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## Class Gifts of Future Interests: When Is Survival Required?

Herman L. Trautman\*

*In this article, Professor Trautman cautions against over-emphasis upon rules of construction in class gift problems, and urges the courts to be guided to a greater extent by the probable intent of the donor. With respect to the survival problem, he suggests that class gifts of future interests to "children" and "grandchildren" do not imply a requirement of survival to the date of distribution; on the other hand, he suggests that a survival requirement is implied in class gifts of future interests to "heirs," "next of kin," and "issue." In view of current tax law, he recommends that estate planners draft class gifts of future interests as contingent interests in which the class is defined to include only those who survive the termination of all prior interests and that no reversionary interests be left in the donor or his estate.*

### I. INTRODUCTION

Suppose a client consults you concerning the planning and writing of his will and says that he wants primarily to leave his estate to, or in trust for, his wife for her life and at her death to their "children." Or, suppose they have no issue, and at his wife's death he wants his estate to go to his blood relatives—"next of kin," "heirs," "intestate successors," or the like. In the earlier years of a predominantly agricultural society when the principal asset of an estate was likely to be farm land, these gifts were typically in the form of a legal life estate to the wife, with a remainder to the class designated. In current times when stocks, bonds and deferred compensation arrangements represent the larger part of a client's estate, and even farm land is likely to be incorporated, these gifts are often in the form of a trust for the life of the wife, the trust to terminate at her death, with a gift of the remainder to the class.

To what extent should a member of either of these class designations who is in existence at the client's death be expressly required to survive the death of the client's wife in order for his interest to be transmissible from him at his death? Similarly, suppose the gift of the remainder is to "nephews and nieces" and a nephew is born

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after the client's death; should he be required to survive the client's wife in order for his interest to be transmissible from him at his death? Is there a natural and inherent difference between class gifts to "children," where all the individuals who can possibly be members of the class are within the knowledge and control of the client, and such class designations as "next of kin" or "heirs," who cannot be positively identified during the client's life? Is there an in-between category such as class gifts to "grandchildren" and "nephews and nieces" where some members of the group are likely to be known to the client but additional members may be born after the client's death but during the life of his wife?

When should the lawyer who plans an estate and assumes the professional responsibility for its proper design expressly require survival to the death of the client's wife as a condition precedent to the right to participate in the ultimate distribution of the estate at that time? Suppose the client should be survived by his wife and two children, and one child should die thereafter during the life of the client's wife leaving a family; how will the lawyer prevent a deceased child's family, as beneficiaries of his estate, from being excluded as participants in his client's class gift of a future interest? Or, in the case where there are no issue and the class gift is to "next of kin" and the like, suppose the client should be survived by his wife and three first cousins, and one of the cousins should die thereafter during the life of the client's wife leaving his entire estate by will to a friend. Will the friend of the cousin be allowed to participate in the ultimate distribution upon the death of the wife? Lastly, if the lawyer who assumes the professional responsibility for planning the estate and writing the will fails to provide expressly for the requirement of survival in class gifts of future interests, how shall the courts respond to the ensuing litigation where the issue is whether there is an implied condition of survival to the death of the client's wife?

Because of recent significant developments, this article will undertake to deal with the requirement of survival in class gifts of future interests both with respect to the responsibility of a lawyer who plans an estate and with the problem confronting the courts in the many cases where either holographic wills are allowed or lawyers fail to discharge their professional responsibility concerning this litigious issue. By way of introduction, it will first stress the importance of a proper training for professional responsibility in this area. It will then attempt to provide a proper perspective for the courts to deal with the unfortunate cases.

Historical and traditional values and policies implicit in some of the rules of construction are compared with the broad scope of modern death taxes, which include transmissible future interests in the

taxable estate, and thus tend to favor other rules of construction in the difficult task of determining whether there should be an implied requirement of survival. Reference is made to recent, respected commentary in legal literature on this problem and a significant recent development in the nationally recognized Tennessee Class Doctrine. Some basic legal concepts with respect to class gifts, future interests and lapsed gifts are defined and distinguished in an effort to forewarn of potential confusion. The principal problem areas concerning the implications of a requirement of survival in class gifts of future interests are then surveyed with the suggestion that there are inherent differences in class designations which suggest differences in probable intent. There is a special section on the developments in the Tennessee Class Doctrine. Following this is a section on estate planning for the requirement of survival which includes suggestions on forms which it is believed will avoid litigation on the requirement of survival. Lastly, in the unfortunate cases of litigation there is an insistence that rules of construction are mere aids to the court not deserving the stature of rules of law, and a plea is made for less emphasis upon the legalistic approach of *stare decisis* and more emphasis upon the finding of fact implicit in the process of judicially ascertaining the testator's probable intent. The arbitration process is suggested as a helpful analogy in the unfortunate cases which are litigated.

## II. THE VALUES INVOLVED

Respected authorities<sup>1</sup> have referred to the requirement of survival as the most litigious issue in the law of future interests. Experience in the planning and writing of wills and other trust instruments makes one keenly aware of the complexity of the survival problem. As has been so well said in the broader context of class gifts generally,

The crying need in this field of the law is not for reform of the courts' technique in handling the problem . . . under discussion, nor reform of the precedents followed by the courts in the solution of the problem. . . . Rather the crying need is for draftsmen, educated to the seriousness and difficulty of the task they are employed to perform.<sup>2</sup>

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1. LEACH & LOGAN, *CASES ON FUTURE INTERESTS AND ESTATE PLANNING* 392 (1961); 2 POWELL, *REAL PROPERTY* § 326, at 716 (1966); Halbach, *Future Interests: Express and Implied Conditions of Survival* (pts. 1-2), 49 CALIF. L. REV. 297, 431 (1961). See also 5 AMERICAN LAW OF PROPERTY §§ 21.10-21.25 (Casner ed. 1952); SIMES & SMITH, *FUTURE INTERESTS* §§ 575-94 (2d ed. 1956).

2. Casner, *Class Gifts to Others than to "Heirs" or "Next of Kin," Increase in the Class Membership*, 51 HARV. L. REV. 254, 308 (1937). "Indeed, it would be no exaggeration to say that of all the moral obligations of the lawyer who undertakes to prepare a will the obligation of competence is paramount. . . . No lawyer should prepare a will unless he considers himself competent to do so. He should approach this question with a realization that to the client the will is probably the most important document of his life . . . . The property may be the result of a lifetime of effort. Its disposition will have lasting and significant effect both upon those included as

Lawyers who plan estates and assume the professional responsibility for these monumental<sup>3</sup> dispositive instruments need first to be aware of the significance of the survival problem so they can submit to their clients the alternative consequences resulting from the choice of whether or not survival to the date of possession shall be a required condition to transmissibility of a future interest. Second, lawyers who assume this professional responsibility need to attain a reasonable skill in the writing of these difficult provisions for future interests, to make the intention of the donor very clear, and to remain safely within the permissive framework of the rules of law concerning perpetuities, marketability, taxation and other public values. A primary problem with respect to the requirement of survival has been the inadequate training of lawyers to counsel, plan and draft precisely concerning the alternate choices to be made by the client.

Because the requirement of survival is not always thought through carefully nor expressed clearly, it frequently becomes a litigious issue within a family group. What should be a desirable and appropriate perspective or approach on the part of the courts and judges in the resolution of these controversies? Do these cases call primarily for an exercise in legal research, *i.e.*, analysis, synthesis, and a rationale of legal precedent for the purpose of insuring the predictability of result? Professor Edward C. Halbach, Jr., has recently criticized the frequently espoused statement that legal precedent "is of little value in deciding questions concerning the meaning to be attributed to donative instruments, because such decisions turn upon the particular facts and language of each case."<sup>4</sup> He has urged, instead, that "strong rules of construction in survival cases not only create a desirable element of predictability, but also generally lead to better results."<sup>5</sup> While I have a genuine appreciation for the excellence of Professor Halbach's discussion of the survival requirement, I am troubled by his emphasis upon strong rules of construction to "be applied without apology."<sup>6</sup>

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beneficiaries and upon those excluded who might naturally expect or hope to be included . . . . If the lawyer doubts his ability to produce the best possible will for the client, he should decline to prepare one." Miller, *Functions and Ethical Problems of the Lawyer in Drafting a Will*, 1950 ILL. L. FORUM 415, 419. See also CHEATHAM, *CASES ON THE LEGAL PROFESSION* 341 (1955).

3. The word "monumental" is used because it is generally impossible to amend or add to these dispositive arrangements after the death of the testator or settlor of a revocable trust, or after the effective date of an irrevocable trust. Many, and perhaps most, lawyers think of writing articles of incorporation as an item of business more important, or deserving of a higher fee, than writing a will or a trust. I am always impressed, however, and perhaps appalled, by the finality and great responsibility of properly drafting these donative instruments, as compared with the amendable articles of incorporation.

4. Halbach, *supra* note 1, at 472. It should be noted that Professor Halbach has since become Dean of the University of California Law School at Berkeley.

5. *Id.* at 473.

6. *Id.* at 329.

It seems to me that he directs the attention of the courts toward research for legal precedent and the formulation of generalized legalisms rather than toward a recognition that these litigated cases represent unfortunate failures in lawyer planning and communication, and, therefore, should be resolved by the courts as best they can according to the probable intent of the donor. I am made happier by his question in a somewhat more limited context, "Why shouldn't a court just ask what a person who used such language probably meant, instead of becoming involved in the distinctions between contingent and defeasibly vested interests?"<sup>7</sup> It seems doubtful that an emphasis upon clarified rules of construction will decrease the number of litigated cases so long as lawyers unfamiliar with the complexities of class gifts of future interests continue to write wills and other trust instruments, and so long as the "higher rule"<sup>8</sup> is the rule that the testator's or donor's intent shall control insofar as it can be judicially inferred.<sup>9</sup>

Courts need to develop a proper perspective concerning the solution of construction problems. It is of primary importance to stress that the only relevant rule of law, as distinguished from a rule of a construction, is that the donor's intent shall control insofar as it can be judicially inferred.<sup>10</sup> The initial concern is with the task of determining the disposition desired by the donor. This begins with a reading of the word symbols used with reference to the objects and persons involved to ascertain the testator's subjective intent insofar as it can be reasonably inferred.<sup>11</sup> Two types of ambiguities, however, tend to arise in the litigated cases. In one, the testator has inadequately expressed his intention. An example of this may be a gift directly, or in trust, to *W* for life, remainder "to my surviving children." If at the testator's death his surviving children are *A* and *B*, but *B* dies during the life of *W* leaving issue, a construction problem might arise; the court would then be called upon to decide whether the word "surviving" relates to *W*'s death, in which case the issue of *B* will receive nothing, or to the testator's death, in which case the remainder became a part of *B*'s disposable estate, so that the issue of *B* may receive one half at *W*'s death as beneficiaries of *B*'s estate. Because it seems clear that the testator had some intention with respect to the word "surviving," the ambiguity is characterized as one in which his intention is inadequately expressed. A second type of ambiguity arises in cases where it seems clear, or very likely, that the testator

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7. *Id.* at 460-61.

8. *Id.* at 299.

9. 5 AMERICAN LAW OF PROPERTY § 21.2 (Casner ed. 1952); 2 POWELL, REAL PROPERTY ¶ 316, at 664 (1950); RESTATEMENT, PROPERTY § 242 (1940); SIMES & SMITH, FUTURE INTERESTS § 462 (2d ed. 1956).

10. *Ibid.*

11. RESTATEMENT, PROPERTY § 241, comment *c* (1940). See note 9 *supra*.

had no subjective intention whatsoever with respect to the subsequent events that occurred.<sup>12</sup> An example of this is the case where the problem is whether or not the word "children" includes adopted children.

For the solution of both types of ambiguities the courts of our Anglo-American system have developed rules of construction which are intended as judicial aids in reaching an appropriate or seemingly desirable decision. They are not positive rules of law which carry the obligation of following precedent. Instead, it has been said that

the judicial ascertainment of the intent of the conveyor is a process which combines an orderly, but somewhat restricted, search for his subjective intent with *supplementing* inferences of an intent which the conveyor probably would have had, if he had addressed his mind to those problems which, in fact, have arisen out of his conveyance.<sup>13</sup>

It would thus seem that a proper perspective for courts in the solution of these unfortunate construction problems is, first to put emphasis upon the ascertainment, by reasonable inference, of the testator's probable intent. Second, the courts should attribute to the testator an intent consistent with both his expressed plan and one or more public values generally attributed to testators, such as concern for marketability of titles, administrative convenience of the probate process, and, to some extent, the predictability of court decisions.<sup>14</sup> As an implementation of these public values, the courts have developed broad constructional preferences which can be used selectively as aids to a reasoned justification of the result reached by judicial inference. Among these constructional preferences there has been a preference for vested interests, a preference against partial intestacy, a preference in favor of maximum validity, a preference for a result consistent with the public interest, a preference for keeping property among blood relatives, a preference against disinheritance of an heir, a preference in favor of the use of technical words in a technical sense,<sup>15</sup> and a preference against implied conditions of survivorship.<sup>16</sup> It should be un-

12. Judge Learned Hand is often quoted in dealing with the problem of will construction in *Boal v. Metropolitan Museum of Art*, 292 Fed. 299 (D.C.N.Y. 1923), as follows: "I have to do with a situation quite outside of anything which the testator had in contemplation, and it is therefore obvious that any solution is bound to be verbal and indeed formal. Yet while it is idle to speculate upon what he personally would have done had he been able to look ahead, courts have always permitted themselves, within limits, to impute to testators an intent which they could not foresee." *Id.* at 304.

13. RESTATEMENT, PROPERTY § 241, comment c (1940). (Emphasis added.)

14. For a discussion of these values see SIMES & SMITH, FUTURE INTERESTS §§ 467-73 (2d ed. 1956).

15. For a brief discussion of each of these preferences see 5 AMERICAN LAW OF PROPERTY § 21.3 (Casner ed. 1952).

16. Professor Halbach strongly defends this constructional preference. See Halbach, *supra* note 1, at 304-12, 327-29, 431.

derstood, however, that these broad constructional preferences, like the maxims of equity, sometimes reflect competing values in the solution of a particular case. The preferences for vested interests and marketability of titles, for example, may lead to a result opposite to that reached by the preference for keeping property among blood relatives; and this problem is particularly relevant to the requirement of survival in class gifts of future interests. While these public values and broad constructional preferences are often used by the courts in deciding cases of ambiguity, it is vitally important to bear in mind that they are not rules of property law which command obedience. Instead, they are used by the courts as a part of the rationalizing process in justification of a particular decision in which the initial emphasis is upon the subjective intent of the testator. In addition, the courts indulge in "supplementing inferences of an intent which the conveyer probably would have had, if he had addressed his mind to those problems which, in fact, have arisen."<sup>17</sup> A failure to understand this will result in a legalistic approach to the problem of construing the donor's intent, with a faulty reliance upon prior cases involving other testators and donors who were in different circumstances, rather than the more realistic approach of asking one's self what is a reasonable implementation of this particular testator's intention.

The Tennessee Class Doctrine,<sup>18</sup> which had been applied vigorously by the courts of Tennessee for more than a hundred years prior to the 1966 development in *Walker v. Applebury*,<sup>19</sup> is a nationally recognized example of the legalistic approach to a construction problem. Beginning as the construction of a will in an early nineteenth century case,<sup>20</sup> the doctrine soon developed into a binding legal authority, ruthlessly applied on the basis of *stare decisis* in all class gifts of future interests to "children," "heirs," "next of kin," "issue," and the like, to require survival to the date of possession unless otherwise expressly provided.<sup>21</sup> This certainly provided predictability of result at the litigation level, after it was too late to clarify or amend the gift; but few lawyers seemed to be aware of the relevance of the doctrine during the planning and drafting period. The Tennessee Class Doctrine, with

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17. See note 13 *supra*.

18. For the national recognition and discussion of this doctrine see, *e.g.*, 5 AMERICAN LAW OF PROPERTY § 21.11 (Casner ed. 1952); SIMES & SMITH, FUTURE INTERESTS § 578 (2d ed. 1956); Halbach, *supra* note 1, at 305.

19. 400 S.W.2d 865 (Tenn. 1966).

20. *Satterfield v. Mayes*, 30 Tenn. 58 (1849).

21. For the Tennessee cases and the discussions of this doctrine see Chambers, *History of the Class Doctrine in Tennessee*, 12 TENN. L. REV. 115 (1934); McSween, *The Tennessee Class Doctrine: A Spectre at the Bar*, 22 TENN. L. REV. 943 (1953); Trautman, *Decedents' Estates, Trusts and Future Interests—1958 Tennessee Survey*, 11 VAND. L. REV. 1237, 1256-58 (1958).

its emphasis upon legal precedent, seems well qualified to satisfy one of Professor Halbach's two values—the strong rule tending to insure predictability of litigation, with a de-emphasis on the “particular facts” of each case.<sup>22</sup> It is contrary, however, to his second value urging the historical preference against implied conditions of survival.<sup>23</sup>

While the 1966 development in Tennessee mentioned above served as the initial stimulus for this article, investigation of the litigation reflected by appellate opinions from other states and the recently published literature prompts the following conclusionary comments which will be discussed and demonstrated in the balance of this article. First, there is a need to re-emphasize Casner's comment that the “crying need” is for draftsmen properly educated for the difficult job of planning and writing with respect to class gifts.<sup>24</sup> Second, there seems to be an unfortunate tendency in many other states in addition to Tennessee to over-emphasize rules of construction to such an extent that they are converted into rules of property law; hence the energies and efforts of judges are directed toward legal research, *stare decisis*, and the predictability of future cases, rather than the more realistic role of an arbitrator of an unfortunate ambiguity in a writing, where the inquiry should be to determine what would be a reasonable implementation of a particular donor's intention.<sup>25</sup> And third, with respect to the requirement of survival in class gifts of future interests, absent an express requirement of survival, (a) there seem to be inherent differences between class gifts of future interests to “children” and the like and gifts to “heirs,” “next of kin,” “issue,” and the like, where the requirement of survival may seem fairly implicit; hence it would seem to be unwise for the courts to formulate a constructional preference against implied conditions of survivorship in all class gifts of future interests; (b) in view of modern estate and gift taxation, it can be argued that a condition of survivorship to the termination of the preceding estate should be the constructional preference because the testator may be presumed to have intended an avoidance of unnecessary tax shrinkage;<sup>26</sup> and (c) in many of the litigated cases where the requirement of survival is not expressed it seems to be a reasonable guess that the donor envisioned an ultimate distribution among blood relatives then comprising the family group rather than a distribution through a remainderman's estate to unknown

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22. Halbach, *supra* note 1, at 319, 328, 471-73.

23. *Id.* at 307.

24. Casner, *supra* note 2, at 308.

25. See, e.g., *In re Patterson's Estate*, 227 Mich. 486, 198 N.W. 958 (1924).

26. 5 AMERICAN LAW OF PROPERTY § 21.3a (Casner ed. 1952); BERGIN & HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 129-30 (1966).

family groups.<sup>27</sup> Since Casner's comment has been re-emphasized in the paper, the discussion hereafter will demonstrate the second and third comments above by a survey of the types of gifts of future interests in which survival may be reasonably implied, an analysis of the 1966 development in which the Tennessee Class Doctrine was rejected as a rule of law, and a discussion of modern estate planning values and considerations which suggest that survival to the date of distribution should be expressly required.

### III. SOME BASIC CONCEPTS AND PROBLEMS DISTINGUISHED

Before making a survey of the problem areas in which survival may or may not be reasonably implied in class gifts of future interests, it may be helpful to state some fundamental principles with respect to the meaning of "future interest" and "class gift" and to distinguish the doctrine of "lapse" with respect to class gifts. The latter involves a no-gift situation, a failure to make an effective gift, according to the common law concept, although statutes in some states frequently provide for substituted gifts within prescribed limitations. As will be seen, however, the language used in some old, but popular, treatises which discussed the doctrine of lapse as applied to class gifts generally, whether of present or future interests, is remarkably similar to the language to be used in discussing the requirement of survival in effective gifts of future interests to a class. This similarity has misled many lawyers and judges who were doing legal research on whether survival is an implied condition.

#### A. *The Meaning of Future Interest*

The only thing future about a legally recognized future interest is that the privilege of possession or enjoyment is postponed to a future date. It is a presently recognized interest in property. Those future interests which are indefeasibly vested are often the subject of commercial transactions before they become present interests. Suppose A transfers property worth 100,000 dollars to B for life, remainder to C in fee simple, and that B is 60 years of age. A has made a gift of a present interest to B worth approximately 40,000 dollars, and a gift of a future interest to C worth approximately 60,000 dollars, the value of the remainder approximating, in percentile, the age of the life beneficiary under the interest rate assumed in the Federal Estate and Gift

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27. BERGIN & HASKELL, *op. cit. supra* note 26. In *Knight v. Pottgieser*, 176 Ill. 368, 52 N.E. 934 (1898), the remainder was to be divided upon the death of the widow "amongst my children and their descendants." The decedent was survived by his widow, his son and three daughters. The son predeceased the widow, however, leaving a widow but no issue. The court held that the son was not required to survive the testator's widow, so that his interest was transmissible under the intestate laws, and the son's widow was entitled to partition.

Tax Regulations.<sup>28</sup> C can frequently sell or mortgage his future interest during the life of B. A lapsed gift, however, is never a gift of a future interest because a lapsed interest never really becomes a presently recognized interest in the property; it has failed to become an effective gift.

#### B. *The Meaning of Class Gifts*

A gift to a class is intended as a gift to a described group rather than a gift to specifically named individuals. The basic concept is that when a group description is used, the donor intends to benefit the persons who comprise the group at a designated time. Thus, when a donor writes in his will a gift "to my nephews and nieces," it is generally interpreted to mean that the donor intends to make the gift at its effective date to those persons who are then his nephews and nieces; the effective date of the gift is intended to be the date of his death. This is said to be a gift of a present interest to the class because not only are the individuals who comprise the group identified at the effective date of the gift, but also their right to income, possession and present enjoyment of the property begins as of its effective date. A donor may write in his will, however, a gift "to W for life, remainder to my nephews and nieces." Beginning with its effective date, there is a present gift to the group of a future interest. While the gift became effective at the death of the donor, it is intended that possession and enjoyment by the individuals comprising the group will not begin until a future date, that is the termination of the life estate of W. It may be assumed that the donor knows who his nephews and nieces are at the time he writes his will and that he could have named them specifically at that time as A, B, C, and D. It is vitally important, however, to understand the different consequences and problems which follow from the employment of the group designation as distinguished from an intended gift to specifically named individuals. If a testamentary gift is intended, the effective date of gift is itself a future date—the date of death. Some of the nephews and nieces may predecease the donor; additional nephews and nieces may be born between the writing of the will and the donor's death; some nephews and nieces may survive the donor but predecease W; some may be born after the death of the donor but during the life of W and either predecease W or survive her. Lastly, it is possible that some nephews and nieces may be born after the death of both the donor and W. Implicit in the use of the class designation to describe one's beneficiaries is the proposition that there may be some changes in the personnel who will comprise the group. In a testamentary gift of a present interest to a class, these changes will take place between

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28. Treas. Reg. § 20.2031-7, Table I and § 25.2512-5, Table I (1958).

the signing of the will and its effective date as a gift—the death of the donor. The identity of the persons who comprise the group in this situation will be finally determined at the effective date of the gift, so that, according to the common law concept, only those persons who are his nephews and nieces at his death will be benefitted. Where the class gift is a future interest—to *W* for life, remainder “to my nephews and nieces”—the estates or successors in interest of those who predeceased the donor will likewise be excluded according to the common law concept of class gifts. There is the additional problem, however, of whether the persons to be benefitted are to be finally identified at the effective date of the gift, *i.e.*, the donor’s death, or whether this determination is to be further postponed until the date of *W*’s death when possession and enjoyment of the property will be distributed. Thus, it becomes very important to make clear in the writing of the will the exact date or dates when the persons to be benefitted are to be identified.

When the class gift is a future interest, who shall be allowed to be included as beneficiaries? Should it be only those who were nephews and nieces at the effective date of the gift—the donor’s death, or all of those plus all who were born before the death of *W*? Shall those born after the deaths of the donor and *W* be included, or shall the group be limited to those who survived to the date of distribution? The answer of the law is quite simple and clear—the donor may choose. There is no rule of law which decrees that it shall be determined one way or another. Indeed, the only relevant rule of law is that the donor’s intent shall control, and the problem arises only because the donor’s will fails to indicate his choice. What should the courts do in such a situation? At the death of *W* there is an obvious need for some decision concerning those persons entitled to a division of the property. It is in this situation where a rule of construction sometimes comes to the aid of the court by attributing to the testator an intent which probably would have been satisfactory to him had he addressed his mind to the problem. Actually, the constructional preference may be dictated by a policy of administrative convenience in probate administration, but it is attributed to the testator as a presumed, supplementary intent, absent evidence indicating a contrary intent. The rule of construction is that, absent a showing of contrary intent, maximum membership in the class will be determined as of the time that a division needs to be made. Thus, in a gift of the present interest “to my nephews and nieces,” the persons comprising the group will be identified at the testator’s death; whereas, in the class gift of a future interest “to *W* for life, remainder to my nephews and nieces,” the persons who benefit will include not only those living at the testator’s death but also those who were born prior

to *W*'s death. Absent a contrary intent, the maximum membership in the group is thus determined by a constructional preference dictated by the convenience of probate administration.

In the example above, where the gift is to "*W* for life, remainder to my nephews and nieces," if survivorship to the date of distribution is not a required condition of the right to participate in the division of the property, then the nephews and nieces alive at the testator's death are said to have vested, transmissible interests subject only to partial divestment through increase of the class by the birth of additional nephews and nieces prior to *W*'s death. If one of those should die during the life of *W*, his share, upon ultimate distribution, will be distributed to his wife or other successors in interest who may not be related to the testator. If, however, survivorship to the date of distribution is a required condition, then the death of one of those during the life of *W* will result in the complete elimination of his interest; therefore, his wife or other successors in interest will not participate. Exactly the same result will occur whether we say that survivorship to the date of distribution is a condition precedent to the right to participate, or that the nephews and nieces alive at the testator's death had vested interests subject not only to partial divestment by the birth of additional class members, but also subject to complete divestment by the failure to survive to the date of ultimate division. While the difference between having a contingent interest or a vested interest subject to defeasance is important in problems involving perpetuities, alienability, destructibility, and creditors' rights, for our problem at the litigation level, it matters not whether we say that survival is a condition precedent or a condition subsequent. The problem is merely whether or not survival is a required condition, in any respect.

### C. *The Problem of Lapse Distinguished*

Assume a gift "to my nephews and nieces"; at the execution of the will the donor had five nephews and nieces, and thereafter one of them predeceased the donor. In logic and according to the common law rule, the doctrine of lapsed gifts has no application to the doctrine of class gifts.<sup>29</sup> By the use of the group designation, the testator manifests an intention to make a gift only to those persons who comprise the group at the effective date of the gift—that is, at the death of the testator. Therefore, by definition, the use of the class concept excludes a potential member who has died prior to the effective date of the gift. The same result is reached if there has been a

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29. SIMES & SMITH, *FUTURE INTERESTS* § 661 (2d ed. 1956), and cases cited therein. See Casner, *Class Gifts—Effect of Failure of Class Member to Survive the Testator*, 60 HARV. L. REV. 751 (1947).

class gift of a future interest, e.g., "to W for life, remainder to my nephews and nieces"; a nephew who has predeceased the testator is not a member of the designated group to whom a future interest gift was effectively accomplished. If instead of using the group description the testator had specifically named his nephews and nieces alive at the execution of the will, then there would be a common law lapse resulting in an intestacy or an increase in the residuary estate. In the case of a class gift, however, there is no common law lapse; there is simply a gift to the group on the effective date of the gift, and this is true whether the gift to the class is of a present interest or a future interest.<sup>30</sup> In most jurisdictions, however, statutes have been enacted providing that in certain cases legacies or devises shall not fail by reason of the fact that the legatee or devisee dies before the testator.<sup>31</sup> In some of these, the lapse statute has been made expressly applicable to class gifts.<sup>32</sup> Where this is not so there has been much litigation, with a majority of the courts holding the lapse statute applicable as a rule of construction where a potential member predeceases the testator.<sup>33</sup> The fluctuation in the potential membership of the class between the execution of the will and the testator's death is not, strictly speaking, a problem of class gifts; there is no gift at all until the testator's death. Instead, the problem is solely one of lapse and the lapse statute. The class gift is initially made as of the testator's death to those persons who then comprise the class, that is, those who survive the testator; and in the case of a class gift of future interests, survival may be required additionally to the future termination of the life estate or date of distribution.

The problem concerning survival of the testator is thus very different from the problem of whether or not one of those receiving a class gift of a future interest, who did survive the testator, is also required to survive the life beneficiary. A failure to understand this difference has led lawyers and judges astray in several states,<sup>34</sup> and it is the original basis for the unusual and exceptional direction taken by the Tennessee cases in the development of the Tennessee Class Doctrine. The doctrine originated in the mid-nineteenth century case of *Satterfield v. Mayes*.<sup>35</sup> In that case, there was a testamentary gift to B

30. SIMES & SMITH, FUTURE INTERESTS § 661 (2d ed. 1956).

31. These statutes are collected in RESTATEMENT, PROPERTY § 298, comment c (1940) and brought up to date as of January 1, 1947, in RESTATEMENT, PROPERTY § 483 (Supp. 1948). See also SIMES & SMITH, FUTURE INTERESTS § 662 (Supp. 1965).

32. TENN. CODE ANN. § 32-306 (1956). Other states in this category are listed in SIMES & SMITH, FUTURE INTERESTS § 662 (2d ed. 1956). The statutes are not uniform.

33. SIMES & SMITH, FUTURE INTERESTS § 662 nn.40 & 41 (2d ed. 1956).

34. See the criticism by Professor Halbach of the dissenting opinion in *In re Stanford's Estate*, 49 Cal. 2d 120, 315 P.2d 681 (1957), in 49 CALIF. L. REV. 297, 298, 310-11 (1961).

35. *Supra* note 20, at 59.

for life, and after her death, the property was to be equally divided among her daughters. *B* had five daughters who survived the testator, three of whom survived *B*. Upon *B*'s death the administrators of the two deceased daughters sought shares of the property. While the lower court held that the remainder vested equally in the five daughters, and that the interests of the two who died before *B*'s death were transmissible to their personal representatives, the Supreme Court reversed and held that survival to the date of distribution was a required condition; hence, the property was to be divided only by the three daughters who survived *B*. The following quotation has been repeated for more than a hundred years as the origin of the Tennessee Class Doctrine:

The rule is well settled that, where a bequest is made to a class of persons, subject to fluctuation by increase or diminution [*sic*] of its number, in consequence of future births or death, and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons, only, as at that time, fall within the description of persons, constituting such class. As if property be given simply to the children, or to the brothers or sisters of *A*, equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects, surviving at the period for distribution, without regard to previous deaths. Members of the class antecedently dying are not actual objects of the gift.<sup>36</sup>

The court cited an earlier edition of *Jarman on Wills*, and the above statement is a paraphrase of Jarman's discussion of the doctrine of lapse with reference to class gifts.<sup>37</sup> Note the substantial similarity of language, however, that can be used in describing the problem of lapse with respect to a class gift and the problem of whether survival to the date of distribution is required by those persons who did survive the testator but whose class gift is a future interest, *e.g.*, "to *W* for life, remainder to my nephews and nieces." While the language seems at first to support the result reached, when it is realized that Jarman is discussing the common law rule that a gift to a class does not include persons who predecease the testator, it is clearly apparent that the court erroneously applied the lapse doctrine to a case where all of *B*'s daughters survived the testator. The case before the court was a class gift of future interest, and the question was whether beneficiaries who survived the testator were also required to survive to a later date, namely, the death of the life tenant. This is a separate problem from that concerning lapsed gifts.

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36. *Ibid.*

37. Compare 1 JARMAN, WILLS 448-49 (8th ed. 1951); McSween, *supra* note 21, at 945.

#### IV. THE REQUIREMENT OF SURVIVAL IN FUTURE INTERESTS: A SURVEY OF PROBLEM AREAS

We have said that by definition a future interest is an interest in property in which possession is not enjoyed at its effective date or creation. The most frequent future interest intended to be created is probably the remainder interest, *e.g.*, to *W* for life, remainder to *A*, *B* and *C*, or, remainder "to my children." It may, however, take the form of an executory interest, *e.g.*, to *A* "if he attains 21," or "when he attains 21," or "to be paid at 21," in which the future interest is not preceded by a prior life estate, but possession and enjoyment is simply postponed to a future date. The basic problem is to determine the circumstances in which the owner of a future interest of any type will be required to survive, not the creation of his interest, but rather the date after its creation when his future interest is to become a present possessory interest. Stated in terms of legal consequences, the inquiry is whether or not the future interest is transmissible in his estate in the event of his death prior to the time when it is to become a present interest.

The discussion to follow will survey the principal problem areas which are (a) construction problems, where the requirement of survivorship is ambiguously expressed, (b) whether a requirement of survival is reasonably implicit in class gifts to "children," "grandchildren," and the like, and (c) whether a requirement of survival is strongly suggested or implied in class gifts to "heirs," "next of kin," and "issue," particularly when the designated ancestor of such class designations is the donor, or someone other than the donee of the life estate.

##### *A. Construction Problems Concerning Express Words of Survivorship*

If the client's decision is that the property ultimately should be distributed only to those members of the class who are alive at the termination of the prior life estate, or at the designated future event, this decision ought to be expressed in words which are free of reasonable ambiguity. Thus, suppose the gift is "to *W* for life, remainder to those of my nephews and nieces who are living at the death of *W* and to the issue per stirpes then living of deceased nephews and nieces, the issue to take the share that their deceased parent would have taken if living." It is believed that this limitation is reasonably free of ambiguity concerning the requirement of survival. Suppose, however, that the gift is to *W* for life, remainder "to my surviving nephews and nieces." There has been a considerable amount of litigation over these words, or their equivalent, concerning whether the word "survival" refers to the death of *W* or the death of the

testator.<sup>38</sup> While in probably a majority of states there is a presumption, and thus a rule of construction, that the words of survivorship refer to the time of distribution and not the death of the testator,<sup>39</sup> there are also several states where there is a presumption (rule of construction) that, in view of the public preference for early vesting, the word "surviving" in this context is presumed to mean surviving the testator.<sup>40</sup> Georgia has a statute which provides that in "construing wills, words of survivorship shall refer to the death of the testator in order to vest remainders unless a manifest intent to the contrary appears,"<sup>41</sup> and California has a statute which provides that words of survivorship relate to the testator's death unless possession is postponed, "when they must be referred to the time of possession."<sup>42</sup> There are some jurisdictions which resolve the ambiguity without reference to presumption. While New York has a line of cases in this category, there is another line of New York cases which indicate there is a presumption that express words of survivorship refer to the death of the testator.<sup>43</sup> Since the gift to the class is not effective in any sense until the death of the testator, the use of the word "surviving" would seem to be surplusage if intended to refer to that event. In any case, in litigation on this problem it is difficult to see that a presumption or rule of construction contributes anything more than a legalistic crutch to be used as a substitute for a reasoned opinion on the probable intent of the testator in the context of the words and circumstances of each case. Furthermore, from the number of recurring cases in states having rules of presumption, it is difficult to say that these rules help to decrease litigation on this problem. The important point is that law students and lawyers should learn

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38. See the extensive citation of cases from each of several states in SIMES & SMITH, *FUTURE INTERESTS* § 577 (2d ed. 1956).

39. *Colorado Nat'l Bank v. McCabe*, 143 Colo. 21, 353 P.2d 385 (1960); *Burden v. Colorado Nat'l Bank*, 116 Colo. 111, 179 P.2d 267 (1947); *In re Winter's Estate*, 114 Cal. 186, 45 Pac. 1063 (1896); *Phelps v. Seeley*, 3 Ill. App. 2d 210, 119 N.E.2d 923 (1954); *In re Gautier's Will*, 3 N.Y.2d 502, 146 N.E.2d 771, 169 N.Y.S.2d 4 (1957). For further cases from other jurisdictions see SIMES & SMITH, *FUTURE INTERESTS* § 577 n.25 (2d ed. 1956).

40. *Bank of Galesburg v. Lawrenson*, 240 F.2d 31 (D.C. Cir. 1956); *Peadro v. Peadro*, 400 Ill. 482, 81 N.E.2d 192 (1948); *In re Pleasonton's Estate*, 45 N.J. Super. 154, 131 A.2d 795 (1957); *In re Wolstenholme's Estate*, 26 Pa. D. & C.2d 610 (Orphans' Ct. 1962); SIMES & SMITH, *FUTURE INTERESTS* § 577 n.24 (2d ed. 1956).

41. GA. CODE ANN. § 85-708 (Park 1933).

42. CAL. PROB. CODE § 122.

43. See, e.g., *Hall v. Killingsworth*, 253 F.2d 43 (D.C. Cir. 1958); *Jewell v. Graham*, 24 F.2d 257 (D.C. Cir. 1957); *Brown v. Potter*, 114 Conn. 441, 159 Atl. 275 (1932); *In re Falk's Will*, 12 Wis. 2d 247, 107 N.W.2d 134 (1961). For the several New York decisions some of which resolve the problem without reference to a presumption, and others which make the reference and depend on it to varying amounts, see SIMES & SMITH, *FUTURE INTERESTS* § 577 nn.31 & 32 (2d ed. 1956).

to relate the express requirement of survival to the future event, if that is the client's decision.

### B. *Class Gifts of Future Interests to Children and Grandchildren*

Suppose the gift is to *W* for life, remainder to *A* and *B*, and *A* dies during the life of *W*; or suppose that *A* wishes to sell or hypothecate his future interest during *W*'s life. It is doubtful if anyone would seriously suggest that the testator intended to make survival to the death of *W* a prerequisite to the future interests of *A* and *B*. To do so would suggest that all future interests are conditioned upon survival. If *A* should die during the life of *W*, his future interest would pass to his wife or other successors quite regardless of whether he left issue. If he should sell or hypothecate, the purchaser would acquire an indefeasible future interest.

Now suppose the gift is to *W* for life, remainder "to my children," or to my son for life, remainder "to his children." When the future interest is made in the form of a class gift to "children," is there any justifiable basis for a finding that the testator intended to make survival of the life beneficiary a condition of the remainder gift? Is the situation any different than the example above where the remainder gift is to *A* and *B*? Except for cases in Tennessee, in which the class gift of a future interest was made prior to the effective date in 1927<sup>44</sup> of Tennessee Code Annotated section 32-305,<sup>45</sup> the overwhelming weight of authority is that a class gift of a future interest to such class designations as "children," "grandchildren," and "nieces and nephews" does not give rise to an implied condition of survival.<sup>46</sup> In appropriate limitations, such as "to son for life, remainder to his children," if there is one member of the class in being at the effective date of the gift, the class is said to be vested subject to open for the inclusion of additional members.

The Tennessee cases on gifts effective prior to 1927 will be dis-

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44. Remarkably, a reference to the Public Acts of Tennessee for 1927, Chapter 13, indicate that the statute was "Passed March 29, 1927," but was "Approved March 21, 1927" by the Governor. Whatever the significance of these apparently inverse dates, any question of validity would probably be affected by the official legislative journal and re-enactment of Tennessee Code Annotated as an official code in 1955. See Tenn. Public Acts, ch. 6 (1955). If the court is going to apply this statute prospectively, however, it will become important to know the exact date on which the statute became law.

45. *Walker v. Applebury*, 400 S.W.2d 865 (Tenn. 1966), indicates clearly that TENN. CODE ANN. § 32-305 (1956) will be applied to gifts effective after the date of that statute, and as a result there will be a new rule for class gifts of future interests made since 1927 in Tennessee. Under the new rule the class will be held to be vested and transmissible unless the circumstances, including the language, indicate a different interest.

46. See the large number of cases collected in SIMES & SMITH, *FUTURE INTERESTS* §§ 146, 578 (2d ed. 1956).

cussed in a separate section of this article. For the present it will suffice to say that there are several cases where the class gift of a future interest was "to my children,"<sup>47</sup> or to daughter for life, "remainder to her children."<sup>48</sup> The Tennessee Class Doctrine, based erroneously on Jarman's discussion of the lapse doctrine as applied to class gifts, has been applied mechanically on the theory of a legal presumption that there is intended an implied condition of survivorship to the date of distribution in every class gift of a future interest, regardless of the type of class designation. Thus, the legalistic rule of presumption was harshly applied to disinherit the successors in interest—often issue of children who died during the life estate. These are cases in which there is no apparent basis for inferring an intent on the part of the testator to require survival. Instead the emphasis is wholly upon a legalism, a rule based upon legal precedent, rather than upon an inquiry as to whether or not there is some factual basis for ascertaining the testator's intent.

As indicated in the great majority of decisions in America,<sup>49</sup> class designations such as "children," "grandchildren," "nephews," "nieces," "daughters," "sons," and the like, do not suggest an intention to require survival to the date of distribution. If there is no other evidence of such an intention, a court ought not to infer such a requirement.

### C. *Class Gifts of Future Interests to "Heirs," "Next of Kin" and "Issue"*

A requirement of survival may be substantially indicated by the testator in describing the class of persons intended by the gift of a future interest. The thought often intended to be communicated is that the property should be divided at the end of the life estate among those persons who at that time are the nearest blood relatives, or those blood relatives who would inherit under the laws of intestate succession if the ancestor had died at the termination of the prior estate or at the future event. Sometimes these class designations are used as the originally designated remainder—*e.g.*, to A for life, remainder to his heirs,<sup>50</sup> in a jurisdiction where Shelley's Rule has been abolished, or to W for life, remainder to "my heirs." Sometimes they are used as descriptions of alternative remainders—*e.g.*, to W for life, remainder to our children or their issue. In other cases, they are used as end limitations after a series of alternative contingent remainders—*e.g.*, to W for life, remainder to A if then living; if A

47. *E.g.*, Tate v. Tate, 126 Tenn. 169, 148 S.W. 1042 (1912).

48. Sanders v. Byrom, 112 Tenn. 472, 79 S.W. 1028 (1904); Satterfield v. Mayes, *supra* note 20, the original authority for the Tennessee Class Doctrine, was such a case.

49. *Supra* note 46.

50. It is assumed that the word "heirs" is used in its technical sense and not as a substitute for "children" or "issue."

is not then living, to *B* if then living; if *B* is not then living, to *C* if then living; if neither *A* nor *B* nor *C* is living at the death of *W*, to *W*'s heirs (or next of kin). That survival of the designated ancestor is fairly implicit is generally agreed.<sup>51</sup> There are particular problems with each designation which should be understood, however, and dealt with expressly.

1. *Class Gifts to "Heirs" and "Next of Kin."*—The easiest problem is to *A* for life, remainder to the heirs of *A* in a jurisdiction where Shelley's Rule is not applicable. Survivorship of *A* is a required condition of the right to participate whether (as is said in the great majority of jurisdictions) survivorship is a condition precedent, or (as the New York doctrine of *Moore v. Littel*<sup>52</sup> declares) those who would be heirs if the life tenant were to die at any given moment are said to have vested remainders subject to being divested by their failure to survive the life tenant.

The more frequent case, which is often so troublesome, is illustrated by the following simple gift, either as a direct gift or in trust: to *W* for life, remainder to "my heirs" (or next of kin). In a recent significant case in Tennessee the gift was to *H* for life, "and at his death back to the Appleburys."<sup>53</sup> Since the testatrix was an Applebury and there were no children, the gift may be interpreted as a remainder "to my heirs." Where the ancestor is not the life beneficiary there is the problem as to whether "heirs" or "next of kin" are to be determined actually at the death of the named ancestor, or, as probably should have been expressly provided, as if the ancestor had died at the death of the life beneficiary. In the latter case, survival of the life tenant is a required condition. In the above example, to *W* for life, remainder "to my heirs," at the testator's death his heirs may be *W*, and brothers *X* and *Y*. If the phrase "my heirs" is interpreted literally, *W*, *X*, and *Y* have indefeasibly vested, transmissible remainders; and each could dispose of his interest to one who is not related to the testator. Another interpretation could be that *X* and *Y* have vested remainders subject to being divested by a failure to survive *W*. While heirs are usually determined at the death of a designated ancestor,<sup>54</sup> when the testator's sole heir is the life beneficiary, the incongruity has caused several courts to hold that heirs are to be selected as if the ancestor had died at the date of

51. RESTATEMENT, PROPERTY § 249 (1940).

52. 41 N.Y. 66 (1869).

53. The decedent wife was an Applebury, and the land given to her husband for life had been inherited by her from the Applebury family. See *Walker v. Applebury*, *supra* note 45.

54. *E.g.*, *In re Newman's Estate*, 68 Cal. App. 420, 229 Pac. 898 (Dist. Ct. App. 1924); *Michigan Trust Co. v. Young*, 347 Mich. 78, 78 N.W.2d 581 (1956).

distribution.<sup>55</sup> When the life beneficiary is one of several heirs of the testator, the *Restatement* finds that "no constructional tendency is sufficiently definite to be capable of statement."<sup>56</sup>

A class gift to the heirs of the life beneficiary clearly requires survival of the life beneficiary. A class gift to the heirs of a living person who is not the life beneficiary certainly requires survival of the designated living person. If the designated person dies during the life estate, however, there is an ambiguity and divergent views as to whether (1) the heirs of the designated person take indefeasibly vested remainders, (2) the heirs take vested remainders subject to being divested by death prior to the life tenant, or (3) the heirs of the designated person will be determined as if he had died at the termination of the life estate.<sup>57</sup> If the designated person does not die during the life estate, there is the hazard that the gift will be invalidated by the rule concerning destructibility of contingent remainders; and in any event, there will be a troublesome reversionary interest between the termination of the life estate and the death of the designated person. Without attempting to discuss all of the difficulties that can be experienced by the gift of a future interest to the "heirs" of a person other than the life beneficiary, it should be apparent that it is very necessary to think the problem through carefully with the client and to express his wishes unequivocally. It is very likely that he will want to keep the property in the blood line of a designated ancestor, in which case it should be provided that the heirs of the designated person (the testator or another) shall be determined as if he had died at the termination of the life estate.

While the above discussion deals with the requirement of survival, it is also important to consider briefly the meaning of the words "heirs" and "next of kin" in class gifts of future interests. When used as a word of purchase, the word "heirs" is normally construed as referring to those persons who inherit the real estate of the ancestor on his death intestate. Thus, there is an implicit reference to the statute on intestate succession, and the problem is simply to determine the time as of which the statute shall be applied. The phrase "next of kin" literally means nearest in blood, and as such its meaning is determined independently of a statute on intestate succes-

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55. *In re Rutan's Estate*, 119 Cal. App. 2d 592, 260 P.2d 111 (Dist. Ct. App. 1953); *In re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954); RESTATEMENT, PROPERTY § 308, comment *k* (1940). *But see* *Loring v. Sargent*, 319 Mass. 127, 64 N.E.2d 446 (1946).

56. RESTATEMENT, PROPERTY § 308, comment *k* (1940).

57. RESTATEMENT, PROPERTY §§ 308-10 (1940); SIMES & SMITH, FUTURE INTERESTS § 153 (2d ed. 1956) and cases cited therein. See also Halbaeh, *Future Interests: Express and Implied Conditions of Survival* (pts. 1-2), 49 CALIF. L. REV. 297, 431, at 315 (1961).

sion.<sup>58</sup> Thus, if the testator leaves a sister and a niece (the daughter of a deceased brother), the sister would take the entire gift; whereas under the usual statute on intestate succession the niece would take a share by right of representation. The *Restatement*,<sup>59</sup> however, and a substantial number of states, construe "next of kin" to mean those persons who would succeed to personalty if the designated ancestor had died intestate at the time the class is to be determined.<sup>60</sup> Where the phrase "next of kin" is used but the gift includes real property, additional construction problems are presented which should be initially decided at the drafting stage, rather than at the litigation stage. The word "heirs" has often been found by the court to have been intended to mean "children" and "issue."<sup>61</sup> There are some states, such as Tennessee, where the persons who inherit real estate differ somewhat from those who succeed to personal property, with different rules concerning the right of representation;<sup>62</sup> and occasionally a state adopts a new statute on intestate succession between the testator's death and the date of distribution when members of the class may be determined.

From the above discussion it should be apparent that in class gifts to "heirs" and "next of kin" not only must the date to which survival is required be made clear, but also the meaning of these words must be made somewhat more precise in order to avoid ambiguity. The following is suggested as illustrative: To *W* for life, and at her death the remainder to those persons who would have succeeded to my personal property under the laws of intestate succession then in effect in the State of Tennessee if my death had occurred at the time of *W*'s death.

2. *Class Gifts to "Issue."*—Suppose the gift is to *A* for life, remainder to his issue. Suppose that *A* had children, grandchildren, and great grandchildren who survived him, and some of each who predeceased him. In its literal meaning, the word includes all descendants, whatever the degree of relationship; hence, all will be included even though the parents of the grandchildren and great grandchildren are also living. It would seem to be rare, however, for a testator to intend that issue of a living child take equally with their parent. Is there anything in the class gift of a remainder to "issue" which implies survival? The *Restatement*<sup>63</sup> takes the position that "issue" connotes

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58. For an interesting recent case so holding, see *Fariss v. Bry-Block Co.*, 208 Tenn. 482, 346 S.W.2d 705 (1961).

59. RESTATEMENT, PROPERTY § 307 (1940).

60. See cases cited in SIMES & SMITH, FUTURE INTERESTS § 727 n.66 (2d ed. 1956).

61. *Id.* at §§ 729-30.

62. Compare TENN. CODE ANN. §§ 31-101 and 31-102, with §§ 31-201 and 31-202.

63. RESTATEMENT, PROPERTY § 249, comment *i* (1940).

a requirement of survival. Normally, it is important to write these gifts in a way which makes clear that the remainder is to issue living at the date of distribution on a per stirpes basis. Thus, the above gift should be written "to A for life, remainder to his issue per stirpes living at his death." Because this seems to be a more probable construction of the testator's intent, a court may be more willing to imply a condition of survival even though there are no express words so indicating. While it has been said that there is an implied requirement of survival,<sup>64</sup> there seem to be few cases so holding directly. It has been suggested that if the common understanding accompanying the use of the word "issue" is that survival to date of distribution is required, a rule of construction which reflects that understanding is essential.<sup>65</sup> I would agree that a rule of presumption would serve a useful purpose here because the word "issue" does not inherently suggest survival as is true of "heirs" or "next of kin."

Suppose the gift is to *W* for life, remainder "to *B* or his issue." It is usually held that *B*'s interest is subject to the requirement of survival, although there is division as to whether his interest is contingent or defeasibly vested.<sup>66</sup> Suppose, however, an issue of *B* predeceases *W*. Is his interest also subject to the requirement? The use of the alternative limitation is said to impose the requirement only upon the takers to be replaced, whereas the alternative takers are subject to no such requirement unless it is specifically annexed to their interest.<sup>67</sup> Here again it is necessary to consider whether the use of the word "issue" inherently implies the requirement of survival.<sup>68</sup> Arguments can be made that survival is not required by the alternative takers; and a "rule court" may well hold that an express requirement as to one beneficiary excludes that requirement as to others, especially if *B*'s interest is regarded as vested subject to being divested. It would seem, however, that a court could reasonably find that the testator intended to keep the property in the family blood line until the termination of the life estate; hence, the use of the word "issue" in this context should be held to suggest an intended requirement of survival.

In summary, while class gifts of future interests to "children," "grandchildren," and the like do not imply a requirement of survival to the date of distribution, class gifts of future interests to "heirs," "next-of-kin," and "issue" seem strongly to suggest that the persons who take are required to survive the designated ancestor. Where the

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64. SIMES & SMITH, FUTURE INTERESTS § 579 (2d ed. 1956).

65. Halbach, *supra* note 57, at 322.

66. 2 POWELL, REAL PROPERTY ¶ 329 n.47 (1950).

67. *Ibid.*

68. See note 63 *supra*.

designated ancestor is the life beneficiary, survival is clearly required to determine his "heirs" and the like. Where the designated ancestor is someone other than the life beneficiary, it seems to be a reasonable guess that the donor envisioned a distribution to those blood relations, e.g., "the Appleburys," who are alive at the termination of the life estate. It would seem wrong, therefore, to equate class gifts to "children" and the like with class gifts to "heirs" and the like, or to suggest that judicial response in these unfortunately litigated gift cases ought not to be governed by the factual differences so implicit in them.

#### V. RECENT DEVELOPMENTS IN THE TENNESSEE CLASS DOCTRINE

The Tennessee Class Doctrine originated in the case of *Satterfield v. Mayes*,<sup>69</sup> decided in 1849, and has been applied for more than a hundred years to class gifts of future interests. The doctrine takes a definite position on all class gifts of future interests, recognizing no distinction between such class designations as "children," "grandchildren," "nephews and nieces," and the like, which do not inherently suggest a requirement of survival, and such class designations as "heirs," "next of kin," "issue," and the like, which seem to suggest inherently a requirement of surviving at least the designated ancestor of such groups. A statement of the Tennessee doctrine is that where a gift is made "to a class of persons . . . and the time of payment or distribution of the fund is fixed at a subsequent period . . . the entire interest vests in such persons only as at that time fall within the description of persons constituting such a class."<sup>70</sup> In class gifts to children, grandchildren, nephews and nieces, the doctrine has been applied mechanically to disinherit the successors of a deceased child without any effort to analyze the limitation and consider the probable intent of the donor. This is not to suggest, however, that all the cases have been decided erroneously, or have reached the wrong results. Indeed, there are several cases where survival to the date of distribution was expressly required by the provisions of the will or gift instrument so that there was no need to resort to the class doctrine in Tennessee.<sup>71</sup> There are several well-reasoned opinions in which the court was primarily concerned with an appropriate construction and implementation of the testator's probable intention, and the reference if any to

69. *Supra* note 20.

70. A quotation from *Satterfield v. Mayes*, *supra* note 20, stated in *Burdick v. Gilpin*, 205 Tenn. 94, 105, 325 S.W.2d 547, 552 (1959).

71. *Hobson v. Hobson*, 184 Tenn. 484, 201 S.W.2d 659 (1947) (remainder to be divided between children "then living"); *Nichols v. Guthrie*, 109 Tenn. 535, 73 S.W. 107 (1903) (remainder to children "then living or descendants of such children"); *Deadrick v. Armour*, 29 Tenn. 588 (1850) (remainder to children "then living"). See other cases cited in *SIMES & SMITH, FUTURE INTERESTS* §.146 n.69 (2d ed. 1956), and in *McSween*, *supra* note 21, at 952 nn.55 & 56.

the legalism known as the class doctrine does not appear to have been determinative.<sup>72</sup> Also, there are several cases where the rule was apparently ignored.<sup>73</sup> Lastly, the harshness of the rule, particularly as applied to class gifts of future interests "to my children," spawned a line of cases which attempt to distinguish gifts of future interests such as "to *W* for life, and at her death to be equally divided between my children, share and share alike,"<sup>74</sup> as a gift to individuals rather than a class gift, so as to avoid the automatic requirement of survival under the class doctrine. This does not seem to be a meaningful classification, however, because the words "equally divided . . . share and share alike" are only descriptive of the distribution process which would take place without use of such words.

If there is a justifiable criticism with regard to the class doctrine in Tennessee, it is that it came to be applied mechanically as a rule of law, and indeed, as a rule of property which could only be changed by the legislature.<sup>75</sup> The emphasis shifted from an analytical consideration of the testator's probable intent in an unfortunately drafted gift instrument to research in *law* with its countless case citations and quotations. The question is not one of law. It is a

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72. *E.g.*, *Rinks v. Gordon*, 160 Tenn. 345, 24 S.W.2d 896 (1930), where there was a gift to sister *A* for life, remainder to sisters *B* and *C* and brothers *D* and *E*, or their heirs who may be living at death of *A*. The word "heirs" was construed as a word of purchase, not limitation, and the emphasis was on the probable intent. *Burdick v. Gilpin*, *supra* note 70, put the emphasis on the testator's probable intent although the class doctrine with legal authority is discussed at some length. In this interesting case, the gift was in trust for three daughters for the life of *A*, one of the daughters, the income to be paid quarterly. If a daughter died during the trust, the income was to be paid to her surviving issue per stirpes. At the end of the trust, the fund was to be divided and distributed to each daughter or her issue. A daughter died during the trust, and then one of her children died during the trust and the problem was whether the grandchild had a transmissible interest, since she had been receiving income since her mother's death. The court required survival notwithstanding the income interest.

73. *Frank v. Frank*, 120 Tenn. 569, 111 S.W. 1119 (1908); *Ward v. Saunders*, 35 Tenn. 387 (1856).

74. *Bridgewater v. Gordon*, 34 Tenn. 3, 5 (1854), which was decided five years after *Satterfield v. Mayes*, 30 Tenn. 58 (1849); *Harris v. Alderson*, 36 Tenn. 250 (1856); *Balch v. Johnson*, 106 Tenn. 249, 61 S.W. 289 (1901); *Smith v. Smith*, 108 Tenn. 21, 64 S.W. 483 (1901); *Keeling v. Keeling*, 185 Tenn. 134, 203 S.W.2d 601 (1947); *Harris v. France*, 33 Tenn. App. 333, 232 S.W.2d 64 (1950). This last case is not strictly a future interest. The gift was of land in trust to pay the income annually to the children of certain named nephews and nieces, the trust to continue until the youngest of such children attains thirty years of age. The problem was the rule against perpetuities, and the court held the gift vested at the testator's death subject to open—thus a gift of a present interest.

75. *Pugh v. Frierson*, 221 Fed. 513 (6th Cir. 1915); *Jennings v. Jennings*, 165 Tenn. 295, 54 S.W.2d 961 (1932); *Tate v. Tate*, 126 Tenn. 169, 148 S.W. 1042 (1912); *Sanders v. Byrom*, 112 Tenn. 472, 79 S.W. 1028 (1904); *Cutshaw v. Shelley*, 13 Tenn. App. 580 (1931); *Chambers, History of the Class Doctrine in Tennessee*, 12 TENN. L. REV. 115, 118 (1934). "Nevertheless, the rule as we have applied it is so firmly established in our decisions, that this Court must abide by it under the doctrine of *stare decisis* until it is changed by the Legislature." *Denison v. Jowers*, 192 Tenn. 356, 360-61, 241 S.W.2d 427, 428 (1951).

question of fact, and the only relevant rule of law is that the testator's intent shall control. Both in cases where the testator's thoughts are inartistically written, and in cases where it seems that he had no thoughts or intention concerning the problem at hand, the function of the court is only to resolve, as best it can, an unfortunate problem in a way consistent with what seems to be the probable intent of the testator, assuming he had considered the problem. It is believed that courts perform a better service in these unfortunate cases by adopting the role of an arbitrator seeking a reasonable implementation of the donor's probable intent. In the arbitration process, precedent is used only as suggestive of an appropriate interpretation of a contract, rather than as a binding precedent. This analogy seems implicit in the statement often made in these cases that legal precedent "is of little value in deciding questions concerning the meaning to be attributed to donative instruments, because such decisions turn upon the particular facts and language of each case."<sup>76</sup> Admittedly, there are certain public values, such as the preferences for early vesting, keeping property among blood relatives, early distribution, and the like, which justify a limited number of helpful rules of construction. But these should never be allowed to assume the status of rules of law. To those who call attention to the public value in the predicability of court litigation, the class doctrine in Tennessee should be an important example for it certainly has simplified matters. It contains an implied condition of survival in all class gifts of future interests, albeit contrary in many cases to the probable intention of the testator and a shocking surprise to the family of a deceased child. Appellate court decisions in Tennessee reveal, however, that it has not eliminated, nor appreciably decreased, the litigation on this troublesome issue.

Apparently motivated primarily by the harshness of the class doctrine as applied to such limitations as "to W for life, remainder to our children," or "to daughter for life, remainder to her children" where a child or grandchild of the testator predeceased the life beneficiary leaving issue,<sup>77</sup> the legislature enacted section 32-305 in 1927. It provides:

Where a . . . gift is made to a class of persons subject to fluctuation by increase or diminution of its number . . . and the time of payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, *and shall*

76. See Halbach, *supra* note 57, at 472. The late Chief Justice Neil in *Hutchison v. Board*, 194 Tenn. 223, 231, 250 S.W.2d 82, 85 (1952) construed an unfortunately drafted deed: "Precedents in cases of this kind, as in cases involving the construction of wills, are not to be thought of as an infallible guide."

77. See Chambers, *supra* note 75, at 118.

*have issue surviving when such period arrives or such event happens, such issue shall take the share of the property* which the member so dying would take if living, unless a clear intention to the contrary is manifested by the will, deed or other instrument.<sup>78</sup>

By its terms the purpose of the legislation was to alleviate the effect of the Tennessee Class Doctrine in only those situations where a member of the class died before the date of distribution "*and shall have issue surviving.*"<sup>79</sup> This statute alone would not seem to change the effect of the class doctrine where a class member predeceases the future event and does not have "*issue surviving when such . . . event happens,*" as was true in *Denison v. Jowers*<sup>80</sup> and in the recent case of *Walker v. Applebury*.<sup>81</sup> It seems inaccurate to suggest, as have several commentators, that section 32-305 was "apparently designed to eliminate the 'class doctrine' and to put Tennessee in accord with the common law position."<sup>82</sup>

In *Denison v. Jowers*,<sup>83</sup> the testator's will gave all his real estate to his wife for life, and "at her death, I will shall go [*sic*] to my brothers and sisters, or their children if any of them should be dead and leave children." The testator was survived by two brothers and two sisters all of whom predeceased his widow, but three of whom left children who survived the widow. The brother who predeceased the testator's widow and left no children or issue was survived, however, by his own widow, who made a deed of whatever interest she might have in the land to the petitioners. The single question was

78. TENN. CODE ANN. § 32-305 (1956). (Emphasis added.)

79. It has been said of the Tennessee statute that "in effect, a 'lapse' statute applies to death of a class member after the effective date of the instrument and before the end of the postponed period." 5 AMERICAN LAW OF PROPERTY § 21.11, at 143 (Casner ed. 1952).

80. *Supra* note 75.

81. 400 S.W.2d 865 (Tenn. 1966).

82. SIMES & SMITH, FUTURE INTERESTS § 146, at 150 (2d ed. 1956). In 1934 Chambers said: "It is now the settled law of Tennessee that . . . the 'Class Doctrine' does not apply to deeds made or wills of persons dying subsequent to the date of the passage of said Act . . ." The statement seems too broad, although it is clear that he was concerned primarily about cases where the class member left issue surviving him. See Chambers, *supra* note 75. For other statements to the effect that the apparent purpose of the statute was to eliminate or abolish the doctrine, see McSween, *The Tennessee Class Doctrine: A Spectre at the Bar*, 22 TENN. L. REV. 943, 944, 957 (1953); Trautman, *Decedents' Estates, Trusts and Future Interests—1959 Tennessee Survey*, 12 VAND. L. REV. 1157, 1177 (1959); Warner, *The Rule Against Perpetuities*, 21 TENN. L. REV. 641, 646 (1951). But compare Trautman, *Decedents' Estates, Trusts and Future Interests—1958 Tennessee Survey*, 11 VAND. L. REV. 1237, 1257-58 (1958), where a more accurate statement appears about *Denison v. Jowers*, *supra* note 75, in which the deceased class member left no issue: "It seems clear, however, that Tennessee Code Annotated section 32-305, which some thought was designed to abolish the Tennessee Class Doctrine, could at best have been only a partial solution, so that it is not surprising that it has been held inapplicable."

83. *Supra* note 75.

whether, in a class gift of a future interest, a class member who predeceases the date of distribution and leaves no issue who survives to that date, has an indefeasibly vested, transmissible interest which will pass at his death to his heirs, next of kin, and other successors in interest. Clearly, Tennessee Code Annotated section 32-305 does not purport to apply to this situation since the class member does not have "issue surviving when such period arrives or such event happens." The court held that the deceased brother who left no issue did not have a transmissible interest; hence the petitioners owned no interest in the property. In so holding, the court applied the Tennessee Class Doctrine on the basis "of stare decisis until it is changed by the Legislature."<sup>84</sup> It is not surprising that the court held that section 32-305 was not applicable;<sup>85</sup> but the court surely was mistaken when it said, in reference to the 1927 statute: "By the passage of . . . [this statute] the Legislature did no more than enact a rule which this Court had eagerly followed without the legislation,"<sup>86</sup> citing a comparison of *Sanders v. Byrom*<sup>87</sup> and *Tate v. Tate*.<sup>88</sup> In the *Sanders* case, the result reached under the statute would have been diametrically opposed to that reached by the judicial decision, because the class owner of a future interest died and left issue surviving who also survived the life beneficiary and was the plaintiff in the case. In the *Tate* case, however, the class owner of a future interest, who predeceased the life beneficiary, left no issue surviving; hence, the 1927 statute would not by its terms be applicable, as was also true in *Denison v. Jowers*.

In *Walker v. Applebury*,<sup>89</sup> decided in 1966, the will of the testatrix gave certain real estate to her husband for life, "and at his death back to the Applebury's," "to the Applebury kin," and in another provision, "then to the Appleberry [*sic*] heirs." It does not appear from the court's opinion whether or not this was a holographic will; but, as is true in so many of these construction cases, the will was neither well-planned nor well-written. The testatrix was a member of the Applebury family, and the land had come to her as an inheritance through her family; "to the Applebury kin" may be paraphrased to read "to my heirs in the Applebury family" to equate it with one of the class designations being discussed. The testatrix was survived by her husband and a number of Applebury kin among whom was a

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84. *Id.* at 361, 241 S.W.2d at 428.

85. See Trautman, *supra* note 82, 11 VAND. L. REV. at 1257-58.

86. *Denison v. Jowers*, *supra* note 75, at 360, 241 S.W.2d at 428.

87. *Supra* note 75.

88. *Supra* note 75.

89. *Supra* note 81.

cousin,<sup>90</sup> Marvin Applebury, who predeceased the husband-life tenant. Marvin was survived by his wife and an adopted son, both of whom survived the life tenant; they were the appellants in this case. The Chancellor applied the Tennessee Class Doctrine to hold that survivorship to the date of distribution is a required condition and that Marvin's death during the life estate terminated his interest in the land, so no interest was transmissible to his widow and adopted child. The court of appeals affirmed the action of the Chancellor. The Supreme Court of Tennessee reversed, however, holding that by virtue of Tennessee Code Annotated section 32-305, the Applebury heirs, determined at the death of the testatrix, took indefeasibly vested, transmissible future interests in the land. Since there was no requirement of survival of the husband-life tenant, Marvin's widow and adopted son were entitled to a portion of the sale proceeds of the land. The court based its decision largely on *Karsch v. Atkins*<sup>91</sup> and *Harris v. France*,<sup>92</sup> both of which stated in unmistakable terms that

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90. While the original opinion refers to Marvin as a nephew, this is corrected in the opinion on the petition to rehear.

91. 203 Tenn. 350, 313 S.W.2d 253 (1958). This was a gift tax case in which the Commissioner asserted a tax on a class gift of a future interest on the basis of a Class B exemption of \$5,000 rather than a Class A exemption of \$10,000, because the only member of the class in existence on the date of the gift was an adopted child of the life beneficiary, and thus not related to the donor. The taxpayer argued that because the law presumes that a woman is capable of having a child, the Commissioner should "wait-and-see," and not base the tax on the basis of the life beneficiary's adopted child, who might not live to the date of distribution. See Trautman, *supra* note 82, 12 VAND. L. REV. at 1177-79

92. *Supra* note 74. This was an unfortunately written will in which the testator undertook to give his Tennessee real estate in trust to pay the income to "the children" of twelve named nephews and nieces "until the youngest child of my nephews and nieces reaches the age of thirty years, and that means whether the children are born before or after my death," after which it was to be divided, or sold for division, "among the children of my nephews and nieces above set out." The question was whether the gift violated the rule against perpetuities. The court held that it was a gift of a present interest to the individual children of the named nephews and nieces who were in existence at the testator's death; that these persons took vested, present interests subject to being only partially divested by the birth of additional children to the named nephews and nieces. Since it was held that each future child's interest would vest on birth, and all such children would of necessity be born within the lives of the named nephews and nieces, plus nine months, the rule against perpetuities involving remote vesting was not violated. If it had been held that survival to the date of division was a required condition for a distributive share, the gift would have violated the rule against perpetuities. Two things should be noted in particular about this case: (1) while the court discussed the change in the Tennessee Class Doctrine effected by TENN. CODE ANN. § 32-305, at 346-48 (1956), it went on to hold that this was not a class gift at all, but a gift to individuals, thus using the theoretically unsound escape mechanism of *Bridgewater v. Gordon*, and cases following it, *supra* note 74; (2) viewed as a class gift of a present interest subject to open, if the court had decided that survival to distribution was a required condition, it would have been a condition subsequent.

By virtue of section 32-305, T.C.A., where applicable, the rule now is that notwithstanding that the time of payment or distribution of the estate is fixed at a subsequent period, or upon the happening of a future event the individual members of the class will take vested transmissible interest [*sic*] unless the will, considered as a whole in the light of all the circumstances, manifests a clear intention to the contrary.<sup>93</sup>

In *Karsch* the court went on to say that

It seems to us though from the language of this statute that an intention to make the remainder contingent must be more or less expressly stated. As we see it the rule should be, in view of this statute, that the estate will be treated as vested unless the contrary is expressly provided for in the will. This is what the statute says—and we must apply it as it reads.<sup>94</sup>

In *Walker v. Applebury*,<sup>95</sup> however, the court modified this slightly to say that, because of section 32-305, the issue will be decided by the following rule:

That the class took a vested transmissible interest in this estate in remainder upon the death of the testatrix unless, (1) the will taken as a whole, in the light of all the circumstances, requires the remainder to remain contingent, and not vest during the life of the life tenant, in order to carry out the clear intention of the testatrix, or (2) there is language in the will expressly providing the remainder not vest during the life of the life tenant.<sup>96</sup>

Precisely what is the significance of *Walker v. Applebury*? First, it makes clear that the court will make a distinction between class gifts of future interests which became effective after the 1927 enactment of Tennessee Code Annotated section 32-305 and those which became effective prior to that date; the statute will be applied to class gifts made after that date.<sup>97</sup> In so holding, the court rejects the statement in *Denison v. Jowers*<sup>98</sup> that by passage of the statute the legislature did no more than enact a rule followed by the court without legislation.<sup>99</sup> Both cases concerned class gifts which became effective after 1927. Where *Denison v. Jowers* brushed the statute aside and applied the ancient Tennessee Class Doctrine, in which survival to the date of distribution is required in all class gifts of future interests, *Walker v. Applebury* sets forth a new rule of construction for post-1927 gifts, going beyond the scope of the 1927 statute,

93. While the quotation is from *Karsch v. Atkins*, *supra* note 91, at 354, 313 S.W.2d at 255, essentially the same words appear in the earlier case of *Harris v. France*, *supra* note 74, at 347, 232 S.W.2d at 69-70.

94. *Karsch v. Atkins*, 203 Tenn. 350, 355, 313 S.W.2d 253, 255 (1958).

95. *Supra* note 81.

96. *Id.* at 869.

97. This had been strongly indicated in the recent case of *Moulton v. Dawson*, 215 Tenn. 184, 384 S.W.2d 233 (1964), involving a pre-1927 class gift in which the court applied the old class doctrine.

98. *Supra* note 75.

99. *Id.* at 360-61, 241 S.W.2d at 428.

under which survival will not be required unless the circumstances justify this conclusion, or the language expressly so provides.

Second, a difficulty arises because the court in *Walker v. Applebury* bases its new rule of construction on Tennessee Code Annotated section 32-305. By its terms that statute seems to apply only when a member of the class dies before the date of distribution "*and shall have issue surviving when such period arrives or such event happens.*"<sup>100</sup> In neither *Denison v. Jowers* nor *Walker v. Applebury* did the deceased class member have issue surviving. While in the latter case the deceased class member left an adopted child who was allowed to participate in the distribution along with the deceased class member's widow, the court makes clear on the petition to rehear that it bases the decision on the proposition that the deceased class member owned a vested, transmissible remainder interest rather than on the theory that his adopted son qualified as surviving issue. The opinions in neither of these cases seem to consider that the statute is expressly limited to cases where the deceased class member leaves issue surviving the date of distribution; yet the court in *Walker v. Applebury* bases its new rule of construction on the statute. In so doing the court quoted from two cases<sup>101</sup> and several law review articles which have said that the 1927 statute was intended to abolish the Tennessee Class Doctrine, including a 1959 comment of this writer.<sup>102</sup> It seems clear now, as indicated in my 1958 comment,<sup>103</sup> that these statements are too broad and, therefore, inaccurate because section 32-305 seems to be limited to those situations where the deceased class member leaves issue surviving the date of distribution. Thus, the statute does not provide an adequate basis for the court's new rule of construction. Indeed, the statute intro-

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100. See text accompanying note 78 *supra*.

101. *Karsch v. Atkins*, *supra* note 94; *Harris v. France*, *supra* note 74.

102. See *Walker v. Applebury*, 400 S.W.2d 865, 867-69 (Tenn. 1966). The court quotes with some changes from the following commentators: SIMES, FUTURE INTERESTS § 76, at 127 (1936); Chambers, *supra* note 75, at 120-21; McSween, *supra* note 82, at 956; Trautman, *supra* note 82, 12 VAND. L. REV. at 1177; Warner, *supra* note 82, at 646.

103. In 1958 I had the good sense to say in 11 VAND. L. REV. at 1257-58, "It seems clear, however, that Tennessee Code Annotated section 32-305, which some thought was designed to abolish the Tennessee Class Doctrine, could at best have been only a partial solution, so that it is not surprising that it has been held inapplicable."

This comment cites *Denison v. Jowers*, *supra* note 75, in which the deceased class member did not leave issue surviving. In 1959, however, I believed the statements in *Karsch v. Atkins*, *supra* note 94, and *Harris v. France*, *supra* note 74, and the other commentators, *supra* note 102, and I failed to check my 1958 comment above.

The original mistake seems to have been made in the first edition of SIMES, *op. cit. supra* note 102, who did not seem to realize that Chamber's conclusion, *supra* note 102, needs to be qualified and limited to situations where the deceased class member left issue surviving. Judge Anderson in *Harris v. France* cited Simes, Warner, and McSween; and Chief Justice Burnett in *Karsch v. Atkins* cited both Simes and *Harris v. France* on the purpose of the 1927 statute.

duces a "lapse" concept into the problem of survival in an effective gift of a future interest to a class, rather than stressing the transmissibility of the deceased class member's interest. Suppose the will of the deceased class member made a gift of his interest to someone other than his issue?

Third, the rule of construction adopted by the court in *Walker v. Applebury* and *Karsch v. Atkins* is a commendable one. The court would do well to adopt it as a judicially created and widely recognized rule of construction, quite independently of the 1927 statute and quite regardless of whether the deceased class member left issue surviving. If the court concludes that the probable intent of the donor is that survival to the date of possession is not a required condition to the transmissibility of a class member's future interest, whether he sells it or dies leaving issue seems to be secondary and irrelevant. If the court believes that the ancient class doctrine should continue to control pre-1927 gifts, it could, by judicial pronouncement, make its new rule of construction applicable to gifts which became effective after the 1927 statute. The theory might be that, since the legislature went a small part of the way in section 32-305 in 1927, the court would adopt the broader rule stated in *Walker v. Applebury* as of the same date. This would support by court decree, rather than by statute, the 1936 statement by Professor Simes that "it would appear that the Tennessee rule . . . is now the same as that in force in other jurisdictions."<sup>104</sup> I know of no reason, however, why the court should feel constrained to limit its new rule of construction to gifts which became effective after the date of the 1927 statute. The ancient Tennessee Class Doctrine was judicially created, and it was based upon an erroneous reading of Jarman's discussion of the doctrine of lapsed gifts as applied to class gifts of present interests. Furthermore, the ancient rule was at best a mere rule of construction and not a rule of law. The only relevant rule of law is that the donor's intent shall control.

Fourth, it is hoped that the court will improve the statement of its judicially-created rule of construction to provide that the courts seek to ascertain the probable intent of the donor in each case and that, unless the courts become convinced that the donor intended to limit the enjoyment of the gift to those who are members of the class at the date of distribution, they consider the future interest as an indefeasibly vested and transmissible interest. This puts the emphasis where it ought to be—on the judicial ascertainment of the probable intent of the donor in each unfortunate case; and it plays down legal research, legal precedent, and the small extent to which the doctrine of *stare decisis* should be applicable.

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104. SIMES, *op. cit. supra* note 102.

Also, the court should realize that it is not likely that one can generalize the intent of donors of all types of class gifts and class designations. As indicated in the above discussion which attempted to survey the principal problem areas, class gifts to "children," "grandchildren," "nephews and nieces" do not inherently suggest an intent on the part of the donor to require survival to the date of distribution in order for the beneficiaries to be identified and have transmissible interests. On the other hand, class gifts to "heirs," "next of kin," and "issue" do seem to suggest that the donor intended that no one should have a transmissible interest until he survives the date of distribution and becomes identified as a blood relative entitled to distribution; transmissibility should accrue only after identification and distribution in the latter class designations. Upon this analysis, the specific result reached in *Walker v. Applebury* may well be questioned. The will read: after the death of *H*, the life tenant, "to the Applebury heirs." Since the testatrix probably could not identify those of her Applebury kin who would survive *H*, does it not seem more probable that the testatrix intended that the identity of her kin who would benefit be determined at the death of *H*? Although the new rule announced by the court in *Walker v. Applebury* is sound as a general rule of construction, its specific application in that case is questionable. It is hoped that the court will give it a broader base as a judicially-created rule of construction, rather than as an interpretation of Tennessee Code Annotated section 32-305.

#### VI. ESTATE PLANNING FOR THE SURVIVAL REQUIREMENT

It is well said in a leading work<sup>105</sup> that the language of the dispositive instrument should make it clear (1) whether there is a requirement of survival; (2) if there is such a requirement, to what date the class member must survive to satisfy the requirement; and (3) if there is such a requirement what disposition is to be made of the interest of the class member when he fails to meet the requirement of survival. It may be a helpful supplement to the above statement to discuss the alternative choices, to examine some of the problems involved in each of the above three divisions, and to suggest an illustrative form.

##### A. *Should There Be an Express Requirement of Survival?*

There continues to be a pervasive constructional preference in property law for vested future interests over contingent future interests and for early vesting over vesting at a later time.<sup>106</sup> The explanation

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105. CASNER, *ESTATE PLANNING* 521 (3d ed. 1961).

106. BERGIN & HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 129 (1966).

for this is indeed historical, reflecting original policies and values of a feudal society which begrudgingly recognized the validity of contingent future interest but held them to be destructible and not alienable, and subsequent common law policies favoring the free alienability of land. In this latter part of the twentieth century in America, however, it is not amiss to say, "beware of any descendible future interests."<sup>107</sup> If a person dies owning a future interest which is descendible—that is, one in which survival to the date of distribution is not required—its value will be included in his taxable estate for both federal estate tax purposes and generally for state inheritance tax purposes. These taxes are imposed upon an owner who has never had possession or enjoyment of the property,<sup>108</sup> and there is frequently a serious problem in his estate concerning where his executor is going to get the money to pay taxes attributable to such future interests. Since these tax and liquidity problems can be avoided by proper planning and drafting while achieving the same result, we may formulate a standard recommendation: In class gifts of future interests survival to the termination of all preceding interests in the property should almost always be required.

If the decision of the client is to require survival, the lawyer who drafts his gift instrument will want to make this fact crystal clear. It might be helpful to suggest at this point an example which it is believed will not only make the requirement of survival clear but will also serve as a basis for discussing the remaining decisions to be made:

To *T* in trust to pay the income to *W* for her life, and at her death this trust shall terminate. The trust assets shall then be divided into a number of like shares equal to the number of my children living at the death of *W* and the number of my children who are then deceased leaving issue living at the death of *W*, and my trustee shall distribute one of such shares to each of my children then living and one of such shares to the issue per stirpes then living of each deceased child. If at the death of *W* there are no issue of mine then living, the trustee shall distribute this trust estate at that time to Alma Mater University for the benefit of its School of Law.

If it is desired, a gift to collaterals can be conveniently inserted prior to the charitable gift, as follows:

If at the death of *W* there are no issue of mine then living, the trustee shall distribute this trust estate to the issue of my parents then living per stirpes. If there are neither issue of mine then living nor issue of my parents then living, the trustee shall distribute this trust estate at that time to Alma Mater University for the benefit of its School of Law.

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107. LEACH & LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* 23 (1961).

108. *Id.* at 403.

It is believed that survival to the death of *W* is expressly required in the above examples for those who will benefit from the future interest.

*B. To What Date or Event Will Survival Be Required?*

It should be noted that survival to the death of *W* is made an express condition precedent in the above example. Thus, there is avoided what might be called the vested-subject-to-being-divested trap. While courts tend to discuss the requirement of survival in terms of the vested-contingent dichotomy, it should be apparent that the real issue is whether there is intended such a requirement. If it is believed that there is intended a requirement of survival, it may be stated in a form that makes it a condition precedent to the right to benefit in the gift (in which case the future interest is said to be contingent), or it may be stated more in the form of a condition subsequent (in which case the future interest will be said to be vested subject to being divested by the failure to survive the preceding interests). The trap in the vested-subject-to-being-divested form may be illustrated by the following example:

To *W* for life, remainder to my children. If any of my children should die before *W* leaving issue, such issue shall take the share of their parent.

Two construction problems have arisen frequently with respect to this type of gift. (1) Suppose a child of the donor predeceases *W* leaving no issue. A "rule court" with a heavy emphasis upon legal research and legal distinctions will likely hold that the children take vested remainders which can be divested only by both predeceasing *W* and leaving issue; accordingly, the child's interest will be transmissible and taxable.<sup>109</sup> (2) Suppose a child predeceases *W* leaving issue who are grandchildren of the testator, and then one of the grandchildren predeceases *W* leaving no issue but leaving a wife. While the requirement of survival is likely to be placed upon the testator's child, it is not so clear that a similar requirement will be placed upon the grandchild.<sup>110</sup> This would have the effect of excluding from succession the wife of a child, but allowing succession by the wife of a grandchild. It should be apparent that, when the divesting form is used, it is necessary to state precisely the divesting conditions at each level of succession. It seems shorter and much less complex to state the requirement in the form of a condition precedent requiring survival to the termination of all prior interests.

When a class gift of a future interest is made to "heirs," "next of

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109. RESTATEMENT, PROPERTY § 254 (1940); SIMES & SMITH, FUTURE INTERESTS § 583 n.5 (2d ed. 1956) and cases cited therein.

110. SIMES & SMITH, FUTURE INTERESTS § 659 (2d ed. 1956) and cases cited therein.

kin," or "issue" of a person other than the owner of the preceding life interest, it is important to choose the date or event to which survival shall be required. Frequently, this will arise in gifts to *H* for life, remainder "to my heirs," or remainder "to my next of kin among the Applebury family." It can arise also in gifts to *W* for life, remainder to the issue of my sister *S*. If the client envisions that the property will be distributed to the blood relatives of the ancestor designated, it should be made clear that "heirs," "next of kin" and "issue per stirpes" of the designated ancestor will not be determined as of the date of his death, but rather as if he had died at the termination of the prior estate. This will require survival to the date of distribution.

C. *When the Class Member Fails To Survive, What Will Be the Disposition?*<sup>9</sup>

In the discussion above, an express requirement of survival to the termination of all prior interests is recommended, and it is also suggested that the requirement be stated in the form of a condition precedent to the right to receive a beneficial interest. It, of course, follows from this that if a potential member of the group dies prior to the termination of the prior life estate, he is by definition excluded from the group described and there is no descendible interest in his estate. It does not follow, however, that there is a risk of disinheriting one line of the family group, such as the issue of a deceased child, if the class gift of the future interest to children is properly drafted so as to require survival to the termination of prior interests. As indicated in the example above, the class can be designed to include each child and the issue of each deceased child who satisfies the requisite condition of survival.

In the gift of any contingent future interest, it is necessary in estate planning to ask who will receive the property if the contingency fails. In the gift of a contingent future interest to a class, we are concerned with what will happen if there are no members of the class who satisfy the described requirements of the class. In the examples above, it will be noted that there can be an alternative gift of a contingent future interest to another class in which survival is required. A series of alternative gifts of contingent future interests will always leave the possibility, however remote, that none of the contingencies will become effective, with the result that there will be a reversionary interest in the donor of an inter vivos gift and in the estate of the donor of a testamentary gift. It is in this circumstance that it frequently becomes advisable to give the ultimate contingent future interest to a charitable beneficiary which is meaningful to the values of the donor. This is illustrated in the above examples by the suggested ultimate gift over to the university. In testamentary

gifts it is important to include such an end limitation in order to make a complete disposition of the total interests in one's property, to avoid intestacy upon this remote contingency in favor of distant collateral relatives often unknown. It also creates a favorable remembrance even though the charity is a remote beneficiary. In inter vivos gifts there are the additional tax problems: (1) the valuation of reversionary interests can be difficult and time consuming in the preparation of the donor's estate tax return at his death; and (2) in those instances where survivorship of the donor may be a requisite of any contingent future interest, and the reversionary interest of the donor exceeds five percent of the property, his taxable estate will include the value of the interest which depended upon survival of the donor.<sup>111</sup>

It is recommended, therefore, that, while class gifts of future interests should be contingent future interests in which the class is defined to include only those who survive the termination of all prior interests, a reversionary interest should not be left in the donor or his estate.

#### *D. The Importance of Making a Complete Disposition*

Many of the litigated cases on the requirement of survival arise because the lawyer who drafted the gift instrument did not realize the importance of providing specifically for the ultimate distribution of the trust assets. Provision is often made quite adequately for the life interest, either directly or in trust; but the lawyer does not always provide specifically for the ultimate division and distribution among the successors after the life interest. Instead, this is often left to a short phrase such as "to my children," "to my heirs," or "back to the Appleburys," in which many problems are left to vague inferences and litigation. As indicated by the examples above, by setting up the mechanism to make the ultimate division of the property, and by providing specifically how it shall be carried out, the draftsman is forced to think the matter through and is perhaps more likely to provide for a complete disposition.

### VII. CONCLUSION

As has been said, the "crying need" in this field is not for reform in the judicial methods of handling this problem, but rather the need is for lawyers educated in the drafting of gifts creating future interests.<sup>112</sup> As long as lawyers write wills and trust instruments creating future interests to classes of unknown persons without care-

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111. INT. REV. CODE OF 1954, § 2037.

112. Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership*, 51 HARV. L. REV. 254 (1937).

fully thinking through the problem and without providing expressly for the ultimate division and distribution when the future interest becomes a present interest, there will be litigation in the courts concerning the persons to benefit. Likewise, as long as people are allowed to write holographic wills, *e.g.*, "back to the Appleburys," there will be litigation concerning their meaning. Nor will strong rules of construction applied "without apology,"<sup>113</sup> indeed, applied as a rule of property, be likely to alleviate the litigation over an ambiguously written gift of a future interest. Tennessee's century-old class doctrine has been easy to understand and has been applied without apology, but it has not prevented people from litigating year after year. Marvin Applebury's widow and adopted son, who are not "Appleburys," were finally permitted to participate in the distribution after two courts said that they could not.

While recent developments in the class doctrine in Tennessee served as the initial stimulus for this article, its purpose broadened to include objectives equally applicable to other jurisdictions where the Anglo-American system of future interests law is being taught and practiced. In part, the emphasis here has been on the need to put greater stress upon training lawyers for professional responsibility with respect to the requirement of survival in class gifts of future interests. Sophisticated skills in consulting, planning, and drafting of appropriate gift instruments in this area must be developed so that the "surgery" of litigation with its consequent "scar-tissue" is less likely to arise.

With respect to an appropriate perspective for the courts to which the unfortunately planned gifts come for resolution, the effort here has been to emphasize that the only true rule of law is the basic principle that the testator's intent shall control. With this basic principle as a guide, the function of the court is to implement equitably a donor's unfortunately drafted gift instrument in a way in which he "probably would have"<sup>114</sup> had the problem been called to his attention. This is the best service that the courts can render to society in these unfortunate cases.

The courts should understand the basic preferences and values traditionally used as aids in construing ambiguities in gift instruments, but they should never allow such aids, or rules of construction, to take on the status and force of law. Also, the courts should become aware of inherent differences in such close and non-shifting groups as "children" as compared with those groups of blood relatives such as "heirs," "next of kin," and "issue per stirpes" whose membership

113. Halbach, *Future Interests: Express and Implied Conditions of Survival* (pts. 1-2), 49 CALIF. L. REV. 297, 431, at 329 (1961).

114. RESTATEMENT, PROPERTY § 241, Comment c, at 1193 (1940).

shifts beyond the control of the donor and whose precise identity at a future date is generally unknown to him.

It is hoped that the analogy to the arbitration process may be a helpful one because it is believed that in the judicial resolution of the ambiguity, the resolution of other ambiguities concerning donative intent by other human beings in somewhat similar but different predicaments can be suggestive only. Orderliness in the prediction process will not be impaired by a greater emphasis upon an equitable implementation of the testator's probable intent. Lastly, a careful look at the digests, the treatises and the advance sheets over a number of years persuades the conclusion that the traditional emphasis on rules of construction in this troubled area will not dissuade those who might be excluded from litigating the ambiguous and inartistically drafted gift instruments.