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Lapse and Vesting of Interest Revisited

Leonard Levin

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INTRODUCTION

When a legatee dies before the testator it is "horn book law" that, subject to certain exceptions discussed herein, the legacy fails and is deemed to lapse.[1] Alternatively, if a settlor creates a trust in which he creates an income interest first and then provides for the distribution to a beneficiary on the termination of the income interest, the presumption is that the beneficiary who is to receive the distribution on termination of the income interest need not survive the time of distribution.[2] Should such beneficiary die after the testator, but before the prior interest expires, his interest presumptively becomes part of his estate and thus passes to the beneficiary's distributees. It is the thesis of this article that these two fact situations raise similar issues of construction and should be decided on the basis of a common set of rules because the difference in treatment is no more than an accident of history.

Initially, it might be noted that the problem under consideration is one of many difficult litigation questions arising from a failure of the testator or settlor to deal specifically with a situation which has actually occurred and the resulting struggle that courts and legislatures have had in attempting to supply the testator's missing intent for that situation. It is perhaps understandable that the results, if not unpredictable, are predicated on relatively arbitrary principles which are seldom subject to the scrutiny of reasoned analysis. An examination of the problem must begin with a brief overview of the law of lapse and of the vesting of future interests, respectively.

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* Professor of Law, Villanova University School of Law; B.S. 1948, Wharton School, University of Pennsylvania; J.D. 1950, Magna Cum Laude, University of Pennsylvania School of Law.

1. *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 (2d ed. 1953).

2. *See generally* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 154 (2d ed. 1956).

I. LAPSE

A. *The Basic Concept*

A testator can easily and specifically address the possibility that a beneficiary could die before he would. On the one hand, he can provide that if a designated donee in his will fails to survive him, an alternate person will take in his place. In the alternative, he can provide that the gift for such beneficiary shall be void. In the absence of such a provision, the starting point of the law was to treat any interest created for a beneficiary who failed to survive the testator as void. Such interest was said to have lapsed.[3] Thus, the gift did not pass to the beneficiary's estate or his successors. If the gift were other than a residuary one and not a class gift,[4] it went into the residue. If it were a residuary gift in which the sole beneficiary predeceased the testator, an intestacy resulted.[5] When there were several residuary beneficiaries, courts were not entirely in agreement. The traditional point of view was still to have a partial intestacy[6] unless the gift was a class gift.[7] However, a number of jurisdictions have altered the rule to avoid an intestacy by implying a gift of the lapsed interest in intestacy in pro rated portions to the other residuary beneficiaries.[8] If the gift were a class gift, even if treated as lapsing on death of a member of the class, the foregoing rules did not apply. Instead, the gift passed to the surviving members of the class.[9] Moreover, the lapse occurred even where the testator did not require that the beneficiary survive him under the express terms of the will. This contrasts sharply with the rule governing vesting of future interests considered subsequently.

The concept of lapse has been largely accepted with little analy-

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3. *See generally* T. ATKINSON, *supra* note 1, at 777 (gifts tend to lapse unless saved by appropriate testamentary or statutory provisions).

4. *See infra* notes 18-20 and accompanying text for a general discussion of lapse and class gifts.

5. *See generally* T. ATKINSON, *supra* note 1, at 784.

6. Sands v. Roth, 41 Ohio Op. 38, 89 N.E.2d 99 (Ohio P. Ct. 1949).

7. *See infra* note 9 and accompanying text.

8. *In re* Nielsen's Will, 256 Wis. 521, 41 N.W.2d 369 (1950); Commerce Nat'l Bank v. Browning, 158 Ohio St. 54, 107 N.E.2d 120 (1952); *see also* 20 PA. CONS. STAT. § 2514(11) (1988) (an implied gift to other residuary beneficiaries is directed in Pennsylvania by its probate code).

9. *See, e.g.*, Cates v. Bush, 295 Ala. 256, 326 So. 2d 742 (1976); *In re* Estate of Blacksill, 124 Ariz. 130, 602 P.2d 511 (1979); Scholem v. Long, 256 Ark. 786, 439 S.W.2d 929 (1969); *In re* Estate of Clarke, 460 Pa. 41, 331 A.2d 408 (1975). Many of these cases litigated the question of whether a gift to persons who are in fact named, can be regarded in context as a class gift for the purposes of this rule. The results of this question are not always predictable.

sis of why the death of a beneficiary before the testator should produce such an outcome. It is possible that this lapse was simply a carry-over from the established principle that inheritance is for the living and that an estate is not a legal entity. Thus, an attempt to make a transfer to a nonexistent entity is void. This should be true whether the designated beneficiary was dead when the will was executed, or died afterward but before the date of the testator's death since the will is only operative upon such death.[10] Although not entirely consistent with the above thought, in a few cases there have occasionally been intimations suggesting that the failure of the interest through lapse arises from the presumed intention of the testator.[11] The concept of lapse is firmly established, and therefore, that there would seldom be any difference between these analyses. The exception would occur in a rare instance in which the testator specifically names the estate of his designated beneficiary as an alternate beneficiary. In the few reported cases in which this has occurred, as might be expected, courts have not been in agreement.[12]

B. *Modern Modifications of Lapse*

The rule requiring a lapse has been substantially modified by modern courts and legislatures. By preventing a lapse, such modifications have not necessarily increased the likelihood that the resultant disposition would be closer to a testator's probable intention. Of course, if a legacy or devise was not a gift but simply was the performance of a contractual obligation entered into by the testator, the obligation would survive his death. Therefore, there would be no reason why the legacy or devise should not also survive and the doctrine of lapse would be deemed inapplicable.[13] However, there have been a few cases in which non-lapse has been a result in which, arguably, its application tends to defeat, rather than further, the probable intention of the testator. Thus, two persons may, by contract, mutually agree on a testamentary provision for the survivor and may further

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10. *Cf. In re* Estate of Russell, 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968) (a gift to a dog was regarded as void because a dog is not a legal entity).

11. *See, e.g., In re* Estate of Griffen, 86 Wash. 2d 223, 543 P.2d 245 (1975); *In re* Conklin's Estate, 131 N.Y.S.2d 323 (Sur. Ct. 1954).

12. *Compare In re* Glass' Estate, 164 Cal. 765, 130 P. 868 (1913) (holding gift to an estate was void for want of a donee) *with In re* Estate of Braman, 435 Pa. 573, 258 A.2d 492 (1969) (sustaining such a gift). *See also* RESTATEMENT (SECOND) OF PROPERTY § 27.1 comment c (1988) (arguing that such a gift should be given effect).

13. *See* 57 AM. JUR. 958 *Wills* § 1427 (1948); *see also* McNeal v. Pierce, 73 Ohio St. 7, 75 N.E. 938 (1905).

agree that such survivor will not revoke his or her will following the death of the first. Such disposition would be common in the estate plans of married persons. When one of the designated beneficiaries of the contract dies before the survivor, the prevailing view has been that the interest created for him does not lapse even though such beneficiary has predeceased the settlor. This is because the beneficiary acquires an irrevocable contract claim, as a third party beneficiary, against the estate of the testator. Even if the estate of such deceased beneficiary were to pass to persons to whom the original testator would not have wished the property to pass, courts have permitted the gift to pass as a part of the estate of such beneficiary.[14]

This principle was expanded in *In re Conklin's Estate*.[15] The testatrix, a widow, recited that the gift was made to a beneficiary because of an unpaid debt due from her deceased husband. This debt had not been paid at her husband's death because of the absence of funds in the estate. The court concluded that the gift did not lapse because of the recital that the gift was to satisfy a moral obligation, which made the case no different than if the gift were to satisfy a legal obligation. Hence, the death of the beneficiary did not cause the gift to fail. It did not appear in the decision who was the recipient of the estate of the beneficiary, although this would seem to have been an important consideration in any speculation of the probable intention of the testator.

Some courts have avoided lapse by reading a contrary intention into the will; *In re Estate of Griffen* is illustrative.[16] In that case, the testatrix had given the residue of her estate to her stepdaughter. The stepdaughter died intestate and was survived by an adopted daughter to whom the testatrix had been close. The heirs at law who were all collaterals had been excluded from the will. In a prior provision of the will, a gift to a friend had been expressly conditioned on her survival. No such language appeared in the residuary gift which was expressed to the adopted daughter "and her heirs." Ordinarily, the language "and her heirs" would have been construed as simply the technical language necessary for an estate of inheritance. The court, nevertheless, construed the language as indicating an intention that

14. *See* Rauch v. Rauch, 112 Ill. App. 3d 198, 445 N.E.2d 77 (1983). The rule has, however, been subject to substantial criticism. *See* Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 397 (1988) (arguing that the rule should not be applied automatically to save every legacy when the legatee dies).

15. 131 N.Y.S.2d 323 (Sur. Ct. 1954).

16. 86 Wash. 2d 223, 543 P.2d 245 (1975).

the gift did not lapse, but rather passed to the adopted daughter of the legatee. It is, however, unclear whether the court was reading in an alternate gift by implication or whether the gift passed to the legatee's estate and then to the heirs of such legatee as a part of the legatee's estate. Since the residuary legatee died intestate, it was unnecessary for the court to make the point clear. If the recipient of the beneficiary is a spouse of a child of the original beneficiary, as a matter of a surmise of the testator's intention, it is easier to justify the decision on grounds similar to the grounds used to justify the decision in *In re Estate of Griffen.*

On the other hand, courts are not always consistent. For example, suppose a testator, under the terms of his will, creates a general power of appointment in a donee and the donee dies before the testator. Further suppose that the donee leaves a will which, except for the order of their deaths, would have been effective to exercise the power conferred. Certainly permitting the testator's gift to pass in accordance with the wishes of the donee does no violence to the avowed intention of the testator. Nevertheless, the traditional view would be that since the alleged donee died before the donor, the power as a right created in the donor's will, would lapse and the attempted exercise by the donee would be totally ineffective.[17]

C. *Application to the Class Gift*

A separate problem concerns the class gift and the failure of a member of the class to survive the testator. Logically, if the prospective member of the class had died before the will was executed, the designation could not have been intended to include him and no real problem of lapse is involved.[18] On the other hand, if the prospective member of the class dies between the time that the will was executed and the time of the death of the testator, conflicting analogies are possible. It might be possible to say that since the class is to be read

17. Curley v. Lynch, 206 Mass. 289, 92 N.E. 429 (1910). *But cf. In re* Fowles' Will, 222 N.Y. 222, 118 N.E. 611 (1918). In this case, the donor and donee were killed in a common disaster and there was no evidence as to who had survived. The court gave effect to a provision in the donor's will that the donee should be presumed to survive him if they did die in a common disaster and also gave effect to the terms of the donee's will. Such a result might have been reached by treating the donee's disposition as an act of independent significance from the donor's will, but the court did not use this rationale to justify the outcome. *Id.*

18. *See* Drafts v. Drafts, 114 So. 2d 473 (Fla. App. 1959); Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1892); *In re* Harrison's Estate, 202 Pa. 331, 51 A. 976 (1902). Nevertheless, some states have applied their anti-lapse statutes to this type of case when such statutes have been held applicable to class gifts. *See also* Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125 (1916); Sloan v. Thornton, 102 Ky. 443, 43 S.W. 415 (1897).

as including only persons qualifying at the time of the testator's death, one who does not survive is excluded as a designated beneficiary. On the other hand, it is possible to treat this as a type of lapse even though the actual benefit passes to the other surviving members of the class. In the absence of a valid statute providing for a substitutionary gift, whether language of lapse is employed or not, it seems clear that the effect of such death is not to enlarge the residue nor to create an intestacy. Instead, the effect is to enlarge the shares of the remaining class members on a prorated basis.[19] Thus, in most cases the question of whether or not there is a lapse is largely a matter of semantics. However, it should be noted that the question may be important in determining whether an anti-lapse statute should apply to a class gift.[20]

D. *Statutory Modifications*

Two statutory changes in the rules of lapse are common. Both appear to constitute an effort by the legislature to join the judiciary in speculating about the probable intention of a testator whose will is silent on the subject. One has expanded the concept of lapse and the other has limited its application.

In expanding the doctrine, most states have provisions covering the possibility of a simultaneous death, particularly in a common disaster. Under the terms of the Uniform Simultaneous Death Act, which most states have adopted,[21] the successors of a deceased beneficiary who wish to receive the gift of their predecessor have the burden of proving that such beneficiary survived the testator. Absent such proof there is a presumption of a lapse. Moreover, the Uniform Probate Code and those states adopting it in whole or in part have imposed a requirement that the beneficiary survive the testator by a significant period of time (designated in the Uniform Probate Code as 120 hours) in order to take.[22] This has been said to be designed in order to avoid the expense of having the same assets pass through more than one estate.[23]

A second modification, which purports to limit the application

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19. *In re* Murphy's Estate, 157 Cal. 63, 106 P. 230 (1909); Rudolph v. Rudolph, 207 Ill. 266, 69 N.E. 834 (1904); *In re* King's Estate, 200 N.Y. 189, 93 N.E. 484 (1910).

20. *See infra* note 31 and accompanying text.

21. *See* UNIFORM PROBATE CODE, 18a U.L.A. § 141 (1990 Supp.) for a listing of jurisdictions adopting the Uniform Simultaneous Death Act.

22. *Id.* at § 2-601.

23. *See id.* at § 2-104.

of the doctrine of lapse, consists of a common statutory provision permitting close successors in interest of a beneficiary to succeed to such beneficiary's gift. It is difficult to generalize because the statutes substantially differ.[24] Most limit their application to beneficiaries who are sufficiently closely related to the testator by blood such as children, brothers and sisters, etc. Additionally, most limit the successors of the decedent who may benefit from the statute to close relatives of the beneficiary such as children or other issue. Although such statutes are loosely designated as "anti-lapse statutes" the designation is a misnomer since such statutes do not place the gift in the estate of the beneficiary, but create a direct substitutionary gift in a close relative of the originally designated deceased beneficiary.[25]

Numerous constructional problems have arisen with regard to anti-lapse statutes. This is particularly true when they have not been carefully designed.[26] Although most anti-lapse statutes do not apply if it can be established that the testator has expressed a contrary intention, there is considerable difficulty in determining what constitutes a showing of such intention. For example, is it sufficient that the testator imposes a requirement that a beneficiary be a "survivor" to avoid the application of the statute?[27] Is it sufficient to establish that the testator desired to treat a given class equally which intention would be defeated by the application of the statute?[28] Would it be sufficient to establish that the testator expressed an intention to disinherit a person who would be an alternate beneficiary under such a statute?[29] Undoubtedly in the interests of certainty, many courts have mechanically applied their "anti-lapse statutes" in a fashion which would seem to be at variance with what common experience

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24. *See* Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 324 (1988) (summarizing various types of anti-lapse statutes); *see also* French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335 (1985).

25. *Id.*

26. *See* Roberts, *supra* note 24 for an informative treatment of these constructional problems; *see also* French, *supra* note 24 (critiquing the workability of such statutes).

27. *See* Schneller v. Schneller, 356 Ill. 89, 190 N.E. 121 (1934) (applying anti-lapse statute). *Compare* Kunkel v. Kunkel, 267 Pa. 163, 110 A. 73 (1920) (anti-lapse statute not applicable) *with* Gale v. Keyes, 45 Ohio App. 61, 186 N.E. 755 (1933) (applying anti-lapse statute).

28. *See* French, *supra* note 24, at 340.

29. Most cases in which this problem has arisen have given a negative answer to this question. *See* Murray v. Murray, 564 S.W.2d 5 (Ky. 1978); *In re* Estate of Sellers, 344 Pa. 538, 496 A.2d 1237 (Pa. Super. Ct. 1985).

would tell us the testator would have probably intended.[30]

One common construction problem relates to the application of the statute to class gifts.[31] Some statutes eliminate this problem altogether by anticipating it and specifically making the statute apply to class gifts.[32] Such language has been held to be inclusive enough to permit descendants of those dying before the testator executed the will to share in the gift.[33] If no specific provision has been made, the outcome is likely to be unpredictable.[34] An outcome is most likely to be influenced by whether the court views the death of one member of the class in the lifetime of the testator as a lapse or simply as an inability to qualify as a member of the class as previously discussed.

III. VESTING OF FUTURE INTERESTS

A. *Distinguished from Lapse*

When the beneficiary of a trust fails to survive a prior interest under the trust, an entirely different set of legal principles is involved. In this situation the future interest in the modern trust is analogized to the historic future interest in real estate. The principles and concepts developed in this context tend to be applied more or less uncritically, except to the extent modified by the legislature. More specifically, the simplest form of the problem exists when a testator provides for a remainder interest following the death of a life income beneficiary. For example, assume that the testator created a trust to provide income for his widow for life and upon her death he created a remainder interest for his son. If the son were to die before the testator, the problem is one of lapse under the principles previously discussed. Suppose, however, that the son survives the

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30. *See generally* French, *supra* note 24, at 359-61.

31. *See generally* T. ATKINSON, *supra* note 1, at 782.

32. Statutes so provide in Pennsylvania, Kentucky, Maryland, Tennessee, Virginia and West Virginia. *See generally* T. ATKINSON *supra* note 1, at 782. Even in the absense of such specific statutory language, most states hold that anti-lapse statutes do in fact apply to class gifts.

33. Hoverstad v. First Nat'l Bank & Trust Co., 76 S.D. 119, 74 N.W.2d 48 (1955). *But cf.* White v. Massachusetts Inst. of Technology, 171 Mass. 84, 50 N.E. 512 (1898); Pimel v. Betjemann, 183 N.Y. 194, 76 N.E. 157 (1905) (refusing to apply anti-lapse statutes in such a case).

34. *See* T. ATKINSON, *supra* note 1, at 782. *Compare* Johns v. Citizens & S. Nat'l Bank, 206 Ga. 313, 57 S.E. 2d 182 (1950) *and* Stahl v. Emery 147 Md. 123, 127 A. 760 (1925) (both cases deny applicability of anti-lapse statutes to class gifts) *with* Hoverstad v. First Nat'l Bank & Trust Co, 76 S.D. 119, 74 N.W.2d 48 (which applies an anti-lapse statute even in the absence of an express provision). The modern trend seems to be to make the anti-lapse statutes applicable.

testator but dies during the lifetime of the life tenant. Should his interest fail in the same way it would have had he died during the testator's lifetime? On principle it is difficult to distinguish the two cases. Nevertheless, under the rubric that the law "favors vesting at the earliest possible time" the presumption would be that the son had a "vested interest" which would not be conditioned upon his survival of the income interest under the trust.[35]

B. *Historic Basis for the Presumption of Vesting*

During an earlier period when most future interests were legal interests in real estate, an interest would have to be vested to be alienable. Such a rule of construction served a valid purpose in promoting free alienability.[36] However, the reason for the rule no longer exists because most future interests are in property held by a trustee with full power to alienate. Additionally, most future interests whether vested or not are treated as alienable.[37]

C. *Consequence of Vested Construction*

Nevertheless, the effect of treating the ultimate right to the principal of the trust as vested is substantial. Thus, such an interest could be sold or given away during the lifetime of the life tenant (absent a valid enforceable spendthrift provision). So too, upon the death of the holder of such interest it would be an asset disposable as a part of the estate of the owner of such future interest.[38] Of course the testator could avoid this construction by making it clear that he required that the beneficiary survive to the time of enjoyment. Thus, if he were to condition the remainder interest on the remainderman being alive when the life interest terminated, the interest would be a contingent remainder and would not be subject to the above rule.[39] Traditional courts struggle with such a construction even to the point of reaching an outcome which seems contrary to common sense.

In one early case, a testator, following a life estate for one

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35. L. SIMES & F. SMITH, THE LAW OF FUTURE INTERESTS § 91, at 188 (2d ed. 1966) [hereinafter SIMES]; *cf.*, *In re* Estate of Button, 79 Wash. 2d 849, 490 P.2d 731 (1971) which applied the rules of lapse and the anti-lapse statute to a revocable inter vivos trust in which the settlor had retained a life interest. The court reasoned that in this limited context there was no substantial distinction between such a trust and a testamentary disposition. *Id.*

36. SIMES, *supra* note 35, at § 90.

37. *Id.* at § 33.

38. Greer v. Parker, 209 Ark. 553, 191 S.W.2d 584 (1946); Gaffney v. Shepard, 108 Conn. 339, 143 A. 236 (1928).

39. *See* SIMES, *supra* note 35, at §33.

named child, gave the remainder "to the named child's surviving children."[40] The court, in accordance with the presumption in favor of vesting, construed the language "surviving" as referring to surviving the testator. The court concluded that the interest was vested, so that each of his grandchildren who were alive at the testator's death took a vested interest, regardless of whether or not he was alive at the actual time of distribution. Thus, the ultimate beneficiaries of the testator's trust could be persons whom the testator not only did not intend, but of whom he was totally unaware. Additionally, in a case where a testator, following a life interest, directed a distribution to Y or his surviving children, it was held that when Y survived the life tenant he took a full interest. This was true even though Y died before the life tenant. Thus, the designated children of Y took no interest at all.[41]

The same principle has been held to apply even when the persons designated for the remainder interest were also within the class of life income beneficiaries. Thus, when a testator created a trust to provide income for two unmarried sisters and provided that upon the death of the surviving sister the property should be divided among his brothers and sisters, the gift was presumed vested. Thus, distributees of the estates of the life tenants shared in the remainder interest.[42] So too, suppose a testator were to create a trust for his wife for life and then direct distribution "to his heirs at law." Even if the court did not apply the doctrine of worthier title to create a reversionary right, nevertheless a modern jurisdiction might treat a surviving spouse as an intestate heir. If this were so, and the term "heirs" was to mean the person's surviving the decedent, the ultimate distribution might be the heirs of the spouse rather than the intended heirs of the decedent.[43]

D. *Application to Gifts Payable on Future Events*

The problem may also arise when the testator delays the distribution to a beneficiary to a point subsequent in time, such as his arriving at a certain age, his marriage, etc. Under these circumstances, the question has been posed in terms of whether the described event is a condition of the gift or a mere description of when a gift which has already been made and is vested, is to be paid or to

40. Ross v. Drake, 37 Pa. 373 (1861).
41. *In re* Weir's Estate, 307 Pa. 461, 161 A. 730 (1932).
42. Security Trust Co. v. Irvine, 33 Del. Ch. 375, 93 A.2d 528 (1953).
43. 20 PA. CONS. STAT. ANN. § 2514 (Purdon 1975).

be distributed.[44] The case law in this area is obtuse, difficult to follow and frequently based upon relatively arbitrary distinctions.[45] Some courts have even based their decisions on early Roman Law, which had been the original basis for distribution of personalty. On this basis a distinction was made between a gift to A when he reaches twenty-one, which would be deemed contingent upon his reaching such age, and a gift "to be paid to A when he reaches twenty-one," which would be deemed vested and distributable as a part of A's estate even if he failed to reach twenty-one.[46] Similarly, many courts engaged in circular reasoning in this sense. Since a beneficiary of a vested interest was entitled during lifetime to the income the interest produced, his interest would be deemed to be vested for all purposes. Thus, he would be required to survive to the time of termination of the trust when the trust could be construed as conferring upon him a right to the income in the interim.[47] Again it seems likely that a testator, if directly confronted with the problem, would have intended his beneficiary only to receive the funds and had no thought to their passing to the beneficiaries' distributees. These individuals might not be his family at all but could be a designated charity or for that matter a designated friend whom the original testator did not even know.

E. *Application to Class Gifts*

At common law, the foregoing rules were as applicable to class gifts of a future interest as they were to gifts to individuals. Thus, a class gift of a future interest was presumed to be vested although subject to open.[48] That is, the share of each participant was subject to being reduced by additional members qualifying before the time assigned for distribution of the corpus.[49] Accordingly, if a trust were created for a testator's wife for life with a remainder to his children, although additional children could qualify to take, any child alive when the testator died would have an interest which would survive

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44. *See generally* SIMES, *supra* note 35, § 93, at 191.

45. *Id.*

46. Clobberie's Case, 86 Eng. Rep. 476 (1677); *see also* Wardwell v. Hale, 161 Mass. 396, 37 N.E. 196 (1894) (a similar rule of construction reached by an American court).

47. Hanson v. Graham, 31 Eng. Rep. 1030 (1801); *In re* Parker, 16 Ch. D. 44 (1880).

48. SIMES, *supra* note 35, § 103, at 211.

49. This rule was subject to the "Rule of Convenience," which has been adopted generally, under which a class closes once any member of the class is entitled to an immediate distribution of principal. *See* Colt v. Industrial Trust Co., 50 R.I. 242, 146 A. 628 (1929); Baylies v. Hamilton, 36 A.D. 133, 55 N.Y.S. 390 (1899).

such child's death. Thus, such child could dispose of his aliquot share either during his life or at the time of his death under the terms of his will.[50]

F. *Statutory Modifications*

In a few states, the legislatures have begun to make changes in these common law rules of construction. However, such legislation is not as common as the anti-lapse statutes previously discussed. In Pennsylvania, all class gifts are construed to consist of those members of the class qualifying at the time such class is to receive distribution. Furthermore, in cases in which the class is described other than as the "heirs or next of kin" of another or words of similar import, the issue of a deceased member of the class may receive the share of such relative. Thus, the outcome would be much the same as it would be in the case of an anti-lapse statute.[51] A similar rule is proposed in the new revision of the Uniform Probate Code which is currently on the drawing board.[52] Changes such as that described above are relatively rare and are, in any event, limited to class gifts. As a result, many courts continue to struggle with the common law rules of construction under which all future interests are presumed vested in the absence of a showing of a contrary intention.

CONCLUSION AND INTEGRATION

Thus, are there any common threads which connect the problem of lapsing and the problem of failure of a future interest because the designee fails to survive to the time of distribution or enjoyment? Certainly the traditional approach has been to start with opposite presumptions. In the case of lapse, the failure of the designee to survive the testator would ordinarily lead to a failure of the interest. Legislative efforts to modify the rule by directing a substitutionary gift have not been entirely successful. In the case of a future interest, absent words of survival, the death of a designee after the testator, will not cause his interest to fail even if the time for enjoyment has not arisen. Instead, the interest becomes a part of the designee's estate. On the other hand, any attempt to decide cases solely on the basis of the testator's intention must be unsatisfactory. In most instances, from the fact that the will was silent, one can infer that

50. *See* SIMES, *supra* note 35, § 103, at 212.
51. *See* 20 PA. CONS. STAT. ANN. § 2514 (Purdon 1975).
52. *See* UNIFORM PROBATE CODE § 2-603 (Proposed Revision 1988).

there was no intention.

It is submitted that the attitude taken by courts in a case in which the legatee fails to survive the testator, is a better point for departure than that taken by courts in determining whether or not the owner of a future interest must survive to the time of enjoyment. Thus, it is a fundamental incident of ownership that one should have the power, not only to enjoy property, but to control its disposition at death. It is, of course, true that no one can control disposition for an indefinite period in the future. Efforts to extend the "dead hand" for an excessive period have led to the Rule against Perpetuities and related limitations.[53] Nevertheless, tradition recognizes the right of an owner to control disposition beyond his lifetime for at least a single generation. If an interest, whether present or future, is permitted to pass as a part of a designee's estate, control over such disposition passes from the original donor at what seems a premature time. The one exception is in the case of a power of appointment in which the donor expressly manifests the intention that another have such disposition.[54] This time of death of donee with respect to that of the donor ought to be irrelevant. In other cases, however, it would seem inappropriate for any interest of a designee to pass as a part of such designee's estate when he predeceases the testator. This concept has, with the exceptions noted herein, generally been recognized in the case of a lapse caused by a death before the testator. Parenthetically it should be noted that under such an analysis it would seem inappropriate to apply the doctrine of lapse when the donee of a power of appointment dies before the testator but clearly indicates how he would have wished the property to pass.

The existence of a similar argument for future interests has not generally been recognized.[55] While a few legislatures have expressed the thought that the determination of membership in a class gift of a future interest should be totally delayed until the time fixed for distribution,[56] such legislation is not widespread and has no application to future interests not designated to a class. This is true although the creation of such a future interest raises a similar problem. Suppose a testator creates a trust to provide income for his surviving spouse for life and then directs the distribution of the corpus to his son, Sam. It seems likely that the testator would not likely contemplate that if

53. *See generally* SIMES, *supra* note 35, § 112, at 237.
54. *Id.*
55. *Cf. In re* Estate of Button, 79 Wash. 2d 849, 490 P.2d 731 (1971).
56. *See* 20 PA. CONS. STAT. ANN. § 2514 (Purdon 1975).

Sam died in the lifetime of his spouse Sam could pass on the interest he was to receive to his church or, worse still, to his mistress. Of course, the testator could have avoided this outcome by expressly requiring that Sam survive, but it does not follow that his failure to do so should require such an outcome. As a matter of fact, much of the complexity accompanying the construction of modern future interests has arisen when courts struggle with murky language attempting to determine whether the interest is contingent upon survival or not. It should be noted, that except possibly in the construction of the applicability of an anti-lapse statute, no similar problem arises in connection with the doctrine of lapse.

It is, of course, true that from the context of a gift, whether present or future, one can frequently draw an inference that a testator, although he did not say so, would wish the descendants of a deceased designee to take his share. The existence of such inference has given rise to the wide spread popularity of anti-lapse statutes. The drafters of the proposed Uniform Probate Code have adopted a similar rationale. Thus it provides for an implied substitutionary gift for issue when a class gift of a future interest is created, and one of the persons who would otherwise have been a member of the class predeceases the time of distribution.[57]

It does not follow, however, that such a substitutionary gift should be mandated and thus woodenly applied in all cases. Many cases can be thought of in which such an implied gift would be inappropriate. For example, suppose a testator provides a trust for the benefit of an unmarried daughter and then provides upon her death the property should be distributed among his other children and his grandchildren, share and share alike. If we were to apply a substitutionary gift for the children of a child who died in the lifetime of the life tenant, it would distort the testamentary plan by giving a double share to the grandchildren whose parents had died. So too, if a testator had provided a gift to a trusted employee it seems speculative that he would want the children of the employee, whom the testator never knew, to receive the share of the designee who died. It might be possible to formulate a complex formula for determining when a substitutionary gift should be employed or not.[58] However, it is suggested that this is an area where flexibility is more important than certainty. Obviously the testator, who by definition, has not made his

57. *See* UNIFORM PROBATE CODE § 2-603 (Proposed Revision 1988).
58. *See* French, *supra* note 24, which suggests just such a formula.

intention clear, should not be in a position to complain about the fact that the final outcome may not be entirely predictable.

In summary, it is suggested that a gift might survive the death of the designee either in the lifetime of the testator or before the time of enjoyment if the designee is the donee of a power of appointment, since by definition the testator desires to have the disposition made by such designee. Under these circumstances, the point at which the donee dies would seem irrelevant. A similar result should follow when the designation is to satisfy a commercial indebtedness. Since the debt survives the creditor's death and may be enforced by the creditor's estate, the designation intended as a means of payment should survive such debt. This should not apply, however, to a third party beneficiary created through a will contract of two other persons, even though for some purposes his rights are recognizable as contractual. In all other cases, no gift should be valid when the designee fails to survive the time of distribution.

The question of whether or not to imply a substitutionary gift for the widow or children of a deceased designee is an entirely different one.[59] This is a question which should best be left to the sound discretion of the court. The criterion for making this determination should be the court's best guess as to what the testator, were he available to be asked, would have wanted given the nature of the estate plan, the purpose of the gift and all of the surrounding circumstances. Since testamentary intention is frequently a matter of speculation or surmise, such an approach introduces an element of uncertainty. Nevertheless, it would free the courts from the artificial restraints placed on their judgment in reaching an outcome. Such decisions are frequently suggested by common sense and common experience. Moreover, in the course of time, guidelines might develop incrementally out of decisional law on the subject.

Such an approach would enormously simplify this area of the

59. It should be noted that a substituted gift for a junior generation, when a beneficiary from a more senior generation dies during the lifetime of the life tenant, could create the possibility of a Generation Skipping Tax under I.R.C. §§ 2601-2662 (1990) at the maximum estate tax rate of 55%. Since there is a $1,000,000 exclusion on the tax it will not be a factor in relatively modest estates. In larger estates, the imposition of a Generation Skipping Tax can be avoided if a general power of appointment is given to a member of the senior generation so that an estate tax is levied on that generation. In the event that the reforms recommended herein were to be adopted, it is hoped that a corresponding modification of the provisions of the Generation Skipping Tax might also be adopted by Congress. Such a modification would exclude from the Generation Skipping Tax cases in which a substituted gift is provided for a member of a junior generation when the member of the senior generation fails to survive to the appointed time of enjoyment.

law by permitting the courts to make more realistic responses to the difficult problem of supplying a testator's probable intention when he has expressed none. This task should not be encumbered by rules based on considerations which no longer have real relevancy.