SOME COMMON PROBLEMS INCIDENT TO DRAFTING DISPOSITIVE PROVISIONS OF DONATIVE INSTRUMENTS*

W. BRYAN BOLICH†

In the short time allotted for this discussion of dispositive provisions of wills and trusts, I shall not attempt to cover the waterfront but will confine my remarks to certain common problems of drafting. Following some consideration of miscellaneous general problems, I shall deal mainly with draftsmanship as related to class gifts and end limitations. Thus I shall discuss neither the fact-gathering nor the tax-saving aspects of estate planning, but will concentrate on methodology in the effectuation of certain schemes of property disposal. And for the most part I can only bring you a professor's-eye view of the matter gained largely in the legal dissecting room where we students conduct post mortems on dispositive mistakes which reach courts of appeal.

I

NECESSARY KNOW-HOW

Estate planning and drafting involve both knowledge and technique —what to do and how to do it. The planner must, as a minimum, understand and evaluate not only the legal but the human factors in the equation. He must be able to elicit confidential information about family and property; and by furnishing ideas, to lead his client into making only the wise and reasonable dispositions of which his estate is capable; and above all else he must have the technical competence to draft the instruments necessary to effectuate the plan. And this calls for the possession by him of certain qualifications: (1) He must know the local law on the subject, the statutes and the cases, especially the significance which the courts give to particular words and phrases, and always remember that by change of the donor's domicile and otherwise the law of another jurisdiction may come to apply; (2) he must know the available legal devices for effectuating various objectives and how to use them, just as the good golfer must know which club to use for a particular result and how to handle it; (3) he needs foresight and

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† Professor of Law, Duke University School of Law.

imagination to envisage and provide for the usual contingencies, of which the average donor is almost completely oblivious; and (4) though he need not be a stylist, he must be able to write with precision and clarity so that the meaning of his language cannot be distorted by a hostile reader. Perfect draftsmanship, which would avoid all construction problems, assumes an ability to express oneself so unambiguously that everything one says means exactly the same thing to everyone else. Unfortunately, neither man nor his language has reached that state in the art of self-expression. Therefore the good draftsman must not only know the formal legal rules but understand the judicial technique in construction problems.[1] And since this area of law is normally covered only in Future Interests, it is a dictum of mine that no one should draft a dispositive instrument of any complexity unless he has had that course. Fortunately, the estate planner and draftsman of today has available some excellent recent texts on the subject, both general and special.[2]

II

THE LEGAL BACKGROUND

The artist has at his disposal all the colors of the spectrum which he may mix as he sees fit, but the legal draftsman has only a certain number of fixed types of estates and other interests, legal or equitable, present or future. However, the common law's trust concept and system of limited estates projected upon the plane of time—perhaps its most sophisticated developments—do permit great elasticity in property settlements. In the game of conveyancing, each interest, like men in a game of chess, has its relative value and fixed characteristics. And once the troublesome problem of construction is disposed of property law has certainty, *i.e.*, when the type of estate or other interest is established the law implies a more or less fixed group of legal consequences whether or not they are intended by the creator.[3]

In the effectuation of a dispositive plan by donative instrument we encounter rules of law like the Rule Against Perpetuities, and rules of construction such as the class-closing rules. Both reflect policy con-

[1] 3 POWELL, REAL PROPERTY §§ 316-318, esp. 318 (1952); Simes, *The Meaning of Heirs in Wills: A Suggestion in Legal Method*, 31 MICH. L. REV. 356 (1933) discusses factors other than the language of a will which may affect its construction.

[2] General: AMERICAN LAW OF PROPERTY (1952); POWELL, REAL PROPERTY (1949-1954); RESTATEMENT, PROPERTY (1936-1940); SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956). Special: CASNER, ESTATE PLANNING (2d ed. 1956); SHATTUCK AND FARR, AN ESTATE PLANNER'S HANDBOOK (2d ed. 1953); STEPHENSON, DRAFTING WILLS AND TRUSTS, ADMINISTRATIVE PROVISIONS (1952); STEPHENSON, DRAFTING WILLS AND TRUSTS, DISPOSITIVE PROVISIONS (1955); TRACHTMAN, ESTATE PLANNING (1951); TWEED AND PARSONS, ESTATE PLANNING (2d ed. 1955); WORMSER, PERSONAL ESTATE PLANNING IN A CHANGING WORLD (6th ed. 1955).

[3] Oliver, *Tax Pragmatism and Property Rationalism*, 20 TEXAS L. REV. 675, 675-689 (1942).

siderations and in varying degrees limit freedom of disposition. But they differ in that the effect of an otherwise applicable rule of construction may be defeated by the sufficient expression of a contrary intent, while rules of law operate regardless of expressed intent to the contrary if the fatal words attracting the rule have been uttered.[4] To the extent that these rules have definiteness of meaning and consistency of judicial application the skilled draftsman can draw a donative instrument certain to give effect to the desires of the donor and to avoid litigation as to the meaning and effectiveness of the instrument. Our concern as draftsmen is to avoid the proverbial search for intent by using words of art and using them unequivocally. The prevalence of skilled conveyancing and standardization of forms in England has produced definiteness in these rules. In this country the absence of such standardization and the persistence of the dogma that no will has a brother hamper the attainment of reasonable certainty and predictability in conveyancing, and tend to shift judicial emphasis from rules of construction to actual intent.[5] Since the types of estate plans and instruments to effectuate those plans fall into fairly definite patterns, I think the lawyer may well use carefully drafted forms of conveyance whenever they fit the facts of his case. If this system is intelligently followed, it should expedite the preparation of such documents and provide considerable insulation against oversights and litigation.[6] However, this suggestion is made subject to the following qualification: "No clause should appear in any will [or other instrument] drawn by you unless you individually know precisely what it means, what object it is designed to accomplish, what doctrine (if any) of the law it grows out of, and how it furthers the testamentary [or other] intention of this particular client."[7]

The lawyer must be alert to the fact that every period and power in our long history since 1066 has left its mark on our property law. Social and economic policies produced both rules of construction effectuating "intent" and rules of law defeating it, but stare decisis often perpetuates such rules long after the originating reasons have ceased to exist and they may constitute booby traps for the unwary. That ogre, the rule in *Shelley's Case,* was probably in origin simply the judicial closing of a "tax" gap, but the rule of law hangs on today and by substituting a fee simple in the ancestor for a life estate in the ancestor with reminder in fee in his heirs penalizes North Carolinians taxwise, by eliminating the estate tax saving of the life estate and remainder concept, and otherwise, especially by thwarting the conveyor's intent to limit the

[4] 5 AMERICAN LAW OF PROPERTY § 21.2 (1952); 1 SIMES AND SMITH, *op. cit. supra* note 2, § 467.
[5] 3 RESTATEMENT, PROPERTY Div. III, Part III, Introd. pp. 1181-1188 (1940).
[6] See Garwood, *Drafting Wills and Trusts,* 94 TRUSTS & ESTATES 807 (1955).
[7] LEACH, CASES AND TEXT ON THE LAW OF WILLS 234 (2d ed. 1949 Rev.).

ancestor to a life estate. One rule of construction which probably was originated to repel the application of a rule of law defeating intent by making an otherwise contingent remainder vested and therefore indestructible and transferable has ripened into the legal axioms that "the law favors the early vesting of estates" and also their "early indefeasibility." While application of these axioms facilitates alienation and validity under the Rule Against Perpetuities,[8] it produces certain unfortunate results today and poses the question whether an express requirement of survival to the date of distribution of a future interest may not be wise in most cases. This may be accomplished either by making the interest subject to a condition precedent of survival or vested subject to defeasance by non-survival.[9] The latter course seems safer because it eliminates certain adverse common law aspects such as the doctrine of destructibility of contingent remainders. If T devises property to his son, A, for life with remainder in fee to A's children, if the remainder is vested rather than contingent on survival, it is subject to the claims of creditors,[10] may be more readily sold by the remainderman,[11] and if transmissible as part of a child's estate it is generally subject to another estate tax and probate expenses[12] and may get out of T's family by descent or devise from the remainderman.[13] If the draftsman discloses these facts to his client, and he should do so, it is probable that the average donor would desire such remainder to be subject to a requirement of survival.[14] If the limitation had read in effect to my son, A, for life, remainder in fee simple to such of his children as are living at his death and the then living descendants per stirpes of such of A's children as may have died at any time before A's death, the unfortunate consequences mentioned above would not likely have occurred.

III

Some Miscellaneous General Problems

As we all know, there are certain common problems as to disposition which the draftsman must reckon with and provide for, or let his client chance the possibility of an unfortunate occurrence. I shall mention some of them.

1. *The no-contest clause.* Whether such a provision should be in-

[8] 3 Restatement, Property § 243 Comments i, j (1940).

[9] See 5 American Law of Property § 21.31 (1952).

[10] Johnson Bros. v. Lee, 187 N. C. 753, 122 S. E. 839 (1924); Watson v. Dodd, 68 N. C. 528 (1873). But see Bodenhamer v. Welch, 89 N. C. 78 (1883).

[11] Brown v. Guthery, 190 N. C. 822, 130 S. E. 836 (1925); Woody v. Cates, 213 N. C. 792, 197 S. E. 561 (1938).

[12] Coddington v. Stone, 217 N. C. 714, 9 S. E. 2d 420 (1940).

[13] Early v. Early, 134 N. C. 258, 46 S. E. 503 (1904).

[14] See generally, Schuyler, *Drafting, Tax and Other Consequences of the Rule of Early Vesting,* 46 Ill. L. Rev. 407 (1951); 3 Powell, *op. cit. supra* note 1, § 318.

serted will ordinarily depend upon the individual situation as to the testator, his property, family, beneficiaries, and the devises and legacies made. North Carolina has heretofore been most liberal in allowing forfeitures for violation of no-contest clauses, but has recently adopted the rule denying forfeiture where there is probable cause for contesting the will and it is done in good faith.[15] Since the purpose of the clause is to prevent contest, if it scares off the beneficiary that is accomplished whether the clause is void or valid. Of course, if a lawyer is consulted deterrence will likely be commensurate with the probability of a court's enforcing the forfeiture.

2. *Lapse.* Unless beneficiaries are explicitly required to survive the testator, the anti-lapse statute provides for a substitute taker in certain cases of death between the date of the will and the testator's death, which statutory substitute is the issue of the beneficiary if he is a lineal descendant or would have been an heir of the testator.[16] Such clauses as "to A if he survive me," or "to the children of A who survive me" will settle the matter satisfactorily provided a substitute taker is named to prevent a possible partial intestacy.

3. *After-born or adopted children.* Failure to provide for them by express inclusion or exclusion in the will may upset your plans by having such child take an intestate share[17] and a substitute gift outside the probate estate may not work.[18]

4. *Buying-off the widow.* As we know, if she exercises her right of dissent from her husband's will she receives her statutory rights; *i.e.*, dower,[19] year's allowance,[20] and her half[21] or child's share of the personal property.[22] Of course, no clause can eliminate this privilege and she must be bought off to prevent disruption of the testamentary plan. It seems always desirable to provide expressly in the will that the provision for her is in lieu of all marital property rights, and it might be expeditious to set up alternative provisions in the will in case the wife does dissent in view of the problems incident to acceleration and sequestration.

5. *Simultaneous Deaths.* Since the Uniform Act is the law of this state[23] its provisions will operate unless expressly excluded and the draftsman must therefore make an election which can only be intelli-

[15] Ryan v. Wachovia Bank and Trust Co., 235 N. C. 585, 70 S. E. 2d 853 (1952); Note 21 U. CIN. L. REV. 521 (1952). And see Whitehurst v. Gotwalt, 189 N. C. 577, 127 S. E. 582 (1925).

[16] N. C. GEN. STAT. §§ 31-42.1, 42.2, 42.3 (1950).

[17] *Id.* § 31-5.5.

[18] Williamson v. Williamson, 232 N. C. 54, 59 S. E. 2d 214 (1950), Note 29 N. C. L. REV. 218 (1951).

[19] N. C. GEN. STAT. § 30-5 (1950).

[20] *Id.* § 30-15.

[21] *Id.* § 28-149.

[22] *Id.* § 30-2. Phipps, *Marital Property Rights*, 27 ROCKY MT. L. REV. 180 (1955) outlines the statutes of all the states.

[23] N. C. GEN. STAT. §§ 28-161.1-167.7 (1950).

gently done in the light of the effects of the statute. Tax considerations apart, principal purposes of the ordinary survivorship clause are to keep property out of the estate of the other person, and to prevent litigation as to who survived or the operation of an anti-lapse statute. A time clause such as the following seems safest: "For the purpose of this my will no legatee or devisee shall be deemed to survive me if he dies within thirty (30) days of my death." This clause is preferred because it eliminates most of the uncertainties inherent in the simultaneous death and common disaster clauses.[24] Conjunction of simultaneous death and anti-lapse statutes may allow a disposition to a beneficiary even though the testator is presumed to survive him.[25]

6. *Pouring Over.* The amendable or revocable inter vivos trust has come to be a rather widely used device in estate planning mainly because of its non-finality and elasticity in meeting changing conditions as to family and property.[26] If the settlor of such a trust wishes by his will to pour over into the trust part or all of his probate estate to be administered as part of the trust, this has raised serious legal questions as to the Statute of Wills.[27] However, an excellent 1955 North Carolina statute effective July 1, 1955,[28] settles the matter for us and permits pour-over from one's will to such previously created inter vivos trust as the trust stands at the settlor-testator's death, and revocation of the trust before that event voids the pour-over.[29] Since only the wealthy can generally afford to create non-revocable inter vivos trusts, this statute can be of aid to the average person. The pour-over provision must sufficiently identify the trust and a clause of the trust should empower the trustee to receive additional property.

In addition to its other advantages, this device can curtail publicity as to one's estate, reduce probate costs, and eliminate court supervision. Use of this device will tend to reduce the importance of the will, and it is not unlikely that strict construction of the act may ensue. Under the English rule such a trust must be more than nominal.[30]

7. *Abatement.* Most wills should probably contain a general or specific abatement clause reducing pro rata all or certain gifts to take care of the ever-present problem of shrinkage of one's ultimate estate resulting from such causes as the fortunes of a business, the economic

[24] See Bowe, *Draftsmanship: Wills and Trusts,* 94 TRUSTS & ESTATES 797 (1955).

[25] Baltimore v. White, 189 Md. 571, 56 A. 2d 824 (1948).

[26] SHATTUCK AND FARR, *op. cit. supra* note 2, c. 4 and 6.

[27] See Comment, 39 VA. L. REV. 817 (1953).

[28] N. C. GEN. STAT. § 31-47 (1955).

[29] See 33 N. C. L. REV. 598 (1955). For a liberal decision sanctioning a revocable, amendable inter vivos trust, see Ridge v. Bright, 244 N. C. 345, 95 S. E. 2d 607 (1956).

[30] See STEPHENSON, DRAFTING WILLS AND TRUSTS, DISPOSITIVE PROVISIONS, *op. cit. supra* note 2 c. 19 (1955).

cycle, and taxation. For example, T might at the date of his will have a million dollar estate and leave $100,000 to charity and the residue to his family; and when he dies years later find his whole net estate is only $100,000.[31]

8. *"Reno" Clause.* In these days of migratory divorces, it seems very desirable to insert some protective provisions as to validity of such divorces, ensuing marriages and issue thereof. A suggested provision is hereinafter given in connection with the discussion of class gifts.

IV

Drafting Class Gifts

Gifts to unborn or unascertained beneficiaries are made possible by the class gift concept, the essence of which is a gift to a described group capable of numerical fluctuation by increase or decrease.[32] Its original function was to provide survivorship by implication among the described group so as to prevent a lapse in case of a testamentary gift. That the class gift is used in a large percentage of all wills and trusts is obvious when it is remembered that it embraces gifts by group designation to persons such as children, grandchildren, brothers and sisters, nieces and nephews, family, issue and heirs. And the vast volume of litigation concerning the meaning of these terms alone raises the red flag of danger for every draftsman as to the imprecision of language in such legal documents and its consequent unpredictableness in this field. Who constitute the class, when the class closes, shares of each member, and whether a member must survive the date of distribution in order to take are principal problems for the draftsman of class gifts. Because of the ambiguities inherent in the concept, it should probably be used only when legally necessary, *i.e.,* when the individual gift will not suffice. The general literature is both exhaustive and excellent.[33]

While only a "lay" lawyer would get caught, there are certain group-sounding phrases which limit the duration of estates and give no interest by purchase to the heirs of the named person, *e.g.,* the traditional common law formulas for creating respectively the fee simple and the fee tail are "to A and his heirs" and to "A and the heirs of his body." Also, the rule in *Shelley's Case* makes void a remainder to the heirs of the grantee life tenant,[34] and the doctrine of worthier title may render void a remainder to the heirs of the grantor.[35]

[31] *Id.* c. 2, Topic C.
[32] 3 Restatement, Property § 279 (1940).
[33] 5 American Law of Property §§ 22.1-22.63 (1952); 3 Powell, *op. cit. supra* note 1, §§ 351-357; 2 Simes and Smith, *op. cit. supra* note 2, chs. 20-23; Long, *Class Gifts in North Carolina,* 22 N. C. L. Rev. 297 (1944).
[34] Martin v. Knowles, 195 N. C. 427, 142 S. E. 313 (1928).
[35] Therrell v. Clanton, 210 N. C. 391, 186 S. E. 483 (1936), Note, 15 N. C. L. Rev. 59 (1936).

1. *Who Constitute the Class.* Even if it is assumed that most any one of the common class gift expressions has been used in its primary or ordinary sense, ambiguities of meaning still remain. A gift "to the children of A," involves the questions whether the following children are included: adopted, illegitimate, stepchildren, and those of different marriages. Likewise such gift to A's "issue" is not conclusive as to whether it extends to legitimate blood descendants of the first and remoter degrees. And a limitation to "the heirs of A" raises three problems as to their ascertainment: what intestacy statute, of what date, and applied when.[36] And in North Carolina, such gift to the heirs of a living person is presumptively a gift to his children,[37] except when a life estate is limited to the ancestor.[38] As a matter of fact, when a layman uses the word "heirs" in a conveyance drafted by him, he probably almost always means children or grandchildren.

In class gifts to heirs, issue and the like, North Carolina is strongly addicted to per capita distribution,[39] although such takers be related to the donor in different degrees, and if a per stirpital division is desired it must be explicitly provided for. If a gift to heirs is a future interest, the date for determining heirs of the named ancestor is a question of construction and may be either his death or the end of the prior estate.[40] And whether an adoptee of A takes under a gift to A's children is a question of intention and depends mainly upon whether such adoption occurred before or after the date when the conveyance spoke.[41]

Such are the definitional vagaries of these expressions,[42] that the only safe course for the draftsman is to elicit from his client what meaning he wants to convey by such terms,[43] if you elect to use them, and then to insert some such clause as the following:

> For purposes of this instrument the terms "child" or "children" mean legitimate blood descendants in the first degree of the parent designated, and "issue" means legitimate blood descendants in the first, second or any other degree of the ancestor designated, pro-

[36] See as to the three points, 5 AMERICAN LAW OF PROPERTY §§ 22.30, 22.36, 22.56, 22.63 (1952); and Long, *supra* note 33, at 302-307.

[37] N. C. GEN. STAT. § 41-6 (1950); Ellis v. Barnes, 231 N. C. 543, 57 S. E. 2d 772 (1950); Note, 29 N. C. L. REV. 58 (1950).

[38] Whitley v. Arenson, 219 N. C. 121, 12 S. E. 2d 906 (1941).

[39] Coppedge v. Coppedge, 234 N. C. 173, 66 S. E. 2d 777 (1951), *rehearing denied,* 234 N. C. 747, 67 S. E. 2d 463; Note, 30 N. C. L. REV. 197 (1952). And see Freeman v. Knight, 37 N. C. 72 (1841).

[40] Grantham v. Jinnette, 177 N. C. 229, 98 S. E. 724 (1919); Ziegler v. Love, 185 N. C. 40, 115 S. E. 887 (1923); 3 POWELL, *op. cit. supra* note 1, § 375.

[41] Bradford v. Johnson, 237 N. C. 572, 75 S. E. 2d 632 (1953), before; Wachovia Bank and Trust Co. v. Green, 239 N. C. 612, 80 S. E. 2d 771 (1954), after; Note, 5 DUKE B. J. 60 (1955).

[42] See Long, *supra* note 33 at 302-307; 2 SIMES AND SMITH, *op. cit. supra* note 2, §§ 721-724, 728-738.

[43] 5 AMERICAN LAW OF PROPERTY § 22.38 (1952).

vided that the words "child" or "children" or "issue" of myself or of any child of mine shall include every child legally adopted by me or by any child of mine and such adopted child and its issue shall be considered legitimate blood descendants of the adopting parent and of any ancestor of such adopting parent; and where a decree of divorce has been rendered by a court of record and the spouses named therein have not thereafter lived together openly as husband and wife, such divorce shall be considered as valid for all purposes, including the following purposes but without limiting the generality of the foregoing: (1) the spouses shall no longer be considered as husband and wife of each other or as heir, distributee or next-of-kin of each other upon death; (2) if a spouse contracts a subsequent purported marriage which, apart from previous marriages, would be valid, such subsequent purported marriage shall be considered as valid, the parties shall be considered husband and wife of each other and heir, distributee or next-of-kin upon death and every child of said marriage shall be considered a legitimate blood descendant of such parents and of any ancestor of either of such parents.

Whenever distribution of real or personal property is to be made to designated "issue" on a per stirpes basis, or whenever such property is devised or bequeathed to the "heirs" of a named person, the property shall be distributed to the persons and in the proportions that personal property of the named ancestor would be distributed under the intestacy laws of North Carolina in force at the time for distribution as if the named ancestor had died intestate at such time, domiciled in such State, unmarried and survived only by such issue or by such heirs, as the case may be.[44]

The above clause should stand a fair chance in most cases of providing certain solutions for the uncertainties of terminology, status, and property distribution it covers. As previously stated in my discussion of general problems, the use of some such provision tailored to fit your facts and in accord with your client's distributive desires is recommended. This particular form would certainly not be suitable if he loves all of his issue per capita and not per stirpes and is opposed to adoptions and divorces!

Although its uncertainties dictate against use of the expression, there may be a class gift to a named person and a group ("to A and the children of B"), all constituting one class,[45] and the distribution in

[44] An adaptation from CASNER, ESTATE PLANNING pp. 337, 338, 376 (Supp. 1955).

[45] 3 RESTATEMENT, PROPERTY § 284 (1940).

North Carolina is normally per capita.[46] If the individual and the described group are in the relation of parent and child we run afoul of the rule in *Wild's Case*,[47] both resolutions of which apply in North Carolina. On a devise "to A and his children" if A has no children at the date of the testator's death Resolution I gives A a fee tail which is statutorily converted into a fee simple,[48] while if he has one or more children Resolution II makes A and his children in esse a single class who take as tenants in common in fee simple to the exclusion of any afterborn children.[49] If your client wants to convey property to A and his children, the words "to A and his children" are unlikely to accomplish a desirable objective. Resolution I facilitates alienation but not T's intent, while Resolution II may conceivably be what T wants if all of A's children can benefit. But most likely T wants successive ownership as between A and his children which could be accomplished by a life estate in A with remainder in fee simple to A's children. While legal life estates to remainders are generally inadvisable as to personal property because of its nature, a recent North Carolina statute now permits them by inter vivos conveyance.[50] And it might be said here that the legal life estate in a parent with remainder to the children, especially in small and uncomplicated estates, when such life estate includes a limited or unlimited power of consumption, has its utility and advantages.[51]

2. *When the Class Closes.* An immediate class gift (to the children of A) closes when the instrument speaks, *i.e.*, when the deed is delivered or the testator dies,[52] while a postponed class gift (to A for life remainder to the children of B) closes at the termination of the prior estate or other period of postponement.[53] The basic idea as to both types is the same, namely, that as soon as the subject matter could be distributed but for the possibility of additional members of the class, considerations of convenience, such as early indefeasibility of title and prompt administration of estates, demand the closing of the class, and persons begotten thereafter are excluded.[54] But these rules are subject to the exception that as to a gift of an aggregate sum to a class (T bequeaths $15,000 to the children of A) if no member is in esse at the

[46] Tillman v. O'Briant, 220 N. C. 714, 18 S. E. 2d 131 (1942).

[47] 3 POWELL, *op. cit. supra* note 1, § 355; 3 RESTATEMENT, PROPERTY § 283 (1940).

[48] Silliman v. Whitaker, 119 N. C. 89, 25 S. E. 742 (1896).

[49] Cullens v. Cullens, 161 N. C. 344, 77 S. E. 228 (1913).

[50] N. C. GEN. STAT. § 39-6.2 (1950); 31 N. C. L. REV. 410 (1953); see SIMES AND SMITH, *op. cit. supra* note 2, §§ 353, 358, 359.

[51] See Comment, 28 N. Y. U. L. REV. 1162 (1953); 28 IND. L. J. 409 (1953).

[52] 3 RESTATEMENT, PROPERTY § 294 (1940).

[53] *Id.* § 295.

[54] 3 POWELL, *op. cit. supra* note 1, §§ 363-365. Such considerations are inapplicable as to class gifts of income. 3 RESTATEMENT, PROPERTY § 295 comment i (1940).

date of distribution the class remains open during A's life;[55] but if each is given a stated sum ($1,000 each to the children of A) the whole gift fails in such case.[56] Otherwise the settlement of T's estate would be postponed indefinitely. However, these are but rules of construction which yield to a sufficient expression of a contrary intent.[57] And even the rule in *Rogers v. Mutch* may be forced so to yield.[58] Therefore, unless these results comport with the donor's desires, it will be necessary by special drafting so to conform the document. In any event, the draftsman should always be explicit as to when the class shall close, *e.g.,* "to the children of A now living" would exclude afterborn; "to the children of A now born or hereafter born during A's lifetime" would include all of A's children; "to A for life remainder to the children of B born before A's death," would explicitly exclude afterborn; "to A for life remainder to the children of B who attain age 21" would normally include only those born before B's eldest reached 21 and could call for his share after A's death. To be general, yet explicit, you could say "By children, I mean all children who are now living or born thereafter, up to the death of the life tenant," or "All children now living or born thereafter up to the time when the first child attains the age of 21."

A gift "to the children of A to be distributed when the youngest attains age 21" involves the possibility of the class closing at any one of four dates, depending upon what "youngest" means. Literally, this language keeps the class open till A dies, but the inconvenience of this solution prompts the *Restatement of Property* to prefer closing whenever the youngest of the class living at any one time attains age 21.[59]

3. *Survival to the Date of Distribution.* Survivorship at least until the death of the testator is characteristic of all testamentary class gifts except insofar as an anti-lapse statute is operative.[60] But from the fact that a class can increase in membership until a future date (to A for life remainder to the children of B; to the children of B 21 years after my death) no inference is made that only such members of the class as survive to such future date of distribution are entitled to take. Only if, according to ordinary rules of construction, there is a condition precedent of survival, or a defeasance upon non-survival, to the date of distribution will the membership of the class be subject to decrease

[55] Weld v. Bradbury, 2 Vern. 708 (1715); 3 RESTATEMENT, PROPERTY § 294(b) comment o (1940).

[56] Rogers v. Mutch, 10 Ch. D. 25 (1878); 3 RESTATEMENT, PROPERTY § 294 comment q. and § 295 comment r (1940).

[57] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1949); Note, 28 N. C. L. REV. 219 (1950).

[58] See Note, 100 U. PA. L. REV. 908 (1952).

[59] 3 RESTATEMENT, PROPERTY § 295, comment k (1940); 2 SIMES AND SMITH, *op. cit. supra* note 2, § 646.

[60] 3 POWELL, *op. cit. supra* note 1, § 367.

after the testator's death.[61] If the gift is to "heirs," "next of kin" or "issue" of a living person, A, and these words are used in their technical sense, a condition precedent of survival to A's death is generally found; but the North Carolina decisions give the term "next of kin" the now unusual meaning of nearest blood relations of the named person.[62] As previously stated, it is generally unwise to create an interest in a class member or an individual that is not subject to a requirement of survival to the date of distribution. In all cases the draftsman should provide explicitly (1) whether there is a requirement of survival; (2) if there is such a requirement, to what date the class member must survive to meet the requirement; and (3) if there is such a requirement, what is to happen to the interest of the class member who fails to meet the survival requirement. Thus "to A for life remainder to the children of B who survive A and per stirpes to the issue of such children of B as shall die at any time prior to the death of A," would seem to make all three points clear. As a draftsman, you can get any answer you want under these rules of construction if you draft the document to show an unambiguous intent to get that legal result.[63]

4. *End Limitations.* While this expression is somewhat vague, it has acquired the popular meaning of gifts over by way of substitution. This may occur as to a primary beneficiary or may be the ultimate limitation after a series of gifts. This ultimate gift over is frequently to heirs or distributees of the donor or another, or sometimes to the donor's favorite charity. And these end limitations are generally limited to occur upon death without issue or words of similar import, such as a devise "to A in fee but if he dies without issue then to B in fee" or "to A for life, remainder to B in fee but if B dies without issue then to C in fee." On these questions the number of cases runs into the thousands.[64] Since 1827 North Carolina has had a statute[65] which presumes that the expression "die without issue" means definite failure of issue, *i.e.*, failure at some specific time, *e.g.*, A's death. But the statute leaves open the question whether it means A's death before the testator or whenever it may occur. The latter is the rule of this state,[66] although there may be an intermediate date between the testator's and A's death which is used.[67] Such defeasance clauses are often used to keep property away

[61] Wachovia Bank and Trust Co. v. Snyder, 235 N. C. 446, 70 S. E. 2d 578 (1952); 3 POWELL, *op. cit. supra* note 1, § 365; 3 RESTATEMENT, PROPERTY § 296 (1940).

[62] 3 RESTATEMENT, PROPERTY § 249 (1940); 3 POWELL, *op. cit. supra* note 1, § 327; "next of kin," Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501 (1921).

[63] See 3 RESTATEMENT, PROPERTY § 296, comment h (1940).

[64] 2 POWELL, *op. cit. supra* n. 1, §§ 263-272; 3 RESTATEMENT, PROPERTY §§ 263-272 (1940); 1 SIMES AND SMITH, *op. cit. supra* note 2, ch. 18.

[65] N. C. GEN. STAT. §41-4 (1950).

[66] Hales v. Renfrow, 229 N. C. 239, 49 S. E. 2d 406 (1948).

[67] Christopher v. Wilson, 188 N. C. 757, 125 S. E. 609 (1924).

from collaterals, and when that is the purpose the estate should remain subject to defeasance until the owner's death, whenever that may occur; but many cases adopt the substitutional construction and make the fee absolute if the first taker survives the testator.[68]

The principal ambiguities can be avoided by explicit drafting, such as "to A in fee but if he die at any time, either before or after my death, without children or remoter issue living at the time of his death, then over to B in fee," or "to A for life, remainder to B in fee, but if B dies at any time before the death of A and without children or more remote issue living at the time of B's death then over to C in fee," or "to A in fee but if A dies before my death and is unsurvived by children or more remote issue living at his (A's) death then to B in fee." This last insures the so-called substitutional construction and gives A an indefeasible fee simple if he survives T.[69]

The problem of end limitations and accrued shares is tricky. T leaves "the residue of my estate in trust to my wife for life, corpus at her death to my three children, A, B, and C in equal shares. Should any of them die before my wife unsurvived by issue, his portion shall pass to the survivors of the said three children in fee." If A so dies without issue his one-third goes to B and C. If B then so dies his original one-third goes to C, but his accrued share does not and belongs to B's estate.[70] Since this is a rule of construction if you add to the above limitation that "upon the death of any one of the above named persons who dies unsurvived by issue then both his original and accrued shares shall go over to the others of the original takers under this gift" you can avoid the above result as to accrual shares.

5. *The Rule Against Perpetuities.* In view of the peculiar drafting dangers incident to class gifts and the perpetuities problem, it seems desirable to make at least a passing reference to the Rule. The classic statement is by Gray and it is generally approved.[71] "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." But for purposes of this rule it is generally held that a class gift is not vested until it is indefeasibly vested in all members. It is treated as a unit and both the maximum and the minimum membership must be certain to be determined within the period.[72] If the interest of one class member can

[68] 1 SIMES AND SMITH, *op. cit. supra* note 2, § 538.

[69] See RESTATEMENT, PROPERTY § 266, comment i (1940); 1 SIMES AND SMITH, *op. cit. supra* note 2, § 548.

[70] Robertson v. Andrews, 175 N. C. 492, 95 S. E. 892 (1918).

[71] GRAY, RULE AGAINST PERPETUITIES § 201 (4th ed. 1942); 4 RESTATEMENT, PROPERTY § 374 (1944); McQueen v. Branch Banking & Trust Co., 234 N. C. 737, 744, 68 S. E. 2d 831, 837 (1952).

[72] 4 RESTATEMENT, PROPERTY § 371 (1944); 3 SIMES AND SMITH, *op. cit. supra* note 2, § 1265.

vest too remotely the entire class gift fails, *e.g.*, if T bequeaths property "to A for life, remainder to such of her children as shall attain 25" and A is alive at T's death the whole class gift is void although A is 75 and her youngest son is 50 because those in esse may die and the whole class be ultimately composed of subsequently born children of A.[73] A simple solution to this problem would be to make the limitation "to A for life remainder to such of her children as shall attain 25 within 21 years after the death of the last survivor of all my descendants and A's descendants living at my death." Or the limitation could read "to A for life, remainder to her children, but if any child dies under 25, his share shall pass to the survivors." This language makes the remainder vested subject to defeasance and since the divesting gift over is too remote it fails and leaves each child's remainder indefeasibly vested.[74]

There are two exceptions to this general rule. A per capita gift to members of a class may be part good and part bad. If T bequeaths $100 to each child of A whenever born who attain age 25, this gift is valid as to A's children in esse at T's death, and void as to those of the class subsequently born.[75] The other exception is where a class is made up of sub-classes. It may also be split. If T bequeaths property in trust to pay the income in equal shares to the children of A for their respective lives, and when each child dies to pay over the share of corpus from which he has received the income in equal shares to his issue then living, the remainders to issue of children of A in esse at T's death are valid, and the others are void.[76]

It is felt that because of the enormous volume of litigation concerning the vested or contingent character of future interests, no draftsman should as a general practice rely on his belief that a particular future interest is so vested as not to violate the Rule. It is far safer so to draft that all of your remainders and executory interests become possessory within the perpetuities period.

[73] See McPherson v. Bank, 240 N. C. 1, 81 S. E. 2d 386 (1954); 3 SIMES AND SMITH, *op. cit. supra* note 2, § 1229. Of course, the common law's conclusive presumption of capacity for childbirth ceases to be silly if one's children include adoptees!

[74] See GRAY, *op. cit. supra* note 71, § 108. And for other forms see 3 SIMES AND SMITH, *op. cit. supra* note 2, §§ 1294-1297.

[75] 4 RESTATEMENT, PROPERTY § 385 (1944); 3 SIMES AND SMITH, *op. cit. supra* note 2, § 1266.

[76] 4 RESTATEMENT, PROPERTY § 389 (1944); 3 SIMES AND SMITH, *op. cit. supra* note 2, § 1267.