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# APPLICATION OF ANTILAPSE STATUTES TO APPOINTMENTS MADE BY WILL

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Powers of appointment are justifiably popular tools of the modern estate planner.[1] Their popularity rests largely on the flexibility of disposition they introduce into a long-term trust and on the means they provide for taking advantage of various opportunities to reduce taxation.[2] In addition, a power of appointment permits the holder many of the advantages of property ownership without some of its corresponding liabilities.[3]

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1. *See, e.g.*, A. CASNER, ESTATE PLANNING 689–782 (3d ed. 1961); J. TRACHTMAN, ESTATE PLANNING 201–11 (1968); H. TWEED & W. PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 58–60 (7th ed. 1966); Halbach, *The Use of Powers of Appointment in Estate Planning*, 45 IOWA L. REV. 691 (1960).

2. A life estate coupled with a general power of appointment, testamentary or presently exercisable, will qualify for the marital deduction. I.R.C. § 2056(b)(5); Rusoff, *Power of Appointment and Estate Planning*, 10 J. FAM. L. 443, 457 (1971). Ownership of a power to appoint to anyone other than the donee, his estate, or the creditors of his estate does not subject the appointive property to taxation in the donee's estate. I.R.C. § 2041(b)(1). Prior to adoption of the Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1520 (1976), non-general powers were frequently used in connection with generation-skipping devices. A. CASNER, *supra* note 1, at 717; Coleman, *The Special Power of Appointment in Estate Planning*, 109 TR. & EST. 920 (1970); Jarvis, *A Survey of Generation Skipping Transfers—The Present Rule and the Possibility of Reform*, 22 SW. L.J. 482, 487 (1968). The impact of the generation-skipping tax of the new Act, I.R.C. §§ 2601–2622, on utilization of non-general powers remains to be seen. *See generally* Bloom, *The Generation-Skipping Loophole: Narrowed, but Not Closed, by the Tax Reform Act of 1976*, 53 WASH. L. REV. 31 (1977). For other articles discussing tax aspects of powers of appointment, *see* Allen, *Use of Trusts and Powers of Appointment in Estate Planning*, 21 ARK. L. REV. & B.A.J. 15 (1967); Brown, *A Case Against an Additional Tax on Generation-Skipping Transfers*, 106 TR. & EST. 997 (1967); Craven, *Powers of Appointment Act of 1951*, 65 HARV. L. REV. 55 (1951); Note, *Special Powers of Appointment and the Gift Tax: The Impact of* Self v. United States, 3 VAL. U.L. REV. 284 (1969).

3. A prime liability of ownership, of course, is availability of assets to creditors. Ownership of a special power does not subject the appointive property to the donee's creditors, because the donee has no beneficial interest. RESTATEMENT OF PROPERTY § 326 (1940). In the absence of a statute, creditors of the holder of a general power cannot reach the appointive property unless the donee has exercised the power. Quinn v. Tuttle, 104 N.H. 1, 177 A.2d 391 (1962); RESTATEMENT OF PROPERTY § 327 (1940). When the donee has exercised the power, courts split; the majority hold that the assets are available for the donee's debts. RESTATEMENT OF PROPERTY §§ 329–330 (1940); Estate of Masson, 142 Cal. App. 2d 510, 298 P.2d 619 (1956). This may be true even if the appointment is defective. Gilman v. Bell, 99 Ill. 144 (1881). A minority of courts refuse to allow the donee's creditors to reach the assets unless they are appointed to the decedent's estate. *See, e.g.*, St. Matthews Bank v. De Charette, 259

Although litigation involving powers of appointment has been relatively infrequent,[4] the increasing use of powers over the last few decades forebodes increasing litigation in this field. Anticipating this development, several states have enacted fairly comprehensive statutes which attempt to set forth in accessible form certain aspects of the common law of powers, make certain revisions in the common law, and replace outmoded statutes on powers.[5] One area in which both the common law and the recent statutes are inadequate is in the application of antilapse statutes to appointments made by will.

This article examines the development of the common law in this area and the modern statutory treatment of the application of antilapse statutes to testamentary appointments. The problems created by both are then analyzed, possible judicial solutions are explored, and finally a statutory solution is proposed.[6]

## I. THE PROBLEMS PRESENTED

Since at least 1748,[7] it has been settled that an appointee under a power exercised by will must be alive at the effective time of the appointment to take the property.[8] If the appointee fails to survive the

Ky. 802, 83 S.W.2d 471 (1935). *See also* Annot., 97 A.L.R. 1070 (1935); Annot., 59 A.L.R. 1510 (1929).

4. There has been more tax litigation dealing with powers of appointment than litigation of other sorts. For example, from 1967 to 1977, at least 41 cases were decided under I.R.C. § 2041, including 19 in circuit courts of appeal, 10 in federal district courts, six in Tax Court, and six in state courts. *See* 26 U.S.C.A. § 2041 (West Cum. Supp. 1977). In contrast, from 1967, when New York enacted its powers act, to 1977, there were only 19 cases reported which cited the statute in any way. N.Y. EST., POWERS & TRUSTS LAW §§ 10–1.1 to –10.8 (McKinney Cum. Supp. 1977–78).

5. CAL. CIV. CODE §§ 1380.1–1391.2 (West Cum. Supp. 1978); MICH. COMP. LAWS §§ 556.111–.133 (1970); N.Y. EST., POWERS & TRUSTS LAW §§ 10–1.1 to –10.8 (McKinney 1967); WIS. STAT. ANN. §§ 702.01–.21 (West Supp. 1977). *See also* MINN. STAT. ANN. §§ 502.62–.79 (West 1947 & Cum. Supp. 1978).

6. The terminology employed in this article generally follows that of the *Restatement of Property*. A power of appointment is a power to designate the transferees of property or the shares among designated transferees, within limits specified by the creator of the power. A general power is one which can be exercised in favor of the donee or the donee's estate; a special power is one to appoint to or among the members of a group not unreasonably large. The creator of the power is the "donor," and the holder of the power, the "donee"; the permissible appointees are the "objects" of the power. RESTATEMENT OF PROPERTY §§ 318–320 (1940).

7. Oke v. Heath, 27 Eng. Rep. 940 (Ch. 1748). The question was raised earlier in Bird v. Lockey, 23 Eng. Rep. 1086 (Ch. 1716), but the resolution was not clearly dispositive of the issue.

8. An appointment by will takes effect upon the death of the donee. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 985 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

donee, the appointment is ineffective and the property passes in default of appointment.[9] A similar doctrine has long been applied to transfers made by will: the taker must be alive at the testator's death or the bequest "lapses" and the property passes by the residuary clause or by intestacy.[10]

To deal with the problems created by the lapse of testamentary gifts, "antilapse" statutes have been enacted in England[11] and most of the American states.[12] Although there are considerable variations, most of the statutes provide that if a bequest to a relative of the testator lapses, the surviving issue of the relative take the lapsed bequest in his or her place.[13] Of these statutes, only Wisconsin's expressly applies

9. *Id.* § 984. Property "passing in default" passes under an express or implied provision in the creating instrument which is to be effective in default of appointment, by the residuary clause of the donor's will, or by intestacy from the donor. If the donor is alive, the property may revert to him. *Id.* § 1031. Under certain circumstances, however, an alternative appointment may be found in the donee's will. Under the capture doctrine, an implied alternative appointment to the donee's estate may be found in an attempt to exercise the power. *See, e.g.,* Talbot v. Riggs, 287 Mass. 144, 191 N.E. 360 (1934). By case law in Massachusetts, the residuary clause of the donee's will exercises the power without express reference to the power. Second Bank-State St. Trust Co. v. Yale Alumni Fund, 338 Mass. 520, 524, 156 N.E.2d 57, 60 (1959). A number of jurisdictions reach the same result by statute. *E.g.,* CAL. CIV. CODE § 1386.2 (West Cum. Supp. 1978).

10. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 (2d ed. 1953).

11. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 33.

12. ALA. CODE § 43–1–13 (1960); ALASKA STAT. § 13.11.240 (1972); ARIZ. REV. STAT. § 14–2605 (1975); ARK. STAT. ANN. § 60–410 (1971); CAL. PROB. CODE § 92 (West 1956); COLO. REV. STAT. § 15–11–605 (1973); CONN. GEN. STAT. ANN. § 45–176 (West 1960); DEL. CODE tit. 12, § 2313 (Cum. Supp. 1976); FLA. STAT. ANN. § 732.603 (West 1976); GA. CODE ANN. § 113–812 (1975); IDAHO CODE § 15–2–605 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 3, § 49 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 29–1–6–1(g)(2) (Burns Cum. Supp. 1977); IOWA CODE ANN. § 633.273 (West 1964); KAN. STAT. § 59–615 (1976); KY. REV. STAT. § 394.400 (1972); ME. REV. STAT. tit. 18, § 1008 (1964); MD. EST. & TRUSTS CODE ANN. § 4–403 (1974); MASS. GEN. LAWS ANN. ch. 191, § 22 (West Cum. Supp. 1977); MICH. COMP. LAWS § 702.11 (1970); MINN. STAT. ANN. § 524.2–605 (West 1975); MISS. CODE ANN. § 91–5–7 (1972); MO. ANN. STAT. § 474.460 (Vernon 1956); MONT. REV. CODES ANN. § 91A–2–605 (1975); NEB. REV. STAT. § 30–2343 (1975); NEV. REV. STAT. § 133.200 (1973); N.H. REV. STAT. ANN. § 551:12 (1974); N.J. STAT. ANN. § 3A:3–13 (West 1953); N.M. STAT. ANN. § 32A–2–605 (1976); N.Y. EST., POWERS & TRUSTS LAW § 3–3.3 (McKinney 1967); N.C. GEN. STAT. § 31–42 (1976); N.D. CENT. CODE § 30.1–09–05 (1976); OHIO REV. CODE ANN. § 2107.52 (Page 1976); OKLA. STAT. ANN. tit. 84, § 142 (West 1970); OR. REV. STAT. § 112.395 (1975); 20 PA. CONS. STAT. ANN. § 2514(9) (Purdon 1975); R.I. GEN. LAWS § 33–6–19 (1969); S.C. CODE § 21–7–470 (1976); S.D. COMPILED LAWS ANN. § 29–6–8 (1976); TENN. CODE ANN. § 32–306 (1977); TEX. PROB. CODE ANN. § 68 (Vernon 1956); UTAH CODE ANN. § 75–2–605 (1977); VT. STAT. ANN. tit. 14, § 558 (1974); VA. CODE § 64.1–64 (1973); WASH. REV. CODE § 11.12.110 (1976); W. VA. CODE § 41–3–3 (1966); WIS. STAT. ANN. § 853.27 (West 1971).

The only states without antilapse statutes are Hawaii, Louisiana, and Wyoming.

13. The principal variations in the antilapse statutes are in the size of the group

## AMERICAN & ENGLISH ANTILAPSE STATUTES

TAKERS SUBSTITUTED BY ANTILAPSE STATUTE

| TAKERS PROTECTED BY ANTILAPSE STATUTE | *Issue (expressed as issue, lineal descendants, descendants, children or their issue, etc.)* | *Heirs* | *Heirs or devisees of predeceased legatee* |
|---|---|---|---|
| *Children* | South Carolina | | |
| *Lineal descendants* | Ala., Ark.,* Ill.,* Ind., Miss., Tex. | | Great Britain |
| *Grandparent or lineal descendant thereof* | Alas.,* Ariz.,* Colo.,* Del.,* Fla.,* Idaho,* Minn.,* Mont.,* N.D.* | | |
| *Relative* | Me., Mass.,* Mich.,† Mo., Neb.,* N.M.,* Nev., Ohio, Okla., Ore.,* S.D., Wash., Wis.** | | |
| *Kindred* | California, Vermont | | |
| *Any devisee* | Ga., Ky.,* N.H., N.C.,* R.I., Tenn.,* Va., W. Va. | Iowa | Maryland* |
| *Other [brackets indicate for whom the issue will be substituted]* | Conn. [child, grandchild, sibling], Kan. [spouse, lineal descendant, or relative within six degrees], N.J. [child, descendant, sibling], N.Y.* [issue, sibling], Pa.* [issue, sibling or child of sibling], Utah [heirs] | | |

*Statute expressly applies to class gifts.
**Statute expressly applies to class gifts, if devisee died after execution of the will.
†Limited to relatives within fourth degree of the testator, unless they are also residuary takers, in which case the issue will be substituted.
No statutes: Hawaii, Louisiana, Wyoming.

to an appointment made by will.[14]

After tracing the development of the doctrine that the appointee under a power exercised by will must survive the donee, this article, in Part II, examines the cases dealing with the question whether anti-

of devisees and legatees covered. All statutes except those of England, Maryland, and Ohio substitute surviving issue for the predeceased taker. *See* Table *supra*.

14. WIS. STAT. ANN. § 853.27 (West 1971).

lapse statutes can be applied to appointments under testamentary powers. Part II proceeds historically from English to American cases and then to recent statutes. The principal question dealt with is whether an appointment made by will is a "devise" or "bequest" within the meaning of the antilapse statutes. Whether a power is general or special has significantly affected some courts' answers to this question.

In Part III, three major problems are treated. The first is whether a distinction should be drawn between appointments made under general powers and those made under special powers. In Part III–*A*, the positions of the various courts and commentators on the applicability of antilapse statutes to appointments made under special powers are analyzed and the conclusion reached that the statutes should be applied.

Even where application of antilapse statutes to appointments under special powers is accepted, courts have refused to do so if the issue of the predeceased appointee do not fit the class description used to designate the objects of the power. Whether this position, also taken by recent statutes, is desirable is discussed in Part III–*B*.

The third problem, treated in Part III–*C*, is raised by those antilapse statutes which apply only to gifts to a relative of the testator. Where the predeceased appointee is related to the donor but not to the donee of the power, courts have refused to apply such antilapse statutes. The same result is to be expected under the recent statutes. The desirability of this result is examined for both general and special powers. After concluding that the result is not desirable, the possibility of construing general antilapse statutes to cover appointments to relatives of both donor and donee is also explored.

## II. COMMON LAW AND STATUTORY APPLICATIONS OF ANTILAPSE STATUTUES

### *A. Development of Survival Requirement*

It was determined in *Oke v. Heath*,[15] decided by Lord Hardwicke in 1748, that an appointee must survive the donee to take under a power exercised by will. In that case, the donee exercised a special

15. 27 Eng. Rep. 940 (Ch. 1748).

power to appoint to her kin in favor of a nephew who predeceased her. The nephew's successors claimed the appointive property, arguing that prior to death the nephew held some form of future interest in the property which would vest on exercise of the power. Like a remainder conditioned to vest on an event other than survival, they claimed, the appointee's interest should vest in the appointee, if living, and otherwise in his successors, on occurrence of the condition. The competing claimant argued to the contrary that the interest of the appointee prior to the appointment was not an interest in property at all, but was a mere expectancy which could not ripen into a property interest unless the holder was living when the power was exercised.[16]

The court rejected the argument that a potential appointee's interest is a property interest and held that the nephew had only an expectancy which lapsed on his death prior to exercise of the power. The court reasoned as follows:

> She has executed her power by will . . . . The whole frame is testamentary . . . ; and although this arises out of her power to make a will, and it is a general notion of law as to powers, that any taking under the directions of the will, take under the power, in the same manner as if their names were inserted there; yet they must take according to the nature of the power and the instrument taken together. . . . [S]he executing her power by will, it must be construed to all intents like a will; the conditions of which are, that it is ambulatory, revocable, and incomplete till her death; nor can any one dying in the testator's life, take under it.[17]

Two years later, another attempt was made to persuade Lord Hardwicke that an appointee under a power exercised by will acquired an interest in the appointive property prior to the death of the donee. In *Duke of Marlborough v. Lord Godolphin,*[18] the argument was based on the "relation back" theory.[19] Under this theory, a transfer effected by exercise of a power of appointment is deemed to have only one operative donative act, the act of the donor in creating the power. The donee is seen merely as the donor's agent, who serves to "fill the blanks" left in the creating instrument by the donor. When

16. The competing claimant was the donee's residuary legatee, a niece of the donee. *Id.* at 940.
17. *Id.* at 942.
18. 28 Eng. Rep. 41 (Ch. 1750).
19. *Id.* at 52.

the blanks are filled, the transfer becomes complete, but its operative date is related back to the date of the creating instrument.[20] This theory has been used, for example, to conclude that the period for determining compliance with the Rule Against Perpetuities is measured from the date of the creating instrument.[21] Applied to the creation of the appointee's interest, relation back would vest the interest as of the date the power was created.

This attempt was no more successful than the remainder analogy argued in *Oke v. Heath*. While Lord Hardwicke accepted the theory of relation back as an explanation for other aspects and consequences of powers, he rejected it for this purpose.[22] He reasoned that even though the appointee's interest would be read back into the creating instrument, if the execution of the power was by will, nothing could vest until the will became effective. Because the act necessary to complete the transfer to the appointee was testamentary, the requirements for taking by will must be met, and because of the ambulatory nature of a will, it could have no effect until its maker died.[23] Thus, a testamentary appointee could take the property only by claiming under both the creating instrument and the will which exercised the power; that is, the appointee was required to survive the death of the donee.[24] This requirement of survival was never again seriously challenged.[25]

### *B. English Antilapse Statute and Cases*

The English antilapse statute was enacted as section 33 of the Wills Act of 1837.[26] In substance, section 33 provides that if a devise or be-

20. *See* 3 R. POWELL, REAL PROPERTY ¶ 387 (P. Rohan rev. ed. 1977); SIMES & SMITH, *supra* note 8, § 423.

21. This is the rule with respect to special powers and is the majority rule in the United States for general testamentary powers. Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E.2d 487 (1938); J. GRAY, THE RULE AGAINST PERPETUITIES § 526.2 (4th ed. 1942); 3 R. POWELL, *supra* note 20, ¶ 387; SIMES & SMITH, *supra* note 8, §§ 1271–1277.

In contrast to this, the English cases and a minority of American courts hold that the rule runs from the time of exercise in the case of all general powers. *See, e.g.*, Industrial Nat'l Bank v. Barnett, 101 R.I. 89, 220 A.2d 517 (1966); Rous v. Jackson, 29 Ch. D. 521 (Ch. 1885); A. KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 695, at 794 (1920).

22. 28 Eng. Rep. at 52.

23. *Id.* at 52–53.

24. Southby v. Stonehouse, 28 Eng. Rep. 389, 390 (Ch. 1755) (Hardwicke, L.C.).

25. *But cf.* Vandersee v. Aclom, 31 Eng. Rep. 399, 404 (M.R. 1799) (party argued inapplicability of *Oke v. Heath* on similar facts).

26. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 33. Section 33 provides:

quest is made to a lineal descendant of the testator and that descendant dies before the testator, leaving issue surviving at the time of the testator's death, there should be no lapse. The property so devised or bequeathed should pass as if the named taker had died immediately after the testator, rather than before.[27]

The first case to consider whether this statute might be applied to a predeceased appointee under a power exercised by will was *Griffiths v. Gale*,[28] decided in 1844. In *Griffiths,* the donee exercised an exclusive special power[29] in favor of one of several permissive takers, and the appointee died shortly before the donee, leaving children surviving.[30] The court held that the antilapse statute did not apply to save the appointment, reasoning that an appointment was not a "devise" or "bequest" which could "lapse":

> [F]or where property is disposed of by virtue of a power, there is no lapse; the property goes over to specified objects, not by virtue of the intention of the donee of the power who has no control over the property, but by virtue of the previous directions of the donor. The term "lapse" shews that the Legislature was speaking of a thing that might lapse: it shews that the Legislature was speaking of devises and bequests properly so called; that is, of dispositions of property of which the testator was owner.[31]

Although *Griffiths* involved a special power, the court's decision

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[W]here any Person being a Child or other Issue of the Testator to whom any Real or Personal Estate shall be devised or bequeathed for any Estate or Interest not determinable at or before the Death of such Person shall die in the Lifetime of the Testator leaving Issue, and any such Issue of such person shall be living at the Time of the Death of the Testator, such Devise or Bequest shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

27. Thus the English statute differs from most American antilapse statutes insofar as it does not pass the property directly to issue of the predeceased taker, but rather passes it as if the named taker had died immediately after the testator. *See* Table at 408 *supra*.

28. 59 Eng. Rep. 1168 (Ch. 1844).

29. Under an exclusive special power, the donee may exclude one or more of the objects in making the appointment. SIMES & SMITH, *supra* note 8, § 879.

30. The argument to the court centered on the question whether the words "lapse," "devise," and "bequest," used in the antilapse statute, were intended to include appointments made by will. From the report of the case, it appears that the argument made by the appointee's administrator was based entirely on other sections of the Wills Act which, he claimed, showed that the words "lapse," "devise," and "bequest" were intended in § 33 to include testamentary appointments. 59 Eng. Rep. at 1169. No reference to the language and holding of *Oke v. Heath* appears in the case.

31. 59 Eng. Rep. at 1170.

did not turn on the nature of the power. In *Eccles v. Cheyne,*[32] decided in 1856, the parties raised the issue whether the antilapse statute applied to an appointment attempted under a general power. The donee in that case exercised her general power of appointment by will in favor of two daughters, one of whom predeceased her. The deceased daughter's representative and the takers in default of appointment both claimed the appointive assets.[33]

Section 27 of the Wills Act of 1837[34] provides that a general devise or bequest in a will shall be construed to include property over which the testator had a general power of appointment, thus exercising the power.[35] Accordingly, the court in *Eccles v. Cheyne* held that the exercise of a general power by will was a "devise" or "bequest" which could "lapse" within the meaning of section 33. It distinguished *Griffiths v. Gale* on the ground that *Griffiths* involved a special power which was not covered by section 27.[36] The court indicated in dictum an even narrower ground for the decision in *Griffiths:* the power there allowed appointment only to "children," and the persons who would have taken had section 33 been applied were not permissible objects of that power.[37]

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32. 69 Eng. Rep. 954 (Ch. 1856).

33. Interestingly, the takers in default argued both that the deceased daughter's share "lapsed by reason of her death in the lifetime of the testatrix," and that the word "lapse" in § 33 was "inapplicable to an appointment." *Id.* at 955.

34. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 27.

35. Section 27 reads in part as follows:

> [A] general Devise of the Real Estate of the Testator, or of the Real Estate of the Testator in any Place or in the Occupation of any Person mentioned in his Will, or otherwise described in a general Manner, shall be construed to include any Real Estate, or any Real Estate to which such Description shall extend . . . *which he may have power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power,* unless a contrary Intention shall appear by the Will . . . .

*Id.* (emphasis added). The section contains a similar provision governing personal property.

36. The court stated:

> In *Griffiths v. Gale* the power was not a general but a limited power. . . . The power was not within the 27th section, which applies only to general powers—powers "to appoint in any manner the appointor may think proper"—words which clearly cannot extend to a power to appoint to children. . . . And as the power was not within the 27th section, as under that section the property, the subject of the appointment, would not have passed by a general bequest, the appointment could not be saved from lapse by the 33d section, which applies only to property which passes by bequest.

69 Eng. Rep. at 955.

37. "In *Griffiths v. Gale* the power was . . . a power to appoint to children, and to children only; and it could never have been the intention of the Act to extend a power, which in its creation was restricted to children, so as to include any persons

The *Eccles* court noted the cases giving creditors access to property subject to a general power, after the power has been exercised, as additional support for its conclusion that the antilapse statute should be applied.[38] Upon exercise of a general power, the donee is treated as having the equivalent of absolute ownership of the property.[39] This is consistent with treating the disposition of appointive assets under a general power as a testamentary disposition of the donee's owned assets.

The court in *Eccles* thus pointed out two bases upon which one might justify treating appointments made under special and general powers differently for purposes of applying the antilapse statute: first, application of the statute to special powers might result in passing the property to people who are not objects designated by the donor; second, the unlimited selection of appointees gives the donee of a general power an interest equivalent to absolute ownership for purposes of making a testamentary disposition. Nonetheless, it rested its conclusion primarily on its construction of the effect of section 27 of the

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but children." *Id.*

This statement, coupled with the one which follows, indicates that the court was somewhat ambivalent on the question whether § 33 could ever be applied in the absence of § 27:

> The Legislature having, by the 27th section, extended the meaning of the word "bequest" so as to include property appointed by the testator under a general power, the word "lapse" in the 33d section should receive a corresponding extension of meaning, and be applicable to a legacy given by an appointment in exercise of power. The only caution to be observed in applying the statute to the exercise of the power is not to extend its operation so as to include objects not within the scope of a limited power.

*Id.* at 957. The final sentence is curious. If § 27 is the only basis for applying § 33, the question of including objects not within the scope of a limited power could not arise, as § 27 applies only to general powers.

Lord St. Leonards, too, failed to take a clear position on the applicability of § 33 if the statutory takers fell within the object class. In discussing these two cases, he says only that

> [i]n [*Griffiths* v. *Gale*] an erroneous view was taken of the general operation of the statute; but as the power was confined to the particular objects the decision was correct. Full effect was given to the words of the statute in Eccles v. Cheyne, in which a *general* power was executed . . . .

E. SUGDEN, A PRACTICAL TREATISE OF POWERS 463 (8th ed. 1861) (footnote omitted) (emphasis in original).

38. 69 Eng. Rep. at 956.

39. *Id.* This is often given as the rationale for allowing creditors access to appointive property when a general power has been exercised. *See, e.g.*, Clapp v. Ingraham, 126 Mass. 200 (1879); SIMES & SMITH, *supra* note 8, § 945. Nevertheless, other cases have explained the result as an intervention by equity to prevent injustice. *See, e.g.*, Gilman v. Bell, 99 Ill. 144, 151 (1881) ("when the appointee is a volunteer, the court holds that he, by the appointment, endeavors to misapply his property to defraud his creditors,—that he must be just before he is generous").

Act.[40] In neither *Eccles* nor *Griffiths* did the court discuss the validity of the distinction drawn between general and special powers in light of the purpose underlying the antilapse statute.

The question raised, but not completely disposed of, in *Eccles v. Cheyne*—the proper scope of *Griffiths v. Gale*—was taken up again in 1881 by Sir George Jessel, Master of the Rolls. In *Freme v. Clement,*[41] an appointment made pursuant to a special power was held void for remoteness.[42] The broad issue was whether the appointive property would pass under the residuary clause of the donee's will or in default of appointment. Section 25 of the Wills Act of 1837 provides that real estate contained in any

> Devise . . . which shall fail or be void by reason of the Death of the Devisee in the Lifetime of the Testator, or by reason of such Devise being contrary to Law, or otherwise incapable of taking effect, shall be included in the Residuary Devise (if any) contained in such Will.[43]

Thus, the question addressed by the court in *Griffiths v. Gale* was again presented: whether exercise of a special power of appointment by will could be considered a "devise."[44]

The *Freme* court concluded that exercise of a special power was a "devise" within the meaning of section 25:

> It must be remembered that, after all, every will is in exercise of a power, not technically, but generally. It is a power given by the Legislature to a man to direct what shall become of his property after his death. It is a mere power; and indeed so much is it a power according to the English law, that there was a time when a man did not possess that power: it was given to him by statute. It is really a power of disposition, and it is a power of disposition which by this very statute is extended. . . . When we speak of a "devise," we mean a devise which is the exercise of a power of disposition given to a man either by the Act of Parliament or by some person. Why should we restrict the meaning of the word, if we find an intention to dispose of the property?[45]

The court suggested the basis of the cases refusing to apply the antilapse statute, section 33, to appointments made under special powers

40. 69 Eng. Rep. at 957.
41. 18 Ch. D. 499 (M.R. 1881).
42. That is, the appointment violated the Rule Against Perpetuities.
43. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 25.
44. *See* note 30 *supra.*
45. 18 Ch. D. at 510.

was not that exercise of a testamentary power was not a "devise" or "bequest," but rather that in each such case application of section 33 would have resulted in passing the appointive property to persons who were not objects of the power.[46]

The appellate court disapproved *Freme v. Clement* three years later in *Holyland v. Lewin,*[47] holding that the only possible basis for applying the antilapse statute to an appointment made by will was section 27 of the Act. Consequently, the antilapse statute could never be applied to appointments under special powers, for they are not covered by section 27. The court reasoned that exercise of a power by will is not a testamentary act, for it does not come within the usual meaning of the words "devise" or "bequest," and there was no reason to suppose that Parliament had intended to change the common law with respect to the operation of special powers.[48]

*Holyland v. Lewin* settled the law in England that the antilapse statute could apply only to an appointment made by exercise of a general power.[49] The basis for applying the statute was clearly held to be the language of section 27 of the Wills Act of 1837, which provides that a general devise should be construed to include property over which the testator had a general power of appointment. The court did not adopt the suggestion made in *Eccles v. Cheyne*[50] that by exercising a general power the donee became the equivalent of an owner of the appointive property. Nor did the court accept the analysis of Sir George Jessel in *Freme v. Clement* that exercise of a power of appointment by will is as much a testamentary disposition of property as any devise or bequest of property owned by the donee. Nowhere in the prevailing English case law is there any discussion of the policy reasons for applying the antilapse statute to general powers and refus-

46. The court stated:
The 33rd section is not so clear: in fact, it has been held not to apply to an appointment; but I take it that the decisions must be treated as founded really—although they are not so in form—upon the fact of the section not applying where the object of th [*sic*] power is not within it.
*Id.* at 514–15.

47. 26 Ch. D. 266 (Ch. App. 1884).

48. *Id.* at 271–73.

49. *See* 30 HALSBURY'S LAWS OF ENGLAND ¶ 461 (3d ed. 1959); 39 HALSBURY'S STATUTES OF ENGLAND 880 n. (3d ed. 1972); 2 T. JARMAN, A TREATISE ON WILLS 819 (7th ed. 1930); R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 491 (4th ed. 1975). *Cf.* Freeland v. Pearson, L.R. 3 Eq. 658, 663 (M.R. 1867) (*Griffiths* settled inapplicability of § 33 to special powers).

50. *See* text accompanying notes 38 & 39 *supra*.

ing to apply it to special powers. The approach the English courts settled on stems solely from an interpretation of the words "devise," "bequest," and "lapse" used in section 33, a technical solution at best.

### C. *The American Authorities*

In the United States, these English authorities have generally been followed, but the grounds for applying antilapse statutes to testamentary appointments have been more broadly stated.

#### 1. *Appointments under general powers*

The first American case to consider applying an antilapse statute to a "lapsed" appointment was *Lyndall's Estate,*[51] which was decided in Pennsylvania in 1893 and involved a general power. The Pennsylvania statutes included a provision, modeled after section 27 of the English Wills Act,[52] providing that a general devise or bequest should be construed to include property subject to a general power of appointment.[53] Citing *Eccles v. Cheyne,*[54] the court held that, because of this provision, the antilapse statute would be applied to preserve the appointment for the issue of the predeceased appointee.

The court did not rely solely on the reasoning of the English court, however, but added:

> The hardship and mischief designed to be remedied by the acts preventing the lapse or failure of bequests or devises to children, brothers or sisters, or their issue, in case of death in the lifetime of the testator, are precisely the same, whether the property is disposed of under a general power or by an ordinary will; and the acts, therefore, must be construed as applying to both cases alike in the absence of language excluding such construction.[55]

The court here seems to have followed the same track as Sir George Jessel in *Freme v. Clement,*[56] that exercise of a testamentary power is

51. 2 Pa. D. 476 (1893).
52. *Id.* at 477. Section 27 is quoted at note 35 *supra.*
53. *Cf.* PA. CONS. STAT. ANN. tit. 20, § 2514(13) (Purdon 1975) (current statute).
54. 69 Eng. Rep. 954 (Ch. 1856). *See* text accompanying notes 32–40 *supra.*
55. 2 Pa. D. at 477.
56. *See* text accompanying notes 41–46 *supra.*

essentially the same for the purpose of the antilapse statute as a disposition of owned assets.[57]

The next case to take up the question, commonly cited as the leading case,[58] was *Thompson v. Pew*,[59] decided in Massachusetts in 1913. In *Thompson*, the donee of a general power attempted to exercise it in favor of her brother who predeceased her leaving issue. Although Massachusetts had no statute comparable to section 27 of the English Wills Act, its case law had established that a residuary clause would exercise a general power of appointment.[60] The court applied the antilapse statute to preserve the appointment for the appointee's issue, reasoning that, because the power was general, the testatrix's power of disposition over the appointive assets was the same as over her own property. In support of its decision, the court cited the cases holding that a general residuary clause would exercise a general power and cases upholding the power of a donee's creditors to reach appointive property after exercise of such a power.[61] Both lines of cases are based on similarities between outright ownership and a general power.

In four American jurisdictions there are cases holding that an antilapse statute applies to an appointment under a general testamentary power.[62] In all but one, such a power is exercised by a general devise, bequest, or residuary clause.[63] This has led at least one commentator to suggest that in a jurisdiction where the opposite rule is followed,

57. Although Sir George Jessel apparently would have applied this reasoning to limited or special powers, *see* 18 Ch. D. at 507, 510–12, the Pennsylvania court in *Lyndall's Estate* applied it only to general powers. 2 Pa. D. at 478.

58. *See, e.g.*, 5 AMERICAN LAW OF PROPERTY § 23.47, at 586 n.8 (A.J. Casner ed. 1952); SIMES & SMITH, *supra* note 8, § 984.

59. 214 Mass. 520, 102 N.E. 122 (1913).

60. Stone v. Forbes, 189 Mass. 163, 75 N.E. 141 (1905); Amory v. Meredith, 89 Mass. (7 Allen) 397 (1863).

61. Massachusetts follows the general rule that creditors of the donee of a general power can reach appointive assets only after an exercise of the power. Olney v. Balch, 154 Mass. 318, 28 N.E. 258 (1891); Clapp v. Ingraham, 126 Mass. 200 (1879).

62. *See* Newton v. Bullard, 181 Ga. 448, 182 S.E. 614 (1935); Thompson v. Pew, 214 Mass. 520, 102 N.E. 122 (1913); *In re* Estate of Sears, 29 Misc. 2d 234, 215 N.Y.S.2d 859 (1961); *In re* Goodman, 155 N.Y.S.2d 424 (Sup. Ct. 1956); *In re* Beaumont's Estate, 147 Misc. 118, 263 N.Y.S. 426 (1933); Newlin Estate, 72 Pa. D. & C. 446 (1950); Rowland's Estate, 17 Pa. D. & C. 477 (1932); Lyndall's Estate, 2 Pa. D. 476 (1893).

63. Georgia is the only one of these jurisdictions in which a general devise, bequest, or residuary clause will not be deemed to exercise a general power. *See* May v. Citizens & S. Bank, 233 Ga. 614, 157 S.E.2d 279 (1967), and cases cited therein.

the antilapse statute would not be applied.[64] Such a result would be consistent with the English courts' position that the exercise of a power of appointment is not a "devise" or "bequest" in the absence of a statute specifically making it such.[65]

The *Restatement of Property* rejects this basis for applying antilapse statutes to appointments under general powers.[66] Instead, it em-

64. H. CAREY & D. SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS §. 365, at 496 (1941).

Statutes in 26 jurisdictions address the question whether a general devise, bequest, or residuary clause will be deemed to exercise a power of appointment in the absence of an express reference thereto. Eleven call for exercise: CAL. CIV. CODE § 1386.2 (West Cum. Supp. 1978); D.C. CODE § 18–303 (1973); KY. REV. STAT. ANN. § 394.060 (Baldwin 1977); N.C. GEN. STAT. § 31–43 (1976); N.Y. EST., POWERS & TRUSTS LAW § 10–6.1 (McKinney 1967); OKLA. STAT. ANN. tit. 84, § 164 (West 1970); 20 PA. CONS. STAT. ANN. § 2514(13) (Purdon 1975); R.I. GEN. LAWS § 33–6–17 (1969); S.C. CODE § 21–7–430 (1976); S.D. COMPILED LAWS ANN. §§ 43–11–45, –60 (1967); VA. CODE § 64.1–67 (1973). Four states provide generally for exercise only in the absence of a gift in default of appointment. MD. EST. & TRUSTS CODE ANN. § 4–407 (1974); MICH. COMP. LAWS §§ 556.114–.116 (1970); W. VA. CODE § 41–3–6 (1966); WIS. STAT. ANN. § 702.03(2) (West 1977).

A number of states have adopted UNIFORM PROBATE CODE § 2–610, which espouses a contrary rule:

> A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

*See* ALASKA STAT. § 13.11.265 (1972); ARIZ. REV. STAT. § 14–2610 (1975); COLO. REV. STAT. § 15–11–610 (1973); FLA. STAT. ANN. § 732.607 (West 1976); IDAHO CODE ANN. § 15–2–610 (Bobbs-Merrill Cum. Supp. 1977); MINN. STAT. ANN. § 524.2–610 (West 1975); MONT. REV. CODES ANN. § 91A–2–610 (1975); NEB. REV. STAT. § 30–2348 (1975); N.M. STAT. ANN. § 32A–2–610 (1975); N.D. CENT. CODE § 30.1–09–10 (1976); OR. REV. STAT. § 112.410 (1975); UTAH CODE ANN. § 75–2–610 (1977).

Massachusetts cases have held since 1863 that a residuary clause exercises a general power. Amory v. Meredith, 89 Mass. (7 Allen) 397 (1863); *see* Annot., 15 A.L.R. 3d 346, 357 (1967). The Massachusetts rule has been followed in New Hampshire. Emery v. Haven, 67 N.H. 503, 35 A. 940 (1894). The New Hampshire holding is in doubt, due to a subsequent case which refused to apply the Massachusetts rule, yet did not refer to *Emery*. *See* Faulkner v. Faulkner, 93 N.H. 451, 44 A.2d 429 (1945).

The majority rule in the absence of statute is that there is no exercise. RESTATEMENT OF PROPERTY § 343 (1940).

65. *See* Holyland v. Lewin, 26 Ch. D. 266 (Ch. App. 1884); text accompanying notes 47–48 *supra*.

66. It states:

> Statutes commonly provide in substance that, if a devisee or legatee bearing a stated relationship to the testator (rarely, any devisee or legatee without regard to relationship) predeceases the testator the property devised or bequeathed passes to any issue of the devisee or legatee surviving the testator (rarely, to the heirs of the devisee or legatee) unless a contrary intent is manifested. Where property is appointed by will under a general power such statutes apply as if such property were owned by the donee and devised or bequeathed by him.
>
> *Caveat:* The Institute takes no position as to the applicability of statutes of

phasizes the similarity between the interest of the donee of a general power and that of an owner of property:

> The statutes referred to in this Section are designed to prevent the failure of testamentary gifts by lapse in situations where it seems probable that it would have been desired to pass the gift to the family of the named recipient if his death had been foreseen. In terms such statutes apply to "devises and legacies" by "testators," words which are technically inappropriate to describe appointments by donees of powers. Yet the donee of a general power is in a position so closely analogous to that of an owner of property and a testamentary appointment by him to a person who predeceases him is so closely analogous to a devise of owned property to such a person that the application of the statutes is extended to cover this situation.[67]

Another ground for applying antilapse statutes to appointments made under general powers is that antilapse statutes are designed to carry out the presumed intent of a person disposing of property at his death. This analysis is stated in the *American Law of Property:*

> [T]he lapse statute prescribes a gift in substitution on the assumption that the testator would have so intended had his attention been drawn to the situation. It may well be supposed that the testator would have intended such a gift in substitution whether his power to make the gift was derived from his ownership of the property in question or from a power of appointment over it. Accordingly the statute, although phrased in terms of devises and bequests of owned interests, is not, when construed with reference to its supposed purpose, confined within the niceties of its phrasing. Thus it operates even though the attempted gift was by the exercise of a power of appointment rather than by the devise or bequest of an owned interest.[68]

While the American cases are not numerous,[69] it seems settled that antilapse statutes can be applied to appointments made pursuant to general testamentary powers, even in the absence of statutory or case law specifically providing that property subject to a general power is deemed to be included in a general devise or bequest. The American

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the type described to powers and appointments other than appointments by will by the donee of a general power.

RESTATEMENT OF PROPERTY § 350 (1940) (italics in original).

67. *Id.* § 350, Comment a.

68. 5 AMERICAN LAW OF PROPERTY § 23.47, at 587 (A.J. Casner ed. 1952).

69. *See* cases cited at note 62 *supra.*

courts have not relied on the technical statutory analysis of the English courts, but rather have looked to the substance of the transaction and to the purpose of the antilapse statutes in reaching their decisions.

### 2. *Appointments under special powers*

Even fewer American cases deal with the question whether antilapse statutes may be applied to appointments under special powers than deal with their applicability under general powers. Only three such cases have been reported.

The most recent case is *Dow v. Atwood,*[70] decided in 1969 by the Supreme Judicial Court of Maine. The donor's will gave his wife a life estate, "after which, it is my wish that she give, bequeath and devise the same to my brother, Alfred L. Atwood, to him and his heirs forever."[71] The court construed this language as creating a special power of appointment. Although the wife's will exercised the power in favor of Alfred, he predeceased her leaving children who survived the wife.

The Maine antilapse statute substitutes lineal descendants for a predeceasing devisee who is related to the testator.[72] Because Alfred was not related to the wife, the court held that the statute could not be applied.[73] Although the court indicated some doubt whether an antilapse statute could be applied to an appointment under a special power in any event,[74] its resolution made it unnecessary to decide the point. Nor did the court decide whether the issue could be substituted under a power which was to appoint only to Alfred.

70. 260 A.2d 437 (Me. 1969).
71. *Id.* at 439.
72. ME. REV. STAT. tit. 18, § 1008 (1964).
73. The only authority cited by the court in support of its conclusion is SIMES & SMITH, *supra* note 8, § 984, *discussed at* text accompanying note 97 *infra.*
74. The court's statement is curious: "As we have seen, the power to appoint to Alfred was special and not general. Thus the rule that a general power of appointment may be considered a property interest passing under an anti-lapse statute is not applicable." 260 A.2d at 441.

The question, of course, is not whether the power passes, but whether the appointive property can be considered to pass by a devise of the donee. The statement may merely be careless; however, the court went on to state: "Under a testamentary special power the appointee takes from the donee and not from the donor of the power." *Id.* The latter statement appears flatly to contradict the principle of "relation back," that title to the appointive property passes from the donor, not the donee, of a power, particularly in the case of a special power. *See* 5 AMERICAN LAW OF PROPERTY § 23.5, at 469 (A.J. Casner ed. 1952); 3 R. POWELL, *supra* note 20, ¶ 387; SIMES & SMITH, *supra* note 8, § 913, at 376; notes 18–21 and accompanying text *supra.* The court's understanding of powers of appointment seems open to question.

The latter question was specifically raised and decided in *Daniel v. Brown,*[75] a Virginia case decided in 1931. In that case, the donee held a testamentary power to appoint property to her husband's nephews and nieces. She exercised it in favor of three nieces and nephews, further providing for the substitution of their issue in the event any of them predeceased her. All three appointees predeceased the wife, one leaving issue surviving her. The surviving nieces and nephews, to whom no appointment was made, claimed the property as implied takers in default. The court held the appointment ineffective, despite the antilapse provision of the will and the antilapse statute,[76] because the substituted takers were not within the class of objects designated by the donor:

> A stream can rise no higher than its source, and the source of authority here denies to Jane C. Jackson the power to leave this property to anyone except the nieces and nephews of her husband. Clearly, Joseph S. Jackson provided a different disposition than to leave his property to the issue of his nieces and nephews, by the very requirements of his will grandnieces and grandnephews were eliminated.[77]

While the court did not discuss whether an antilapse provision might ever be applied to an appointment under a special power, it did indicate that had this been a general power, it would have applied it, following *Thompson v. Pew.*[78]

Whether an antilapse statute can be applied to an appointment under a special power was raised in *Grubb's Estate,*[79] a Pennsylvania case decided in 1939. The donee had a power to appoint to her descendants, or if she had none, to the donor's descendants. Having no descendants, she exercised the power by her will in favor of the donor's grandchildren, one of whom predeceased her leaving issue surviving.

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75. 156 Va. 563, 159 S.E. 209 (1931).
76. VA. CODE § 5238 (1919).
77. 159 S.E. at 210.
78. The court surmised:
If the power had been general in the donee to select the object of the bounty and the donee of the power had exercised her discretion, and the devisees named by her had died prior to her death then section 5238 would have prevented the lapse of such devises in favor of the issue. This was the holding in the case of Thompson v. Pew, 214 Mass. 520, 102 N.E. 122.
*Id.*
79. 36 Pa. D. & C. 1 (1939).

The case was first adjudicated by a single "auditing judge."[80] He treated it as a case of first impression in the United States,[81] reviewed the English authorities,[82] and distinguished them on the ground that the English antilapse statute does not identify a class of substitute takers (such as issue), but rather passes the property to those who would be the appointee's successors, as of the moment after the donee's death, whoever they might be.[83] Thus the danger of bringing in one not a member of the class of objects is much greater in England. He went on to approve a position which he attributed to Sir George Jessel,[84] that the possibility of one not a member of the class claiming under the antilapse statute should not preclude claims from those who do fall within the class:

> [T]here is no need to deny those who are within the limits of a special power the benefits of the lapse provision merely because someone not within the limited class *might* seek to invoke it; when that case arises we need merely say that in special powers the lapse statute may only be applied when it will operate to substitute a person within the class limited.[85]

The judge ruled that Pennsylvania's antilapse statute applied to preserve the appointment to the deceased grandchild's issue.[86]

In reaching this conclusion, the court reasoned, first, that within the limit of permissible appointees the donee's power of disposition over appointive assets is the same as a power of disposition over owned assets at death; both are essentially testamentary dispositions. Second, the antilapse statute is a canon of construction, providing a legislative presumption of intent to make a substitutional gift where

80. *Id.* at 1.
81. *Id.* at 5.
82. *Id.* at 5–7. The opinion takes note of Freme v. Clement, 18 Ch. D. 499 (M.R. 1881); Griffiths v. Gale, 59 Eng. Rep. 1168 (Ch. 1844); Holyland v. Lewin, 26 Ch. D. 266 (Ch. App. 1884).
83. The English statute is quoted at note 26 *supra*.
84. 36 Pa. D. & C. at 6. The language to which the judge apparently referred reads:

> The 33rd section . . . has been held not to apply to an appointment; but I take it that the decisions must be treated as founded really—although they are not so in form—upon the fact of the section not applying where the object of th [*sic*] power is not within it. But the point has yet to be decided whether that section does not apply to powers of appointment (in cases where an appointment would be warranted), such as general powers, and perhaps some special powers.

Freme v. Clement, 18 Ch. D. 499, 514–15 (M.R. 1881).
85. 36 Pa. D. & C. at 6.
86. *Id.* at 7–8.

no contrary intention appears in the will. Because the two types of dispositions are essentially the same, the legislative presumption of intent should apply equally to appointments effected by will as to devises or bequests.[87] Thus, by stressing both the similarity of an appointment to a disposition of owned property and the presumptive intent of testators upon which the antilapse statute rests, the court wove together the two analyses reflected in the *Restatement of Property*[88] and the *American Law of Property*.[89]

The Orphans' Court affirmed the decision,[90] holding that, for this purpose, there is no fundamental difference between general and special powers. In each case, the donee is exercising a power of disposition by will over property which is not owned by the donee, but the disposition is essentially testamentary.[91]

### 3. *American statutes*

Three states—California, Michigan, and Wisconsin—have enacted statutes providing that their antilapse statutes apply to appointments made by will.[92] These statutes all resolve the question whether a distinction should be drawn between appointments under general and special powers by rejecting the distinction. The statutes also resolve two other questions which arise in applying antilapse statutes to testamentary appointments: whether the statute can be applied if the predeceasing appointee's issue are not objects of the power; and whether the statute can be applied if the appointee is related to the donor but not to the donee of the power. The statutes answer both questions in the negative. California's statute is representative:

> If an appointment by will or instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective, the appointment is to be effectuated, if possible, by applying [the antilapse statute] as though the ap-

87. *Id.* at 7.
88. *See* text accompanying note 67 *supra.*
89. *See* text accompanying note 68 *supra.*
90. 36 Pa. D. & C. at 8.
91. *Id.* at 8–10.
92. CAL. CIV. CODE § 1389.4 (West Cum. Supp. 1978); MICH. COMP. LAWS § 556.130 (1970); WIS. STAT. ANN. § 853.27 (West 1971). The Minnesota and New York revisions have no such provision.

pointive property were the property of the donee except that the property shall pass only to persons who are permissible appointees.[93]

These statutes received almost no comment prior to enactment even though all were adopted as the result of law revision commission studies and recommendations.[94] The balance of this article discusses the validity of the choices made and concludes with a recommendation that these statutes should be amended to expand their coverage.

## III. THREE PROBLEMS ANALYSED

### *A. Application to Special Powers*

English courts have refused to apply the antilapse statute to appointments under special powers on the ground that exercise of such a power is not a "devise" or "bequest" within the meaning of the statute. The dearth of authority leaves the question open in the United States. Principal American commentators are divided on the question.

Powell[95] and the *Restatement of Property*[96] take no position on the question. Simes and Smith take the position that antilapse statutes probably should not be applied to appointments under special powers because

[l]apse statutes are designed to effectuate the purpose of the testator (who, in these cases, is the donee of the power). But the purpose of

93. CAL. CIV. CODE § 1389.4 (West Cum. Supp. 1978). *See also* MICH. COMP. LAWS § 556.130 (1970); WIS. STAT. ANN. § 853.27 (West 1971).

94. *See* 9 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 302 (1969); [1966] MICH. LAW REVISION COMM'N ANNUAL REPORT 5–6.

The California Law Revision Commission's report, which resulted in California's statutory changes, was based on a study by Richard R.B. Powell; the Wisconsin statute was passed in response to a project led by Richard W. Efflund. *See* Powell, *Powers of Appointment in California,* 19 HASTINGS L.J. 1281 (1968), *reprinted in* 9 CAL. LAW REVISION COMM'N, *supra* at 335; Efflund, *Powers of Appointment—The New Wisconsin Law,* 1967 WIS. L. REV. 583; Efflund, *Status Report on the Bar Research Project on Revision of the Property Statutes,* WIS. B. BULL., December 1962, at 22. A study was done in Michigan by Olin L. Browder. *See* O. BROWDER, FIRST ANNUAL REPORT, STUDY OF MICHIGAN STATUTES ON POWERS OF APPOINTMENT (1967), *cited in* Powell, *supra* at 1293 n.76.

The comment on § 1389.4 of the California statute cites the comparable Michigan provision, stating that the section "embodies the theory of Sections 349 and 350 of the *Restatement of Property*" and that the section is needed because the antilapse statute "does not specifically deal with lapse of a testamentary appointment." 9 CAL. LAW REVISION COMM'N, *supra* at 327.

95. 3 R. POWELL, *supra* note 20, ¶ 399, at 378.58–.59.

96. RESTATEMENT OF PROPERTY § 350 (1940) (caveat quoted at note 66 *supra*).

> special powers is to carry out the wishes of the donor by giving the donee a personal discretion for the benefit of a particular class. And the lapse statute is not designed to aid in effectuating the purposes of the donor.[97]

The *American Law of Property* takes the opposite point of view.[98] Because one reason for applying the antilapse statute is to carry out the presumed intent of the donee, who, had she anticipated the appointee's time of death, presumably would have substituted the appointee's issue, then

> it is irrelevant that the range of permissible appointees was limited by the donor who created the power, and the statute should operate to effect a gift in substitution to the extent that such a gift was within the power of the donee. . . .
>
> A lapse statute should operate if the person named by statute as substitute taker is within the group of permissible appointees, no matter how wide or how narrow that group happens to be.[99]

The position taken by the court in *Grubb's Estate*[100] and by the *American Law of Property* has more to commend it than that taken by Simes and Smith or the English courts. Under either a special or a general power, the donee is given the power to make what is essentially a testamentary disposition of the appointive property. Although technically this may not be a testamentary disposition, as a practical matter it is a disposition brought about by an instrument which has no effect until the death of its maker.

Lapse problems usually arise because of the normal time lag between execution of such instruments and their effective dates, accompanied by failure to foresee in the drafting the events which actually occur and failure or inability to change the instruments after a change in circumstances.[101] Whether the instrument disposes of property

97. SIMES & SMITH, *supra* note 8, § 984.
98. 5 AMERICAN LAW OF PROPERTY § 23.47 (A.J. Casner ed. 1952).
99. *Id.* § 23.47, at 587–88.
100. 36 Pa. D. & C. 1 (1939). *See* text accompanying notes 79–91 *supra.*
101. *See* Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning,* 1972 WASH. U.L.Q. 607, 665; Chaffin, *The Time Gap in Wills: Problems under Georgia's Lapse Statutes,* 6 GA. L. REV. 268 (1972); 26 WASH. & LEE L. REV. 105 (1969).
As stated by one court:
> The rule as to the lapsing of devises and legacies that prevailed before the statute defeated, in most cases, the intention of the testator. He generally made his will with reference to the objects of his bounty as they existed at the time,

owned by the testator or of property over which he has only a power of appointment, the difficulty is the same: unforeseen events make the plan set forth by the testator impossible to fulfill, and there is no indication of what the testator would have wished had he known of the events which in fact occurred. When the disposition is made to certain classes of people, usually relatives, legislatures have judged that most testators would have preferred the issue of the predeceased taker over others who might claim the property.[102] No reason appears to explain why this judgment as to probable preference should be different depending on whether the testator owned the property, had a general power of appointment, or had a special power of appointment. If the donee could, by express provision in the will, have provided the issue as substitute takers of the property, in the absence of any express testamentary provision to the contrary there seems no reason why the statutory substitute should not be supplied.

Assuming that the substitute takers are permissible objects of the power, the position taken by Simes and Smith[103] is hard to defend. There is no reason to suppose, because the donor's scheme embraced the possibility that the takers under the statute would have been appointees, that applying an antilapse statute will upset the donor's probable intent. On the contrary, any policy which tends to further the donee's purpose, within the limits defined by the donor, should also further the donor's intent, given the donor's delegation of discretion to the donee.

The position of the English courts[104] has more logic to support it. If, indeed, the exercise of a power is not a devise or bequest, and the statute must be construed strictly because it is in derogation of the common law, their conclusion follows. This conclusion, however, ignores the reality of the situation; in this context at least, the exercise

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and as though his will took effect at the date of its execution, not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointments, and should receive a liberal construction, so as to advance the remedy and suppress the mischief. It . . . provides that, where a devise is made to a child or other relative of the testator who dies before the testator, the issue of such object of his bounty shall take the portion devised to such child or relative. Nothing is more just and conformable to the probable intention of the testator in every instance.

Woolley v. Paxson, 46 Ohio St. 307, 24 N.E. 599, 600 (1889).

102. In all but two of the American antilapse statutes, the issue of the predeceased takers are substituted. *See* Table at p. 408 *supra*.

103. *See* text accompanying note 97 *supra*.

104. *See* text accompanying note 48 *supra*.

of a testamentary power is no different from a devise or bequest and should be similarly treated.

In contrast to the approach taken by the English courts, American courts have generally looked to the substance of the appointment transaction rather than the technical meaning of the words used in the antilapse statute.[105] Applying this approach to the question whether the statutes should be applied to appointments under special powers, American courts should conclude that the statutes do apply. This result would be consistent with the three recent statutes on the subject, all of which provide for application of the antilapse statute to appointments under special as well as general powers.[106]

### *B. Application to Expand the Class of Permissible Objects*

A more difficult problem is posed where the objects of the special power do not include the issue of the predeceased appointee. The recently enacted statutes in California, Michigan, and Wisconsin[107] all provide that the antilapse statute cannot be applied if the substitute takers are not within the class of permissible appointees of the power. This position accords with the uniformly expressed views of courts and commentators.[108] All proceed on the assumption that to pass the property to persons not within the class literally described by the donor would do great violence to the donor's intent. As the Virginia court pointed out in *Daniel v. Brown,*[109] when the donor creates a power to appoint to nieces and nephews, she could not possibly have intended their issue to take. Notwithstanding its logical appeal, this position ignores the law developed in the analogous class gift cases.

When a gift is made by will to a class of persons and one or more of them predeceases the testator, the question arises whether the antilapse statute may be applied. Application of the statute results in passing the property to takers not literally described as class members by the testator. This is precisely the problem posed by application of antilapse statutes to appointments under a special power where the

105. *See* Part II–*C supra.*
106. *See* note 92 and accompanying text *supra.*
107. *See* note 93 *supra.*
108. *See* Daniel v. Brown, 156 Va. 563, 159 S.E. 209 (1931); Grubb's Estate, 36 Pa. D. & C. 1 (1939); 5 AMERICAN LAW OF PROPERTY § 23.47 (A.J. Casner ed. 1952); 3 R. POWELL, *supra* note 20, ¶ 399, at 378.59; SIMES & SMITH, *supra* note 8, § 984. *Accord,* Freme v. Clement, 18 Ch. D. at 514–15.
109. 156 Va. 563, 159 S.E. 209 (1931). *See* text accompanying note 77 *supra.*

description of the objects of the power does not include the takers who are substituted by the statute. Since there is so little case law on this problem in the powers context, courts and legislators should look to the law developed in the class gift cases.[110]

Earlier decisions in the class gift area were troubled by the technical question whether there could be a "lapse" with a class gift so long as one member of the class survived.[111] Because the survivor would take all of the property, there would be no lapse in the ordinary sense. These cases are analogous to the earlier struggles in determining whether there could be a "lapse" with the exercise of a power of appointment. As with the powers cases, most authorities now hold that there can be a lapse under a class gift even though there are surviving members of the class.[112]

A more difficult question is that of the testator's intent. When the class description is used, it can be argued that the testator intended as takers only those persons meeting the description used at the time of his death. It is more difficult than with a gift to a named individual to conclude that the testator would have preferred the issue of the deceased class member over the surviving members of the class. Conversely, it can be argued that the testator is no more likely to have anticipated the possibility that a member of the class might predecease him than that a named individual might. Where the class designation is used, the testator's purpose may have been only to provide for possible increase in class membership or to economize on words. From use of a class designation alone it is not realistically possible to ascertain whether or not the testator intended to preclude the issue from taking.

Because no reliable indicator of the testator's actual intent is available,[113] the policy favoring equality of distribution among branches

110. Well over 100 cases directed to this question are collected and discussed in Annot., 56 A.L.R.2d 948 (1957). Since 1957 the following cases have been decided: Drafts v. Drafts, 114 So. 2d 473 (Fla. Dist. Ct. App. 1959); Veal v. King, 216 Ga. 298, 116 S.E.2d 223 (1960); *In re* Estate of Evans, 193 Neb. 437, 227 N.W.2d 603 (1975); Gianoli v. Gabaccia, 82 Nev. 108, 412 P.2d 439 (1966); Wilson v. Smith, 47 Tenn. App. 194, 337 S.W.2d 456 (1960). *See also* Cooley, *Lapse Statutes and Their Effect on Gifts to Classes,* 22 VA. L. REV. 373 (1936).

111. *See, e.g.,* Trenton Trust & Safe-Deposit Co. v. Sibbits, 62 N.J. Eq. 131, 49 A. 530 (Ch. 1901). *See also* Annot., 56 A.L.R.2d 948, 953–56 (1957).

112. Annot., 56 A.L.R.2d 948, 950 (1957). *See, e.g., In re* Steidl's Estate, 89 Cal. App. 2d 488, 201 P.2d 58 (1948); Drafts v. Drafts 114 So. 2d 473 (Fla. Dist. Ct. App. 1959).

113. Antilapse statutes apply only in the absence of an expressed contrary intent. *See, e.g.,* CAL. PROB. CODE § 92 (West 1956) ("unless an intent appears to substitute

of the family has been used to tip the balance in favor of applying antilapse statutes to class gifts.[114] The rationale is stated in *In re Steidl's Estate:*

> [T]he statute was not solely for the purpose of preventing intestacy but was enacted to substitute descendants of a deceased legatee, since experience has shown that by reason of neglect and failure to anticipate the death of the primary legatee before the death of the testator the latter often failed to provide for such contingency. . . . A technical construction will defeat the object of the statute and will result in a discrimination against the descendants of one member of a class in favor of the descendants of another. Such discrimination should not be permitted unless it is manifest that such was the testator's intention. . . . Such statutes are remedial and should receive a liberal construction.[115]

The same policy considerations should lead to applying antilapse statutes to appointments under special powers even if the issue are not within the description of the objects of the power. Here, too, no realistic conclusion can be drawn from use of the class designation alone that the donor intended to include or exclude the issue from taking in the event a class member died before the donee. Arguments can be made that the description means what it says, and that because the gift is to be effective in the future the donor must have foreseen the possibility that a class member would die leaving issue before the appointment. On the other side, however, it seems as likely that the donor did not anticipate the death, and that had he done so, he would have provided for the substitution of issue.

In the situation involving a special power, the opportunities for class members to die before the gift is effective are even greater than with the usual class gift. The special power is often designed to be exercised at a point in time well after the donor's death. While this

another in his place"); MASS. GEN. LAWS ANN. ch. 191, § 22 (West Cum. Supp. 1977) ("unless a different disposition is made or required by the will"); N.Y. EST., POWERS & TRUSTS LAW, § 3-3.1 (McKinney 1967) ("unless the will provides otherwise"); 20 PA. CONS. STAT. ANN. § 2514 (Purdon 1975) ("In absence of a contrary intent appearing therein, wills shall be construed . . . ."). The same result has been reached where the statute contains no such language. *In re* Estate of Jackson, 106 Ariz. 82, 471 P.2d 278 (1970); Hay v. Dole, 119 Me. 421, 111 A. 713 (1920); *In re* Estate of Allmond, 10 Wn. App. 869, 520 P.2d 1388 (1974).

114. Casner, *Class Gifts—Effect of Failure of Class Members to Survive the Testator,* 60 HARV. L. REV. 751, 758–59 (1947). *See also* RESTATEMENT OF PROPERTY § 298 & Comment a (1940); Annot., 56 A.L.R.2d 948, 950 (1957).

115. 89 Cal. App. 2d 488, 201 P.2d 58, 63 (1948).

might lead the drafter to a more careful consideration of possible future events, it also expands the range of possibilities which may not have been anticipated or provided for. The inferences that may be drawn as to the donor's intent are simply too ambiguous to provide the basis for a rational decision as to whether or not to apply the antilapse statute.

The policy favoring equality of distribution among the branches of a family should tip the balance in favor of applying antilapse statutes to appointments under special powers as well as to class gifts. Although the donor has given the donee the power to discriminate among the various branches of the family, or among members of the object class, the donor has shown no clear intent to limit the number of branches among whom the power can be exercised. Because the power is usually designed to permit flexibility in the ultimate disposition of the property by permitting the donee to take into account changing family circumstances, applying the statute to permit the donee to select not only among the primary class members but also among the issue of those who are deceased may permit a more complete effectuation of the donor's purpose. Unfortunately the published literature does not reveal why the recent statutes specifically foreclose the possibility of applying the antilapse statute in this circumstance; they may simply follow the prevailing views of the authorities. On balance, it is submitted that antilapse statutes should be applied without regard to whether the substitute takers are included within the permissible appointees. The prevailing view should be reconsidered, and the recent powers statutes should be amended.

### *C. Application to the Donor's Relatives*

The purpose of antilapse statutes is to carry out the probable intent of the testamentary transferor.[116] If the testator has failed to provide expressly for the devolution of property in the event the named taker predeceases her, most statutes supply the issue of the predeceased beneficiary as substitute takers, on the assumption that this carries out the probable intent of the average testator. In the majority of states,

116. 6 W. Bowe & D. Parker, Page on Wills § 50.10 (rev. ed. 1962); Chaffin, *supra* note 101, at 271–72; 26 Wash. & Lee L. Rev. 105 (1969). *Cf.* Becker, *Future Interest and the Myth of the Simple Will,* 1972 Wash. U.L.Q. 607, 666 (assumed decedent would not give to dead person).

however, this imputation of preference for the issue of the predeceased taker over the testator's residuary or intestate takers is confined to the blood relatives of the testator.[117]

Most of the cases in the United States applying antilapse statutes to testamentary appointments have involved appointments to a person related to the donee.[118] Two cases, however, have raised the question whether the antilapse statute could be applied to testamentary appointments made to persons related to the donor but not the donee. In *Dow v. Atwood*,[119] a donee appointed to her husband's brother under a special testamentary power. In *Rowland's Estate*,[120] the donee exercised a general testamentary power in favor of her husband's nephew and her own brother. In each case the husband was the donor of the power.

In *Dow*, the court refused to apply the statute on the ground that the husband's brother was not a relative of the wife.[121] In *Rowland's Estate*, the court applied the statute to preserve the appointment to the donee's brother's issue, but refused to apply it to the appointment to her husband's nephew on the ground that he was not related to her.[122] In neither case did the court discuss the possibility that the statute could be applied to an appointment to a relative of the donor.

The same result, that the antilapse statute applies only to appointments made to relatives of the donee, is to be expected under the Michigan, Wisconsin, and California statutes.[123] Although this result seems generally accepted,[124] serious questions can be raised whether it reflects any legitimate policy judgment. Is there any sense to applying the antilapse statute where the predeceased appointee is related to the donee but refusing to apply it where the appointee is related only to the donor?

117. *See* Table at p. 408 *supra*.

118. *See* cases cited at note 62 *supra*. All involved appointments to persons related to the donee. Although Daniel v. Brown, 156 Va. 563, 159 S.E. 209 (1931), involved a power to appoint to the donor's relatives, the Virginia antilapse statute applies to any devisee. *See* Table at p. 408 *supra*.

119. 260 A.2d 437 (Me. 1969). *See* text accompanying notes 70–74 *supra*.

120. 17 Pa. D. & C. 477 (1932).

121. 260 A.2d at 441.

122. 17 Pa. D. & C. at 478, 480. The Pennsylvania lapse statute applies *inter alia* to nephews and nieces of the testator. *See* note 12 *supra*.

123. *See* note 92 *supra*.

124. The court in Thompson v. Pew, 214 Mass. 520, 102 N.E. 122 (1913), stated:

> The donee of a power to be exercised by will must be regarded as the testator pro hac vice. Indeed, when the power is created by deed and is to be executed by will, the donee is the only person who performs any testamentary act. It can make no difference as to the nature of the power or the relation sustained by the

*1. General powers*

The most common rationale articulated by the American authorities for applying antilapse statutes to testamentary appointments is that the holder of a general power has such a complete power of disposition over the appointive property that, for this purpose, the donee should be treated as the owner of the property.[125] An uncritical extension of this analogy leads to the conclusion that, in applying the statute, the appointive property should be treated exactly like the donee's owned property, with the result that an appointment to a predeceased relative of the donor is not saved from lapse unless the appointee is also related to the donee.

This analysis, however, ignores both the nature of a power of appointment and a purpose of the antilapse statutes. Although the donee of a general testamentary power has a power of disposition at death as broad as that held over property owned at the time of death, the donee is not in fact the owner of the appointive assets. Prior to death, the donee cannot convey or make a binding contract to transfer the property;[126] in the absence of a contrary statute, the creditors of the

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appointor to the appointee whether the power be created by deed or by will. The appointor then is the testator; he is the person who makes the will, he, in the absence of anything in the will to the contrary, and not the donor of the power is the person whose relationship to the appointee is to be considered wherever by statute or otherwise relationship between the person giving and the person receiving by will is material.

102 N.E. at 123–24. Simes and Smith merely quote from this passage without further discussion. SIMES & SMITH, *supra* note 8, § 984, at 478.

Powell cites Rowland's Estate, 17 Pa. D. & C. 477 (1932), and Old Colony Trust Co. v. Allen, 307 Mass. 40, 29 N.E.2d 310 (1940), for the same proposition. 3 R. POWELL, *supra* note 20, § 399, at 378.58 n.17. *Old Colony,* however, involved the doctrine of capture. *See generally* 5 AMERICAN LAW OF PROPERTY § 23.61 (A.J. Casner ed. 1952). The court stated merely that the gift to the appointee lapsed and that the appointment could not be saved by the lapse statute because the appointee left no issue. The appointee and the donee were related, but no suggestion was made that the donee is to be considered the sole testator under the statute. 29 N.E.2d at 311.

The *American Law of Property* states that the donee is the only "testator" within the meaning of the antilapse statutes, because the donee was the person attempting to make the gift. 5 AMERICAN LAW OF PROPERTY § 23.47, at 588 (A.J. Casner ed. 1952). *Accord,* Halbach, *The Use of Powers of Appointment in Estate Planning,* 45 IOWA L. REV. 691, 721 (1960).

125. *See* text accompanying notes 66–67 *supra.*

126. This result is attributed to giving effect to the donor's intent. 5 AMERICAN LAW OF PROPERTY § 23.35 (A.J. Casner ed. 1952); 3 R. POWELL, *supra* note 20, § 395; RESTATEMENT OF PROPERTY § 340, Comment a (1940); SIMES & SMITH, *supra* note 8, § 1013. It would be ironic if the antilapse statute could not be extended to protect the donor's relatives; no policy in favor of the donee's intent would be furthered thereby, yet the donor's probable intent would be defeated.

donee cannot reach the property;[127] any disposition of the property cannot postpone vesting beyond lives in being plus twenty-one years from the date the power was created.[128] In the event the donee does not exercise the power, the property will pass as specified by the donor, or by intestacy from the donor.[129]

Although the presumption of these antilapse statutes, that the substitution would be intended only for takers related to the testator, may be accurate when applied to property owned by him, it seems unreasonable when applied to appointive assets. Because the donee is aware both of the origin of his power and of the fact that his capacity to deal with the assets inter vivos is restricted, and because he has affirmatively selected the appointee, it seems most likely that he would hold an appointee related to the donor of the power in as much affection as an appointee related to him, and thus would prefer the appointee's issue to either his residuary takers[130] or the takers in default.

Thus, although the donee of a general power holds an unlimited power of disposition over the appointive assets at death, insistence on applying the antilapse statute as if he were the owner of the appointive assets is more likely to defeat the donee's intent than to carry it out. The coverage of statutes providing for application of antilapse statutes to testamentary appointments should be extended to appointees who are related to either the donor or the donee.

### 2. *Special powers*

When the appointment is made under a special power, the argument for applying the antilapse statute to substitute takers for a prede-

127. *See* note 3 *supra.*

128. 6 AMERICAN LAW OF PROPERTY § 24.34 (A.J. Casner ed. 1952); J. GRAY, THE RULE AGAINST PERPETUITIES § 526.1–.3 (4th ed. 1942); R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 124 (1966); J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 141–42 (2d ed. 1962); *see* note 21 *supra.*

129. 5 AMERICAN LAW OF PROPERTY § 23.61 (A.J. Casner ed. 1952); R. POWELL, *supra* note 20, ¶ 402; SIMES & SMITH, *supra* note 8, § 1031. In the words of the *Restatement:* "Where there is a general power and no gift in default of appointment in specific language, property not appointed passes to the donor or his estate." RESTATEMENT OF PROPERTY § 367(1) (1940).

130. Even though the particular appointment fails, the residuary clause will exercise the power in a number of jurisdictions. *See* note 64 *supra.* In addition, the capture doctrine may also result in passing the appointive property by the donee's residuary clause or to his intestate takers. *See* Talbot v. Riggs, 287 Mass. 144, 191 N.E. 360 (1934); SIMES & SMITH, *supra* note 8, § 974.

ceased relative of the donor, but not of the donee, is even more compelling. In this situation, the donee has nothing approximating ownership of the appointive asssets. As Simes and Smith have pointed out, the donee merely has the discretion to make a selection among the members of a group selected by the donor.[131] She is not entitled to make any beneficial use of the power or the appointive property by virtue of her power.[132]

Under these circumstances, refusing to apply the antilapse statute to prevent lapse of appointments to relatives of the donor, while applying it to prevent lapse of appointments to relatives of the donee, seems absurd. That modern statutes[133] allow such a result is surely no more than a legislative oversight. Those statutes should be amended to broaden their protective coverage to include relatives of the donor as well. Any new statutes on this subject should clearly so provide.

### 3. *Preventing lapse by judicial decision when the appointee is related only to the donor*

Although the surest way to provide antilapse protection to the issue of predeceased appointees who are related to the donor, but not to the donee, is by statute, it may be possible to reach this result by construction of existing antilapse statutes. Antilapse statutes were not drawn with the problems of powers of appointment in mind; they were drawn in terms of a single "testator" who is predeceased by a devisee or legatee leaving issue surviving. The basic problem in applying them to provide protection for relatives of the donor, of course, is applying the word "testator" to the donor of the power.

The most obvious technical objection to doing so is that the word "testator" in the statutes cannot be construed to apply to two different persons. An argument that the term may be so construed can be made based on the nature of the transaction. The transfer of property effected by exercise of a power of appointment is a two-step process.[134]

131. SIMES & SMITH, *supra* note 8, § 984, *quoted at* text accompanying note 97 *supra.*

132. An attempt to exercise a special power even indirectly to provide benefits to the donee is a fraud on the power. Horne v. Title Ins. & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948); *In re* Carroll's Will, 274 N.Y. 288, 8 N.E.2d 864 (1937).

133. *See* note 93 and accompanying text *supra.*

134. Simes, *The Devolution of Title to Appointed Property,* 22 ILL. L. REV. 480, 493 (1928).

The donor sets the basic frame of the disposition, determining the persons who have interest in the property and creating a power in the donee to shift some or all of those interests by exercise of the power. The range of discretion given the donee in selecting the ultimate owners of interests in the property is determined by the donor and may vary from no discretion at all to discretion to select anyone, including the donee.[135] To view the transfer as effectuated by the donative act of only one or the other is to ignore the fact that two donative acts are required to complete the transfer in the event the power is exercised.

It requires no great leap of logic to proceed from the two-step nature of the transaction to the conclusion that both donor and donee can be regarded as the "testator" for the purpose of determining who is a "relative of the testator" within the meaning of the antilapse statutes. The analysis of the relationship between donor and donee which views the donee as the agent of the donor to "fill in the blanks" of the donor's dispositive scheme is useful here.[136] If the donee is viewed as the donor's agent, it can be argued that, for this purpose at least, the donee's will can be attributed to the donor, making the donor the "testator." Because of the two-step nature of the transaction, however, this analysis should not be taken so far as to conclude that only the donor should be treated as the "testator."

An additional technical objection to construing antilapse statutes to include the donor within the meaning of the word "testator" might be raised where the power is created by inter vivos instrument rather than by will, namely, that a donor of an inter vivos instrument cannot be a "testator." Although the agency analysis should be sufficient to counter such an objection, an additional argument could be based on

135. The range of discretion, of course, determines whether the power is general, special, or hybrid. For definitions of general and special powers, *see* note 6 *supra*. Hybrid powers are neither general nor special and arise predominantly from the federal estate and gift tax provisions that define a general power for tax purposes as one "exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate," I.R.C. § 2041(b)(1) (estate tax), or "exercisable in favor of the individual possessing the power . . . , his estate, his creditors, or the creditors of his estate," I.R.C. § 2514(c) (gift tax). A power to appoint to anyone except donee, creditors of donee, donee's estate, or the creditors of donee's estate is therefore not a general power within the estate and gift tax codes, but it is not a special power either. This is a typical hybrid power. SIMES & SMITH, *supra* note 8, § 875. Because this article takes the position that no distinction should be drawn between general and special powers in applying antilapse statutes, no separate treatment has been accorded hybrid powers.

136. *See* notes 19–20 and accompanying text *supra*.

*In re Estate of Button.*[137] In that case the court applied an antilapse statute to the interest of a beneficiary of an inter vivos trust. Its reasoning supports the position that the donor of a testamentary power created by inter vivos instrument is included within the meaning of the word "testator":

> A gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an inter vivos instrument or in a will. [The antilapse statute] declared the policy of the law of [the State of Washington], and that policy is against the lapsing of gifts to relatives of the deceased. This does not mean that a testator or trustor cannot provide for a different disposition. If he does, of course, the statute has no application.
>
> Where a statute . . . applied by its terms to devises of real estate, we held that it declared the policy of the state applicable to a trust covering personal property as well. . . . By the same principle, there being no conflicting statutory provision, a statute covering gifts by will which would lapse in the absence of statute, applies to gifts provided in a trust.[138]

The policies behind preventing lapse of testamentary gifts to relatives of the testator—preventing disappointment of expectations, providing equality among the branches of the family, and protecting issue of predeceasing family members—apply equally to the relatives of the donor and donee of the appointive property. In addition, it seems most reasonable to presume that the donee's intent would be furthered by substituting takers for the predeceased appointee, even if the appointee is related only to the donor. American courts have generally rejected the technical approach employed by English courts and applied antilapse statutes to testamentary appointments, because, for this purpose, they are substantially similar to other testamentary dispositions. It seems reasonable to hope they will conclude that the protection of the statutes should be extended to the donor's relatives.

## IV. A STATUTORY PROPOSAL

Courts can and should apply antilapse statutes to special powers as

137. 79 Wn. 2d 849, 490 P.2d 731 (1971).

138. *Id.* at 854–55, 490 P.2d at 734 (1971). The court's analysis was unnecessary, because the interest should have been construed to be without a condition of survival. Fletcher, *A Critical Note on Lapse,* 8 GONZ. L. REV. 26 (1972).

well as general powers, follow the class gift cases to substitute issue of a predeceased appointee even when such issue are not included within the class of permissible objects, and extend the protection of antilapse statutes to relatives of the donor. The cases discussed above, however, make it unlikely that they will all do so. Consequently, a statutory resolution of these problems would be desirable.

Statutes, if carefully drawn, present the following advantages: they can provide a basis for sound planning by eliminating problems of retroactivity and reliance; specify the scope of application of a rule beyond a particular situation; preclude litigation otherwise necessary to establish rules when there is no relevant common law authority; and provide a basis for making the necessary arbitrary judgment as to what most disposers of property would have intended had they foreseen the particular problem.

A statute designed to prevent the lapse of an appointment under a testamentary special or general power might take the following form:

> If the appointee of any power of appointment exercised by will, who is related by consanguinity to either the donor or the donee of the power, predeceases the donee of the power, leaving issue who survive the donee, the surviving issue of such appointee shall take the appointed property, per stirpes and not per capita, in the same manner as the appointee would have done had he survived the donee. The donee of any special power, whether exercisable by will or by deed, shall have the power to appoint to the issue of any object of the power who predeceases the exercise of the power. The provisions of this statute shall apply to any member of the class of objects of the power who was alive at the date of the execution of the instrument creating the power, or born thereafter, and shall apply to the issue of any object of the power, even though such issue are not included within the description of the objects of the power. Provided, however, that this statute shall not apply if either the donor or the donee specifically manifests an intent that some other disposition of the appointive property shall be made.

This statute follows the majority of American jurisdictions in limiting application of the antilapse statute to blood relatives of the testator,[139] although relatives of both donor and donee are included. In states where the antilapse statute is more broadly or narrowly applica-

139. *See* note 117 and accompanying text *supra*.

ble, changes should be made to reflect the legislative judgment as to the range of protection to be afforded by the statute.

The statute also follows the vast majority of American jurisdictions in substituting issue for the predeceased taker.[140] In those few jurisdictions where the substitute takers are not limited to issue, consideration should be given to providing separate treatment for general and special powers. Because a principal justification for applying antilapse statutes to class gifts is to preserve equality of distribution among branches of a family,[141] and a principal concern in applying antilapse statutes to appointments under special powers should be to adhere to the donor's probable intent,[142] limiting the substitution under special powers to issue of the predeceasing object of the power should be considered. For appointments under general powers, the basic pattern of the jurisdiction's antilapse statute could be retained.

This statute, like other antilapse statutes, applies only in the absence of a manifestation of a contrary intent by the donor or donee of the power.[143] It is designed to fill the gap if there is no discernible intent of the donor or donee as to the desired disposition of the property when an intended taker predeceases the effective date of transfer. Adoption of a statute such as the one suggested should resolve satisfactorily the problems discussed herein without the costs and delays incident to the adjudicatory process.

## V. CONCLUSION

Development of American law on the proper application of antilapse statutes to appointments made by will is in a rudimentary stage. The little case law on the subject has followed the lead of the English decisions in applying the statutes to appointments under general powers, but fortunately has not confined the grounds for decision to the statutory basis used by the English courts. Because the problems created by the death of an appointee are essentially the same as those presented by the death of a devisee or legatee under a will, antilapse statutes designed to resolve the latter problems should be liberally applied to testamentary appointments.

140. *See* Table at p. 408 *supra*.
141. *See* note 114 and accompanying text *supra*.
142. *See* note 126 *supra*.
143. *See* note 113 *supra*.

The policies underlying the antilapse statutes can best be implemented by applying them more broadly than has yet been suggested by either courts or commentators. Thus, the statutes should be applied not only to appointments under general powers, but to those under special powers as well; they should be applied to protect the relatives of the donor as well as of the donee; finally, they should be applied to protect the issue of appointees even when such issue are not included in the designation of the objects of the power.

American courts, following their tradition of looking behind the form of a statute to its underlying purposes and the substance of the problems presented, can reach these results in construing existing statutes.[144] The process will be slow and uncertain, however. To avoid the necessary expenses, uncertainties, and delays of the judicial process, state legislatures should enact statutes like the one set forth above to provide ample antilapse protection to appointees under powers exercised by will.

144. Justice Traynor has eloquently stated that the courts must be forward-looking in interpreting new legislation which was enacted to overturn or redirect old common law:

> One way or another, the rising line of statutes and of judicial precedents are likely at times to converge. It is not realistic, if it ever was, to view them as parallel lines. The volume of lawmaking is now so great that we no longer can afford to have judges retreat into formulism, as they have recurringly done in the past to shield wooden precedents from any radiations of forward-looking statutes while they ignored dry rot in the precedents themselves.

Traynor, *Statutes Revolving in Common-Law Orbits,* 17 CATH. U. AM. L. REV. 401, 402 (1968).