this body of law—including principles that seem to blunt express conditions—§ 2-707 clearly repudiates it. A gift to “B at age 30”—with or without interim income or the term “payable”—creates a future interest unless B is already age thirty when such interest is created. Because it is a future interest, § 2-707 renders B’s interest subject to a requirement of survivorship of the time for distribution—namely, when B attains age thirty.⁹⁴ Further, one should again observe that § 2-707’s requirement of survivorship obtains even when the time for distribution is an event that is inherently certain to occur—for example, the expiration of a specified period of time—and, therefore, evidences no condition of any kind.⁹⁵ To summarize, the immediate message for all lawyers is clear: they must retool their basic understanding of the law of

§ 577.

93. See SIMES & SMITH, *supra* note 20, § 586.

94. See UNIF. PROBATE CODE § 2-707(b) (amended 1993), 8 U.L.A. 194 (1998).

95. For example, consider this trust created by A: “Income to B for ten years; upon the expiration of ten years principal shall be distributed to B absolutely and forever.” At common law, B’s remainder would be indefeasibly vested because the expiration of ten years was not an uncertain event and because the language contained no express conditions. The result would, however, be different under § 2-707 because all future interests are automatically subject to conditions of survivorship of the time of possession. See *id.*

future interests and all of its nuances because basic precepts and refinements have been turned on their head.

Because of the dramatic changes caused by § 2-707, lawyers must now master these changes and then decide how to live with them in light of the dispositive instruments they design and draft. The former is, of course, fundamental if one is to comprehensively and meticulously implement the particular objectives of individual estate owners. Nevertheless, this is not an easy task. Section 2-707 is not long, but it is clearly complex. Of particular note, it has a tie-breaking subsection that determines which group of living descendants will prevail when the beneficiary of a future interest and the beneficiary of a gift created in the alternative both die before the time for distribution.⁹⁶ The complexity is caused in part by the subsection's terminology, which in the end cannot be sorted out and understood without careful study of the statutory comments and examples and, perhaps, resort to explanations within law reviews.⁹⁷

There is, however, a more important reason why mastery of § 2-707 is not an easy task. In short, its subtleties and nuances are not readily anticipated. To be sure, its fundamental requirement of survivorship and its substitute gift to surviving descendants are straightforward and clear-cut. The rest of § 2-707, however, is not. Indeed, the results that obtain under much of it are unexpected, often because they seem counter-intuitive. For example, a gift to members of a class who must expressly survive the time for distribution is not enough to circumvent the statutory substitute gift to living descendants of a deceased member of the class.⁹⁸ Further, the commentary to § 2-707 explains that it is patterned after the anti-lapse section within the Uniform Probate Code. That section, however, is confined to the preservation of lapsed gifts intended for certain members of the estate owner's family. This reflects expectations that make sense within the context of a dispositive scheme confined to family. Section 2-707, however, applies to all gifts, and its forced substitute gift to living descendants may have no factual basis whatsoever within the context of dispositive schemes that do not encompass family.⁹⁹

96. *See id.* § 2-707(c).

97. For full discussion of the complexity of the tiebreaker section, see Becker, *supra* note 14, at 354–57.

98. *See* UNIF. PROBATE CODE § 2-707(b)(2), (3).

99. Section 2-707 of the Uniform Probate Code is intended to project the anti-lapse idea into the law of future interests. *See id.* § 2-707 cmt.; *see also* Waggoner, *supra* note 11, at 1210. The anti-lapse provision within the Uniform Probate Code is restricted to members of the estate owner's family. This is also true of most state anti-lapse statutes. *See supra* notes 35, 66. However, unlike these anti-lapse provisions, § 2-707 is not restricted to family members. The reason for most anti-lapse statutes is clear.

Additionally, as previously discussed, substitute gifts created by an estate owner may not function under § 2-707 as an alternative future interest, even though the estate owner intended it as a preemptory gift.¹⁰⁰ Indeed, a lawyer may quickly discover that § 2-707 permits one to preempt the statutory substitute gift to descendants through express creation of an alternative future interest. She may, however, not recognize that this will work only some of the time, mainly because § 2-707 does not recognize gifts-in-default of the exercise of a power of appointment and substitute transfers to the residuary takers as statutory alternative future interests. Consequently, even when something is expressed in the alternative and intended to supersede all else, it may not have that effect under § 2-707.

Finally, whenever a class gift is expressly created for survivors of the time of distribution and followed by an alternative future interest in the event there are no survivors, the statutory gift to living descendants of a deceased member of the class comes into and out of the picture in ways that seem to make no sense.¹⁰¹ Under § 2-707, if none of the class members survive, then the alternative future interest controls even though the deceased class members may have left living descendants. Because that is what the limitation literally provided, the statutory substitute gift to surviving descendants of deceased class members is superseded. If, however, one or more members of the class survive the time of distribution along with the descendants of members who failed to survive, then the statutory substitute to living descendants prevails and they are included.¹⁰² Under these circumstances, one might have thought otherwise; surely the surviving class members or the beneficiary of the alternative future interest should have a higher priority. After all, the primary gift seems restricted to the surviving members and in lieu of them there is an express giftover. Nevertheless, under § 2-707 mere words of survivorship will not preempt the statutory substitute to living descendants, nor will the express alternative future interest control because, by its terms, it takes effect only upon the failure of all class members to survive.

In the main, estate owners would not, based upon the time of death of a beneficiary, wish to distort their dispositive scheme established primarily for family members, especially if such beneficiary leaves surviving descendants who presumably fall within the ambit of the gift that was intended. This assumption makes sense with respect to lapsed gifts to family members. It is at best an uneasy assumption when applied to others, and for that reason, nearly all anti-lapse statutes place relational limits on the lapsed gifts that are to be preserved.

100. See *supra* notes 82–87 and accompanying text.

101. For further discussion and explanation, see Becker, *supra* note 14, at 391–95.

102. See UNIF. PROBATE CODE § 2-707 ex. 6 (amended 1993), 8 U.L.A. 194 (1998).

The bottom line is that sometimes the living descendants are included, and sometimes they are not. The problem arises, of course, because the estate owner did not expressly provide for them under any circumstance. Nevertheless, § 2-707 forcibly includes them, presumably because of a belief that this is what the estate owner should have intended had he been asked the correct questions. If asked, however, is this actually what the estate owner would have wanted? Would the estate owner have wished to protect and, therefore, preserve shares for living descendants of deceased class members only if one or more class members survived? Would he have cast aside his concern for descendants because no class member survived? However one might choose to fabricate intent, surely the estate owner would not have tied his concern for living descendants of deceased class members to the presence or absence of a surviving class member. Although this result may be understood in light of § 2-707's heavy-handed attempt to have its way with trusts that are perceived to be deviant, it does not have any rational basis in terms of what people probably intend. The real danger of this kind of irrationality is misinterpretation, misunderstanding, and misapplication of § 2-707, which heighten the cost of not achieving full mastery of the statute and not adapting dispositive provisions in light of it.

Once again specific provisions within § 2-707 and the results they achieve are counterintuitive, unexpected, and often irrational. More generally and importantly, however, § 2-707 will seem counterintuitive to all lawyers because it breaches the common law paradigm upon which lawyers have been schooled and practiced. The model that lawyers have been taught and the one that they use proceeds from a zero-based blank slate in which silence equals nothing by way of interests or conditions. Section 2-707 breaches this paradigm, however, it does not erase it. The common law paradigm still presents the basic methodology for command thoughts respecting the creation of property interests, namely, thoughts that direct, define, and circumscribe what people receive and enjoy. Yet because of § 2-707, the paradigm is now laced with exceptions that erode the zero base and, therefore, make it more difficult to master and implement with effective dispositive provisions.

Assuming that lawyers achieve full mastery of § 2-707—and are able to retain it¹⁰³—how will they live with the changes it makes? In short, how

103. This is not an easy task. Section 2-707 is intricate, complicated, and often counterintuitive. It will tax the memory of even the most talented lawyers. Those who retain it are destined to be only those who must reckon with it repeatedly and frequently. The reaction of most lawyers should parallel their response to the rule against perpetuities and, therefore, lead them to something resembling saving

will § 2-707 affect the way lawyers plan and draft dispositive provisions? Will these changes to the common law paradigm seriously impact the methodology for drafting that has evolved over centuries in response to the paradigm? Proponents of § 2-707 believe that it will have no effect on the trusts experienced lawyers draft, and, accordingly, these estate planners can and should continue doing exactly what they did beforehand.¹⁰⁴ This article, however, concludes otherwise.¹⁰⁵ Even though one says what one means, under § 2-707 it may not mean what it says.

How should and how will lawyers respond? To begin with, § 2-707 is only a rule of construction.¹⁰⁶ Presumably, its condition of survivorship and substitute gift will yield to a contrary intent. Nevertheless, the foregoing discussion quite clearly indicates that a contrary intent established by other express conditions of survivorship and alternative future interests will not always displace either the statutory condition of survivorship of the time for distribution or the statutory substitute gift to living descendants. Nevertheless, one can assume that § 2-707 would yield completely if the governing instrument established a contrary intent through a clear and unequivocal statement that § 2-707 should have no control over or effect upon any provision within such instrument. This solution may be the most appealing to skilled lawyers, especially those whose estate plans and dispositive provisions are meticulously crafted and who want to immunize those plans from outside forces designed to rectify the mistaken designs of inexperienced lawyers.¹⁰⁷ Such practice should inevitably lead to the complete emasculation of § 2-707 because over time these kinds of boilerplate disclaimers will find their way into published forms and soon thereafter into the trusts that all lawyers create. Given this practice, the reach of § 2-707 will be nonexistent, and the consequence will be almost as if it had never been adopted.¹⁰⁸

Conceivably, this system for avoidance may not obtain. Instead, lawyers may choose to design and draft estate plans as if § 2-707 could not be removed completely with one comprehensive boilerplate provision. In all probability, these lawyers will never rely on § 2-707 to supply either conditions of survivorship or substitute gifts to living descendants. Even when their dispositive provisions parallel the scheme embraced by

clauses, thereby enabling them to ignore § 2-707 completely. *See, e.g., infra* notes 106–08 and accompanying text.

104. *See* Waggoner, *supra* note 11, at 2349.

105. For expanded development of this conclusion, see Becker, *supra* note 14, at 368–09.

106. *See* UNIF. PROBATE CODE § 2-701 (amended 1991), 8 U.L.A. 181 (1998).

107. For further discussion, see Becker, *supra* note 14, at 405–07.

108. For further discussion, see *id.* at 407–09.

§ 2-707, they will undoubtedly express all conditions and all gifts, and they will do this clearly and comprehensively. Once again, § 2-707 is, after all, merely a rule of construction, and they would always want to assure the results they desire through positive affirmation rather than rely on rules that might be changed or unexpectedly overcome by contextual facts.¹⁰⁹

Problems arise, however, when the estate design calls for dispositions that deviate from the requirements of § 2-707. Here one really notices the changes to the common law paradigm made by § 2-707 and their impact upon planning and drafting. The fundamental technique for creating command expressions under the common law paradigm has been one of positive affirmation. Once again, everything begins with a blank slate and the transferor's interest is not fully divested until the interests and conditions expressly superimposed upon the blank slate add up to the full measure of the transferor's estate in the subject matter. In short, one drafts by affirmation—addition—and not by negation—subtraction.¹¹⁰ Section 2-707, however, changes all of this. One must now know precisely when to subtract, what to subtract, and how to subtract. Indeed, building a disposition by addition alone will not suffice whenever the estate design calls for provisions that deviate from § 2-707's overlay. Affirmation is not enough; instead, the limitation must also contain clear expressions of negation.

This can be illustrated. Once again, assume that A wants to leave income to B and then, after B's death, principal to C, but without any requirement of survivorship. "Income to B for life; thereafter, principal to C absolutely and forever" will not work under § 2-707.¹¹¹ Instead, one must expressly subtract the implied condition of survivorship by saying: "(T)hereafter, principal to C absolutely and forever even if C does not survive the time for distribution of principal." Or suppose A wishes to leave the principal to B's children with a requirement of survivorship but without a substitute gift to the living descendants of deceased children. "Income to B for life; thereafter, principal to B's then living children absolutely and forever" will not work under § 2-707.¹¹² Instead, one must expressly subtract the automatic statutory substitute gift by saying: "(T)hereafter, principal to B's then living children absolutely and forever,

109. For further discussion, see *id.* at 385–86.

110. See *supra* notes 52–64 and accompanying text.

111. See UNIF. PROBATE CODE § 2-707(b) (amended 1993), 8 U.L.A. 194 (1998).

112. See *id.* § 2-707(b)(3).

the share of any deceased child shall belong to the then living children of B and not to such deceased child's living descendants."

Further, suppose in the event B has no surviving children, A wants the trust principal to pass to C. "Income to B for life; thereafter, principal to B's then living children absolutely and forever, but if none survive then to C absolutely and forever" will not accomplish A's objective. Under § 2-707, the alternative gift to C cuts out the living descendants of B's deceased children if no children survive B but not if one or more children survive B.¹¹³ Once again, one must subtract through complete negation of any statutory substitute gift to living descendants of B's deceased children. Indeed, one must insert: "(T)hereafter, principal to B's then living children absolutely and forever, the share of any deceased child shall belong to the then living children of B and not to such deceased child's living descendants, but if none survive B then to C absolutely and forever."¹¹⁴

The foregoing illustrations demonstrate the pervasive impact of § 2-707. What one intends and says clearly and definitively may not be the meaning established under the law. What was unambiguous under the common law paradigm achieves a new meaning that is unapparent and non-literal. Despite this new meaning, however, one should observe that such transformed language format will never become a creative format lawyers use to implement the fabricated statutory meaning. In short, § 2-707 destroys meaning and substitutes a new interpretation—an interpretation that is necessarily an uneasy one because the language format § 2-707 impacts will never rise to a symbol for positive expression of § 2-707's fabricated meaning.¹¹⁵

Further, under the common law paradigm one's main concern was with gaps attributable to express conditions and the failure to build alternatives that filled these gaps and made the estate owner's disposition complete.¹¹⁶ These were, however, self-inflicted problems caused by the dispositive design, and they could always be overcome through recognition and

113. See *supra* notes 101–03 and accompanying text.

114. If the giftover, in the event B leaves no living children, had been directly to the residue and not C, then one would have had to subtract the substitute gift to descendants of B's deceased children twice by providing two disclaimers. (For example, one would have to substitute the following alternative gift for the one used above in the text: "but if none of B's children survive B, then to the residue absolutely and forever and not to the living descendants of B's deceased children.") Because the giftover to the residue does not qualify as an alternative future interest under § 2-707, the living descendants of B's children would have taken ahead of the residue even though the language seems to preempt completely the primary gift in the event B has no surviving children. See *supra* notes 82–84 and accompanying text.

115. See *infra* notes 123–28 and accompanying text.

116. See *supra* notes 58–64 and accompanying text.

comprehensive creation by addition. Estate planning under § 2-707, however, is changed and has become much more complex. What should be clear is that by altering the paradigm and methods for expressing the creation of interests—by adding circumstances that call for negation beyond affirmation—§ 2-707 lays a trap even for experienced lawyers. Its changes transcend subtlety; indeed, they are profound.

IV. THE CASE FOR MAINTAINING THE COMMON LAW PARADIGM: A CRITIQUE AND ARGUMENT

Section Three has demonstrated how § 2-707 deviates from the common law paradigm and its significant impact upon planning and drafting. In light of these observations, Section Four states the case for maintaining the common law paradigm and rejecting revisions, such as § 2-707, that deviate from it and ultimately complicate the process for designing and expressing estate transfers.

A. *Section 2-707 and New Kinds of Default Options for Silence*

Those who support § 2-707, and potentially other law revisions that similarly alter the common law paradigm, will begin their defense with elaboration of the particular benefits to be achieved by such changes. More specifically, they compare the results achieved with particular dispositive designs both before and after their revision, and they conclude that nearly all estate owners would prefer the revised result.¹¹⁷ And that is reason enough to justify their changes to the common law, even if the paradigm for creation has been compromised.

There is, however, another argument to be made in defense of § 2-707 and any other revision that might alter the common law paradigm, namely, an argument that minimizes the significance and impact of an altered paradigm. They would observe that one default option has merely replaced another. Systems of expression and of law—particularly statutes—almost always have default options for things that are unanswered or unclear.¹¹⁸ If

117. See Waggoner, *supra* note 11, at 2310–21.

118. For example, in the absence of words of limitation that specifically describe the kind of interest expressly created in a transferee, courts will fill the void and find the creation of a particular kind of estate. In doing so, they are invariably governed by a statutorily created default construction, which in most jurisdictions is no longer, as at common law, the life estate but is instead the fee simple. See *supra* notes 17, 55; see also UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.401(g) (amended 1972), 7B U.L.A. 549 (2000) (which, in the absence of expressed agreement, fixes a basis for determining rent, where and when such rent is to be paid, and the kind of tenancy that arises).

A creates a trust with “income to B for life and principal thereafter to C absolutely and forever,” the limitation is silent as to precedent conditions involving A’s distribution of principal, other than the obvious requirement that B must die. Under the common law paradigm the default option for silence is nothing, meaning there is no precedent condition. Therefore, C’s successors can assume possession even if C does not survive B. Further, if one were to supply a precedent condition of survivorship that C did not satisfy and there were no expressed substitute gift—and, consequently, silence as to the existence of one—the common law paradigm’s default option would again control. Such silence would amount to nothing—that is, no substitute gift—and, accordingly, the gift of principal following B’s death would fail. The default option for a failed gift of principal would then become operative. Again, it is a form of nothing. Any transfer from A that is less than the interest A owns constitutes an incomplete divestiture and leaves A with a reversion. Therefore, upon B’s death, the principal in a sense goes nowhere. Instead, it remains exactly where it has been all along—with A. Consequently, the principal will revert to A upon the death of B in the event C predeceases B.

Continuing the argument, what § 2-707 really does, then, is merely to change the default option for certain kinds of gifts. As to all future interests created in trust, silence no longer equals nothing. It no longer means no condition and no substitute gift. The default option for total silence—that is, no conditions at all—is a condition of survivorship of the time for distribution and a substitute gift to the then living descendants of the owner of the future interest in the event she fails to survive. Further, if there is an express requirement of survivorship that does not relate to the time for distribution, the same default option applies; namely § 2-707 adds an additional requirement of survivorship along with a substitute gift to living descendants. Finally, if there is an express requirement of survivorship tied directly to the time for distribution, but silence concerning a substitute gift, the default option under § 2-707 produces a substitute gift to living descendants. Accordingly, these are the default options for silence within the context of future interests created pursuant to a trust.¹¹⁹ Silence no longer means nothing under § 2-707; instead, it means something—indeed, something very significant.

This argument—one that reduces the impact of § 2-707 to a mere change in default options—seems to assume that default options are fungible, namely, that one is as good as the other, and that it does not

119. See *supra* notes 65–76 and accompanying text.

really matter which option is adopted so long as some option is selected. To be sure, this assumption is ill founded. Default options are not fungible. Some present problems and complexities that others do not. And some achieve important goals that others do not. In short, the default system that accompanies the creation of property interests under § 2-707 creates a paradigm that is more complex and confusing. And the policy reasons that underlie § 2-707 do not justify the infusion of such complexity and confusion, especially when there are other ways to prevent and overcome poorly designed estate plans.

B. Problems Generated by Mixed-Bag Default Options

To begin with, one should observe that, after adoption of § 2-707, the core of the new paradigm is still a zero-based system in which one begins creation of interests from a blank slate and the default option for silence remains nothing. After all, § 2-707 is only concerned with future interests that are created pursuant to a trust.¹²⁰ Consequently, the common law paradigm is still intact with respect to transfers that do not involve a trust. But even when a trust is used, the default option in most instances is still nothing, and one will still create interests by addition and cumulation until the transferor's interests have been fully exhausted. For example, if A uses a trust to create successive income interests in B for life and C for life, but does not thereafter dispose of the principal, the gift would be incomplete assuming A held an absolute interest. Silence would constitute nothing and the subject matter would revert back to A or A's estate. Further, if A had made C the beneficiary of the principal and had conditioned such gift upon C's graduation from college prior to the termination of B's life estate, C's gift would fail and revert back to A's estate assuming, for example, that C had survived B but not yet graduated from college. The existence of living descendants in C would be irrelevant because § 2-707 only creates a substitute gift to descendants in the event the requirement of survivorship of the time of distribution is not met. Consequently, the statute becomes inapplicable, and the common law paradigm controls. Once the gift of

120. See UNIF. PROBATE CODE § 2-707 (amended 1993), 8 U.L.A. 194 (1998). In some ways the limited scope of § 2-707 is a surprise. The section is intended to overcome and rewrite poorly drafted dispositive provisions. Therefore, one might have thought that the statutory focus ought to be instruments of transfer that do not utilize trusts, such as deeds and even simple wills, because they are often prepared without benefit of adequate counsel or any counsel at all. Trusts, however, almost always reflect the work of lawyers. Consequently, the occasion for mistake, oversight, and incompetence ought to be greater in the first instance than in the latter and, therefore, surely should demand the attention of such law reform.

principal to C fails, there is no substitute disposition of principal, and, as a result, one is left with silence. Silence means nothing by way of further transfer; therefore, the disposition of principal is incomplete and must revert.

Consequently, reforms like § 2-707 leave one with a mixed bag in terms of default options. Most of the time, silence means nothing, but some of the time, it translates into something very significant. Because of this, those who execute these instruments of transfer and those who benefit from them—and even those who must interpret and implement the dispositive commands within them—will have a more difficult time understanding them and reconciling the results they yield. The predominant system for communicating the dispositive message is still the blank slate. Silence must be breached by clear exposition of gifts. Experienced lawyers will never rely upon silence to signify something beyond nothing, even when they intend to employ the conditions and gifts that underscore a default option derived from silence. Instead, experienced lawyers will clearly and fully elaborate them. And when the limitations they create contain silence, they intend to create nothing even though a new default option may impose something. When this happens, those who read these provisions may inevitably puzzle—or worse litigate—over gifts and conditions that evolve from pure silence and, therefore, seem to come out of nowhere. Though the creation and interpretation of these instruments are ultimately in the hands of professionals, a system of expression that makes no sense to the very people who use it or benefit from it is destined to create problems and much displeasure.¹²¹ Ideally, dispositive instruments should be readable and understandable by all, and

121. One should note that the system for command expression used with respect to commonplace daily activities often employs a blank slate in which silence means nothing, where directions are added and cumulated and, therefore, resemble the common law paradigm for creation of property interests. Consider, for example, the way one creates and expresses a “shopping list” for someone else to carry out. See *infra* note 157. Indeed, there is a common sense appeal to this kind of paradigm and it is something people come to understand and employ.

Also one should add that lawyers are often criticized because they do not draft documents that are understandable by the very people who must sign them and, therefore, should surely comprehend them. Often instruments governing the transfer of property interests are shrouded with mystery, sometimes because of terms and concepts that derive from history. This is not desirable and most legal educators recognize this. Consequently, the emphasis of much instruction on legal writing is on conciseness and clarity. So just imagine the reaction of a family when they are told unexpressed gifts exist and undercut the “clear meaning” of the dispositive instrument that governs their family inheritance. Indeed, they may ask when a gift is left to surviving siblings: “Why are my brother’s descendants entitled to take? Where does the trust even mention his descendants? How can this be?” Surely, neither the lawyer nor the system looks very good under these kinds of circumstances.

the law neither looks good nor functions well when it moves in other directions.

The mixed bag also presents problems for lawyers who plan and draft dispositive instruments. At least two kinds of problems compound the complexity of the process. First, there is difficulty caused by the mere presence of a default option that produces something from nothing—something substantial that is derived from mere silence. A system in which silence means nothing, and where the transfer of interests to others begins with a blank slate, is easy to grasp, retain, and implement. Clear and complete expression of all gifts and conditions is mandatory. Failure to explicate will almost always nullify an intended gift or condition. One begins the creative process with a landscape that has few limits, thereby giving the estate owner significant freedom to chart out a highly personal dispositive design. Implementation of that design requires one to fill in the landscape in great detail. And one knows that every intended feature must always appear in that landscape, or else it will not exist. However, once the system becomes a hybrid, which may require subtraction of unexpressed statutorily created conditions and gifts triggered by special design configurations, the process of transfer and creation becomes more complex.¹²² To begin with, one must master the substance and nuances of the new default option because they may not be simple or obvious. The stakes are high because the new default option, as in the case of § 2-707, may not be grounded in anything connected to express language or even apparent intent, and it may yield a result that actually frustrates the dispositive design. One must learn that silence does not equal nothing under certain circumstances, and, further, one must never overlook those circumstances or what the new default option produces once they arise.

This leads to a second problem that compounds complexity, one that concerns difficulties in varying or aborting the statutory overlay imposed by silence. Before examining this second problem, one must first

122. For discussion of these complexities, see *supra* Part III.B. One should note, however, that there are instances in which a system of mixed-bag directions is required, does not involve great complexity or cost, and functions well. For example, consider the simple act of ordering a hamburger from your local McDonald's. By default, the hamburger includes ketchup, mustard, pickle slices, and onions, see McDonald's, www.mcdonalds.com (last visited Aug. 24, 2005)—items considered to be desirable by most customers. However, not everyone prefers onions. Some may prefer extra mustard instead. In order to achieve the desired result, a customer must first request no onions, and then request extra mustard. In other words, the customer creates their "ideal" hamburger by addition (selection of the hamburger itself), subtraction, and then addition. This type of mixed-bag system works well because it is simple and intuitive; the customer and vendor interact directly and in person, with a tangible result. Any problems with the hamburger are easily corrected, and the risk for error is low. A new hamburger can be made in seconds, at a low cost.

understand how lawyers are apt to draft in light of new dispositive overlays engendered by silence. Given the fact that the core of the system for creating interests still rests upon the common law paradigm, one cannot expect that the new default option will ever be used as a positive method for achieving the result it imposes. More specifically, one should not expect lawyers to rely upon silence to produce the dispositive design embraced by § 2-707. Indeed, the authors of § 2-707 fully expected skilled estate planners to continue drafting just as they had before its enactment, namely, to use language that elaborated the very consequences that § 2-707 was intended to yield.¹²³ There are at least three reasons why their prediction makes sense and why silence will not replace expression as the principal technique for delineation of § 2-707's conditions of survivorship and substitute gifts.

First, the new default option is only a rule of construction and not a rule of property.¹²⁴ As such it can always be overcome by language and context that clearly indicates a different intent and, therefore, disposition. If an estate owner clearly opts for a condition of survivorship and a substitute gift to surviving descendants, then her lawyer must make these requirements unmistakable. One must always safeguard against unforeseen misinterpretation, and full reliance upon a default option that functions only as a rule of construction is not an adequate safeguard. An estate planner should always view her margin of error as zero. Because a rule of construction always allows for something different, its margin for error is much too great. The only way to assure conditions and the substitute gifts they require, and thereby crystallize and evidence actual intent, is to express them fully.

Second, this judgment to explicate all conditions and gifts is consistent with the literature on drafting.¹²⁵ Much has been written about the importance of clear intent, the use of literal expression, and the avoidance

123. Waggoner, *supra* note 11, at 2349.

124. See UNIF. PROBATE CODE § 2-701 (amended 1991), 8 U.L.A. 181 (1998).

125. See, e.g., WILLIAM SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING 270 (Student ed. 1965).

If a condition of survivorship is to be imposed, it should be carefully drafted. The instrument should explicitly state the time to which survivorship is required. It should also explicitly state whether (and to what time) survivorship is required for both primary and alternative takers. It should also explicitly state the circumstances for the application of the survivorship requirement and the effect of failing to survive under all conditions and under some but not all circumstances. In addition, it should also specify what disposition is to be made of the property in the event there is a failure to survive.

Id. (internal citations omitted).

of ambiguous terms and phrases.¹²⁶ Such literature is not confined to the creation of property interests and, therefore, to things that rest upon the common law paradigm. Whether one is concerned with property interests, contracts, or legislation, clarity has always been emphasized as an absolute essential for drafting. Such clarity invariably requires literal expression that calls for language that fully and unambiguously elaborates the ideas and requirements of the legal commands that flow from such documents. If a command embraces an idea that leads to a single result, then the language must compel a meaning that leads nowhere else. Phrases and words with more than one meaning must, therefore, be avoided, and so must silence when its meaning has only the force of a rule of construction. Instead, the meaning that underscores silence should be confirmed by language that overtly erases the potential for ambiguity.

There is a third reason why lawyers will not rely upon § 2-707 and, therefore, silence for the inclusion of § 2-707's conditions and gifts. Very often lawyers will either want to vary these conditions and substitute gifts or expand upon them. For example, as to gifts of principal, estate owners frequently want to include additional requirements beyond survivorship of the prior income interests. This might include tying distribution to particular ages. Sometimes these requirements might involve survivorship of a designated age,¹²⁷ but at other times they may not. Instead of survivorship, all that may be intended is deferral of distribution until the age is actually attained or would have been attained.¹²⁸ Further, when conditions are included, an estate owner may wish to deviate from the substitute gift imposed by § 2-707. Surviving descendants of a deceased beneficiary may not be intended at all. Highest priority may be given to other surviving members when a class gift is created. Or, if not a class gift, the preferred alternative may be a residuary gift to charities. Indeed, sophisticated estate planning will often call for more conditions or

126. See, e.g., REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 12–13, 73–97 (1965).

127. See, e.g., ROBERT P. WILKINS, *2 DRAFTING WILLS & TRUST AGREEMENTS* §§ W.11.60–W.11.62, W.11.70, W.11.74 (Michael L.M. Jordan ed., 3d ed. 2002). These provisions stagger distribution of the principal to beneficiaries upon attainment of multiple ages. For beneficiaries who do not survive one or more of these age requirements, principal is redirected, sometimes immediately *per stirpes* to the deceased beneficiary's then living issue, and sometimes to them after default in the exercise of a special power of appointment given to the deceased beneficiary.

128. See *id.* §§ W.13.70–W.13.71. These provisions authorize a trustee or executor to act as trustee for the benefit of a beneficiary otherwise entitled to distribution of principal before attaining age twenty-one. Although the trustee thereby controls distribution of income and principal before such beneficiary attains twenty-one, this provision requires payment of all remaining principal to the beneficiary upon attaining age twenty-one or to the beneficiary's executor or administrator if such beneficiary dies before then.

different substitute gifts. In either case, experienced lawyers will fully express and elaborate all terms, conditions, and gifts that reflect the estate design, including those that deviate from the statutory overlay.

Given the fact, then, that lawyers will not rely upon silent statutory conditions and gifts, but will always choose to express them, planners and drafters must confront a second kind of complexity. More specifically, they must not only know the contents of the new default option, they must also know whether such silent overlay will affect or circumscribe in any way their explication of their estate owner's complete dispositive design. Stated otherwise, they must know when and how to subtract the contents of the default option and circumvent the overlay it imposes, and they must also know how to replace the overlay with the precise terms, conditions, and gifts of their clients. This would be an uncomplicated task if the default option could be erased with any expression that addressed the silence differently. In a sense, this is exactly how intestate statutes of descent and distribution function. Except with respect to protection offered to a surviving spouse, intestacy statutes are erased by any will that fully disposes of a testator's estate. One gift of everything does it all.¹²⁹

This, however, is not how § 2-707 operates, and, as indicated previously, it is not an easy matter to eradicate its statutory overlay.¹³⁰ For example, express conditions of survivorship imposed upon a class will not eliminate the substitute gift to living descendants of a deceased beneficiary who otherwise would have been a member of the class. Additionally, an alternative gift directly and immediately to the residue will not be enough to circumvent the statutory substitute to living descendants of a deceased beneficiary. A disposition different from the substance of the overlay is not necessarily enough to overcome it. Instead one must expressly subtract all undesired features in a manner permitted by § 2-707, and the technique for accomplishing this may not be obvious. Or one must negate § 2-707 and remove it from the trust entirely. Either way, the task is not easy. Consequently, § 2-707, or any other default option arising from silence, can become a disaster waiting to happen, especially for experienced and skilled professionals—a group that was never intended to be affected by § 2-707.

129. Absent a surviving spouse or certain descendants which one must mention at least by way of exclusion, a will that disposes of a decedent's entire estate will erase the potential claims of heirs at law who would otherwise take through the statute of descent and distribution. Indeed, a simple devise of "all of the rest, residue, and remainder of my estate to B absolutely and forever" is all that it would take to negate the statutory overlay that functions in the absence of a will that effectively disposes of one's entire estate.

130. See *supra* Part III.B.

The foregoing discussion has been quite specific to § 2-707. Once again, the problems and complexities involved in bypassing its statutory overlay would be averted if one could more readily escape its impact; for example, a system of negation in which every disposition that addressed any aspect of the silence upon which the default option was predicated would immediately and entirely suspend the statutory overlay. Nevertheless, such a system would not eliminate the basic complexity caused by a mixed bag of default options. If the core of the paradigm is still a blank slate in which the meaning of silence is nothing, then those involved in the creation and transfer of interests will be accustomed to exactly that. The blank slate with which they commence must be altered by the addition of interests. The end product of conditions and gifts is reached by the cumulation of things expressly mentioned and thereby added together to comprise a complete transfer. The paradigm's conclusion when silence occurs is quite simple: nothing is added to the equation. Statutory changes that alter the paradigm by making something out of nothing, especially those that substitute complex conditions and gifts for silence, add considerable complexity and inevitably heighten the occasions for oversight and mistake. One must always reckon with the silent something—when to look for it, what it is, how it affects the estate design, and finally how to overcome it. Complexity is inevitable when the need for subtraction is introduced into a system built upon creation by addition. Section 2-707 is a major departure from the common law paradigm, but it may not become the only one. There may be others that add new kinds of default options—new content to silence that occurs within other contexts. Each time this happens, new complexities should arise and so will occasions for oversight as to the recognition and subtraction of these different kinds of statutory overlays.

C. Critiquing an Entirely New Kind of Paradigm Where Silence Always Means Something

The critique, thus far, has assumed a fundamental system for creation in which dispositions are built by addition and the default option for silence amounts to nothing in terms of conditions or gifts. Although § 2-707 does not abrogate the core of the existing common law paradigm—nor is there any evidence that law reformers will attempt this in the future—one should observe that it would be possible to have an entire system that functioned quite differently, namely, one in which the transfer of interests does not begin with a blank slate. Instead, every dispositive act, especially those that were donative, would begin with

creation of preordained interests. For example, if one had only a spouse, one might begin with a preordained transfer of everything to such spouse absolutely even when the document was silent both as to the donee and the kind of interest the donee was to receive. Or if one had a spouse and children, one might begin with a preordained trust with an income interest to the spouse for life and the principal to such children. Such a system might include conditions concerning the gift of principal and an array of substitute gifts. The conditions could include requirements of survivorship of the time for distribution, attainment of specific ages, and anything else one might view as a desirable norm. In the end, for every family constellation, the estate owner and her lawyer would confront an elaborate dispositive overlay that established preordained gifts and conditions. Enactment by an estate owner—e.g., with a spouse and children—of a dispositive overlay would be quite simple. It could be accomplished, for example, by merely executing and funding a living trust. Without more, the overlay would exist. Silence as to the terms of disposition would not amount to nothing; instead, it would automatically invoke the appropriate overlay. Under these circumstances, dispositive choices would not exist. An estate owner could either opt for the preordained overlay by will or through a living trust or allow her estate to pass by intestacy, which might reenact the same overlay or a different one.

As described, this overlay would be inflexible and, thereby, fully preempt dispositive choice. Alternatively, the overlay could present limited choices. For example, it could offer a limited spectrum of gifts and conditions that were legally permissible. The paradigm for exercising personal choice would then become a process in which one created by subtraction or check-off. To be sure, the overlay might offer alternative models from which one could choose a preferred dispositive scheme that constituted a complete transfer unto itself. Further, there might be limited options within each model—for example, the option to select the age or ages upon which distribution of principal was conditioned. And in every instance, these models and the options within them would be prioritized. Accordingly, silence or a failure to subtract would default to the remaining model and the options with the highest priority. Individual preference would be expressed through elimination of unwanted models and unwanted conditions and gifts within the model that was retained. At the core of the planning and drafting process would be the subtraction of rejected dispositive models and of particular features of the preferred dispositive model until the remaining structure reflected an estate owner's personal design. Once again, failure to subtract would automatically default to the model and options with the highest priority.

Without modification, such a system would not be superior to the common law paradigm. Personal choice would be limited to subtraction of particular dispositive models and the features within them, but it would not include substitution of unique kinds of gifts crafted by estate owners. On its face the complexity of such a default system would seem enormous because of the elaborate overlays it created for each family constellation. Nevertheless, official forms could be created for each family constellation, and these forms would display all models and the options within them.¹³¹ Individual estate owner refinement of each design would then consist of creation by deletion, namely, the elimination of unwanted alternative models or options. Mistakes could still occur. Incomplete gifts could result whenever too much was subtracted. But this risk may not be greater than the risk of an incomplete gift under the common law paradigm whenever too little is added. Under the common law, an incomplete gift would result from some form of silence that could potentially yield a reversion and intestacy. However, under this system, an incomplete gift would default to the remaining option or model with the highest priority.

There would, nevertheless, be a transcendent problem that involves a basic reduction in dispositive freedom. To be sure, under the common law paradigm one cannot create new kinds of interests previously unknown and unrecognized by the law.¹³² Nor can one infuse requirements and conditions deemed illegal or contrary to public policy.¹³³ Beyond these relatively unrestricted parameters, one has great freedom to design and shape a dispositive design, limited only by one's own imagination. Consequently, if one were to convert to a system in which all permissible options had to be enumerated as part of its overlay, estate owner choice would immediately become finite. Accordingly, personal freedom would be compressed unless the overlay were to proliferate options almost *ad infinitum*. Such extensive proliferation would ultimately yield a work product that was cumbersome if not unwieldily. Either way, there would be a cost.

If, however, the system were made more flexible by truly honoring personal choice, it would still require a positive system for creation once portions of or all of the default scheme had been erased. Undoubtedly,

131. This would, of course, resemble in some ways basic forms available today and what lawyers do with them. There is, however, an important difference. Lawyers can discard forms completely, or provisions within them, and substitute dispositive designs of their own which are crafted to meet the objectives of individual estate owners.

132. See *supra* note 51.

133. See *supra* notes 44–47 and accompanying text.

once all or a portion of the extensive preexisting overlay had been removed, the positive system would resemble the one embraced by the common law paradigm in which creation is by addition. This seems inevitable so long as ownership is still defined in terms of estates measured over time and possessory and nonpossessory estates are sanctioned.¹³⁴ One begins with the unit owned by the estate owner, and, for a complete transfer to occur, all possessory and nonpossessory interests must add up to the whole that belonged to the transferor. Once one vacates a portion or all of the statutory overlay, one must rebuild, and this requires one to use the calculus upon which the estate system has evolved. For example, if the statutory overlay called for a transfer of the full estate to the surviving spouse in fee simple absolute, then if one were to opt for something different by using multiple income interests, the sum of the gifts must still add up to complete disposition of the estate. And this could only be accomplished with an end gift of the principal that was the equivalent of a fee simple absolute.

Although creation by addition would seem unavoidable under these circumstances, the default option for silence might not be fully restored to nothing. If the new overlay created by statute could be readily erased, partly or completely, then the statutory default system would no longer apply to silence and a different default would be needed to replace it. Presumably, the default option for silence would revert to nothing—no conditions and no substitute gifts—at least as to the portions of the overlay that had been removed. Nevertheless, the new system might not permit one to erase fully the overlay. Instead, it could require one to continue subtracting undesired conditions and substitute gifts throughout the process of rebuilding estate units by addition. Indeed, silence would still translate into something. As a practical matter, this would require either the expression or negation of conditions and substitute gifts upon the creation of each future interest. For example, suppose the default system called for a fee simple absolute in a surviving spouse, but the estate owner elected to create an income interest in the spouse with the principal to their children absolutely. The statutory overlay might still superimpose conditions of survivorship and substitute gifts to living descendants in the rebuilt gift that replaces the one otherwise given absolutely to the spouse. If the estate owner did not want such conditions or substitute gifts, then express subtraction would be required. Further, if the estate owner wanted

134. For a summary discussion of the estate concept, see NELSON, STOEBUCK, & WHITMAN, *supra* note 16, at 219–24.

these aspects of the overlay or wished to add other requirements, then surely they would be expressed in full. Creation of new interests under these circumstances would then require both subtraction and addition.

One thing seems clear: if dispositive freedom as we have known it is to be preserved, a paradigm for creation based exclusively upon subtraction would not be viable. A system that makes “something” the equivalent of silence all of the time will not work adequately so long as personal choice remains an important value. Consequently, a mixed-bag system for creation of interests—in which silence sometimes means something and sometimes means nothing—seems inevitable once law reform permits the integrity of the common law paradigm to be compromised. And with a mixed bag, one could expect the same kinds of difficulties now encountered under § 2-707.¹³⁵ At the very least, lawyers must become fully versed in the new overlay and whatever was required to avert it and enable them to implement a new design. This could become very complicated. The level of complexity would depend upon the requirements for escaping the overlay and the controls imposed upon the process for rebuilding a different dispositive scheme. At the very least, the complexity generated by such a system should rival the problems caused by the mixed-bag paradigm created by § 2-707 and, therefore, so should the occasions for oversight and disaster as to objectives and results sought by the estate owner. One thing is for sure: this mixed bag would be far more difficult to master than the common law paradigm.

D. Benefits and Costs of Altering the Meaning of Silence—The Argument for Rejecting § 2-707 and Changes to the Common Law Paradigm

Despite these complexities, one might justify a system of mixed-bag default options if the benefits it achieved were significant. Conceivably, a system’s benefits might outweigh its complexities and dangers. It is, however, difficult to make a comparative analysis based upon default options that have yet to be conceived which transform silence into “something” instead of “nothing.” Section 2-707 does, however, exist; consequently, one can begin with a comparative analysis concerning it and, therefore, an examination of the reasons for § 2-707 and the objectives and benefits it is intended to achieve.

To begin with, one should note generally objectives that do not underscore § 2-707. For example, it does not serve the kinds of public

135. For discussion of these difficulties, see *supra* Part IV.B.

policies that frequently explain many decisions, rules, and statutes affecting the law of property. It is not concerned with preserving alienability, preventing fraud, achieving a supply of habitable rental housing, the pursuit of certainty, or assuring the legitimacy of an act of transfer.¹³⁶ Nor is it concerned with assuring dispositive accuracy and the clarification of ambiguous or incomplete expression required to discover true intent.¹³⁷ These reflect important societal values that have justified many rules which have gained acceptance despite the private costs they frequently impose. If any of these traditional values supported § 2-707 or potentially new and different default options, the analysis might be different, and so might one's ultimate conclusion.

Section § 2-707 is, however, different. It is grounded upon assumptions concerning preferred dispositive choices and what is needed to assure correct implementation of such choices. Section 2-707 is intended to rewrite certain trusts because of a strong belief that the estate owner was never asked the right questions and, therefore, never given the right dispositive choices.¹³⁸ Section 2-707 rests upon two basic assumptions.¹³⁹ First, estate owners always wish to conserve death costs that can diminish the size of their estate, and this includes death costs associated with not only their death, but also those associated with the death of their beneficiaries.¹⁴⁰ Second, estate owners much prefer to keep their estate

136. Section 2-707 is not concerned with matters of alienability as are the common law rule against perpetuities and the doctrine forbidding direct restraints upon the fee simple. Unlike many recording acts, it is not concerned with the prevention of fraud. It is not concerned with achieving a supply of habitable rental housing as are housing codes and the implied warranty of habitability. Additionally, § 2-707 is not concerned with the pursuit of certainty and consistency as is the doctrine of *stare decisis*. Nor is § 2-707 intended to assure the legitimacy of donative transfers of property as does the statute of frauds.

137. Section 2-707 does not focus on words—such as “descendants”—or phrases—such as “die without issue”—that can be patently ambiguous or become ambiguous as a result of the language and factual context in which they are used. Further, § 2-707 does not focus on incomplete expressions that often suggest an estate owner design that is not fully established. For example, consider these two residuary testamentary trusts: (1) “Income to B for life, and then principal to C absolutely if B dies without children alive at her death”; (2) “Income to B for life, and then if C survives B, principal to C absolutely; however, if C dies before B without leaving children alive at B's death, then principal to D absolutely.” Assume in the first illustration that B is survived by children and in the second that C predeceases B but leaves surviving children. A strict application of the common law paradigm, in which silence amounts to nothing, will cause the remainders to fail, an incomplete disposition of the estate owner's estate, and an intestacy. Some courts, therefore, might reach this construction and conclusion. Others, however, might find insight and ultimate direction in the conditions that mention children and, consequently, find by implication a substitute gift to surviving children even though the language failed to expressly define such gift.

138. See *supra* note 12 and accompanying text.

139. See *supra* note 11 and accompanying text.

140. With respect to estate conservation upon the deaths of beneficiaries, consider this residuary trust created by A: “Income to my husband, H, for life; upon the death of H, principal to my two

within the families of their beneficiaries, and this means essentially descendants of beneficiaries.¹⁴¹ This desire to control estate devolution is especially strong whenever a beneficiary is unable to survive the time for enjoyment and thereby personally benefit from the estate owner's gift. Consequently, estate owners wish to substitute their judgment and control over the destiny of their estate whenever beneficiaries predecease the time for distribution. Instead of risking diversion of the estate to spouses or others through a beneficiary's will, estate owners prefer to substitute their judgment by making a direct gift to a deceased beneficiary's living descendants. Consequently, based upon these assumptions, § 2-707 rewrites trusts by including requirements of survivorship for beneficiaries of future interests and by adding substitute gifts to living descendants for those beneficiaries that do not survive. Unless a trust expressly negates these choices, § 2-707 proceeds from the assumption that *all* estate owners share the same goals and, as a result, want the same conditions of

children, B and C, absolutely and forever." As written, B's and C's remainders are vested and, therefore, transmissible at death if either were to predecease the time for distribution of principal, namely, at H's death. All transmissible interests, whether possessory or nonpossessory, become a part of a decedent's estate and are, depending upon the size of the estate, subject to estate tax. Consequently, if B predeceased H and left his share of the principal to a living descendant, B-1, such remainder would continue within the family consistent with the expectations of most estate owners. It would, however, be diminished by any estate taxes at the death of B that were incurred as a result of including B's remainder within B's taxable estate. This tax, however, could have been avoided through a condition of survivorship, by making B's interest non-transmissible at death and removing it from his estate. And by adding a substitute gift to B's living descendants, A could have directly provided for B-1 just the same as B had in the original example. This is exactly what § 2-707 accomplishes. It produces estate conservation among beneficiaries through requirements of survivorship and substitute gifts and thus better preserves the original estate devised by A. Section 2-707 is designed to accomplish this because of underlying assumptions made about what estate owners really desire and, therefore, must intend.

There is, however, some evidence that traditional priorities among estate owners are changing and that this shift in objectives could alter the landscape of estate planning. In short, concern for taxes and estate conservation and protection are being eclipsed by a concern for preservation of the family and the values that underlie it. Because of the comparatively recent explosion of individual wealth within this country, the decline of estate taxes, and the presence of other factors, some commentators observe that estate owners are now focusing on the effect of too much wealth. To be sure, estate owners still want to minimize intra-family strife and protect their families from ever being destitute, but they also want to provide incentives and opportunities for family members. Most importantly, they do not want to provide an unearned and non-working lifestyle that blunts ambition and depreciates self-worth. *See, e.g.,* John J. Scroggins, *Protecting and Preserving The Family—The True Goal of Estate Planning, Part I: Reasons and Philosophy*, 16 PROB. & PROP. No. 3, 29 (2002); John J. Scroggins, *Protecting and Preserving the Family: The True Goal of Estate Planning, Part II—Some of the Tools*, 16 PROB. & PROP. No. 4, 34 (2002).

141. In light of this assumption, § 2-707 includes a substitute gift to the living descendants of a beneficiary of a future interest who fails to satisfy an expressed or statutory requirement of survivorship of the time for distribution. For further discussion of this assumption, see Halbach & Waggoner, *supra* note 11, at 1133.

survivorship and substitute gifts. Therefore, § 2-707 superimposes a template that standardizes all future interests created through trusts.

Proponents of § 2-707 argue that lawyers experienced in estate planning ask the right questions that elicit the foregoing responses and dispositive choices, and, accordingly, they then include conditions of survivorship and substitute gifts to living descendants.¹⁴² Inexperienced lawyers do not, however, ask these questions and, therefore, do not include these provisions. Consequently, the trusts they draft are flawed and may even constitute malpractice. Section 2-707 saves estate owners, beneficiaries, and the public from bad trusts, and it spares lawyers from costly litigation and adverse judgments. It overcomes bad trusts by rewriting them so that principal is ultimately delivered to those beneficiaries who were really intended to receive it if the estate owner had only been asked the right questions. Consequently, these are the benefits that derive from § 2-707 and the new paradigm it generates for creation of interests, one that includes a mixed bag of default options. And these are the benefits that must justify costs incurred by § 2-707's paradigm.

These costs are multiple. Once again, there are the foregoing costs endemic to a system that alters the meaning of silence and leaves one with a mixed bag that calls for both addition and subtraction in the formation and implementation of an estate design.¹⁴³ These costs derive from problems associated with non-literal meaning, increased complexity, and the resulting predilection for oversight and mistake. But there are also added costs peculiar to § 2-707 that derive mainly from problems associated with the subtraction of its overlay whenever an estate owner wishes to vary it or eliminate it.¹⁴⁴ A lawyer must know the overlay, all of its subtleties, and how the estate owner's true design differs from it. This is not an easy matter because the overlay's requirements often seem counterintuitive. Further, one must know how to remove the overlay and prevent it from interfering with an otherwise clearly expressed dispositive design. Once again, this is not an easy matter because the statutory mechanisms for aborting the requirements of § 2-707 are replete with surprises. In short, language that clearly articulates a different result will not necessarily yield such result.

142. *See supra* notes 11–12 and accompanying text. This suggests a third underlying assumption for § 2-707: trust provisions that do not include these conditions of survivorship and substitute gifts to living descendants of deceased beneficiaries are drafted by inexperienced and often incompetent lawyers.

143. *See supra* Parts IV.B & C.

144. For discussion of these problems, see *supra* Part III.B.

Putting the foregoing costs aside, however, one must examine the benefits of § 2-707 and the questions and problems they raise and the special costs associated with them. One should first observe that § 2-707 is grounded upon presumed intent and that estate owner intent has always been the main mantra of courts when deciding problems of interpretation, and such intent has frequently underscored the results courts reach in these cases.¹⁴⁵ Sophisticated commentators and judges, however, sometimes recognize that such intent is often nonexistent because the problem under consideration was undoubtedly never anticipated and, therefore, never contemplated by the estate owner. Consequently, they recognize that “actual dispositive intent” under these circumstances is merely a fiction. And what courts are really doing when they purport to apply intent is fabricating a solution based upon what judges believe the estate owner would have really wanted if he had been asked the right questions and then responded with an appropriate choice.¹⁴⁶

Construction through fabricated intent is commonplace in the law of future interests, but perhaps the best example is the *rule of convenience* which judges use to determine the maximum membership of class gifts.¹⁴⁷ Most often, language that creates a class gift fails clearly to specify maximum limits to the class. Usually limits are implied. For example, an immediate devise from A “to the children of B” is assumed to include all the children B may have. Because it is a class gift, one also assumes that B’s children are entitled to equal shares. Finally, one assumes that B’s children are intended to receive distribution of their respective shares immediately upon creation, namely, at the settlement of A’s estate. Sometimes one or more of these assumed directions is made explicit.¹⁴⁸

145. See SIMES & SMITH, *supra* note 20, § 465.

146. *Id.*; see also *Roberts v. Tamworth*, 73 A.2d 119, 121 (N.H. 1950).

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

Id. (alteration in original) (internal citations omitted).

147. For a full discussion of the rules that govern determination of the maximum membership of class gifts, see SIMES & SMITH, *supra* note 20, §§ 631–51.

148. See, for example, *Thomas v. Thomas*, 51 S.W. 111, (Mo. 1899), one of the leading cases on

Problems arise, however, whenever potential members are born after the time for first distribution of principal. In this example, the problem would arise if B were to survive A and thereafter had an additional child or children. These children would then have been born after the time for first distribution if B had had any children alive at A's death.

The problem exists because of a perceived conflict among the foregoing three directions. Courts could, of course, accommodate all three directions with reallocations of distributed principal in the event others were born and, therefore, members were added after first distribution of principal. This would necessitate ongoing court surveillance and supervision because class members who had received their respective shares would be required to return portions of it each time the class expanded. Courts, however, regard this as administratively inconvenient and, therefore, a burden they are unwilling to assume. Because this is not viewed as a viable choice, courts conclude that all three directions cannot be implemented "as is," even if all three were made explicit. Ultimately courts have settled upon a compromise that they believe correlates with the probable intent of estate owners, namely, that the class must close and the maximum membership fixed at the time of first distribution of principal. Many courts justify this result on the basis of actual intent.¹⁴⁹ In reality, it is a fabricated intent. It is the court's own answer to the question of what do they believe the estate owner would have intended if she had been presented with the problem and its available solutions.

This approach seems remarkably similar to the one underlying § 2-707. Both the court-created solution to issues of class composition and § 2-707's creation of conditions and substitute gifts are predicated upon fabricated intent; once again, what the estate owner would really have wanted if she had addressed the problem directly. Nevertheless, there is an important distinction between the approaches of courts in construction cases generally and § 2-707, one that forces us to assess the benefits of each approach differently. Principles of construction and interpretation adopted by courts that reflect fabricated estate owner intent are invariably triggered by perceived ambiguity derived from incomplete or inadequate expression. For example, the *rule of convenience* will not control class composition whenever the language is complete, unambiguous, and does

the subject of maximum class membership and the rule of convenience. In that case, the testator expressly directed that all children born to his son should be included within the class, that payment of his or her share should be made to each child upon arriving at majority, and that division among the group should be in equal shares. *Id.* at 111.

149. *See, e.g., id.* at 113–14.

not present an administratively inconvenient solution.¹⁵⁰ Courts apply this rule only when the language itself does not offer an acceptable basis for determination. The rule does not change the basic paradigm for creation. It is decisive whenever something—invariably, something contradictory or ambiguous—has gone wrong in the conversion of estate owner intent into command language. Indeed, it does govern on the basis of what most people would prefer under the circumstances. It will not, however, govern at all if the language is clear and not problematic. It is not designed to rewrite provisions that offer unambiguous and viable results even when courts firmly believe that the estate owner might have intended and, therefore, should have provided otherwise. To be sure, many of these decisions are explained in terms of estate owner intent. Just as often, however, a court might say that “it’s not what we believe the estate owner intended but what the language clearly says.”¹⁵¹ Quite differently, § 2-707’s fabricated intent controls even when no ambiguity exists under the basic common law paradigm used for the creation and interpretation of interests. The *rule of convenience* differs greatly from § 2-707; indeed, the *rule of convenience* does not present an interpretive license to improve an estate plan through fabricated intent.

Additionally, one should observe that § 2-707’s fabricated intent assumes the existence of a universal intent for all estate owners. It also assumes that unambiguous dispositive manifestations of a different intent—that is, the failure to express conditions of survivorship along with substitute gifts—reflect inexperienced or inadequate lawyering. These assumptions are downright dangerous because many of § 2-707’s assumptions are counterintuitive and open to serious question, especially

150. For example, consider these two trusts that leave principal to the children of C: (1) “Income to B for life, and then to all of C’s children equally absolutely and forever. However, if C survives B, distribution of principal shall be deferred until the death of C. Until then, income shall be distributed equally among C’s children”; (2) “Income to B for life, and then to all of C’s children absolutely and forever, with distribution to be made equally among C’s children born by the time of B’s death. However, if C survives B, the trustee is directed to reserve a portion of the principal to be held for the benefit of any children C may have after the death of B. If none are born thereafter, such reserved portion of principal shall be added to the shares of children who previously received distributions of principal.” Both examples avoid the administrative dilemma underlying the rule of convenience. In the first example, principal is left to all of C’s children equally, but the administrative dilemma is avoided by deferring distribution until C’s death when she can no longer have additional children. In the second example, distribution is not deferred. Instead, a portion of the principal is set aside for those who are born after the death of B. Although courts are unwilling to supervise recovery of portions of shares already distributed to beneficiaries, they have no problem with a trust that defers and staggers payment of portions of the principal.

151. See, e.g., MANDEL, *THE PREPARATION OF COMMERCIAL AGREEMENTS* 8 (1955); PIESSE, *THE ELEMENTS OF DRAFTING* 11–12 (J.K. Aitken ed., 5th ed. 1976).

those that control alternative gifts.¹⁵² Further, although some of § 2-707's underlying assumptions may predominate among estate owners, without more, no one can assume universality for all of the estate planning norms that underscore it. Yet rather than relying on lawyers to do the right thing, the proponents of § 2-707 intrude and rewrite documents without really knowing in each case whether § 2-707's revised product comports with an estate owner's actual intent. The risks are enormous. Inexperienced and experienced lawyers alike can prepare documents that unwittingly misfire because the complex nuances of the statutory overlay imposed by § 2-707 may be misunderstood. Further, escape from the statute can become unduly difficult and, therefore, never mastered. And because of this, there will be instances in which carefully conceived and intelligent plans are subverted. The shift in paradigm caused by § 2-707 will not be without significant costs. In short, the benefits achieved through § 2-707's overlay are at best questionable, and they are not without potential for overwhelming costs.

Beyond these costs and concerns as to § 2-707's fabricated intent, there seems to be something fundamentally wrong with the way in which the proponents of § 2-707 achieve its benefits. Surely one ought to wonder about the matter of arrogance. The subjects of § 2-707 are future interests created by trusts, testamentary or living trusts. Future interests, however, created without a trust—for example by deed—are excepted. Unlike the preparation of deeds, lawyers almost always have a hand in the creation of trusts. Given this reality, underscoring § 2-707 is a premise that some lawyers know better what the clients of others actually want and that these select lawyers should be able to dictate to all through intervention into lawyer-client relationships and their work products. Sometimes this intervention will yield a good result, but sometimes it will not. One never knows for certain. Surely, there is something fundamentally wrong with

152. Counterintuitive provisions within § 2-707 include its provisions for an ultimate gift to heirs: for example, its provision that governs nontestamentary trusts and creates statutory substitute gifts to heirs even though heirs are not included elsewhere within the estate owner's trust or will. For further discussion, see Becker, *supra* note 14, at 359. Also, § 2-707 is counterintuitive with respect to alternative gifts. To begin with, a giftover to the residue within a non-residuary devise itself, one that explicitly controls in the event the beneficiary of the future interest does not survive the time for distribution, does not qualify as an alternative future interest that would otherwise eliminate the statutory substitute gift to living descendants of the deceased beneficiary. For further discussion, see *id.* at 358, 391–92. Additionally, if an alternative future interest is created as a substitute in the event there are no survivors with respect to a future interest in a class expressly subject to a requirement of survivorship of the time for distribution, the statutory substitute gift to living descendants of deceased class members is not completely eliminated. There are scenarios in which these descendants are included and others in which they are excluded, which taken together, do not make sense in terms of any consistent intent one might impute to an estate owner. For further discussion, see *id.* at 393–95.

law reform that embarks on a mission of “we know better than you,” even though the reformers are without benefit of individual client contact. To be sure, the real world of law practice is replete with dispositive designs that have gone awry, often because of problems that should have been anticipated and resolved. If the lawyers responsible for these documents had engaged in comprehensive prevision and expert provision, these problems would not have arisen.¹⁵³ But that’s the real world. The solution to estate designs that misfire and misdirect should not be forced intervention and revision accomplished through statutory overlays. One instance—such as § 2-707—will lead to another and another and another instance of one group of “expert lawyers” interfering with what all others do. Where will it end? Surely, there are more appealing solutions. Better education, within and without law school, and a heightened sense of professional responsibility and knowledge as to what it takes to prepare effective dispositive instruments is a much better way to proceed. Section 2-707 is more than an act of arrogance; it’s the wrong way to assure better dispositive plans and instruments. Above all, such need for improved estate planning does not justify serious changes to the common law paradigm and the long-term costs they will inflict. Better estate plans should never be achieved at the expense of the systems of command expression that are always needed to carry out such designs.

To summarize, § 2-707 rewrites existing trusts that deviate from the mainstream of estate planning. Section 2-707 is designed to produce better results, at least those most estate owners would desire if asked the right questions and offered the right choices. Its benefits derive from the results it achieves: it saves death costs, directs principal to those really intended to benefit, and spares inexperienced lawyers from malpractice claims. In accomplishing this, § 2-707 fabricates a universal intent for estate owners. However, unlike other rules governing the interpretation of property interests that proceed from fabricated intent, § 2-707 imposes its dispositive overlay despite the presence of language with clear and unmistakable meaning. It is not triggered by problematic language but instead by a simple language format that would otherwise be viewed as unambiguous. At best, then, these benefits rest upon a fabrication that

153. See *supra* note 90. For a thorough discussion of construction problems and their underlying issues of prevision and provision and for further illustration of what lawyers must do to accomplish “comprehensive and astute prevision” and “concise and accurate provision,” see David M. Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751 (1978); David M. Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning* (Pts. 1 & 2), 1972 WASH. U. L.Q. 607 (1973), 1973 WASH. U. L.Q. 1 (1974).

radically departs from interventions of the past. Further, § 2-707's fabricated intent is flawed. At the very least, it can never reflect universal wishes among estate owners, especially because some of its overlay is counterintuitive and because estate owners inevitably offer countless differences among their wants and dispositive desires. To be sure, § 2-707's overlay can be modified or revoked, but the risks of misinterpretation and misdirection are great for both inexperienced and experienced lawyers. Consequently, the stakes are high and so are the potential costs of § 2-707. In the end, § 2-707 reflects an arrogant attempt to rewrite trusts because its proponents know best what the clients of others always want. These then are the short term costs of § 2-707. The long term costs lie in a new paradigm that ratchets up significantly the complexities and difficulties of expressing command thoughts for the creation of interests.

V. CONCLUSION

Once again, the common law paradigm for creation and interpretation of interests begins with the assumption that silence equals nothing; that is, silence translates into nothing more by way of additional interests and conditions. The formation of a disposition begins with a blank slate. Nothing is transferred until and if expressed. Consequently, the entire conveyance is shaped cumulatively through the explication and addition of component interests. Section 2-707 was intended to produce better trusts that reflect the answers that most estate owners would give if asked the right questions respecting dispositive design. Nevertheless, it accomplishes this by assaulting the common law system for command expression.¹⁵⁴ Consequently, silence now equals something some of the time and nothing most of the time. The paradigm has been converted into a mixed bag in which the transfer of ownership still requires addition, but often it requires careful and sophisticated subtraction of portions or all of the silent overlay imposed by § 2-707. As a result, one is left with a new system that is exceedingly complicated and makes the overall task of drafting much more problematic.

These difficulties should not be surprising. One should observe that the common law system is not the only paradigm grounded upon a blank slate,

154. Once again, this refers to command expressions that are intended to control the distribution and disposition of property interests governed by recognized instruments of transfer. There are, of course, other forms of command expressions within the law generally and also within the law of property. These would, for example, include those commands imposed by statute.

with silence amounting to nothing and with directions imposed by addition. These paradigms all work because of their clarity and their simplicity in formulating both elementary and complex commands. The composition of music is perhaps the best analogy because it rests upon a formal paradigm much the same as the creation of trusts is tied to the common law paradigm. A composer begins with a blank slate. Nothing exists by way of directive sound until the first note is put to paper. Thereafter, absent an indication for improvisation,¹⁵⁵ nothing is to be played and heard except for the musical notes that have been expressed. Additionally, the direction is cumulative. The musical piece is expressed by addition and not subtraction. One note after another and another add up to the final composition. Some short-hand notations may exist such as keys, flats, and sharps. But these notations do not alter the character of the paradigm; specifically, nothing exists until and unless it is expressed through positive notation.¹⁵⁶

Consider another analogy that involves an informal paradigm for command expression. Shopping lists can be composed for one's own guidance, but they can also be composed as specific directions for others that must be observed in making retail purchases. Indeed, the directions can be as concrete as the directions an estate owner gives to a trustee concerning the delineation of beneficiaries and the terms of each gift. How then does one create a shopping list? Each item is spelled out one by one. The list is expanded by addition and the cumulation of all the items taken together constitutes the full shopping list.¹⁵⁷ Sometimes alternatives are included. Items may be subtracted and others may replace them, depending perhaps on the price per unit and the number of units that are

155. Sometimes a composition will expressly allow for improvisation. This is, unto itself, as much of a positive direction from the composer as is the inscription of a specific series of musical notes. Sometimes, however, a performer will elect to improvise even when the composer offers no specific direction to do so. This is much the essence of jazz. When this kind of improvisation occurs, the ultimate product that is heard is not strictly the musical command of the composer, but instead, it reflects the unique imprint of the performer as well.

156. The final product may, of course, contain repeat phrases and passages, but even this must be noted in some manner. The composition may also contain rest notes that are added to the blank slate in order to impose silence in the midst of sound.

157. A shopping list may, of course, contain short-hand directions often used among members of a family. For example, it may say: "Buy items b, c, d, e, and f, along with the usual." The "usual" is a short-hand representation for repeated lists or portions of lists from the past, and it may be expressed or always implied. Either way, the usual is of itself just as much a positive direction as is the designation of "b, c, d, e, and f." The instruction may also introduce items eliminated from the "usual," and thus present a need for subtraction. Nevertheless, this subtraction is from a list created by positive direction and not from one imposed automatically by statute.

available. Again, this is very similar to the express use of conditions and the inclusion of substitute gifts in the creation of trusts.¹⁵⁸

Just imagine, however, formulating a shopping list for a trip to Wal-Mart that reflects a paradigm predicated exclusively upon negation rather than positive affirmation. Just imagine a system for command expression in which silence would mean that every item within the store were to be purchased. Negation would, however, be permitted, and one could accomplish this by specifying items not to be purchased on a list—a reverse shopping list that would spell out each item to be rejected. Just think how difficult and inefficient this would be to formulate even if one had access to the full inventory of the store and could replicate it ahead of time. Or imagine a paradigm that presented a mixed bag of affirmation and negation, one similar to the effect § 2-707 has had on the creation of trusts and their beneficial interests. Imagine a system in which shopping lists were created for a trip to Wal-Mart that required positive expression of all items to be purchased with the exception of shoes, men's shirts, vegetables, and sundries. As to these latter categories, silence meant that everything was to be purchased, for example, all vegetables and all sundries. If this were not intended, then one had to specify items that were not to be purchased. In the end, the shopping list would enumerate items that were to be purchased along with specific sundries, vegetables, shoes, and shirts that were not to be purchased. Imagine the confusion, problems, and likelihood for error generated by this mixed-bag paradigm. Undoubtedly, it would appeal to no one, and everyone would be wary of

158. One should also observe that there are many forms of nonverbal communication that parallel the common law paradigm and its blank slate. Consider the use of signs in baseball that coaches and managers give to players. The default is generally free choice for the batter and sometimes for a base runner as well. Signs are given to execute certain things. Those signs may require renewal for each pitch or conceivably for each time at bat. Sometimes a sign may subtract a previous instruction, thereby bringing the batter back to free choice or some other existing instruction. And sometimes the signs themselves may amount to nothing because, through a previous instruction, they are intended to mask the actual direction. Nevertheless, each instruction proceeds from the blank slate or default and builds to a final communication on which the player must act.

In another striking example of command thought structure, the Danish toy company Lego uses a similar paradigm in its instructions to construct its toys from small pieces of interconnecting plastic. With the complete absence of language, Lego instructions begin with the blank slate and step-by-step add pieces to this blank slate, slowly but surely creating the end result. Construction is accomplished by addition and silence is meaningless. Each instruction is made up of a simple picture of the desired structure, which usually contains several more pieces added in various locations, beginning with the first instruction which is several pieces standing alone, added to the blank slate which is the basis. These instructions continue piece by piece until the desired product has been created—a nonverbal step-by-step process of addition only that uses the positive expression of command thought to reach its goals. Complete instructions for five different train-related objects can be found at <http://www.lego.com/eng/trains/workshop/buildinstructions.asp> (last visited June 11, 2005).

paradigm changes that made it the prevailing system for formulating shopping lists.

Surely one should have the same concerns about § 2-707 and any other assaults upon the common law paradigm. Just imagine the complexities that would be caused by taking § 2-707 several steps further. For example, assume that § 2-707 converted its automatic substitute gift to living descendants of a deceased beneficiary into a gift in default of the exercise of a power of appointment and that it gave each beneficiary of a future interest who failed to survive the time for distribution a non-general testamentary power to appoint principal to such beneficiary's living descendants. Further, assume § 2-707 automatically included staggered age requirements for distribution of principal to the beneficiary or to those living descendants who took pursuant to such power or gift in default. Each of these additions would be consistent with mainstream estate planning and viewed as good practice.¹⁵⁹ Each of these changes would expand the statutory overlay and further alter the meaning of silence. Under this expanded version of § 2-707, its overlay would control even if unintended so long as the overlay were not expressly negated in the manner permitted by the statute. Just imagine how this would compound the problems of creating and interpreting trusts that utilize future interests.

Or consider another possible statutory substitute for silence, namely, a perpetuities saving clause. This additional overlay would reflect what all experienced estate planners include in trusts that involve future interests.¹⁶⁰ One would imagine such an overlay to be quite popular. After all, everyone should favor protective devices that secure estate designs against unintended and unexpected disasters that might otherwise sabotage the entire plan. Perpetuities saving clauses do exactly that, and that is why lawyers use them. Yet silence under the common law paradigm has meant nothing thus far as to these saving clauses. Until expressed, the clause does not exist. Perpetuities reform has occurred with great profusion, but it has not accomplished this by changing the common law paradigm for creation of interests.¹⁶¹ And this is probably for very good reasons,

159. See *supra* notes 127–28. One should observe, however, that age requirements that are used with respect to “descendants” covered by the power or gift in default usually impose directions for payment and not requirements of survivorship. This occurs because of the perpetuities problems that can arise with respect to groups of recipients that are not confined to lives in being when the interests are created.

160. For a summary of various kinds of saving clauses, references to the form books in which they regularly appear, a discussion of their components and how these clauses function, and finally illustrations of their defects and inadequacies, see Becker, *supra* note 5, at 378–407.

161. Some of the perpetuities reforms are designed to patch up specific kinds of perpetuities

including the fact that one size—one kind of saving clause—can never fit all. Statutory overlays that change the meaning of silence by including a standardized saving clause are not worth the risks of misguided redirection of principal and the problems they generate for lawyers who must fashion estate plans that conform to individual wishes.¹⁶²

Perpetuities saving clauses are good things. And most of the time, so are conditions of survivorship and substitute gifts triggered by any failure to satisfy these conditions. But so are many other practices that experienced and sophisticated estate planners follow. Most likely, these are matters that all planners should raise with clients, and these are provisions that all lawyers should include whenever consistent with individual designs. But altering the meaning of silence and, therefore, the common law paradigm is not the way to achieve better lawyering and better work products. The fundamental problem lies with those who practice estate planning and not with the system for command expression. Consequently, the solution ought to address the former and not the latter.¹⁶³ There is a saying that is especially relevant and familiar to all. “If it ain’t broke, don’t fix it.” For this there may be an appropriate corollary:

problems that have repeatedly yielded undesirable results. However, the most significant changes have been much more pervasive and substantial. Generally, they either convert the rule into an actualities test or offer courts discretionary powers of reformation of the problematic provision in the event of a perpetuities violation. Most, however, do both. *See supra* note 4; *see also* Becker, *supra* note 5, at 356–65. One should carefully note that the redirection of subject matter whenever a violation occurs is not at all like the intrusion into silence that is imposed by § 2-707. To begin with, a court’s power to reform, and therefore alter the estate design, does not arise unless and until a provision violates the rule against perpetuities and, therefore, becomes unenforceable as written. Consequently, a court cannot intrude unless the language itself causes a void in the dispositive scheme. Additionally, the powers given to courts are discretionary. There is no preordained solution or dispositive design imposed upon all estates that present perpetuities problems. The solution is discretionary and flexible and it must be adapted to the identifiable wishes of the estate owner. This is unlike § 2-707 and also unlike saving clauses which frequently redirect principal to then living income beneficiaries. *See supra* note 159. Nevertheless, one should observe that the latter redirection still reflects the estate owner’s explicit choice. Section 2-707, however, does not.

162. For discussion and illustration of why tailor-made provision-by-provision perpetuities compliance is superior to “the one size fits all” approach of a standard saving clause, *see* Becker, *supra* note 5, at 408–16.

163. For example, education during and after law school should be the focus of any lasting solution. Law schools, in particular, have not done a very good job in preparing students for the practice of estate planning. To begin with, there are not many courses that touch upon estate planning in most law school curricula. Indeed, there are not many courses devoted to the skills needed for planning generally as opposed to litigating. More importantly, perhaps, many students graduate without full appreciation of the specialized information and skills needed to plan and implement the disposition of estates. Quite the contrary, many schools popularize the notion that the one thing every student should be able to do upon graduation is to prepare a simple will or trust. As a result, lawyers of every stripe and experience prepare these documents and, as a result, many fail to ask the right questions, design the appropriate plan, and include effective conditions and provisions.

“If you do attempt to fix it, you may break it.” And over time this kind of law reform may prove to be terribly unwise.