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FOREWORD BY GEOFFREY C. HAZARD, JR.

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* As to Reporter's Notes in this volume: In accordance with the traditional practice of the Institute, the Black Letter and Comments in this volume were approved by the Council and by the membership of The American Law Institute and represent the views of the Institute. The Reporter's Notes, containing supporting authority, explanation, and other discussion by the Reporter, are not subject to review by the Council and membership and are not statements of the institute.
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FOREWORD

This third volume of Donative Transfers, addressed to Class Gifts, is a companion to Volumes One and Two. Like them it addresses a major topic in the law of property that was previously embraced in the original Restatement of Property. The work on the present volume began in 1984 and was developed in Tentative Drafts Nos. 8–10, considered by the Institute in its 1985, 1986, and 1987 meetings. The formulations herein include revisions reflecting the deliberations at those meetings.

The general question addressed in the present volume is the construction of words of disposition involving donees identified as a class, as distinct from specifically identified donees. Questions of construction arise where the language of disposition in such gifts is ambiguous in some respect. Where the language of the instrument adequately indicates the donor's intent, reliance on rules of construction is unnecessary. However, given the vagaries of language and the multiple contingencies that can eventuate regarding membership in a class, questions of interpretation may arise. The rules of construction stated herein guide the resolution of those questions.

The rules for construction of class gifts are based on assumptions about the normal relationships that obtain between a donor and possible donees, particularly the relationships within a family, including an extended family. These assumptions in turn reflect the evolution of community mores and changing public policy toward family relationships as expressed in decisional and statutory law. For example, adopted children have now come to be regarded as equal in status with natural children. Interpretation of terms such as "children" and "grandchildren" in class gifts should be guided accordingly. Similarly, the status today of children in second marriages reflects change both in patterns of family formation and in expectations that result from second marriages. The formulation of the rules of interpretation in this Restatement reflects recognition of changes such as these.

The exposition reflects the skill and sensitivity of the Reporter, Professor A. James Casner. As in earlier volumes of Donative Transfers, Professor Casner brings to bear both the highest technical legal skill and thoughtful awareness of contemporary social relationships. The Institute acknowledges its continuing debt to him in the completion of this important work. We also express our
FOREWORD

thanks to the members of his Advisory Committee for their able and conscientious contributions in the drafting process.

GEOFFREY C. HAZARD, JR.
Director
The American Law Institute

September 29, 1988
TOPIC 1
CLASS GIFTS TO OTHERS THAN "HEIRS" AND THE LIKE

Introductory Note: The class gift terms as words of purchase that are the subject of consideration in Topic 1 are "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants," and "family." The Topic is divided into four Chapters.

Chapter Twenty-Five, entitled Primary Meaning of Class Gift Term, considers who is initially excluded or included as a member of the class in the absence of language or circumstances indicating a contrary intent. The presumed exclusions and inclusions give effect to the natural and normal meaning of the class gift term that is used. The language or circumstances indicating a contrary intent by the donor may expand or narrow this natural and normal meaning. For example, in the absence of any language or circumstances indicating a contrary intent, the primary meaning of a gift to the "children" of a designated person will exclude any grandchildren of such person (§ 25.1) but will include adopted children (§ 25.4) of such person. When the primary meaning of a class gift term has been determined, the outer limits of possible takers under such term will have been ascertained. Not every person within such outer limits will necessarily be entitled to share in the disposition because he or she may not come into being in time (Chapter 26) or may die too soon (Chapter 27).

Chapter Twenty-Six, entitled Time Within Which a Class Member Must Be in Being in Order to Share in the Class Gift—Increase in the Class Membership, describes the circumstances under which a person who comes within the primary meaning of the class gift term is excluded from membership in the class because not in being on the date distribution to the class is to take place. Failure to attain membership in the class on this ground is based on the assumed intention of the donor, and hence the result is controlled by language or circumstances indicating a contrary intent. If the class gift is to the "children" of a person who is deceased, such as a gift to the "children" of the donor's deceased son, the problem of how long the class may increase in membership may arise at least to the extent of the period of gestation in which the deceased son's wife may have a child conceived before the deceased son died. The deceased son may leave some sperm of his that may be used after he dies to impregnate his wife (or another woman) and in such case,
the problem of increase in class membership may be presented in a gift to the “children” of the donor’s deceased son that extends for an indefinite time into the future.

Chapter Twenty-Seven, entitled A Class Member Fails to Meet a Requirement of Survival or to Fulfill Some Other Condition—Decrease in the Class Membership, deals with the person who is within the primary meaning of the class gift term and who comes into being within time but who dies before the date distribution to the class is to be made. Under certain circumstances, it may be assumed that the donor intends to exclude from the class those persons who otherwise would be class members if they do not live to the date of distribution. This assumed intent of the donor may be overcome by language or circumstances indicating a contrary intent. The problem of whether a class member dies too soon is always presented in a devise or bequest to a class and a person, who otherwise is within the primary meaning of the class gift term, is deceased when the will is executed, or if alive, dies before the testator. The problem may be presented when enjoyment in possession of the class gift is postponed to some date after the dispositive instrument takes effect and the class member dies after the effective date of the dispositive instrument but before the date the class members are to enjoy a possessory interest. The disposition of the share the class member would have taken when he or she dies too soon depends, of course, on the intent of the donor, but the fact that the donor used a class gift term to describe the beneficiaries may justify the conclusion that the donor intended the entire class gift to go to the members of the class who survive to some period of time. This conclusion, however, may be affected by whether the donor was thinking of the beneficiaries primarily as members of a class (sometimes referred to as being group-minded) or as individuals who make up the class. The latter interpretation is most likely to be made when the names of the individuals who comprise the class are also used in describing the beneficiaries, as when the gift is to “the children of A, namely X, Y, and Z.” The role of antilapse statutes has to be explored when the class gift is made in a will and a member of the class dies before the testator.

Chapter Twenty-Eight, entitled Share of Each Class Member, presents for consideration a variety of gift combinations that raise questions as to the intent of the donor in regard to the share of the subject matter of the gift that is to pass to each class member. The problem of division among the class members will arise when the class members include persons in differing degrees of relationship to the designated ancestor, as in a gift to the “issue” of a designated person, or when the gift is to a named individual and a class, as
when the gift is to "A and his children" or to "A and the children of B," or when the gift is to several different classes, as when the gift is to the "children of A and the children of B."
Topic 2

CLASS GIFTS TO HEIRS AND THE LIKE

Introductory Note: If a donor makes a gift to the "heirs" of a designated person, the donor has used a class gift term that has no ascertainable meaning without the aid of some statute on descent and distribution that determines the persons who would take property owned by the designated person if such person died intestate. The class gift terms considered in Topic 1 do not have this characteristic.

This basic difference between Topic 1 on class gifts to others than "heirs" and the like and this Topic 2 requires that gifts to "heirs" and the like be developed separately. The goal in this Topic 2, however, is the same as it was in Topic 1, that is, to ascertain the ultimate takers under the class gift term that is used.

If the class gift term that is used is "heirs" or the like, after it is determined who is described by the class gift term that is used it must be ascertained whether the class gift term is a word of purchase or is either a word of limitation or a nullity.

Any words in a gift that operate to designate a donee are called "words of purchase." In contrast therewith, any words in a gift that operate to designate the extent of the interest acquired by a donee are called "words of limitation." The words "heirs," "heirs of the body," "next of kin," or "relatives" may operate either to designate a donee, in which case they are words of purchase, or to designate the extent of the interest acquired by some other described person, in which case they are words of limitation, or they may be a nullity in the sense that they designate neither a donee nor the extent of the interest of some other described person.

Chapter Twenty-Nine in this Topic 2 is concerned with gifts to heirs and the like if the class gift term that is used creates an interest in the class. In other words, the class gift term is a word of purchase. Chapter Thirty in this Topic 2 develops the circumstances under which the class gift term that is used fails to create any interest in the class. This is the case if the class gift term is a word of limitation describing the extent of the interest in some other person, or if the class gift term is a nullity and the disposition is construed as though the class gift term is stricken from the disposition.
PART VI

CLASS GIFTS

Introductory Note: In a donative transfer, the donor may be unable to identify the intended beneficiaries by name because they have not yet been born or because their ascertainment depends on the occurrence of some future event. For example, if the donor desires to benefit the children of a daughter and the daughter is alive, the donor can identify by name only the children of the daughter who are born and alive at the time the dispositive instrument is executed. The unborn children of the daughter can be identified by the words “children of my daughter.” The word “children” is a class gift term. It describes the beneficiaries by their membership in an identifiable group.

The donor may describe the intended beneficiaries as the “heirs” of a living person. Technically, a living person has no “heirs.” Such person’s heirs will be ascertained for the first time at such person’s death. Thus, the “heirs” cannot be named at the time the dispositive instrument is executed. The word “heirs” is a class gift term. It describes the beneficiaries by their membership in an identifiable group.

The class gift terms that may be used to describe intended beneficiaries fall into one or the other of two general categories. One category includes the class gift terms such as “children,” “grandchildren,” “brothers,” “sisters,” “nephews,” “nieces,” “cousins,” “issue,” “descendants,” or “family.” The characteristic of these class gift terms is that the possible members of the class can be determined without reference to a statute on descent and distribution of property. The other category includes the class gift terms such as “heirs,” “next of kin,” or “relatives,” which have no meaning divorced from a statute on descent and distribution.

The circumstances of a particular distribution may justify the conclusion that the term “children” is used by the donor to mean “heirs,” or may justify the conclusion that the term “heirs” is used by the donor to mean “children.” Hence, an initial inquiry is whether the class gift term that is used is to be given its normal meaning or a special meaning in determining in which category a class gift term belongs.

Rules of construction have evolved with respect to class gift terms that attribute to the donor certain intentions in regard to the solution of various questions that may be raised in identifying who takes under the class gift term that is used and in determining how
much each class member takes. The application of a rule of construction in a particular case may be overcome not only by the language of the dispositive instrument but also by circumstantial evidence.

When a rule of construction applicable to a class gift term is overcome, it means that the language or circumstances of the disposition that uses the class gift term justifies attributing to the donor an intent other than the intent attributed to the donor by the rule of construction. The circumstances that may be the basis of attributing such an intent to the donor usually are those that exist when the dispositive instrument is executed. In appropriate cases, the donor's words or conduct subsequent to the date the dispositive instrument is executed may be considered to show what the donor's intention was at the time the dispositive instrument was executed. See the Reporter's Note to the Introductory Note.

The burden of proof is on the person who would attribute to the donor an intent that is different from the one attributed to the donor by the rule of construction. Some rules of construction rest on a firm foundation and hence are difficult to overcome. Others may rest on a shaky foundation and hence may be more easily overcome.

When the donor of a disposition of property uses a class gift term, a preliminary question is whether the class gift term is used as a word of purchase or a word of limitation. Only when the class gift term is used as a word of purchase will the disposition create a property interest in the persons described by the term. When the class gift term is a word of limitation, it describes the extent of the property interest given to someone else.

Part VI on Class Gifts is divided into two Topics. Topic 1 concerns class gifts other than gifts to "heirs" and the like. Topic 2 considers gifts to "heirs" and the like.

REPORTER'S NOTE TO INTRODUCTORY NOTE

1. Evidence admissible to ascertain intent of donor—In II Scott on Trusts, 4th ed., Fratcher, § 164.1 (1987), it is stated:

   The terms of the trust are determined by the intention of the settlor at the time of the creation of the trust, and not by his subsequent intention. . . . The settlor's words or conduct subsequent to the creation of

   the trust, however, may be admissible to show what his intention was at the time of the creation of the trust.

Page on Wills (Bowe-Parker rev. 1961), in § 32.6, states that where "a class description such as 'children,' or 'nephews' is used, it is ordinarily held that a latent ambiguity is raised if it is shown that there are illegitimate or adopted children,
so that evidence of the testator's relations with and or attitude toward them is admissible to determine whether it was his intent to include them in the gift." In § 32.9, at Note 41, Page points to a Connecticut case, Trowbridge v. Trowbridge, 127 Conn. 469, 17 A.2d 517 (1941), as an example of a declaration of the testator being admitted to show the testator's attitude toward a person claiming under the will. In that case the testator's will created a trust for the benefit of his four sons. At the death of each son his share was to go to his "issue." One of the sons died leaving a child that had been adopted by the son when the child was four years old. (The will was executed in 1921, the child was adopted in 1926, and the testator died in 1931.) In concluding that the testator did not intend that the adopted child should share in the gift to "issue," the court considered evidence that the testator frequently expressed to his secretary disapproval of his son's plan of adoption; that the testator had inquired as to the effect the adoption would have under the inheritance laws of New York (where the testator was also domiciled) and had been advised that by those laws the adopted child would not inherit; that (for reasons not connected with the adoption issue) the testator considered making a new will, the draft of which contained a clause providing "It is my intention that no adopted child shall inherit under this will." (The draft was never executed.) The court also noted that the testator had frequently told the mother of his natural grandchildren that they were his only grandchildren and that he wanted them to know the value of money as they would inherit his estate. The court specifically held that it was not error to admit the evidence. "This testimony was admitted for the purpose of showing the testator's attitude toward the adopted child. . . . It was properly admitted." *Id.* at 474-75, 17 A.2d at 519-20.
Chapter Twenty-Five

PRIMARl MEANINOf CLASS GIFT TERM

Introductory Note

Section
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25.2 Gifts to "Children"—Children Born Out of Wedlock
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25.5 Gifts to "Children"—Child Adopted by Another
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25.8 Gifts to "Grandchildren," "Brothers and Sisters," "Nephews and Nieces," "Cousins" and Other Similar Terms
25.9 Gifts to "Issue" or "Descendants"
25.10 Gift to "Family"

Introductory Note: The class gift terms to which a primary meaning is assigned in this Chapter involve gifts other than gifts to heirs and the like. The class gift terms that will be examined in this Chapter are "children" (§§ 25.1–25.7), "grandchildren" (§ 25.8), "brothers" (§ 25.8), "sisters" (§ 25.8), "nephews" (§ 25.8), "nieces" (§ 25.8), "cousins" (§ 25.8), "issue" (§ 25.9), "descendants" (§ 25.9), and "family" (§ 25.10). These class gift terms according to ordinary language usage have normally accepted outer limits of inclusiveness. The language or circumstances may indicate an intent to include, within the class, persons beyond such outer limits of inclusiveness or an intent to narrow the normally accepted outer limits of inclusiveness.

§ 25.1 Gifts to "Children"—Exclusion of Grandchildren and More Remote Descendants

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term excludes descendants of such person more remote than those of the first generation. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. The rule stated in this section narrows the possible takers under a disposition in favor of the "children" of a
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designated person by excluding from the primary meaning of such class gift term descendants of such person more remote than those of the first generation. The justification for such exclusion is that the term "children" in normal usage does not include grandchildren or more remote descendants. Hence, when this term is used, without additional language or circumstances indicating a different meaning, it is reasonable to assume that the donor intended such normal usage of the term "children."

The function of the rule of this section is primarily negative, that is, to exclude grandchildren and more remote descendants from the possible takers. It is not to be concluded from the rule of this section that all descendants of the designated person who are in the first generation will be included in the class. One or more may be excluded because not born in time or because he or she died too soon, or because he or she has been adopted out, or because of additional language or circumstances that indicate some first generation descendants should be excluded (see § 25.7).

b. Factors providing additional support for exclusion of grandchildren and more remote descendants from gift to "children." In view of the fact that additional language or circumstances may indicate an intent to include grandchildren and more remote descendants in a gift to "children" of a designated person, it is relevant to see whether there are any factors present in the disposition that support such exclusion. Such factors, if present, would make it more difficult to overcome the exclusion of grandchildren and more remote descendants in a particular case.

Illustrations of the factors that provide additional support for the exclusion of grandchildren and more remote descendants from a gift to "children" of a designated person are the following:

(1) The same disposition in which the gift to "children" of a designated person is made elsewhere makes express provision for the grandchild or other remote descendant who is claiming under the gift to "children."

(2) The same disposition in which the gift to "children" of a designated person is made elsewhere contains a clause using the word "children" with regard to the same parent in such a manner as unequivocally to denote that only descendants in the first generation of that parent are included.

(3) The same disposition in which the gift to "children" of a designated person is made elsewhere contains a reference to "grandchildren," indicating that the donor had in mind the distinction between descendants in the first generation.
and more remote descendants, and hence intended only
descendants in the first generation in relation to the gift to
"children."

c. **Grandchild or more remote descendant taking by descent from or as transferee of a child who is a beneficiary under gift to "children."** When the date of distribution under a gift to the "children" of a designated person is postponed to some date subsequent to the effective date of the dispositive instrument, as in the case of a gift by O to "O's son S for life, remainder to S's children," if the remainder gift to S's children is vested subject only to partial divestiture by the birth of more children to S, a child of S has a transferable and descendable interest prior to the date the child is entitled to possession. If before S dies, a child of S transfers the child's interest to a grandchild or more remote descendant of S, or such child's interest descends on intestacy to a grandchild or more remote descendant of S, the grandchild or more remote descendant will share in the disposition "to S's children" on the date of distribution at S's death. The possibility that a grandchild or more remote descendant may share in a gift to "children" under these circumstances is not in conflict with the rule of this section. The primary meaning of the class gift term is not affected. The grandchild or more remote descendant is taking an owned interest of a child and is not taking under the gift to the "children" of a designated person.

**Illustrations:**

1. O transfers property by will to T. T is directed to hold that property in trust and "to pay the income to O's son S for life, then to distribute the trust property outright to S's children in equal shares." S has two children, C₁ and C₂. Under the controlling local law, the interests of C₁ and C₂ are vested subject only to partial divestiture by the birth of additional children to S. C₁ dies intestate. C₁ is survived by a wife, a son, and a daughter, who are C₁'s heirs. S dies. C₁'s son and daughter, a grandson and granddaughter of S, together with C₁'s wife, are each entitled to share in the trust property as heirs of C₁. They take as distributees of C₁'s estate, not from O. Had C₁ left a will, C₁'s share in the remainder interest under the trust would have passed by C₁'s will. If grandchildren of S took in their own right under the gift to "children" of S, they would take under O's will and their interest would not be a part of C₁'s gross estate for estate tax purposes.

2. Same facts as Illustration 1 except that the remainder interest in the trust property is "to S's children who survive S"
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in equal shares." When C₁ dies intestate before S, C₁ does not own an interest in the trust property that is descendable, and consequently C₁'s wife and son and daughter are not entitled to any share of the trust property on the termination of the trust on S's death.

3. Same facts as Illustration 1 except that the remainder interest in the trust property is "to S's children who survive S in equal shares," and C₁ transfers by deed C₁'s interest under the trust to C₁'s son and daughter and C₁ survives S. C₁'s son and daughter, a grandson and granddaughter of S, are each entitled to one-fourth of the trust property under the deed from C₁.

4. Same facts as Illustration 1 except that O's will contains a valid spendthrift clause which provides that the interest of each beneficiary in the income and principal shall be free from the control or interference of any creditor of the beneficiary or any spouse of a named beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation. The spendthrift clause will not prevent C₁'s vested remainder from passing by descent to C₁'s wife and son and daughter when C₁ dies before S. The spendthrift clause would prevent any transfer inter vivos by C₁ to C₁'s son and daughter.

d. Grandchild or more remote descendant as substituted taker under gift to "children"; herein antilapse statutes. The terms of the dispositive instrument may specifically provide with respect to a gift to "children" of a designated person that if a child dies before the period of distribution leaving issue who survive the period of distribution, the share such child would have taken had such child lived to the period of distribution shall pass to such child's issue. In such case the grandchildren or more remote descendants of the designated person may take in their own right as substituted beneficiaries under the alternative disposition.

An antilapse statute, within the limits prescribed in the statute, is designed to provide a substituted taker for a beneficiary named in a will (or in a trust that operates as a substitute for a will) who dies before the testator (or the creator of the substitute for a will), in the absence of a manifestation of intent by the donor that the antilapse statute is not to apply. If the controlling antilapse statute applies to class gifts and if the substituted takers provided for in the antilapse statute are the descendants of a child who dies before the testator (or before the creator of a substitute for a will) in the case of a gift to "children," the grandchildren or more remote descendants of the designated person may take in their own right as beneficiaries of the disposition, the same as would be the case if
the will (or substitute for a will) had specifically provided for such substituted takers.

Illustrations:

5. O executes a will that gives O's residuary estate "to the children of my daughter D to be divided among them in equal shares." D has two children, C₁ and C₂. C₁ dies survived by a son and daughter, a grandson and granddaughter of D. O dies. The antilapse statute in the controlling jurisdiction does not apply to class gifts. The entire residuary estate passes to C₂ in the absence of additional language or circumstances that would overcome the primary meaning of the class gift term "children." The gift "to the children of my daughter D" is in effect construed as a gift to the children who survive O, because a deceased child of D is not a child of D at the time the will takes effect on the death of O.

6. Same facts as Illustration 5 except that C₁ is deceased on the date that O executed the will. The antilapse statute in the controlling jurisdiction applies to class gifts but only with respect to members of the class who die after the will is executed and before the date the will takes effect. The result is the same as in Illustration 5.

7. Same facts as Illustration 6 except that the antilapse statute in the controlling jurisdiction applies to class gifts whether a member of the class dies before or after the date that O executes the will, and the antilapse statute substitutes for the deceased class member such class member's descendants. C₁'s son and daughter, the grandson and granddaughter of S, take the share of the residue that C₁ would have taken had C₁ survived O. They take in their own right as beneficiaries of the disposition, the same as would be the case if the will had specifically provided for them to be substituted for C₁.

8. Same facts as Illustration 7 except that the residuary gift is "to the children of O's daughter D who survive O." The express requirement of survival attached to the class gift to the "children" of D eliminates the applicability of the antilapse statute. Hence the son and daughter of C₁ will not share in the residuary gift and the entire residue will pass to C₂, who survives O.

e. Implied gift to "children" of a designated person. The rule of this section is applicable to an implied gift to "children" of a designated person to the same extent as to an express gift to "children." An implied gift to "children" of a designated person may result in the case of a gift by O "to my son S for life and if S
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dies without children surviving him to my daughter D." The implication of a gift to S's children who survive him is based on the gap in the language of the disposition if S leaves children surviving him. The fact that there is a gift over to O's daughter if S dies without children surviving him justifies the inference that S's children are to take if there are any who survive S. Additional language or circumstances may justify the conclusion that the implied gift in this situation is to S's "issue," a class gift term that does not exclude grandchildren or more remote issue (see § 25.9).

f. Gift to the "heirs" of a designated person construed as gift to "children." When a gift is made to the "heirs" of a designated person, additional language or circumstances may show that the donor used the word "heirs" as meaning "children." If it is determined that the donor meant the "children" of the designated person by the use of the word "heirs," the rule of this section is applicable. See Topic 2 on gifts to "heirs" and the like.

g. Language or circumstances indicating a contrary intent. The rule of this section is a rule of construction, and hence it yields to any finding of a contrary intent of the donor from additional language or circumstances. Comments h through j consider the more frequently encountered variations in language or circumstances which indicate that the donor used the word "children" to denote descendants generally of the designated person.

h. Circumstances indicating a contrary intent—disposition meaningless unless "children" construed to include grandchildren or more remote descendants. When facts existing at the time the dispositive instrument is executed would necessarily or very likely make the gift to the "children" of a designated person a nullity unless the word "children" is construed to include grandchildren or more remote descendants, such construction may be justified. If the facts that make or very likely make the gift a nullity, unless the word "children" is construed to include grandchildren or more remote descendants, develop subsequent to the execution of the dispositive instrument, a finding of a contrary intent to the application of the rule of this section is not justified.

Illustrations:

9. O executes a will that provides for a bequest of $100,000 "to the children of my son S to be divided equally among them." At the time O executes the will S is deceased, no child of S is living, and O knows this. Grandchildren of S are living at the time O's will is executed and O knows this. There is no applicable antilapse statute. The gift to the "children" of S is a nullity unless the word "children" is construed
to mean "grandchildren." In this situation the word "children" should be construed to mean "grandchildren" to avoid the gift "to the children of S" being a nullity. If the bequest of the $100,000 would otherwise fall into the residue and go to the residuary takers, it may be relevant to see who are the residuary takers in determining whether the word "children" should be construed to include "grandchildren."

10. Same facts as Illustration 9 except that S is alive but is a widower 60 years of age. In this situation it may be possible for S to have a child who could take under the disposition "to the children of S," but that is unlikely and looking at the situation from O's standpoint it is likely that the bequest of the $100,000 will be a nullity unless the word "children" is construed to include "grandchildren." In this situation, whether S subsequently has a child or not, in the absence of facts indicating a contrary result, it would be reasonable to conclude that the word "children" should be construed to include "grandchildren" to avoid the likelihood that the gift "to the children of S" will be a nullity.

11. Same facts as Illustration 9 except that at the time O executes the will, O is unaware that no child of S is living, S's children having been killed and knowledge of their deaths not having been communicated to O. In this situation the word "children" should be construed to mean "grandchildren" to avoid the gift "to the children of S" being a nullity, because, if O had known the facts, O would probably have intended such result to avoid the gift being a nullity.

12. Same facts as Illustration 9 except that only one child of S is living at the time O executes the will, two children of S having previously died, and O knows this. The child of S who is alive when O executes the will dies before O. Assuming as in Illustration 9 that there is no applicable antilapse statute, the gift to the "children" of S will be a nullity unless the word "children" is construed to mean "grandchildren." Since the language of the gift, "to the children of my son S to be divided equally among them," appears to contemplate multiple recipients, and since O knew at the time the will was executed that multiple distributees were an impossibility if grandchildren of S were excluded, these facts should justify construing the word "children" as including "grandchildren."

i. Circumstances indicating a contrary intent—"children" construed to include grandchildren or more remote descendants to effectuate probable intent to benefit equally two or more groups. When the donor indicates an intent to benefit equally two
or more groups and such indicated intent will not be accomplished unless "children" is construed to include grandchildren or more remote descendants, giving "children" the broader construction may be justified.

Illustrations:

13. O's nearest relatives are by blood O's brother and sister, and by affinity, the three sisters of O's deceased spouse. O executes a will under which the bulk of O's estate is disposed of by the residuary clause in the will. The residuary clause provides as follows: "I give one-half of my residuary estate in equal shares to my brother and my sister and I give the other one-half of my residuary estate in trust, the trustee to pay the net income to my deceased spouse's sister A for life and after A's death, the trustee shall divide the trust property into two parts and the trustee shall distribute one part to the children of A's sister B and the trustee shall distribute the other part to the children of A's sister C." B has one child and that child has a child, a grandchild of B. B dies. B's child dies. O dies. A dies. There is no applicable antilapse statute. A conclusion is justified that O intended equality of distribution between O's own collateral relatives and the collateral relatives of O's deceased spouse. Such intent is more completely accomplished by construing the gift to the children of A's sister B to mean descendants of B. In the absence of language or circumstances indicating a contrary intent, it is reasonable to conclude that B's grandchild should not be excluded by the terms of the disposition.

14. O executes a will that provides for a bequest of $100,000 "to the children of my daughter D, such children to take per stirpes." At the time O executes the will two children of D are living and two children of D are deceased, with issue of each deceased child living. These facts are known to O. There is no applicable antilapse statute. The reference in O's will to a per stirpes distribution has no relevance if only descendants of D in the first generation can take under the gift. The specification of a per stirpes plan of distribution indicates an intent of O that the various descendant lines of D are to share equally in the disposition. The effectuation of that indicated intent justifies construing "children" as meaning "issue" so that each descendant line out of D will receive one-fourth of the $100,000 bequest.

1. Language indicates a contrary intent—the term "children" and a more inclusive term such as "issue" or "descend-
"ants" used interchangeably. When the donor describes the beneficiaries under a dispositive instrument by the use in one instance of the term "children" and in another similar instance by the term "issue" and it is clear that no difference in meaning is intended by the interchangeable use of such terms, the donor has indicated an intent that the different terms are to be given the same meaning. It will depend on the circumstances of each case whether the term "issue," which includes grandchildren and more remote descendants in its primary meaning, will overcome the primary meaning of the term "children" or vice versa.

k. Gift to "sons" or "daughters." By analogy to the rule of this section a gift "to the sons" of a designated person or "to the daughters" of a designated person excludes grandsons and granddaughters in the absence of additional language and circumstances indicating a contrary intent.

STATUTORY NOTE TO SECTION 25.1

1. A Georgia statute provides that limitations over to "heirs," "heirs of the body," "lineal heirs," "lawful heirs," "issue," or words of similar meaning shall be held to mean "children," whether the parents are alive or dead. The statute also provides that "[u]nder such words the children and the descendants of deceased children by representation in being at the time of the vesting of the estate shall take."

Georgia Code Ann. § 44-6-23 (1982)

A North Carolina statute provides that "[a] limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."


2. Antilapse statutes and their applicability to class gifts are developed in the Statutory Note to Section 27.1.

REPORTER'S NOTE TO SECTION 25.1

1. Comparison with present state of the law—The rule of this section is supported by judicial authority. The rule of this section is, in substance, identical with the corresponding rule of § 285 of the first Restatement of Property.

2. Justification for the rule of this section—The justification for the rule of this section is contained in Comment a.

3. Cases supporting the rule of this section—"children" excludes grandchildren—The testator, in Grant v. Mosely, 52 S.W. 508 (Tenn. 1899), left one-third of her estate "to my sister . . . and, if she be dead to her children." The sister and her only daughter both died before the testator, but the sister left two grandchildren. These two grandchildren could not take under the will, according to the court, be-
cause “[t]he technical and legal meaning of the words ‘child or children’ is immediate offspring, and does not include grandchildren.” Id.

In Cathell v. Burris, 21 Del.Ch. 233, 187 A. 9 (1936), the testator left his wife a power to appoint real property on her death among “my children her and me surviving.” In default of appointment the property was to pass under the laws of intestate succession, which provided that the issue of a deceased child shall take the parent’s share. In voiding the wife’s attempted appointment to grandchildren, the court pointed out that “[t]he general rule is that in the absence of a context indicating an intont to the contrary, ‘children’ does not embrace ‘grandchildren.’” Id. at 11.

The testator in Meriden Trust & Safe Deposit Co. v. Spencer, 127 Conn. 261, 16 A.2d 349 (1940), left $40,000 in trust for his niece for life, remainder to her surviving children. The niece died leaving a grandchild but no children. In rejecting the grandchild’s claim that she was a surviving child within the meaning of the trust instrument, and that she was therefore entitled to the remainder interest, the court stated that words are to be given their “primary and usual meaning” and that “[t]he word ‘children’ has a definite and generally accepted meaning of descendants in the first degree.” Id. at 264, 16 A.2d at 350.

In In re Ellis’s Estate, 178 Misc. 491, 34 N.Y.S.2d 884 (Sur.Ct.1942), affirmed without opinion, 264 App.Div. 845, 36 N.Y.S.2d 187 (1942), the court stated that the “uniform rule is that where a testator speaks of children in general terms he does not intend to include grandchildren.” 178 Misc. at 493, 34 N.Y.S.2d at 887. There, the testator left a portion of his residuary estate “to those of my first cousins who are living at the time of my death, and to the children of any of my first cousins who shall have died before I do.” Under such language, the testator’s surviving first cousins and the children of those who did not survive were entitled to take, but the grandchildren of the predeceased first cousins were not permitted to take.

Old National Bank & Union Trust Co. v. Hughes, 16 Wash.2d 584, 134 P.2d 63 (1943), involved a trust, the corpus of which was to be distributed per stirpes to the settlor’s brothers’ “surviving children” after the death of his mother and last surviving brother. In holding that the settlor’s grandnieces were not entitled to share in the distribution, the court declared that “the word ‘child’ or ‘children’ used in a trust instrument will not be construed to include ‘grandchildren’ unless such construction is impelled by other language in the instrument.” Id. at 588, 134 P.2d at 65.

The testator in Briggs v. Peebles, 144 Tex. 47, 188 S.W.2d 147 (1945), left his estate to be divided equally among his brothers and sisters if they survived him or, if not, to “their children.” After the will was executed, the testator’s sister died leaving five children, one of whom predeceased the testator leaving children of her own. In holding that these grandchildren of the testator’s sister were not entitled to take as her “children,” the court stated that when “construed in connection with the rules relating to the construction of wills, it is clear that testator in the use of the words ‘their children’ did not include the
grandchildren of his deceased brothers and sisters."

In Bridgeforth v. Gray, 222 So.2d 670 (Miss.1969), the grantor conveyed land to his daughter, reserving a life estate in himself. The deed provided that should the daughter die without issue, "said lands to descend equally to the other children" of the grantor. After the death of the grantor's daughter without issue, several grandchildren of one of the grantor's predeceased sons—that is, great-grandchildren of the grantor—claimed that under the terms of the deed, they were entitled to an interest in the land. The court rejected their claim, however, stating that "[a] limitation in favor of the 'children' of a designated person excludes all descendants of such person more remote than those of the first generation, unless the conveyor effectively manifests an intent to benefit other takers." Id. at 672, citing Restatement of Property § 285; 5 American Law of Property, §§ 22.30, 22.31 (A.J. Casner ed. 1952); and Simes and Smith, The Law of Future Interests § 722 (2d ed., 1956).

4. Factors providing additional support for the exclusion of grandchildren and more remote descendants from a gift to "children"—

a. The disposition to "children" elsewhere expressly provides for the grandchild or other remote descendant who is claiming under the gift to "children." In Logan v. Bronson, 56 S.C. 7, 33 S.E. 737 (1899), the testator left all his property to his wife for life, then in trust to his daughter for life, and finally, to all the daughter's children in equal shares. The wife died soon after the will was probated and the daughter died shortly thereafter, leaving eight children and several grandchildren by a predeceased child. These grandchildren of the daughter claimed a share in the remainder of the estate with the daughter's eight children. The court denied their claim, holding that the testator "knew how to express his intention when his purpose was to provide for a grandchild," and in fact, expressly provided for his grandchildren in other parts of the will. Id. at 10, 33 S.E. at 738. "It is clear, therefore, that the plaintiffs, being grandchildren and not children of the life tenant . . . cannot be included in the limitation over, after the death of such life tenants, to her children." Id. (emphasis in original).

In In re McCarty's Estate, 138 Pa.Super. 415, 10 A.2d 790 (1940), the testator left his named grandson and granddaughter $200 and $2,000 respectively. After specific bequests, he left the residue of his estate to "my children in equal shares absolutely." At the time the will was executed, the testator had five children. A sixth child had died prior to the execution of the will leaving two children, the grandson and granddaughter of the testator mentioned above. In holding that these two grandchildren were not included in the gift to "my children," the court held that no additional language in the will indicated that "children" should be construed more broadly than offspring of the first generation. "On the contrary, it would appear that testator had clearly in mind the distinction between 'children'
and ‘grandchildren,’ because in the second and third paragraphs of his will he referred to appellants as his ‘grandson’ and ‘granddaughter,’ respectively.” Id. at 417, 10 A.2d at 791.

b. The disposition refers to the “children” of a designated person in such a manner as unequivocally to denote only a descendant in the first generation of that person. In In re Steinmetz’s Estate, 194 Pa. 611, 45 A. 663 (1900), the testator gave a life estate in a portion of his real estate to each of his four children with remainder to their children. He further provided that in case any of his children, whom he named individually, died without “lawful issue,” the share of that child was to go to the “surviving child or children in equal shares.” In holding that a grandchild whose parent was deceased was not entitled to take his parent’s share, the court reasoned that “[t]hroughout the whole will when [the testator] uses the word ‘children’ there are modifications and explanatory words which clearly show that by the use of the word he means to designate his three sons and daughter. . . . [W]e see no justification for giving the word a more extensive meaning than the testator has given to it, throughout any other part of his will.” Id. at 615, 45 A. at 665.

In Matter of Hartman, 347 N.W.2d 480 (Minn.1984), the testator created a trust for his daughter for her lifetime. Upon her death, the trust assets were to be distributed to her son, if he survived her. If her son predeceased her, the trust provided that if “there should be another child, or children, of my said daughter . . . living at that time” the trust was to continue for their benefit and be distributed to “such child, or children” at age 30. Id. at 482. If there were no other children of the testator’s daughter then living, the trust assets were to be distributed to the testator’s brother, sister, sister-in-law, and a nephew. Testator’s daughter was age 37 at the testator’s death, had a son age 11, and did not plan to have more children. The daughter’s son predeceased her, leaving three children. After her death, the three children (the daughter’s grandchildren) argued that the language “such child or children” should be read to include them. The court, however, held that “based on the plain meaning of the language, and the fact that neither the provisions of the will as a whole nor the surrounding circumstances warrant a contrary conclusion, . . . testator intended ‘child’ to mean descendants of the first degree only.” Id. at 485. One of the factors influencing the court was the fact that the testator had also created a separate trust for the benefit of his daughter’s son to be distributed to him at age 30 which, if he did not survive to that age, was to be distributed to his mother (rather than to any children he might have). Finding that “it does not necessarily follow [from the testator’s creation of trusts for the benefit of his daughter and her son] that he wanted to provide for more distant generations who were not yet born rather than living collateral relatives,” the court ordered distribution of the trust corpus to the heirs of settlor’s deceased
brother, sister, and sister-in-law, and to the named nephew, rather than to the daughter’s grandchildren. *Id.* at 484.

c. The same disposition in which the gift to “children” is made in one place elsewhere refers to “grandchildren,” indicating that the grantor intended to distinguish between descendants in the first generation and more remote descendants. In Phinizy v. Foster, 90 Ala. 262, 7 So. 836 (1880), the testator provided that “in the event of my son Edgar dying without issue living at his death, I desire his portion . . . to be divided equally among the children of . . . my daughter Elmira”; but should Elmira die without issue, “I desire [this] estate . . . to be equally divided among all my grandchildren and great-grandchildren.” At the time the will was executed, Elmira had five living children. When Edgar died without issue in 1887, only two of those children were still alive. Several of Elmira’s grandchildren, children of deceased children, were alive, however, and they sought to take as her “children” under the testator’s will. The court rejected their claim, holding *inter alia* that “[t]he term ‘children,’ there being no necessity to give it a broader signification to prevent the will being inoperative, and it not appearing the testator intended to use it in a more extensive sense, includes only the persons who descend from him in the first degree. When he intended grandchildren or great-grandchildren, he used those terms.” *Id.* at 265–266, 7 So. at 837.

Similarly, in Thompson v. Batts, 168 N.C. 530, 84 S.E. 858 (1915), a clause in the testator’s will directed “that the residue of my estate, both real and personal, . . . be equally divided between my wife and children, except George W. Thompson and T.J. Thompson,” and then gave “to my granddaughter, Lena Thompson, half share of my personal estate.” One of the testator’s children predeceased him, leaving a child who sought to share in the residuary bequest in place of his parent. The court, however, refused to expand the term “children” to include this grandchild, holding that by expressly providing for a grandchild in the disposition, “the testator clearly shows . . . that he understood the distinction between children and grandchildren.” *Id.* at 531, 84 S.E. at 858.

In Hogatt v. Clopton, 142 Tenn. 184, 217 S.W. 657 (1919), the testator left half of certain lands to his wife and half to his wife’s niece, with the wife’s half, on her death, to go to the niece. He further provided that “in the event of [the niece’s] dying without children or grandchildren, then the land . . . should go to the children of [the testator’s nephew] who may then be living.” The testator’s wife died in 1887, and thirty years later the niece died “without children or grandchildren.” At the niece’s death, the testator’s nephew had one surviving child and several grandchildren, by deceased children, who sought to take as the nephew’s “children.” The court held that the nephew’s surviving child took to the exclusion of the grandchildren, stating that the testator’s intent to discriminate between children and grandchildren is apparent from his use in
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one place of "children" and in another of "children and grandchildren."

The court in In re Friend's Estate, 164 Misc. 373, 298 N.Y.S. 941 (1937), decree affirmed, 253 App.Div. 801, 2 N.Y.S.2d 625 (1938), refused to expand the term "children" to include grandchildren on similar grounds. There, the testator left one-fourth of his residuary estate in trust for his daughter for life, with the corpus to be divided upon her death "into as many equal parts as there are children of my said daughter" and then distributed to "such children." The daughter died leaving a daughter and two grandchildren. In holding that these two grandchildren of the testator's daughter were not entitled to take as "children" under the testator's will, the court reasoned that where the testator "intended grandchildren to take, he used the word 'grandchildren' or 'issue,' and where he meant 'children' he employed the word 'children.'" Id. at 375-376, 298 N.Y.S. 943. See generally 5 American Law of Property, § 22.31 (A.J. Casner ed. 1952).

5. Language or circumstances indicating a contrary intent—"children" includes grandchildren—The cases that follow are typical of some of the more common situations in which contrary intent—that is, intent to include grandchildren and more remote descendants in a gift to "children"—has been found.

a. Cases in which "children" includes grandchildren if such construction is necessary to prevent the will from being inoperative. In In re Schedel, 73 Cal. 594, 15 P. 297 (1887), the testator left $2,000 to each of the "children" of my deceased sister . . . to be paid to them when he, she or they shall have arrived at the age of majority." At the time the testator made his will his sister had been dead for 42 years and the last of her children had been dead for seven years. Five grandchildren of the testator's sister sought, therefore, to take as "children" within the meaning of the will. In holding "that the word 'children,' as used by the testator in describing the issue of his deceased sister, should be construed to mean 'grandchildren,'" Id. at 599, 15 P. at 299, the court reasoned that at the time the will was drafted there were "no persons in existence who were children of his sister in the ordinary sense of that word, and could be none when the legacies would take effect." Id. at 598, 15 P. at 299. Furthermore, since he knew that she had been dead for 42 years, he "must have known . . . that her children, if living, could not be under the age of majority." Id.

b. "Children" construed to include grandchildren or more remote descendants to effectuate indicated intent to benefit equally two or more groups. In In re Walker's Estate, 240 Pa. 1, 87 A. 281 (1913), the testator directed that his daughter Rebecca should receive the interest on $6,000 annually until her death, at which time the principal was to be paid to her "child or children." The daughter died survived by a granddaughter but no children. In upholding the granddaughter's claim that she was entitled to take as a "child" under the will,
the court reasoned that "[t]o each of his other daughters he had given $6,000 absolutely, and we think it is clear that he intended the like sum to remain in Rebecca’s line, if possible." Id. at 3, 87 A. at 282.

Similarly, in Davis Trust Co. v. Elkins, 114 W.Va. 742, 175 S.E. 611 (1934), the testator created a trust with the income payable to his children for life, "and at the death of any of my said children, I give and bequeath his or her share in equal proportions, to his or her children." One of the testator’s daughters died survived by two children and by the child of a predeceased son. In holding that this grandchild was entitled to share in the bequest along with his grandmother’s two surviving children, the court reasoned that "[t]he tenor of the will under review discloses that the testator intended to provide for his children and their families in the spirit of equality." Id. at 749, 175 S.E. at 615. To deny this grandchild the opportunity to take the share which his father would have taken had he lived would effectively cut off one branch of the testator’s daughter’s family and would run counter to “the patriarchal spirit” evident throughout the will. Id. at 749, 175 S.E. at 614.

And in In re Blodgett’s Will, 250 App.Div. 324, 294 N.Y.S. 358 (1937), the testator set up a trust which ultimately was to benefit "the brothers and sisters of my deceased husband, Milton J. Blodgett, the children of such as may be dead to take the shares which their parents would have taken if alive." A sister of the testator’s husband died survived by a grandchild but no children. In holding that this grandchild was entitled to take along with the “children” of the life tenant, the court declared “that the purpose of the ultimate bequest was to benefit the several branches of the family (brothers and sisters) of her husband per stirpes and . . . the sole issue of a deceased sister of the testatrix’ husband, though a grandchild comes within the testamentary description of the ultimate remaindermen.” Id. at 332, 294 N.Y.S. at 367.

In Alsman v. Walters, 184 Ind. 565, 106 N.E. 879 (1914), a devise to the testator’s son for life “and after his death to his children surviving him in fee simple” was construed by the court to create a vested remainder interest in the son’s children living at the testator’s death, subject to diminution only upon the birth of other children to the son. This interpretation permitted a grandchild of the son to take as the representative of his deceased parent, although the court had previously noted that "[t]his court has frequently decided that the meaning of the word ‘child’ is not broad enough to include grandchild.” Id. at 569, 106 N.E. at 880. The court’s decision was also based on a presumed intention on the part of the testator to treat the families of the children of the son equally. “Nothing in this will warrants the imputation to testator of an intent to make the fee-simple title of this land a grand prize to the victor in his grandchildren’s race with death.” Id. at 575, 106 N.E. at 882.

c. The term “children” and a more inclusive term such as “issue” are used interchangeably.
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In Rogerson v. Wheeling Dollar Savings & Trust Co., 159 W.Va. 376, 222 S.E.2d 816 (1976), the testator provided for the distribution of the corpus of a trust to the "surviving children" of two deceased brothers, and to various other relatives or their "surviving issue." In determining the beneficiaries, the court held that the word "children" must be construed to include all lineal descendants, not just those of the first degree. "[W]hen it appears from the context that another meaning was intended such words will not be applied in their technical sense." Id. at 821. Here, the testator used the words "children" and "issue" interchangeably and apparently intended "to create a per stirpes distribution among all lineal descendants of the testator's siblings." Id.

A similar result was reached in Trust Company Bank v. Heyward, 240 Ga. 557, 242 S.E.2d 257 (1978). There, the testator's will provided that "[i]n the event my brother or any of my sisters shall have predeceased my wife the child or children of such brother or sister shall take per stirpes a one-fourth share of" the remainder interest in a trust. Elsewhere in the will, the testator used similar phrases to denote substitute, remaindermen. However, in those other provisions he used the term "descendants" interchangeably with "children." The court held that while "the popular and legal sense of the word 'children' ordinarily includes only first generation offspring," it will be read expansively where an intent to do so has been manifested. The court then concluded that "'[i]n the will now before us we find ample evidence that the testator intended that the word 'children' . . . was used to mean descendants." Id. at 364, 242 S.E.2d at 262.

§ 25.2 Gifts to "Children"—Children Born Out of Wedlock

When the donor of property describes the beneficiaries thereof as the "children" of a designated person, the primary meaning of such class gift term includes a descendant in the first generation of such person who is born out of wedlock. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. It is an undeniable fact that a child born out of wedlock is a descendant of that child's parents in the first generation. Public policy is and should be against discrimination as between two persons on the ground that one was born out of wedlock. The acceptance of this public policy is evidenced in the trend in state statutes of descent and distribution to eliminate in the determination of the heirs of a deceased person any difference in treatment of persons born in and out of wedlock. It is reasonable to assume that the donor who describes the beneficiaries of a
disposition as the “children” of a designated person favors such public policy and does not intend to draw any distinction between individuals who establish themselves as descendants in the first generation of the designated person on the ground of whether they are born in or out of wedlock. The burden should be on the donor to make clear that a child born out of wedlock is to be excluded as a beneficiary if that is the donor’s desire.

Historically, a child born out of wedlock was “filius nullius,” that is, the child of no one. Under that approach, a gift to the “children” of a designated person did not include in the takers thereunder a child of such person born out of wedlock. The rule was applied for a long time with such rigor that its applications violated the clear intent of donors. The judicial approach was gradually modified. Increasing attention was paid to the intent of the donor. The circumstances under which it was concluded that the intent of the donor was not to exclude a child born out of wedlock became fairly widespread. The time has come to shift from a rule that requires a finding of an intent of the donor to include a child born out of wedlock to a rule that requires a finding of an intent to exclude the child. The rule of this section makes that shift.

b. Proof that a child born out of wedlock is a child of the designated person. The rule of this section requires that a child born out of wedlock establish that he or she is a child of the designated person in order to share in a gift to “children.” If the child is unable to establish that fact, obviously he or she cannot be a taker under the gift.

c. Child born out of wedlock included in primary meaning of “children” but excluded on other grounds. A child born out of wedlock, the same as any other child, may be excluded from a gift to “children” on the ground that he or she is not born soon enough, or does not meet some contingency that attaches to the gift to “children,” such as a requirement of survival to some period of time or to some age. The rule of this section only places the child born out of wedlock initially in the list of possible takers.

d. Factors providing additional support for inclusion of child born out of wedlock in gift to “children.” In view of the fact that additional language or circumstances may overcome the inclusion of a child born out of wedlock in a gift to “children” of a designated person, it is relevant to see whether there are any factors present in the disposition that provide additional support for their inclusion. Such factors, if present, would make it more difficult to overcome the initial inclusion of the child.
Illustrative of the factors that provide additional support for the inclusion of a child born out of wedlock in a gift to the "children" of a designated person are the following:

(1) **The child is legitimated.** A child born out of wedlock can be legitimated in any one of several ways. The most common procedure is the intermarriage of the parents of such child subsequent to the birth of the child. Statutes sometimes permit legitimation by a father's acknowledgment of parenthood, and sometimes require such an acknowledgment plus a judicial procedure for its effectuation. One thing that might cause a donor to consider excluding a child born out of wedlock in a gift to "children" is the elimination of the problems of proof of parentage. Legitimation, before or after the execution of the dispositive instrument, eliminates that issue.

(2) **Marriage of parents is invalid.** A divorce obtained by a person in one state may not be recognized in another state. If such divorced person goes through a marriage ceremony after the divorce and the state in which the marriage ceremony takes place does not recognize the divorce, there is no valid marriage. Children born thereafter to such couple are technically born out of wedlock. In such case, the children are not considered in the minds of most people as born out of wedlock, and this fact is supportive of the inclusion of such children in a gift to "children."

(3) **Gift may be meaningless unless child born out of wedlock is included.** If the designated person whose "children" are the beneficiaries of the gift has only children born out of wedlock at the time the dispositive instrument is drafted and this fact is known to the donor, these facts are supportive of the inclusion of such children in the gift to the "children" of such person. These facts are even more supportive if it is no longer possible, or very unlikely, that the designated person will have any more children.

(4) **Child born out of wedlock member of family.** If the child born out of wedlock is treated as a member of the family of the person whose "children" are the beneficiaries of the gift and this is known to the donor at the time the dispositive instrument is executed, this fact is supportive of the inclusion of such child in the gift to "children" of the designated person. Normally, when a gift is made to the "children" of a designated person, the donor is interested in benefiting those individuals the designated person regards as his or her children.

(5) **Child born out of wedlock an heir of the person whose "children" are designated as the beneficiaries.** If the
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state law in the state in which either the donor or the person whose "children" are described as the beneficiaries resides provides that a child born out of wedlock will inherit on the same basis as a child born in wedlock, this fact is supportive of the inclusion of children born out of wedlock in the gift to the "children" of such person. Such state law represents a public policy favoring the elimination of distinctions in property rights on the basis of whether a person is born in or out of wedlock, and it is to be assumed that donors are in favor of such public policy unless they specify differently.

e. Language or circumstances indicating a contrary intent. The rule of this section is a rule of construction and hence it yields to any finding of a contrary intent of the donor from additional language or circumstances. A contrary indication of intent may result in the exclusion from the gift to "children" of a designated person of a child born out of wedlock that otherwise would be included.

Illustrations:

1. O by will transfers property "to the children of my son S." O's will provides as follows: "References in this will to 'child' or 'children' mean lawful blood descendants in the first degree of the parent designated." At the time of O's death, S has three children, C1, C2, and C3. C1 and C2 were born out of wedlock but C1 has been legitimated. C3 was born in wedlock. The language in O's will does not exclude C1 from the gift "to the children of my son S." The legitimation of C1 makes C1 a "lawful" blood descendant of S. If under the controlling statute of descent C2 would take a child's share as an heir of S, C2 is not excluded because C2 is a "lawful" blood descendant of S.

2. Same facts as Illustration 1 except that the provision in O's will is changed to read as follows: "References in this will to 'child' or 'children' mean blood descendants in the first degree of the parent designated who are born in wedlock." Both C1 and C2 are excluded from the gift "to the children of my son S." If the marriage of S was annulled after the birth of C3, C3 should be regarded as born in wedlock for the purposes of O's will.

3. Same facts as Illustration 1 except O's will contains an additional provision (sometimes referred to as a Reno divorce clause) which reads as follows: "A child born to persons who are openly living together as husband and wife after the performance of a marriage ceremony between them and such
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child's lawful blood descendants shall be considered in this will as lawful blood descendants of such child's parents and of any ancestor of such child's parents, regardless of the fact that a purported divorce of one or both of such persons with reference to a prior marriage is invalid." The quoted language specifically deals with one type of case where a child technically might not be a "lawful" blood descendant and provides that the child shall be regarded as a "lawful" blood descendant. Such clause should not be construed to mean that a child born out of wedlock could be a "lawful" blood descendant only in the situation described so as to prevent C1's legitimation from making C1 a "lawful" blood descendant.

4. Same facts as Illustration 1 except that it is established that O was a very religious person and he had disinherited his daughter and her descendants because she had resided with a man to whom she was not married and had had several children by him. This action of O was not changed by the fact that D's children were legitimated prior to O's death. On the basis of this additional information, the conclusion is justified that the legitimation of C1 will not make C1 a "lawful" blood descendant of S for purposes of O's will.

5. Same facts as Illustration 1 except that in other provisions in O's will he gave $1 to C1 and $1 to C2. The conclusion is justified that O did not intend that either C1 or C2 should share in the gift "to the children of my son S."

6. O by will transfers property "to the children of my son S." S has two children, C1 and C2. A third child, C3, claimed that S and C3's mother had had an extramarital affair and that C3 was born as a result of that relationship. O knew of this affair and knew of this claim at the time he executed his will, but S had told O that he was not the father of C3. Under these circumstances, the conclusion is justified that O did not intend that C3 be included in the gift "to the children of my son S" regardless of whether S is the father of C3.

f. Gift to "children"—grandchild or more remote descendant born out of wedlock when grandchildren and more remote descendants included. When grandchildren and more remote descendants are included in a gift to "children" under § 25.1, the status of grandchildren or more remote descendants born out of wedlock is governed by the rule of this section, unless language or circumstances indicate a contrary intent.

g. Cross reference. The effect on the rule of this section if a child is born as a result of artificial insemination is dealt with in § 25.3. If a child born out of wedlock would otherwise be included
in a gift to “children,” the effect of the adoption out of such child is considered in § 25.5.

STATUTORY NOTE TO SECTION 25.2

1. Child born out of wedlock recognized as heir of mother. Statutes in all 50 States and the District of Columbia provide that a person born out of wedlock is a child of his or her natural mother for purposes of intestate succession. (The intestate succession statutes are collected in items 2-4 below.)

2. Child born out of wedlock recognized as heir of father if parentage recognized by father or established by proof. Under the following statutes a person born out of wedlock is considered the child of his or her natural father for purposes of intestate succession if paternity is established before or after the father's death, whether or not the father has acknowledged the child's paternity:

Alabama Code Ann. § 43-8-48 (1982) (but see Alabama statute in item 5)
California Probate Code § 6408 (West Supp.1987) (but see item 6)
Colorado Rev.Stat. § 15-11-109 (1973) (but see item 5)
Delaware Code Ann. tit. 12, § 508 (1979)
Idaho Code § 15-2-109 (1979) (but see item 5)
Louisiana Civil Code Ann. art. 880 (West Supp.1987) (accompanying comment indicates “Once a relationship is proven by blood or adoption, the succession rights of such a relative are established without reference to the legitimacy of that relationship.”)
Massachusetts Gen.L. ch. 190, §§ 5, 7 (1986)
Minnesota Stat. § 524.2-109 (1986); statute providing that child born out of wedlock shall not inherit from the kindred of the father by right of representation (§ 525.172) repealed effective December 31, 1986
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Nebraska Rev.Stat. § 30-2309 (1979)
Nevada Rev.Stat. § 126.041 (1985) (quoted statute is similar to Uniform Parentage Act provision; statute providing for succession of children born out of wedlock (§ 134.170) repealed in 1979)
New Jersey Stat.Ann. § 3B:5-10 (West 1983)
Rhode Island Gen.Laws § 33-1-8 (Supp.1986), amending earlier version of statute which provided that child born out of wedlock not heir of father unless parents intermarried and father recognized child and which was declared unconstitutional in In re Estate of Cherkas, ___ R.I. ___, 506 A.2d 1029 (1986).
Utah Code Ann. § 75-2-109 (1978)
Virginia Code Ann. §§ 64.1-5.1 and 64.1-5.2 (1980)

3. Child born out of wedlock recognized as heir of father if parentage recognized by father.

   a. The following statutes provide that a child born out of wedlock is considered the child of his or her natural father for purposes of intestate succession if paternity has been established during the lifetime of the father. Most of the statutes also provide that paternity may be established after the death of the father if the father openly treated the child as his natural child or acknowledged paternity in some other manner.

   Indiana Code Ann. § 29-1-2-7 (West 1979) (paternity may be established after death of father if father married mother and acknowledged child's paternity)
   Iowa Code § 633.221 (1985), Iowa Code Ann. § 633.222 (West Supp. 1987) (paternity may be established after death of father if the evidence proving paternity is available during father's lifetime, or if father openly treated child as his natural child or has recognized child in writing)
   Kansas Stat.Ann. § 59-501 (1983) (paternity may be established after death of father if father notoriously or in writing recognized paternity)
   Maryland Estates and Trusts Code Ann. § 1-208 (1974) (with additional provisions similar to Kansas statute)
New York Estates, Powers and Trusts Law § 4-1.2 (McKinney 1981) (filiation proceeding during lifetime of father or clear and convincing evidence with acknowledgment by father if father is dead)

North Carolina Gen.Stat. § 29.19 (1984) (paternity may be established after death of father if father acknowledged child in writing and filed the acknowledgment)

Oklahoma Stat. tit. 84, § 215 (1981) (with additional provisions similar to Kansas statute)

South Carolina Code Ann. § 62-2-109 (Law Co-op. 1987) (paternity may be established after death of father if adjudication is commenced within six months after death of father and by clear and convincing proof) (but see item 5 below) (see item 4 below for prior statute, which this replaces effective July 1, 1987)


Wisconsin Stat.Ann. § 852.05 (1983-84) (with additional provisions whereby paternity can be established after death of father if father acknowledged paternity in court proceeding or in writing)

b. The following statutes provide that a person born out of wedlock is the child of his or her natural father for purposes of intestate succession only if the father has acknowledged paternity of the child:

Michigan Comp.Laws § 700.111 (1979) (see also Michigan statute in item 5 below)


4. Child born out of wedlock not recognized as heir of father. The following statutes provide that a person born out of wedlock is not a child of the natural father for purposes of intestate succession:

Kentucky Rev.Stat. § 391.090 (1984) (declared unconstitutional in Pendleton v. Pendleton, 560 S.W.2d 538 (Ky.1977); Opinion of Attorney General 79-285: where father files an affidavit recognizing child or where the fatherhood is established by an appropriate court action, the child is the child of the father for purposes of inheritance); repealed effective July 15, 1986

South Carolina Code Ann. § 21-3-30 (Law Co-op. 1976) (declared unconstitutional in Wilson v. Jones, 231 S.C. 230, 314 S.E.2d 341 (1984) (children born out of wedlock whose fathers' deaths occurred after April 26, 1977, can inherit from their fathers' estates); amended effective June 20, 1985, to provide that child born out of wedlock can inherit from father's estate if paternity established during lifetime of father or father has signed instrument acknowledging child as his; repealed effective July 1, 1987, and replaced by § 62-2-109 (see item 3a, above).
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West Virginia Code § 42-1-5 (1982) (declared unconstitutional in Adkins v. McEldowney, 167 W.Va. 469, 280 S.E.2d 231 (1981) ("Our legislature may want to provide a statutory scheme compatible with [the holding that this section is unconstitutional], outlining how illegitimate children may prove entitlement to inherit from their fathers. Until such time as it does, trial courts must evaluate each cause on a case-by-case basis." Id. at 473, 280 S.E.2d at 233.))

5. Child born out of wedlock recognized as included in class gift term if child would be heir under applicable statute of descent.

   a. The following statutes conform to § 2-611 of the Uniform Probate Code, which provides that "persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession." (The intestate succession statutes for the states whose statutes are listed below are collected in items 2-4 of this Statutory Note.)

      Florida Stat. § 732.608 (1985)
      Michigan Comp.Laws § 700.138 (1979)
      Nebraska Rev.Stat. § 30-2349 (1979)
      Utah Code Ann. § 75-2-611 (1978)
      Virginia Code Ann. § 64.1-71.1 (1980) (applies to all inter vivos trusts executed after July 1, 1978, and to all wills of decedents dying after the same date, regardless of when executed)

   b. Indiana and Pennsylvania have adopted statutes similar to § 2-611 of the Uniform Probate Code:

      Indiana Code Ann. § 29-1-6-1(e) (West 1979)

   c. The states whose statutes are listed below have adopted an earlier and more restrictive version of § 2-611 of the Uniform Probate Code. The following statutes provide that "persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession. However, a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father (emphasis added)."
Idaho Code § 15-2-611 (1979)
South Carolina Code Ann. § 62-2-609 (Law Co-op. 1987)

California has a statute similar to the earlier version of § 2-611 that provides that persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with the rules for determining relationships for purposes of intestate succession, but "in construing a devise by a testator who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or that parent's parent, brother, sister, spouse, or surviving spouse."

California Probate Code § 6152 (West Supp.1987)

REPORTER'S NOTE TO SECTION 25.2

1. Comparison with present state of the law—The rule of this section is not supported by the weight of judicial authority except in the recognition of various factors that are supportive of the inclusion of children born out of wedlock in a gift to the "children" of a designated person. Recent case law in some states supports the rule, and statutes have been enacted in several states that give support to the rule of this section. The first Restatement of Property in § 286 took a position contrary to the rule of 25.2 in that the primary meaning of the word "children" did not include children born out of wedlock unless the child was legitimated at the time the dispositive instrument was executed or a contrary intent was manifested. Various factors which justified a finding of a contrary intent were listed.

2. Rationale for the rule of this section—The justification for the rule of this section is stated in Comment a.

3. Cases supporting the rule of this section—Connecticut was the first state to reject the distinction between children born in and out of wedlock in the area of inheritance rights. In Eaton v. Eaton, 88 Conn. 269, 91 A. 191 (1914), the testator established a trust with the income payable to his two daughters for life. Upon the death of either daughter, the trustees were "to pay to each of the children of such deceased daughter an equal portion of her share, discharged of said trust." The nonmarital child of one of the testator's daughters (of whom the testator was "presumably" aware when he drafted the will) successfully argued for recognition as one of her mother's "children" under the will.

For many years, Connecticut was the only state which refused to distinguish between the inheritance rights of children born in and out of wedlock. In recent years, however, the courts in New York have followed suit, rejecting many such dis-
tinctions and to a large degree reversing the presumptions against nonmarital children.

The first case to move in this direction was Will of Hoffman, 53 A.D.2d 55, 385 N.Y.S.2d 49 (1976), in which the testator, before her death in 1951, established a trust for the benefit of her two cousins. The trust provided that on the death of the first of the cousins, his one-half share of the income should be paid for the remainder of the trust term "to his issue." One cousin died in 1965 leaving a daughter and a son. The son died in 1972 leaving two children born out of wedlock who sought to take their father's share of the trust income. A unanimous court held that "the word 'issue' should be construed to refer to legitimate and illegitimate children alike in the absence of an express qualification by the testatrix." Id. at 65, 385 N.Y.S.2d at 56. In so holding, the court noted that in light of "recent changes in societal attitudes and recent developments in constitutional law," the presumption against children born out of wedlock is "outmoded" and "discriminatory." Id. at 57, 385 N.Y.S.2d at 50. Other New York cases which reject distinctions between marital and nonmarital children include Matter of Dillon, 96 Misc.2d 920, 409 N.Y.S. 2d 700 (1978) (nonmarital grandson held entitled to share in a residuary bequest to "grandchildren" with his five half-siblings); Matter of Estate of Gans, 134 Misc.2d 426, 511 N.Y.S.2d 458 (Sur.Ct.1986) (child born out of wedlock to son of testatrix held entitled to inherit as "issue").

Although this trend in the case law toward granting greater recognition to the rights of children born out of wedlock is not as developed elsewhere as it is in New York, there is some indication that courts in other jurisdictions are moving in the same direction. For example, in Walton v. Lindsey, 349 So.2d 41 (Ala.1977), in which a nonmarital child sought to share with her half brothers and sisters born in wedlock a bequest to "my children, share and share alike," the Supreme Court of Alabama held that the question of whether such a bequest included a child born out of wedlock whom the father had recognized and supported was a question of fact precluding summary judgment.

In Estate of Dulles, 494 Pa. 180, 431 A.2d 208 (1981), the testator's granddaughter, who had been born out of wedlock, sought to establish her right to receive income from a trust established for the benefit of the testator's "grandchildren." In holding for the granddaughter, the court reasoned that "it cannot be said that testators whose wills fail to contain specific provisions are unanimous in the sentiment to discriminate against children born out of wedlock." Thus, the canon of construction which would normally bar her claim is "constitutionally infirm." Id. at 193, 431 A.2d at 214.

In Powers v. Wilkinson, 399 Mass. 650, 506 N.E.2d 842 (1987), the court held that a child born out of wedlock to a granddaughter of the donor was not "issue" for purposes of an inter vivos trust under the rule of construction which was in effect at the time the trust was created. However, the court went on to reverse the rule of construction then in effect in Massachusetts that, "absent clear expressions of a contrary intent, the term 'issue' must be read to exclude nonmarital descendants" and concluded instead that, in future cases, "the word 'is-
sue,' absent clear expressions of a contrary intent, must be construed to include all biological descendants." Id. at 657, 661–62, 506 N.E.2d at 846, 848 (emphasis added). The court held that the new rule of construction would apply only prospectively, and not to the case at hand.

4. Additional factors supporting the inclusion of persons born out of wedlock in a gift to "children" or other similar terms—

a. The child has been legitimated. In In re Sheffer's Will, 139 Misc. 519, 249 N.Y.S. 102 (1931), the testator established a trust for the benefit of his widow with varying portions of the remainder going to his four children or their "lawful issue." One of the testator's sons fathered two children out of wedlock, but subsequently married the mother of these two children. In construing the gift, the court held that the term "lawful issue" includes children who, although born out of wedlock, were legitimated by the subsequent marriage of the parents.

Similarly, in Dunlavy v. Lowrie, 372 Ill. 622, 25 N.E.2d 67 (1939), the testator devised an interest in certain real property to her son for life and on his death to "any child or children of his body" who may survive him. The testator's son had a nonmarital child, subsequently divorced his wife, and married the child's mother. In holding that the nonmarital child was entitled to the remainder interest, the court reasoned that "[t]he child was admittedly legitimated when the prior estate expired and it is immaterial that he was born illegitimate." Id. at 628, 25 N.E.2d at 71.

In Scales v. Scales, 564 S.W.2d 667 (Tenn.App.1977), the testator left each of his six children a share of his real property "for and during their lives with remainder to their children." One of the testator's sons had a nonmarital child whom he judicially legitimated in 1962 more than ten years after the testator's death. This legitimated child sought to take under the testator's will as a "child" of his father after the father's death in 1972. Noting that although the general rule provides "that absent clear evidence of contrary intention, words such as 'children' in a will will be construed to mean legitimate children and not to include illegitimate ones," the court held "that plaintiff's legitimation . . . rendered him legitimate" for purposes of inheritance, notwithstanding that he was not legitimated until forty years after his birth, or more than ten years after the testator's death. Id. at 671.

In Powers v. Steele, 394 Mass. 306, 475 N.E.2d 395 (1985), an out of wedlock grandchild who was born in 1977, sixteen years after the donor's death in 1961, and who was judicially legitimated in 1984 in the state of the child's domicile, was held to be "issue" of the donor and the donor's son for purposes of an inter vivos trust.

b. Marriage of parents invalid. In New Jersey Title Guarantee & Trust Co. v. Elsworth, 108 N.J. Eq. 229, 154 A. 602 (1931), the child of an invalid bigamous marriage sought to share in a remain-
der interest which was distributable to the "children" of her natural father. The court granted her request, holding that "[t]he child ... is not the offspring of a meretricious relation, but of a ceremonial marriage, at which the testatrix became the girl's grandmother." *Id.* at 233, 154 A. at 604. In fact, the testator and the child's father both apparently believed that his first marriage was invalid and viewed his second marriage as valid. Thus, although the marriage was technically invalid, and the child was therefore technically born out of wedlock, the child nevertheless was held to be included in the gift.

The testator, in Wood v. Paulus, 524 S.W.2d 749 (Tex.Civ.App. 1975), established a trust "for any lawfully begotten children of my son Claude N. Paulus, born after my death." Certain relatives of the testator challenged the legitimacy of Claude's daughter by his second marriage, claiming that because no decree of divorce was ever entered, his first marriage was never officially dissolved. Thus, Claude's second marriage was invalid, and the daughter was not a "lawfully begotten" child within the meaning of the will. The daughter responded by offering evidence that her parents were in fact validly married, and in addition she provided evidence of an informal marriage—that whether or not they were invalidly married, her parents held themselves out as husband and wife. In holding that the daughter was entitled to take under the testator's will, the court noted that the "will requires that the children be born in wedlock sanctioned by law. This necessarily includes informal marriages sanctioned by the Family Code." *Id.* at 759.

c. The gift would be meaningless unless a nonmarital child is included. In In re Kaufer's Will, 203 Wis. 299, 234 N.W. 504 (1931), the testator left $5,000 "to the children of my deceased sister Betty Kaufer Friend, to be divided equally among those living at the time of my death, including the child or children of a deceased child by right of representation." Betty's only daughter predeceased the testator leaving only nonmarital children. In determining whether these nonmarital grandchildren were "children" within the meaning of the bequest, the court held that if the testator was aware that they had in fact been born out of wedlock, that fact is "sufficient to rebut the presumption that legitimates only were intended." *Id.* at 304, 234 N.W. at 503. Since the record did not indicate whether the testator knew of their status, the court remanded the case to the trial court for further proceedings.

The testator in Old Colony Trust Co. v. Attorney General of the United States, 326 Mass. 532, 95 N.E.2d 649 (1950), left certain property "to the children of my late sister Doretta Wade." The testator's sister had two children, one of whom had been born out of wedlock. The court held that the nonmarital child was entitled to take under the will, reasoning that "[w]hen the will was drawn the testator knew that Doretta was dead and survived by but two children, one of whom was illegitimate. He would not, in our opinion, have used the plural word to
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refers solely to the legitimate son of Doretta." *Id.* at 533, 95 N.E.2d at 650.

d. The nonmarital child is treated as a member of the family. In In re Parson's Trust, 56 Wis.2d 613, 203 N.W.2d 40 (1973), the testator established a trust for the benefit of her son and daughter and provided that at the death of either of them, "I direct that my Trustee divide such deceased child's share of my trust estate into as many shares as such deceased child shall leave children surviving. One such share shall be set aside for each child. . . ." The testator's son had three children born during his first marriage. Three days after his divorce he married a second time and subsequently had another child. The second marriage was found to be invalid on technical grounds. In determining whether this "technically illegitimate" child was entitled to take as a "child" under the testator's will, the court held that the words "child" and "children" appearing in a will do not include an illegitimate child unless it plainly appears from the language of the instrument that the testator intended that the illegitimate child be included.

Similarly, in Lyon v. Lyon, 88 Me. 395, 34 A. 180 (1896), a child born out of wedlock, whose parents married after his birth, sought to take by the will of his father's sister a legacy of $2,000 bequeathed to her "nephews." In rejecting the child's claim, the court held that "[w]here legacies or devises are given to a 'child' or 'children' of some person named, or to 'nephews,' these words mean prima facie, legitimate children or nephews." *Id.* at 406, 34 A. at 182.

In Flora v. Anderson, 75 Fed. 217 (C.C.S.D.Ohio 1896), the will and codicil of Nicholas Longworth established a trust for the benefit of his daughter Eliza Longworth Flagg, with the remainder to "the issue of her body surviving her." Eliza Longworth Flagg died in 1891 "without issue of her marriage." However, an individual claiming to be her nonmarital son sought to take the remainder interest. In rejecting his claim, the court held that "even if he were the illegitimate son of Eliza L. Flagg, he would not be included in the meaning of the

5. Cases contrary to the rule of this section—Many of the cases contrary to the rule of this section are at least several decades old. In addition, a large number of them have been preempted by statutes embodying the rule of this section (see the Statutory Note to this section).

Typical of some of the older cases contrary to the rule of this section is Johnstone v. Taliaferro, 107 Ga. 6, 32 S.E. 931 (1899). There, the testator conveyed certain property to her then unmarried granddaughte...
phrase, 'the issue of her body surviving her.' That phrase applies only to legitimate children." *Id.* at 235.

In Marsh v. Field, 297 Ill. 251, 130 N.E. 753 (1921), the testator's great-grandson sought to take under a gift to "issue" even though he had been born out of wedlock. In rejecting his claim, the court held that "[i]n the absence of an expressed intention that these terms shall be treated in a manner differing from their settled meaning, an illegitimate child cannot take under the term 'child' or 'issue' in a will." *Id.* at 257, 136 N.E. at 753.

Among the more recent cases which do not support the rule in this section is Byers v. Womack, 367 F.2d 816 (7th Cir.1966). There, it was held that under Indiana law a child born out of wedlock was not one of the "children" of the testator's son. In so holding, the court stated that "[i]t is a rule of construction that prima facie the word 'child,' 'children,' or other terms of kinred, when used either in a statute or will, mean legitimate child or children or kindred." *Id.* at 818.

In Cooper v. Melvin, 223 Ga. 239, 154 S.E.2d 373 (1967), the court rejected the claim of two children born out of wedlock who sought to share in the proceeds of an insurance policy with the two children of their father's marriage. In holding that in the provision of the policy covering persons entitled to the proceeds in the absence of a designated beneficiary, the word "children" did not include those born out of wedlock, the court declared that "[t]he words children and issue, in deeds, wills, and other conveyances, must be held to mean legitimate children or issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates." *Id.* at 241, 154 S.E.2d at 375.

In Tindol v. McCoy, 535 S.W.2d 745 (Tex.Civ.App.1976), it was held that "[t]he words 'children born to his body' in a will . . . means prima facie legitimate children, and they cannot include illegitimate children unless a plain intention to so include them can be found on the face of the will itself." *Id.* at 751. Thus, the claim of the adoptive daughter of the testator's grandson, who had also claimed to be the illegitimate daughter of her adoptive father, was rejected.

Vicars v. Mullins, 227 Va. 432, 318 S.E.2d 377 (1984), was the first Virginia case dealing directly with the question of whether an illegitimate child would take under a will as "issue" of the father. In Vicars, the testator's son had an illegitimate child in 1901 who the son adopted in 1918, 14 years after the testator's death. The court found there to be no evidence that the testator had any contact with the illegitimate grandchild or that the testator's son had any contact with his illegitimate child before the testator's death. The court therefore held that "the presumed intent of [the testator] was to require that [the testator's son] leave legitimate issue" to inherit the testator's son's interest in certain real estate under the will. *Id.* at 440, 318 S.E.2d 381. The court also took into account, in reaching the decision, that at the time of the testator's death in 1904 an illegitimate child could not inherit it from his father.
6. Cases not directly involving the rule of this section but involving the rights of children born out of wedlock—The trend toward including children born out of wedlock in class gifts discussed in item 3 arise in an atmosphere of change created, in part, by a series of Supreme Court decisions. Beginning in 1968, the Court began to break down many of the distinctions between the rights of marital and nonmarital children, and while all such distinctions have not been eliminated, the ones that remain are, at the very least, subject to constitutional limitations.

The first of these cases was Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), in which the administrator of an accident victim's estate sued on behalf of five nonmarital children for the wrongful death of their mother, raising the issue of whether the term "children" in Louisiana's wrongful death statute included children born out of wedlock. In upholding the children's right of recovery, the Court held that the statute, if construed to deny the right of recovery for children born out of wedlock, creates an invidious discrimination contravening the Equal Protection Clause of the Fourteenth Amendment, since, "[I]egitimacy or illegitimacy at birth has no relation to the nature of the wrong allegedly inflicted on the mother." Id. at 72, 88 S.Ct. at 1511, 20 L.Ed.2d at 439. The companion case of Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73, 88 S.Ct. 1512, 20 L.Ed.2d 441 (1968), struck down the same statute as it applied to a suit by a mother for the wrongful death of her nonmarital child.

The equal protection standard articulated in Levy has been applied in other areas. Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) (establishing the right of children born out of wedlock to receive worker's compensation benefits for the death of their father); Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 772, 35 L.Ed.2d 56 (1973) (establishing the right of children born out of wedlock to compel support from their father); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973) (establishing the right of children born out of wedlock to participate in state supported welfare programs); Jiminez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974) (establishing the right of children born out of wedlock to receive social security disability benefits); Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) (striking down a statute which permitted children born out of wedlock to inherit only from their mothers, while children born in wedlock could inherit by intestate succession from both parents); Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) (invalidating a statute which required that all paternity actions be filed within one year of the child's birth); Pickett v. Brown, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983) (invalidating a statute which required that all paternity actions be filed within two years of the child's birth).

Some distinctions between children born in and out of wedlock have remained intact, however. In Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), the Court upheld a Louisiana intestate succession scheme, which unlike Trimble, supra, differentiated on the basis of the circumstances of
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the child's illegitimacy, thus barring a child born out of wedlock from sharing the proceeds of her father's estate with the children born of his marriage. In so holding, the Court recognized the state's legitimate power to make laws for the distribution of the property.

A number of subsequent decisions followed the reasoning in Labine in upholding distinctions between marital and nonmarital children. Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) (upholding a Georgia statute which precludes a father who has not legitimated his child from suing for the wrongful death of the child); Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978) (upholding a New York statute which allowed a child born out of wedlock to inherit from his intestate father only if a paternity order has been entered during his father's lifetime); Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976) (upholding a provision of the Social Security Act which required proof of dependency from children born out of wedlock, but not from marital children).

§ 25.3 Gifts to “Children”—Child Conceived by Means Other Than Sexual Intercourse

When the donor of property describes the beneficiaries thereof as “children” of a designated person, the primary meaning of such class gift term includes a child conceived by means other than sexual intercourse who is recognized by the designated person as his or her child. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. In the situation governed by this section the person whose children are designated as the beneficiaries of the disposition of property regards the child that is conceived by other than sexual intercourse as his or her child. A donor who has selected as beneficiaries of a property disposition the “children” of a designated person should have the burden of excluding from the class any person who has a reasonable claim to be regarded as a child of such person. In the instances covered by this section, the child in question will always have a reasonable claim to be given the status of such person’s child.

b. Homologous artificial insemination. Homologous artificial insemination is involved when a wife is artificially inseminated with the sperm of her husband. In such case, whether the designated person whose “children” are the beneficiaries of the property disposition is the wife or the husband, in the mind of the average donor the child would have the status of a child born to such
husband and wife as a result of sexual intercourse. There is no
basis of excluding such child from the gift to "children" in the
absence of a contrary manifestation of intent on the part of the
donor. The fact that the dispositive instrument refers to the
children as "lawful born children" or as children "born in wedlock"
is not a manifestation of a contrary intent.

Illustration:

1. O transfers property by will to T in trust. T is directed
to pay the income to O's daughter D for life and, on D's death,
to distribute the trust property "to D's children." At the time
O executed his will and at O's death, D was married to H₁ and
she had two children that were born to her and H₁ by sexual
intercourse. After O's death D and H₁ were divorced and D
married H₂. D and H₂ were unable to have a child by sexual
intercourse and decided to have a child by inseminating D
artificially with the semen of H₂. This was successful and a
child was born to D as a result of the artificial insemination.
This third child of D is included in the primary meaning of the
gift to the "children of D." The fact that O might not have
contemplated that his daughter D would have a child by artifi-
cial insemination in view of the fact that he knew she had had
two children without using artificial insemination is not a basis
for concluding that O would have intended to exclude the child
produced by artificial insemination.

c. Heterologous artificial insemination. Heterologous arti-
ficial insemination is involved when a woman is inseminated with
the sperm of a man other than her husband. If the designated
person whose "children" are the beneficiaries of the property
disposition is the impregnated woman, the child produced by the
process of artificial insemination is included in the gift to her
"children" under the rule of this section, in the absence of facts or
circumstances indicating a contrary intent of the donor. Such child
is the woman's child regardless of the source of the semen used in
the artificial insemination, and the burden should be on the donor to
distinguish among her children if the donor intends to make any
such distinction. If, however, the understanding was that the
impregnated woman would turn over the child to the man whose
semen was used and she in fact does so, then since she is not to
recognize the child as her own, it should be assumed that the donor
would not intend such child to be included in a gift to that woman's
"children," in the absence of further evidence that the donor
intended otherwise.

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If the designated person whose "children" are the beneficiaries of the gift is the husband of the impregnated woman, the issue is whether the persons involved, that is, the impregnated wife, the husband, and the man whose semen was used, intended that the child should be recognized as the child of the husband. For this to be true, the artificial insemination would have to be carried out with the husband's consent, and, if he consented, it is reasonable to assume that he intended to recognize the child as his own.

If the designated person is the man whose semen was used, the child produced by heterologous artificial insemination is not included in the gift to his children, unless the understanding of the persons involved was that the child would be turned over to him to be raised as his child. If this is the understanding, then the question is presented, if the man whose semen is used was married, will such child also be included in a gift to the "children" of his wife. If she consented to the arrangement, it is reasonable to assume that she will recognize the child as her own, particularly if for some reason she had been unable to have children of her own. If this is true, it is reasonable to assume the donor would intend to benefit such child under a gift to her "children."

Illustrations:

2. O transfers property by will to T in trust. T is directed "to pay the income to O's son S for life and, on S's death, to distribute the trust property to S's children." At the time O executed his will and on O's death S was married to W and they had two children born to them by sexual intercourse. Subsequent to O's death, S became infertile. W and S wanted another child and arrangements were made to have her artificially inseminated with the semen of another man whose identity was not revealed to either S or W. S consented to this procedure and recognized the child as his own. The person whose semen was used was not aware of where or when it was used. The child thus produced by W is included in the primary meaning of the gift "to the children of S." The fact that the child produced by artificial insemination will not be related by blood to O or to S does not justify the conclusion that O, the donor, would not intend such child, which S plans to recognize as his child, to be included in the primary meaning of the class gift term.

3. Same facts as Illustration 2 except that the third person whose semen is used to artificially inseminate W is known to both S and W and the third person knows his semen is to be used to impregnate W. It is assumed that this change
in facts would not have caused the donor to intend any differently as to the inclusion of the child in the primary meaning of the gift "to the children of S."

4. Same facts as Illustration 3 except that W made the arrangement to be artificially inseminated without S's knowledge and consent, but after the child was born S consented to bring the child into the family and raise the child as though it was his child. This belated recognition of the child by S causes the child to be included in the primary meaning of the gift "to the children of S" because it is assumed the donor would intend to benefit the child of S's wife that S is willing to raise and treat as his own.

5. Same facts as Illustration 4, except that after the child is born, W turns the child over to the man whose semen was used to produce the child. Such child would not be included in the primary meaning of a gift "to the children of S" but would be included in the primary meaning of a gift to the children of the man whose semen was used or to the children of his wife if she consented to the arrangement.

d. Child produced by artificial insemination where the persons involved are not married. The fact that a child is produced by artificial insemination where no married persons are involved results in a child born out of wedlock of the person whose semen is used and of the woman who is impregnated. In such case the rule of § 25.2 applies in determining whether such child born out of wedlock is included in a gift to the "children" of a designated person. If the child would be included in the gift under the rule of § 25.2, there may be circumstances in connection with the creation of a child by artificial insemination which would justify the conclusion that the child was to be recognized only as the child of one or the other of the persons involved, as would be the case where a single woman was artificially inseminated in order to have a child of her own and the man simply produced the semen as an accommodation to her. In such case, it would be reasonable to conclude that the donor would intend to include the child in a gift to the "children" of the impregnated woman but not in a gift to the "children" of the man whose semen was used in the artificial insemination.

e. In vitro fertilization and the surrogate mother. If the semen of a man is used to fertilize the egg of a woman outside the uterus with their mutual consent, and the fertilized egg is implanted in the woman who furnished the egg or in a surrogate mother who is to carry the child, it is reasonable to conclude that the child thus produced for the man and woman involved is to be recognized by them as their child. It is reasonable to conclude the
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donor would intend such child to be included in the primary meaning of a gift to the “children” of either one. In the absence of further evidence, it is reasonable to conclude that the donor of a gift to a surrogate mother’s “children” would not intend to include in the primary meaning of the class gift term the child carried by the surrogate mother (see Illustration 5).

STATUTORY NOTE TO SECTION 25.3

1. A Connecticut statute provides as follows:

(a) The words “child,” “children,” “issue,” “descendant,” “descendants,” “heir,” “heirs,” “unlawful heirs,” “grandchild” and “grandchildren,” when used in any will or trust instrument, shall, unless the document clearly indicates a contrary intention, include children born as a result of [artificial insemination].


2. Section 5 of the Uniform Parentage Act provides as follows:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband’s consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician’s failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.

The following statutes conform to the Uniform Parentage Act or are similar to the Act in that they provide for the status of a child conceived as a result of artificial insemination:

Alabama Code § 26-17-21 (1986) (conforming to the Uniform Parentage Act)

Alaska Stat. § 25.20.045 (1983) (child is considered for all purposes natural and legitimate child of both spouses)

Arkansas Stat.Ann. 34-720 (Supp.1985) (child born to married woman deemed legitimate natural child of woman’s husband if he consents in writing to artificial insemination) (see also item 3, below)
California Civil Code § 7005 (West 1983) (conforming to the Uniform Parentage Act)


Florida Stat. § 742.11 (1985) (child "irrebuttably presumed" to be legitimate)

Georgia Code Ann. § 19-7-21 (1982) (child "irrebutably presumed" to be legitimate)


Louisiana Civil Code Ann. art. 188 (West Supp.1987) ("The husband . . . cannot disavow paternity of a child born as the result of artificial insemination of the mother to which he consented.")

Maryland Estates and Trusts Code Ann. § 1-206 (1974) (child is legitimate child of both husband and wife)

Massachusetts Gen.L. ch. 46, § 4B (1986) (child considered legitimate child of both husband and wife)

Michigan Comp.Laws § 700.111(2) (1979) (child considered child of husband and wife for purposes of intestate succession) (see also § 333.2824 (1979))

Minnesota Stat. § 257.56 (1986) (conforming to the Uniform Parentage Act)

Missouri Ann.Stat. § 193.085 (Vernon Supp.1987) (if child is born to married woman as result of artificial insemination, with consent of her husband, name of husband shall be entered on birth certificate as father of child)

Montana Code Ann. § 40-6-106 (1985) (conforming to the Uniform Parentage Act)


New Jersey Stat.Ann. § 9:17-44 (West Supp.1986) (but donor of semen and woman can enter into contract whereby he will be treated in law as natural father of child)

New Mexico Stat.Ann. § 40-11-6 (1986) (but donor of semen to other than donor's wife may be treated as natural father of child if he consents in writing signed by him and the woman)

New York Dom.Rel.Law § 73 (McKinney 1977) (child considered legitimate for all purposes)
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Oklahoma Stat. tit. 10, § 552 (1981) (child considered in all respects same as naturally conceived legitimate child)


Tennessee Code Ann. § 68-3-306 (1983) (child considered legitimate child of both husband and wife)

Texas Family Code Ann. § 12.03 (Vernon 1986) (if husband consents to artificial insemination, resulting child is legitimate child of both husband and wife)

Virginia Code Ann. § 64.1-7.1 (1980) (child presumed for all purposes legitimate natural child of both husband and wife, the same as natural child)

Washington Rev.Code § 26.26.030 (1985) (but donor of semen and woman can agree in writing that said donor shall be the father)

Wisconsin Stat. § 891.40 (1983-84) (conforming to Uniform Parentage Act)


3. An Arkansas statute provides as follows:

   (B) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child, shall be for all legal purposes the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of the woman intended to be the mother.


4. A Louisiana statute provides as follows:

   Inheritance rights will not flow to the in vitro fertilized ovum as a juridical person, unless the in vitro fertilized ovum develops into an unborn child that is born in a live birth, or at any other time when rights attach to an unborn child in accordance with law. As a juridical person, the embryo or child born as the result of in vitro fertilization and in vitro fertilized ovum donation to another couple does not retain its inheritance rights from the in vitro fertilization patients.


REPORTER'S NOTE TO SECTION 25.3

1. Comparison with present state of the law—Estate of Gordon, 131 Misc.2d 823, 501 N.Y.S.2d 969, (Sur.Ct.1986) was the first case to address the question of whether children born during wedlock by means of artificial insemination are "issue" for purposes of interpreta-
tion of a testamentary trust. In *Gordon* the court held that two children born during wedlock to the wife of the decedent's son by means of heterologous artificial insemination "at the time of their birth were issue of decedent's son" and thus were contingent remaindermen of testamentary trusts. *Id.* at 825, 501 N.Y.S.2d 971. The court made this finding even though no statutory provision for legitimating the children existed at the time of the death of the decedent or of the birth of either child. (New York Dom. Rel. Law § 73, S.N. § 25.3, *supra*, enacted in 1974, now holds that such children would be considered legitimate for all purposes.)

There are no other cases that establish the presumed intent of the donor of a property disposition as to the status of a child conceived through artificial insemination. More specifically, no cases other than *Gordon, supra*, hold that the words "children," "grandchildren," "issue," "descendants," or other similar terms when used in a will or trust include or do not include children born as a result of artificial insemination. Under the statutes that have been enacted in a number of states (see the Statutory Note to this section), there is some basis for concluding that a child so conceived may take under such a term. A child conceived through homologous artificial insemination may be the legitimate child of the mother's husband for purposes of inheritance. There is also some indication in the case law that a similar rule would apply where conception is achieved through heterologous artificial insemination. The first Restatement did not consider the status of children who are conceived by means other than sexual intercourse.

2. Justification for the rule of this section—Justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—

a. Homologous artificial insemination. Only a few cases have passed on the question of whether a child born of homologous artificial insemination, where the wife is inseminated with sperm from her husband, is the legitimate child of the husband. Among those cases is the partially reported opinion of *Doornbos v. Doornbos*, 23 U.S. L.W. 2308 (Super.Ct., Cook County, Ill. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill.App.2d 473, 139 N.E.2d 844 (1956), which held, in dicta, that "[h]omologous artificial insemination . . . is not contrary to public policy and good morals, and does not present any difficulty from the legal point of view."

In *In re Adoption of Anonymous*, 74 Misc.2d 99, 345 N.Y.S.2d 430 (Sur.Ct.1973), it was held, again in dicta, that homologous artificial insemination "creates no legal problems since the child is considered the natural child of the husband and wife." *Id.* at 100, 345 N.Y.S.2d at 430–31.

The position taken by the courts in *Doornbos* and *Anonymous* is further supported by the presumption embodied in the statutory and common law of virtually every jurisdiction that a child born in wedlock is the legitimate child of the husband. As stated in *Joplin v. Meadows*, 623 S.W.2d 442, 443 (Tex.App.1981), "[t]his presumption of legitimacy is one of the strongest known to our law
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and it can be rebutted only by clear and convincing evidence showing the impossibility that the child was sired by the presumed father,” or as stated in K.S. v. G.S., 182 N.J.Super. 102, 107, 440 A.2d 64, 67 (1981), in order to rebut the presumption of legitimacy, “proof of illegitimacy must be such that there is no possible escape from that conclusion.” Since in the case of homologous artificial insemination the husband is in fact the natural father of the child, the presumption would effectively be irrebuttable.

b. Heterologous artificial insemination. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (1948), involved, inter alia, a husband’s right to visit the child born during his marriage. His estranged wife argued that since the child had been conceived through heterologous artificial insemination, where the wife is inseminated with sperm from a donor other than her husband, it was not her husband’s child and therefore no visitation rights should be granted. The court rejected the wife’s argument, granting visitation rights to the husband on the ground that the child was “potentially adopted or semi-adopted,” and went on to state in dicta that “[t]his child is not an illegitimate child.” The situation is the same, the court continued, as in the case of a child “born out of wedlock who by law is made legitimate upon the marriage of the interested parties.” Id. at 787, 78 N.Y.S.2d at 392. It must be noted, though, that the court did not purport to “pass on the legal consequences in so far as property rights are concerned in a case of this character.” Id.

In People v. Sorensen, 68 Cal.2d 280, 66 Cal.Rptr. 7, 437 P.2d 495 (1968), the defendant was convicted for failure to support the child born to his wife through heterologous artificial insemination, a procedure to which he had consented. In upholding the conviction, the court declared that the nonparticipating parent was the “lawful father” of the child for the purposes of past divorce support due to his consent to the procedure. The court further stated, again in dicta, that a child conceived through heterologous artificial insemination was legitimate for all purposes.

Similarly, in In re Baby Doe, 291 S.C. 389, 353 S.E.2d 877 (1987), the court held “that a husband who consents for his wife to conceive a child through artificial insemination with the understanding that the child will be treated as their own, is the legal father of the child born as a result of the artificial insemination and will be charged with all the legal responsibilities of paternity, including support.” Id. at 392, 353 S.E.2d at 878. The court went on to rule that such consent by the husband need not be in writing, but could be express or implied. In R.S. v. R.S., 9 Kan.App.2d 39, 670 P.2d 923 (1983), the court held that “a husband who with his wife orally consents to the treating physician that his wife be heterologously inseminated for the purpose of producing a child of their own is estopped to deny that he is the father of the child, and he has impliedly agreed to support the child and act as its father.” Id. at 44, 670 P.2d at 928.

In re Adoption of Anonymous, supra, which involved an adop-
tion in which the former husband of the petitioner’s wife refused his consent, raised the issue of whether a former husband who had consented to the heterological artificial insemination of his wife is the “parent” of the child born of that procedure, whose consent is required for the adoption of the child by another. The court held that the former husband is the child’s “parent,” whose consent is needed before such an adoption can take place, and went on to state in dicta that such child “is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.” *Id.* at 105, 345 N.Y.S.2d at 435-36.

The position that children conceived through heterological artificial insemination are children born in wedlock is further supported by the presumption that a child born to a married woman is the legitimate offspring of her husband. It is unclear how helpful this presumption will be, however, since it is generally rebuttable upon a showing that the husband was impotent or that he had no access to his wife at the time of conception, A.G. v. S.G., 199 Colo. 403, 609 P.2d 121 (1980), or upon a showing of clear and convincing evidence that it is naturally, physically, or scientifically impossible for the husband to be the father. Leonard v. Leonard, 360 So.2d 710 (Ala.1978). Since, in contrast to cases in which conception is achieved through homologous artificial insemination, evidence that it is impossible for the husband to be the natural father exists in virtually every case in which heterologous artificial insemination is employed, the presumption of legitimacy could be rebutted in most such cases. *But see In re Marriage of Stephen and Sharyne B.*, 124 Cal.App.3d 524, 177 Cal.Rptr. 429 (1981) (blood test conclusively establishing non-paternity held insufficient to rebut presumption of legitimacy where two-year statute of limitations not met).

In *Karin T. v. Michael T.*, 127 Misc.2d 14, 484 N.Y.S.2d 780 (Fam.Ct.1985), a female posing as a male married another woman and signed an artificial insemination agreement which stated in part “[t]hat such child or children so produced are his own legitimate child or children and are the heirs of his body,” and that he waived any rights to disclaim such children. *Id.* at 16, 484 N.Y.S.2d at 782. Two children were subsequently born to the couple as the result of artificial insemination. The couple later moved to have the “marriage” declared null and void, and the Department of Social Services brought an action against the “father” for support. The court held that contract and equitable estoppel prevailed to prevent the “father” from denying parenthood, and that the “father” was indeed a “parent” with parental responsibilities. The court found the “father” to be chargeable with support of the children and that “[w]hatever may be the rights and/or remedies of the [“father”] and the mother of these children concerning . . . inheritance rights and any others are left to another forum at another time.” *Id.* at 19, 484 N.Y.S.2d at 784.

4. Cases contrary to the rule of this section—in a somewhat dated opinion, *Doornbos v. Doornbos*, su-
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pra, it was held that “heterologous artificial insemination . . . with or without the consent of the husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore illegitimate. As such it is the child of the mother and the father has no right or interest in such child.”

Gursky v. Gursky, 39 Misc.2d 1083, 242 N.Y.S.2d 406 (1963), was an annulment proceeding in which the husband claimed, inter alia, that there was no issue of the marriage in question, since the child born during the marriage was conceived through artificial insemination. The court agreed with the husband, holding that a child conceived through artificial insemination of a married woman using semen donated by someone other than her husband is not the legitimate issue of the husband, even though the husband had consented to the procedure. The husband, however, was estopped from refusing to support the child, since he consented to the procedure and since the wife probably would not have undergone the procedure in the absence of such consent. (Note: the holding in this case that children conceived through artificial insemination are illegitimate has been reversed by statute in New York State [see the Statutory Note to this section].

Further support in the case law for the notion that children conceived through heterologous artificial insemination are not the legitimate offspring of their mother's husband can be found in Leonard v. Leonard, supra, which held that the term “bastard” applies not only to a child born out of wedlock, but also to a child born in wedlock but sired by a man who is not the mother's husband. Similarly, In re Marriott's Estate, 515 P.2d 571 (Okl.1973), held that a statute providing that all children born in wedlock are presumed to be legitimate meant children born while the purported parents are married to each other. Since in the case of heterologous artificial insemination the child's natural parents are not married to each other, if the rule of Leonard and Marriott were applied the child would be considered born out of wedlock.

In K.S. v. G.S., supra, a husband refused to support the child born to his wife through heterologous artificial insemination on the ground that he had not consented to the procedure. The court found that he had, in fact, consented to the procedure, but stated in dicta that “in the absence of a husband's consent to artificial insemination support obligations may not be imposed on him.”

182 N.J. Super. at 106, 440 A.2d at 66.

5. Related issues—

a. Rights of children artificially conceived where parties are unmarried. No cases have arisen which address the inheritance rights of children conceived through artificial insemination where the parties are unmarried. However, C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom.Rel.1977), addressed the issue of whether the known donor of semen used by an unmarried woman to artificially inseminate herself had any rights with respect to the resulting child. The court noted that if the child had been conceived by intercourse, the man would be the father even though the couple was unmarried. “Likewise, if an unmarried woman
conceives a child through artificial insemination from semen of a known man, that man cannot be considered to be less a father because he is not married to the woman." Id. at 167, 377 A.2d at 824. Noting that "[i]t is in a child’s best interests to have two parents whenever possible," the court found C.M. to be the natural father, with visitation rights and duties of support and maintenance of the child. Id. at 167, 377 A.2d at 825.

b. In vitro fertilization. In regard to the rights of children conceived through in vitro fertilization whether carried to term by the true mother or a surrogate mother, the issues are directly analogous to those raised by artificial insemination, and it is likely therefore that many of the same principles would apply.

c. "Equitable parent" doctrine. In Atkinson v. Atkinson, 160 Mich. App. 601, 408 N.W.2d 516 (1987), a Michigan court adopted the doctrine of "equitable parent," holding that "notwithstanding the fact that the husband is not the biological father of a child born during the marriage, the husband may acquire rights of paternity under the theory of ‘equitable parent’ and the analogous doctrine of ‘equitable adoption.’" Id. at 604, 408 N.W.2d at 517. The court found "that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support." Id. at 608, 408 N.W.2d at 519.

d. "Surrogate father". L.M.S. v. S.L.S., 105 Wis.2d 118, 312 N.W.2d 853 (App.1981) dealt with the question of "[w]hether a husband who [because of his own sterile condition] has agreed to his wife’s impregnation by another man should be required to support a child born during the marriage but not fathered by him." Id. at 120, 312 N.W.2d at 854. The court found that the husband had all the legal duties and responsibilities of fatherhood, including support.


§ 25.4 Gifts to “Children”—Adopted Children

When the donor of property describes the beneficiaries thereof as the “children” of a designated person, the primary meaning of such class gift term

(1) includes any child adopted by the designated person in an adoption proceeding, if such person is the donor, and

(2) if the designated person is other than the donor, includes

(a) any child adopted by the designated person in an adoption proceeding that he or she has raised, or

(b) any child adopted by the designated person in an adoption proceeding under circumstances that contemplate that the child will be raised by him or her.

It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. A person other than the donor who adopts a child he or she has raised or which he or she contemplates raising draws no distinction in his or her mind between a natural-born child in the family and such an adopted child. It is reasonable to conclude that the donor of a disposition of property would likewise not intend any distinction to be drawn between natural-born children and such adopted children in the enjoyment of the benefits conferred on “children” of the designated person. If the adoption is made under circumstances where the adopted child has not been raised and will not be raised as would a natural-born child of the adopting parents, it is reasonable to conclude that the donor of the property disposition would not intend such adopted child to share in the benefits of the disposition to the designated person’s “children.”

If the designated person whose “children” are the beneficiaries of a disposition of property is the donor, then any child the donor has adopted is included primarily in a gift to the donor’s “children.” Only if the language or circumstances indicate a contrary intent will the donor’s adopted child not be included in the primary meaning of the class gift term.
Illustrations:

1. O transfers property by deed to T in trust. T is directed to pay the income to O for life and on O's death, to distribute the trust property "to O's children." The trust is irrevocable. O has two natural-born children. When O is 80 years old, he decides he would like to have a favorite niece share in the distribution of the trust property on his death. He adopts the niece, who is 50 years of age at the time of the adoption. O dies. The adopted child (niece) is entitled to share in the trust property on the same basis as O's two natural-born children. The ability to add beneficiaries to an existing class gift by the process of adoption is not a power that has tax significance any more than the ability to add beneficiaries to an existing class gift by the natural process of having more children has tax significance.

2. Same facts as Illustration 1, except that O's two natural-born children die before O, each child leaving two children who are grandchildren of O. O adopts his four grandchildren as well as his niece. The five adopted children are entitled to share in the trust property on O's death as the "children" of O.

b. Adopting parent other than donor—adopted child has been or will be raised by the adopting parent. If a child is adopted at or shortly after birth, it is clear that it is contemplated that the child will be raised as a natural-born child would be raised. If the adopted child has had no previous close relationship with the adopting parent and has reached his or her majority at the time the adoption takes place, the raising of the child is largely over and this will prevent the adopted child from being assimilated into the family, as is the case when the child is adopted at an earlier age. The rule of this section only causes a child adopted by a person other than the donor to be included in the primary meaning of a gift to such person's "children" when the child has gone or will go through a developing process with the adopting parent for some reasonable period similar to that in the case of a parent and a natural-born child. The donor of the property disposition, however, may manifest an intent to include in a gift to "children" of a person other than the donor an adopted child, regardless of the circumstances of the adoption.

Illustration:

3. O transfers property by will to T in trust. T is directed to pay the income to O's son S for life and on S's death, to distribute the trust property "to S's children." Some years after O's death, it becomes apparent that S and his wife W will
not have any natural-born children. S adopts a child who has reached majority and then negotiates to buy from the adopted child the remainder interest that S believes is vested in such child, which, if true, will result in S having both the life interest under the trust and the vested remainder interest. S in his will gives the remainder interest to W. S dies. If the gift "to S's children" fails because no child of S within the primary meaning of that class gift term under O's will has come into existence, the property will pass under the residuary clause in O's will. If, however, the adopted child of S is a child of S within the meaning of the gift "to S's children," then W will be entitled to the remainder interest under the trust. The rule of this section excludes the adopted child under the circumstances from the primary meaning of the class gift term, as the adoption did not take place under circumstances that contemplated bringing the adopted child into the family and raising the adopted child as a natural-born child would be raised.

4. O transfers property by will to T in trust. T is directed to pay the income to O's daughter D for life and on D's death, to distribute the trust property "to D's children." Some years after O's death, D undertakes to provide financial help for an adult child of a deceased friend of D who is severely handicapped. In order to give the handicapped child some financial security, D adopts such child. Such adopted child of D should not be included in the gift "to D's children" under the trust created by O's will.

c. Language or circumstances indicating a contrary intent that excludes adopted children that otherwise would be included. The donor of a disposition of property may manifest an intent to exclude adopted children that otherwise would be included under a gift to the "children" of a designated person. The donor may desire to benefit only blood relatives of the designated person. This desire may be accomplished by defining "children" as "lawful blood descendants in the first degree of the designated ancestor." If the donor provides that the gift is to "the natural-born children of my son," an adopted child of the son is excluded. If the gift is to "all children born to my son," such language should exclude a child adopted by the son. If the donor provides that the gift is to the "lawful children of my son," such language should not exclude an adopted child that otherwise would be included, because an adopted child is a lawful child.

d. Donor knows that the person whose "children" are named as beneficiaries has an adopted child. If the donor of a disposition of property describes the beneficiaries thereof as the
"children" of a person other than himself or herself and knows at the time the dispositive instrument is executed that such person has an adopted child, it is reasonable to conclude that the donor intends to include such adopted child in the primary meaning of the gift to "children" regardless of the circumstances of the adoption. If such adopted child was adopted under circumstances that would result in the child's inclusion in the primary meaning of the class gift term, even if the donor had not known of the adoption, then the fact that the donor knew of the adoption does not justify the conclusion that the donor would intend a subsequently adopted child to be included regardless of the circumstances of the adoption.

Illustration:

5. O transfers property by will to T in trust. T is directed to pay the income to O's daughter D for life and on D's death to distribute the trust property "to the children of D." At the time O executed his will, D had no children of her own but had adopted two children when they were very young and was raising them in her family. Some years after O's death, D's first husband died and D married a man who had two grown children. At the urging of her second husband, D adopted his two children with the expectation they would become beneficiaries under her father's trust. The conclusion is justified that O would not intend the children of D's second husband to be included in the primary meaning of his gift "to the children of D," even though he intended the two children originally adopted by D to be so included.

e. Adopted child excluded on grounds that have no relation to fact that child is adopted. An adopted child included in the primary meaning of a gift to the "children" of a designated person may be excluded as a beneficiary because the child is not adopted until after the class has closed to any increase in the class membership (see Chapter 26), or because the adopted child does not meet a requirement of survival that applies to all class members (see Chapter 27).

f. Cross reference. The status of a child who is adopted out with reference to such child's natural parents is considered in § 25.5.

STATUTORY NOTE TO SECTION 25.4

1. The following statutes conform to the Uniform Probate Code § 2-611, which provides that adopted persons are included in class-gift terminology and terms of relationship:
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California Probate Code § 6152 (West Supp.1987) (see additional discussion of statute in item 5, below)
Florida Stat. § 732.608 (1985)
Idaho Code § 15-2-611 (1979)
Michigan Comp.Laws § 700.138 (1979)
Nebraska Rev.Stat. § 30-2349 (1979)
South Carolina Code Ann. § 62-2-609 (Law Co-op.1987)
Utah Code Ann. § 75-2-611 (1978)

Virginia Code Ann. § 64.1-71.1 (1980) (applies to all inter vivos trusts executed after July 1, 1978, and to all wills of decedents dying after the same date, regardless of when executed)
Wisconsin Stat. § 851.61 (1983-84) (applies only to instruments executed after April 1, 1971, and only if adopted person was a minor at the time of adoption or child was adopted after having been member of adoptive parent's household prior to age 15)

2. The following statutes provide that an adopted person shall be treated as if he were the genetic child of the adopting parent for purposes of the applicability of all documents and instruments, whether executed before or after the adoption decree is issued, which do not expressly exclude an adopted person in their operation or effect (the asterisk after a statute indicates that the state involved is also listed under item 1 of this Statutory Note):

Florida Stat. § 63.172 (1985)*

Georgia Code Ann. § 19-8-14 (1982) (child also takes as "child" of adoptive parent under class gift made by will of third person)
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Indiana Code Ann. § 29-1-6-1(d) (West 1979) (testamentary instruments only; if adoptee is not child of testator applies only if child was adopted prior to age 21 and before the death of the testator)

Maryland Family Law Code Ann. § 5-308 (1984) (if instrument executed prior to June 1, 1947, section applies if decree of adoption was entered on or after same date; statute construed in litigation culminating in Mercantile–Safe Deposit & Trust Co. v. Purifoy, 280 Md. 46, 371 A.2d 650 (1977), and Purifoy v. Mercantile–Safe Deposit & Trust Co., 567 F.2d 268 (4th Cir.1977))

Massachusetts Gen.L. ch. 210, § 8 (1986)

Michigan Comp.Laws § 700.128 (1979)*


New York Estates, Powers and Trusts Law § 2-1.3 (McKinney Supp. 1987) (applies only to wills of persons dying or inter vivos instruments executed on or after March 1, 1964, and to inter vivos instruments executed prior to such date which were subject to the creator’s power to revoke or amend as of such date; disposition to “lawful issue” includes adopted children)


Oregon Rev.Stat. § 112.195 (1983) (applies only if adopted person was a minor at time of adoption or was adopted after having been raised by adoptive parents)

Pennsylvania Cons.Stat.Ann. § 2514(7) (Purdon Supp.1987) (testamentary instruments only; in construing will of testator who is not adopting parent applies only if adopted person was a minor at time of adoption or adoption reflected an earlier parent-child relationship that existed during the child’s minority)

Rhode Island Gen.Laws § 15–7–16 (1981) (does not apply if the particular estate limited to a class shall have vested in persons not including the adopted person prior to April 20, 1962, or if the child was over 18 at the time of the adoption and was adopted after the death of the maker of the instrument)

Tennessee Code Ann. § 36–1–126 (1984) (does not apply if the particular estate limited to a class vested in persons other than the adopted person prior to March 29, 1976, or if child was over 21 at the time of adoption)
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Texas Family Code Ann. § 16.09 (Vernon 1986)
Wisconsin Stat. § 851.51 (1983-84) (applies only to instruments executed after April 1, 1971, and only if adopted person was a minor at the time of adoption or child was adopted after having been member of adoptive parent's household prior to age 15)*

3. The following statutes provide generally for the effect of adoption but do not state specifically whether an adopted child will be considered a child of the adoptive parents for the purpose of construing wills and other instruments (the asterisk after a statute indicates that the state involved is also listed under item 1 of this Statutory Note).

a. The following statutes provide that an adopted child shall be entitled to the same rights as a natural child of the person adopting the child:

   Louisiana Civil Code Ann. art. 214 (West Supp.1987)
   Missouri Ann. Stat. § 453.090 (Vernon 1986)*

b. The following statutes provide that after the final decree of adoption is entered the relation of parent and child and all the rights, duties, and other legal consequences of the natural relation of parent and child shall thereafter exist between such adopted child and the persons adopting such child and the kindred of the adoptive parents:

   Mississippi Code Ann. § 93-17-13 (1972)
   Montana Code Ann. § 40-8-125 (1985)*
   Nebraska Rev. Stat. § 43-110 (1978)*
   Oklahoma Stat. tit. 10, § 60.16 (Supp.1986)
   South Carolina Code Ann. § 20-7-1770 (Law Co-op. Supp.1986); amended effective July 1, 1987, and, for purposes of this statutory note, replaced by § 62-2-109 (see item 3c, below)*

c. The following statutes provide that after the decree of adoption is entered the child shall become the legal child of the persons adopting him, and they shall become his legal parents with all the rights and duties between them of natural parents and legitimate child:

   Alabama Code § 26-10-5 (1986)*
   Colorado Rev. Stat. § 19-4-113 (1986)*
   Hawaii Rev. Stat. § 578-16 (1985)*
   Minnesota Stat. § 259.29 (1986)
   South Carolina Code Ann. § 62-2-109 (Law Co-op. 1987); effective July 1, 1987, replaces § 20-7-1770 for purposes of this statutory note (see item 3b, above)*

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d. The following statutes provide that for the purpose of intestate succession the adopted person inherits from and through the adoptive parents in the same manner as a natural-born child inherits from and through the child's natural parents:

California Probate Code § 6408 (West Supp. 1987)
Idaho Code Ann. § 16-1508 (1979)
Iowa Code Ann. § 633.223 (1985)
West Virginia Code § 48-4-11 (1986)

4. The following statute provides that upon the issuance of a final adoption decree the same rights, duties, and obligations, and the same right of inheritance shall exist between the adopted person and the person or persons making the adoption as though the adopted person had been the legitimate child of the person or persons making the adoption; except the adopted person shall not be capable of taking property expressly limited to the heirs of the body of the persons making the adoption and there shall be no right of inheritance between the adopted person and his issue on the one hand and predecessors in line of descent and collateral kin of the person or persons making the adoption on the other hand:


5. The following statute provides that, unless otherwise provided in the will, “[i]n construing a devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent’s parent, brother, sister, or surviving spouse”:

California Probate Code § 6152 (West Supp. 1987) (see also item 1, above)

6. The following statute provides that the adoptee shall be, to all intents and purposes, and for all legal incidents, the child, legal heir, and lawful issue of the adoptive parent, entitled to all rights and privileges, including the right of inheritance and the right to take under testamentary disposition:


REPORTER'S NOTE TO SECTION 25.4

1. Comparison with present adopted child in the primary mean-state of the law—There is judicial support for the inclusion of an adopted child in the primary meaning of the word “children,” but these cases have not generally ar-
articulated a limitation on their inclusion along the line of the limitation expressed in subsection (2) of § 25.4. Several statutes providing that adopted children are included in the primary meaning of the word “children” apply only if the child was a minor at the time of adoption or the adoption reflected an earlier parent-child relationship that existed during the child’s minority (see the Statutory Note to this section, item 2). There is substantial judicial support for the exclusion of an adopted child, but state statutes in many jurisdictions have overruled these cases. The first Restatement, in § 287, took the position that adopted children were excluded under a limitation to the “children” of the adopting parents, but suggested that the fact that the conveyor was also the adoptive parent, or the conveyor at the time of the execution of the instrument knew of the adoption, would tend to establish a contrary intent of the conveyor.

2. Justification for the rule of this section—The justification for the rule of this section is contained in Comment a.

3. Cases which recognize that an adopted child is included in the primary meaning of a gift to “children”—In re Will of Patrick, 259 Minn. 193, 106 N.W.2d 888 (1960), stated in dicta: “In this state adopted children stand in the same position as biological children in all respects, including their right to inherit by laws of intestacy or under appropriate testamentary provisions. . . . This is not the general, or perhaps even the majority, view. However, it is based upon humane and compassionate considerations which are appropriate to the attitudes of a modern civilized society, and which are expressed in our statutes on this subject. We have come to realize that it is not the biological act of begetting offspring—which is done even by animals without any family ties—but the emotional and spiritual experience of living together that creates a family. The family relationship is created far more by love, understanding and mutual recognition of reciprocal duties and bonds, than by physical genesis. . . . Formal adoption recognizes this fact as between parents and children.” Id. at 195-96, 106 N.W.2d at 890. This case actually relied on the fact that the testator knew of an earlier adoption to hold that an adopted child was included in a gift to the “descendants” of another person.

Three years later, however, the same court stated the rule that, “absent clear expression to the contrary, the word ‘children’ includes adopted children.” In re Trusteeship Agreement With Nash, 265 Minn. 412, 416, 122 N.W.2d 104, 107 (1963) (citing Patrick’s Will in support and § 287 of the first Restatement as contra). The court discussed the common law reluctance to give adopted children the same rights as natural children, but wrote, “it is clear that this state has by statute and judicial decision assumed a more liberal attitude. The forbearance, affection, and respect which characterize the relationship of a mutually devoted parent and child are fostered more by the intimate experience of daily life which they share together than by the accident of common biological origin.” Id. at 419, 122 N.W.2d at 109. Here the settlor left property in trust for her son Willis, Willis’s two daughters, “and any other issue of my said son who may hereafter be born.” Willis later adopted two
more children during a second marriage. Faced with a neutral and inconclusive trust instrument, the court stated the presumption to be in favor of the adopted child and that "one who seeks to exclude adopted children from the benefits of such a trust has the burden of proving by a fair preponderance of the evidence that this was what settlor had in mind." Id. at 418, 122 N.W.2d at 108–109. Since "[n]either party . . . succeeded in convincing us of what the settlor had in mind," the adopted children were allowed to take. See also In re Trusts created by Agreement with Harrington, 311 Minn. 403, 250 N.W.2d 163 (1977) (use of phrase "issue of the body" by testator did not explicitly exclude adopted children).

Even as the dicta of Patrick's Will developed into the rule of Nash, the position adopted by the Minnesota legislature and courts was becoming "the general, or perhaps even the majority, view." Today a majority of jurisdictions have adopted statutes providing that an adopted person shall be treated as if he were the natural child of the adopting parent for purposes of applying all documents and instruments that do not expressly exclude the adopted person, whether executed before or after the issue of the adoption decree (see the Statutory Note to this section). Several states have statutes conforming to Section 2-611 of the Uniform Probate Code, providing that adopted persons are included in class gift terminology and terms of relationship. In addition, several states have statutes that provide generally for the effect of adoption but do not state specifically whether an adopted child will be considered a child of the adoptive parents for the purposes of construing wills and other instruments. These statutes typically state that the adopted child shall have the "same rights" as a natural child or that the relationship between the adopted child and the adopting parent shall be that of parent and child. Only Vermont provides by statute that an adopted person shall not be capable of taking property expressly limited to the heirs of the body of the adopting parents.

Prince v. Nugent, 93 R.I. 149, 172 A.2d 743 (1961), affirmed per curiam, 93 R.I. at 170, 172 A.2d at 755 (1961), construed one such statute. A trust deed provided that part of the trust income was to be paid to and among "the female children and more remote female issue living at the time of such payment" of each of three named people. Nine years after the trust was executed, William Wood Prince, a child of one of the three named people, adopted a son, Alain. Alain subsequently had a natural daughter who was allowed to take a share of the trust income. The court first determined that Alain was Wood Prince's "child." The statute in force when the trust was executed, which had enlarged the capacity of an adopted child to inherit, did not automatically include the adopted child within limitations to the "children" of the adopting parent. The legislature subsequently adopted a rule of construction providing that, absent the contrary intent of the donor, in all instruments executed before or after the law became effective, an adopted child is deemed to be included in a gift to lawful issue or descendants. The court considered the latter statute to be a rule of evidence, holding that under the
statute the lack of express or implied intent to exclude adopted children from a gift to its adoptive parents is "prima facie evidence of [the] intent to include therein the adopted child." *Id.* at 166, 172 A.2d at 753. Parties opposing the inclusion of adopted children in the class are permitted to introduce evidence to overcome the prima facie case. "This, in effect, reverses the burden of proof as it was fixed by the decisions of this court prior to the enactment of [the statute]." *Id.* The court stated that the statutory words "lawful issue" must be given a broad, nontechnical reading to encompass all limitations, so as not to leave the status of an adopted child in doubt. "[S]uch of these statutes as are intended to integrate adopted children into family units and thus promote the public interest in the preservation of the family are to be liberally construed in favor of the adopted child." *Id.* at 168, 172 A.2d at 754. As nothing in the deed of trust or in the circumstances of its execution was of "sufficient probative force to overcome the prima facie case arising out of an application of the rule of construction," Alain was held to be the child of Wood Prince, and Alain's daughter was held to be the "remote female issue" of the grantor. *Id.* at 170, 172 A.2d at 755.

In In re Adler’s Will, 30 Wis.2d 250, 140 N.W.2d 219 (1966), Frederick Adler placed property in trust for his nieces and nephews, providing that the "issue" of any niece or nephew who dies before the distribution of the trust property may take the share to which the predeceased person would have been entitled. Seven years after Frederick's death and 12 years after the trust instrument was executed, his niece adopted a child. The court noted the stipulation that Frederick had never referred to his intention with respect to adopted children. It then considered the law in force at the time the instrument was executed, which stated that "adoption . . . completely change[s] the legal status of the adopted person from that of a child of the natural parents to that of a child of the adoptive parents. . . . The word ‘issue,’ as applied to descent of estates, shall be construed to include all the lawful lineal descendents of the ancestor." *Id.* at 269, 140 N.W.2d at 224 (emphasis by the court). The court stated that the status of adopted children under the statute "is an extrinsic fact that must be considered in determining the testator's intent," *Id.* at 260, 140 N.W.2d at 224-25, as is "the increasing social acceptance of adoption." *Id.* at 260, 140 N.W.2d at 225. Frederick, therefore, "was aware of the changed attitude of the public in regard to adoption, and . . . he knew that the adoption of children was regarded as a normal possibility in any family, and that children when so adopted were given the same status, love and attention as children born in the bloodline." *Id.* at 262-63, 140 N.W.2d at 226. The children were allowed to take as the "issue" of Frederick's niece.

A Texas court directly refuted the rationale of § 287 of the first Restatement: "We are unwilling to say from the record before us that it was ‘undesirable’ or ‘wrong’ for the [testators] to have such confidence in their grown son as to invest him with the power and the right to increase the number of his ‘children’ who would take the property at his death by adopting a baby and making it a constituent member
of his family." Vaughn v. Gunter, 458 S.W.2d 523, 527 (Tex.Civ.App. 1970), affirmed per curiam, 461 S.W.2d 599 (Tex.1970). G.H. and Dixie Vaughn created identical inter vivos trusts. Their son, G.H. Vaughn, Jr., was the life beneficiary and the principal of the trusts was to be distributed at his death to his “children . . . and the descendants of any child of his dying before such time . . . .” The junior Vaughn had one natural child when the trusts were established. He adopted a second child after the settlors died. Both children survived their father. The court held that the adopted child should share in the principal of the trusts, finding no “evidence in the record to indicate that G.H. Vaughn and his wife Dixie intended to include as remaindermen only children actually born to their son . . . to the exclusion of adopted children.” 458 S.W.2d at 525. The court discussed the common law rule but held that its presumption was reversed by a statute providing that adopted children are the children of their adopting parents for every purpose unless the instrument “uses words clearly intended to exclude children by adoption.” Id. at 526. The court observed that the statute was passed more than one year prior to the execution of the trusts and that the attorney who had drafted the instruments testified that he had known of the act. Since the instruments contained no words of exclusion, the testators were presumed to have intended the adopted child to take.

Vaughn was followed shortly by Davis v. Waldron, 463 S.W.2d 458 (Tex.Civ.App.1971), holding that the words “bodily heirs” did not indicate the intent required by the Tex-
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parent unless such document shall provide otherwise.” The court wrote of another statute, “it is not important whether the adoption statute directly controls the interpretation of instruments. The important point is that the statute reflects the feeling and attitude of the average man and its policy should be followed unless the benefactor explicitly reveals a contrary purpose.” Id. at 489, 201 A.2d at 574. The court concluded that it could not believe the testator “intended to deny her beneficence to a child her foster daughter might one day embrace and adopt as her own.” Id. at 493, 201 A.2d at 576. See also In re Thompson, 53 N.J. 276, 250 A.2d 393 (1969) (“issue” included child adopted by testator’s daughter after testator’s death).

In In re Collins’ Estate, 393 Pa. 195, 142 A.2d 178 (1958), the court rhetorically inquired, “[a]re we going to read into the terms of this will an intent upon the part of testatrix to exclude the ‘chosen’ children of her own children . . .?” 393 Pa. at 211, 142 A.2d at 187. Here the testator provided that, on “the death of either of my said children leaving descendants,” the principal of a trust should be paid to such descendants. After the testator’s death her daughter adopted two children. The court held that the meaning of the will and of the word “descendants” must be determined according to the law in effect when the will became effective. Tracing the statutory history of Pennsylvania, the court determined that “through the legislative mandate an adopted child [at the time of the testator’s death] possessed all the rights of a natural child, both as to its adopting parents and the collateral kindred of its adopting parents.” Id. at 207, 142 A.2d at 184 (emphasis by the court). Although these two children were adopted after the testator wrote her will, they were “in the eyes of the law in exactly the same relationship to testatrix’s daughters as though born of her body.” Id. at 210, 142 A.2d at 186. Thus, in the absence of a contrary intent, the adopted children were permitted to take. See also In re Tafel’s Estate, 449 Pa. 442, 296 A.2d 797 (1972) (announcing rule of construction that, absent evidence of contrary intent, testamentary words “child” or “children” include child adopted as minor regardless of date of adoption).

And in In re Heard’s Estate, 49 Cal.2d 514, 319 P.2d 637 (1957), the testator left part of her estate in trust, income payable to her son John for life, “or if he be deceased, then to his lawful issue, if any . . .”. Upon termination of the trust the corpus was to be paid to “the heirs of the lawful issue” of John. Fifteen years after the will was executed and 11 years after the testator died, John adopted a son whom the court allowed to take. Noting that an antilapse statute provided that an adopted child is the “lineal descendant” of his adoptive parents, the court held that “the policy in this state [is] to give to an adopted child the same status as a biological one . . . ,” Id. at 519, 319 P.2d at 614, and “the court must assume, unless a contrary intent is expressed, that [the testator] intended that [her] will would fit [in] and be compatible with the general body of the law and public policy.” Id. at 522, 319 P.2d at 642. The court discussed the position of the adopted child in modern society, writing that an adopting parent “is not foisting a child on his relatives
and there is no magic by which a blood child may develop into a more desirable child than one adopted. The kin of the parents may well find an adopted child much to their liking while finding little satisfaction in their relationship with a blood child. . . . These things being so nebulous afford no grounds for excluding adopted children from the term ‘lawful issue.’” Id. at 523, 319 P.2d at 643.

In Elliott v. Hiddleson, 303 N.W.2d 140 (Iowa 1981), the court rejected the “stranger to the adoption” rule of construction then in effect. In reaching its decision, the court noted the policy favoring adoption recognized in other jurisdictions and the policy expressed in an Iowa statute which gave an adopted child the same legal status as a natural child of the adopting parents. In applying the new rule to the case at hand, the court found that, in leaving a devise to “grandchildren,” whom the testator had defined as “lineal heirs of my own children,” an adopted grandchild was to be included in the same manner as natural grandchildren. Id. at 141. See also Matter of Estate of Nicolaus, 386 N.W.2d 562 (Iowa 1985) (applying Elliott and, finding no contrary intent by the testator, concluding that adopted daughter of deceased son of testator fell within term “issue” in will).

In re Estate of Darling, 219 Neb. 705, 365 N.W.2d 821 (1985), held that under a Nebraska statute relating to adoption “an adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to the same extent as do the adoptive parent’s natural children.” Id. at 708, 365 N.W. at 824.

The court held that the statute negated an earlier case to the contrary.

Similarly, Read v. Legg, 493 A.2d 1013 (D.C.App.1985), held that adopted children of the testator’s grandson were entitled to inherit as “lineal descendants” under a testamentary trust, since there was no clear evidence of testator’s intent to exclude them. To the same effect, the court in Hines v. First Nat. Bank and Trust Co., 708 P.2d 1078 (OkI.1985) found that an adopted grandchild fell within the definition of “issue” for purposes of interpreting a testatrix’s will. Since the Uniform Adoption Act was in force at the time of the testatrix’s death, the court found to be controlling its requirement that “[u]nless adopted lineal descendants are excluded by testamentary disposition, the Uniform Adoption Act . . . includes adopted children as beneficiaries and devises under a will leaving the estate to the ancestor’s issue.” Id. at 1080. In Matter of Maloney Trust, 423 Mich. 632, 377 N.W.2d 791 (1985) the court held that, in the absence of an expressed intention to the contrary in an irrevocable inter vivos trust, adopted grandchildren were to be included in accordance with a statute which supplanted the common law rule of construction. See also Matter of Estates of Leggett, 424 Mich. 77, 378 N.W.2d 467 (1985), certiorari denied, Papalini v. Fithian, 476 U.S. 1171, 106 S.Ct. 2894, 90 L.Ed.2d 981 (1986) (“issue” in will to be construed to include any adopted person in accordance with statute enacted after settlor’s death, which supplanted common law rule of construction). Settlor’s use of the terms “born” and “date of birth” in relation to her grandchildren did not clearly indi-
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cate an intent by the settlor to exclude adopted grandchildren. In another case to the same effect, In re Estate of Ogden, 353 Pa.Super. 273, 509 A.2d 1271 (1986), appeal denied, 513 Pa. 634, 520 A.2d 1385 (1987) the court held that the adopted children of a deceased named beneficiary were entitled to share as beneficiaries of the two trusts in question. The use of the terms “heirs of the body” and “children of the body” was not sufficient to overcome the presumption that it was the settlor’s intent that adopted children be included.

See also Wilson v. Johnson, 389 S.W.2d 634 (Ky.1965), in which Elizabeth Johnson left her estate in trust for the benefit of several people. When the youngest of her son’s children turned 21, the son’s children were to get the corpus absolutely. The son was married when the trust was created but had no natural children. His wife had two children, 20 and 24 years old respectively when the testator’s will became effective. Approximately 30 years later the son adopted the two children. When the son died two years after the adoption, the children were not allowed to take the trust corpus. The court recognized that under the prevailing adoption statute, adopted children are presumed to be included in a gift to “children” in the absence of a contrary intent, but held that these adopted persons were grown men and were not within the commonly accepted meaning of the word “children” as used by the testator: “those persons who were actually born of the parents or, if adopted, were adopted as children.” Id. at 636.

See generally Weitzel v. Weitzel, 16 Ohio Misc. 105, 239 N.E.2d 263 (Prob.Ct.1968) (discussing In re Coe and In re Patrick’s Will and concluding that “[t]he stranger-to-the-adoption presumption is unfair, inequitable and has no relationship to the actual attitude and experience of the general public, the court and students of adoption, and therefore should be avoided either by judicial action or by legislative fiat.” Id. at 115, 239 N.E.2d at 270).

4. Cases which exclude an adopted child from the primary meaning of a gift to “children”—The early case of In re Woodcock, 103 Me. 214, 68 A. 821 (1907), held that “[w]hen in a will a provision is made for ‘a child or children’ of some person other than the testator, an adopted child is not included. . . .” Id. at 217, 68 A. at 822. Here the testator left her daughter, Mary, her residuary estate for life, and left the remainder to the testator’s three other named children. The will provided that “in case either of my said three children shall die before said Mary, leaving a child or children,” such child was to take the share its predeceased parent would have taken. One of the three named children, Horatio, predeceased Mary and was survived by a daughter he had adopted eight years before the testator executed her will. The adopted child was not allowed to take. The court reasoned that “there is a presumption that the testator intended ‘child or children’ of his own blood, and did not intend his estate to go to a stranger to his blood . . . the adopted child of Horatio, however fully his child in law, was not the grandchild of Horatio’s mother, the testatrix, was not in any way related to her, was a stranger to her blood. The testatrix was under no
sort of obligation, moral or family, to make any provision for her." *Id.*

In Rhode Island Hospital Trust Co. v. Sack, 79 R.I. 493, 90 A.2d 436 (1952) amended, 79 R.I. 493, 497, 91 A.2d 676 (1952), the settlor placed $100,000 in trust, directing that the income should be paid to his wife for the support of his nephew. When the nephew reached 21, the income was to go to him directly or, if he died before that age, the corpus was to be distributed to his "children . . . living at the time of his decease." A child adopted by the nephew 30 years after the trust was created and 10 years after the settlor's death was not permitted to share in the corpus. "The word 'children' does not usually include an adopted child, notwithstanding a statutory provision investing an adopted child with the right of inheritance from the adopting parent, unless it is manifest from the language of the will and the surrounding circumstances . . ." that such was the settlor's intent. 79 R.I. at 495-96, 90 A.2d at 437. The court found nothing in the deed of trust to indicate that the settlor had intended adopted children to take.

The issue in Baker v. Giffrow, 257 Iowa 929, 135 N.W.2d 629 (1965), was whether the testator knew that three children adopted by her son Ernest about 18 months prior to the execution of her will were, in fact, adopted. The trial court had found as a fact that the testator spent "considerable time" in Ernest's home, but that she "never did know that [the three children] had in fact been adopted by Ernest . . . either before or after the execution of her Will." *Id.* at 934, 135 N.W.2d at 632-33. The Supreme Court of Iowa reviewed the testimony of the witnesses *de novo*, but agreed with the lower court's finding. The court held that the will exhibited no intent to include adopted children and the three adopted children were excluded from participation in a gift to Ernest's "children."

Parker v. Carpenter, 77 N.H. 453, 92 A. 955 (1915), excluded a daughter adopted by the testator's son, William, subsequent to the execution of a trust favoring the "children" of the testator's two sons, from a share in the gift. The court held that she "is not William's child within the ordinary meaning of that word, and there is nothing to rebut the presumption that [the testator] intended to give that word its ordinary meaning." *Id.* at 454, 92 A. at 956.

Similarly, Huxley v. Security Trust Co., 27 Del.Ch. 206, 33 A.2d 679 (1943), cited the rule of the first Restatement of Property and stated that "[a] gift to a child of one, other than the testator, prima facie means his own child and not an adopted child." *Id.* at 211, 33 A.2d at 681. Here testator left his residuary estate to his daughters, providing that if any daughter should die without leaving a surviving husband, her share of the estate was to go to her "children." A child adopted by testator's daughter was held not to be a "child" within the terms of the will. See also Casper v. Helvie, 83 Ind.App. 166, 146 N.E. 123 (1925) (gift to testator's son's "children" did not include child adopted subsequent to testator's death); Brunton v. International Trust Co., 114 Colo. 298, 164 P.2d 472 (1945) (child adopted by trust settlor's son was not within class of son's "children"); and Matter of Watson's Estate, 199 Misc. 339, 99 N.Y.S.2d 128 (Sur.Ct. 1950) (gift to the "child or children" of testator's children excluded child
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adopted by testator's daughter prior to the execution of the will, even though testator wrote on his copy of the will that he meant to include the adopted child).

More recently the Supreme Court of Ohio reaffirmed its commitment to the "stranger to the adoption" doctrine of § 287 of the first Restatement of Property and stated that "[t]here is a presumption that words used in a will are used in their primary and ordinary sense. It is generally held that when a testator uses the word 'child' he means a natural child, unless the context clearly shows that he means to use the term in a sense including adopted as well as natural children. This is particularly the fact when the testator speaks, not of his own children, but of the children of other persons." Central Trust Co. v. Bovey, 25 Ohio St.2d 187, 189-90, 267 N.E.2d 427, 429 (1971). The testator in Bovey had created an inter vivos trust, providing that the trust income was payable to his wife for life. Upon the wife's death, the income was to go to four daughters equally and, at the death of each daughter, a one-quarter share of the corpus was to be paid to the "child or children . . . surviving the daughter then dying." The court held that the adopted child of a daughter was not her "child surviving" and could not share in the corpus. The court determined that a statute which gave adopted children the same rights that natural born children have was inapplicable because it was passed after the trust was created. See also Bagwell v. Alexander, 285 S.C. 331, 329 S.E.2d 771 (App.1985) (child adopted by testator's son after testator's death not "child" of son within meaning of codicil—"general rule is that the words 'child' [or] 'children' connote blood relationship" Id. at 384, 329 S.E.2d at 772).

Gifts to the "issue" of persons other than the testator similarly exclude adopted children in the absence of the testator's contrary intent. In New York Life Insurance & Trust Co. v. Viele, 161 N.Y. 11, 55 N.E. 311 (1899), the testator left his daughter one-third of the income from a trust for life. On the daughter's death one-third of the principal was to go to her "then living lawful issue" or, in default of such issue, to the testator's grandchildren. The daughter's two natural children predeceased her. A child adopted under the laws of Saxony twelve years prior to the testator's death was not allowed to take under this limitation because the context of the will indicated that the testator used the words "lawful issue" in their primary and general sense to mean descendants and not adopted children. The court observed that the will named the testator's 10 grandchildren by blood individually but did not name this adopted child, and that if the adopted child was "lawful issue," she would take one-third of the testator's residuary estate, while the 10 grandchildren by blood would only take one-fifteenth of the estate each. "[S]uch a marked discrimination in favor of an adopted child . . . who was in no way related to her by blood, and against her own descendants, would seem to call for some explanation, and none appears either upon the face of the will or in the surrounding circumstances." Id. at 21, 55 N.E. at 314. The court stated that such a result would be "unjust and improbable," and favored instead the "interpretation as will permit the estate to pass to those persons
who are in the line of ancestral blood." *Id.* at 22, 55 N.E. at 315.

New York courts have followed *Viele* even when the testator's intent to exclude adopted children was not so clearly manifest in the will. See, e.g., *In re Fricke’s Estate*, 75 N.Y.S.2d 725 (Sur.Ct.1947), decree affirmed, 274 App.Div. 878, 83 N.Y.S.2d 470 (1948), appeal denied, 274 App.Div. 1032, 85 N.Y.S.2d 908 (1949) (held that the “then living issue” of testator’s nephews did not include a nephew’s adopted daughter, stating that “[t]he rule is that the word ‘issue’ primarily signifies lineal descendants and unless the context of the will indicates otherwise it does not include adopted children,” *Id.* at 728); *Matter of Baur’s Will*, 205 Misc. 551, 128 N.Y.S.2d 815 (Sur.Ct. 1954) (child adopted by trust beneficiary after settlor’s death not considered the beneficiary’s “issue” absent settlor’s intent to include her in the gift); and *In re Taintor’s Estate*, 32 Misc.2d 160, 222 N.Y.S.2d 382 (Sur.Ct.1961), decree affirmed, 16 A.D.2d 768, 228 N.Y.S.2d 461 (1962), appeal denied, 12 N.Y.2d 642, 232 N.Y.S.2d 1026, 185 N.E.2d 551 (1962) (child adopted subsequent to testator’s death did not share in gift to “lawful issue” of the brothers and sisters of testator’s niece). And see *In re Watson’s Estate*, supra.

A number of courts have explicitly relied on § 287 of the first Restatement of Property to exclude adopted children from sharing in gifts to “issue.” In *Central Trust Co. v. Hart*, 82 Ohio App. 450, 80 N.E.2d 920 (1948), James M. Hart was the life beneficiary of two testamentary trusts. The remainder of the second was to go to his “child or children.” James Hart had no natural children but had adopted a son approximately 20 years after the testators’ deaths. The court held that the adopted son could not take under either limitation. The court quoted § 287 of the first Restatement of Property in full and stated that “[t]he facts bring the case within the general rule of exclusion stated in the rule and not within either of the exceptions.” *Id.* at 460, 80 N.E.2d at 925. Specifically, neither testator was the adopting parent and neither could possibly have known about the adoption when they executed their wills.

The Ohio courts again cited the rule of § 287 of the first Restatement in *Casey v. Gallagher*, 11 Ohio St.2d 42, 227 N.E.2d 801 (1967). The testator left two-thirds of the income from a trust to his children. Upon the death of any children “leaving a child or children the issue of their bodies,” such issue were to take their dead parents’ share of the income. The court held that “[s]tanding alone and unmodified by the context of a will, the term, ‘issue,’ would not include even adopted children.” *Id.* at 47, 227 N.E.2d at 806. There were, however, further indications of testator’s intent to confine income payments to blood relatives. The court observed first that the testator used the words “of their bodies.” Second, he provided a gift over to his surviving children if one of his children did not leave issue of his body. Third, in a further provision of the will he directed the corpus to be distributed only to the heirs of his children who were heirs of his blood. More recently, in *Tootle v. Tootle*, 22 Ohio St.3d 244, 490
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N.E.2d 878 (1985), the Ohio Supreme Court held that two adopted children could not inherit through or from their mother in a class gift. At issue was the interpretation of a will executed in 1925 which contained a devise of certain real estate to the testator's daughter and her husband for their lives, and then to "the heirs of their bodies." The court noted that adopted children would ordinarily, absent a contrary intent, at the time the case was decided, be on the same footing as natural children for purposes of inheritance. However, the court found a contrary intent by the testator in the fact that a statute in effect at the time the will was executed expressly indicated that an adopted child could not inherit property expressly limited to "the heirs of the body."

In In re Uihlein's Estate, 269 Wis. 170, 68 N.W.2d 816 (1955), the testator left his residuary estate in trust for his wife and children for the life of his wife and provided that, on the death of his wife, the corpus was to be distributed "equally among my said children then living, and the then living issue, per stirpes, of any deceased child of mine." The testator was survived by seven children. Claudia, one of the surviving children, subsequently adopted two children of her own. The court ruled that a statute that gave adopted children the legal ability to inherit it did not limit the adopting parent's right to deny an inheritance by making other provisions and that amendments purporting to give adopted children the same rights that natural children have were inapplicable because they were not passed until after the testator's death. The court held that the testator's intent must govern and that the adopted child of a person other than the testator "is not, in the absence of contrary compelling circumstances entitled to share in a gift to children or issue of the third person." Id. at 176, 68 N.W.2d at 820, citing, inter alia, § 287. The testator's children were 20 to 30 years old at his death. Claudia was 23. Nothing in the record indicated that the testator knew Claudia was incapable of having children and the two children, adopted seven and nine years after the testator's death, were not eligible to share in his estate.

In Boston Safe Deposit & Trust Co. v. Fleming, 361 Mass. 172, 279 N.E.2d 342 (1972), appeal dismissed, 409 U.S. 813, 93 S.Ct. 46, 34 L.Ed.2d 69 (1972), the testator left a portion of his estate in trust for his daughter for life, the principal to be paid on the daughter's death "to and among her issue then living, equally" or, in default of issue, to six named charities. The daughter was survived by two adopted children. A statute passed after the will was executed, giving adopted children the same right to take under a class gift as natural children, applied on its face only to bequests made after it became effective, and did not control. The court declined to apply it, or its policy, retroactively with the effect of "taking established interests in property from their charitable owners and bestowing those interests upon adopted children of a person other than the testator. . . ." Id. at 181-82, 279 N.E.2d at 348. The court stated that any contrary rule would be better adopted by the legislature and, citing § 287 of the first Restatement of Property, decided to adhere to its earlier constructions. The adopted children did not take. See
also New England Merchants Nat. Bank v. Groswold, 387 Mass. 822, 444 N.E.2d 359 (1983), where the adopted child of an income beneficiary sought to take a share of the trust assets on termination as "issue" of the beneficiary. The court again declined to give retroactive effect to the policy of the statute giving adopted children class gift rights, citing Fleming. Similarly, the court in Scribner v. Berry, 489 A.2d 8 (Me.1985), declined to apply retroactively a statute providing that a testator's reference to "descendants" or "issue" of the testator's children would include an adopted child of the testator's son. The adoptive grandson was held to have no interest in the testator's estate under the rule of construction in effect during the testator's lifetime.

In Diemer v. Diemer, 717 S.W.2d 160 (Tex.App.1986), only one of testator's children did not have natural children at the time of execution of the will. The bequest to that child was the only bequest to refer to "issue." The bequests to the testator's other children, all of whom had natural children, referred to the "descendants" of the testator's children. The court therefore interpreted "issue" to exclude adopted children, and a child later adopted by settlor's son was excluded from taking under the will.

In Hyman v. Glover, 232 Va. 140, 348 S.E.2d 269 (1986) an adopted child of the testatrix's deceased son sought to take a bequest to the "issue" of that son. However, the court held that the common law meaning of the word "issue" does not include adopted children, and a statute including adopted persons in class gift terminology and terms of relationship for purposes of intestate succession did not operate to include adopted children in the word "issue."

The term "descendants" also does not ordinarily include adopted children. In Connecticut Bank & Trust Co. v. Hills (Estate of Hart), 157 Conn. 375, 254 A.2d 453 (1969), a Miss Hart created a trust, the income from which was to be paid to two brothers. At the death of either brother, his share was to go "per stirpes to his descendants living at the time of each regular income payment. . . ." A child adopted by one brother 13 years before the trust was established was not allowed to take under the limitation. The court stated that "'descendant' or 'issue' in their ordinary and primary meaning connoted lineal relationships by blood, and they will be so construed unless it clearly appears they were used in a more extended sense." Id. at 378, 254 A.2d at 455. The court found that "[n]either the fact that the adoption preceded the execution of the trust nor the fact that . . . Miss Hart probably knew of the adoption when she established the trust would, even together, suffice to require [the conclusion that she meant to include adopted children among her] descendants." Id. at 380, 254 A.2d at 456. No significance was attached to Miss Hart's failure to expressly disapprove of the adoption; the court held that such failure is not the equivalent of approval. See also Appeal of Wildman, 111 Conn. 683, 151 A. 265 (1930) (gift to "lineal descendants" of testator's daughter did not include child adopted by daughter after testator's death).

5. Cases which consider whether an adopted child of the donor is included in the primary meaning of
a gift to the donor’s “children”—In the early case of Sewall v. Roberts, 115 Mass. 262 (1874), Robert Roberts placed $100,000 in trust, income payable to himself for life. Upon Roberts’s death, the principal was to be transferred in trust for the “benefit of any child or children of said Robert Roberts.” Roberts later adopted a daughter and attempted to change the terms of the trust by his will, in which he provided that one-half of the principal should go to his wife and one-half should go to “my daughter by adoption.” The court held that Roberts possessed only an equitable life estate in the trust property and that he had no power to change the trust terms. The court did, however, allow the adopted child to take under the original trust instrument. First the court observed that under the Massachusetts adoption statute, which provided that, with certain exceptions, “[a] child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, must be regarded in the light of a child born in lawful wedlock.” Id. at 276. The court then determined Roberts’s intent: “His general intention was that the property should go in the first instance to his children as a class. Whoever at his death fell within that class was within this general intention, and as his adopted daughter is by law his child, she belongs to the class intended to take, and her rights cannot be defeated upon the assumption that he did not intend her to take.” Id. at 278.

The attempt to change the trust terms in Roberts, which would appear to have been additional evidence of the settlor’s intent to include his adopted child within the class of children, was not discussed. In Russell v. Russell, 84 Ala. 48, 3 So. 900 (1888), however, the court affirmatively refused to consider such extrinsic evidence and did not allow testator’s adopted child to take. T. S. Russell’s will gave “my children two-thirds of all my personal and real estate.” When the will was executed Russell had a child approximately six years old. Fifteen years later Russell adopted a son under a statute making adopted children capable of inheriting from their adoptive parents. The Supreme Court of Alabama held that the statute did not authorize the adopted child to take under a gift to “my children,” since it applied only to the intestate portions of an estate and did not make the adopted son into the child of the decedent. The court noted circumstances tending to show that Russell intended to treat the adopted son exactly as he treated his natural child, but held that since Russell failed to revoke or change the will, as was necessary to carry out such intention, the child could not take. “Even a known wish or intention of the testator can avail nothing, if he failed to take the legal steps necessary to carry it into effect.” Id. at 52, 3 So. at 901.

Cases in which a benefit to a decedent’s adopted child is involved commonly arise under insurance policies. In such cases the courts occasionally analyze the problem in contract terms. In Martin v. Aetna Life Insurance Co., 73 Me. 26 (1881),
John Wall purchased a life insurance policy payable on his death to his wife or, if she predeceased him, "to their children for their use." The court noted in dictum that "[i]f the word ['children'] is to be understood in its ordinary sense, as used in wills and such instruments, without anything in the circumstances to qualify its meaning, it is clear [an adopted child] must be excluded." Id. at 27. Because the policy was in essence, however, a contract, the court stated that it must be construed so as to carry out the intent of the parties to it. The court observed that the Walls adopted the child at birth, before the policy was written. They had no other children and never told the child he was adopted. "These facts lead conclusively to the inference that their intention was to provide for this child as well as for any others they might subsequently have." Id.

Similarly, Von Beck v. Thomsen, 44 A.D. 373, 60 N.Y.S. 1094 (1899), affirmed per curiam, 167 N.Y. 601, 60 N.E. 1121 (1901), emphasized contract analysis to hold that a child adopted 11 years after the last of four insurance policies was purchased shared in the proceeds along with the purchaser's two natural children. The proceeds were payable to the purchaser's "children" and "surviving children." The court found that it was the purchaser's intention that all his children alive when the policies were paid should take, regardless of whether they were born before or after the policies were issued. A New York statute gave adopted children the same relationship to their adoptive parents as natural children have with theirs, and the court held that adopted children thus had the same rights as their natural siblings.

The insurance contract provided that the insurer would pay "to the persons who occupied the relationship of children of the insured . . .," and so the insurance company was contractually bound to pay an equal share to the adopted child.

Other cases emphasize the legal relationship of the adopted child and the adopting parent. In Virgin v. Marwick, 97 Me. 578, 55 A. 520 (1903), for example, Edward Marwick purchased two insurance policies on his life payable in part to his "surviving children, in equal shares to each." Marwick's only natural child died in infancy before either policy was purchased, but a child adopted 11 years later was allowed to take the proceeds. The relevant statute provided that such adopted child "shall be . . . to all intents and purposes, the child of the adopters, as if they had been his natural parents." The court observed that Marwick, in effect, "asked the law to make Ernest his child," which strengthened the conclusion that "it is altogether probable that he had abandoned expectation of a natural child . . . he . . . must have desired and intended him to take the place of a child by birth." Id. at 582-83, 55 A. at 521. See also Chancellor v. Chancellor, 23 S.W.2d 761 (Tex.Civ.App. 1929) (proceeds of father's insurance policy, payable to mother, entitled to go to adopted child when mother predeceased father).

In one of the rare cases recently to address the issue, Toombs v. Daniels, 361 N.W.2d 801 (Minn. 1985), held that an adopted daughter of two of the settlors of an inter vivos trust was a "child of" the two settlors and thus a beneficiary of the trust, under a clause of the
trust which provided that "if any child or children are hereafter born to" the two settlors, they should become additional beneficiaries of the trust. *Id.* at 804. This holding was reached even though the trust, in a section dealing with the spouse and issue of any child of the two settlors, said that "[t]he term 'issue' shall not include adopted children." *Id.* at 804. The court held that, since at the time the trust was executed (1920), the word children would include adopted children unless a contrary intention was clearly manifested, a specific exclusion of adopted children was required if such was the settlors' intent.

Outside the area of insurance contracts, litigation over inclusion of the testator's own adopted child in a gift to his children is virtually absent from the more recent cases, with the exception of *Toombs*. This fact is a consequence of the "general trend of liberalization . . . apparent in all jurisdictions to the end that an adopted child will be treated as the natural child of the adopting parents. . . ." *Weitzel v. Weitzel*, 16 Ohio Misc. 105, 107, 239 N.E. 2d 283, 285 (Prob.Ct.1968). The principle is, however, occasionally expressed in dicta. Thus the court in *Weitzel* wrote that "a testator is presumed to have intended to include in a testamentary gift to a class, a child adopted by him in the absence of any indication to the contrary in the instrument." *Id.* at 110, 239 N.E.2d at 267.

Similarly, *Connecticut Bank & Trust Co. v. Hills* (Estate of Hart), 157 Conn. 375, 254 A.2d 453 (1969), states that "[i]f the testator or settlor is the adopting parent, the term 'child' or 'children' is ordinarily held inclusive of an adopted child." *Id.* at 382, 254 A.2d at 457. (The court here refused to include testator's brother's adopted child within the class of such brother's "descendants.")

For further statements regarding a gift to the donor's children, see also *Brunton v. International Trust Co.*, 114 Colo. 298, 308, 164 P.2d 472, 477 (1945); *Appeal of Wildman*, 111 Conn. 683, 687, 151 A. 265, 266 (1930); *Casper v. Helvie*, 83 Ind. App. 166, 180, 146 N.E. 123, 127 (1925); and *In re Woodcock*, 103 Me. 214, 216, 68 A. 821, 822 (1907).

6. Cases which consider the significance of the fact that the donor knew of the adoption—In *In re Upjohn's Will*, 304 N.Y. 366, 107 N.E.2d 492 (1952), the testator left half of the income from his residuary estate to his wife for life, then to 17 people, limited on the life of another. Those 17 people were the beneficiaries of 17 separate trusts comprising the other half of the estate income. The testator's will provided that if any of the 17 beneficiaries should die before the termination of his or her trust, the income should be paid to "his or her lawful issue or descendants if any . . . ." The testator knew that one of the beneficiaries had an adopted child and no natural children. The court held that the adopted child was within the class of the beneficiary's "lawful issue or descendants." Citing, *inter alia*, § 287 of the first Restatement of Property and *Comment a* thereto, the court wrote that it is of "surpassing significance" that the testator knew of the adoption. "Where it appears that he knew of the adoption, he is taken . . . to have intended the inclusion of the adopted child, and his will is so construed, unless other language in the will or other circumstances reflect a differ-
ent or contrary intention." *Id.* at 375, 107 N.E.2d at 496.

Similarly, Mesecher v. Leir, 241 Iowa 818, 43 N.W.2d 149 (1950), held that "a principal requirement for the adopted child to be considered under the term ‘children’ is that the adoption was completed before the execution of the will, and second, the testator knew of the adoption." *Id.* at 826, 43 N.W.2d at 153. Albert Davenport bequeathed a one-third share of his residuary estate to "the children of my aunt . . . as may be living at my death." The aunt had two natural daughters and one adopted daughter who was, by blood, her granddaughter. The adopted child was allowed to take a share of the bequest. The court observed that Davenport executed his will 37 years after the adoption took place and that there was evidence that Davenport knew of the adoption "for practically all of this period and that it had met with his approbation." *Id.* at 824, 43 N.W.2d at 152. The court quoted § 287 of the first Restatement of Property and *Comment g* thereto, and then concluded that it was "more logical and more reasonable" under these circumstances to hold that the testator intended the adopted daughter to take than to deny her a share. *Id.* at 827, 43 N.W.2d at 154.

In Munie v. Gruenewald, 289 Ill. 468, 124 N.E. 605 (1919), Joseph Munie left his residuary estate to his wife for life, the remainder to be "divided among all my children" and the children of a predeceased son. The will further provided that if any more of Munie's children failed to survive the life tenant, "the share that would fall to such child is to go to his children . . . ." One of Munie's daughters did predecease the life tenant and was survived by an adopted child. The child was permitted to take. The court stated that "[a]t the time the will was drawn the testator knew of the adoption of appellee by his daughter, and subsequent thereto always treated her in the same manner he treated his grandchildren." *Id.* at 469, 124 N.E. at 606.

Weitzel v. Weitzel, 16 Ohio Misc. 105, 239 N.E.2d 263 (Prob.Ct.1968), held that where a testator knew that her son had adopted a child, but did not change her will to specifically exclude such child from a gift to her "grandchildren," the child will be included. The court based its result on "a general trend of liberalization" concerning adoption and on Ohio statutes, concluding that "the legislature intended to further expand the inheritance rights of an adopted child, to treat that child as a natural child of the adopting parents." *Id.* at 107, 109, 239 N.E.2d at 265, 267. But see Matter of Watson's Estate, 199 Misc. 339, 99 N.Y.S.2d 128 (Sur.Ct. 1950), in which a gift of the principal of a trust to the "child or children of any child of mine" excluded a child adopted by the testator's daughter before the will was written. The testator wrote on his copy of the will that he meant to include the adopted child in the bequest but the court refused to consider this evidence since the testator never made the change legally effective.

When it is not conclusively shown that a testator knew of a beneficiary's adoption, the fact that the adoption took place long before the will is executed has been held sufficient to warrant the inclusion of the adopted child within a gift to a class. Thus In re Bergen's Will, 27 Misc.2d 804, 208 N.Y.S.2d 658
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(Sur.Ct.1960), children adopted by the testator's second cousins were allowed to take under a gift to the "child or children of each second cousin who shall have predeceased me." The children were adopted more than 30 years before the will was executed. "This fact by itself is presumptive evidence that testatrix knew of the adoption. . . ." Id. at 808, 208 N.Y.S.2d at 657. See also In Re Will of Patrick, 259 Minn. 193, 106 N.W.2d 888 (1960), in which "[t]he evidence is conclusive that testator knew of the de facto adoption [under Scottish law] and regarded Philip King Patrick as his nephew. [Thus] the record supports an inference that testator understood the term 'descendant' to include adopted children." Id. at 241, 106 N.W.2d at 892.

The courts sometimes emphasize that designating a class as "children" of a named individual further supports the inference that the testator contemplated that an adopted child should be included. In In re Bergen's Will, supra, the court stated that "by designating them in her will merely as 'children,' and not as 'issue' or 'descendants of the blood' indicates that [testatrix] did not wish to exclude the adopted children from sharing in her estate." 27 Misc.2d 604, 608, 206 N.Y.S.2d 653, 657 (Sur.Ct.1960). And in Munie v. Gruenewald, supra, the court noted that testator could easily have manifested an intent to exclude his daughter's adopted child by limiting the gift to "the heirs of his body, or to children of the blood of his children, or to children born to his children." 289 Ill. 468, 472, 124 N.E. 605, 607 (1919).

7. Other factors indicating intent to include adopted child—The donee of a power to appoint properly to his "children" or "issue" may appoint to his adopted children where he is also empowered to appoint to persons unrelated to him by blood. In Matter of Charles' Estate, 200 Misc. 452, 102 N.Y.S.2d 497 (Sur.Ct.1951), affirmed mem., 279 A.D. 741, 109 N.Y.S.2d 103 (1951), affirmed mem., 304 N.Y. 776, 109 N.E.2d 76 (1952), the testator gave her daughter a power to appoint property to the daughter's children or the issue of any deceased children, to her husband, and to her two brothers. The court upheld the appointment of two-thirds of the property to the daughter's two adopted children. The court first stated that where "there is a simple gift to children, no appearance to discriminate between those born to the named ancestor and those adopted by him." 200 Misc. at 460, 102 N.Y.S.2d at 504. Then the court turned to the testator's intent: She authorized the donee to appoint to "her husband and to any one or more of the group of presumptive remaindermen in any manner or proportion." Thus "she was empowered to defeat completely [the presumptive remaindermen's] interest by an act not involving a child or children." Id. at 462, 102 N.Y.S.2d at 505-6. Since the donee could have arbitrarily cut off the interests of these takers in default of children, her appointment to adopted children was not a fraud upon such takers' rights.

A similar result was reached in In re Bankers Trust Co., 31 N.Y.2d 322, 338 N.Y.S.2d 895, 291 N.E.2d 137 (1972). The donee was given a power to appoint trust property to "such persons as he might direct and appoint by will," or in default of appointment, to his "issue then living," or if no issue survived, to
his "next of kin then living." Donee did not exercise the power; his two adopted children were allowed to take as his "issue." The court reasoned that the donor empowered him to give property to anyone he chose. "Since the settlor had authorized his child to appoint to those not of his blood, it is difficult to believe that he did not intend adopted, as well as natural, children to be included in the word, 'issue,' wherever used in the trust instrument." Id. at 329, 338 N.Y.S.2d at 899, 291 N.E.2d at 140.

A gift to one's "heirs at law" may disclose an intent to allow an adopted child to take if the relevant statute so permits at the time the class closes. In Tiedtke v. Tiedtke, 157 Ohio St. 554, 106 N.E.2d 637 (1952), for example, Harry Tiedtke left his residuary estate in trust for his daughter, Justina, for life and directed that, if his daughter left no children, the remainder should be distributed among his "heirs at law." Tiedtke was survived by four siblings and Justina. Justina, who was 18 at Tiedtke's death, later married and adopted a child. Three of Tiedtke's siblings predeceased Justina, leaving descendants. Whether the adopted child should be included within the term "children" of Justina was not argued, but the court held that the child may share in Tiedtke's estate as an "heir at law." The court decided that Tiedtke intended to exclude Justina from the class of his "heirs at law," reasoning that, since at the time of his own death Justina was his only heir at law, Tiedtke must have intoned that such heirs be determined at her death. Prior to Justina's death, a descent and distribution statute was passed that included adopted children within the term "heirs," reversing the statutory rule in force at the time Tiedtke died. The court determined that since Justina was only 18 when he died, Tiedtke must have known that who would ultimately be his heirs at law would be determined by a large number of factors of which he had no control, including the possibility of a change in the relevant statutes.

A variety of factors influenced the court in Gannett v. Old Colony Trust Co., 155 Me. 248, 158 A.2d 122 (1959). The testator left property in trust, providing that on the death of three named people—his natural daughter, his natural granddaughter, and his adopted son, John—the corpus was to go to his "issue then living." John had natural children of his own. The court held that if John's children survived the stated contingency they would be entitled to share as "issue" of the testator. The court found the following factors persuasive: (1) Testator had failed to distinguish between adopted children and natural children in his will, leaving a life estate in the trust income to "my son, John. . . ." (2) Testator provided that if John predeceased the other named people, John's issue would receive John's share of the income. The court thought it unreasonable to conclude that testator would give John's issue a gift of income and then cut them off from the corpus. (3) The attorney who wrote the will did not know that John was adopted; he chose "issue" to assure that each child's share would pass through his or her line by representation. (4) Testator had always treated John as his natural son.

8. Cases which exclude child adopted as adult—In re Estate of Ketcham, 343 Pa.Super. 534, 495 A.2d 594 (1985), dealt with one per-
son adopted as an infant and another person adopted as an adult. In construing the terms of a testamentary trust to include the person who had been adopted as an infant, the court applied the rule of construction adopted in Tafel, supra. The court then went on to exclude the person who had been adopted as an adult. Although the adoptee had lived with the adoptive parent since she was 18 years old, the adoptive parent declined to adopt her until learning of a change in the law allowing inheritance by adoptees. The court ruled that "[t]he sole purpose of her adoption was to secure an inheritance. . . . Such a blatant attempt to rewrite the testatrix's will by an adoption undertaken by a person other than the testator to prevent a gift over in default of a natural 'child' or 'children' is proscribed." Id. at 540, 495 A.2d at 597. (quoting Tafel). See also In re Estate of Kauffman, 352 Pa.Super. 1, 506 A.2d 951 (1986), appeal denied, in which the court, quoting Ketcham, held that, absent a showing of a parent-child relationship during the minority of the adopted child, a person adopted at age 35 would not qualify as a "child" or "issue" of the adopting parent under the will of a testator who was deceased before the adoption took place. The court emphasized the policy developed in Ketcham, that a legatee not be allowed to "rewrite" a testator's will after the testator's death. See also Cox v. Whitten, 288 Ark. 318, 704 S.W.2d 628 (1986) (person adopted by brother of testatrix as adult not allowed to take devise to brother's "children"); Callery Trusts, 6 Pa.Fiduc. 2d 99 (Orphan's Ct. Allegh. County 1986) (stepdaughter adopted at age 30 who was never a member of adopting father's household not entitled to inherit from adopting father's father as "child" of adopting father).

9. Cases which include child adopted as adult—In Lehman v. Corpus Christi Nat. Bank, 668 S.W.2d 687 (Tex.1984), the will defined "descendants" as including "the children of the person designated, and the issue of such children, and such children and issue shall always include those who are adopted." The court held that the class of beneficiaries unambiguously included a stepson of the testator's son who was adopted at age 26 by the testator's son. The court found the language of the will to be a clear expression of the settlor's intent, and thus found no need to look beyond the will to determine the testator's intent.

In Diemer, supra, the will of the testatrix (wife of the testator referred to in item 4, above) provided for certain devices, and then provided that "the use of the term 'child' or 'children' in either of the foregoing devices, insofar as same applies to issue of either of my children, shall be understood to mean natural issue, or legally adopted children of either of my said children." Id. at 163 (emphasis added by court). The court found that the language clearly expressed the intent of the testatrix, and allowed the stepson of the testatrix's son, who was adopted by him at age 28, to take under the will as his "child."

10. General secondary authority—For general discussions of the problems involved in class gifts involving adopted children see, Rein, Relatives by Blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions,
§ 25.5 Gifts to “Children”—Child Adopted by Another

When the donor of property describes the beneficiaries thereof as “children” of a designated person, the primary meaning of such class gift term excludes descendants of such person in the first generation who have been adopted by another, if such adoption removes the child from the broader family circle of the designated person. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. When a child has been removed from the family circle of the child’s natural parents by adoption, it is reasonable to conclude that the donor would no longer intend such adopted child to be treated as continuing on the same basis as those children who remain in the family circle the donor is benefitting. This section recognizes this reasonable conclusion by excluding in such case the adopted-out child from the primary meaning of the gift to “children.” When the adoption out does not remove the child from the family circle of the designated person, as in the case of an adoption by the spouse of the person whose children are named as beneficiaries, the adopted-out child is not excluded. The facts and circumstances of a particular case may overcome the rules of this section and lead to the inclusion or exclusion of an adopted-out child that otherwise would be excluded or included in the primary meaning of the gift to “children.”

b. Language or circumstances indicating a contrary intent—gift to donor’s “children.” When the person whose children are named as the beneficiaries of a disposition of property is the donor, the circumstances of the adoption-out are more likely than in other cases to justify the conclusion that the donor does not intend to exclude the adopted-out child from benefitting under a gift to the donor’s “children.” This would be particularly true if the donor...
had no other children who could take under the gift to the donor's "children."

Illustrations:

1. O transfers property by will to T in trust. T is directed to pay the income in equal shares "to O's children who are living on each income payment date and on the death of O's surviving child, to distribute the trust property to O's issue then living, such issue to take per stirpes, and if no issue of O is then living, to distribute the trust property to the X charity." At the time O executed his will, his wife had died leaving him with two young children and O had consented to the adoption of these children by his sister because he did not think he could provide an appropriate home in which he could raise them. O dies without ever having any additional children. Under these circumstances, the conclusion is justified that O intends the two children adopted by his sister to share in the trust for the benefit of his "children" as though the adoption-out had never taken place.

2. Same facts as in Illustration 1, except that at the time O executed his will the adoption-out was to a person not related by blood or marriage to O, O had not seen his children for some years, and O had remarried and had a child by his second marriage. Under these circumstances, the children adopted-out should not be included in the primary meaning of the gift to the donor's "children" in the absence of additional facts and circumstances indicating that the donor intended to include them.

3. Same facts as in Illustration 1, except that at the time O executed his will, O had remarried and his two children by his prior marriage had been adopted by his second wife and were living in his house with him and his second wife. The primary meaning of the word "children" in the donor's will includes his children by his first marriage that have been adopted by his second wife.

c. Language or circumstances indicating a contrary intent—gift to "children" of person other than donor. The donor may by express language include or exclude another person's child who has been adopted out from a gift to such other person's "children." The circumstances relating to the making of a gift to a designated person's "children" normally do not anticipate the possibility of a child of such person being adopted out, and consequently there is usually no express provision dealing with this fact when it turns up. If the gift to the designated "children" would be a nullity unless the adopted-out child is included in the gift and the
donor is aware of this when he executed the dispositive instrument, it is reasonable to infer an intent to the donor that the adopted-out child is to be included in the gift to the designated person's "children."

Illustrations:

4. O transfers property by will to T in trust. T is directed to pay one-half the income to O's son S for life and to pay the other one-half of the income to O's daughter D for life. On the death of S, T is to distribute one-half of the trust property "to S's children," and on the death of D, T is to distribute one-half of the trust property "to D's children." At the time O executes his will, S has two children and D has one child. Neither S nor D has any additional children. After O's death, S's wife dies. S's children are ages 10 and 12 when their mother dies. D adopts S's children with S's encouragement in order to provide them a family atmosphere in which to grow up. S dies. It is clear under these circumstances that O does not intend that S's children share in the trust property both as children of S and as children of D. If they share only in the remainder to D's children, S's children and D's one child will enjoy only the remainder interest in one-half and the remainder to S's children will fail as S has no children within the primary meaning of the class gift term. The remainder to S's children that fails will pass under O's residuary clause to persons other than the children of S and D. It is reasonable under these circumstances to infer an intent in O to include S's children who have been adopted out in the gift "to S's children," and to exclude them from the gift "to D's children," even though D has adopted them. In this way, the children of S will enjoy one-half of the trust property and the child of D will enjoy the other one-half; but S's children will begin their enjoyment in possession of the trust property before D's child begins such enjoyment, as D's child must wait until D dies.

5. Same facts as Illustration 4, except that the trust provides that if either S or D dies without a child surviving him or her, that child's one-half will be added to the other one-half of the trust property and be disposed of accordingly. In this situation if S's children are excluded from the gift to S's children because of their adoption-out but are included in the gift to D's children, the entire trust property will pass to the three children at the same time in equal one-thirds. It is reasonable under these circumstances to infer an intent to O to include S's children who have been adopted out in the gift to S's children and to exclude them from the gift to D's children.
even though $D$ has adopted them, so as to keep the share of $S$'s children to one-half of the trust property rather than growing to two-thirds of the trust property by the adoption-out. Thus the result should be the same as that produced in Illustration 4.

6. Same facts as Illustration 4, except that $S$ remarries and has three children by his second marriage. Under these circumstances, it is not reasonable to infer that $O$ intends the children of $S$ that were adopted by $D$ to be included in the primary meaning of the gift to $S$'s children.

7. $O$ transfers property by will to $T$ in trust. $T$ is directed to pay the income to $O$'s son $S$ for life and on $S$'s death to distribute the trust property “to $S$'s children.” $O$'s son has two children by a first marriage which ended in divorce with $S$'s ex-wife awarded custody of the children. This is the situation at the time $O$ executes his will. After $O$'s death, $S$'s ex-wife remarries and her new husband, with $S$'s acquiescence, adopts $S$'s children. $S$ remarries and has two children by his second marriage. $S$'s second wife dies and he marries again. $S$'s third wife adopts the children of $S$ by his second marriage. $S$ dies. The children of $S$ by his second marriage are included in the primary meaning of the gift to $S$'s children, because the adoption is by $S$'s spouse, which does not remove them from $S$'s family. The facts, however, that the first wife has custody of $S$'s children by his first marriage and that her second husband has adopted $S$'s children in the custody of his wife support the rule of this section that the adopted-out children of $S$ are excluded from the primary meaning of the gift to $S$'s children.

8. $S$ is the only child of his father, $O$, and his mother, $M$. $S$ marries $W$. $O$ and $M$ are genuinely fond of $W$ and as a wedding present $O$ transfers $100,000$ to $T$, “the income from which is to be paid to $S$ and $W$ for their lives, and after the death of the survivor of them, to the children of their marriage until their youngest child reaches the age of 18 years, at which time the trust will terminate and the trust principal will be distributed to the children of $S$ and $W$ in equal shares.” $S$ and $W$ have two children, $C_1$ and $C_2$. $O$ and $M$ are genuinely thrilled to be grandparents and spoil $C_1$ and $C_2$ with frequent gifts. $S$ dies. $W$ remarries, and Jack, her new husband, adopts $C_1$ and $C_2$ (who are aged seven and nine at the time of the adoption). $O$ and $M$ continue to see $W$, $C_1$ and $C_2$ on a regular basis. $O$ dies. $W$ dies when $C_1$ is 40 and $C_2$ is 38. $C_1$ and $C_2$ should be entitled to one-half each of the trust principal.
STATUTORY NOTE TO SECTION 25.5

1. The following statutes provide that upon entry of the decree of adoption the adopted individual shall be considered a stranger to his former relatives for all purposes including rights under the laws of intestate succession and the construction of instruments which do not expressly include the individual by name, except that where a parent of a child dies without the relationship of parent and child having been previously terminated and a spouse of the living parent thereafter adopts the child, the child’s rights from or through the deceased parent are unaffected by the adoption:

Alaska Stat. § 25.23.130 (Supp.1986) (child does not inherit from natural parents unless decree of adoption specifically provides for continuation of inheritance rights) (see also item 6, below)

California Probate Code § 6152 (West Supp.1987) (statute applies in construing wills; see additional statute in item 2 below; in construing devise by a testator who is not the natural parent, a person born to the natural parent should not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or that parent’s parent, brother, sister, spouse, or surviving spouse)


Florida Stat. § 63.172 (1985)


Indiana Code Ann. § 29-1-6-1(d) (West 1979) (child still inherits through natural parent if marriage of natural parent to adopting parent occurs before death of testator)

New York Dom.Rel.Law § 117 (McKinney Supp.1987) (but as to wills or lifetime instruments executed after August 31, 1986, unless the instrument indicates the contrary, an adopted person is included in class-gift terminology and terms of relationship regarding his or her natural relationship prior to adoption if (i) an adoptive parent is married to the natural parent, is the child’s natural grandparent, or is a descendant of such grandparent and (ii) the testator or creator is the child’s natural grandparent or a descendant of such grandparent) (amended to reflect decision in Matter of Estate of Best, 66 N.Y.2d 151, 495 N.Y.S.2d 345, 485 N.E.2d 1010 (1985), reargument denied, 66 N.Y.2d 1036, 499 N.Y.S.2d 1031, 489 N.E.2d 1304 (1985), cert. denied sub nom. McCollum v. Reid, 475 U.S. 1083, 105 S.Ct. 1463, 89 L.Ed.2d 720 (1986), to abolish right of adopted children to distribution based on natural relationships, except in limited circumstances).


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ship" with adopted-out child, child still considered "child" of natural parents)

Wisconsin Stat. § 851.51 (1983-84)

2. The following statutes provide that upon entry of the decree of adoption the relationship between the adopted person and his natural parents shall be severed; and all the legal rights, obligations, and other legal consequences of the relationship, including rights under the laws of intestate succession, shall cease to exist, except the adoption of a child by a stepparent shall not in any way change the status of the relationship between the child and the child's natural parent who is the spouse of the petitioning stepparent:

California Probate Code § 6408.5 (West Supp.1987) (for purposes of intestate succession, the relationship between an adopted person and his or her parent does not exist unless (i) the natural parent and adopted person lived together at any time as parent and child, or the natural parent was married to or was cohabiting with the other natural parent at the time the child was conceived and died before the birth of the child and (ii) the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents)

Iowa Code § 633.223 (1985)
Louisiana Civil Code Ann. art. 214 (West Supp.1987)
Massachusetts Gen.L. ch. 210, § 7 (1986)
Michigan Comp.Laws Ann. § 710.60 (West Supp.1987)
Minnesota Stat. § 259.29 (1986)
Oklahoma Stat. tit. 10, § 60.16 (Supp.1986)

South Carolina Code Ann. § 20–7–1770 (Law Co-op. Supp.1986); amended effective July 1, 1987, and, for purposes of this statutory note, replaced by § 62–2–109 (see item 5, below)

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West Virginia Code § 48-4-11 (1986)

3. An Idaho statute provides that, unless the adoption decree otherwise provides, from the time of the adoption the natural parents are relieved of all parental duties, responsibilities, and rights, and the rights of the child, including the right of inheritance, are terminated unless specifically provided by will:

Idaho Code § 16-1509 (1979)

4. A Colorado statute provides that an adopted child inherits from and through his or her natural parents and adoptive parents except to the extent the inheritance rights have been divested by a final order of relinquishment, a final decree of adoption, or an order terminating the parent-child relationship:


5. The following statutes provide that for the purposes of intestate succession an adopted individual retains the right of inheritance from and through his natural parents upon entry of the decree of adoption:

Alabama Code Ann. § 43-4-3 (1982)
Nebraska Rev.Stat. § 43-106.01 (1978)
Rhode Island Gen.Laws § 15-7-17 (1981)

South Carolina Code Ann. § 62-2-109 (Law Co-op. 1987) (termination of parental rights ineffective to disqualify child or its kindred to inherit from or through parent); effective July 1, 1987, replaces § 20-7-1770 for purposes of this statutory note (see item 2, above)


6. The following statutes provide that for the purposes of intestate succession an adopted child does not inherit from his or her natural parents unless the decree of adoption specifically provides for the continuation of inheritance rights:

Alaska Stat. § 13.11.045 (Supp.1986) (see also item 1, above)

7. A Washington statute provides that a lawfully adopted child shall not be considered an "heir" of his natural parents for purposes of descent and distribution:


REPORTER'S NOTE TO SECTION 25.5

1. Comparison with present section insofar as it excludes the state of the law—The rule of this adopted-out child is supported by
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judicial authority. There is also judicial authority that is contrary to the rule of this section. The first Restatement in § 288 is contrary to the rule of this section.

2. Justification for the rule of this section—The justification for the rule of this section is contained in Comment a.

3. Cases supporting the rule of this section—In Stamford Trust Co. v. Lockwood, 98 Conn. 337, 119 A. 218 (1922), the testator established a trust which gave the income to his children for life and the principal to their descendants. After the testator's death, one of his sons had a daughter who was subsequently adopted out of the family. Upon the death of her natural father, the adopted-out daughter sought to participate in the distribution of the principal of the trust established by the testator. The court denied her claim, however, holding that her right to participate was lost when, before her father's death, she was adopted by others.

In re Estate of Bennett, 555 S.W.2d 692 (Mo.App.1977), involved the residuary clause of the will of Mary Bennett, who died in 1975. Under that clause, the residue of her estate was to go to her daughter, Lucy Smith. Lucy Smith had died two years earlier but was survived by two adopted children, who were found by the probate court to be the heirs of Mary Bennett. Certain relatives of Mary Bennett's deceased husband challenged that finding, contending that before the death of their adoptive grandmother, the two children were adopted out of the family. The court held that if it could be proven that the two children were in fact adopted out of the family, they would be barred from taking under the residuary clause of Mary Bennett's will.

In DePrycker v. Brown, 358 So.2d 1140 (Fla.App.1978), the testator's daughter by his first marriage, who was adopted by her mother's second husband, sought to take under the residuary clause of the testator's will, which named as beneficiaries "my children who survive me." The court denied her claim, however, since she was no longer a legal "child" of her natural father. While "[i]t is true that Appellee was a bloodchild of [testator] and that he could have included her in his will as a recipient of his bounty, just as he could devise any part of his estate to any person he chose," there was no "obligation of support nor claim upon the beneficent bounty on the part of the natural father toward such adopted child." Id. at 1142. See also In re Will of Martell, 457 So.2d 1064 (Fla.App.1984), in which the court held that an "adopted away" grandchild of a deceased beneficiary was not entitled to a share of the trust assets. The date of termination of the trust and determination of the beneficiaries was found to be controlling for determining the applicable statute.

In Matter of Estate of Best, 66 N.Y.2d 151, 495 N.Y.S.2d 345, 485 N.E.2d 1010 (1985), reargument denied, 66 N.Y.2d 1036, 499 N.Y.S.2d 1031, 489 N.E.2d 1304 (1985), cert. denied sub nom. McCollum v. Reid, 475 U.S. 1083, 106 S.Ct. 1463, 89 L.Ed.2d 720 (1986), the testator's residuary estate was placed in trust with the income payable to the testator's daughter, and then to the daughter's "issue." The daughter died survived by two children. One of the children was born out of wedlock and was given up for adoption shortly after his birth. The court
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held that the adopted-out child was not entitled to share in the trust distributions, noting that "[u]nlike the child born out of wedlock who, but for the abrogation of the common-law presumption of exclusion, would have no right to inherit as the issue of any parent, what [the adopted-out child], in effect, seeks here is inheritance rights as the issue of both his biological and his adoptive parents." The court went on to find that "[p]owerful policy considerations militate against construing a class gift to include a child adopted out of the family." The court found that such inheritance rights "would be inconsistent with the child's complete assimilation into the adoptive family" and would encourage contravention of the confidentiality of adoption records. *Id.* at 155, 495 N.Y.S.2d at 347, 485 N.E.2d at 1012.

4. Cases contrary to the rule of this section—In *Mississippi Valley Trust Co. v. Palms*, 360 Mo. 610, 229 S.W.2d 675 (1950), the testator in his will divided his residuary estate into seven equal shares with one share payable to each of his seven children, the children of a deceased child to take per stirpes. Josephine Walsh Bates, one of the testator's children, died in 1916 leaving three children. In 1925 Ellen Walsh Maffit, the sister of Josephine, adopted the three children. Ellen died in 1940 survived by two of the adopted children but leaving no descendants of her own. The issue raised was whether the two surviving adopted children were entitled to take two shares of the residuary estate, the children of a deceased child to take per stirpes. **Josephine Walsh Bates,** one of the testator's children, died in 1916 leaving three children. In 1925 Ellen Walsh Maffit, the sister of Josephine, adopted the three children. Ellen died in 1940 survived by two of the adopted children but leaving no descendants of her own. The issue raised was whether the two surviving adopted children were entitled to take two shares of the residuary estate, one through their natural mother and one through their adoptive mother. The court held that "[t]he mere fact that Josephine's children were adopted by their mother's sister did not prevent them from inheriting through their own blood mother." *Id.* at 617, 229 S.W.2d at 679. However, the court refused to permit them to take an additional share through their adoptive mother, since there was no indication in the testator's will that he intended that any of his grandchildren take more than one share.

In *In re Dickenson Estate*, 5 Fid. Rep. 421 (Pa.1955), the testator placed a portion of his residuary estate in trust for the benefit of his daughter for life and then to "her lawful child or children her surviving." The daughter's first born child was adopted by others shortly after birth, and the question raised was whether such a child was entitled to take through her natural mother. In concluding that the adopted child was entitled to take through her natural parents, the court emphasized the fact that under the law existing at the time of the testator's death, an adopted child would not be permitted to take from or through his or her adoptive parents, and thus fairness dictated that she be allowed to take through her natural mother.

The court in *In re Price's Estate*, 54 Berks 67 (Pa.1963), held that the child of a life tenant was a member of the class of the life tenant's "children" and was not excluded from participating in the distribution of the corpus even though he had been adopted out of the family. Significantly, the court reached this result even though under the Wills Act of 1917 an adopted child would be entitled to take from and through his or her adoptive parents.

In *In re Zastrow's Estate*, 42 Wis. 2d 390, 166 N.W.2d 251 (1969), the testator left a portion of his estate to certain named nieces and nephews, or "[i]f any said nieces and nephews predecease me, then . . . to the child or children of his or her body." One of
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the nephews had two children who were subsequently adopted by their mother’s husband. The nephew pre-deceased the testator, and the issue raised was whether the two children were entitled to take as “children of the body” of their natural father. The court held that in spite of a statute providing that “after the order of adoption is entered the relationship of parent and child between the adopted person and his natural parents . . . shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist,” the bequest included the two adopted children. In so concluding, the court reasoned that the law of descent and distribution only comes into play when the decedent fails to make a will, not when the court is called upon to determine his intent on the basis of the language of the will.

In Monroney v. Mercantile-Safe Deposit and Trust Co., 291 Md. 546, 435 A.2d 788 (1981), the issue raised was whether the testator’s nephew’s natural son, who had been adopted by his stepfather, could take as the “child” of the nephew. In so concluding, the court reasoned that the law of descent and distribution only comes into play when the decedent fails to make a will, not when the court is called upon to determine his intent on the basis of the language of the will.

In Monroney v. Mercantile-Safe Deposit and Trust Co., 291 Md. 546, 435 A.2d 788 (1981), the issue raised was whether the testator’s nephew’s natural son, who had been adopted by his stepfather, could take as the “child” of the nephew. In holding that he was entitled to take, the court reasoned that the rule of construction that a child who has been adopted is no longer considered to be the child of either natural parent was not applicable to a will executed in 1941, since the relevant statute did not take effect until 1970.

In Matter of Daigle’s Estate, 642 P.2d 527 (Colo.App.1982), the testator fathered two children during his first marriage. After the marriage ended in divorce, the two children were adopted by the new husband of testator’s former wife. The testator remarried and had two more children. He subsequently executed a will which included a gift to his “children.” In holding that the children of the testator’s first marriage were entitled to take under the testator’s will, the court declared that “[i]n the absence of a statute directing a different construction, the effect of adoption does not change a claimant’s description as a child after the adoption.” Id. at 528.

5. Cases involving language or circumstances indicating a contrary intent—In Matter of Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43 (Minn.1985), the court held that the legitimate daughter of the deceased son of settlor was “issue” of the settlor, notwithstanding the fact that, after the son’s death his daughter was adopted by the son’s wife’s second husband. Since the trust instrument defined “issue” as “all persons who are descended from the [settlor], either by legitimate birth to or legal adoption by him or any of his legitimately born or legally adopted descendants,” the court found nothing in the trust agreement to cause her adoption to preclude her membership in the class of “issue” of the settlor. Id. at 45.

Similarly, in In re Estate of Leonard, 128 N.H. 407, 514 A.2d 822 (1986) (mem.), the Supreme Court of New Hampshire affirmed the lower court’s finding that the testatrix’s use of the term “lineal descendant” in her will was intended to include two of her son’s children who were adopted by their stepfather after their natural parents’ divorce and before the execution of the testatrix’s will. The testatrix’s reference to the two children as her grandchildren in a devise to them by name in another portion of her will was held sufficient to overcome any assumption to the contrary.

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§ 25.6 Gifts to "Children"—Relatives by Affinity

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term excludes stepchildren, sons-in-law, and daughters-in-law of such person, and excludes other persons related to such person only by affinity. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. When a donor of a disposition of property describes the beneficiaries thereof as the donor's "children" or as the "children" of some other person, it is reasonable to infer that the donor does not intend to include in the primary meaning of such class gift term those persons who have come into a relationship only by affinity with the person whose children are designated. A relative by affinity will not have any blood relationship to a person whose "children" are the beneficiaries of the disposition.

b. Language or circumstances indicating a contrary intent. The rule of this section is a rule of construction and therefore yields to a finding of a contrary intent of the donor as revealed by the express language of the disposition or by the circumstances of the particular case. The circumstances may frequently justify the inclusion of stepchildren in a gift to children.

Illustrations:

1. O transfers property by will to T in trust. T is directed to pay the income in equal shares "to O's children who are living on each income payment date and on the death of O's surviving child, to distribute the trust property to O's issue then living, such issue to take per stirpes, and if no issue of O is then living, to distribute the trust property to the X charity." At the time O executed her will, she was past the usual childbearing age and had no children of her own and was married to a man who had four children by a previous marriage. These children had lived with O and her husband for many years. Under these circumstances, it is reasonable to conclude that when O referred to her "children" in her will she was referring to her stepchildren. Thus her stepchildren should be included in the primary meaning of the gift "to O's children" and the issue of her stepchildren should be included in the primary meaning of the gift "to O's issue." If O, at the time she executed her will, had children of her own, in the
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absence of additional facts, O's stepchildren should not be included in the primary meaning of the gift to "O's children" or in the gift to "O's issue."

2. O transfers property by will to T in trust. T is directed to pay the income "to my daughter for life and on her death, to distribute the trust property to her children." At the time O executed his will his son had died leaving surviving the son's wife, O's daughter-in-law, and two children. O had no daughter of his own. Under these circumstances, the conclusion is justified that O's daughter-in-law is the "daughter" referred to in O's will.

STATUTORY NOTE TO SECTION 25.6

1. A California statute provides, for the purposes of intestate succession, the relationship between a person and his or her foster parent, and between a person and his or her stepparent, has the same effect as if it were an adoptive relationship if (i) the relationship began during the child's minority and continued throughout the parties' joint lifetimes and (ii) it is established that the foster parent or stepparent would have adopted the person but for a legal barrier.

California Probate Code § 6408 (West Supp.1987)

2. Another California statute provides that stepchildren, foster children, and their issue when appropriate to the class are included in class gift terminology and terms of relationship:


REPORTER'S NOTE TO SECTION 25.6

1. Comparison with present state of the law—The rule of this section is supported by judicial authority. The rule of this section is the same as § 289 of the first Restatement.

2. Justification for the rule of this section—The justification for the rule of this section is stated in Comment a.

3. Cases supporting the rule of this section—

a. Stepchildren excluded. In Bates v. Dewson, 128 Mass. 334 (1880), the testator's will directed that a house be purchased, to be held in trust for the benefit of his servant during his life, with remainder to the servant's family on his decease. The servant died during the testator's lifetime, leaving a widow, a child, and a stepson born to his wife during a previous marriage. In construing the term "family," the court held that in the absence of words manifesting a different intention, it meant his widow and child, but did not include his stepson.

In Blankenbaker v. Snyder, 18 Ky.L.R. 437, 36 S.W. 1124 (1896), the testator made specific bequests to the children of each of his two marriages, and left the residue of his estate to "my children, without distinction." The testator's second wife had a
daughter by a previous marriage who sought to take under the residuary clause. The court rejected her claim, however, holding that a stepchild is not entitled to share in such a devise with the testator's natural children.

In Jenkins v. Packington Realty Co., 167 Ark. 602, 268 S.W. 620 (1925), the testator devised his estate to a son and his wife with remainder to "their children." The son had a child by a previous marriage who sought to take under the will. In holding that the child of the husband's former marriage is not included in such a devise, the court reasoned that "the plain meaning of the language is that it relates to the issue of the intermarriage between the two named persons mentioned, and not to all of the children of either person so named." Id. at 605, 268 S.W. at 621.

In re Lima's Estate, 225 Cal. App.2d 396, 37 Cal.Rptr. 404 (1964), held that even though the principal asset of the wife's estate was realty conveyed to her by her predeceased second husband, her daughter by her first husband takes all of such estate to the exclusion of her stepchildren (her second husband's children by a previous marriage) under a statute governing descent to issue when the decedent leaves no surviving spouse. See also Stewart's Estate, 122 Cal.App.3d 625, 176 Cal.Rptr. 142 (1981) (under same statute unadopted stepchildren and their heirs are not "issue"); In re Estate of McLaughlin, 11 Wash.App. 320, 523 P.2d 437 (1974) (under law of intestate succession stepson is not in any sense an heir of decedent); California State Automobile Association v. Jacobson, 24 Cal.App.3d 850, 101 Cal.Rptr. 366 (1972) (stepfather may not maintain action for damages for wrongful death of his unadopted stepdaughter).

In In re Kurtz's Estate, 145 Pa. 637, 23 A. 322 (1892), the testator gave legacies to his stepchildren whom he described in his will as "children which came to me from my marriage with my wife," as well as to his own children. He further provided that the residue be distributed "to his wife and children." Noting that the testator had "left children of his own which answer this description," the court held that the stepchildren were entitled to no part of the residue.

In Davis v. Mercantile Trust Co., 206 Md. 278, 111 A.2d 602 (1955), the testator willed the residue of his estate in trust for five named brothers and sisters, six named nephews and nieces, and seven unnamed children of such nephews and nieces. At the time that the will was executed, the testator's nephews and nieces had six children and one stepchild whom the testator believed to be the natural child of one of his nephews. In holding that the stepchild was not entitled to share in the residuary bequest, even though it was found that the testator had intended to include him in the class of unnamed children, the court reasoned that "[t]he testator was obviously mistaken as to his true status and we cannot find, under the circumstances, that the testator was indifferent to ties of blood, or had any desire to provide for a putative stepchild whom his nephew was under no
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legal or moral obligation to support." *Id.* at 287, 111 A.2d at 605.

In re Goetzinger's Estate, 12 Misc.2d 197, 176 N.Y.S.2d 899 (1958), which involved the construction of a will, raised the issue of whether references to "nephews" included the deceased stepson of the testator's brother. In holding that the stepson was not entitled to share in the bequest, the court reasoned that nothing in the text of the will was indicative of an intention to expand the term "nephew" beyond its customary meaning as a blood relative, and that proof offered as to the testator's attitude toward the brother's stepson did not justify the conclusion that the testator regarded him as part of the class described in the will.

In In re Connolly, (1935) 2 D.L.R. 465, a Canadian decision, the Nova Scotia Supreme Court held that a bequest "to my children" does not disclose an intention to benefit his stepchildren even though the testator, who had two stepchildren, had no children of his own, and his wife was past the normal age for childbearing.

b. Stepchildren included. Among those cases permitting stepchildren to take under a gift to "children" or similar terms is Herrick v. Snyder, 27 Misc. 462, 59 N.Y.S. 229 (1899). There, a widow with three children married a widower with three children. Thirteen years after the husband's death, the testator died leaving the residue of her estate to "the children of my first and second marriage." No children had been born of her second marriage, but the court held that since her husband was dead at the time she made the will and it was therefore impossible for her to have children of her second marriage, she must have been referring to her stepchildren. Under these circumstances, the stepchildren were allowed to take.

Similarly, in Von Fell v. Spirling, 97 NJ.Eq. 527, 128 A. 611 (1925), which involved a proceeding to construe a residuary clause leaving the balance of the testator's estate to "my children and grandchildren mentioned above," the court permitted the testator's stepdaughter and the two children of the stepdaughter to take, since in the paragraph immediately preceding the residuary clause they had been referred to as "my daughter," "my granddaughter," and "my grandson."

In Matter of Sulzbacher's Estate, 169 Misc. 1, 6 N.Y.S.2d 683 (Sur.Ct.1938), sufficient evidence was found to justify inclusion of the testator's sister's stepchildren in a bequest to his "nephews" and "nieces" where during his life he had referred to them as his nephew and niece, and although he had only one nephew and one niece, in the will he used the words "nephews" and "nieces."

More recently in In re Gehl's Estate, 39 Wis.2d 206, 159 N.W.2d 72 (1968), the testator married a man with six small children, raising them as her own natural children. Subsequently, she had one child of her own. The court held that a bequest to "my beloved children" included the six stepchildren, since the testator was beyond childbearing age, had had only one child, and
had in every respect treated the stepchildren as her own.

In Thompson Estate, 25 Fid. Rep. 254 (Pa.Orphans' Ct., 1974), the testator made a bequest “to my daughter, Josephine Thompson Hunger” and “to such of my grandchildren as are living on the thirty-first day after my death.” The testator had never had any children of her own, and Josephine Thompson Hunger, who had four children was actually her stepdaughter. The court permitted the stepdaughter and her children to take under the will, since the testator looked upon and treated them in every respect as her natural child and grandchildren, she held them out to the world as her child and grandchildren, and the scrivener who had drafted the will thought, based on information supplied by the testator, that they were her blood relatives.

In Cavers v. St. Louis Union Trust Co., 531 S.W.2d 526 (Mo. App.1975), the testator bequeathed a share of the corpus of a trust to Jenny Cavers “or her said daughters.” At the time that the will was executed Jenny Cavers had two stepdaughters, but no daughters. In holding that the share of the trust corpus was properly awarded to the stepdaughters, the court emphasized that although Jean Cavers is mentioned elsewhere as a stepdaughter, and the bequest is to daughters, the distinction is not determinative where the document as a whole indicates that the testator intended to give the stepdaughters the same interest as if they were natural daughters. The court’s decision may have been influenced by the fact that the group of heirs who challenged the right of Jean Cavers to take under the will would not have been eligible to take even if they had prevailed on this point.

c. Other relatives by affinity.

In Boyd v. Perkins, 130 Ky. 77, 113 S.W. 95 (1908), the executor of Robert Boyd, Sr.'s estate sought to recover on five notes for $500 each from the husband of the testator's late niece, who in turn raised as a defense a clause in the testator's will stating “that at my death any note or obligation that any of my kin may owe me is hereby cancelled, and the amount is given and bequeathed to such relative.” The court rejected the defense, stating that “[t]he words 'kin,' 'relative' and 'relatives' used in the will in question will not prima facie include a mere nephew by marriage.” Id. at 81, 113 S.W. at 96. In so concluding, the court noted that Kentucky's intestacy rules were analogous to the situation with which it was faced, and would have allowed inheritance only by blood relatives.

In McMenamy v. Kampelmann, 273 Mo. 450, 200 S.W. 1075 (1918), a group of relatives of the testator's deceased wife sought to take under a clause in his will leaving the residue of his estate to his "immediate relatives." In rejecting their claim, the court held that the term "relatives" in such a bequest included blood relatives only, and not relatives by affinity, unless the will disclosed a plain purpose to the contrary.

Similarly, in Frederick v. Hoffman, 7 Ohio App.2d 27, 218 N.E.2d 478 (1966), the niece of the testator's deceased wife sought to
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take under a residuary clause leaving the remainder of the testator's estate to "my nieces and nephews." In denying her claim, the court held that the ordinary and primary meaning of the terms "niece" and "nephew" is immediate descendants of the brothers and sisters of the person named. Thus, when the testator used the phrase "my nieces and nephews" in his will, he meant the children of his brothers and sisters, not the nieces and nephews of his prior deceased spouse.

In In re Shafer's Estate, 269 Cal.App.2d 588, 75 Cal.Rptr. 39 (1969), the testator established a trust for the benefit of his grandchildren which provided that if any of his grandchildren should die without issue, his or her share of the trust income is payable to "the parent of such beneficiary." One grandchild died in 1952, and his share was paid to his mother, the testator's daughter. Upon the daughter's death in 1967, her husband, the testator's son-in-law, sought to collect as a parent of the original beneficiary. The court held, however, that the term "parent" was limited to those related to the testator by blood. In so concluding, the court appeared to place heavy emphasis on the fact that no other relatives by affinity were mentioned in the will.

A number of cases have permitted relatives by affinity to take under a gift to "children," "grandchildren," "brothers and sisters," "nephews and nieces," and other similar terms. Among those cases is Baldwin's Ex'rs v. Curry, 272 Ky. 827, 115 S.W.2d 333 (1938). There the testator left the residue of his estate to the nieces and nephews "named herein before." The testator's niece by marriage sought to share in the residuary bequest, since she had been referred to in two earlier provisions as "my niece." In upholding her claim, the court declared that although the terms "nieces" and "nephews" generally refer only to blood relatives and do not include relatives by affinity, the fact that she was referred to elsewhere in the will as "my niece" indicates a contrary intent of the testator which is controlling.

In In re Wittmer's Estate, 151 Pa.Super. 274, 30 A.2d 197 (1943), a codicil to the testator's will left part of his residuary estate to "my surviving nephews and nieces." The testator had no nephews and nieces of his own, but his late wife did. Under such circumstances, the court held that evidence is admissible to establish the testator's intent to benefit these relatives by affinity.

In In re Platt's Estate, 147 N.Y.S.2d 716 (Sur.Ct.1955), the testator's will directed that his residuary estate be divided into nine equal portions, with one portion going to each of eight named nephews and nieces and one portion going to the named nephew of his deceased wife. The will further provided that if any of his nieces or nephews survived him but subsequently died without lawful descendants, his or her share was to be allotted to the surviving "nieces" and "nephews." In holding that the nephew of the testator's deceased wife was entitled to take an allotment as a surviving nephew, the court noted that he had been referred to elsewhere in the will as a neph-
ew and that there appeared to be "on an equal footing" with the testator's blood relatives.

§ 25.7 Gifts to "Children"—Descendants in the First Generation

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term includes all descendants of such person in the first generation who have not been adopted out. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. When reference is made to the child of a designated person, the image that naturally and normally comes to mind is a descendant of the designated person who is in the first generation. The rule of this section includes in the primary meaning of such class gift term such natural and normal usage. It does not, however, restrict the primary meaning of a gift to "children" of a designated person to natural-born first generation descendants. To obtain the full picture of who is included in the primary meaning of a gift to the "children" of a designated person, it must be determined when a descendant in the first generation of the designated person born out of wedlock is included (§ 25.2); when a child conceived by other than sexual intercourse, even though not a descendant of the designated person, is included (§ 25.3); when an adopted child of the designated person is included (§ 25.4); and when a child adopted out is excluded (§ 25.5). Only when §§ 25.2–25.5 are read with this section, does the full scope of the primary meaning of a gift to "children" of a designated person unfold.

There may be initial exclusions from the primary meaning of a gift to "children" of a designated person. Such initial exclusions are descendants of the designated person more remote than the first generation (§ 25.1); and children of the designated person by affinity (§ 25.6).

The possible takers under a gift to "children" of a designated person, that is, the primary meaning of such class gift term, can narrow or expand as a result of language or circumstances indicating a contrary intent of the donor.

The class members who come within the primary meaning of the class gift term as finally determined may not share in the disposition because they are not born in time (Chapter Twenty-Six) or die too soon (Chapter Twenty-Seven).
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b. Language or circumstances indicating a contrary intent—descendant in first generation excluded. Since all descendants of the designated person in the first generation who are born in wedlock and who have not been adopted out are initially included in the primary meaning of a gift to such person's "children," a manifestation of intent contrary to this stated inclusion will result in the elimination from the primary meaning of one or more descendants in the first generation.

Illustrations:

1. O transfers property by will to T in trust. T is directed to pay the income to O's wife W for life and on W's death, to distribute the trust property "to W's children." O and W have four children. After O's death, W remarries and has a child by her second husband. It is possible to infer that O, when he referred to W's children, meant her children by him. Extrinsic evidence would be admissible to show that is what O meant. Consequently, though W's child by her second marriage is a descendant of hers in the first generation, such child may not be included in the primary meaning of a gift to W's children.

2. Same facts as Illustration 1, except that the remainder gift under the trust is "to the children of me and my wife" and in addition to the child W had by her second marriage, O had had a child by a previous marriage. O's child by his previous marriage did not live with O and W while O was alive. It is reasonable to conclude that O, when he referred to the children of "me and my wife," meant the children resulting from their marriage. Consequently, though O's child by his previous marriage is a descendant of his in the first generation and W's child is a descendant of hers in the first generation, neither of such children should be included in the primary meaning of the gift to the children of "me and my wife."

3. Same facts as Illustration 2, except that O and W never had any children of their marriage. In such case, the reference to "the children of me and my wife," if it is to have any significance, must refer to the children either one may have by previous or subsequent marriages. Thus, there is no indication of intent to exclude any descendant in the first generation of either O or W.

4. O transfers property by will to T in trust. T is directed to pay the income to O's son S for life, then to pay the income to S's wife W for life, and on the death of the survivor of S and W, to distribute the trust property "to the survivor's children then living." S and W have four children, all of whom were
born in O's lifetime. After O's death, S dies and W remarry.

W has two children by her second marriage. Obviously, the children of W by her second marriage are not related by blood to O or S. It is reasonable to conclude under these circumstances that O, when he referred "to the survivor's children then living" had in mind the children resulting from the marriage of S and W and that W's children by her second marriage, though descendants of hers in the first generation, should not be included in the gift to the "children" of the survivor of S and W.

5. O transfers property by will to T in trust. T is directed to pay the income to O's daughter D for life and then to distribute the trust property "to D's children." At the time O executed his will D was married and had two children. Subsequently, but during O's lifetime, D's husband died and D remarried. O violently opposed D's remarriage because of his intense dislike of D's second husband, which dislike existed before she married him and at the time he drew his will. D had a child by her second husband and O refused to allow this child in his home at any time and refused to see the child. Under the circumstances, it is reasonable to conclude that O did not intend D's child by her second marriage, who was related to D's other children by the half-blood, to be included in the primary meaning of the gift "to D's children."

STATUTORY NOTE TO SECTION 25.7

1. See the Statutory Notes to §§ 25.1-25.6.

REPORTER'S NOTE TO SECTION 25.7

1. Comparison with present state of the law—The rule of this section is supported by judicial authority. The rule of this section is much broader than the similar rule of § 290 of the first Restatement.

2. Justification for the rule of this section—The justification for the rule of this section is stated in Comment a.

3. Gifts to children of the donor—Courts have consistently held that, absent a manifestation of contrary intent, a gift to the "children" of the donor includes children born of all marriages of the donor. In addition, at least one court has held that a gift to one child of a life interest in certain property does not preclude that child from sharing in a gift of the remainder interest in the same property to the donor's "children." Lynn v. Worthington, 266 Ill. 414, 107 N.E. 729 (1915).

opinion sub nom. Hamilton National Bank of Chattanooga v. Meadow, 492 F.2d 1243 (6th Cir. 1974), provided that the trust income was to be paid to the grantor's wife for her life, and after her death "apportioned in equal shares to the grantor's children . . . ." Three sons and a daughter were born to the grantor and his wife. The wife died. The grantor remarried, and another daughter was born. At the time of the filing of the lawsuit the second daughter had not been receiving a share of the trust income. The court held that the daughter of the second marriage was entitled to share in the income. "[T]hose disputing the second daughter's right to be a beneficiary seek to make a distinction not made on the face of the trust agreement." 357 F.Supp. at 118. The court also rejected the argument that since the distributions of the trust income commenced on the death of the first wife, there was an intent to exclude children born thereafter. "Where distribution of income only is involved, there is no obstacle, nor even a real inconvenience, in allowing the class to remain open to those children born after the distribution of income begins but prior to a distribution of the corpus." 357 F.Supp. at 119.

In Dillard v. Jeffries, 118 Va. 81, 86 S.E. 344 (1915), a deed conveyed land to the grantor's second wife for her life, and after her death to "his children equally and their descendants." The court held that "[t]his language is unambiguous and too plain for interpretation. By no reasonable construction can such language be held to exclude the children of [the grantor] by his first wife. The words 'his children and their descendants’ necessarily include his child by his first marriage . . . ." Id. at 84, 86 S.E. at 845. Similarly, in Muth v. Goins, 199 Ky. 321, 250 S.W. 995 (1923), the use of "the word 'children' unqualified by any word showing that it was used in a restricted sense" was held to include the testator's children from both of his marriages.

b. Manifestation of intent to exclude children from prior and subsequent marriages. Where the transferor gives a gift "to the children of my spouse and me" or "to our children," the courts have held that only children common to the transferor and his or her spouse at the time of the execution of the dispositive instrument are included in the word "children." (See Illustration 2 of this section.) In Cooper v. Cooper, 78 S.C. 317, 58 S.E. 950 (1907), the testator died survived by a wife and several children by her, together with three children by a previous marriage. Following provisions in favor of the testator's wife the will stated that certain property was "to be equally divided between all of our surviving children, or those of them who may not have completed their education, should there be such. . . ." (Emphasis in the will.) The court noted that elsewhere in the will the testator had provided for "my children," and noted that "[h]ad he intended to give the remainder in question to all of his children, he would not have changed the use of 'my,' and used 'our,' for 'my' would have been the more appropriate word to express that intention." Id. at
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321, 58 S.E. at 952. The court also noted the testator's express concern that his children had money for their education, pointing out that in another provision of the will he reduced the share that the children that had already completed their education would receive. At the time of the execution of the will, the children by the testator's first marriage had already completed their education. "Therefore only the children of the second marriage . . . are entitled to share in the remainder." *Id.* at 322, 58 S.E. at 952. Similarly, in Bailey v. Price, 495 S.W.2d 378 (Tex.Civ.App. 1973), the words "any other children who may be born to my wife and me, or adopted by us" were held to include only children common to the testator and his wife at the time of the execution of the will. A child born of a previous marriage of the testator was not included. Cf. Beedy v. Finney, 118 Iowa 276, 91 N.W. 1069 (1902) (held, where remainder is given to heirs of grantor and another, and these are capable of having common heirs, heirs of their common bodies are intended).

4. Gifts to children of individual other than the donor—When a donor makes a transfer in favor of the children of a designated person who is related to the donor by blood (such as a child or niece or nephew or sibling of the donor), all children of that designated person will be related by blood to the transferor. On the other hand, where the designated person is not related by blood to the donor (as when the designated person is the spouse of the donor or a son-in-law or daughter-in-law of the donor) children of subsequent and prior marriages of the designated person will not be related to the transferor by blood.

a. Gifts to children of a designated person who is related to the donor. In Sutton v. Greening, 164 Ky. 164, 175 S.W. 1 (1915), a clause in the testator's will devised a farm to his son, further providing that if the son should not live "until his youngest child living shall have arrived at the age of sixteen years, I desire that the farm named above shall be a home for his wife Sallie Sutton and children until that period arrives." Sallie Sutton died before the son and the son remarried and had another child. Noting that children by the son's second wife "are as closely related to the testator . . . as the children of the first wife," the court held that "in the absence from the will of language manifesting such intention, it will not be presumed that the testator intended a provision, made in his will for his son's children, as such, to include some of them and exclude others." *Id.* at 168–69, 175 S.W. at 3.

In Webster v. Welton, 53 Conn. 183, 1 A. 633 (1885), by one clause of his will the testator gave specific legacies to four named grandchildren, children of his son. The residuary clause of the will directed that one-fifth of the residuary estate be divided among "my grandchildren, children of my son. . . ." The court held that a fifth child of the son, born of a subsequent marriage, should share in the residuary gift. The court reasoned that "it is not lightly to be assumed that the testator intended to disinherit one grandchild while making the others, members of the same class, recipients of his bounty,"
and the use of a specific gift to the grandchildren living at the time of the execution of the will and a class gift in the residuary clause indicated a desire to produce different results.

In Conner v. Ogle, 4 Md. Ch. 425 (1848), the testator devised her entire estate in trust for the benefit of her daughter and her daughter's children for the life of the daughter, and after the daughter's death "for her children to be equally divided amongst them." The court held that children of a subsequent marriage of the daughter were included in the class. See also Amory v. Leland, 94 Mass. (12 Allen) 281 (1866) (devise to son in trust for benefit of his children held to include children of second marriage entered into after death of testator).

b. Children of spouse of transferor. In McCoy v. Fahrney, 182 Ill. 60, 55 N.E. 61 (1899), the grantor executed a deed in favor of his wife, and directed that after her death the property should be conveyed "to all the children" of his wife. The wife later divorced the grantor and remarried. The court held that "[c]hildren born to the wife by the second husband, though included within the literal meaning of the words 'all her children,' were clearly not intended to be included within the meaning of the word 'all' as employed by the maker of the instrument." Id. at 66–7, 55 N.E. at 63.

In Blankenbaker v. Snyder, 18 Ky.L.Rep. 437, 36 S.W. 1124 (1896), the children of the testator's first marriage were specifically provided for in the will, and another clause provided that the homestead should go to "my present wife and her children. . . ."

The court held that the testator did not intend in the latter clause to provide for a child of the wife by a former marriage but that the language "her children" was used "to distinguish them from the children by his first wife, and [was] never intended to make one not of his blood share equally in the estate with his own children." Id. at 438, 36 S.W. at 1125.

The result in Blankenbaker should be compared with another case from the Court of Appeals of Kentucky, Pettit v. Norman, 119 Ky. 777, 82 S.W. 622 (1904). In the later case a deed conveyed certain real property to the wife of the grantor for her life, with remainder to "her children." The wife subsequently divorced the grantor and remarried. The court held that a child of the second marriage was entitled to share in the gift of the remainder. "While it is not customary for a father to voluntarily permit one who is a stranger to his blood to share with his children in his bounty, he may do so if he choose, and the fact that it is unusual will not per se authorize a court to disregard the plain meaning of the words in the deed conferring such bounty." Id. at 783, 82 S.W. at 622.

Pointing to Pettit v. Norman for support, the court in Higdon v. Leggett, 205 Ala. 437, 88 So. 646 (1921), reached the same result on similar facts. In Higdon land was devised to the wife of the grantor "in trust for such children as may be born of said [wife]." The court reversed the trial court, noting that "[w]e have nothing to counteract the manifest meaning of the words
used except the mere inference that it was unnatural for Col. Leggett to have not confined his generosity to the children of his own blood. Such action may appear unnatural, but it is by no means unprecedented or prohibited, and, unaccompanied by facts or circumstances evincing a contrary intent, will not of itself overturn the plain meaning of the words employed." *Id.* at 438, 88 So. at 647.

In *Schapiro v. Howard*, 113 Md. 360, 78 A. 58 (1910), the testator devised his entire estate to his wife for her life, "and in the event of my said wife having any child or children at the time of her death, I will and devise the whole of my said estate to said child or children . . . . But in the event of my said wife dying without issue living, then . . . . I devise and bequeath all said estate to my heirs at law." (Emphasis by court.) Noting that the trial court had held, despite the use of "unambiguous and unmistakable language," that the testator intended that his property should go only to his widow's children by him, the Court of Appeals reversed. According to the appeals court, the trial court's opinion of what the testator should have been expected to do in making a will amounted to a rewriting of the will by the trial court. "Because the cases are rare in which a man makes any provision for the children of his wife by a second marriage, it is not to be assumed when such a provision is made that the testator has said what he did not mean to say, and that the court is at liberty to undo what he has done." *Id.* at 370, 78 A. at 62.

c. Children of individual not related to the donor. In *Gray's Administrator v. Pash*, 24 Ky.L. Rep. 963, 66 S.W. 1026 (1902), a codicil to the will directed that part of the testator's residuary estate be set aside such that there could be paid to "the children of Z. T. Pash one thousand dollars each as they become of age. . . ." Z. T. Pash was the husband of a niece of the testator. At the time of the execution of the codicil, the only children of Z. T. Pash were the children of the testator's niece. The niece died, Z. T. Pash remarried, and had five more children. The court refused to divide the class and read into the will a requirement that the children be related to the testator by blood, and held that all seven children were included in the class. The court noted that the will did not mention the niece, and the gift to the children did not state that they were the children also of the niece. The court also pointed out that the testator lived 14 years after the death of the niece and 10 years after the second marriage of Z. T. Pash.

In *In re Gunby's Will*, 29 Misc. 2d 155, 218 N.Y.S.2d 715 (Sur.Ct. 1961), a gift of a farm was made to the widow of the testator for her life and upon her death "to her children, then living." There were no children of the marriage between the testator and the widow, but the widow had three children from a previous marriage and married again after the death of the testator and had a fourth child. All four children were held to be entitled to share the remainder interest.
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5. Gifts to children of husband and wife; only children common to both included—The courts are in agreement that a gift to a husband and wife “and their children” (or a gift “to the children” of a married couple) will be construed to exclude children born of prior or subsequent marriages of either spouse. See Turner v. Turner, 195 N.C. 371, 142 S.E. 224 (1928) (deed to husband and wife for life and then to “their children”); Evans v. Opperman, 76 Tex. 293, 13 S.W. 312 (1890) (“their children” designated beneficiaries meant only the children common to both the insured and his wife); Jenkins v. Packington Realty Co., 167 Ark. 602, 268 S.W. 620 (1925) (devise to son and son’s wife for their lives “and after their deaths to be equally divided between their children”); Thomson v. Philips, 347 S.W.2d 832 (Tex.Civ.App.1961) (devise to “the children of my son . . . and his wife”); In re Michaels’ Estate, 135 Misc. 24, 237 N.Y.S. 533 (Sur.Ct.1929) (at son’s death trust principal was to be divided among “his children who may survive him and his wife Sarah Michaels”); Dean v. Lancaster, 233 S.C. 530, 105 S.E.2d 675 (1958).

In Hersam v. Aetna Life Insurance Co., 225 Mass. 425, 114 N.E. 711 (1917), a life insurance policy was payable to the insured’s husband, “or in the event of his death before hers to their children . . . .” No children were born to the insured and her husband but the husband had a daughter by a previous marriage. The husband having predeceased the insured, his daughter claimed entitlement to the proceeds. The court denied the daughter’s claim, holding that the ordinary meaning of the word “their” required that the children referred to in the policy be children of both the insured and her husband.

In Riley v. Lewis, 110 S.C. 376, 96 S.E. 613 (1918), a deed was made to a husband and wife “and the present or future issue of their bodies . . . .” (Emphasis added.) At the time of the execution of the deed the husband and wife had no children by each other, but each had children by former marriages. Sixteen days after the execution of the deed, a child was born to the couple, but that child died. The court held that the word “present” in the deed referred to the children of both spouses alive when the deed was made, and that “present” did not refer to the child about to be born (who came in under “future”).

§ 25.8 Gifts to “Grandchildren,” “Brothers and Sisters,” “Nephews and Nieces,” “Cousins,” and Other Similar Terms

1. When the donor of property describes the beneficiaries thereof as

(a) “grandchildren” of a designated person; or
(b) “brothers and sisters” of a designated person; or
(c) “nephews and nieces” of a designated person; or
(d) "cousins" of a designated person; or
(e) some other group similarly described;
the primary meaning of such class gift term is deter-
mind by substituting, in place of the class gift term, the
equivalent class gift term employing the word "children"
and applying to the equivalent class gift term employing
the word "children" the rules of §§ 25.1-25.7 to ascertain
who is initially included and excluded. It is assumed in
the absence of language or circumstances indicating a
contrary intent that the donor adopts such primary
meaning.

(2) The following are equivalent class gift terms
employing the word "children":
(a) for "grandchildren of A"—"children of chil-
dren of A";
(b) for "brothers and sisters of A"—"children of
either or both of A's parents exclusive of A";
(c) for "nephews and nieces of A"—"children of
brothers and sisters of A";
(d) for "cousins of A"—"children of A's uncles
and aunts."

(3) Other groups similarly described to which the
rule of this section applies include "uncles and aunts,
great-grandchildren," "grandnephews," and "grand-
nieces."

Comment:

a. Rationale. When the donor of a disposition of property
describes the beneficiaries thereof as "grandchildren of A," or
"brothers and sisters of A," or "nephews and nieces of A," or
"cousins of A," problems can arise in determining the primary
meaning of the class gift terms which are analogous to each of
these dealt with in §§ 25.1-25.7 concerning gifts to "children" of a
designated person.

b. Equivalent class gift term employing the word "chil-
dren." The equivalent class gift term employing the word "children"
involves the rules of §§ 25.1-25.7 being employed twice in
those cases where the equivalent class gift term is "children of
children" of a designated person. The rules must be applied first to
determine who are "children" of a designated person and again to
determine who are "children of children" of a designated person.
It is possible that the rules of §§ 25.1-25.7 may have to be em-
ployed three times because the equivalent class gift term may be
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"children of children of children" of a designated person, as would be the case when the gift is to "great-grandchildren" of a designated person.

c. Application—gift to "grandchildren." Grandchildren of a designated person are "children of the children" of the designated person. "Children" of the designated person under § 25.1 will not include initially descendants of the designated person more remote than those in the first generation. Such "children" may include children born out of wedlock of the designated person (§ 25.2), children who are produced by other than sexual intercourse (§ 25.3), and adopted children (§ 25.4). Children who are adopted out will be included or excluded as provided in § 25.5; and children related by affinity will be excluded (§ 25.6). In this way the initial layer of "children" of the designated person is determined. The process is then repeated to ascertain who are initially included or excluded in determining "children of children" of a designated person.

Each time the process is repeated, the language of the disposition or the circumstances of it may justify the conclusion that some persons initially included or excluded by the application of the rule of the particular section are to be excluded or included, thereby narrowing or expanding what would otherwise be the primary meaning of the word "children."

Illustrations:

1. O by will transfers property to T in trust. T is directed to pay the income to O's daughter D for life, and on D's death, to distribute the trust property to "O's grandchildren." D is O's only child. D has two children born to her as a result of her marriage to H. D also has a child born to her as a result of an extramarital affair. "O's grandchildren" are the "children of D" and the primary meaning of the "children of D" includes D's child born out of wedlock, as well as her other two children.

2. Same facts as Illustration 1, except that D's child born out of wedlock was born while O was alive and during O's lifetime O refused to have any relationship with the child born out of wedlock, refusing on all occasions to allow the child in his house. These additional facts permit the conclusion that O did not intend to include D's child born out of wedlock in the class described as "O's grandchildren."

3. O by will transfers property in trust to T. T is directed to pay the income in equal shares "to O's grandchildren living on each income payment date until no grandchild of O is living or until 21 years after the death of the surviving grandchild of
O living on O's death, whichever first occurs, at which time the trust property is to be distributed to O's issue then living, or if no issue of O is then living, the trust property is to be distributed to the X charity." At the time O's will is executed and at O's death, O has two children, a son S and a daughter D. S has one child at the time of O's death and D has two children. S's wife has a child by a previous marriage, a stepchild of S, who has been raised in S's home. After O's death, S adopts his stepchild. S's adopted child is included in the primary meaning of a gift to "children of S," and hence is included in a gift to "children of children of O," which is the equivalent of a gift to "O's grandchildren." The adopted child was alive when O died, though only a stepchild of S, and hence becomes a measuring life for the duration of the income payment to "O's grandchildren."

4. O by will transfers property in trust to T. T is directed to pay the income to O's wife W for life, and on her death, to distribute the trust property to "O's grandchildren." W had children by a prior marriage who were O's stepchildren. O never had any children of his own and he never adopted his stepchildren. It is reasonable to conclude that under these circumstances O meant the children of his stepchildren when his will gave the remainder interest under the trust to "O's grandchildren."

d. Application—gift to "brothers and sisters." The "brothers and sisters" of a designated person are the "children of either or both of the parents of the designated person, exclusive of the designated person." A child of one but not the other of the parents of the designated person is a relative of the half-blood, but relatives of the half-blood are treated the same as those of the whole blood in determining who is included in the primary meaning of a gift to "children" of some person.

Illustrations:

5. O by will transfers property to "my brothers and sisters in equal shares." O's parents, F and M, had two other children by their marriage. F also had two children by a prior marriage. M, after the death of F, adopted a two-year old child of her sister. O died survived by the two children of F by his first marriage, the other two children of F and M, and the adopted child of M. These five children are the "children" of either or both of O's parents and are the brothers and sisters of O that are included in the primary meaning of the gift to the brothers and sisters of O.
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6. Some facts as in Illustration 5, except the child adopted by M was 20 years old and had been adopted by M in the hope that the adopted child would look after M. Under these circumstances the adopted child would not be included in the primary meaning of a gift to the “children” of M under the rule in § 25.4. Consequently, a conclusion would be justified that such child would not share in the gift to O’s brothers and sisters.

e. Application—gift to “nephews and nieces.” The “nephews and nieces” of a designated person are the “children” of the brothers and sisters of the designated person. The brothers and sisters of the designated person are the “children of either or both parents of the designated person, exclusive of the designated person.” Once they are determined by the application of the rules of §§ 25.1–25.7, the rules of these sections must be applied again to determine who are “children of the children of either or both of the parents of the designated person.” In common parlance, the children of the brothers and sisters of the designated person’s spouse are referred to as such person’s nephews and nieces. Since they are related to the designated person by affinity only, they are excluded initially from the primary meaning of “nephews and nieces” of the designated person. The language or the circumstances of the gift to the “nephews and nieces” may fairly easily justify the conclusion that nephews and nieces by affinity are to be included.

Illustration:

7. O by will transfers property in trust to T. T is directed to pay the income in equal shares “to my nieces and nephews living on each income payment date until the death of the survivor of my nieces and nephews, at which time the trust shall terminate and the trust property shall be distributed to the X charity.” O’s wife W was deceased when T executed his will. W had one brother who predeceased her. O and W took the brother’s children, the wife’s nieces and nephews, into their home and raised them. O had one sister who predeceased him and O and W were close to her children, O’s nephews and nieces. Under these circumstances, the conclusion is justified that the gift in O’s will “to my nieces and nephews” includes the children of W’s brother as well as the children of O’s sister.

f. Application—gift to “cousins.” The “cousins” of a designated person are the “children” of the uncles and aunts of the designated person. The uncles and aunts of the designated person are the “children” of the designated person’s grandparents, exclu-
sive of the designated person’s parents. Once the “children” of the grandparents are determined by the application of the rules of §§ 25.1-25.7, the rules of these sections must be applied again to determine who are “children of the children of the grandparents of the designated person.” In common parlance, the children of the grandparents of the designated person’s spouse are referred to as such person’s uncles and aunts. Likewise, in common parlance, the children of the uncles and aunts of the designated person’s spouse are referred to as such person’s cousins. In both of these instances, since the uncles and aunts of the designated person’s spouse and the children of the spouse’s uncles and aunts, the spouse’s cousins, are related to the designated person by affinity only they are excluded initially from the primary meaning of “cousins” of the designated person. The language or the circumstances of the gift may fairly easily justify the conclusion that cousins by affinity are to be included.

STATUTORY NOTE TO SECTION 25.8

1. The following statutes conform to the Uniform Probate Code § 2-611, which provides that half-bloods are included in class gift terminology and terms of relationship:

- Idaho Code § 15-2-611 (1979)
- Michigan Comp.Laws § 700.138 (1979)
- Nebraska Rev.Stat. § 30-2349 (1979)
- Utah Code Ann. § 75-2-611 (1978)

2. Many states provide that there shall be no distinction between half-bloods and whole-bloods for purposes of intestate succession, i.e.:

REPORTER'S NOTE TO SECTION 25.8

1. Comparison with present state of the law—The rule of this section is supported by judicial authority. The rule of this section is, in substance, identical with the corresponding rule of the first Restatement of Property, § 291, but in view of the fact that the positions taken in the first Restatement in regard to children born out of wedlock, adopted children and children adopted out are contrary to corresponding rules in §§ 25.2, 25.4, and 25.5, the application of the rule of this section produces different results in some cases from the results produced under the first Restatement.

2. Justification for the rule of this section—The justification for the rule of this section is stated in Comment a.

3. Cases supporting the rule of this section—

a. Gift to "grandchildren." In Heyward v. Hasell, 2 S.C. 509 (1871), the testator devised certain property to his two sons, but provided that should they die without lineal descendants, the property was to go to "such of my grandchildren begotten, or to be begotten of my daughters, as may be alive at the time of the death of the survivor of my sons." Both of the sons died without issue, and at the death of the second son, several of the daughters' children were living, as were a number of their grandchildren. In holding that the term "grandchildren" should not be read expansively so as to include the great-grandchildren, the court reasoned that in its primary and ordinary sense, "grandchildren" includes only the children of children (emphasis added).

In Clarke v. Rathbone, 221 Mass. 574, 109 N.E. 651 (1915), the testator adopted his grandson, but stated in his will that he did not intend "thereby to have the said grandchild share in my estate as one of my children, but that he should take under my will only the share of a grandchild." The son of the grandson subsequently sought to take under testator's will as a grandchild, arguing that he became a grandchild through his father's adoption. The court rejected his claim, however, since there was no indication that testator intended him to take as a grandchild, and absent such intent, the term "grandchild" does not include a great-grandchild.

Matter of Mahlstedt's Will, 167 Misc. 13, 3 N.Y.S.2d 468 (Sur.Ct. 1938), raised the issue of whether three great-grandchildren whose parents had died could take the shares which would have gone to their parents under a bequest to "grandchildren." The court held that they could not, since the word "grandchildren" was used in its primary and ordinary meaning and was therefore confined to the immediate offspring of testator's children.

In re Welles' Will, 9 N.Y.2d 277, 213 N.Y.S.2d 441, 173 N.E.2d 876 (1961), involved a clause in testator's will directing that the remainder of a trust fund be distributed "equally among my grandchildren then living." In construing the term "grandchil-
"dren," the court held that it did not include great-grandchildren, especially where there were living grandchildren capable of taking under the will.

In Harris Trust and Sav. Bank v. Beach, 145 Ill.App.3d 682, 99 Ill.Dec. 438, 495 N.E.2d 1173 (1986), testator's great-grandchildren, children of a deceased grandchild who failed to survive all intervening life estates, urged that the definition of "grandchildren" to be applied in the distribution of the share of the deceased grandchild (their father) under the testator's will should include great-grandchildren. The court held that "[t]he term should be given its ordinary meaning . . ., which limits 'grandchildren' to children of a son or daughter and excludes more remote descendants unless a contrary intent is manifested." Id. at 445, 495 N.E.2d at 1180. The court found nothing in the testator's will to indicate an intent contrary to the general rule, and thus excluded the great-grandchildren from receiving their father's share.

b. Gifts to "sisters and brothers." In Haynes v. Williams, 686 S.W.2d 870 (Mo.App.1985), the testator left one surviving brother and two surviving sisters. Another sister predeceased the testator. The court held that the testator's deceased sister, who died six years prior to the execution of his will, and whose death was known to him, was not one of the "brothers and sisters" to whom he left the residue of his estate, and thus the deceased sister's children could not take her share. The court found no indication that the testator had intended to benefit the sister's children, and that if he had he could easily have named them in the will.

c. Gifts to "nieces and nephews." In Buzby v. Roberts, 53 N.J.Eq. 566, 32 A. 9 (1895), the testator placed certain property in trust for her son for life, "and, at the time of my son's death, it is my wish and will to leave all the property of all kinds to be equally divided among my nephews and nieces on my father's side, according to law." The testator's grandniece, the daughter of a nephew who had died prior to the drafting of the will, sought to take under the bequest. The court rejected her claim, however, noting that "[t]he language of the will, as to the persons among whom the estate is to be divided, is entirely operative" and does not require further construction. Id. at 571, 32 A. at 11.

In re Nicholson's Will, 115 Iowa 493, 88 N.W. 1064 (1902), involved a residuary bequest to the testator's "nephews and nieces." At the time the will was drafted, the testator had several nephews and nieces living, and "at least one grandnephew whose mother had been dead for more than ten years." The issue raised was whether testator had intended to include the grandnephew within the class of "nephews and nieces." In holding that he was not included in such a class, the court reasoned that "we hardly think that one unversed in the law would say that testator intended to include [his grandnephew] in the class described as 'nephews and nieces.' If he had intended to include the grandnephew, we think it more likely
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that he would have named him.” *Id.* at 499–500, 88 N.W. at 1067.

In Bank of New York v. Shillito, 14 N.Y.S.2d 458 (Sup.Ct. 1939), the testator's will provided that "in default of any child or issue of my daughter," the principal of a trust fund was to be distributed "to those of my nephews and nieces who shall be the children then living of my brother Stewart Shillito and my sister Mary Wallace Rogers." The issue raised was whether certain grandnieces and grandnephews were included in the class of "nephews and nieces." In holding that they were not included, the court pointed out that "[n]ephews' and 'nieces' ordinarily connote immediate offspring of brothers and sisters." While "[i]t is true that cases can be found in which the words . . . 'nephews' and 'nieces' have been extended beyond their primary meaning, . . . such construction is never adopted in the absence of clear evidence of intention obtained from the language of the will." *Id.* at 461.

In re Phillips' Estate, 236 Wis. 268, 294 N.W. 824 (1940), involved a residuary bequest to "my nieces and nephews." Several grandnieces and grandnephews, whose mothers had predeceased the testator, sought to take under the bequest. The court held, however, that grandnieces and grandnephews are not included within the term "nieces and nephews." While "[i]t is true that cases can be found in which the words . . . 'nephews' and 'nieces' have been extended beyond their primary meaning, . . . such construction is never adopted in the absence of clear evidence of intention obtained from the language of the will." *Id.* at 461.

Weaver v. Liberty Trust Co., 170 Md. 212, 183 A. 544 (1936), involved a residuary bequest to "my lawful heirs, being my first cousins." The children of one of the testator's deceased first cousins sought to take under the will. The court rejected their claim, however, since the term "first cousin" implies the child of an aunt or uncle. Thus it would not include a first cousin once removed.

In Bristol v. Mazza, 288 S.W.2d 564 (Tex.Civ.App.1936), the testator bequeathed his residuary estate to his "surviving first cousins" and listed the names of twenty-two "cousins" from whom the class of "first cousins" should be selected. Several of the "cousins" on the list were actually second cousins, two of whom sought to take under the bequest. The court rejected their claim, however, since the language of the instrument and the testimony of
the attorney who drafted it indicated that the testator intended to include first cousins only. Moreover, even if the bequest had been one to "cousins" rather than "first cousins," the word "cousins" ordinarily "denotes sons or daughters of brothers or sisters of one's father or mother and includes first cousins only." *Id.* at 565-6.

See also Ferguson v. Johnson, 159 Me. 4, 187 A.2d 59 (1963) (the word "cousin" in a statute fixing the inheritance tax on property passing to a cousin means "first cousin," that is to say, a child of an uncle or aunt).

e. Relatives of the half-blood. Barnhill v. Sharon, 135 Ky. 70, 121 S.W. 983 (1909), held that the descendants of the testator's half-sister may take under a bequest "to issue of my brothers and sisters" since there was nothing in the will to show that the testator intended to limit the bequest to his full sisters.

Similarly, in Hocker v. Stevens, 18 S.W.2d 842 (Tex. Civ. App. 1929), the testator's nephews and nieces of the half-blood sought to take under a bequest to "nephews and nieces." In permitting them to take under the will, the court stated that a gift to a class "embraces all of that class who are living at the time of the death of the testator without regard as to whether they are of the whole blood or half-blood." *Id.* at 843.

In Matter of Guering's Estate, 206 Misc. 850, 133 N.Y.S.2d 253 (Sur.Ct. 1953), the executors of the decedent's estate sought to determine whether a bequest to "my brothers and sisters" included the decedent's brothers and sisters of the half-blood. The court held that they were entitled to share in such a bequest. See also Warpool v. Floyd, 524 S.W.2d 247 (Tenn. 1975) (children of half brothers and sisters share equally with children of full brothers and sisters in the distribution of intestate personality). But cf. Doar v. Doar, 63 R.I. 18, 6 A.2d 738 (1939), and Greer v. Greer, 138 S.C. 475, 136 S.E. 742 (1927) (special factors found which confined gifts to nephews and nieces of the whole blood).

4. Cases in which individuals who do not fit within the primary meaning of a term are permitted to take—

a. Gifts to "grandchildren." A number of cases have permitted great-grandchildren to take under gift to "grandchildren." Among those cases is Ball v. Weightman, 273 Pa. 120, 116 A. 653 (1922), in which the testator's will imposed a spendthrift trust upon income payable to his children and grandchildren. The issue raised was whether the spendthrift trust also extended to the interest of a great-grandchild who was entitled to collect under the will. In holding that the spendthrift trust extended to the great-grandchild's interest, the court declared that while ordinarily the term "grandchildren" is restricted to children's children, . . . it may be enlarged by the context so as to embrace great-grandchildren or even more remote descendants." *Id.* at 123, 116 A. at 654. Here, the testator had used the words "grandchildren," "issue," and "descendants" synonymously throughout the will.
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In In re Englis' Estate, 54 N.J. 350, 255 A.2d 242 (1969), the testator left a life interest in his residuary estate to each of his five children and provided that should any child die without children surviving, his or her share should go to the testator's other living children or to the surviving children of any child who has died, "such grandchild or grandchildren to take the same share which their parent would have taken if living." In construing the term "grandchildren," the court held that in this case it included testator's great-grandchildren, since the "stirpital distribution to grandchildren rather than a per capita distribution indicates that the testator was thinking in terms of blood line rather than individual grandchildren." 406 N.E.2d at 1000 (n. 9).

b. Gifts to "nieces and nephews." In Cromer v. Pinckney, 3 Barb. Ch. 466 (N.Y.1848), testator made a gift to each of his "nephews and nieces," but specifically excluded John Cromer, a grandnephew, from the gift. The court held that all of the other grandnephews and grandnieces whose ancestors were deceased at the time the will was made were included in such a gift, since the exclusion of one grandnephew implied that testator intended to include all of the others.

The court in Shepard v. Shepard, 57 Conn. 24, 17 A. 173 (1889), held that a bequest to any "nephew or niece" of the testator, "having fitted themselves for college," and desiring to study for the ministry, included grandnephews and grandnieces. "We are . . . of the opinion," the court declared, "that the testatrix did not use the word 'nephew' or 'niece' in the ordinary and more accurate sense, as including only children of brothers and sisters, but, inasmuch as she used those words in speaking of the children of nephews and nieces, she manifestly used them as including grandnephews and grandnieces as well." Id. at 29, 17 A. at 174.
In In re Davis, 19 R.I. 654, 35 A. 1046 (1896), the testator made a gift "to such of my three (3) nieces (the daughters of my deceased sister Mary Fitzgerald, late of Dublin, Ireland) as shall survive me." His sister never had any daughters, but had three granddaughters (grandnieces of testator). Under these circumstances, where the description was such that only the three grandnieces could have been intended, the grandnieces were permitted to take.

In In re Kittson's Estate, 177 Minn. 469, 225 N.W. 439 (1929), the testator left a portion of his estate "to my nephews and nieces (children of my deceased brother, Louis Coyle Kittson)." At the time the will was made, only one living child of Louis Coyle Kittson remained, but there were two grandchildren (testator's grandniece and grandnephew). In so construing such a bequest, the court held that although the terms "nephews" and "nieces" ordinarily mean sons and daughters of a brother or sister, the facts indicate that testator "actually intended that the bequest go to the grandnieces and grandnephews of his deceased mother." Id. at 9, 233 N.E.2d at 532.

In Jesseph v. Leveridge, 205 Ark. 665, 170 S.W.2d 71 (1943), the testator bequeathed her residuary estate "to my nephews and nieces, share and share alike." Elsewhere in the will, the testator had used the word "niece" to refer to a grandniece, and the issue raised was whether such a reference indicated an intention to expand the definition of the terms "nieces and nephews" to include grandnieces and grandnephews. The court held that grandnieces and grandnephews were included in such a gift, since the description of them as nieces or nephews is a sufficient manifestation of intent to alter the traditional rule.

In Shalkhauser v. Beach, 14 Ohio Misc. 1, 233 N.E.2d 527 (1968), testator made a gift to, among others, "the nieces and nephews of my deceased mother." The only nephews and nieces of testator's mother had died some years prior to the execution of the will, but a grandnephew and two grandnieces were still alive. The court held that although the terms "nephews" and "nieces" ordinarily mean sons and daughters of a brother or sister, the facts indicate that testator "actually intended that the bequest go to the grandnieces and grandnephews of his deceased mother." Id. at 9, 233 N.E.2d at 532.

In Matter of Estate of Anderson, 359 N.W.2d 479 (Iowa 1984), the testator left a bequest to "my nieces and nephews." The testator had one blood niece and blood nephew and his deceased wife had 19 blood nieces and nephews. While the court noted that "the term 'nieces and nephews' commonly refers only to those related by blood," Id. at 480, they went on to find that a latent ambiguity existed in the will because "the wording of the bequest simply did not apply to a singular niece and a singular nephew." Since, in this case, the testator had a number of nieces and nephews by marriage with whom he maintained a close relationship, the court found that "it was the testator's intent to bequeath his property to his surviving nieces and nephews and to his wife's surviving nieces and nephews share and share alike." Id. at 481.
In Clymer v. Mayo, 393 Mass. 754, 473 N.E.2d 1084 (1985), a revocable pour-over trust (designed to receive the assets of the decedent at her death) provided that “the balance ... shall be held ... for the benefit of the nephews and nieces of the Donor living at the time of the death of the Donor.” The decedent had no siblings and therefore no nephews and nieces who were blood relations (and the possibility of siblings being born after the trust was executed was very remote considering the ages of all concerned). However, at the time of the execution of the trust the decedent’s husband had two nephews and a niece. The court held that the nephews and niece of the decedent’s husband were the intended beneficiaries under the trust, despite the fact that the decedent had divorced her husband prior to her death. In so deciding the court considered evidence of the relationship between the decedent and the nephews and niece, and her contributions to their education. The court rejected an argument that the decedent’s divorce left her “without any nephews and nieces—by blood or marriage—at the time of her death”; that the decedent’s divorce somehow revoked the gift to the nephews and niece “since the beneficiaries are identified by their relationship to the decedent through her marriage and not by name, we should presume that the decedent no longer intended to benefit her former relatives once her marriage ended.” Id. at 772-3, 473 N.E.2d at 1095. The court noted that, while a statute existed which implied an intent to revoke testamentary gifts between the divorcing parties, there was “no indication in the statutory language that the legislature presumed to know how these changes affect a testator’s relations with more distant family members.” Id.

c. Gifts to “cousins.” In Dalton v. White, 129 F.2d 55, 76 U.S. App.D.C. 93 (1942), the testator’s will contained a clause in which she gave “to each one of my cousins living at the time of my death, irrespective of the remoteness of their relationship and irrespective of whether his or her parent cousin may be living one thousand dollars.” Here, the court construed the term “cousin” to mean more than first cousins, since the phrases “irrespective of the remoteness of their relationship,” and “irrespective of whether his or her parent cousin may be living,” indicated that the testator intended to use “cousin” in a broader sense. It was unclear, however, how far the testator wished to extend the term, since allowing all of the approximately two thousand claimants to collect would exhaust the estate, thus preventing payment of more than a fractional portion of the bequests to named beneficiaries made elsewhere in the will, and thus, the clause was held to be void for vagueness.

In Succession of Kamlade, 232 La. 275, 94 So.2d 257 (1957), the testator bequeathed one half of his estate to his “cousins” on his father’s side of the family, and one half to his “cousins” on his mother’s side. At the time the will was drafted, the testator had four first cousins on his father’s side and two on his mother’s side, but at his death, only the first
cousins on his father's side remained. In construing the term "cousins," the court held it was not restricted to first cousins but that it encompassed the nearest surviving cousins. Thus, the first cousins on the testator's father's side of the family, and the second cousins on his mother's side of the family, were permitted to take.

§ 25.9 Gifts to "Issue" or "Descendants"

When the donor of property describes the beneficiaries thereof as "issue" or "descendants" of a designated person, the primary meaning of such class gift term is determined by substituting in place of the class gift term the words "children" and "children of children" and "children of children of children," etc., of the designated person, and applying the rules of §§ 25.1–25.7 to ascertain who is initially included and excluded. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Comment:

a. Rationale. When the donor of a disposition of property describes the beneficiaries thereof as "issue" or "descendants" of a designated person, the donor has used a class gift term that primarily refers to a succession of generations down from the designated person. The term "children" primarily refers to the first generation down from the designated person. Each succeeding generation down from the designated person is made up of the "children" of the prior generation. Hence, the primary meaning of the word "children" as developed in §§ 25.1–25.7 must be applied to each generation level to ascertain the total primary inclusiveness or exclusiveness of the gift to "issue" or "descendants" of a designated person.

The persons who are within the primary meaning of the term "issue" or "descendants" of the designated person may nevertheless be excluded from taking a share because they are not born in time (Chapter Twenty-Six), or die too soon (Chapter Twenty-Eight). In view of the fact that the persons within the primary meaning of the term "issue" or "descendants" of the designated person involve persons in different generations down from the designated person, the question is presented whether the distribution to them is to be made on a per capita basis or per stirpes basis (Chapter Twenty-Eight). A per stirpes plan of distribution will cut out persons in a lower generation if a person in a higher generation in the line of
Descent is available to take the share allocable to that line of descent.

The language of the dispositive instrument or the circumstances surrounding the disposition may justify the conclusion that the primary takers under a gift to the "issue" or the "descendants" of a designated person is to be expanded or narrowed. Such contrary intent will overcome the primary meaning of the class gift term that otherwise would obtain.

b. "Issue" or "descendants" compared with "heirs of the body." When a gift is made to the "heirs of the body" of a designated person, in the absence of language or circumstances indicating that the term "heirs of the body" means "issue" or "descendants," the designated person must be deceased and resort must be had to some statute on descent and distribution to ascertain who is described (see Topic 2 on Gifts to "Heirs" and the Like). The persons who are within the primary meaning of a gift to "issue" or "descendants" of the designated person can be ascertained while the designated person is alive, and no statute of descent and distribution has to be applied.

c. Gifts over on failure of "issue." The donor of a disposition of property may use the word "issue" in the disposition, not to provide a beneficial interest in the issue of a designated person, but to shift the gift to the designated person to someone else if the designated person "dies without issue." In determining whether the designated person "dies without issue," the primary meaning of the word "issue" is determined by a rule analogous to the rule of this section. The gift over on death without issue may, however, provide the basis of implying a gift in favor of the designated person's issue if such person dies with issue. This would be the case if the donor's gift is "to A for life but if A dies without issue, to B and his heirs." If A dies with issue, a gift would normally be implied in favor of A's issue in this case, and the primary meaning of the gift to "issue" of A that is implied would be governed by the rule of this section.

d. Application—language or circumstances indicating an intent to narrow primary meaning of "issue" or "descendants." Language or circumstances indicating an intent by the donor to exclude some persons who otherwise would be included in the primary meaning of a gift to "issue" or "descendants" of a designated person may be effective to narrow the primary meaning that otherwise would obtain. A disposition to "female issue of A" or to "issue of A by his wife W" would narrow the possible takers under the disposition.
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The word "issue" may be used to denote "children" of the designated person. The inexpert use of technical language may be evident by the use of the words "issue" and "children" interchangeably, justifying the conclusion that only the first lower generation of the designated person is intended to be beneficiaries of the disposition.

Illustrations:

1. O by will transfers property to T in trust. T is directed to pay the income "to O's children living on each income payment date and to the issue of a deceased child of O living on each income payment date, such issue to take the share in the income that their parent would have taken if living. On the death of O's surviving child, to distribute the trust property to O's issue then living, such issue to take per stirpes, and if no issue of O is then living, to distribute the trust property to the X charity." O is survived by three children and by six grandchildren. The initial distribution of trust income is to the three children of O. Subsequently, one of these children dies, survived only by two grandchildren who are the children of a deceased child of such deceased child of O. It is contended that the two grandchildren of O's deceased child do not share in the income distribution because a deceased child's share of the income is to go to the deceased child's issue who are living on the income payment date, such issue to take their "parent's" share. The deceased child of O is not the "parent" of such deceased child's grandchildren. The scheme of distribution established by O points toward a distribution of one-third to each of the three lines headed by O's three children. The conclusion is justified that the donor did not intend by the use of the word "parent" in this context to narrow the meaning of the word "issue" in the description of the beneficiaries of the income interest under the trust to the "children" of a deceased child of O. This conclusion is supported by the fact that the distribution of the trust property on the termination of the trust is "to O's issue then living, such issue to take per stirpes."

2. O by will transfers property to T in trust. On the termination of the trust, T is directed to distribute the trust property "to the issue of O who are natural-born issue of O and who are born in wedlock, such issue to take on a per capita basis." This language would exclude from the primary meaning of the gift to "issue" any adopted children and any child born out of wedlock.
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e. Application—language or circumstances indicating an intent to expand the primary meaning of "issue" or "descendants." A donor may intend to expand the primary meaning of a gift to "issue" or "descendants" of a designated person to include persons that would be excluded from a gift to "children" under §§ 25.1–25.7. For example, an intent might be manifested to include "stepchildren" or to include children adopted out that otherwise would be excluded.

STATUTORY NOTE TO SECTION 25.9

1. A Delaware statute provides as follows:
   (c) For purposes of construing a governing instrument, unless a contrary statement appears in such governing instrument:
      (1) The term "issue" shall denote a distribution per stirpes, such that the children of the person whose issue is referred to shall be taken to be the heads of the respective stocks of issue; and a person legally adopted, whether under or over the age of 18 years at adoption, shall thereafter be considered to be a child and issue of the adopting person and an issue of the ascendants of the adopting person, and the issue of the person so adopted shall be considered to be issue of the adopting person and his or her ascendants.

2. A Rhode Island statute provides as follows:
   Whenever a devise or bequest is made to one for life and thereafter to his issue, in any will hereafter made, such issue shall be construed to be the children of the life tenant living at his decease, and the lineal descendants of such children as may have then deceased, as tenants in common, but such descendants of any deceased child taking equally amongst them the share only which their deceased parent, if then living, would have taken.

3. The following statutes provide that a transfer of property to the "issue" or "descendants" of a designated person will be construed to vest the property in those persons who would take under the laws of intestate succession:
   Oklahoma Stat. tit. 84, § 168 (1981) (statute applies to devises to "issue" and "descendants" as well as to "heirs," "relations," "legal representatives," "personal representatives," "family," and "nearest (or next of) kin")
   Wisconsin Stat. § 700.11 (1983-84) (statute applies in construing remainder to "issue" as well as to "heirs" of a designated person)

REPORTER'S NOTE TO SECTION 25.9

1. Comparison with present section is supported by judicial authority. The rule of this section is
generally in accord with § 292 of the first Restatement. However, persons are included in the primary meaning of "issue" or "descendants" under the rule of this section because of the inclusion in a gift to "children" of adopted children and children born out of wedlock, which was not the case in the first Restatement.

2. Justification for the rule of this section—The rationale for the rule of this section is stated in Comment a.

3. Cases supporting the rule of this section—

a. Gifts to "issue" or "descendants" as including lineal descendants of any degree. In Twaites v. Walker, 133 Iowa 84, 110 N.W. 279 (1907), the testator's will provided for distribution of the income from his property to his children, and upon each of their deaths, to their "children" or "descendants." The testator's granddaughter, who was a beneficiary under the will, died and was survived by a husband who sought to take her share of the bequest. In rejecting the husband's claim, the court held that "ordinarily the word 'descendants' includes issue of the body of every degree, no matter how remote, and it does not mean the next of kin or heirs generally." Id. at 88, 110 N.W. at 280.

In Love v. Walker, 59 Or. 95, 115 P. 296 (1911), the testator devised certain real estate to his son, but provided that in the event of his death without issue the devise should go to persons designated elsewhere in the will. The son died and was survived by two grandchildren, but no children. In construing the term "issue," the court held that it included the two grandchildren.

In Romjue v. Randolph, 166 Mo. App. 87, 148 S.W. 185 (1912), James A. Lea and Nancy Lea made a gift to their three foster children or "their descendants." One of these foster children died childless, and the question presented to the court was whether "brothers and sisters of a deceased" are "his descendants within the meaning of the will." In holding that they were not included in a gift to "descendants," the court declared that the word "is not to be understood as meaning next of kin, or heirs at law; for these phrases comprehend persons in the ascending, as well as the descending, line, and may also include collaterals; but it does mean the issue of the body of the person named, of every degree, such as children, grandchildren and great-grandchildren, and all others in the direct descending line." Id. at 95, 148 S.W. at 188.

Wilkins v. Rowan, 107 Neb. 180, 185 N.W. 437 (1921), involved a devise of land to the testator's son for life, and at his death to "the issue of his body in fee simple. The court held that "a devise to 'issue' or 'issue of the body' will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent." Id. at 189, 185 N.W. at 439.

In Third National Bank v. Noel, 183 Tenn. 349, 192 S.W.2d 825 (1946), the testator's will provided that his estate be divided among the "surviving issue" of his three grandsons. In construing the
term “issue,” the court stated that it “includes all persons who have descended from a common ancestor; that unless controlled by the context, it means lineal descendant without regard to degree of proximity or remoteness from the original stock or source.” *Id.* at 358, 192 S.W.2d at 828.

Somewhat more recently, the court in *In re Wehr’s Trust*, 36 Wisc.2d 154, 152 N.W.2d 868 (1967), held that a bequest to the testator’s aunt’s “descendants” did not include the aunt’s nephew. In so holding, the court noted that the word “descendant” may in its popular sense include collateral relatives, but stated that “it is common legal knowledge that ‘descendants’ do not include collateral relatives.” *Id.* at 168, 152 N.W.2d at 876.

First National Bank of Cincinnati v. Gaines, 15 Ohio Misc. 109, 237 N.E.2d 182 (1967), involved a provision of a will under which the corpus of a testamentary trust was to be distributed to the “issue” of the testator’s deceased sisters or his wife’s deceased sisters. In construing the word “issue,” the court declared that “[t]he synonyms ‘descendant,’ ‘issue,’ and ‘offspring’ are ordinarily used to refer to those who have issued from an individual and include his children, grandchildren and their children to the remotest degree.” *Id.* at 121, 237 N.W.2d at 190.

In Mercantile Trust Co., N.A. v. Davis, 522 S.W.2d 798 (Mo.1975), the residuary clause of the testator’s will created a trust for the benefit of her three daughters. It further provided that upon the death of any daughter without issue, her share was to pass to the surviving daughter or daughters or the issue of any deceased daughter or daughters. In construing the term “issue,” the court held that it was limited to lineal descendants, and that it excluded lineal ancestral and collateral heirs.

Further support for the rule of this section is provided in *In re Estate of Butterfield*, 405 Mich. 702, 275 N.W.2d 262 (1979). There, the testator made a gift to his children; should any of them die, his or her share was to go to his or her “issue.” In holding that the testator’s great-grandchildren were included in a gift to “issue,” the court stated that the term contemplates all lineal descendants.

But see *In re Moulton’s Estate*, 133 Cal.Rptr. 500, 63 Cal.App.3d 1 (1976) (term “lawful issue” refers to those entitled to take under intestacy laws and thus includes an adult adopted by the beneficiary).

b. Circumstances justifying a more restrictive reading of gifts to “issue” or “descendants.” A number of cases have held that a gift to “issue” or “descendants” is restricted to offspring of the first, and occasionally, the second generation. In each of these cases, however, additional language or circumstances indicated that the testator intended that a more limited definition of the terms be applied.

For example, in *Arnold v. Al- den*, 173 Ill. 229, 50 N.E. 704 (1898), the word “issue” was held to be synonymous with the word “children.” There, the testator
had devised certain property to his brothers and sisters and the "child or children" of his deceased brothers and sisters, with the share of any brother or sister who should die without issue going to the survivors. In the will, the word "issue" was used interchangeably with the word "children," and the court held that under such circumstances, the meaning of "issue" was limited by "child" or "children," and only immediate offspring was intended by such terms.

Wallace v. Wallace, 103 Conn. 122, 130 A. 116 (1925), involved a gift to "the issue of any of my children dying before or after me to receive the share which the parent of such issue would have received if living." (emphasis added). The court restricted the gift to the immediate offspring of the testator's children, declaring that "[w]here the term 'issue' is used in correlation with parent, we have held, in construing other wills, that children were meant by issue, and such has been the general holding elsewhere." Id. at 133, 130 A. at 119.

More recently, in Steele v. Leete, 27 Conn.Sup. 474, 244 A.2d 824 (1968), the testator bequeathed the residue of her estate in trust, with the income payable in equal shares to her two daughters. Her will further provided that the children of the first daughter would receive their mother's share of the income and, eventually, one-half of the principal, in case of her death, and that if the second daughter "shall leave issue her surviving, that issue shall take absolutely the share herein set out" to the second daughter. The court, in construing the term "issue" as synonymous with "children," noted that where the two terms were used interchangeably, such a definition of "issue" was justified.

Similarly, in Pedro v. January, 261 Or. 582, 494 P.2d 868 (1972), the testator devised certain property to his three daughters and provided that should any of them "die without issue surviving them, then the property herein devised to such issue shall descend to my other grandchildren by right of representation." The court held that while "issue" normally contemplates lineal descendants, the fact that it is coupled with the term "grandchildren" indicates that testator intended to restrict the gift to grandchildren.


§ 25.10 Gift to "Family"

When the donor of property describes the beneficiaries thereof as the "family" of a designated person, such class gift term has no clear primary outer limits meaning but includes at least the spouse and minor children of the designated person in the absence of language or circumstances indicating a contrary intent.
DONATIVE TRANSFERS (PROPERTY, SECOND) Pt. IV

Comment:

a. Rationale. When the beneficiaries of a disposition of property are described by the donor as the “family” of a designated person, a class gift term has been used that does not have a clear primary outer limits meaning as in the case of the other class gift terms referred to in §§ 25.1-25.9. The maximum inclusiveness of the term, absent evidence of greater inclusiveness, would seem to be the designated person’s spouse, the issue of the designated person, other persons who are living in the household of the designated person, and other persons economically dependent on the designated person. The minimum inclusiveness of the term, absent specific evidence of lesser inclusiveness, would seem to be the designated person’s spouse and minor children. The rule of this section recognizes the minimum inclusiveness and calls for the consideration of the language and circumstances to establish the outer limits of the term in each case.

Illustrations:

1. O by will transfers property to T in trust. T is given discretion “to pay the income and principal of the trust, from time to time, in such amount or amounts, to members of O’s family as T in T's uncontrolled discretion may determine; on the death of the surviving member of O's family, T shall distribute the then remaining trust property to O’s issue then living, such issue to take per stirpes; and if no issue of O is then living, T shall distribute the then remaining trust property to the X charity.” At the time O executed his will and at O’s death, his household consisted of his wife and two minor children and no other children. The “family” of O consists of his wife and the two minor children.

2. Same facts as Illustration 1, except a child of O has now attained majority, is married, and has established his own home. T inquires whether this married child is still a beneficiary under the trust to whom T in T’s discretion can make payments of income and principal. Since the duration of the trust is measured by the lives of the original members of O’s family, the conclusion is justified that an original member of the family does not drop out of that category by establishing a separate household.

3. Same facts as Illustration 2, except that the child who has married and established a separate home now has a child, a grandchild of O. T inquires whether this grandchild of O is a person to whom T in T’s discretion may make payments of income and principal. If such grandchild is included in the
term "family," the date set for the termination of the trust would violate the rule against perpetuities. Hence, the conclusion is justified that the term "family" under these circumstances does not include the "issue" of O but includes only O's "children," and T is not authorized in T's discretion to make payments to O's grandchild. O's grandchild, however, will be included in the gift to O's "issue" on the termination of the trust.

4. Same facts as Illustration 1, except that one of O's children, at the time O executed his will and on his death, was by a previous marriage that ended in divorce, and that child lived with and was supported by his mother. O had had no relationship with this child since the divorce. Under these circumstances, the conclusion is justified that the term "family" as used in O's will does not include the child by O's previous marriage.

5. O by will transfers property to T in trust. T is given discretion "to pay the income and principal of the trust, from time to time, in such amount or amounts, to my son S and members of S's family as T in T's uncontrolled discretion may determine; twenty-one years after the death of the survivor of O and S, T shall distribute the then remaining trust property in equal shares to the then living members of S's family, and if no member of S's family is then living, T shall distribute the then remaining trust property to the X charity." At the time O executed his will and at his death, S had had no children but was married to W who had had four children by a previous marriage. These stepchildren of S lived in S's household. Under these circumstances, the conclusion is justified that S's "family" for purposes of the trust under O's will includes the four stepchildren.

6. Same facts as Illustration 5, except that after O's death, S and W have a child of their own. The birth of this child does not have the effect of eliminating S's stepchildren from S's "family" for purposes of the trust. The child born to S and W becomes a member of S's "family" for purposes of the trust.

STATUTORY NOTE TO SECTION 25.10

1. The following statutes provide that a transfer of property to the "family" of a designated person will be construed to vest the property in those persons who would take under the laws of intestate succession:
§ 25.10 DONATIVE TRANSFERS (PROPERTY, SECOND) Pt. IV

California Probate Code § 6151 (West Supp.1987) (statute applies in construing devises to “family” as well as “heirs,” “next of kin,” “relatives,” or to persons described by words of similar import)

Indiana Code § 29-1-6-1(c) (1976) (statute applies in construing transfers to “family” as well as to “heirs,” “next of kin,” “relatives,” and “the persons therunto entitled under the intestate laws” or to persons described by words of similar import)

Oklahoma Stat. tit. 84, § 168 (1981) (statute applies in construing transfers to “family” as well as to “heirs,” “relations,” “legal representatives,” “personal representatives,” “issue,” “descendants,” and “nearest (or next of) kin”)

20 Pennsylvania Cons.Stat.Ann. § 2514(4) (Purdon 1975) (applies to devises to “family” as well as to “heirs,” “next of kin,” “relatives,” and “persons described by words of similar import”)


REPORTER'S NOTE TO SECTION 25.10

1. Comparison with present state of the law—There is judicial authority supporting the rule of this section. The case law indicates that the term “family” in a dispositive instrument is susceptible of many possible meanings depending upon the context in which it is used. The first Restatement gives a primary meaning to the term “family” as the spouse and issue of the designated person.

2. Justification for the rule of this section—The justification for the rule of this section is contained in Comment a.

3. “Family” as including spouse and issue—In Whiting v. Whiting, 70 Mass. (4 Gray) 236 (1855), the testator devised the residue of his estate “to the children of my son, David Whiting, to be divided amongst them and their heirs” at the death of the son, and further stated that “[i]t is my will that the use and improvement of the above mentioned [property] . . . be appropriated during his life to the maintenance and support of his family.” The court held that the adult son of David Whiting was a member of his father’s family even though he was married and had children of his own.

In Hall v. Stephens, 65 Mo. 670, 20 Am.Rep. 502 (1877), the testator devised several parcels of land “to Hiram Stephens and family.” Such a devise, according to the court, included Hiram Stephens and his wife and children.

In Bates v. Dewson, 128 Mass. 334 (1880), the testator’s will directed that a house be purchased at a cost not exceeding one thousand dollars, to be held in trust for the benefit of his servant during his life, with remainder to his family on his decease. The servant died during the testator’s lifetime, leaving a widow, a child, and a stepson born to his wife during a previous marriage. The court held that for the purposes of such a bequest, the word “family” meant his widow and child, but did not include his stepson.
In Smith v. Greeley, 67 N.H. 377, 30 A. 413 (1892), the testator devised certain property in trust “for the support and maintenance of my son, James C. Greeley, or his family.” The court construed such a devise to include “any wife, child or children of James C. Greeley.” Thus, it not only included his widow and their children, but it included the son’s child by a previous marriage even though he did not live with the widow.

Somewhat more recently, the testator in In re Keegan’s Estate, 37 N.Y.S.2d 368 (Sur.Ct.1942), made bequests “[t]o the family of Thomas McCann, brother, deceased,” and “[t]o the family of Robert McCann, brother, deceased.” Thomas left a widow and three adult children, while Robert left a widow, the widow of his late son, and two grandchildren. The court construed the word “family” in these bequests to include the widow and children of Thomas, and the widow and grandchildren of Robert, but not the widow of Robert’s son.

In Magill v. Magill, 317 Mass. 89, 56 N.E.2d 892 (1944), the testator created a trust for the benefit of her granddaughter during her life and provided that upon the granddaughter’s death without issue, the principal should go to the then living members of the granddaughter’s father’s family. The granddaughter died without issue. Her father was survived by one son. Two other sons had died previously, but each left two children, and the issue raised was whether the father’s “family” included his four grandchildren. The court permitted the grandchildren to take concluding that in the absence of language to the contrary, grandchildren are included in a bequest to “family.”

In Zahn v. Martin’s Estate, 295 S.W.2d 103 (Mo.1956), the testator devised a life estate and power of sale in all of her real estate to her husband. She further provided that at the death of her husband, one-half of the property, or if sold, one-half of the proceeds from its sale, were to go to her nephew “and family and children.” The court interpreted this bequest to be one to the nephew, his wife, and his children.


4. Cases which conclude that the term “family” has greater or lesser inclusiveness than spouse and children—

a. Inclusiveness depends on facts. In Stuart v. Stuart, 18 W.Va. 675 (1881), which involved a bequest to the testator’s son’s wife and “family,” it was held that “[t]he word ‘family’ has a great variety of meanings depending on the instrument in which it is used. If it be in an act of the legislature, its meaning varies with the varying purposes of the act in which it is used. If it be in a contract, its meaning largely depends on the character of the contract. If in a will, it depends not only upon the context and purposes for which it was used in the will, but in England also upon the nature of the property bequeathed or devised. So variant is the meaning of the word ‘family,’ that in the same will the identical same words will be construed as having essentially different meanings.” Id. at 682.
§ 25.10 DONATIVE TRANSFERS (PROPERTY, SECOND) Pt. IV

In Raynolds v. Hanna, 55 Fed. 783 (C.C.N.D.Ohio 1893) (No. 4, 743) (reversed on other grounds in Brooks v. Raynolds, 59 Fed. 923 (C.C.A.6th 1893)), which involved a similar bequest, then circuit judge and later Supreme Court Justice Jackson stated that "[t]he word family employed in the will admits of a great variety of applications. It may mean a man's household, consisting of himself, his wife, children and servants; it may be his wife and children, or his children, excluding his wife; it is sometimes construed to mean his heirs at law. Its proper interpretation in each case must depend upon and be determined by the context of the will, the circumstances in which the testator is placed, and the character and situation of those who may be presumed to be the objects of his bounty." Id. at 790.

In Farnam v. Farnam, 83 Conn. 369, 77 A. 70 (1910), the court declared that "[t]he word 'family' in a will is one of flexible meaning and will be construed differently, as the circumstances require, in order that the apparent meaning in which it is used in any given case may be carried into effect." Id. at 375, 77 A. at 72.

In In re Tefft's Will, 130 N.Y.S.2d 192 (1954), which involved a bequest to an unmarried nephew "and his family," the court noted that "[t]he word 'family' has been defined as including children, wife and children, blood relatives and in some instances members of the domestic circle." Id. at 194.

b. "Family" as synonymous with "children."

i. Spouses excluded. In Moredock v. Moredock, 179 Fed. 163 (C.C.W.D.Pa.1910), the testator made a bequest to his son for certain specified purposes with the balance, if any, and the son's share of the residuary estate to be held in trust for the benefit of the son and "his family." In construing the term "family," the court held that absent any indication of the context in which it is used, it will be held to mean "children."

In Lemmon v. McElroy, 113 S.C. 532, 101 S.E. 852 (1920), the testator made a gift for the use of his sister and her children, should she have any, but if not then to her brothers and sisters or their families. At the sister's death, the widow of one of her brothers sought to take as the "family" of her late husband. In rejecting her claim, the court held that the word "family" means "children." Although "family" may under different circumstances have a number of other meanings "[i]ts primary meaning . . . is 'children,' and so it must be construed in all cases, unless the context shows that it was used in a different sense." Id. at 535, 101 S.E. at 853.

In Pfeiffer Estate, 33 Del.Co. 525, 60 York 104, 56 Pa.D. & C.2d 467 (Pa.Orph.1946), the testator's will provided, in relevant part, that if any of his "above named heirs should die before I do, his or her interest shall go to their family, if they have any, equally, apportioned
to their children, share and share alike.” One heir, a brother, predeceased the testator, survived by a widow and two sons who sought to take as the brother’s “family.” In rejecting the widow’s claim to a portion of her husband’s interest in the bequest, the court held that “[t]he primary meaning of the word ‘family’ is ‘children,’ and it has been universally held in a number of cases that the word does not include a wife.” Id. at 526, 60 York at 105. Furthermore, the court continued, the phrase “‘equally apportioned to their children, share and share alike,’ indicated his [the testator’s] intention that the children should receive their deceased parent’s share to the exclusion of the widow of the deceased heir.” Id.

ii. Grandchildren excluded. In In re Livingston’s Estate, 5 Lanc. Law Rev. 25 (1887), the testator bequeathed a portion of his estate to “my brother William’s family.” In holding that the illegitimate child of William Livingston’s daughter could not take under such a bequest, the court noted that even if children born out of wedlock could take under a gift to “family,” the word “family” primarily means children, and thus a grandchild could not take.

In Smith v. Smith, 336 P.2d 355 (Okl. 1959), the testator’s will gave each of his two children a one-sixth interest in the income from his estate. It further provided that if either should die, his or her interest should revert to the “surviving member” or members of the testator’s family, or if no member of his family survived, then to the testator’s nearest blood relatives. The court held that the daughter of the owner of one of these one-sixth interests (the granddaughter of the testator) was not a “surviving member” of the testator’s family, although she was not precluded from taking as his nearest blood relative.

Cf. In re Noel’s Estate, 210 Kan. 31, 499 P.2d 1072 (1972) (granddaughter not included in bequest to “immediate members” of the testator’s father-in-law’s family, since the term only includes living children of the father-in-law).

c. “Family” as including those within the immediate domestic circle. In Adison v. Bowie, 2 Bland 606 (Md. 1830), the testator’s will included a bequest “for the support of the family.” In holding such a bequest was one for the support of his widow and the maintenance and education of his infant children, the court reasoned that it was “made by a husband and a parent, for his family; and therefore, should have a construction at least as coextensive with what his duties were, when he was alive.” Id. at 627.

Similarly, in Andrews v. Andrews, 54 Tenn. (7 Heisk.) 234 (1872), the testator made a bequest for “the maintenance of my family.” The court concluded that such a bequest included the widow and the children living with her, but that it did not include a son nearly grown and not residing with the widow and other children.
§ 25.10 DONATIVE TRANSFERS (PROPERTY, SECOND) Pt. IV

In Bradlee v. Andrews, 137 Mass. 50 (1884), the testator placed real estate in trust with the rents and income payable to his son and daughters and "their families," should they have any. In construing the term "families," the court held that it "would include the son and daughters, together with their respective children so long as they should live together and form a portion of the same household, or from their tender years be entitled to be treated as its members. It would also include the wife of the son, if she continued to reside with or be entitled to support from him." Id. at 55.

Similarly, in In re Simon's Will, 55 Conn. 239, 11 A. 36 (1887), the testator in his will placed all of his property, and the income therefrom, in his wife's possession "for the family." At his death, the testator left a widow, a 14-year-old daughter, and a 30-year-old son. The court interpreted the word "family" as including the wife and daughter, but not the son, since he was living away from home and was capable of supporting himself.

In Wood v. Wood, 63 Conn. 324, 28 A. 520 (1898), the testator in his will reserved to his wife and daughter a house which was then occupied by "my son and family." The premises were to be kept in repair and the taxes paid by the son, and when no longer occupied by a member of "my family," to be sold with the proceeds divided among the testator's heirs. In holding that the term "family" included the wife and daughter but did not include the son, the court reasoned that the ordinary and legal meaning of the word family was the collective body of persons who live in one house and under one domestic government but did not include adult children living separate from and not forming a part of the same household.

In Brett v. Donaghe's Guardian, 101 Va. 786, 45 S.E. 324 (1903), the testator bequeathed a portion of his estate in trust for the benefit of his son "and his family." The son died, leaving his wife and daughter and a grandson of the testator who had been raised in a distant state. In rejecting the grandson's claim to one-third of the trust corpus, the court declared that "the word 'family' has a variety of meanings and applications which may include an entire household, all descended from a common stock, their husbands and wives, but it does not include the child of a son who was born and always resided in a foreign state." Id. at 789, 95 S.E. at 325.

In Union Planters Bank & Trust Co. v. Alsobrook, 6 Tenn. App. 264 (1927), the testator bequeathed her estate "to my son Ashley Alsobrook and family to be divided among the children after they become of age." The court construed the word "family" in such a bequest as including the father, mother, and children living in the home as part of the family household.

In re Tefft's Will, supra, involved a bequest of trust income to Albert H. Bickmore, Jr., the testator's unmarried nephew, "and his family." In determining that two of Bickmore's cousins were not entitled to share in the bequest as "his family," the court emphasized that neither were
members of his domestic circle. While he had visited or temporarily resided with one of the cousins several times during the year, such a connection was insufficient to establish the necessary domestic ties, especially since Bickmore had maintained a similar arrangement with various other people. The other cousin, moreover, maintained his own separate household with his wife and children.

d. “Family” as synonymous with statutory distributees. In re McCrum’s Estate, 97 Cal.App. 576, 275 P. 971 (1929), the testator’s will included a provision which stated, “I wish my husband’s family to share and share alike the remainder of my property.” The late husband of the testator had left, in addition to several surviving nieces and nephews, two grandnephews and a grandniece. In holding that the grandnephews and grandniece were entitled to participate in the bequest along with the nephews and nieces, the court reasoned that by statute in California, a disposition to “family” would be a disposition to those who would take under the laws of intestate succession. Several states have adopted similar statutes. (See the Statutory Note to this section.)

See also Matter of Benaglia’s Estate, 195 Misc. 680, 89 N.Y.S.2d 383 (Sur.Ct.1949) (New York court, applying California law, concluded that the gift of an interest in the remainder to the “family” of the testator’s wife was intended for those who at the time of her death would be her statutory distributees).
Chapter Twenty-Six

TIME WITHIN WHICH A CLASS MEMBER MUST BE IN BEING IN ORDER TO SHARE IN THE CLASS GIFT—INCREASE IN THE CLASS MEMBERSHIP

Introductory Note

Section

26.1 Gifts Immediate in Form to Class—When Class Closes to After-Conceived and After-Adopted Persons

26.2 Gift Postponed in Form to a Class—When Class Closes to After-Conceived and After-Adopted Persons

Introductory Note: This Chapter, like the previous Chapter, concerns class gifts to others than “heirs” and the like. The previous Chapter considers the first step in the process of determining the beneficiaries under a class gift to others than “heirs” and the like, that is, the ascertainment of the possible takers under the class gift. The possible takers under a class gift to “children,” “grandchildren,” “brothers,” “sisters,” “nephews,” “nieces,” “cousins,” “issue,” “descendants,” “family,” and similar terms, are those who come within the primary meaning of the class gift term under the rules developed in Chapter Twenty-Five.

This Chapter considers the second step in the process of determining the beneficiaries under a class gift to others than “heirs” and the like. This step may be referred to as the determination of the time within which the class may increase in membership. An increase in the class membership may result from a person within the primary meaning of the class gift term being conceived or adopted.

The rules of this Chapter are exclusionary in operation in that they exclude from the primary meaning of the class gift term persons who otherwise would be within that meaning, because they did not come into being as class members soon enough. If the dispositive instrument that creates the class gift is a will, the possible times within which it may be essential that a class member has come into being are (1) when the will is executed, (2) when the will becomes effective, (3) when the subject matter of the bequest becomes distributable to a class member if that is subsequent to the date of the testator’s death, or (4) when it is no longer possible for additional class members to come into being. The donor may close the class to after-conceived and after-adopted members of the class at any one of the times referred to above. If the donor has not
clearly made a choice, the rules of construction in this Chapter make the choice.

If O by will makes a bequest to "the children of O's son S" and S is dead on the date O executes the will, obviously no class member can come into being after that date (a child of S in gestation on that date is regarded as in being). If S is alive on the date O's will is executed, then additional class members can come into being, after the date O's will is executed, by a child of S being conceived or by S adopting a child. If S is not alive when O dies, however, no additional class member can come into being after O's death (a child of S, in gestation on the date of O's death is regarded as in being). If S is alive when O dies, then additional class members can come into being after O dies by a child of S being conceived or by S adopting a child. If the bequest to S's children is not distributable until some time after O's death, and S dies before the distribution date, no additional class member can come into being after the date of distribution (a child of S in gestation on that date is regarded as in being). If S is alive on the distribution date, then additional class members can come into being after such date by a child of S being conceived or by S adopting a child.

The observations above about when it is no longer possible for additional class members to be conceived do not take into account the possibility that the person whose children are the described class may have left ova (if the person is a woman), or semen (if the person is a man), which may be used to produce a child after the death of such person. Such after-born child should not be included in the described class because of the practical considerations of providing assurance for an indefinite period of time that a share in the class gift will be available for such after-born persons. Such after-born person, however, will be included if the language or circumstances of the gift indicate the donor so intends. If such intent is found, the disposition may create a rule against perpetuities problem (see § 1.4, Comment k).

The rules of construction that operate to close the class when it is still possible for a class member to come into being should be designed to embody what the average donor would have desired if the problem had been considered and the donor had expressed explicitly when the class should no longer increase in membership. As long as the class remains open, it is not possible to determine definitively the exact share of any class member in the subject matter of the disposition. This is not a significant handicap until the date contemplated by the donor that a class member is to enjoy in possession the benefit of the class gift. Such enjoyment is not fully available if the class member's interest is subject to partial
divestiture by additional class members coming into the picture. Thus, the rules of construction that apply should make a reasonable choice between what might be said to be the initial desire of a donor, who describes beneficiaries by a class gift term, to include all who come within the described group at any time, and the public interest in promoting the early full utilization of property by closing the class at the time a class member is entitled to a possessory interest in the property. When the rule that is adopted closes the class at the time a class member is entitled to a possessory interest, it has been referred to as "the rule of convenience."

If the date contemplated by the donor that a class member is to enjoy in possession such person's share of the class gift is significant, then class gifts generally should be divided into those that are immediate in form, in that it is contemplated by the donor that the possessory benefit is to begin when the dispositive instrument takes effect, and those that are postponed in form, in that it is contemplated by the donor that such benefit is not to begin until a date subsequent to the date the dispositive instrument takes effect. Consequently, this Chapter is divided into two sections; § 26.1 considers gifts immediate in form and § 26.2 applies to gifts postponed in form.

§ 26.1 Gift Immediate in Form to a Class—When Class Closes to After-Conceived and After-Adopted Persons

If a gift that is immediate in form is made in favor of a class described as "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants," "family," or by similar class gift terms, then, unless a contrary intent of the donor is found from additional language or circumstances,

(1) such disposition excludes a person within the primary meaning of the class gift term who is conceived or adopted after the effective date of the dispositive instrument, if on that date there is a class member, or a substitute for a class member, available to take under the gift; and

(2) if there is no class member, or no substitute for a class member, available to take under the gift on that date, such disposition does not exclude any person who is within the primary meaning of the class gift term on the ground that he or she was conceived or adopted too late.
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Comment:

a. Rationale. If a gift that is immediate in form is made to the class, it is contemplated by the donor that the subject matter of the gift is to be enjoyed in possession by the class on the date the dispositive instrument becomes effective. This is not possible if there is no person then available to take under the class gift (see Comment 1). However, if there is such a person then available, such person can obtain full enjoyment of at least some definitive share immediately, if the class is closed to after-conceived and after-adopted class members. The rule of construction of Subsection (1) of this section so provides in the absence of additional language or circumstances that indicate the donor intended otherwise. In regard to the circumstances that may be considered in determining the donor's intent, see Reporter's Note to Introductory Note to Part VI on Class Gifts.

If there is no person available on the effective date of the dispositive instrument to take under a gift to a class that is immediate in form and if the gift is not to fail entirely, the choice is to exclude all class members after the first one comes into being or not to exclude any class member on the ground that he or she is conceived or adopted too late. The rule of construction of Subsection (2) of this section adopts the position of not closing the class until it is no longer possible for class members to be conceived or adopted, unless a contrary intent is found from additional language or circumstances (see Comment 1).

It is possible that the result produced by the operation of the rule of construction of Subsection (1) of this section is what the particular donor would have intended if the problem had been considered by the donor. The rule of Subsection (1) is desirable from the viewpoint of the public interest in that the immediate distribution to the class is unhampered by the otherwise necessary complex safeguards in favor of possible but as yet not conceived or adopted takers. Furthermore, the early conclusion of the administration of the estates of decedents is facilitated under the rule of Subsection (1) when the dispositive instrument is a will.

In many situations, the exclusionary operation of the rule of construction of Subsection (1) of this section is of little effect. There is no exclusionary effect if the class gift is by will and is in favor of the children of the testator. The same is true if the class gift is in favor of the children of a person who is deceased on the effective date of the dispositive instrument. The exclusionary effect is of slight practical importance when a person who, at the effective date of the dispositive instrument, is past the usual age of
having children, although it does exclude children such person may thereafter adopt.

All of the class gift terms listed in this section relate to class gifts to others than "heirs" and the like. The reference to "similar class gift terms" does not expand the rules of construction of this section to gifts to "heirs" and the like. Such reference is designed to pick up class gift terms such as "great-grandchildren," "uncles," "aunts," "grandnephews," "grandnieces," "second cousins," etc.

b. Primary meaning of class gift term. The rules of construction set forth in Chapter Twenty-Five must first be applied to determine who come within the primary meaning of the class gift term that is used, and to determine whether additional language or circumstances exclude from such primary meaning class members who otherwise would not be excluded. The rule of construction of Subsection (1) of this section only excludes after-conceived and after-adopted class members who are within such primary meaning.

c. Child in gestation on the effective date of the dispositive instrument. A child who is within the primary meaning of the class gift term is regarded as in being during the period of gestation for purposes of the rules of construction of this section. In view of the fact that a child in gestation must be born alive in order to be entitled to a share of the class gift, the failure to exclude a child in gestation at the effective date of the dispositive instrument in which an immediate gift in form is made to the class causes some delay in the determination of the shares of class members. The minimum share of each class member entitled to a share in the class gift cannot be determined until it is known how many children there are in gestation that may receive a share. The maximum share of each class member entitled to a share is delayed until it is established whether the child or children in gestation will be born alive. Such delay is limited in time and does not undermine the reasons for closing the class, under the rule of Subsection (1) of this section, on the effective date of the dispositive instrument.

If the donor provides that the class gift is to those members of the described class who are "born" on the effective date of the dispositive instrument, this reference to the word "born" is not sufficient additional language to cause the exclusion of a child in gestation who otherwise would not be excluded from the class.

Illustration:

1. O transfers property by will "to the children of my son S." After O executed his will and before his death, S and his wife W arranged to have W artificially inseminated with the semen of another man, the child thus produced to be raised by
S and W as their child. The child born to W is not excluded from the primary meaning of a gift to S’s children under the rule of construction in § 25.3. If such child is in gestation when O dies and is later born alive, such child is not excluded from the bequest to the children of O’s son S, in the absence of additional language or circumstances that indicate otherwise.

d. Adoption in process on the effective date of the dispositive instrument. By analogy to a child in gestation, a child who is in the process of being adopted is regarded as an adopted child during the period the adoption is in process. Consequently, an adopted person who is a class member is not excluded from a gift immediate in form to the class when the adoption is in process on the effective date of the dispositive instrument and is concluded within a reasonable time thereafter.

e. Possible exclusion of class members not excluded by rule of this section. A person who comes within the primary meaning of the class gift term, who is conceived or adopted prior to the effective date of the dispositive instrument, may not be entitled to share in the class gift because such person does not meet a requirement of survival to the date the dispositive instrument takes effect. The circumstances under which a class member’s interest is subject to a requirement of survival to the date the dispositive instrument takes effect are considered in Chapter Twenty-Seven.

If the class gift term that is used to describe the beneficiaries of the disposition is “issue” or “descendants,” the primary meaning of such class gift term includes those in the lineal line of descent from the designated ancestor regardless of their degree of relationship, unless additional language or circumstances indicate otherwise (see § 25.9). Under the rules of construction in Chapter Twenty-Eight, if the distribution is to such “issue” or “descendants” on a per stirpes basis, an issue or descendant in being on the date the dispositive instrument takes effect is not excluded by the rule of Subsection (1) of this section, but is excluded if an ancestor of such person who is a member of the class is alive and entitled to take a share.

f. Gift immediate in form—generally. The rules of construction of this section are restricted to gifts to a class that are immediate in form. A gift in favor of a class is immediate in form when the donor, having a present interest in the subject matter of the gift, purports to give a present interest therein to the described class, the enjoyment in possession of which is to begin on the effective date of the dispositive instrument. The present interest of the donor may be a fee simple interest, a qualified fee simple interest, an estate for the donor’s life or for the life of some other
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person, or an estate for years. The present interest that the donor
gives to the members of the described class may be the donor's
entire interest or some lesser present interest or a present undivid-
ed interest.

Illustrations:

2. O, owner of Blackacre in fee simple, transfers by will
her entire interest therein “to the children of my daughter D.”
D survives her mother. On the date of her mother's death, the
effective date of her mother's will, D has two children both
adopted by D at an early age and raised in her home. Two
years after her mother's death, D adopts another child. The
child adopted by D after her mother's death is excluded from
sharing in the gift of Blackacre under the rule of Subsection (1)
of this section, in the absence of additional language or circum-
stances that indicate otherwise.

3. Same facts as Illustration 2, except that D has a
natural-born child two years after her mother's death. Such
natural-born child of D is excluded from sharing in the gift of
Blackacre under the rule of Subsection (1) of this section, in the
absence of additional language or circumstances that indicate
otherwise.

4. O, owner of a twenty-year lease in Blackacre, transfers
by will her entire interest in such lease “to the children of my
daughter D.” D survives her mother. On the date her moth-
er's will took effect, D had two children ages 10 and 8. Two
years after her mother's death, D has another child. The child
born to D after her mother's death is excluded from sharing in
the gift of the leasehold interest in Blackacre under the rule of
Subsection (1) of this section, in the absence of additional
language or circumstances that indicate otherwise.

If the gift by the donor to the described class is the right to the
income from the donor's ownership interest that is transferred to a
trustee, no immediate gift is made to the class. The gift of the
income interest is a series of successive postponed gifts. The
postponed period with respect to each income payment ends on the
date the income payment is to be made. In regard to the exclusion
of class members not in being on an income payment date, see
§ 26.2, Comment g.

Illustration:

5. O, owner of Blackacre in fee simple, transfers by will
an interest therein “to the children of my daughter D, each
child's share to last until such child's death.” D survives her
mother. On the date of her mother's death, the effective date of her mother's will, D has two children ages 10 and 8. Two years after her mother's death, D has another child. The child born to D after her mother's death is not excluded from a legal life interest in Blackacre, from and after such child's birth, by analogy to a gift of an income interest under a trust to the children of D, in the absence of additional language or circumstances that indicate otherwise. A remainder interest that will not vest until after the death of the after-born child of D may violate the rule against perpetuities (see § 1.4).

9. Gift immediate in form—distribution delayed by normal estate administration matters. When a gift that is immediate in form of other than real property to a class is made by will, though the death of the person whose will is involved is the effective date of the will, no one is in a position to carry out the terms of the will until the will is probated and a personal representative appointed. A distribution to legatees under the will frequently cannot be made until sometime later because of possible claims of creditors and estate tax liabilities. If a will contest develops, distributions under the will are held up until the contest is settled and that may be several years. These delays that are inherent in the administration of a decedent's estate are not relevant in applying the rule of Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise. In other words, a gift immediate in form is not changed to a postponed gift by the delays referred to above.

Illustrations:

6. O transfers by will the sum of $100,000 "to the children of my son S." Under the controlling local law, such a bequest earns interest at a specified rate for delay in payment beginning one year after O's death. The executor under O's will delays paying the legacy until one year after O dies, because to pay it sooner would increase the amount passing under the legacy at the expense of the takers of the residue who otherwise would pick up the income earned by the $100,000 prior to its payment. A child born to S 11 months after O dies is excluded from sharing in the legacy under the rule of construction in Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise.

7. Same facts as Illustration 6, except that the bequest to S's children is in terms "said sum to be paid after the probate of my will to the children of my son S," and the child of S born
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after O's death who was not in gestation at O's death was in gestation on the date of the probate of O's will. The child of S who was in gestation when the will was probated is excluded from sharing in the legacy under the rule of construction in Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise. The language in the will calling for the payment after the probate of the will is not language that indicates otherwise as it is descriptive of a delay that is inherent in a disposition under a will.

h. Gift immediate in form—condition precedent to class gift. If the gift to each member of the described class is subject to the fulfillment of a condition precedent, such as a gift to those class members who attain a specified age, the gift is one postponed in form, not a gift that is immediate in form, if the condition precedent has not been fulfilled as to any class member on the date the dispositive instrument takes effect (see § 26.2, Comments m-o). If, however, the condition precedent is fulfilled as to one or more of the class members on or prior to the date the dispositive instrument takes effect, a gift immediate in form is involved that is subject to the rule of Subsection (1) of this section.

Illustrations:

8. O transfers by will the sum of $100,000 "to the children of my son S who attain 21." At O's death, the effective date of O's will, S is alive and has three children, C1, C2, and C3. No child of S has attained 21 at O's death. A gift postponed in form is involved, the rule of § 26.2 applies, and the class does not close until a child of S attains 21.

9. Same facts as Illustration 8, except that at O's death C1 has attained 21. The rule of Subsection (1) of this section applies because there is a gift immediate in form at least as to C1 and if C1 is to be given a share of which C1 cannot be deprived by after-conceived or after-adopted children, the class must close, because C1 can thereby be given a definitive share of one-third of $100,000. If C2 and C3 both attain 21 later, they will each receive one-third of $100,000. If one or both of them fail to attain 21, C1's share will be correspondingly enlarged.

10. O transfers by will the sum of $100,000 "to the children of my son S when S's youngest child living on my death attains the age of 21 or would have attained that age had said child lived." At O's death, the effective date of O's will, S is alive and has three children, C1, C2, and C3. C3 is S's youngest child living at O's death and is 18 years of age. A
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Gift postponed in form is involved, the rule of § 26.2 applies, and the class does not close until $C_3$ attains 21 or would have attained 21 had $C_3$ lived.

11. Same facts as Illustration 10, except that at O's death $C_3$ has attained 21. The rule of Subsection (1) of this section applies and the class closes to after-conceived or after-adopted children of S on the death of O, in the absence of additional language or circumstances that indicate otherwise.

i. Gift immediate in form—prior interest expires before effective date of dispositive instrument. If a disposition purports to create an interest that is prior to the class gift and such prior interest expires by its terms before the effective date of the dispositive instrument, the class gift is judged as to whether it is a gift immediate in form as though there had been no attempt to create such a prior interest. This situation may typically arise when the dispositive instrument is a will.

Illustration:

12. O's will purports to devise Blackacre “to my wife W for life then to the children of my son S.” W predeceases O. On O’s death, S is alive and has two children, $C_1$ and $C_2$. The expiration of W's life interest by her death prior to O's leaves O's will with a gift immediate in form to S's children. Consequently, in the absence of additional language or circumstances that indicate otherwise, any child of S that is conceived or adopted after O's death is excluded from the class gift under the rule of Subsection (1) of this section.

j. Gift immediate in form—prior interest eliminated by a disclaimer. An interest given to a person by the dispositive instrument that is prior to the class gift may be disclaimed by such person. A disclaimer by such person must be made before the acceptance of the interest given to such person and within a reasonable time after the gift (see § 2518 of the Internal Revenue Code for time within which a disclaimer must be made to be effective for gift or estate tax purposes). The disclaimer has the legal effect of treating the disclaimed prior interest as though it never existed, what appeared initially to be a gift postponed in form becomes an immediate gift in form, and the rule of this section in regard to the closing of the class is applied accordingly. The dispositive instrument may provide that the disclaimer will not cause the class to close to after-conceived and after-adopted persons until it would have closed if there had been no disclaimer.

The termination of a prior interest after the effective date of the dispositive instrument by merger with the remainder interest in
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the class does not make the remainder interest in the class a gift immediate in form because the prior interest has had some period of existence in order for a merger to take place. Consequently, the effect of the merger on the closing of the class is governed by the rule of § 26.2 (see § 26.2, Comment i).

Illustrations:

13. O by will transfers Blackacre “to O’s son S for life, remainder to S’s children in fee simple.” After the effective date of the will, S makes a qualified disclaimer of his life interest. S has two children, C₁ and C₂, at the time the will becomes effective. Under the controlling local law, the disclaimer by S relates back to the effective date of the will, and the remainder to S’s children is accelerated, entitling S’s children to the disposition in their favor as of the effective date of the will. Consequently, in the absence of additional language or circumstances that indicate otherwise, any child of S that is conceived or adopted after the effective date of the will is excluded from the class gift under the rule of Subsection (1) of this section.

14. Same facts as Illustration 13, except that O’s will provides “that in the event S disclaims his life interest, the gift to S’s children shall not close to after-conceived and after-adopted children of S until it would have closed if S had not disclaimed his life interest.” C₁ and C₂ will be entitled to possession of Blackacre, but their interests will be subject to partial divestiture by after-conceived and after-adopted children of S until S dies.

k. Donor transfers future interest to class. The donor may own a transferable future interest in property and transfer such interest to a described class. In such case, whether the donor has or has not created the interest that must end before the members of the class can enjoy their gift in possession, such prior interest in fact exists. Consequently, the gift to the class is not an immediate one in form and the rule of § 26.2 applies in determining when the class closes to after-conceived and after-adopted persons (see § 26.2, Comment j).

Illustrations:

15. O transfers by will an interest in Blackacre “to my wife W for life.” The residuary clause in O’s will gives all the rest and residue of his estate “to the children of my daughter D.” D has two children, C₁ and C₂, on the date O’s will becomes effective. D is alive on O’s death. The residuary gift
includes the remainder interest in Blackacre following the life estate in W, as well as other property with respect to which there is no prior interest. In these circumstances, O has made a gift postponed in form to the class so far as Blackacre is concerned but a gift immediate in form to the class so far as other items in the residue are concerned. The rule of § 26.2 applies in determining when the class closes to after-conceived and after-adopted children of D with respect to Blackacre. The rule of Subsection (1) of this section governs with respect to the closing of the class as to other items in the residue.

16. The same facts as Illustration 15, except that O's will directs that his entire residuary estate, including the future interest in Blackacre, be converted to cash by his executor and the cash distributed "to the children of D." Such direction converts the entire residuary gift into one immediate in form and the rule of this section applies. Consequently, in the absence of additional language or circumstances that indicate otherwise, any child of D that is conceived or adopted after O's death is excluded from the class gift under the rule of Subsection (1) of this section. If the executor is given only a power to convert the assets in the residue to cash, rather than a mandate, the gift to the class of the future interest in Blackacre would be postponed until the power is exercised and thus would be governed by the rule of § 26.2.

1. No person available to take a possessory interest under the class gift on the effective date of dispositive instrument. If no class member has been conceived or adopted at any time prior to the effective date of the dispositive instrument in which a gift that is immediate in form is made to a class, and if such gift is effective under controlling local law, the gift to the class is governed by the rule of Subsection (2) of this section and the class does not close to any after-conceived and after-adopted persons.

It may be that a class member who was in being prior to the effective date of the dispositive instrument drops out of the class before such date by failing to meet a requirement of survival, and, as a consequence, no class member is in being on such date. In this case, if such gift is effective under controlling local law, the gift to the class is governed by the rule of Subsection (2) of this section and the class does not close to any after-conceived and after-adopted persons.

Though a class member in being drops out of the class because of a failure to meet a requirement of survival to the effective date of the dispositive instrument, provision may be made in the instrument or by statute for another person to be substituted for such
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Class member. This situation quite commonly exists in connection with class gifts under so-called antilapse statutes. In such case, the gift to the class remains subject to Subsection (1) of this section and the class closes to after-conceived or after-adopted persons on the effective date of the dispositive instrument, in the absence of additional language or circumstances that indicate otherwise. If a class member disclaims his or her interest after the effective date of the dispositive instrument, and as a consequence no class member is available to take under the class gift, the gift to the class is governed by Subsection (2) of this section and the class does not close to after-conceived and after-adopted persons.

Illustrations:

17. O transfers by will O's residuary estate "to the children of my son S." On the date O executes his will, S has had no children and no child of S is conceived or adopted between the date O executed the will and the date it becomes effective on O's death. S survives O. The class gift is governed by the rule of Subsection (2) of this section and the class does not close to after-conceived and after-adopted children of S as long as S is alive, in the absence of additional language or circumstances that indicate otherwise.

18. Same facts as Illustration 17, except that a child of S in being when O's will is made dies before O, leaving no issue, no other child of S comes into being prior to O's death, and no antilapse statute is applicable. The result is the same as in Illustration 17.

19. Same facts as Illustration 18, except that the antilapse statute is applicable and provides a substituted taker for the deceased child's interest. In such case the rule of Subsection (1) of this section applies and, in the absence of additional language or circumstances that indicate otherwise, any child of S who is conceived or adopted after the effective date of O's will is excluded.

m. Bequest of specific sum to each class member. If the size of a class member's share in a bequest immediate in form to the class does not depend on the number in the class, as when a specific sum is given to each class member, it is not necessary to close the class to after-conceived and after-adopted class members to make a definitive gift to a class member who is entitled to his or her share. Nevertheless, the rule of Subsection (1) of this section applies and the class closes to after-conceived and after-adopted class members, because otherwise property disposed of by the
decedent's will is held up due to the inability to determine how many bequests of specific sums will be needed.

Illustrations:

20. O transfers by will the sum of $100 "to each child of my son S." On the effective date of O's will, S is alive and has two young children, C₁ and C₂. O's estate is $100,000. In the absence of additional language or circumstances that indicate otherwise, a child of S that is conceived or adopted after O's death is not entitled to the sum of $100.

21. Same facts as Illustration 20, except that O's will directs that $1000 be set aside, out of which the sum of $100 shall be paid to each child of S until the fund is exhausted. After-conceived and after-adopted class members should receive $100 gifts until the $1,000 fund is exhausted.

n. Additional language or circumstances that indicate a contrary intent—generally. The rules of this section are rules of construction that may be overcome by additional language in the dispositive instrument, or by the circumstances surrounding the disposition that indicate a contrary intent. The contrary intent indicated may exclude more class members than would be excluded under the rules of Subsections (1) and (2) of this section, thereby narrowing the class, or may exclude fewer class members than would be excluded under the rule of Subsection (1) of this section, thereby expanding the class.

If the contrary intent narrows the class, as when a gift by will is "to the children now living of my son S," and S has two children, C₁ and C₂, living on the date the will is executed, the only problem that arises from the fact that a class gift term is used to describe the beneficiaries is the effect if one or the other of C₁ and C₂ dies before the testator. The result may be different than would be the case if the gift had been made "to C₁ and C₂." This difference is considered in Chapter Twenty-Seven.

If the contrary intent expands the class so that class members who otherwise would be excluded under the rule of Subsection (1) of this section are not excluded, as when a gift by will is "to the children of my son S whether born or adopted before or after my death," what distribution is to be made to the members of the class who are alive and ready to take on the death of the testator, and what is to be done to assure that appropriate shares will be available for after-conceived and after-adopted class members? This same question arises if Subsection (2) of this section is applicable.
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If the subject matter of the gift is land, the class members ready to take should be entitled to enjoyment in possession of undivided interests in the land, the undivided interests of each to total the entire interest in the land, which undivided interests, however, will be subject to partial divestiture by after-conceived and after-adopted class members. The holders of the undivided interests in the land should not have to account to after-conceived and after-adopted class members for any of the benefits received by them from the enjoyment of the possession of the land prior to a partial divestiture.

If the subject matter of the gift is other than land, the class members ready to take should receive immediate enjoyment of the gift, but with adequate safeguards that the shares of the after-conceived and after-adopted class members will be forthcoming. This can be done by placing the subject matter of the gift in trust to be managed for their benefit and the benefit of after-conceived and after-adopted children until no additional class members can come into the picture. The existing class members from time to time will receive all the current benefits from the management of the property in the trust with no obligation to account for such benefits to after-conceived and after-adopted class members.

When the subject matter of the gift is other than land, instead of using a trust, the subject matter may be delivered to the class members that are ready to take, they to take subject to partial divestiture by after-conceived and after-adopted class members, and they to provide bond that the property or its value will be forthcoming in sufficient amount to make up the shares of after-conceived and after-adopted class members. In this situation also there should be no obligation to account for the benefits received by the existing class members from the enjoyment of the subject matter when a partial divestiture occurs.

If there are no class members ready to take when the dispositive instrument takes effect, as when Subsection (2) of this section is applicable, the subject matter of the gift should be held in a trust, with the income accumulated and added to principal, until a class member comes into being, and from that time forward one of the solutions mentioned above can be applied.

Illustrations:

22. O transfers by will the sum of $100,000 "to the children of my son S now born or adopted and who may hereafter be born or adopted." The issue is whether the reference to "who may hereafter be born or adopted" is restricted to the children of S born or adopted after the will is
executed and before O dies. In the absence of additional language or circumstances, the quoted words should not be so restricted but should expand the class to include after-conceived and after-adopted children of S whenever born or adopted.

23. Same facts as Illustration 22, except that the bequest is in the amount of $100,000 for each class member. O's estate amounts to $500,000. In such case, there would be significant inconvenience in administering O's estate due to the unknown number of $100,000 gifts that would be needed, if class members conceived and adopted after the effective date of the dispositive instrument are not excluded. In the absence of additional language or circumstances that indicate otherwise, it is reasonable to conclude that the reference to class members who may "hereafter" be born or adopted is restricted to those born or adopted after the will is executed and before the will takes effect.

24. Same facts as Illustration 22, except that the bequest of $100,000 is "to all the children of my son S." In the absence of additional language or circumstances, it is reasonable to conclude that the reference to the word "all" is not sufficient to overcome the rule of construction of Subsection (1) of this section, but refers to all the children who come into being before the effective date of the will.

STATUTORY NOTE TO SECTION 26.1

1. The following statutes provide for the rights of children in gestation, children conceived before but born after the transferor's death, or other vesting period:

a. The following statutes apply to both immediate and postponed gifts and provide that a child conceived before but born after the testator's death (or other vesting period) takes if answering the class description:
   - California Probate Code § 6150 (West Supp.1987) (see also statutes in items 1b and 1c)
   - New York Est., Powers & Trusts Law § 2-1.3 (McKinney 1981) (see also statute in item 1c)
   - South Dakota Cod. Laws Ann. § 29-5-20 (1984) (see also statute in item 1b)
   - Wisconsin Stat. § 700.12 (1983-84)
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b. The following statutes provide that a child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth:

- California Civil Code § 29 (West 1982) (see also statutes in items 1a and 1c)
- Idaho Code § 32-102 (1983) (see also statute in item 1c)
- Louisiana Civil Code Ann. art. 29 (West 1952)

- c. The following statutes provide that when a future estate is limited to “heirs,” “issue,” or “children,” posthumous children are entitled to take the estate in the same manner as if born before the death of the parent:

  - Alabama Code § 35-4-8 (1975)
  - California Civil Code § 698 (West 1982) (see also statutes in items 1a and 1b)
  - Idaho Code § 55-108 (1979)
  - Michigan Comp.Laws § 554.30 (1979)
  - New York Est., Powers & Trusts Law § 6-5.7 (McKinney 1967) (see also statute in item 1a)

- d. The following statutes provide that when an estate has been by any conveyance limited in remainder to the son or daughter or to the use of the son or daughter of any person to be begotten, such son or daughter, born after the decease of his or her father, shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death:

  - Mississippi Code Ann. § 89-1-11 (1972)
  - Missouri Ann. Statutes § 442.510 (Vernon 1952)

- e. The following statutes provide that a child (in some states all relatives) conceived before but born after the decedent's death will be considered as living at the death of the decedent for purposes of intestate succession:
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Delaware Code Ann. tit. 12, § 505 (1979) (child)
Florida Stat. § 732.106 (1985) (heirs)
Georgia Code Ann. § 53-4-2(4) (Supp.1986) (child)
Idaho Code § 15-2-108 (1979) (relatives)
Indiana Code § 29-1-2-6 (1976) (descendants)
Iowa Code § 633.220 (1985) (heirs)
Louisiana Civil Code Ann. art. 954 (West 1952) (child)
Massachusetts Gen.Laws cb. 190, § 8 (1986) (child)
Michigan Comp.Laws § 700.108 (1979) (child)
Minnesota Stat. § 525.171 (1982) (child); § 524.2-108, effective 12/31/86 changed to relatives of decedent
Mississippi Code § 91-5-3 (1972)
Missouri Ann.Stat. § 474.050 (Vernon 1956) (child or descendants)
Nebraska Rev.Stat. § 30-2308 (1979) (relatives)
New York Est., Powers & Trusts Law § 4-1.1(e) (McKinney 1981)
(distributees of decedent)
Oklahoma Stat. tit. 84, § 228 (1985) (child)
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Utah Code Ann. § 75-2-108 (1978) (relatives)
Virginia Code § 64.1-8.1 (1980) (relatives)
Wisconsin Stat. § 852.03(4) (1983-84) (relatives)

2. The following statutes provide that an immediate testamentary disposition to a class includes every person answering the description at the testator's death:

California Probate Code § 6150 (West Supp.1987)
Oklahoma Stat. tit. 84, § 171 (1981)

3. A group of statutes in Louisiana provides for the treatment of a "class trust," an inter vivos or testamentary trust in favor of a class consisting of some or all of the grantor's children, or grandchildren, nieces, nephews, grandnieces, or grandnephews, or any combination thereof. If such a trust is created, "[t]he trust instrument may state a date or a method for defining a date on which the class shall close. Unless the trust instrument provides otherwise, the class shall close when, because of the definition of the class, members may no longer be added to it." Property in a "class trust" must remain in trust until the class closes:


4. Disclaimer statutes

Internal Revenue Code, § 2518
Uniform Disclaimer of Transfer by Will, Intestacy or Appointment Act
Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act

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REPORTER'S NOTE TO SECTION 26.1

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. They follow in general the positions taken in § 294 of the first Restatement, but they operate on a broader base because the primary meaning of the class gift term does not exclude persons born out of wedlock and adopted persons. See, however, in regard to § 26.1, Illustration 5, § 295 of the first Restatement, Comment f.

2. Justification for the rules of this section—The justification for the rules of this section is stated in Comment a.

3. Gifts to children of testator or to children of person deceased at effective date of dispositive instrument—If the conveyance is by will and the class is the “children” of the testator, no children of the testator will be excluded from the class as being born or adopted too late. In Meares v. Meares’ Executors, 4 Ired.L. 192 (N.C.1843), a daughter born after the execution of her father’s will argued that she was not provided for in the will which gave gifts to the testator’s “children,” and was therefore entitled under the pretermitted heir statute to the share of her father’s estate that she would have taken had he died intestate. The court denied her claim, noting that

in construing a father’s will, . . . a gift to his own children will be held to include all of them in being at his death, unless it be evident upon the will that the testator meant the provision only for those living at the date of the will; for the law presumes he intended to fulfill his natural duty by providing for each one, and, therefore, if it be possible, receives his words in that sense.

Id. at 197. The Rhode Island Supreme Court reached the same conclusion when presented with nearly identical facts in Industrial Trust Co. v. McLaughlin, 44 R.I. 360, 117 A. 428 (1922).

Similarly, there is no room for the rules of this section to operate when the gift is to the children of a person who is deceased on the effective date of the dispositive instrument; none of the designated person’s children comes into being too late to share in the gift. See Claude v. Schutt, 211 Iowa 117, 233 N.W. 41 (1930) (gift to “the children of my deceased son”); In re Hutton’s Estate, 106 Wash. 578, 180 P. 882 (1919) (gift to children of deceased half-brother of testator); McIntire v. McIntire, 14 App.D.C. 337 (1899) (gift to children of deceased brother).

Recently, in Platt v. Romesburg, 290 S.C. 164, 348 S.E.2d 536 (App. 1986), a grandchild born after the execution of will but before the death of the testatrix was not entitled to share under the will, which divided the residuary estate equally among her three married grandchildren. The court held that the number of legatees was settled by naming them specifically.

4. Exclusionary operation of rule of Subsection (1) of this section—In Loockerman v. McBlair, 6 Gill 177 (Md.1847), the testator provided that certain land should go “to my dear grandchildren.” In holding that grandchildren born after the death of the testator were
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Not included in the gift, the court stated that

the devise is immediate. Those who are entitled to the devised premises became entitled to the land, so soon as the testator died—the description of the persons to take is general, and only those, who at the time of the testator's death came within that description can take.

Id. at 179. In Crockett v. Crockett, 332 Mass. 564, 126 N.E.2d 363 (1955), the will provided, "To all my nieces and nephews, I wish that my Estate would provide a four year college course to any wishing to accept such." The court held that the nephews (there were no nieces) living at the testator's death were entitled to the gift. The court rejected the argument that since the testator had no nieces, he must have intended to include a niece who might be born beyond the period fixed by the rule against perpetuities, noting that there was nothing to take the case out of the "general rule that estates are to vest and be distributed as soon as that can be accomplished . . . ." Id. at 567, 126 N.E. at 365. Also, to allow afterborn nieces and nephews to share would have held up computation of the residuary gift in favor of the testator's mother, wife, and son, who were the primary objects of the testator's bounty. The following cases also illustrate the exclusionary operation of the rule of Subsection (1) of this section with regard to immediate testamentary gifts: members of the class born after the testator's death are excluded (unless they are in gestation at the time of the testator's death—see item 5, below). Dawson v. Christopher, 122 W.Va. 543, 11 S.E.2d 175 (1960) (devise of one-half of testator's land "to the children of my daughter" was gift to class of children living at testator's death and child born to daughter after testator's death was excluded); James v. James, 164 S.W. 47 (Tex. Civ.App.1914) (two children conceived after death of testator did not share with brothers and sisters in gift to children of testator's son); Benson v. Wright, 4 Md.Ch. 278 (1848) (afterborn "children" were excluded from testamentary gift to "children" of living individual); Jenkins v. Fryer, 4 Paige 47, 53 (N.Y.1833) (where no time is fixed for distribution of a legacy, "it is considered as due at the death of the testator; and none but children who were born or begotten previous to that time are entitled to share in the legacy"); Clarke v. Clarke, 253 N.C. 156, 116 S.E.2d 449 (1960) (bequest to the children of the testator's sons did not include children born after the death of the testator).

Courts have justified closing the class at the death of the testator because allowing persons born after that date to share in the gift would result in a violation of the rule against perpetuities. In In re Hammond's Will, 73 Misc.2d 901, 343 N.Y.S.2d 282 (Sur.Ct.1973), the will gave $25,000 to each of the testator's three named grandchildren living at the execution of the will, and also provided that $25,000 be paid "to each additional grandchild of mine, if any, who shall be born after the date hereof." Noting that if afterborn grandchildren were allowed to share in the disposition the gift would violate the New York perpetuities statute, the court held that only the grandchildren born before the testator's death, when the will became effective, were entitled
to $25,000. Cf. Applegate v. Brown, 168 Neb. 190, 95 N.W.2d 341 (1959), in which the will directed that all of the testator's estate be placed "in trust for the use, benefit, comfort and maintenance of my nieces and nephews and such other of my relatives as may in the discretion of my [executors] warrant and require financial aid and assistance. . .". The court held that the will created a valid trust and that the class of beneficiaries were the relations of the blood of the testator. The court also found that the gift was an immediate gift, and, pointing to the predecessor of the rule of this section in the first Restatement of Property (§ 394), held that the class included the testator's relatives living at his death, and excluded relatives born after that date. The gift was a gift of income only; there was no explicit disposition of the corpus by the will. There was also no time stated for the duration of the trust. According to the court,

Obviously the trust created by the will expires with the death of the last of the beneficiaries. . . . [T]he corpus of the trust property on the termination of the trust goes as intestate property to the testator's heirs.

Id. at 201-02, 95 N.W.2d at 349. If the class had been allowed to increase with each income distribution, the court would not have been able to determine easily when the trust should end. See also In re Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983) (gift of income from residuary estate to, among others, "the issue of Nina Carden;"trust was to terminate on death of all income beneficiaries; held, class closed at death of testator because of violation of rule against perpetuities if the class was allowed to remain open indefinitely). (Comment f states that in gifts of income, there is no immediate gift made to a class, but rather a series of postponed gifts. See also § 26.2, Comment g, and the Reporter's Note to Section 26.2, item 3.)

Kitchens v. Craig, 1 Bail.L. 119 (S.C.1828), involved a deed of personal property to "the heirs of Frances Kitchens." The word "heirs" was construed to mean "children," and the court held that only children in being at the time of the deed took, noting that the deed recited that the property had been "delivered" to the heirs of Frances and it was impossible to make a delivery to persons not in existence. Afterborn children of Frances were excluded. A similar case is Tharp v. Yarbrough, 79 Ga. 382, 4 S.E. 915 (1887), construing a deed to "The heirs of Robt. A Tharp, their heirs and assigns." The opinion notes that at the time the deed was made Robert had three children, and "several others" were born afterwards. The court first concluded that the gift to the "heirs" meant "children" (see the Georgia statute in the Statutory Note to Section 25.1, item 1), and held that only the three children living at the time of the deed were entitled to share in the property. See also Rose v. Rose, 191 Va. 171, 60 S.E.2d 45 (1950) (deed of land to "Otto R. Wachsman and his children" held to create joint fee simple estate in Otto and his four then living children in equal portions).

5. Children in gestation—Much of the law regarding the inclusion of a child in gestation in a gift to a class is statutory; see the Statutory Note to this section, item 1. This item discusses the cases which hold that a child in gestation at the time
the dispositive instrument takes effect is included in the class if the
close.
These cases are perhaps the best
illustrations of the limits on the exclu-
sionary operation of the rule of
Subsection (1) of this section. Chil-
dren in gestation are the last mem-
ers of the class to be included be-
fore the class closes.

The rule that children in gestation
are not excluded in a gift to a class is
long-established and universally
accepted. In Smart v. King, 19
Tenn. (Miegs) 149 (1838),
the will
directed that the residuary estate
"be equally divided amongst my
grandchildren." At the death of
the testator his daughter was preg-
nant. When the executors refused
to include the child in the distri-
bution, he brought suit. The court, in
holding that the child in gestation
was included in the gift, noted that
Whatever may have been the ear-
lier decisions on this point, it
would seem that there is not at
present any doubt that the com-
plainant is entitled to the relief
sought.

Id. at 152. See also Matter of
Holthausen's Will, 175 Misc. 1022,
1024, 26 N.Y.S.2d 140, 143 (Sur.Ct.
1941) ("It has been the uniform and
unvarying decision of all common
law courts in respect of estate mat-
ters for at least the past two hun-
dred years that a child en ventre sa
mere is 'born' and 'alive' for all
purposes for his benefit.").

In the following cases a child in
gestation at the death of the testa-
ator was allowed to share in a class
gift under the will. Biggs v. Mc-
carthy, 86 Ind. 352, 44 Am.Dec. 320
(1882) (devise to named individual
"and her children"); In re Walton's
Estate, 183 Kan. 228, 326 P.2d 264
(1958) (gift of residuary estate to
the "nieces and nephews of myself
and my wife" included nephew born
270 days after death of testator);
Hall v. Hancock, 32 Mass. (15 Pick.)
255, 26 Am.Dec. 598 (1834) (gift of
residuary estate "to my grandchil-
dren . . . such of them as may be
living at my decease" included
grandchild born within nine months
of testator's death); Fuller v. Gale,
78 N.H. 544, 108 A. 308 (1918), over-
rulled on other grounds
Amoskeag Trust Co. v. Trustees of Dartmouth
College, 89 N.H. 471, 200 A. 786
(1938) (gift of $100,000 "for each
grandchild I may leave surviving
me, whether now or hereafter born"
included grandchild born four
months after testator's death;
grandchild born later would be ex-
cluded); Randolph v. Randolph, 40
N.J.Eq. (13 Stew.) 73 (Ch. 1885)
grandchild born two days after tes-
tator's death included in gift of
$3000 "for each of my grandchil-
dren living at the time of my de-
cease"); In re Levy's Estate, 138
1927) (grandchild in gestation at tes-
tator's death shared in gift of resid-
uary estate "to such of my
grandchildren as shall survive me");
In re Meyer's Estate, 119 N.Y.S.2d
737 (Sur.Ct.1953) (will gave $5000 to
"each and every issue" of testator's
two sons and a nephew; two chil-
dren born to named parents within
nine months of testator's death
were entitled to $5000); Culp v. Lee,
109 N.C. 675, 14 S.E. 74 (1891) (por-
tion of residuary estate to "the chil-
dren of my niece," held, child born
day after testator's death shared);
James v. James, 164 S.W. 47 (Tex.
Civ.App.1914) write of error dis-
missed (gift of portion of residuary
estate to children of testator's son
included child in gestation at death of testator; two children born later were not included).

Similarly, if the dispositive instrument is a deed, a child conceived at the time the instrument takes effect will be included in a gift to a class if the child is within the primary meaning of the class gift term. Medlock v. Brown, 163 Ga. 520, 136 S.E. 551 (1927) (child born one month after execution and delivery of deed was included in gift to "Mary F. Wells and her children"); King v. Rea, 56 Ind. 1 (1887) (deed conveyed estate "to Martha . . . and her children"); date of deed was April; child born in August "was a person in being, and therefore could take"); Heath v. Heath, 114 N.C. 547, 19 S.E. 155 (1894) (gift to "children" conveyed title to child in gestation at date of conveyance).

The American Law of Property points out that the fact that the language of the gift is to those "born" in the lifetime of the testator does not exclude children in gestation. "Thus, to exclude children in gestation requires almost express language to that effect." 5 American Law of Property § 22.42 at n. 23 (A.J. Casner ed.1952). In In re Gebhardt's Will, 139 Misc. 775, 249 N.Y.S. 286 (Sur.Ct.1931), the will provided that $2000 be given "to each of my grandchildren who may be born after this will" included a child born nine days after the death of the testator.

Comment c also states that a child in gestation must be born alive in order to be entitled to a share of the class gift. In all of the cases discussed in this item the children in gestation at the effective date of the instrument were subsequently born alive. This was also the case in Ebbs v. Smith, 59 Ohio Misc. 133, 394 N.E.2d 1084 (Prob.Ct.1979); the court held that a grandchild in gestation took under a gift "to the children and grandchildren of Mary Murtz." The court also noted in dictum that this would not have been the result if the child had not been born alive.

6. Distribution delayed by normal estate administration matters—In In re Landwehr's Estate, 147 Pa. 121, 23 A. 348 (1892), the will directed that the residuary estate be sold "as soon after my decease as they, my executors, shall think fit and expedient." The will also directed that a portion of the residuary estate pass to "the children of my son." At the testator's death the son had seven children. Two more children were born after the testator's death, but before the distribution by the executors. The lower court, which was affirmed per curiam, held that only the children living at the testator's death were entitled to take.

The gift is immediate; and, while actual possession is postponed until sale, postponement is for convenience of distribution. . . . As the discretionary power of sale vested in the trustees must be exercised within a reasonable time, the delay in actual distribution is such as would take place in
ordinary cases of administration, and will not operate to let in subsequently born children.

Id. at 123, 28 A. at 349. A similar case is Worcester v. Worcester, 101 Mass. 128 (1869). The will provided as follows: "To my nephews and nieces who may survive me, I give and bequeath the residue of my estate . . . and it is my will that my real estate be sold as soon as may be advisable for the purpose of making such distribution." More than one year after the death of the testator, but before any payment had been made to the residuary legatees, a son was born to one of the testator's brothers. He argued that because he was born before the distribution date, he was entitled to share in the residuary estate. The court rejected the argument, holding that only the nephews and nieces in being at the testator's death were entitled to share in the residuary estate. The court rejected the argument, holding that only the nephews and nieces in being at the testator's death were entitled to share. In Merrill v. Winchester, 120 Me. 203, 113 A. 261 (1921), a bequest to each of the testator's sister's children, grandchildren, and greatgrandchildren of $3000, "to be paid within two years after this will is admitted to probate, to those then living, and to those born afterwards, within two years of birth." The court construed the provision to mean that members of the class living at the testator's death would receive their bequest within two years of that date. "[T]hose born afterwards" was construed to refer only to children in gestation at the testator's death; their legacies were to be paid within two years of their births. In any event, only those class members conceived before the death of the testator could take under the will.

In Goodwin v. Goodwin, 48 Ind. 584 (1874), the court construed the language of the will as manifesting an intention that the class not close until the actual date of distribution. The residuary clause provided that "after paying off the foregoing legacies and expenses," the residuary estate should "be equally divided among the children of my sons . . . that may then be living." The court held that two grandchildren born after the testator's death and before the distribution of the residuary estate were entitled to share in the gift. "It seems to us that they answer to the description of the class contained in the will. They are children of [one of the sons], and they are living at the time when the distribution of the residue is to be made." Id. at 591.

7. Condition precedent to class gift fulfilled before effective date of dispositive instrument—In Cowles v. Cowles, 56 Conn. 240, 13 A. 414 (1887), the residue of the estate was given to a trustee in trust for the benefit of the testator's grandchildren, "the principal and profits to be divided equally between said grandchildren as they shall respectively arrive at the age of twenty-five years. . . ." One of the grandchildren reached age twenty-five prior to the death of the testator and the court held that only the grandchildren conceived as of the testator's death were entitled to share in the residuary estate.

8. Prior interest expires before effective date of dispositive instrument—In Carver v. Oakley, 57 N.C. (4 Jones Eq.) 85 (1858), the will provided for a bequest to Betsy Carver for her life and then "[t]he same to be equally divided between the grand-children of my deceased son Josias . . . ." Betsy died before the testator. The court refused to accept an argument that only
grandchildren alive at Betsy’s death shared in the remainder, and that grandchildren born between her death and the testator’s death were excluded.

It is a well established rule of construction, that when property is given, by will, to a class, as many of the class shall be included in the benefit as can be, without doing violence to the language of the instrument. Here, the period of division among the grandchildren, as a class, is the death of the testator, and we think all must be embraced, who were then living.

*Id.* at 86.

9. Prior interest disclaimed—In Weinstein v. Mackey, 408 So.2d 849 (Fla.App.1982), an inter vivos trust provided that following the death of the settlor the income from a specified portion of the corpus was to be paid to the settlor’s nephew and his wife for their lives, and upon the death of the survivor, the corpus generating the income was to be distributed to the nephew’s children. Shortly after the death of the settlor the nephew and his wife executed “unconditional disclaimers.” The court held that the disclaimers accelerated the remainder interest so that it was immediately distributable to the four living children of the nephew, to the exclusion of any afterborn children, noting that “[a] clear majority of the cases . . . hold that a remainder to a class . . . is both accelerated and closed upon the termination of the preceding life estate.” *Id.* at 852. The court rejected the argument that the settlor would have wanted the principal to be held in a kind of equitable limbo . . . awaiting [the nephew’s] natural death and the termination of the possibility—which is only speculative in any case—of his having other children. On this point we must conclude from a consideration of the entire trust instrument that [the settlor] sought to grant her nephew and niece income during their lives simply as a benefit for them, rather than as a means of postponing the distribution of the corpus to the ultimate objects of her bounty, her grandnephews and grandnieces. Because for their own reasons—probably relating to post-mortem estate planning—[the nephew and his wife] do not want that benefit, there is no reason for, or, to put it more accurately, [the settlor] would have no reason to want any subsequent delay in the distribution and receipt of the principal.

*Id.* at 854.

The majority of the cases involving a disclaimer result from a spouse’s election to take against the will and claim his or her statutory share of the decedent spouse’s estate. This was the situation in Davis v. Hillard, 129 Md. 348, 99 A. 420 (1916). In that case the will directed that property in which the surviving spouse was given a life interest was to be sold after her death and the proceeds paid to the testator’s grandchildren. The court held that the surviving spouse’s renunciation and election to take against the will was equivalent to her death, and that the property should therefore be sold and distributed to the then living grandchildren. A similar case is Allen v. Hannum, 15 Kan. 625 (1875) (widow elected against will; remainder beneficiaries were children of testator’s daughter; held, children took remainder interest immediately).
The court in Askey v. Askey, 111 Neb. 406, 196 N.W. 891 (1923), found an intent on the part of the testator that the class of "grandchildren" should not close until the death of his widow whether or not she elected to take the life interest given to her in the will. The disputed provision in the will gave the widow "enough of the proceeds of my property for her living and support during her natural life . . . but if she again marry after my death then this amount shall stop . . . and at the death of my wife I want the property sold and be divided among my grandchildren. . . ." The widow elected to take under the law of descent and distribution rather than under the will. Noting that the testator had provided for one contingency—the remarriage of the widow—upon which her interest would cease, and that under that contingency the property was not to be distributed to the grandchildren until the widow's death, the court held that the testator intended that the only event which would prompt distribution of the remainder interest (and the closing of the class) was the widow's death.

In Cool v. Cool, 54 Ind. 225 (1876), the will gave the widow a life interest in the testator's estate for "as long as she remains my widow." On the death of the widow the property was to be divided among the testator's nieces and nephews. The widow elected to take against the will. As in Askey, supra, the court focused on the result if the widow had terminated her interest in a manner contemplated by the testator—remarriage. Since the income interest in the property would have passed as intestate property on the remarriage of the widow, it passed as intestate property when she renounced the will. The court also held that there was no acceleration of the remainder; death of the widow was the only event upon which the nephews and nieces would take. As a result, the heirs of the testator were entitled to the income from the residuary estate until the widow's death, at which time the property would be distributed to the nephews and nieces. In Yeaton v. Roberts, 28 N.H. 459 (1854), the court also found that "[t]he expectation of the testator apparently was, that [the widow] would accept the life estate provided by the will, and, consequently, that the portions of these children [as remaindermen] would not fall into their position till after her death." Id. at 468. The children/remaindermen were entitled to the income from the estate until the death of the widow.

In Neill v. Bach, 231 N.C. 391, 57 S.E.2d 385 (1950), the will gave a house and lot to the testator's daughter for her life, "with the remainder in fee to her children." The daughter renounced the gift. The court stated that while there were similarities between this case and the cases in which a surviving spouse elected to take against the will (with the result that a remainder interest to a class was accelerated), "it will be noted that in none of those cases was the remainder devised to a class whose membership was not ascertainable at the time of the acceleration of the remainder." Id. at 394, 57 S.E.2d at 387. The court also noted that the holding that the class did not close until the death of the daughter was supported by the fact that if the daughter had accepted the devise she could not cut off the interest of unborn members of the class by a
conveyance. See also Hiester Estate, 40 D. & C.2d 211 (Pa.Orph.Ct. 1966), in which a testamentary trust was established for the testator's widow for her life or until her remarriage, then to the testator's daughter for her life. At the death of the daughter the principal was to he paid "to her then living issue per stirpes. . . ." Within two months of the remarriage of the testator's wife, the daughter renounced the gift. The court held that the testator did not give his daughter the authority to terminate the trust he created for her and her children. He gave her no power to prefer any of her children over any others. He declared categorically that upon her death, the corpus of the trust is to be distributed to her then living issue per stirpes. . . . The intention of decedent is clear and must be complied with. . . . [T]he trust continues for her children born during her lifetime . . . the class does not close until the time of her death, but will open to let in any children born after the date of her renunciation and prior to her death.

Id. at 221.

10. Prior interest merged with remainder interest to class—Contrary to the result reached when the prior interest is disclaimed, it is generally held that the acceleration of the class gift by merger of the prior interest with the remainder interest to the class will not affect the size of the class; the class will continue to be able to increase until the time the prior interest would have ended. The American Law of Property notes that when the prior interest owner renounces his interest, he picks the class as a result of such renunciation. It is difficult to distinguish the result reached in the renunciation cases from that reached in the merger cases except on the theoretical ground that a renunciation relates back to the date the instrument takes effect so that a prior interest never existed.

5 American Law of Property § 22.43, n. 23 (A.J. Casner ed.1952). Comment j states that termination of the prior interest by merger does not make the remainder interest an immediate gift. Comment i of § 26.2 states that in a merger situation the class closes on the date of the merger.

In Craig v. Rowland, 10 App.D.C. 402 (Fed.1897), there was a devise to the nephew of the testator for his life, and at his death remainder to his issue. If the nephew died without issue the property was to go to the heirs of the testator. Before the birth of any children to the nephew (but when the nephew had a child in gestation), the heirs of the testator conveyed their interests to the nephew, and the nephew sold the property to a third party. The court held that the remainder vested in the child in gestation, subject to opening to allow additional children to share. The sale of the property did not result in a transfer of the fee simple interest.

In Birdsall v. Birdsall, 157 Iowa, 363, 132 N.W. 809 (1912), there was a devise to the testator's son and his wife for their lives, remainder to the son’s children living at the son's death and the issue of deceased children. The remainder was held to be contingent “on account of the uncertainty as to the persons who are
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to take." As a result, the conveyance of the life estate to the remaindermen did not result in their acquiring absolute title to the property. See also Field v. Peeples, 180 Ill. 376, 54 N.E. 304 (1899) (devise to daughter for life "and at her death to descend to her children," daughter conveyed life estate to children; held, children had fee and could bring action of ejectment, but their vested interest was subject to partial divestment by birth of more children to daughter); Stiles v. Cummings, 122 Ga. 635, 50 S.E. 484 (1905) (deed from husband to wife for her life with remainder to his children; wife and living children joined to sell property to third party; held, child born after deed had an interest in the remainder that was not defeated by the sale).

In Trenton Banking Co. v. Hawley, 7 N.J.Super. 301, 70 A.2d 896 (1950), $75,000 was given to a testamentary trustee in trust for the benefit of the testator's daughter for her life. After her death the property was to be distributed to the daughter's children free of trust. Three years after the death of the testator the daughter executed a "release" of her life estate, with the intention of accelerating the remainder interest and terminating the trust. The court held that the release did not have the desired effect, and the class would not close until the death of the daughter. Dictum to the effect that the class would have been closed if it was shown that the daughter was permanently sterile inspired a second case, In re Ransom's Estate, 89 N.J. Super. 224, 214 A.2d 521 (1965). In that case the will created a trust which specified that the income should be paid two-thirds to the testator's son for his life and one-third to the son's wife for her life. Upon the death of the son or his wife, his or her share of the income was to be paid to their children. The children were also given a power of appointment, presently exercisable, over the principal of the trust corresponding to their income share. The court allowed termination of the trust upon a "surrender and release" by the son and his wife with the result that their son, as the only living remainderman, became the owner of the trust property. In so holding, the court held that the class of children born to the son and his wife had closed given that the wife was 72 years old and incapable of having any more children. See also Street v. National Newark & Essex Bank, 121 N.J.Super. 586, 298 A.2d 289 (1972) (life beneficiary and remaindermen ("children" of life beneficiary) could accelerate and terminate trust on showing that life beneficiary's vasectomy had closed class of remaindermen).

11. Donor transfers future interest to class—What initially appears to be an immediate gift may have a postponed gift component. In Britton v. Miller, 63 N.C. 268 (1869), the testator devised all of her property to the children of her brother and sister. Included in the estate was a remainder interest following a life estate. The testator died before the life tenant, and the court held

The property in possession is to be divided among those who answered the description at the time of [the testator's] death; and the property in remainder is to be divided among those who answered the description at the falling of the life estate. . . .

Id. at 270. The fact that the remainder interest was created by a
different grantor in a different dispositive instrument was immaterial; the effect was the same as if the testator had created two gifts, one immedi at and the other postponed. As a result, a child of the testator's brother born between the death of the testator and the death of the life tenant was allowed to share in the remainder interest, but not in the testator's other property.

12. Bequest of specific sum to each class member—In In re Laing's Will, 206 N.Y.S.2d 170 (Sur Ct.1960), affirmed, 3 A.D.2d 837, 216 N.Y.S.2d 131 (1961), there was a gift to three named children of the testator's niece of $20,000 each, with further provision that, "If there are more children born after the date of this will, they will each receive the same amount... . . ." A fourth child was born nine days after the death of the testator. The court held that the child was entitled to a $20,000 legacy. "This is not to say, however, that any children subsequently born... will have similar rights. Such a holding would cause indefinite delay of the distribution of this estate." 206 N.Y.S.2d at 176. See also In re Hammond's Will, 73 Misc.2d 901, 343 N.Y.S.2d 282 (Sur Ct.1973) (will gave $25,000 to each of testator's three named grandchildren "and also to each additional grandchild of mine, if any, who shall be born after the date hereof;" held, two grandchildren born after testator's death were not entitled to $25,000).

Illustration 21 should be compared with a Pennsylvania case, In re Trattner's Estate, 394 Pa. 133, 145 A.2d 678 (1958). In that case the will divided the residuary estate into several "parts" and provided "to any granddaughter or nephew born after the execution of this Will, one-half (½) part of the residue until 3 parts are consumed." No grandnieces or grandnephews were born between the date of the will and the testator's death, but after the death of the testator three grandnieces and three grandnephews were born and a grandniece and grandnephew were adopted. The court held that while the testator intended to limit the distribution in any event to six participants, she also intended to benefit only those grandnieces or grandnephews conceived before her death. "It would be a violent interpretation of testatrix's words to construe them that her entire estate should remain unliquidated and unsettled for such a period of time as would be necessary to elapse to exhaust the possibility of the birth of grandnieces or grandnephews." Id. at 137, 145 A.2d at 680. As a result, only the two grandnieces who were in gestation at the death of the testator were entitled to a share of the residue.

13. Additional language or circumstances that indicate a contrary intent—Language of the dispositive instrument or circumstances surrounding the execution of the dispositive instrument may indicate an intention on the part of the transferor to confine the gift to members of the class alive at the date of the execution of the dispositive instrument rather than at the time it takes effect. This was the holding of Beckwith v. McAlister, 165 S.C. 1, 162 S.E. 623 (1932). Children born between the execution of the will and the death of the testator were not included in a gift to a husband and wife "and to their children now living." "Ordinarily, where a legacy is given to a person or persons 'now living' the reference is to such as are in existence at
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the date the will was made." *Id.* at 11, 162 S.E. at 627.

Similarly, a transferor could manifest an intention that the rule of convenience not apply, and that an immediate gift not be limited to the members of the class conceived prior to the date of the dispositive instrument, but remain open until a subsequent time. In *Cole v. Cole*, 229 N.C. 757, 51 S.E.2d 491 (1949), the issue was whether a gift in a will of a house and its contents "to my beloved nephews and any other children who may be born to Robert and Peg Cole" was intended to include children born to the Colees after the testator's death. At the time of the execution of the will the Colees had three sons; a fourth child was in gestation. The court held that the rule of convenience did not require that the class close at the death of the testator, but that the rule was a "rebuttable presumption" which could bend in the face of a contrary manifestation of intent. "We think the language employed in this will, in its ordinary acceptation, is broad enough with respect to its futurity . . . to accomplish that purpose." *Id.* at 762, 51 S.E.2d at 495. In reaching this conclusion the court rejected the argument that the language in question referred to the child in gestation. Holding that "the class membership may not be closed until the possibility of afterborn children is extinct, through the death of these ancestors," the court noted that the inconvenience inherent in such a gift may not have been anticipated by the testator given that the law "still refused to be advised, but contrary to human experience accepts the possibility of issue as long as there is life." The court suggested that "legislative relief of

more general application might be indicated rather than an arbitrary judicial adjustment. . . ." *Id.* at 763, 51 S.E.2d at 495. See also *DeSanto v. Haug*, 65 N.J.Super. 206, 167 A.2d 428 (1961) (discussed in Reporter's Note to Section 26.2, item 14; gift to children of son of testator and "any child born to him," when they reached majority; held, class did not close until death of son) and *In re Earle's Estate*, 369 Pa. 52, 85 A.2d 90 (1951) (discussed in Reporter's Note to Section 26.2, item 3; the phrase "each and every" was "an emphatic way of saying 'all' and can indicate only an intent that no son of his sons be excluded"). Compare *McCann Estate*, 9 Fid.Rep. 136 (Pa.Orph.Ct. 1959) (gift to "any other children . . . that may arrive in the future" included only children born between date of execution and effective date of will); *Evans Estate*, 9 Fid.Rep. 25 (Pa.Orph.Ct.1959) (immediate gift in will to "any child of my daughter . . . who shall be born hereafter;" held, class closed at death of testator under rule of convenience); *Hoffman Estate*, 9 Fid. Rep. 508 (Pa.Orph.Ct.1959) (gift to named children of son of testator "and any other children he may have" included only grandchildren born before death of testator).

14. The Kentucky rule—cases contrary to the rule of this section—In Kentucky the rule of convenience has not been applied where the transferor makes a gift to the children of a person who is a near relative of the transferor. See *Azarch v. Smith*, 222 Ky. 566, 1 S.W.2d 968 (1928), and earlier cases cited in 5 American Law of Property § 22.42, n. 7 (A.J. Casner ed. 1952). However, in a case in which the persons whose children were
designated were not near relatives of the testator (the designated parents were not related at all), the Supreme Court of Kentucky held that the devise was intended to benefit only those children known to the testator. Barker v. Barker, 143 Ky. 66, 135 S.W. 396 (1911). There have been no recent cases involving the rule of this section in Kentucky.

§ 26.2 Gift Postponed in Form to a Class—When Class Closes to After-Conceived and After-Adopted Persons

If a gift that is postponed in form is made in favor of a class described as "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants," "family," or by similar class gift terms, then, unless a contrary intent of the donor is found from additional language or circumstances,

(1) such disposition excludes a person within the primary meaning of the class gift term who is conceived or adopted after the end of the postponed period, if at that time there is a class member, or a substitute for a class member, available to take under the gift; and

(2) if there is no class member, or a substitute for a class member, available to take under the gift at that time such disposition does not exclude any person who is within the primary meaning of the class gift term on the ground that he or she was conceived or adopted too late.

Comment:

a. Rationale. If a gift that is postponed in form is made to a class, it is contemplated by the donor that the subject matter of the gift is to be enjoyed in possession by the class on the date the postponed period ends. This is not possible if there is no person then available to take under the class gift (see Comment k). However, if there is such a person then available, such person can obtain full enjoyment of at least some definitive share at that time, if the class is closed to after-conceived and after-adopted class members. The rule of construction of Subsection (1) of this section so provides, in the absence of additional language or circumstances that indicate the donor intended otherwise. In regard to the circumstances that may be considered in determining the donor's intent, see Reporter's Note to Introductory Note to Part VI on Class Gifts.
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If there is no person available at the end of the postponed period to take under a gift to a class that is postponed in form and if the gift is not to fail entirely, the choice is to exclude all class members after the first one comes into being or not to exclude any class member on the ground that he or she is conceived or adopted too late. The rule of construction of Subsection (2) of this section adopts the position of not closing the class until it is no longer possible for class members to be conceived or adopted (see Comment k).

It is possible that the results produced by the operation of the rule of construction of Subsection (1) of this section are those that the particular donor would have intended if the problem had been considered by the donor. The rule of construction of Subsection (1) is desirable from the viewpoint of the public interest in that the distribution to the class at the end of the postponed period is unhampered by the otherwise necessarily complex safeguards in favor of possible but as yet not conceived or adopted takers.

In many situations, the exclusionary operation of the rule of construction of Subsection (1) of this section is of little effect. There is no exclusionary effect, if the class gift is by will and is in favor of the children of the testator. The same is true if the class gift is in favor of the children of a person who is deceased at the end of the postponed period. The exclusionary effect is of slight practical importance when the class gift is in favor of children of a person who, at the end of the postponed period, is past the usual age of having additional children, although it does exclude children such person may thereafter adopt.

All of the class gift terms listed in this section relate to class gifts to others than "heirs" and the like. The reference to "similar class gift terms" does not expand the rules of construction of this section to gifts to "heirs" and the like. Such reference is designed to pick up class gift terms such as "great-grandchildren," "uncles," "aunts," "grandnephews," "grandnieces," "second cousins," etc.

b. Primary meaning of class gift term. The rules of construction set forth in Chapter Twenty-Five must first be applied to determine who comes within the primary meaning of the class gift term that is used, and whether additional language or circumstances excludes from such primary meaning persons who otherwise would not be excluded. The rule of construction of Subsection (1) of this section only excludes after-conceived and after-adopted class members who are within such primary meaning.

c. Child in gestation at the end of the postponed period. A child who is within the primary meaning of the class gift term is regarded as in being during the period of gestation for purposes of
the rules of construction of this section. In view of the fact that a child in gestation must be born alive in order to be entitled to a share of the class gift, the failure to exclude a child in gestation at the end of the postponed period, if a postponed gift in form is made to the class in the dispositive instrument, causes some delay in the final determination of the shares of class members. The minimum share of each class member entitled to a share in the class gift cannot be determined until it is known how many children there are in gestation that may receive a share. The maximum share of each class member entitled to a share at the end of the postponed period is delayed until it is established whether the child or children in gestation will be born alive. Such delay is limited in time and does not undermine the reasons for closing the class under the rule of Subsection (1) of this section on the date the postponed period ends. See, however, Comment g in regard to a gift to a class of the right to income under a trust when a class member is in gestation on the income payment date.

If the donor provides that the class gift is to those members of the described class who are “born” by the end of the postponed period, the use of the word “born” is not sufficient additional language to cause the exclusion of a child in gestation who otherwise would not be excluded from the class.

Illustration:

1. O transfers property by will to T in trust. T is directed “to pay the net income to S, the son of O, for life, and on S's death, to distribute the trust property to S's children in equal shares.” Prior to O's death, S had two children, C₁ and C₂. After O's death, S and his wife W arranged to have W artificially inseminated with the semen of another man, the child thus produced to be raised by S and W as their child. Such child is included in the primary meaning of the gift to S's children (see § 25.3). On S's death, such child is in gestation. The child born to W is not excluded from the remainder gift “to S's children,” in the absence of additional language or circumstances that indicate otherwise.

d. Adoption in process when postponed period ends. By analogy to a child in gestation, a child who is in the process of being adopted is regarded as an adopted child during the period the adoption is in process. Consequently, an adopted person who is a class member is not excluded from a gift postponed in form to the class if the adoption is in process when the postponed period ends and is concluded within a reasonable time thereafter. See, however, Comment g in regard to a gift to a class of the right to income
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under a trust when the adoption has not been completed on an income payment date.

e. Possible exclusion of class members not excluded by rule of this section. A person who comes within the primary meaning of the class gift term and who is conceived or adopted prior to the end of the postponed period may not be entitled to share in the class gift because such person does not meet a requirement of survival to the end of the postponed period. The circumstances under which a class member's interest is subject to a requirement of survival to the end of the postponed period is considered in Chapter Twenty-Seven.

If the class gift term that is used to describe the beneficiaries of the disposition is "issue" or "descendants," the primary meaning of such class gift term includes those in the lineal line of descent from the designated ancestor regardless of their degree of relationship, unless additional language or circumstances indicate otherwise (see § 25.9). Under the rules developed in Chapter Twenty-Eight, if the distribution is to such "issue" or "descendants" on a per stirpes basis, an issue or descendant in being at the end of the postponed period is not excluded by the rule of Subsection (1) of this section, but is excluded if an ancestor of such person who is a member of the class is alive and entitled to take a share.

f. Gift postponed in form—generally. The rules of construction of this section are restricted to gifts to a class that are postponed in form. A gift in favor of a class that is not immediate in form is necessarily a gift postponed in form. See for examples of gifts to a class that are immediate in form, § 26.1, Comments f-m. Generally speaking, a gift to a class is postponed in form if it is not contemplated by the donor that any person within the primary meaning of the class gift term will be entitled to the present enjoyment or possession of any part of the subject matter of the class gift on the date the dispositive instrument takes effect.

g. Gift postponed in form—periodic income payments and periodic principal payments under a trust. If the gift made by a donor to the described class is the right to periodic payments of income from the donor's ownership interest that is transferred to a trustee, a definitive distribution of income payments can be made on each income payment date only if class members not in being on that date are excluded from such payment. Each income payment to the class is a postponed gift and under the rule of Subsection (1) of this section, class members not in being on an income payment date are excluded from that income payment in the absence of additional language or circumstances that indicate otherwise. If a person who is within the primary meaning of the class gift term is
in gestation on the income payment date, or is in the process of being adopted on that date, allowing such person to share in the income payment would place a serious burden on the trustee to investigate to determine whether a share of the income payment has to be set aside for such possible additions to the class membership. Consequently, in the absence of additional language or circumstances that indicate the donor intends to place such burden on the trustee, the class member in gestation, or in the process of being adopted, is excluded from sharing in income payments until born alive or until adopted.

A legal life interest in favor of a described class is sufficiently similar to an income interest in favor of a class under a trust to justify similar treatment in regard to the closing of the class. See § 26.1, Comment f, Illustration 5.

A trust may call for periodic annuity payments to be made to a class. The annuity payment is to be made out of income to the extent the income is sufficient and out of principal to the extent the income is not sufficient. In such case, the class closes on each annuity payment date to the same extent as it would close if only income was payable to the class.

A trust may call for income payments to be made to the class on a regular basis and, in addition, provide for mandatory payments of some portion of the principal to be made to the class from time to time on a schedule that does not correspond to the scheduled income payments. In such case, the required payments of income would be governed by the discussion above in this Comment g, but the required payments of principal would not exclude a class member in gestation, or in the process of being adopted, on the date the mandatory payment of principal is to be made, in the absence of additional language or circumstances that indicate otherwise. Thus a class member in gestation, or one in the process of being adopted, on the date the mandatory payment of principal is to be made should not be excluded.

h. Gift postponed in form—discretionary distributions of trust property to class. A gift to a class under a trust may be discretionary in various ways. The trustee may have discretion to select among the class the ones who will receive distributions. The trustee may have complete discretion as to when the distributions will be made to the class. The trustee may be required to make distributions of some trust property at specified times but have discretion to select the class members who will be entitled to each distribution. As long as the trustee's discretion in effect permits the selection of the class members that will receive a distribution, obviously those not selected are excluded from a particular distribu-
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A class member in gestation, or in the process of being adopted, when the trustee makes the selection will be a class member eligible to be selected.

Illustrations:

2. O transfers property by will to T in trust. T is authorized "to distribute such amount or amounts of the trust property, from time to time, to such one or more of the grandchildren of O, as T shall in T's uncontrolled discretion determine." The trust is to terminate on the death of the survivor of O's grandchildren living on O's death, at which time the trust property is to be distributed "to O's issue then living on a per stirpes basis, and if no issue of O is then living, the trust property is to be distributed to the X charity." When T selects a date for a distribution of some of the trust property to selected grandchildren of O, the class closes to after-conceived and after-adopted grandchildren on that date so far as that distribution of trust property is concerned, but the class is not closed to after-conceived and after-adopted grandchildren so far as future distributions of trust property are concerned. A child in gestation or in the process of being adopted on the selected date may be selected to receive a distribution.

3. O transfers property by will to T in trust. T is directed "to pay the net income to O's daughter D for life, and to distribute such amount of the corpus, from time to time, to such one or more of D and her children as T shall in T's uncontrolled discretion determine." The trust is to terminate on the death of D, at which time the then remaining trust property is to be distributed "to D's issue then living on a per stirpes basis, and if no issue of D is then living, the then remaining trust property is to be distributed to the X charity." When T selects a date for the distribution of some of the trust corpus, the class closes to after-conceived and after-adopted children of D on that date so far as that distribution of trust corpus is concerned, and T may exclude in the exercise of T's discretion some of the class members who are eligible to receive payments.

i. Gift postponed in form—prior interest created in subject matter of class gift. When a dispositive instrument provides for a property interest in the subject matter of the disposition that precedes the class gift in the same subject matter, and the prior interest takes effect, the class gift is a postponed one. The prior interest may be a life interest, or an interest for years, or an interest defeasible upon some occurrence, as long as upon the
The period of postponement of the class gift is either the duration of the prior interest, or, when the prior interest is terminable only on a defeasance, the duration of such defeasability. The prior defeasible interest may become indefeasible by the course of events. In this case, the “postponed gift in favor of the class” limited to become possessory upon the defeasance of the prior interest fails, because a condition precedent thereto has become impossible of fulfillment.

The prior interest provided for in the dispositive instrument may never be created because the attempted life interest, or the attempted interest for years, or the attempted defeasible interest may have expired in accordance with its terms before the effective date of the dispositive instrument. If this occurs, then the class gift becomes one immediate in form and the closing of the class to after-conceived and after-adopted class members is governed by the rule of construction in § 26.1 (see § 26.1, Comment i).

The prior interest provided for in the dispositive instrument may never be created because the person designated to take it refuses to accept it by disclaiming the prior interest. In the event of an effective disclaimer, the dispositive instrument is treated as though the provisions relating to the prior interest had never been inserted, so that the class gift becomes one immediate in form and the closing of the class to after-conceived and after-adopted members is governed by the rule of construction in § 26.1 (see § 26.1, Comment j).

The prior interest may be created but end by merger or some other technical rule prior to the time called for by the terms of its creation, thereby causing the class gift to become a possessory one. In such case, the class gift is a postponed one and the issue presented is whether the date for the closing of the class is the date when the prior interest would have expired by its terms, or the earlier date on which it in fact terminates. The rule of construction of Subsection (1) of this section applies for the closing of the class as of the date the prior interest expired by the merger, in the absence of additional language or circumstances that indicate otherwise.

Illustrations:

4. O by will transfers property to T in trust. T is directed “to pay the net income to O’s wife W until her death or remarriage, and then to distribute the trust property to the children of O’s son S.” W survives O and two years after O’s death W remarries. S survives O and at O’s death, S has two
children, C₁ and C₂. Prior to W's remarriage, S has another child, C₃. On the date of W's marriage, S's wife is pregnant and the child in gestation, C₄, is born alive after W's remarriage. S has another child, C₅, born two years after W's remarriage. W's defeasible life interest is terminated by her remarriage and the class gift to S's children closes to after-conceived and after-adopted members of the class under the rule of Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise. Consequently, S's child, C₅, born two years after W's remarriage is excluded from the class gift.

5. O establishes a revocable inter vivos trust. The trustee is directed "to pay the income to O for his lifetime, then to pay the income to O's wife W until she dies or remarries whichever first occurs, then to distribute the trust property to O's issue, such issue to take per stirpes." On the date the trust is established O has two children, C₁ and C₂, and a grandchild, GC₁, the child of a deceased child of O. O and W are divorced, and under the controlling local law a divorce revokes any disposition in a will or revocable trust of either spouse in favor of the other spouse. After the divorce, C₂ dies but is survived by GC₂, who was conceived after the divorce. O dies. The class gift to O's issue under the revocable trust closes to after-conceived and after-adopted members on O's death, not on the expiration of the interest in W which was terminated by the divorce. Hence GC₂ is not excluded under the rule of Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise.

6. O transfers property by will to T in trust. T is directed "to pay the income to O's son S for life, then to distribute the trust property to S's children." S has two children, C₁ and C₂, at the time O executes the will. S has another child, C₃, prior to O's death. Six months after O's death and prior to any payment of income to S, S effectively disclaims his life interest under the trust. On the date of the disclaimer, S's wife is pregnant with a child that was conceived after O's death and this child is later born alive. The effect of S's disclaimer is to convert what appears to be a gift postponed in form to S's children into one immediate in form. Hence S's child who was conceived after O's death but prior to the disclaimer is excluded under the rule of Subsection (1) of § 26.1, in the absence of additional language or circumstances that indicate otherwise.

7. O transfers Blackacre by deed "to O's daughter D for life, then to D's children in fee simple." Ten years after the
transfer of Blackacre, D transfers her life interest to her two children, C₁ and C₂. Prior to such transfer, under the controlling local law, C₁ and C₂ have a vested remainder subject only to partial divestiture by the birth of more children to D. The transfer of D’s life interest to C₁ and C₂ causes it to terminate if there is a merger. Any child of D that is conceived or adopted after the merger is excluded from the class gift under the rule of Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise.

j. Donor transfers future interest to class. The donor may own a transferable future interest in property and transfer such interest to a described class. In such case, whether the donor has or has not created the interest that must end before the members of the class can enjoy their gift in possession, such prior interest in effect exists. Consequently, the gift to the class is a postponed one and the rules of this section apply to after-conceived and after-adopted class members (see § 26.1, Comment k, Illustrations 15 and 16).

k. No class member available to take a possessory interest under the class gift when distribution to class is contemplated by the donor. If no class member has been conceived or adopted at any time prior to the end of any prior interest in the dispositive instrument that precedes the gift to the class, and the gift to the class is effective under controlling local law, the gift to the class is necessarily postponed beyond the date the prior interest ends and at least until a class member comes into being. The issue is whether the class closes to after-conceived and after-adopted members when the first member of the class comes into being and is entitled to a possessory interest. The alternative is to conclude that under these circumstances the class stays open to admit after-conceived and after-adopted persons as long as it is possible for them to come into the picture, in spite of the administrative inconveniences. The choice that does not exclude any after-conceived and after-adopted class members is the one adopted under the rule of Subsection (2) of this section, in the absence of additional language or circumstances that indicate otherwise.

It may be that a class member is in being prior to the end of any prior interest in the dispositive instrument that precedes the gift to the class, but drops out of the class gift so that no class member is in being on the date contemplated by the donor for distribution to the class. Under these circumstances, the situation is like the one discussed in the preceding paragraph and the result is the same so far as closing the class to after-conceived or after-adopted class members is concerned. If, however, the class mem-
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ber who was in being had a descendent interest, or the dispositive instrument or an applicable antilapse statute provides a substitute for the class member who was in being, the rule of this section applies to close the class at the time it would have been closed if the class member had not dropped out (see § 26.1, Comment l).

Illustrations:

8. O transfers by will O's residuary estate to T in trust. T is directed “to pay the net income to O's wife W for life, then to distribute the corpus to the children of O's son S.” S has had no children on the date O's will is executed and has had no children on O's death. W and S survive O. On W's death S has had no children. The gift to S's children stays open to admit children of S as long as it is possible for a child of S to come into being, in the absence of additional language or circumstances that indicate otherwise. T is required to hold and manage the trust property and accumulate the income until a child of S comes into being or until it is no longer possible for a child of S to come into being. If S dies without a child of his coming into being, the trust property passes to those persons entitled to the reversionary interest as a result of the failure of the class gift. If a child of S comes into being, the income of the trust that thereafter is earned off of the trust property (including as part of the trust property any accumulated income) becomes payable to such child, subject to partial divestiture by additional children of S coming into being. When it is no longer possible for a child of S to come into being, the trust terminates and the trust property is distributed to S's children.

9. Same facts as Illustration 8, except that S had a child before O died but such child predeceased O and no antilapse statute was applicable to provide a substitute for the deceased child of S. The result described in Illustration 8 is not changed.

10. Same facts as Illustration 8, except that S had a child before O died and such child predeceased O but an applicable antilapse statute provided a substitute for such deceased child of S. In such case the class will close to after-conceived and after-adopted children on the death of W, and the substitute for S's deceased child will be entitled to the trust property.

11. Same facts as Illustration 8, except that S had a child after O died and before W died. S's child died before W. In such case the class will close on the death of W to after-conceived and after-adopted children of S because S's child who died had a vested interest that passed as an owned interest of such child on his or her death.
l. Bequest of specific sum to each class member. If the size of a class member's share in a bequest postponed in form to the class does not depend on the number in the class, as when a specific sum is given to each class member at the end of the postponed period, it is not necessary to close the class at the end of the postponed period to after-conceived and after-adopted class members to make a definitive gift to a class member who is then entitled to his or her share. Nevertheless, the rule of Subsection (1) of this section applies and the class closes to after-conceived and after-adopted class members because otherwise property disposed of at the end of the postponed period is held up due to the inability to determine how many gifts of specific sums will be needed.

Illustrations:

12. O transfers by will property to T in trust. T is directed “to pay the net income to O's daughter D for life, then to pay to each grandchild of D the sum of $1,000 and to pay the balance of the trust property, if any, to D's children.” D survives O. D dies. At D's death, the trust property is worth $500,000 and D has three children, C1, C2, and C3, and five grandchildren. Each of the five grandchildren is entitled to $1,000. In the absence of additional language or circumstances that indicate otherwise, a grandchild of D that is conceived or adopted after D's death is not entitled to $1,000.

13. Same facts as Illustration 12, except that on D's death T is directed “to pay to each grandchild of D that is born within 21 years after D's death the sum of $1,000 and to pay the balance of the trust property, if any, to D's children.” O has clearly manifested an intention that grandchildren of D conceived or adopted after D's death are to share in the $1,000 gifts to each grandchild. T will have to hold up distribution of the trust property to D's children until 21 years after D dies, or distribute the trust property but require D's children to give bond with surety that they will provide the necessary $1,000 amounts for after-conceived and after-adopted grandchildren of D.

m. Gift postponed in form—attainment of a stated age by a class member a condition precedent. If the gift to the described class is to those class members who attain a specified age, it is not contemplated by the donor that any distribution will be made to a member of the class until he or she attains the specified age and the class gift is a postponed one if no class member has yet attained the specified age. Under the rule of Subsection (1) of this section, the class will close to after-conceived and after-adopted class members.
when a class member attains the specified age and becomes entitled to call for his or her share (compare this situation with the situation considered in Comment k). By closing the class at that time, the minimum amount he or she is entitled to can be ascertained. Class members who are in being at that time are not excluded by the closing of the class but will take their respective shares if they fulfill the specified age contingency. The shares of those who are not excluded by the closing of the class, but whose gifts fail because the age contingency is not satisfied, will go to enlarge the shares of those class members who satisfy the age contingency.

Illustrations:

14. O transfers by will O's residuary estate to T in trust. T is directed "to pay the income to O's son S for life, then to distribute the trust property to S's children who shall attain 21." S survives O and at O's death, S has two children, C₁ and C₂. At S's death, C₁ is 22 years old and C₂ is 18 years old. C₁, who has fulfilled the age contingency, is entitled to one-half the trust property with the possibility of becoming entitled to the other one-half of the trust property if C₂ does not fulfill the age contingency. T should distribute one-half of the trust property outright to C₁. T should withhold distribution of the other one-half of the trust property, in the absence of additional language or circumstances that indicate otherwise, accumulating the income, until C₂ fulfills or fails to fulfill the age contingency. If C₂ fails to fulfill the age contingency, the remaining trust property should be distributed to C₁, or if C₁ is not alive, to those entitled to property owned by C₁ at his death.

15. Same facts as Illustration 14, except that neither C₁ nor C₂ has fulfilled the age contingency at the time of S's death. In this situation, the issue is what should T do with the trust property pending the determination of whether C₁ and C₂ fulfill the age contingency. In the absence of additional language or circumstances that indicate otherwise, T should hold the trust property, accumulating the income, until distribution can be made pursuant to the fulfillment of the age contingencies or as a result of the failure of such fulfillment.

16. O transfers property by deed to T in trust. The trust is revocable by O. T is directed "to pay the net income to O for life, then to distribute the trust property to O's grandchildren who attain 21. On the date the deed is executed and at O's death, O has two children, a son S and a daughter D. S has two children, GC₁ and GC₂. D has three children, GC₃, GC₄, and GC₆. At O's death, the ages of the grandchildren are as
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follows: GC₁, 18; GC₂, 16; GC₃, 14; GC₄, 12; and GC₅, 10. Under the rule of Subsection (1) of this section, the class described as grandchildren of O will not close to after-conceived or after-adopted grandchildren until one grandchild attains 21 years of age, in the absence of additional language or circumstances that indicate otherwise. See Illustrations 14 and 15 in regard to what T should do with the trust property prior to the closing of the class and after an age contingency is satisfied, or if the class gift fails because no age contingency is satisfied.

n. Gift postponed in form—class member to be paid his or her share on attainment of specified age. If the gift to the described class calls for the payment to each class member of his or her share when he or she attains a specified age, the attainment of the specified age is not a condition precedent to the gift, but is only a designation of the time for the payment of an otherwise vested interest. If no class member dies, the class will close to after-conceived and after-adopted persons when all prior interests have expired and the oldest class member has attained the specified age, because such oldest class member is then entitled to call for his or her share and the class must be closed to after-conceived and after-adopted persons in order to determine the size of the share to be distributed. If a class member dies before he or she attains the specified age, the issue is when will distribution be made to the successors in interest of the deceased class member assuming any prior interests have expired. The possibilities are first, that distribution should be made to such successors in interest on the death of the class member because the only reason for withholding the distribution to such class member while he was alive was to assure that he or she had reached an age of maturity that would enable him or her to take proper care of the property and that reason is no longer relevant; or second, that distribution should be made to such successors in interest on the date the deceased class member would have attained the designated age had he or she lived; or third, that distribution should be made to such successors in interest when the closing of the class to after-conceived and after-adopted persons will not be caused thereby. The third of these possibilities is the one that is preferred.

Illustrations:

17. O transfers by will property to T in trust. T is directed "to pay the net income to O's wife W for life, then to distribute the trust property to O's grandchildren, each grandchild to be paid his or her share at 21." At O's death W is living and O has two children, a son S and a daughter D. S has two children, GC₁ and GC₂. D has three children, GC₃, GC₄,
and GC₅. At O’s death, the ages of the grandchildren are as follows: GC₁, 18; GC₂, 16; GC₃, 14; GC₄, 12; GC₅, 10. The gift to the grandchildren is construed as not subject to a condition precedent that a grandchild attain 21. The reference to the age of 21 relates only to the time when distribution is to be made to a grandchild. GC₁ attains 21. Distribution cannot be made to GC₁ at that time because O’s wife W is still living. Hence the class does not close to after-conceived or after-adopted grandchildren when GC₁ attains 21.

18. Same facts as Illustration 17, except that O’s wife W dies three years after GC₁ attains 21 and GC₆, a child of S, was born shortly before W died. GC₆ is not excluded from the class under the rule of Subsection (1) of this section. On W’s death, the class closes to after-conceived and after-adopted grandchildren. T knows definitely that the trust property is to be divided into six shares, that GC₁ and GC₂ are entitled to receive their shares, that the balance of the shares, though indefeasibly vested in the four other grandchildren, is to be retained by the trustee and is to be paid to each of the four other grandchildren as he or she attains 21. T should accumulate the income of the four retained shares and account for so much of the accumulated income as relates to a grandchild’s share to such grandchild at the time distribution is to be made to that grandchild.

19. Same facts as Illustration 18, except that GC₆ dies at the age of six months. The purpose of postponing distribution to a grandchild to the age of 21 is to avoid placing in the hands of such grandchild property before the grandchild is old enough to care for it properly. There is no point in postponing for any further period of time the distribution of GC₆’s share and thus it should be distributed by the trustee at GC₆’s death to GC₆’s heirs. Such distribution will not cause a closing of the class because the closing of the class was previously caused by the shares of GC₁ and GC₂ becoming distributable.

20. Assume that in Illustration 19, at the time GC₆ died, no other grandchild of O had attained 21. If the share of GC₆ became distributable on the death of GC₆, the class would close to after-conceived and after-adopted grandchildren at the death of GC₆. In this case, distribution to GC₆’s heirs is postponed until such time as the class would otherwise close to after-conceived and after-adopted grandchildren, in the absence of additional language or circumstances that indicate otherwise.

o. Gift postponed in form—distribution to class when "youngest" class member attains stated age. If the gift to a class
is postponed until the "youngest" class member attains a stated age, the meaning of the word "youngest" must be determined before the end of the postponed period can be ascertained. It is possible to construe the word "youngest" to refer to the person in the described class who was the youngest on the date the dispositive instrument was executed, or to refer to the person in the described class who was the youngest on the date the dispositive instrument took effect (when that date was other than the date the dispositive instrument was executed), or to refer to the person in the described class who was the youngest on the date no living class member was under the stated age, or to refer to the person in the described class who was the youngest on the date when it was no longer possible for after-conceived or after-adopted children to come into the described class. In the absence of additional language or circumstances that indicate otherwise, the word "youngest" should refer to the person in the described class who was the youngest on the date no living class member was under the stated age.

When the class member who is the "youngest" has been ascertained, it must be determined whether he or she remains the "youngest" for purposes of determining the date of distribution to the class, if such class member dies before attaining the specified age. In this situation, the issue is whether the date of distribution is when such class member would have attained the stated age had he or she lived, or when the youngest class member that is living attains that age. In the absence of additional language or circumstances that indicate otherwise, the date of distribution should shift to the date when the next youngest class member attains the stated age.

Illustrations:

21. O transfers property by will to T. T is directed "to pay the net income to O's son S for life, then to distribute the trust property to S's children when S's youngest child attains the age of 21." At O's death, S has two children, C₁ and C₂, and C₁ is 12 years of age and C₂ is 10 years of age. Two years after O's death S has another child, C₃. When C₃ attains 21, though S is still alive and distribution cannot be made to the class until S dies, C₃ will be the "youngest" class member because he was the youngest on the date when no living class member was under 21. The class will not close to after-conceived or after-adopted class members, even though the "youngest" class member has attained the stated age, because distribution is further postponed until the end of S's life interest. In this situation distribution will be made on S's death and
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no child of S will be excluded on the ground that he was born or adopted too late.

22. Same facts as Illustration 21, except that before C₃ attains 21, S has another child C₄. C₄ becomes the "youngest" class member for purposes of determining when the "youngest" class member attains 21, because at no time prior to his coming into the picture were all the living class members over the age of 21.

23. Same facts as Illustration 22, except that C₄ dies before attaining the specified age. In the absence of additional language or circumstances that indicate otherwise, the "youngest" becomes C₃. Whether C₄'s death eliminates C₄ from a share of the class gift depends on whether C₄'s interest is subject to a requirement of survival to the date of distribution. See Chapter Twenty-Seven in regard to when a class member's interest is subject to a requirement of survival to the date of distribution.

p. Additional language or circumstances that indicate a contrary intent. The rules of this section are rules of construction that may be overcome by additional language in the dispositive instrument, or by circumstances surrounding the disposition, which indicate a contrary intent. The contrary intent may exclude more class members than would be excluded by the rules of this section, thereby narrowing the class, or may exclude fewer class members than would be excluded under the rules of this section, thereby expanding the class.

If the contrary intent narrows the class, as when the gift by will is "to my son S for life, then to the children now living of my son S," and S has two children, C₁ and C₂, living on the date the will is executed, the only problem that arises from the fact that a class gift is used to describe the beneficiaries is the effect if one or the other of C₁ and C₂ dies before the testator, or after the testator and before S. The result may be different than would be the case if the gift had been made "to C₁ and C₂." This difference is considered in Chapter Twenty-Seven.

If the contrary intent expands the class, as when a gift by will is "to my wife W for life, then to the children of my son S whether born or adopted before or after the death of the survivor of myself and W," what distribution is to be made to the members of the class who are alive and ready to take on the death of the survivor of the testator and W, and what is to be done to assure that appropriate shares will be available for after-conceived and after-adopted class members?

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If the subject matter of the gift is land, the class members ready to take on the death of the survivor of the testator and W should receive undivided interests in the land subject to partial divestiture as to their undivided interests by after-conceived and after-adopted class members.

If the subject matter of the gift is other than land, the class members ready to take on the death of the survivor of the testator and W should receive enjoyment of the gift at that time, but with adequate safeguards for the shares of the after-conceived and after-adopted class members. The necessary safeguards can be provided by placing the subject matter of the gift in trust to be managed for their benefit and the benefit of the after-conceived and after-adopted class members until no additional class members can come into the picture. The safeguards can also be provided by delivery of the subject matter of the gift to the class members that are ready to take, subject to partial divestiture by after-conceived and after-adopted class members, with a bond with sureties required of the distributees that the subject matter of the gift or its value will be forthcoming in sufficient amount from time to time to make up the shares of after-conceived and after-adopted class members.

Illustrations:

24. O transfers by will the sum of $100,000 to T in trust. T is directed "to pay the income to O's daughter D for life, then to distribute the trust property to the children of O's son S including those who may hereafter be born or adopted." The language "hereafter born or adopted" should be construed, in the absence of additional language or circumstances that indicate otherwise, to include children of S who may be conceived or adopted after the life interest in D ends, because the language is unnecessary to pick up children of S conceived or adopted before D dies.

25. Same facts as Illustration 24, except that the transfer in trust is of O's residuary estate and the distribution to S's children on the death of D is in the amount of $100,000 to each child, with the balance if any to the X charity. In such case, if children of S conceived or adopted after D's death are not excluded, the trustee would have to withhold all of the trust property on the death of D until it is known how many $100,000 gifts have to be made. Consequently, it is reasonable to conclude that the words "who may hereafter be born or adopted" is restricted to the children of S who may be born or adopted before D dies (see Comment l).
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q. Dispositive instrument a revocable trust. If the donor makes a gift to a class in a revocable trust that is to take effect in possession and enjoyment on a date subsequent to the donor's death, the postponed gift should be treated in the same way as a postponed gift under the donor's will.

STATUTORY NOTE TO SECTION 26.2

1. The following statutes provide that in construing a testamentary disposition of a postponed interest to a class, the class includes all persons coming into being within the time to which possession is postponed:
   California Probate Code § 6150 (West Supp. 1987)
   Georgia Code Ann. § 44-6-65 (1982)
   Oklahoma Stat. tit. 84, § 171 (1981)

2. A group of statutes in Louisiana provides for the treatment of a "class trust," an inter vivos or testamentary trust in favor of a class consisting of some or all of the grantor's children, grandchildren, nieces, nephews, grandnieces, or grandnephews, or any combination thereof. If such a trust is created, "[t]he trust instrument may state a date or a method for defining a date on which the class shall close when, because of the definition of the class, members may no longer be added to it." Property in a class trust must remain in trust until the class closes:

3. Statutes providing that a child conceived before but born after the testator's death (or other vesting period) takes if answering the class description, and statutes providing that a child conceived but born after the decedent's death will be considered as living at the death of the decedent for purposes of intestate succession, are collected in the Statutory Note to Section 26.1, item 1.

REPORTER'S NOTE TO SECTION 26.2

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. They follow in general the positions taken in § 295 of the first Restatement, but they operate on a broader base because the primary meaning of the class gift term does not exclude persons born out of wedlock and adopted persons.

2. Justification for the rules of this section—The justification for the rules of this section is stated in Comment a.

3. Income interest under a trust—The cases are in agreement with Comment g that each periodic payment of income should be treated as a gift postponed by the period which precedes its payment, and
that during such period of postponement the class can increase in membership. In Will of Dow, 55 A.D.2d 323, 390 N.Y.S.2d 721 (1977), the court stated that as to the question of who was entitled to the periodic distributions of income "no rule of convenience need be considered since no inconvenience is experienced by admitting new members to the class after distribution has begun." Id. at 334, 390 N.Y.S.2d at 729. In Lux v. Lux, 109 R.I. 592, 288 A.2d 701 (1972), a gift of income to the grandchildren of the testator was held to include grandchildren born before each distribution date. Thus, the quantum of each share of income received by a grandchild would be reduced as each new member of the class joined his brothers and sisters and cousins. See also McDowell National Bank of Sharon v. Applegate, 479 Pa. 300, 388 A.2d 666 (1978), where it was argued that since some members of the class had an interest in current trust income they would properly demand at the testator's death, the class closed at that time. The court disagreed.

Although beneficiaries living at the time of the testator's death have a vested interest in current trust income, the class may still remain open after the testator's death for purposes of determining membership in the class receiving the principal upon distribution and income earned until distribution of the principal.

Id. at 308, 388 A.2d at 670.

In In re Earle's Estate, 369 Pa. 52, 85 A.2d 90 (1961), the will provided as follows:

I give and bequeath to my Trustees in Trust for the benefit of each and every male child of my sons who shall by birth inherit and bear the name of Earle, the sum of One Hundred Thousand ($100,000) Dollars. . . .

The will further provided that each of the initial beneficiaries would receive the income allotted to that beneficiary for his life, and upon his death the income was to be paid to the issue of the initial income beneficiaries until the time for the distribution of the principal of the trust estate arrived, which was 21 years after the death of the last grandchild or greatgrandchild living at the death of the testator. Nearly all of the testator's estate was to be distributed to trustees to establish similar trusts for other beneficiaries, and all of the trusts were to end on the date described above, at which time the remainder was to be distributed to the issue of the initial beneficiaries, per stirpes. The court held that the language of the will, specifically the phrase "each and every," was "an emphatic way of saying 'all' and can indicate only an intent that no son of his sons be excluded." Id. at 56, 85 A.2d at 93. "[I]t is reasonable to regard the testator's intent as including in the described class those born after his death as well as before." Id. at 57, 85 A.2d at 93. The court reversed the lower court's holding that the case fell within "the general rule of law holding that in any immediate gift to a class, the class closes as of the date of the testator's death. . . ." There was no ambiguity in the will which would allow resort to that rule of construction, according to the supreme court. Further, there was no justification for closing the class and excluding sons of sons born after the testator's death.
In this case the basic reason, which gave rise to the "rule of convenience," is not present. There is here no gift of principal to any member of the class in question that vested at testator's death. only income is given. No distribution is made of the principal to any family beneficiary and the whole of it is withheld until the date of the termination of the trust.

Id. at 60, 85 A.2d at 95. The distribution of the estate was not delayed as a result of holding the class open. While the award to the trustees was "[t]echnically . . . a distribution . . . it is not the kind of distribution which warrants the application of the rule of convenience." Id. at 66, 85 A.2d at 97. Holding that the "real distribution date" for the application of the rule of convenience was the date of the distribution of the principal at the termination of the trust, the court concluded that a grandson born after the death of the testator was "within the exact meaning of the language used in describing the class." Id. at 69, 85 A.2d at 98. Compare Applegate v. Brown, 168 Neb. 190, 95 N.W.2d 341 (1959) (discussed in the Reporter's Note to Section 26.1, item 4).

4. Postponement measured by the duration of a prior interest—In many situations in which a gift is postponed until the termination of a prior interest, it is not possible for class members to be conceived or adopted after the termination of the prior interest. This is the situation when the postponed gift is in favor of the children of the testator, or the children of a person who dies before the termination of the prior interest, or the children of a person who has been given a life interest in the gift. In these situations the rule of this section does not operate to exclude any possible members of the class. Thus, in Hartford National Bank & Trust Co. v. Thrall, 184 Conn. 497, 440 A.2d 200 (1981), in construing a testamentary trust the income of which was to be paid to the testator's two children and one grandchild for their lives, with the corpus of the trust to be distributed on the death of all three to their children, the court held that "[the class] closed, by the rule of convenience, at the death of the last income beneficiary because it was at that time that the members of the class were entitled to possession and enjoyment of their gift. . . ." Id. at 503, 440 A.2d at 204. Children of the income beneficiaries born after the death of the testator were allowed to share in the gift; no members of the class were excluded. In In re Estate of Darling, 219 Neb. 705, 365 N.W.2d 821 (1985), the class entitled to take was determined at the time of the son's death and not at the time of the testatrix's death. The language dividing the trust res among "the children" of the named son "who survive him" allowed children adopted after the testator's death to be included in the class. For additional cases, see 5 American Law of Property § 22.43, n. 1-3 (A.J. Casner ed. 1952).

Where it is possible for persons who fall within the primary meaning of the class description to be conceived or adopted after the termination of the anterior interest, the exclusionary operation of the rule of Subsection (1) of this section is demonstrated. The rule of Subsection (1) of this section operates to exclude from the class gift all persons conceived or adopted after
the termination of the prior interest. In Drury v. Drury, 271 Ill. 336, 111 N.E. 140 (1916), the will provided for a life interest in certain real property in the testator's granddaughter. After the death of the granddaughter without issue the property was to go to the great grandchildren of the testator. The court noted that:

There was no language in the will which confined the gift to great grandchildren in existence at the testator's death, and the rule is that, where the gift is not in terms immediate, and so confined, and a gift to a class is postponed pending the termination of a life estate, those members of the class, and those only, take who are in existence at the death of the life tenant.

Id. at 341, 111 N.E. at 142. Thus, great grandchildren born after the testator's death, but prior to the death of the life tenant, were included in the class, and a great grandchild born after the death of the life tenant was excluded. In Hofing v. Willis, 31 Ill.2d 365, 201 N.E.2d 852 (1964), the Supreme Court of Illinois disapproved the Drury case insofar as it announced as a mechanical and universal rule of construction that a class gift of a future interest which is contingent on an event other than survivorship is also contingent on survivorship. The court decided Hofing based on a different intent of the grantor, which was determinable from the language of the deeds. The will in Hitchcock v. Skelly Oil Co., 197 Kan. 1, 414 P.2d 67 (1966), gave a life estate in the bulk of the testator's property to his children, with the remainder to his grandchildren. The court held that the grandchildren who were born prior to the death of the last life tenant would take the remainder interest. Afterborn, as well as after-adopted, grandchildren would be included in the gift.

In Edwards v. Butler, 244 N.C. 205, 92 S.E.2d 922 (1956), Joseph G. Edwards executed a warranty deed conveying certain real property to his wife, "Lilly Mae Edwards, her lifetime and then to my children...." Lilly Mae Edwards died in childbirth, and left surviving her husband, three children born prior to the execution and delivery of the deed, and the child who was born on the day his mother died. Joseph remarried and had more children. The court held that only the four children in being when the life estate terminated were entitled to share in the property described in the deed.

In Schumache v. Howard Savings Institution, 128 N.J.Eq. 56, 15 A.2d 107 (1940), affirmed, 131 N.J.Eq. 211, 23 A.2d 581 (1942), the residue of the estate was placed in trust for the benefit of the testator's daughter for her life. After her death the corpus was to be divided among "the daughters of my brothers and sisters." The daughter contended that the remainder disposition violated the rule against perpetuities given "that it was testator's intention that 'every' daughter of his brothers and sisters was to share." The court disagreed, noting that the daughter "overlooks the rule that the class closes when the period of distribution arrives." See also In re Ransom's Estate, 89 N.J.Super. 224, 214 A.2d 521 (1965) ("The testamentary disposition in favor of testator's 'grandchildren' was a gift to a class and embraced not only those living at the time of the testator's death, but all who might subse-
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quently come into existence before distribution." Id. at 230, 214 A.2d at 524).

Wilkes v. Wilkes, 488 S.W.2d 398 (Tex.1972), was a case construing a testamentary trust, the income of which was to be paid to five named beneficiaries for their lives, and on their deaths the trust assets were to be distributed to the lineal descendants of each of the five named beneficiaries. It was argued that on the death of one of the named beneficiaries that the lineal descendants of that beneficiary determined at that time took a vested interest in the remainder. The court held that the class of remainder beneficiaries was not to be determined until the termination of the trust. A similar case is Will of Dow, 55 A.D.2d 323, 390 N.Y.S.2d 721 (1977) (class of "issue" not to be determined until termination of trust; court was applying District of Columbia law but there was no D.C. or Maryland law on point; court followed "majority rule" as expressed in Simes and Smith and first Restatement § 295).

In In re Gunby's Will, 29 Misc.2d 155, 218 N.Y.S.2d 715 (Sur.Ct.1961), a gift of a farm was made to the testator's widow for her life, and upon her death "to her children, then living." The widow remarried after the death of the testator, and a child born of this marriage was held to be included in the gift (along with three children of the widow from a marriage prior to her marriage with the testator). (For additional cases dealing with the question of whether children from prior or subsequent marriages will be included in a gift to the "children" of the spouse of the donor, see Reporter's Note to Section 25.7, item 4b.) See also In re Loghry's Will, 118 N.Y.S.2d 301 (Sur.Ct.1952), in which it was stated, "It is clearly the intent of the will to determine the class upon the death of the last life tenant by the use of the words, "upon the death of the survivor of the devisees above named I give and bequeath my said farm to my then surviving grandchildren, share and share alike.'" Id. at 303. See also In re Will of Friend, 259 Wis. 501, 49 N.W.2d 423 (1951) (court determined from "language of testatrix" in the will that class was to be determined as of death of life beneficiary, not testatrix; court noted "in passing" that result was sustained by first Restatement § 295).

5. Cases contrary to the rule of Subsection (1) of this section—In Bach v. Pace, 305 S.W.2d 528 (Ky. 1957), the granting clause of a deed conveyed certain real property from a husband to his wife "for her natural life, and so long as she remains the widow," with the remainder interest to the grantor's grandchildren. The court, refusing to apply the rule of convenience (under which the remainder interest would have vested in the grandchildren living at the death of the life tenant), pointed out that it was possible that a grandchild would be born outside of the period allowable under the rule against perpetuities, and that the remainder interest therefore failed.

6. Children in gestation—A child in gestation is considered a child in being for the purposes of inclusion in a postponed gift to a class, just as a child in gestation is considered in being for purposes of inclusion in an immediate gift to a class (see Reporter's Note to Section 26.1, item 5, and Statutory Note to Section 26.1, item 1). In the following cases there was a postponed gift to a class, and a child in gestation at
the time the gift became distributable was allowed to share in the gift: Barker v. Pearce, 30 Pa. 173, 72 Am.Dec. 691 (1858) (gift of real property to testator's son for life and after his death to his children; son died when his wife was pregnant with their second child; held, child in gestation shared property with her brother); McLain v. Howland, 120 Mich. 274, 79 N.W. 182 (1899) (gift of entire estate to testator's widow for life and after her death to children of testator's daughter, among others; held, child of daughter born within month of death of widow was entitled to share in remainder interest); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925) (testator directed that his residuary estate be held by his executors until 20 years after his death, at which time it was to be distributed to his grandchildren; held, grandchild born within nine months of 20-year period was entitled to share in remainder interest); Cf. Cowles v. Cowles, 56 Conn. 240, 13 A. 414 (1887) (gift to grandchildren "so soon as they shall attain the age of twenty-five years" included grandchild born six months after death of testator where one grandchild had attained age 25 before testator's death).

7. Prior interest terminated by disclaimer or merger—Cases in which a prior interest that would have postponed a gift to a class is disclaimed are discussed in the Reporter's Note to Section 26.1, item 9. Cases in which a prior interest is merged with a remainder interest to a class are discussed in the Reporter's Note to Section 26.1, item 10.

8. Donor transfers future interest to class—In Britton v. Miller, 63 N.C. 268 (1869), the testator devised a future interest—a remainder following a life estate in another person—to a class. The court held that the gift was a postponed gift, and that the class did not close at the testator's death but at the death of the life tenant. (See Reporter's Note to Section 26.1, item 11.)

9. No class member in being when distribution to class contemplated—Comment k states that in the situation in which there are no class members conceived or adopted prior to the end of the postponed period, the rule of Subsection (2) of this section will apply and the class will remain open as long as it is possible for class members to come into the picture. Judging from the amount of litigation on the issue, the situation is not likely to be encountered very often. The leading American case is Gest v. Way, 2 Whart. 445 (Pa.1837), in which certain land was to go at the testator's death to the testator's grandchildren. At the testator's death his two children were unmarried. The gift was held to vest in the grandchildren at their births, "liable, however, . . . to open and let in the brothers and sisters as they might afterwards be born." Id. at 449.

10. Postponement measured by the period of time required for one member of the class to attain a stated age. In In re Pergament's Estate, 8 Misc.2d 233, 163 N.Y.S.2d 72 (Sur.Ct.1957), the testator directed that part of her residuary estate be placed in trust, the income to accumulate for the benefit of the issue of her son and daughter. The corpus and the accumulations were to be held until the male issue reached age 25, at which time they would receive 1/2 of their share, with the remainder distributable at age 30. Female issue were to receive 1/2 at age 21 and 1/2 at age 27. Looking
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to the first Restatement, § 295, for authority, the court applied the rule of convenience and interpreted the trust such that "[g]randchildren born after the death of the testatrix are entitled to participate in the fund except that no grandchild born after the time of the first distribution of the fund shall be entitled to a share in that fund." *Id.* at 243, 163 N.Y.S.2d at 81. So construed, the trust was invalid as violative of the New York perpetuities statute, and the trust failed in its entirety. See also Littlestown National Bank v. Little, 28 D. & C.2d 498 (Pa.Orph. Cl.Adams Cty.1962) (gift of income of trust to children of David and Marian Little "until such time as they arrive at the age of 21 years; at which time the trustee shall distribute the net corpus of said fund to the children of Davis S. and Marian Little;" held, class closed when first child reached age 21).

In Rhode Island Trust Co. v. Bateman, 93 R.I. 116, 172 A.2d 84 (1961), the will directed that a portion of the residuary estate be divided into as many shares and separate trust funds "as there are children born and maybe [sic] born" of a named son and grandson. Only income was to be paid to the beneficiaries "until such time as they respectively attain the age of twenty-five years," at which time the child's share of the principal was to be distributed. When one of the beneficiaries reached age 25 the trustees brought a suit for construction. No children had been born between the date of the execution of the will and the suit for construction. The court held that the testator "clearly intended to limit the class . . . to the children of his son . . . and grandson . . . who were in being at the time he executed the will [or] who might be born between that time and his death." *Id.* at 126–27, 172 A.2d at 90–91. In so holding the court noted that, "since the testator's intent is clear and inasmuch as the language used is not ambiguous there is no need to resort to rules of construction." *Id.* at 127, 172 A.2d at 91. A concurring opinion felt there was an ambiguity in the language, but would have reached the same result by way of the rule of convenience. Under the rule of convenience, the concurring opinion noted, the class would not close until the first beneficiary became 25 years of age. Since no children were born between the death of the testator and the time the first child reached age 25, the result in this case was the same no matter which rule was applied.

In Sherrod v. Any Child or Children Hereafter Born to Watson N. Sherrod, Jr., 65 N.C.App. 252, 308 S.E.2d 904 (1983), affirmed, 312 N.C. 74, 320 S.E.2d 669 (1984), the will provided that a farm be given to the testator's two granddaughters, daughters of the testator's son, and "any unborn children of my son . . . share and share alike. . . . This bequest to be handled by the children's father . . . as he thinks best until the oldest child shall have reached the age of thirty years. . . ." The trial court held that the trust would terminate and the class would close on the oldest child's 30th birthday. The Court of Appeals, while agreeing with the reasoning of the trial court, reversed, pointing to a decision of the North Carolina Supreme Court, *Wise v. Leonhardt*, 128 N.C. 289, 38 S.E. 892 (1901), as controlling. *Wise* held that, "if the gift is real property, there is no interven-
ing life estate, and the property is to be distributed at a later date, the class is closed at the death of the testator.” *Id.* at 290-91, 38 S.E. at 892. The rationale in *Wise* was that the class had to close at the testator’s death so that the court would be able to determine who had title. The Court of Appeals indicated that criticism of the case seemed valid for several reasons.

First, legal title would not be in limbo during the period of the trust. Rather it would be in the trustee; and equitable title would be in the members of the class born prior to the death of the testator. The fact that their title is subject to partial divestment does not mean they do not have it. Second, no inconvenience results from keeping the class open, since distribution cannot occur until a later date. This is especially true here where the testator set a specific date for distribution. Third, keeping the class open until distribution would further the policy of including therein as many people as possible.

65 N.C.App. at 257, 308 S.E.2d at 904. The Court of Appeals held that the class closed at the death of the testator because “we consider *Wise*, though arguably unwise, the controlling authority.” *Id.* at 258, 308 S.E.2d at 908. The North Carolina Supreme Court affirmed this holding without discussion. *Wise* and other cases with similar reasoning are criticized in 5 American Law of Property § 22.43 at n. 8 and 9 (A.J. Casner ed. 1952).

11. Postponement measured by the period of time required for the “youngest” class member to attain a stated age—*Comment o* points out that the period of postponement required by a limitation in favor of a class, distributable when the youngest class member attains a stated age, might logically be any one of four periods. The possible distribution dates are when the person who was the “youngest” at the time the dispositive instrument was executed reaches the stated age, when the person who was the youngest on the effective date of the conveyance reaches the stated age, and when the youngest of all members of the class in being at a particular time has reached the stated age. The last possible construction would delay distribution until further members of the class have become impossible, that is until after the death of the parent or parents of the class members. *Comment o* adopts the third of these four possible constructions.

The highest courts of Rhode Island and South Carolina have expressly adopted the position taken by the first Restatement, *Comment k*, which is substantially similar to *Comment o* of this section. In Lux v. Lux, 109 R.I. 592, 288 A.2d 701 (1972), Philomena Lux devised her residuary estate to her grandchildren, further providing that “[a]ny real estate included in said residue shall be maintained for the benefit of said grandchildren, and shall not be sold until the youngest of said grandchildren has reached twenty-one years of age.” The court held that “there is no good reason to exclude any person who is born before the period of distribution,” and that distribution of the property should be made at any time when the youngest of the then living grandchildren has attained the age of 21. Similarly, in South Carolina
National Bank of Charleston v. Johnson, 260 S.C. 585, 197 S.E.2d 668 (1973), the court stated:

The date assigned by the present will for the distribution of the property is "when any youngest grandchild reaches twenty-one." When the time arrives that there is no living grandchild of the testator under twenty-one, the limitation of the will has been met and the estate is then distributable to those of the class living at that time.

Id. at 595, 197 S.E.2d at 672. See also In re Trust of Walker, 17 Wis. 2d 181, 116 N.W.2d 106 (1962) (portion of trial court decree left standing stated that gift was a class gift to the grandnephews and grandnieces of the testator, with distribution to take place when all members of the class living at any one time attained the age of 50 years).

The American Law of Property states that the fourth construction, that the word "youngest" means youngest whenever born, is the "prevailing view." 5 American Law of Property § 22.44, at n. 4 (A.J. Casner ed. 1952). However, not all the cases cited in the American Law of Property support this view. The authorities are in agreement (and the cases are clear) that the first two constructions are to be rejected, and that the class should be capable of increase until the time of distribution, but it is not so clear when that distribution date will arrive (or, more specifically, whether a distribution can be made prior to the death of the parents of the class members given that it is only then that it is assured that no more class members can be born). Two of the opinions cited by the American Law of Property have language that conclusively indicates that the court is adopting the fourth construction. In Singer v. First National Bank & Trust Co., 195 Ga. 269, 24 S.E.2d 47 (1943), the final distribution of the trust corpus was to occur when the youngest child of the testator's son "born or to be born, shall become 25 years of age." The court held that the trustee must hold the property at least until the death of the son since the possibility of issue never becomes extinct during the lifetime of a named parent for whose children, born or to be born, the trust is created. In Sheridan v. Blume, 290 Ill. 508, 125 N.E. 353 (1919), there was a gift of one-fifth of the residue of the testator's estate to the children of a daughter of the testator to be held in trust "until the youngest living child of said Annie Bell shall have reached his or her majority." The court held that, "There being a possibility of more children born to Annie Bell it cannot be told until her death who will be entitled finally to a possible share." Id. at 512, 125 N.E. at 355.

On the other hand in Dale v. White, 33 Conn. 294 (1866), a testamentary gift "to be equally divided between all of my grandchildren when the youngest shall become of age" was held to be divisible when all the living grandchildren came of age and there was no indication that their parents were dead. In Sutton v. Greening, 164 Ky. 164, 175 S.W. 1 (1915), a farm was devised to the son of the testator, but if the son should die before his youngest child reached the age of 16 years, then the son's wife and children were to have the farm as their home until that period arrived. The court held that the wife and children had a contingent interest in the farm. "It is true the contingency may never
happen that will enable them to enjoy the interest, for the father may live until the youngest child becomes 16 years of age, in which event the interest of each child would close and end." Id. at 168, 175 S.W. at 2.

In McDowell National Bank of Sharon v. Applegate, 479 Pa. 300, 388 A.2d 666 (1978), a testamentary trust was established for the benefit of the children of a son of the testator. The trust was to continue until the youngest child of the son reached age 25 (or one year prior to the end of the maximum period allowable under the rule against perpetuities, whichever occurred first). The lower court held that the testator intended that the class would close on the death of the testator and that afterborn children of the son would not share in the gift. The supreme court reversed the lower court, holding that the class did not close on the death of the testator, but remained open so as to include children of the son born after the death of the testator. The court refused to express a view as to when the class would close, noting that the lower court had not appointed a trustee ad litem for children not yet ascertained who might claim entitlement to the benefits of the trust.

12. Postponement measured by combination of types of postponement—In New England Trust Co. v. McAleer, 344 Mass. 107, 181 N.E.2d 569 (1962), the income from a trust was to be divided among the testator's five children. When the last surviving child died, the income was to be distributed to the issue of the five children. Distribution of the principal was postponed until the youngest grandchild attained the age of 21. All of the grandchildren reached the age of 21 before the last of the five children died. The court held that the class of remaindermen must be determined as of the date when the youngest grandchild reached age 21. "There could be no distribution until both these interests had terminated. Although the testator apparently believed that all of the children would be dead before his youngest grandchild reached 21, we are of the opinion that the class was intended to remain open until all prior interests had terminated." Id. at 113, 181 N.E.2d at 573.

The holding in Stinson v. Palmer, 146 Conn. 335, 150 A.2d 600 (1959), is contrary to Illustration 21. In that case income from a trust was to be paid to the testator's widow for her life, and at her death "[s]uch trust estate shall pass to the children of my sons . . . in equal amounts to each one of them surviving and paid at the time each one shall reach the age of thirty years." The court held that the class closed on the death of the widow. Each of the grandchildren then living was entitled to share in the trust estate, "but enjoyment thereof was postponed until he or she reached his or her thirtieth birthday."

13. Class held to be "ascertained" prior to distribution date of postponed gift with result that deceased members are included in gift—This Chapter addresses the issue of whether a potential class member is conceived or adopted in time to be included in the class. In the case of a gift to a class in which distribution of the gift is postponed, a member of the class may be conceived in time but die before the date of distribution. Whether or not the deceased class member's
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distributees will be entitled to his or her share of the gift depends on whether the gift is deemed to be vested or contingent (conditional on survival). Absent a requirement of survival imposed by the transferor, most courts hold that such a gift is vested, subject to partial divestiture as a result of additional class members being born; death of a class member before the period of distribution does not defeat his or her interest. See Reporter's Note to Section 27.3. Some courts have resolved the issues as to whether a class member is conceived in time and whether the gift is vested or contingent by the single determination as to "the time when the class is to be ascertained."

In the following cases involving postponed gifts the courts hold that the class is to be "ascertained" as of the death of the testator, with the result that the interests of class members who were deceased at the time of distribution were not defeated. It should be noted that the use of this approach in the following cases did not result in any afterborn class members being excluded; in many of the cases the gift was to be to the "children" of the testator (a class incapable of increase after the death of the testator). While the result in these cases would have been the same under the rule of this section, the cases may act as precedent for cases in which class members born after the death of the testator and before the period of distribution would be excluded. This seems to have been the case in Georgia. Witcher v. Witcher, 231 Ga. 49, 200 S.E.2d 110 (1973), has been cited for the proposition that where a remainder estate is devised to a class, the members of the class are to be ascertained as of the death of the testator unless there is a plain and manifest intention that the class is not to be determined until a future date or until a subsequent event has occurred." Clark v. Citizens Southern National Bank, 243 Ga. 703, 705, 257 S.E.2d 244, 246 (1979). (See item 4 above.) In Witcher the will provided the testator's widow with a life interest in the residuary estate, and at her death the remainder was to go to the "children" of the testator. The will further provided that if a child predeceased the testator or the widow, the child or children of that deceased child should take the parent's share. One of the testator's children predeceased the testator, leaving no children, but survived by his spouse. The surviving spouse argued that as the sole heir of the deceased child she became entitled to the son's share of the remainder in the residuary estate. The court agreed with the widow. The child was alive at the testator's death and the remainder vested in him at that time. "There is no language in the will which plainly manifests an intention to divest the share of a son who survived the testator, but predeceased the life tenant, leaving no child or children to be substituted devisees." Id. at 52, 200 S.E.2d at 112.

Similarly, in In re Mamlock's Will, 31 Misc.2d 1080, 221 N.Y.S.2d 161 (Sur.Ct.1961), the will gave the residue of the estate to the testator's widow for her life, with remainder "to my children or the survivors of them. . . ." The court stated,

Here the gift to testator's children is made in words of present gift, the enjoyment of the remainder being suspended for purposes of letting in the intermediate estate of the wife. In such situa-
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14. Language or circumstances that indicate a contrary intent—In Wachovia Bank & Trust Co., N.A. v. Robertson, 16 N.C.App. 484, 192 S.E.2d 848 (1972), certiorari denied, 282 N.C. 675, 194 S.E.2d 155 (1973), the testator created two trusts under her will. Income from the first trust was to be paid one-half to the testator’s daughter for her life, and one-half to the children (or issue of deceased children) of the daughter. At the death of the daughter, the trust was to terminate and the principal distributed to the children of the daughter, or the issue of deceased children, per stirpes. Income from the second trust was also to be paid one-half to the daughter, and one-half to the children (or issue of deceased children) of the son of the testator. The son, according to the will, did not need the trust income to maintain his standard of living.) The second trust did not contain the provision as to termination contained in the first trust (“upon the death of my daughter . . .”), but in every other respect the provisions of the second trust were identical to the first trust. The trial court held that both trusts terminated at the death of the daughter, and the class of “children” of the daughter and son closed at that time. The court of appeals reversed, noting that “the testatrix knew how to create interests vesting only at [the death of the life beneficiary]. Having omitted those words . . . we think she clearly intended that the children of [the son] were to be determined at [the testator’s] death and the division of shares for them made then.” Id. at 490, 192 S.E.2d at 853. As a result, the court held that a child of the son born after the death of the testator was not included among

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the beneficiaries of the second trust.

In DeSanto v. Haug, 65 N.J. Super. 206, 167 A.2d 428 (1961), the court construed a gift of one-half of the residuary estate, in trust until they reached majority, to "the children of my son Rudolph Haug, or any child hereafter born to him, . . . share and share alike. . . ."

The court rejected an argument that the class should close at the death of the testator, and did not consider the alternative of closing the class at the time the oldest grandchild reached majority. In holding that the class would remain open until the death of the son, the court stated that,

The language used here by the testator goes beyond that of a mere gift to a class. He specifically includes as a beneficiary "any child hereafter born" to his son. Such language cannot be disregarded . . . but instead must be given some meaningful effect by the court.

Id. at 210, 167 A.2d at 430. The trustee was instructed to pay income to the living grandchildren and given the discretion to pay out principal "so long as the interests of any unborn grandchildren are sufficiently protected." Id. at 212, 167 A.2d at 428.

15. Cases contrary to the rule of Subsection (1) of this section—the Kentucky rule—In Tuttle v. Steele, 281 Ky. 218, 135 S.W.2d 436 (1939), the court stated,

In this state . . . the common law rule has not been followed and it has been uniformly held that persons born into the class after the testator's death, even where there is no postponement of distribution or enjoyment, will come into and form members of the class where there is nothing to show an intention to exclude afterborn members.

Id. at 222, 135 S.W.2d at 439. As a result a devise to the testator's widow for life and at her death to the testator's great-nieces and great-nephews included great-nieces and great-nephews born after the death of the testator's widow. Members of the class living at the widow's death had a vested remainder subject to open to let in afterborn members. See also Bach v. Pace, 305 S.W.2d 528 (Ky.1957) (deed to settlor's wife for life with remainder to settlor's grandchildren was violative of rule against perpetuities because it included grandchildren who might be born to children of settlor who were born after the date of the deed).
Chapter Twenty-Seven

A CLASS MEMBER FAILS TO MEET A REQUIREMENT OF SURVIVAL OR TO FULFILL SOME OTHER CONDITION—DECREASE IN THE CLASS MEMBERSHIP

Introductory Note

Section

27.1 Class Member Dies Before the Date the Dispositive Instrument Is Executed

27.2 Class Member Dies After the Date the Dispositive Instrument Is Executed but Before It Takes Effect

27.3 Class Member Dies After the Effective Date of the Dispositive Instrument but Before the Date of Distribution

Introductory Note: This Chapter, like the two previous Chapters, relates to class gifts to others than "heirs" and the like. Chapter Twenty-Five considers the first step in the process of determining the beneficiaries under a class gift to others than "heirs" and the like; that is, the ascertainment of the possible takers under the class gift. The possible takers under a class gift to "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants," "family," and similar terms are those who come within the primary meaning of the class gift term under the rules developed in Chapter Twenty-Five.

Chapter Twenty-Six is concerned with the second step in the process of determining the beneficiaries under a class gift to others than "heirs" and the like. This second step is the determination of the time within which the class may increase in membership. An increase in the class membership may result from a person within the primary meaning of the class gift term being conceived or adopted within some specified period of time.

The fact that a person is within the primary meaning of the class gift term and is conceived or adopted within the specified period of time does not necessarily mean that such person will share in the class gift. A class member may have to meet a requirement of survival to some future date, or fulfill a condition of some other type, to prevent the class member from dropping out of the class. This Chapter Twenty-Seven considers when and to what extent the class may decrease in membership and the effect on the class gift of a decrease occurring. This is the third step in the process of determining the beneficiaries under a class gift to others than "heirs" and the like.

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A decrease in the membership of a class is most frequently caused by the failure of a class member to survive to some specified time. This requirement of survival may relate to the date the dispositive instrument is executed, or to the date the dispositive instrument becomes effective, or to some date subsequent to the date the dispositive instrument becomes effective.

A condition that may cause a decrease in the class membership may relate to the attainment of some specified age by the class members, which condition has built into it survival at least to that age. The condition may relate to the occurrence or non-occurrence of some other event that is unrelated to survival, such as a provision that restricts the class gift to those members of the class who have not gone into bankruptcy prior to the date of distribution.

Chapter Twenty-Seven is designed to do the following: (1) describe the circumstances under which a class member is required to survive to some specified period of time in order to share in the class gift; (2) point out the disposition that is made of the share a class member would have taken when he or she fails to meet a requirement of survival or to fulfill some other condition; and (3) consider whether language specifying the attainment of some age by a class member is a condition or merely a reference to the time a class member is to receive his or her interest in possession.

§ 27.1  Class Member Dies Before the Date the Dispositive Instrument Is Executed

If a gift is made in favor of a class described as "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," or by similar class gift terms that describe a one-generation class,

(1) a person within the primary meaning of the class gift term who dies before the date the dispositive instrument is executed is excluded from the described class;

(2) the share in the class gift that a deceased class member would have taken had he or she lived, when the share of each class member is not a specified amount, goes to enlarge the shares of the class members not excluded by the rule of this section, except to the extent that substitute takers are provided to take in place of the deceased class member by additional language or circumstances or by an applicable antilapse statute.
Comment:

a. Rationale. When a gift is made in favor of a one-generation class and a person who is within the primary meaning of the class gift term dies before the date the dispositive instrument is executed, such deceased class member cannot be the recipient of any interest in the subject matter of the class gift. A gift cannot be made to a dead person. The donor may provide, however, that someone else is to be substituted for the deceased class member to receive the gift the deceased member would have received had he or she lived. Also an antilapse statute may provide a substitute taker.

b. Effect of exclusion of deceased class member. If the subject matter of the one-generation class gift is to be divided among the class members entitled to take, the effect of the exclusion of a class member who is deceased on the date the dispositive instrument is executed (absent substituted takers) is to enlarge the shares of the other class members. If, however, the share of a class member is not dependent on the number in the class, as when each class member is given a specified amount, the exclusion of a class member does not increase the shares of the other class members. In such case, the specified amount the excluded class member would have taken had he or she lived goes to substituted takers if any and otherwise goes to augment the property passing to others than the described class.

If a gift is made “to A, B, and C” (the gift is construed to be one to individuals rather than to a class) and A is deceased when the dispositive instrument is executed, the share that A would have taken had he or she lived does not pass to B and C, in the absence of additional language or circumstances that indicate otherwise. When a one-generation class gift is involved, however, the class members who survive the date the dispositive instrument is executed are in fact described by the class gift term that is used. The emphasis is on the class, not on the individual members of the class. This is sometimes expressed by the statement that when a class gift term is used the donor is group-minded and not individual-minded. When the donor describes the beneficiaries both by the class gift term and by their individual names, as when the gift is “to the children of X, namely A, B & C,” the facts and circumstances of the execution of the dispositive instrument will determine whether it is treated as a class gift or a gift to individuals, so far as where the share of the person deceased when the dispositive instrument is executed goes.

c. Intent of donor that estate of deceased class member be substituted. The donor could provide expressly in the dispositive instrument that the share a class member who is deceased on the
date the dispositive instrument is executed would have taken had he or she lived shall pass to his or her estate. A possible meaning to attribute to the word "estate" in this context is those persons who would take on intestacy from the deceased class member if he died on the date the dispositive instrument takes effect. The substituted takers, when the deceased class member's estate is substituted for the deceased class member, should be deemed to take directly from the donor and not from the deceased class member.

A substituted gift to a deceased class member's estate may describe others than those persons who would take property in the deceased class member's estate if he or she had died intestate on the date the dispositive instrument takes effect. For example, the conclusion may be justified that the substituted gift to a deceased class member's estate means to those persons who would take under the residuary gift in the deceased class member's will, if he or she had died on the date the dispositive instrument takes effect.

Illustrations:

1. O transfers Blackacre by deed in equal shares "to my children who have attained and who later attain the age of 21." On the date the deed is executed, O's son C1 is deceased but he had attained the age of 21 before he died. O had two other children, C2 and C3, both of whom were under 21. The reference in the deed to O's children "who have attained 21" could only refer to O's deceased child C1. Consequently, it is reasonable to conclude that C1's estate is to be substituted for C1, and this is accomplished by implying a gift to C1's estate of the share C1 would have taken had he lived. The effect of implying a gift to C1's estate is to close the class to after-conceived and after-adopted children of O. Blackacre passes to C1's estate, subject to partial divestiture by C2 and C3 attaining the age of 21.

2. Same facts as Illustration 1, except that O's transfer of Blackacre is by will. In such case, the reference in the will to O's children "who have attained 21" could refer to those children alive when the will is executed who have attained 21 before O dies. In the absence of additional facts or circumstances that indicate otherwise, the rule of this section would exclude C1 from the class and C1's estate would not be entitled to an interest in Blackacre.

d. Intent of donor that issue of deceased class member be substituted. The donor could provide expressly that the share of any class member who is deceased on the date the dispositive instrument is executed, and who leaves issue who survive the
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effective date of the dispositive instrument, shall pass to such deceased class member's issue. The property that passes to the issue of a deceased class member in this situation is not a transfer to them from the deceased class member but is a transfer to them from the donor.

Illustration:

3. O transfers property by deed to T in trust. The trust is irrevocable by O. T is directed to pay the income to O for life, then to distribute the trust property "to O's children in equal shares, the share of any deceased child of O to be paid to such deceased child's issue." On the date the deed is executed, O has two living children, C1 and C2, and one child of O, C3, is deceased, but C3 left surviving issue. The objective of O to treat his lineal lines equally is carried out more completely if the share C3 would have taken had he lived is allowed to pass to C3's issue. Consequently, the reference to the share of any deceased child of O includes C3, who was deceased when the deed of trust was executed, and C3's issue take the share O3 would have taken had C3 lived.

e. Substituted takers for deceased class member provided by antilapse statute. Antilapse statutes provide under specified circumstances for substituted takers to take the share of a beneficiary of a disposition who does not survive to some specified time. These statutes vary to some extent from State to State in the terms of their applicability (see the Statutory Note to Section 27.1). The donor may manifest an intent that an antilapse statute otherwise applicable shall not apply. The donor may select as the controlling antilapse statute the one in force in a particular State at some specified time. In the absence of such selection by the donor, the controlling antilapse statute is the one in force in the State in which the donor resides at the time the dispositive instrument becomes effective. The substituted takers under an antilapse statute always take from the donor, not from the deceased beneficiary.

When a class member dies before the dispositive instrument is executed, the controlling antilapse statute must be examined to determine whether it can apply in such situation. If it can and all other conditions for its applicability are met, including the availability of the statutorily described substituted takers, the substituted takers will take the share the deceased class member would have taken had he or she lived, unless the donor has manifested an intent that the antilapse statute not apply.

For many purposes the revocable trust operates as a substitute for a will. The reasons that justify the applicability of an antilapse
statute to wills are equally present when a revocable trust is involved. Consequently, the statutory language relating to the antilapse statute should be construed to apply to revocable trusts as well as to wills whenever that is possible.

Illustrations:

4. O transfers property by will "to my children in equal shares." O had four children, C1, C2, C3, and C4. C1 and C2 were deceased on the date O executed his will. C1 left issue surviving but C2 died without issue surviving. The controlling antilapse statute applies to class gifts to relatives of the testator and applies in case a member of the class is deceased on the date the will is executed. The substituted takers under the antilapse statute are restricted to the issue of the deceased class member. The issue of C1 will take the share C1 would have taken if he had lived. C2 left no issue, so the antilapse statute provides no substituted taker for C2's share and it goes to augment the shares of C3 and C4.

5. Same facts as Illustration 4, except that the transfer is by deed to T in trust. The trust is revocable by O. T is directed "to pay the income to O for life, then to distribute the trust property to O's children in equal shares." If the antilapse statute is construed to be applicable to transfers under a revocable trust, the result is the same as in Illustration 4. If the antilapse statute is construed not to be applicable to transfers under a revocable trust, then there is no substituted taker for the share C1 would have taken, and the shares C1 and C2 would have taken had they lived go to augment the shares of C3 and C4.

6. Same facts as Illustration 4, except that the transfer under O's will is "to my surviving children in equal shares." The applicability of the antilapse statute to C1's share is overcome by the insertion of the word "surviving" in the description of the class, in the absence of additional language or circumstances that indicate "surviving" refers to some date prior to the date the dispositive instrument is executed, and the shares of both C1 and C2 go to augment the shares of C3 and C4. In regard to the meaning of the word "surviving" in other contexts, see § 27.2, Comment f.

f. "Similar class gift terms that describe a one-generation class." For the meaning of "similar class gift terms that describe a one-generation class" in the rule of this section, see § 26.1, Comment a.
g. Cross reference. When a gift is made in favor of a class described as "issue" or "descendants," or by similar class gift terms that describe a multigenerational class, the effect of the death of a class member before the date the dispositive instrument is executed depends on whether the distribution to the class is per stirpes or per capita, and hence is considered in Chapter Twenty-Eight where the per stirpes and per capita distribution matter is developed.

STATUTORY NOTE TO SECTION 27.1

In general, antilapse statutes are designed to save a gift from lapsing because of the death of a legatee before the death of the testator. When applicable, the statutes provide that a gift will not lapse, but will pass to the takers substituted by the statute, usually the deceased legatee's issue. Antilapse statutes do not apply in every situation, however, and the language and applicability of antilapse statutes vary from jurisdiction to jurisdiction.

A given statute may specifically state that it applies to dispositions in favor of a class (see item 1 below), or may be silent as to its applicability to class gifts but have been construed to apply (see item 2 below).

The majority of antilapse statutes condition their applicability on the deceased legatee being related to the donor in some way. The Statutory Note to Section 18.6, item 2, organizes the various antilapse statutes according to the relationship required in order for the statute to apply.

Another issue is whether the antilapse statute applies if the deceased legatee died before the execution of the dispositive instrument (see item 4). At common law a gift to a person dead at the execution of a will was a "void" gift and failed for that reason; a gift "lapsed" only if the legatee died between the execution of the will and the death of the testator.

Another issue is whether the antilapse statute applies only to lapse situations arising under a will; some antilapse statutes apply as well to situations in which a beneficiary under an inter vivos trust, whose interest is to take effect at the death of the settlor, dies before the settlor (see item 5).

Finally, there may be a dispute as to which jurisdiction's antilapse statute applies (see item 6).

1. The following antilapse statutes provide that a testamentary disposition to a member of a class who dies before the testator will result in the application of the statute to the same extent the statute applies to a disposition made to an individual devisee or legatee. Statutes marked with an asterisk conform to Section 2–605 of the Uniform Probate Code, which applies to class gifts whether the class member died before or after the execution of the will, but only if the deceased legatee is a grandparent or a lineal descendant of a grandparent of the testator.

Alabama Code § 43–8–224 (1982)*
Alaska Stat. § 13.11.240 (1985)*

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Colorado Rev.Stat. § 15–11–605 (1973) *
Delaware Code Ann. tit. 12, § 2313 (1979) *
Florida Stat. § 732.603 (1985) *
Idaho Code § 15–2–605 (Supp.1986) *
Michigan Comp.Laws § 700.134 (1979) *
Minnesota Stat. § 524.2–605 (1986) *
Nebraska Rev.Stat. § 30–2343 (1979) *
named beneficiary murdered testator and thus was deemed to
have died immediately prior to the death of testator resulting in
the share he would have received going to his two children in
North Dakota Cent.Code § 30.1–09–05 (1976) *
South Carolina Code Ann. § 62–2–602 (Law Co-op.1987)
Utah Code Ann. § 75–2–605 (1978) *
Virginia Code § 64.1–64.1 (Supp.1986)
Wisconsin Stat. § 853.27 (1983–84)

2. The following antilapse statutes do not specifically state that the
statute applies to class gifts:

gifts in Clifford v. Cronin, 97 Conn. 434, 117 A. 489 (1922))

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Indiana Code Ann. § 29-1-6-1(g)(2) (West 1979)

Iowa Code § 633.273 (1985) (construed not to apply to class gifts in Redinbaugh v. Redinbaugh, 199 Iowa 1053, 203 N.W. 246 (1925) and Matter of Estate of Kalouse, 282 N.W.2d 98 (Iowa 1979); former statute with substantially similar language did apply to class gifts: Downing v. Nicholson, 115 Iowa 493, 88 N.W. 1064 (1902))


Mississippi Code Ann. § 91-5-7 (1972)

Missouri Ann.Stat. § 474.460 (Vernon Supp.1987) (construed to apply to class gifts in Zombro v. Moffett, 329 Mo. 137, 44 S.W.2d 149 (1931))


West Virginia Code § 41-3-3 (1982)

In the following cases the courts construed antilapse statutes (which did not specifically state that they applied to class gifts) to apply to class gifts. The cases and the statutes construed have been superseded by statutes listed in item 1 above. In re Steidl's Estate, 89 Cal.App.2d 448, 201 P.2d 58 (1948); Drafts v. Drafts, 114 So.2d 473 (Fla.App.1959); Rudolph v. Rudolph, 207 Ill. 266, 69 N.E. 284 (1904); Chenault's Guardian v. Chenault's Estate, 89 Ky. 83, 11 S.W. 424 (1889); Bray v. Pullen, 84 Me. 185, 24 A. 811 (1892); Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1892);
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In the following cases the courts construed antilapse statutes (which did not specifically state that they applied to class gifts) not to apply to class gifts. The cases and the statutes have been superseded by statutes in item 1 above. Lacy v. Murdock, 147 Neb. 242, 22 N.W.2d 713 (1946); Trenton Trust & Safe Deposit Co. v. Sibbits, 62 N.J.Eq. 131, 49 A. 530 (Ch. 1901).

3. In Louisiana a statute provides that all testamentary dispositions lapse if the devisee or legatee does not survive the testator:

Louisiana Civil Code Ann. art. 1697 (West 1987) (but see statute in item 5, below)

4. This item addresses the issue of whether an antilapse statute will apply when the class member dies before the dispositive instrument is executed. Statutes marked with an asterisk conform to Section 2-605 of the Uniform Probate Code.

a. The following antilapse statutes provide that the statute applies to class gifts and that it is immaterial whether the death of the class member occurred before or after the execution of the will:

Alabama Code § 43-8-224 (1982) *
Alaska Stat. § 13.11.240 (1985) *
Colorado Rev.Stat. § 15-11-605 (1973) *
Delaware Code Ann. tit. 12, § 2313 (1979) *
Florida Stat. § 732.603 (1985) *
Idaho Code § 15–2-605 (Supp.1986) *
Michigan Comp.Laws § 700.134 (1979) * (The ambiguous class gift to "my remaining brothers" did not mean surviving brothers. Antilapse statute operated to save bequets of deceased brother, who died prior to the execution of the will, and deceased brother, who died after the execution of the will but before the testatrix.) In re Estate of Fitzpatrick v. Wolfe, 159 Mich.App. 120, 406 N.W.2d 483 (1987).
Minnesota Stat. § 524.2-605 (1986) *
Montana Code Ann. § 72-2-512 (1985) *
Nebraska Rev.Stat. § 30–2343 (1979) *
New Jersey Stat.Ann. § 3B:3-35 (West 1983) *
b. The following antilapse statutes provide that the statute applies to class gifts but that it does not apply to dispositions made to class members who died before the execution of the will:

- California Prob.Code § 6147 (West Supp.1987) (if testator did not know of death of class member at execution antilapse statute does apply)

- Maryland Estates & Trusts Code Ann. § 4-403 (1974 & Supp.1986) (statute also does not apply to void gifts to individual legatee or devisee)

- New York Estates, Powers & Trusts Code § 3-3.3 (McKinney 1981)


- Wisconsin Stat. § 853.27 (1983-84)

c. The following antilapse statutes provide that the statute applies to class gifts but do not specifically state the consequences of the death of a class member before the execution of the will:


- Kentucky Rev.Stat. § 394.410 (Michie/Bobbs-Merrill 1984) (statute applies if class member dies before the testator, compare Kentucky Rev.Stat. § 394.400 (Michie/Bobbs-Merrill 1984), which provides that the antilapse statute will apply where an individual devisee dies before execution of the will or before the testator; see also Chenault's Guardian v. Chenault's Estate, 88 Ky. 83, 11 S.W. 424 (1889) (predecessor statute construed to apply to class gift where member of class died before execution of the will))


d. The following antilapse statutes do not specifically provide that the statute applies to class gifts or to a devisee or legatee who died before the execution of the will:


- South Carolina Code Ann. § 62-2-603 (Law Co-op.1987)


- Utah Code Ann. § 75-2-605 (1978)

- Virginia Code § 64.1-64.1 (Supp.1986)

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is dead at the execution of the will, but have been construed to apply where a class member dies before the execution of the will:

Missouri Ann.Stat. § 474.460 (Vernon Supp.1987) (construed to apply where class member was dead at execution of will in Zombro v. Moffett, 329 Mo. 137, 44 S.W.2d 149 (1931))


In the following cases the courts construed antilapse statutes (similar to the statutes listed above) to apply where a class member died before the execution of the will. The cases and the statutes construed have been superseded by statutes listed in items 4a and 4e above. Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125 (1916); Bray v. Pullen, 84 Me. 185, 24 A. 811 (1892); In re Kittson’s Estate, 177 Minn. 469, 225 N.W. 439 (1929); Wildberger v. Cheek’s Executor, 94 Va. 517, 27 S.E. 441 (1897).

e. The following antilapse statutes are similar to those listed in item 4d above, but have been construed not to apply where a class member dies before the execution of the will:


In the following cases the courts construed antilapse statutes (similar to the statutes listed above) not to apply where the class member died before the execution of the will. The cases and the statutes construed have been superseded by statutes listed in items 4a and 4b above. Drafts v. Drafts, 114 So.2d 473 (Fla.App.1959); Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1892); In re Schuette’s Estate, 138 Neb. 568, 293 N.W. 421 (1940); Pimel v. Betjemann, 188 N.Y. 194, 76 N.E. 157 (1905). (The statutes listed in item 2 of this Statutory Note that have been construed not to apply to class gifts where the class member dies between the execution of the will and the death of the testator would also not be applied where the class member died before the execution of the will.)

5. This item addresses the issue of whether an antilapse statute will apply when the dispositive instrument is not a will but an inter vivos trust, and a beneficiary of the trust dies before the settlor/life beneficiary.

a. A group of statutes in Louisiana provide for the treatment of a “class trust,” an inter vivos or testamentary trust in favor of a class consisting of some or all of the grantor’s children or grandchildren, nieces, nephews, grandnieces, or grandnephews or any combination thereof. If such a trust is created, a descendant of a member of the class dying before
the creation of the trusts shall be considered a member of the class by
representation, unless the instrument otherwise provides; and an interest
of a member of the class who dies during the term of the trust vests in his
heirs or legatees; but the trust instrument may provide that the interest of
a member of the class who dies intestate and without descendants during
the term of the trust vests in the other members of the class.


§ 11.12.110 (1985), has been construed to apply in the situation in which a
beneficiary under an inter vivos trust dies before the settlor/life benefici-
ary. In In re Estate of Button, 79 Wn.2d 849, 490 P.2d 731 (1971), the
settlor created an irrevocable trust, reserving the income for his life. At
the settlor's death the trust principal was to be paid to the settlor's mother
and the trust terminated. There was no provision for the disposition of the
trust principal in the event the settlor's mother predeceased the settlor,
which did occur; the settlor's mother died two weeks before the settlor.
The court held that the Washington antilapse statute (which provided that
when an estate is devised to a relative of the testator, and the devisee dies
before the testator leaving lineal descendants, such descendants shall take
the estate) applied to prevent the gift from lapsing. The court noted that
A gift to be enjoyed only upon or after the death of the donor is in
practical effect a legacy, whether it is created in an inter vivos
instrument or a will.

Id. at 854, 490 P.2d at 734.

The New Mexico antilapse statute, New Mexico Stat.Ann. § 45-2-605
(1978) (which conforms to § 2-605 of the Uniform Probate Code), has been
construed not to apply where some of the beneficiaries of a testamentary
N.M. 113, 645 P.2d 986 (1982), the court stated

The antilapse statute states that it applies only to the issue of a
deviser related to a decedent who has predeceased the testator. As
provided in § 45-1-201(7), N.M.S.A.1978, “In the case of a devisee to
. . . a trustee on trust described by will, the trust or trustee is a
deviser and the beneficiaries are not devisees.” Under the will in this
case, the Bank was the devisee and the named siblings of the decedent
were beneficiaries. The antilapse statute is inapplicable to decedent’s
testamentary dispositions.

Id. at 118, 645 P.2d at 991.

6. Restatement, Second, Conflict of Laws § 240 states that in a will
devising land, in the absence of the designation of a forum whose rules of
construction will apply, the will is construed in accordance with the rules of
construction that would be applied by the courts of the situs. Section 264
states that as to movables, the will is construed in accordance with the
rules of construction that would be applied by the courts of the state where
the testator was domiciled at the time of his death. Comment f to § 240
notes, however, that
there are weighty reasons favoring application of the rules of construction of the state where the testator was domiciled at the time the will was executed. The testator is more likely to have been familiar with the rules of this state than those of the state of the situs, and the same is true of the lawyer who drafted the will provided that he was employed in the state of the testator's domicil. The land may be located in two or more states. If so, it is almost certain that the testator intended the words used in the will to bear a single meaning and not mean perhaps as many different things as there are states in which there is land covered by the will (see § 224, Comment f). Also, the land may have been acquired after the execution of the will. Furthermore, application of the rules of construction of the state of the testator's domicile is desirable in the interest of applying a single rule not only to his movables but also to his land wherever situated (see §§ 263-264). The purpose of construction is to carry out the testator's intentions and it is probable that he intended the words used in the will to bear the same meaning throughout and not mean perhaps different things when applied to land and to movables.

In Zombro v. Moffett, 329 Mo. 137, 44 S.W.2d 149 (1931), the court stated that although the operative effect of a will as to the disposition of real estate is governed by the law of the state in which the real estate is situated (cit. om.), the general rule is that the construction of a will for the purpose of ascertaining the testator's meaning and intention therein, is governed by the law of the testator's domicile, whether the will disposes of personal property or real estate. 

Id. at 145, 44 S.W.2d at 152 (emphasis in original). The court held that a residuary gift to the brothers and sisters of the testator included the issue of a brother who was dead at the execution of the will by virtue of the Missouri antilapse statute. The residuary estate contained land in four states, but the testator was domiciled in Missouri. In Moffett v. Moffett, 131 Kan. 546, 292 P. 942 (1930), on the other hand, the Kansas real estate contained in the residuary estate was held to pass only to the class members living at the death of the testator. “The title to real property in Kansas is governed by the law of this state. . . . A devise to a dead person cannot take effect in Kansas.” Id. at 554, 292 P. at 947.

REPORTER'S NOTE TO SECTION 27.1

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. The corresponding sections in the first Restatement of Property (§§ 296-299) are consistent with the rules of this section, but the organization of this chapter is not the same as the organization of the corresponding Topic 4 in the first Restatement. The cases discussed in item 3 below correspond to the rule of § 281 in the first Restatement.

2. Justification for the rules of this section—The justification for the rules of this section is stated in Comment a.

3. Group-mindedness of the transferor—in order for the rules
of this section (and the rules of §§ 27.2 and 27.3) to have any application, it must first be determined that the donor intended a class, rather than specific individuals, as beneficiaries (see Comment b). In most cases the donor will have made it clear that he or she intends a gift to a class. Sometimes, however, a donor may describe the beneficiaries both by a class gift term and by their individual names. In the absence of facts or circumstances indicating a contrary intent, the courts have generally found that the naming of individual beneficiaries indicates an intention to make a gift to the named individuals and not a class. Recently, in Henderson v. Parker, 728 S.W.2d 768 (Tex.1987), the testators left specific acreage to each of their three sons. One of these sons predeceased the testators and was survived by two daughters. In addition to the specific disposition, the will contained language devising the property to the “surviving children of this marriage.” The court held that the devise of property to “surviving children of this marriage” meant children surviving at the time that the will was executed and therefore did not create a class gift, in that testators’ intent was to be determined as of the time the will was executed. The individual gift to the deceased son did not lapse (by virtue of antilapse statute) and thus his children each received an equal share in the specific property that was devised to their father, who died intestate. Additional cases where class gifts were not found include In re Estate of Porter, 714 S.W.2d 200 (Mo.App. 1986) (decedent devised entire estate to her two named sisters, who predeceased her; held, not a class gift and antilapse statute applied resulting in lineal descendants of the two named sisters taking entire estate to the exclusion of the lineal descendants of decedent’s other siblings, who had died prior to the execution of decedent’s will); In re Finlay Estate, 154 Mich.App. 350, 397 N.W.2d 307 (1986), appeal granted, 428 Mich. 909, 409 N.W.2d 484 (1987) (residuary estate to four named stepchildren; held, not a class gift since each stepchild was named individually and there was no evidence to suggest that the decedent intended a class gift). (See generally 5 American Law of Property §§ 22.4–22.11 (A.J. Casner ed. 1952).) This item focuses on the factors that tend to establish a contrary intent such that a gift to a class is found.

a. Class gift construction more fully accomplishes the manifested intent of the donor for an equal or proportional distribution. In Brewster v. Mack, 69 N.H. 52, 44 A. 811 (1890), the testator left a remainder interest “in five equal shares” to his three living children and the named children of each of two deceased daughters. One of the named grandchildren died before the testator. If the gift was to him as an individual, the gift would lapse. If, however, the gift to the grandchildren was to them as a class, then the survivors of the class would take. In determining the share of the surviving grandchild, the court held that “the testator intended the surviving children or child of his daughter Isabella should have one-fifth of the estate, that he considered her children together as a class.” Id. at 54, 44 A. at 813. This was so given the fact that “[t]he num-
ber of equal shares in the estate is determined by the number of the testator's children, without reference to the number of the grandchildren in each family." *Id.* at 53, 44 A. at 812.

The testator in Swallow v. Swallow, 166 Mass. 241, 44 N.E. 132 (1896), left half of the residue of her estate to her two named "heirs" and half to the three named "heirs" of her late husband. Two of the husband's "heirs" predeceased the testator. As in *Brewster*, supra, the issue raised was whether the gift was one to individuals, in which case the shares of the predeceased "heirs" would lapse, or to a class, in which case the surviving class member would take. The court held that "the dominant intention of the testatrix, as manifested in her will, is that one-half of the remainder should go to the heirs of her husband whom she has named [as] a class," and one-half should go to her two named heirs as a class. *Id.* at 243, 44 N.E. at 133.

More recently, the testator, in Lichter v. Bletcher, 266 Minn. 326, 123 N.W.2d 612 (1963), left half of her estate to her four named brothers and sisters and half to the nieces and nephews of her late husband. A brother and a sister predeceased the testator, and shortly thereafter the testator confirmed the will by codicil. In holding that a class gift to the brothers and sisters was created, and that the portions of the deceased class members passed to the two surviving members, the court noted that "Restatement, Property, § 281, seems apposite in specifying as factors which lead to establish a class gift the manifested intent of the testatrix for equal or proportional distribution as between two groups of persons." *Id.* at 333, 123 N.W.2d at 617.

In Berning v. National Bank of Commerce Trust and Savings, 176 Neb. 856, 127 N.W.2d 723 (1964), the testator established a trust which on the death of the last life beneficiary was to be divided into two equal parts. The named children of the testator's surviving son were to take one part, and those of a predeceased son were to take the other. One of the predeceased son's children died before the last life beneficiary. It was held that since the testator provided that the remainder interest "be divided into two equal parts to the children of his own children or their issue," the "testator divided his grandchildren into two classes, a natural classification for him to make, particularly if he wanted to treat the issue of his two sons equally." *Id.* at 864, 127 N.W.2d at 728.

b. Class gift construction more fully accomplishes the manifested intent of the donor to exclude designated persons from sharing in the subject matter of this limitation. In Jackson v. Roberts, 80 Mass. (14 Gray) 546 (1860), the testator left his son "Robert Roberts, the sum of twenty dollars; my said son being already possessed of sufficient property, no larger legacy or provision for him by me is thought needful or desirable." The testator went on to leave the residue of her estate to the five named children of an adopted daughter. Two of these named beneficiaries predeceased the testator, and the issue raised was whether the
gifts to them lapsed and passed to the son by intestacy, or whether they went to the surviving children of the testator's adopted daughter. The court held that a class gift to the adopted daughter's children was created, and thus the legacies did not lapse. Unless this construction was applied, a portion of the residue bequeathed to the five children would have gone to the son of the testator, from whom she had expressly withheld everything except a small legacy. A clause in the will in Fowler v. Whelan, 83 N.H. 453, 144 A. 63 (1928), provided as follows: "The Sum of Five Thousand Dollars, to be held in trust as hereinbefore stipulated, for the benefit of my brother John Daley, and the remainder of said rest and residue equally to my sister, Belle Whelan and Honoria Daley." Honoria predeceased the testator. It was held that Belle was entitled to the entire residue, since it was left to a class consisting of the two sisters. This construction was favored because reading it as a gift to individuals would have resulted in the brother taking a portion through intestacy. "The usual method of limiting a specific amount for the brother's benefit out of the residue has some tendency to show that the testatrix intended thereby to fix a bound to his share therein." Id. at 458, 144 A. at 66. Similarly, in McElroy v. Fluker, 265 S.W.2d 361 (Mo.1954), the testator, after making specific bequests to various people, including his daughter, left the residue of his estate "to my sisters, Jennie Fluker Madsen and Florence Fluker, share and share alike." Jennie predeceased the testator, and the daughter sought to take her share as the testator's heir. The court rejected her claim, however, holding that the gift did not lapse, but rather, a class gift was created. Thus, Florence was entitled to the entire residue as the sole surviving member of the class. This construction was favored in part because the inclusion of a specific bequest to the daughter indicated that $1,000 was all the testator wanted her to have. In In re Estate of Dumas, 117 N.H. 909, 379 A.2d 836 (1977), the testator gave his wife Rachel a life estate in certain real property, with remainder to his son, if living at her death, and if not, to "my grandchildren, David Dumas and Darrell Dumas, in equal shares, to them, their heirs and assigns forever." The testator's son and both grandchildren predeceased Rachel, although David was survived by a son. Rather than permitting Darrell's half of the gift to lapse and pass into Rachel's estate, the court held that a class gift was created in favor of David and Darrell. When Darrell died his share passed to David, and at David's death the entire remainder interest passed to David's son. "This brief will reveals but one discerning purpose: that the testator's widow was to receive a life estate in the real estate but nothing greater than a life estate." Id. at 912, 379 A.2d at 838. Furthermore, "[t]his purpose becomes more evident when it is considered that Rachel Dumas' closest heirs, and those who would take if the real estate passed to her estate, were children of Rachel's through a prior marriage and unrelated to the testator." Id.
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c. The limitation includes language which imposes a joint obligation upon the takers thereunder. In Bolles v. Smith, 39 Conn. 217 (1872), the testator's will provided as follows:

I give and devise unto Frederic M. Smith, Valentine W. Smith, and Timothy W. Smith, sons of my late brother, Roswel Smith, and to their heirs and assigns forever, equally, the residue of my estate, both real and personal, by their paying the legacy bequeathed to my wife, and also the legacies hereinafter named.

Timothy died during the testator's lifetime. In holding that a class gift was created, the court reasoned that "[t]he only condition . . . upon which the legacy could take effect, was a joint obligation to be assumed by the legatees. That clearly indicates that the testator intended that it should be a joint legacy." Id. at 220. And if the beneficiaries "are joint tenants, prima facie they take as a class." Id. at 221. Similarly, the testator in Cryder v. Garrison, 387 Pa. 571, 128 A.2d 761 (1957), left her house to three named nieces, but provided in a codicil (which was invalidated by a subsequent codicil) that "the Turnbach girls 'should' pay $2,000 for it to help with expenses." One niece predeceased the testator. The joint obligation to pay $2,000, although subsequently extinguished, was one of the factors which contributed to the finding that a class gift had been created.

d. The limitation includes language which, in terms, includes among the takers thereunder afterborn persons fitting into the descriptive term found in such limitation. In Stiles v. Cummings, 122 Ga. 635, 50 S.E. 484 (1905), Alexander Cummings, Jr. deeded certain real property to his four named children "and any future children I may have by my said wife." The court held that "the proper construction of the deed is that, while the grantor began the clause under consideration by dealing with certain named children as individuals, the use of the words thereafter added shows an intention to depart from this scheme and to deal with them as a class." Id. at 637, 50 S.E. at 485. As a result a child born after the execution of the deed was included in the class. A similar result was reached in Brown v. Fidelity Union Trust Co., 134 N.J.Eq. 217, 34 A.2d 805 (1943), affirmed mem. 135 N.J.Eq. 461, 39 A.2d 129 (1944). There, the testator placed his residuary estate in trust for his wife for life, with the principal payable upon her death to his two sons in equal shares. He further provided that "[i]f I shall leave any other child or children me surviving, I direct that such child shall share with my said sons under the provisions herein and under the same terms, conditions and trusts." The court noted that "[n] testamentary gift to several persons by name is presumably a gift to them as individuals and not as a class, even though they constitute a natural class." Id. at 218, 34 A.2d at 805. But the fact that the testator provided for afterborn children convinced the court that he intended to make a class gift. When one of the sons predeceased the testa-
tor the other son took his share as surviving class member.

4. Cases supporting the rule of this section—In the following cases the issue was whether an antilapse statute (which did not specifically state that it applied to class gifts or in the situation in which the devisee or legatee was dead at the execution of the will) applied, so that the substituted takers under the statute would take the share of a class member who died before the execution of the will. The cases hold that the antilapse statute does not apply in the situation described; persons who die before the execution of the will never come into the class. The result of such a finding is that the shares of the surviving class members are augmented by property that would have passed to the persons who would have been class members if they had survived. Clifford v. Cronin, 97 Conn. 434, 117 A. 489 (1922); Moffett v. Moffett, 131 Kan. 546, 292 P. 942 (1930); Almy v. Jones, 17 R.I. 265, 21 A. 616 (1891); In re Hutton’s Estate, 106 Wash. 578, 180 P. 882 (1919). See also Pimel v. Benjemann, 183 N.Y. 194, 76 N.E. 157 (1905) (superseded by statute; see item 4b of Statutory Note); Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1893) (superseded by statute; see Statutory Note, item 4a); In re Schuetto’s Estate, 138 Neb. 568, 293 N.W. 421 (1940) (superseded by statute; see Statutory Note, item 4a). The Pennsylvania antilapse statute provides that it does apply to class gifts, but was construed not to apply to the situation in which the class member dies before the execution of the will in In re Harrison’s Estate, 202 Pa. 331, 51 A. 976 (1902).

It should be noted that several States’ antilapse statutes specifically provide that they apply in the situation in which the class member dies before the execution of the will, or have been construed to apply in that situation. See the Statutory Note to this section, items 4a, c, and d.

In Jackson v. Roberts, 80 Mass. (14 Gray) 546 (1860), the testator bequeathed her residuary estate to the five children of two deceased individuals, naming them. One of the named children died, and the testator subsequently executed a codicil changing her executor, but noting that in all other respects the codicil confirmed the original will. The court held that the gift was a class gift, and that as such the surviving children took the entire estate. The court noted that the fact that the testator had not felt the necessity to change the will, given that she knew of the death of one of her devisees when she executed the codicil, supported its finding that the testator believed that the death of one of the children would result in his share passing to the surviving children. See also Shaffer v. Kettel, 96 Mass. (14 Allen) 528 (1867) (member of class died between execution of will and execution of codicil; held, his share passed to surviving class members) and Lichter v. Bleteher, 266 Minn. 326, 123 N.W.2d 612 (1963) (finding of class gift resulted in share of class members dying between execution of will and execution of codicil passing to surviving class members).

5. Intent of donor that estate of deceased class member be substituted—Comment c provides that a gift to the estate of a class member should be given effect, with the property passing as though the class member had died intestate on the effective date of the dispositive
instrument. Additional language or circumstances might indicate that the donor intended the gift to the class member's estate to pass to the persons named in the residuary clause of the deceased class member's will. No cases were found in which a court construed a gift to a class member's estate. Judicial decisions are divided as to whether a gift to an individual's estate is valid.

In In re Glass' Estate, 164 Cal. 765, 130 P. 868 (1913), the court held that a bequest to the estate of an individual who died between the execution of the will and the death of the testator failed because the estate "is not a person or entity which can take under the will." Id. at 767, 130 P. at 869. On the other hand, in In re Brunet's Estate, 34 Cal.2d 105, 207 P.2d 567 (1949), the same court held that a gift "To Otto Speckter or his Estate" was valid. The court distinguished Glass on the grounds that in Glass the gift was to the estate of a living person, in Brunet "the term was used with reference to a deceased person. . . . [I]f Otto Speckter survived the testator, the property was to go to Speckter, but if Speckter predeceased the testator the property was to go to Speckter's estate." Id. at 108, 207 P.2d at 569. The court held that Speckter's successors in interest, his heirs or devisees, should take the devise.

In Cumming v. Cumming, 219 Ga. 655, 135 S.E.2d 402 (1964), a gift "to the estate of my wife" (should the testator and his wife die under circumstances where the order of their deaths could not be determined) was held to mean the residuary beneficiaries under the wife's will. The same result was reached on similar facts in Braman Estate, 18 Fiduc. Rep. 460 (Pa.Orph.Ct.1968) (gift to testator's sister "or her estate"). Additional cases are collected in Annotation, Validity, Construction, and Effect of Bequest or Devise to a Person's Estate, or the Person or His Estate, 10 A.L.R.3d 483 (1966).

Commentators have warned that a limitation to the estate of a named person should be avoided given the uncertainty of validity under state property law. Huston, Transfers to the "Estate" of a Named Person, 15 Syracuse L.Rev. 463 (1964) and Fox, Estate: A Word To Be Used Cautiously, If At All, 81 Harv.L.Rev. 992 (1968). Professor Casner states

There is no sound property reason why an estate gift should not be allowed to reach the destination intended by the transferor if that intention is discoverable, in the absence of some showing that his manifested intention is against public policy. When the estate gift is used in a context that clearly shows it is designed to take advantage of a tax law that specifically refers to estate gifts, it should be determined that the transferor had in mind the result that would satisfy the Internal Revenue Code terminology. Thus any attack on an estate gift by the Service should fail in the absence of a showing that the result that would satisfy the Internal Revenue Code terminology, if intended by the transferor, would be invalid under the controlling state law. This approach eliminates the significance of most, if not all, prior state decisions in regard to estate gifts.

§ 27.2 Class Member Dies After the Date the Dispositive Instrument Is Executed but Before It Takes Effect

If a gift is made in favor of a class described as "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," or by similar class gift terms that describe a one-generation class,

(1) a person within the primary meaning of the class gift term who dies after the date the dispositive instrument is executed but before it takes effect is excluded from the described class;

(2) the share in the class gift that a deceased class member would have taken had he or she lived, when the share of each class member is not a specified amount, goes to enlarge the shares of the class members not excluded by the rule of this section, except to the extent that substitute takers are provided to take in place of the deceased class member by additional language or circumstances or by an applicable antilapse statute.

Comment:

a. Rationale. When a gift is made in favor of a one-generation class and a person who is within the primary meaning of the class gift term dies after the date the dispositive instrument is executed but before it takes effect, such deceased class member cannot be the recipient of any interest in the subject matter of the class gift. A gift cannot be made to a dead person. While it is true that the donor, at the time the dispositive instrument was executed, contemplated that the class members then alive would share in the gift, the donor knew that such class members would have to survive to the date the dispositive instrument took effect to be recipients of an interest in the subject matter of the gift. The rule of this section gives effect to this knowledge by excluding from the class a class member who dies after the dispositive instrument is executed but before it takes effect. The donor may provide, however, that someone else is to be substituted for the deceased class member to receive the gift the deceased class member would have received had he or she lived. Also an antilapse statute may provide a substitute taker.

b. Effect of exclusion of deceased class member. The effect of the exclusion of a class member who dies after the date the dispositive instrument is executed but before it takes effect is the
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same as when the exclusion is of a class member who dies before the dispositive instrument is executed (see § 27.1, Comment b).

\(c\). Date the dispositive instrument takes effect. A will is a dispositive instrument that always has some gap between the date on which it is executed and the date it becomes effective. If a class member dies during this gap, the rule of this section is applicable. Normally, a deed is effective on the date it is executed (assuming it is delivered on that date) and when this is true, the rule of this section has no area of operation.

If the dispositive instrument is a deed but it is revocable by the donor and the donor retains the current benefits from the transferred property, the situation is analogous to that of a will and the rule of this section is applicable to exclude a class member who dies after the deed is executed and while the power to revoke in the donor is outstanding. The revocable document is not regarded as taking effect for purposes of the rule of this section until the power to revoke ends. If the controlling local law applies the antilapse statute to revocable trusts, as is suggested in Comment f, additional support is given to the position taken above as to the date the revocable trust takes effect.

Illustrations:

1. O transfers property by deed to T in trust. The trust is revocable by O. T is directed “to pay the income to O for life, then to distribute the trust property to O’s nephews and nieces.” On the date the deed is executed, O has two nieces, \(N_1\) and \(N_2\). \(N_1\) dies. Then O dies. The rule of this section applies in the absence of an applicable antilapse statute and \(N_1\) is excluded from the class. The trust property is distributable to \(N_2\).

2. O transfers property by deed to T in trust. The trust is revocable by O. T is directed “to pay the income to O’s son S for life, then to distribute the trust property to S’s children.” On the date the deed is executed, S has two children, \(C_1\) and \(C_2\). \(C_1\) dies, then O dies, and finally S dies. \(C_1\) is not excluded from the class by the rule of this section because he died after the dispositive instrument took effect. Since O did not retain the current benefits from the transferred property, the situation is not analogous to a will, and the dispositive instrument is deemed to take effect on the date it is executed for purposes of the rule of this section. See § 27.3, which considers when a class member is excluded who dies after the dispositive instrument takes effect but before the date of distribution to the class.
3. O executes a deed transferring Blackacre "to my children in fee simple as tenants in common." The deed is delivered in escrow with instructions that the deed is to be delivered to the grantees on O's death. The escrow arrangement is irrevocable by O. O has two children, C1 and C2, on the date the deed is delivered in escrow. This arrangement involves a postponed gift, and consequently after-conceived and after-adopted children of O are not excluded from the class under the rule of § 26.2. The effective date of the deed, however, is the date it is delivered in escrow, and a child of O who dies before O is not excluded by the rule of Subsection (1) of this section.

d. Intent of donor that estate of deceased class member be substituted. The substitution of the estate of a class member who dies after the dispositive instrument is executed and before it becomes effective is like such substitution when a class member is deceased on the date the dispositive instrument is executed (see § 27.1, Comment c, Illustrations 1 and 2).

e. Intent of donor that issue of deceased class member be substituted. The substitution of the issue of a class member who dies after the dispositive instrument is executed and before it becomes effective is like such substitution when a class member is deceased on the date the dispositive instrument is executed (see § 27.1, Comment d, Illustration 3).

f. Substituted takers for deceased class member provided by antilapse statute. In regard to antilapse statutes generally, see § 27.1, Comment e, and the Statutory Note to Section 27.1.

When a class member dies after the dispositive instrument is executed and before it becomes effective, the controlling antilapse statute must be examined to determine whether it can apply in such situation. If it can and all other conditions for its applicability are met, including the availability of the statutorily described substitute takers, the substituted takers will take the share the deceased class member would have taken had he lived, unless the donor has manifested an intent that the antilapse statute not apply.

For many purposes the revocable trust operates as a substitute for a will. The reasons that justify the applicability of an antilapse statute to wills are equally present when a revocable trust is involved. Consequently, the applicable antilapse statute should be construed to apply to revocable trusts as well as to wills whenever that is possible.

Illustrations:

4. O transfers property by will "to my children in equal shares." O has four children, C1, C2, C3, and C4. C1 is deceased
on the date O executes his will. C2 dies after the execution of the will but before the will becomes effective on O's death. C1 and C2 leave issue who survive O. The controlling antilapse statute applies to class gifts to relatives of the testator but not to a class member who was deceased when the will was executed. The substituted takers under the antilapse statute are restricted to the issue of a deceased class member. The issue of C1 will not take the share C1 would have taken had C1 lived. The issue of C2 will take the share C2 would have taken had he or she lived. In this situation the result that is reached when the antilapse statute applies to a class member who was deceased when the will was executed is a more sound family result.

5. Same facts as Illustration 4, except that the transfer under O's will is "to my surviving children in equal shares." The problem is whether the word "surviving" in this context means surviving the execution of the will or surviving the effective date of the will. In the absence of additional facts or circumstances that indicate otherwise, the word "surviving" in this case should mean surviving on the date O's will is executed so as to leave as much room as possible for the operation of the antilapse statute. Consequently C2's issue will be substituted for C2.

6. Same facts as Illustration 4, except that the transfer is by deed to T in trust. The trust is revocable by O. T is directed "to pay the income to O for life, then to distribute the trust property to O's children in equal shares." If the antilapse statute is applicable to a transfer under a revocable trust, the result is the same as in Illustration 4. If the antilapse statute is not applicable to a transfer under a revocable trust, then there is no substituted taker for C2's share and both C1 and C2 are excluded.

7. O executes a will when O is young and his children are all very young. O's will provides that his property is to pass "to my surviving children." Many years later when O's children have grown up, O dies without having changed the will. One of O's children has predeceased O leaving issue. If the word "surviving" is ignored, the antilapse statute will substitute the issue of O's deceased child for the deceased child and O's property will pass equally to the various branches of O's family. Under these circumstances, the conclusion is justified that the word "surviving" was intended by O to be operative only while his children were young and did not have issue who could take their respective shares if one of them died before O.
Under such construction of the word "surviving" it would become inoperative in this case, and the antilapse statute would apply to the share of the deceased child of 0.

g. "Similar class gift terms that describe a one-generation class." For the meaning of "similar class gift terms that describe a one-generation class" in the rule of this section, see § 26.1, Comment a.

h. Cross reference. When a gift is made in favor of a class described as "issue" or "descendants," or by similar class gift terms that describe a multigenerational class, the effect of the death of a class member after the date the dispositive instrument is executed but before it takes effect depends on whether the distribution to the class is per stirpes or per capita and hence is considered in Chapter Twenty-Eight where the per stirpes and per capita distribution matter is developed.

STATUTORY NOTE TO SECTION 27.2

1. The antilapse statutes collected in items 1–3 of the Statutory Note to Section 27.1 are also applicable to this section. Item 5 of that same note addresses the issue of whether an antilapse statute will apply when the dispositive instrument is an inter vivos trust, and item 6 addresses conflict of laws issues that may arise in connection with a gift involving property in more than one jurisdiction.

REPORTER'S NOTE TO SECTION 27.2

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. The corresponding sections in the first Restatement of Property (§§ 296-299) are consistent with the rules of this section, but the organization of this Chapter is not the same as the corresponding Topic 4 in the first Restatement.

2. Justification for the rules of this section—The justification for the rules of this section is stated in Comment a.

3. Share of class member who dies between execution of will and death of testator goes to enlarge shares of surviving class members—The rule of this section is firmly established: no cases were found with a contrary result (finding a lapse when a class member died), and no cases were found in which the sole issue in the case was whether a gift to a class member who died before the testator would lapse or pass to the surviving class members.

In the cases in this item the issue was whether the gift was a class gift or a gift to individuals (see the Reporter's Note to Section 27.1, item 3). Having determined that the gift was a class gift, the courts went on to hold that when one of the class members died between the execution of the will and the testator's death (and no antilapse statute was applicable), the deceased class member's share did not lapse, but
went to augment the shares of the surviving class members.

In In re Devin's Estate, 108 N.H. 190, 230 A.2d 735 (1967), for example, the testator left her residuary estate to Sarah and Elizabeth Frost, her best friends. Sarah died between the execution of the will and the death of the testator. The court held that it would "apply the class gift concept to effectuate her real purpose, even though the language of the residuary clause is not ordinarily calculated to create a class gift." Id. at 192, 230 A.2d at 736. Elizabeth was held to be entitled to the entire residuary estate as the sole surviving class member. In so holding the court noted that it was "improbable" that the testator would have chosen to let Sarah's share lapse and pass by intestacy to the testator's closest relative and heir (who was given only a relatively small pecuniary legacy), and that an intention was manifested to confine the residue to the residuary legatees.

Additional cases include Warner's Appeal, 39 Conn. 253 (1872) (gift to two nephews; one of whom died before the testator; held, class gift and surviving nephew took entire gift); Swallow v. Swallow, 166 Mass. 441, 44 N.E. 132 (1896) (one-half of estate was to go to three named "heirs" of testator; two of three died between execution of will and death of testator; held, class gift and surviving class member took entire one-half); Jackson v. Roberts, 80 Mass. (14 Gray) 546 (1860) (residuary estate to five named children of two deceased individuals; held, class gift such that death of two children before testator resulted in their shares passing to surviving children); In re Ives' Estate, 182 Mich. 699, 148 N.W. 727 (1914) (residuary gift to named siblings of testator; held, class gift such that death of sister before testator resulted in surviving brothers taking her share); In re Hunter's Estate, 212 Mich. 380, 180 N.W. 364 (1920) (residuary gift to named sisters of testator; held, class gift, such that death of one sister resulted in surviving sister taking entire residuary estate); Crecelius v. Horst, 78 Mo. 566 (1883) (residuary gift to two named children; held, class gift such that death of one resulted in survivor taking entire residue); Halloway v. Burke, 336 Mo. 380, 79 S.W.2d 104 (1935) (residuary gift to brothers and sisters; one sister died between execution of will and death of testator and surviving brothers and sisters took her share); McElroy v. Fluker, 265 S.W.2d 361 (Mo.1954) (residuary estate to two named sisters of testator; held, class gift, such that death of one sister before testator resulted in surviving sister taking deceased sister's share); Fowler v. Whelan, 83 N.H. 453, 144 A. 63, 75 A.L.R. 752 (1928) (residuary estate to two named sisters; held, class gift and death of one sister before testator resulted in surviving sister taking entire residuary estate); United States Trust Co. v. Jamison, 105 N.J.Eq. 418, 148 A. 398 (1929) (life estate to grandniece, remainder to children of grandniece; held, class gift such that death of one of grandniece's children before the testator resulted in remainder being shared by surviving children); Brown v. Fidelity Union Trust Co., 134 N.J.Eq. 217, 34 A.2d 865 (1943), affirmed memorandum, 135 N.J. Eq. 461, 39 A.2d 129 (1944) ("child" of testator died (without issue) after execution of will and less than a year before testator; held, class
gift such that surviving children took his share; Hoppock v. Tucker, 59 N.Y. 202 (1874) (gift to three children construed to be class gift with result that when one child died between execution of the will and testator's death, surviving children took his share); Page v. Gilbert, 32 Hun 301 (N.Y.1884) (gift to two children construed to be class gift with result that death of one between execution of will and death of testator resulted in survivor taking entire gift); In re Young's Estate, 133 Misc. 454, 232 N.Y.S. 427 (Sur.Ct. 1928) (residuary estate to named nephews and nieces; held, class gift such that death of two nephews prior to testator's death resulted in survivors taking their share); In re Knickenberg's Will, 180 Misc. 217, 40 N.Y.S.2d 437 (Sur.Ct.1943) (class gift to testator's sisters: death of sister between execution of will and death of testator resulted in surviving sister taking all); Jensen v. Cunningham, 596 S.W.2d 266, 13 A.L.R. 4th 970 (Tex.Civ.App.1980) (gift to six named grandchildren construed to be gift to them as a class, with result that when one grandson died between execution of will and death of testator surviving grandchildren took his share); Matter of Estate of Burruss, 152 Mich. App. 660, 394 N.W.2d 466 (1986) (gift to three named children, or to the "survivor or survivors of them", resulted in surviving two children taking the share of a daughter who died between execution of will and death of testatrix to the exclusion of the children of the predeceased daughter); Baker v. Martin, 709 S.W.2d 533 (Mo.App. 1986) (residuary estate to three named persons; held, class gift, such that when one of those three named persons was convicted of the capital murder of the testatrix, the residue passed to the other two named persons even though they were the sons of the killer); Slattery v. Kelsch, 734 S.W.2d 813 (Ky. App.1987) (Westlaw, Kentucky Cases Database) (residuary gift to first cousins; one first cousin died between execution of will and death of testator and surviving first cousins took his share).

If the gift is of the testator's residuary estate, a result similar to the result in the above cases can be achieved even if the gift is construed to be a gift to individuals; the death of one individual does not result in a lapse and an intestacy, but instead the lapsed gift falls back into the residuary estate to be distributed to the remaining residuary beneficiaries. See, e.g., Corbett v. Skaggs, 111 Kan. 380, 207 P. 819, 28 A.L.R. 1230 (1922) and Uniform Probate Code Section 2-606.

4. Intent of donor that estate of deceased class member can be substituted—The donor could provide that the share of a deceased class member will pass to the deceased class member's estate. See Reporter's Note to Section 27.1, item 5.

§ 27.3 Class Member Dies After the Effective Date of the Dispositive Instrument but Before the Date of Distribution

If a gift is made in favor of a class described as "children," "grandchildren," "brothers," "sisters,"
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“nephews,” “nieces,” “cousins,” or by similar class gift terms that describe a one-generation class,

(1) a person within the primary meaning of the class gift term who dies after the dispositive instrument takes effect but before such class member is entitled to distribution of his or her share is not excluded from the class by reason of such death, if such death does not make impossible the fulfillment of a condition, unless additional language or circumstances indicate otherwise, or an applicable statute provides otherwise.

(2) If additional language or circumstances indicate otherwise or an applicable statute provides otherwise, the share in the class gift that such deceased class member would have taken had he or she lived, when the share of each class member is not a specified amount, goes to enlarge the shares of the class members not excluded, except to the extent that substitute takers are provided to take in place of the deceased class member by additional language or circumstances or by a statute.

Comment:

a. Rationale. When a gift is made in favor of a one-generation class and a person who is within the primary meaning of the class gift term dies after the date the dispositive instrument takes effect but before the deceased class member is entitled to distribution of his or her share, such deceased class member has received a property interest on the effective date of the dispositive instrument. Under the rule of this section, such property interest is not automatically eliminated by the failure of the class member to survive to the date of distribution. This rule tends to promote the long-established preference in favor of the early vesting of property interests. The historical reasons for favoring vested interests over contingent property interests are no longer relevant, but a modern justification for favoring vested interests in the class gift context is that it enables the deceased class member to pass his share to his issue, thereby keeping the benefits of the gift equal among the descendant lines (see Comment b).

The rule of this section is only a rule of construction that may be overcome by additional language or circumstances that indicate the property interest in the deceased class member is subject to a
requirement that the deceased class member survive to the date of distribution.

b. Effect of not excluding deceased class member. The effect of not excluding the deceased class member under the rule of Subsection (1) of this section, assuming his or her property interest is not subject to some condition that becomes impossible of fulfillment as a result of the class member's death before the date of distribution, is to cause such property interest to pass as any other owned asset of the deceased class member. The property interest passes from the deceased class member, not from the donor. This means that the deceased class member's share passes through his estate while it is still a future interest and may be subject to the payment of death taxes (see Reporter's Tax Note to Section 27.3). Normally it would be a better overall result to provide a substitute taker for the deceased class member and avoid involvement of the class member's share in his or her estate.

Illustrations:

1. O transfers property by will to T in trust. T is directed "to pay the income to O's daughter D for life, then to distribute the trust property to D's children in equal shares." D has four children, C₁, C₂, C₃, and C₄. C₁ and C₂ die after O dies but before D dies. C₁ and C₂ are not excluded from the class under the rule of Subsection (1) of this section. Their respective interests are vested during D's lifetime, subject only to partial divestiture by D having additional children. The shares of C₁ and C₂ pass from them as a result of their respective deaths in the same manner as any other assets they owned at their deaths.

2. Same facts as Illustration 1, except that on D's death T is directed "to distribute the trust property to D's children who attain 21." C₁ dies at the age of 22 and C₂ dies at the age of 18. In this situation C₁ is not excluded from the class as a result of his or her death before the date of distribution, but C₂ is excluded because C₂'s death makes it impossible for the condition of attaining 21 to be fulfilled. The shares of the other class members who attain 21 are increased as a result of the exclusion of C₂.

c. Date the dispositive interest takes effect and date of distribution. The date the dispositive instrument takes effect must be ascertained in determining whether the rules of this section are applicable (see § 27.2, Comment c, in regard to the date a dispositive instrument takes effect). That date may be the same as the date each class member is entitled to distribution of his or her
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share. If so, there is no room for the operation of the rules of this section. For the rules of this section to apply there must be some gap between the date the dispositive instrument takes effect and the date a class member is entitled to distribution of his or her share.

d. Intent of donor that estate of deceased class member be substituted. When a class member is not excluded from the class as a result of the class member's death after the date the dispositive instrument takes effect and before the date of distribution, the donor is not likely to provide for the substitution of the deceased class member's estate in the event of such death because the deceased class member's estate will succeed to the deceased class member's share. If provision is made, however, for such substitution, the takers under the substitution will take from the donor. The takers under the substitution may not be the same as the ultimate takers when the deceased class member's share passes from the deceased class member (see § 27.1, Comment c, Illustrations 1 and 2).

e. Intent of donor that issue of deceased class member be substituted. The substitution of the issue of a class member who dies after the dispositive instrument takes effect and before such class member's share is distributable will cause the various lineal lines to be treated equally. This equal treatment of lineal lines can be accomplished by the deceased class member's will if there is no substitute gift to issue. The substitute gift to issue route, however, avoids passing the gift to the deceased class member's issue through the deceased class member's estate (see Reporter's Tax Note to Section 27.3). Because of the undesirability of having the gift pass through the deceased member's estate and because the provision for substitution of issue is a sufficient indication of the donor's intent that he did not wish such a result, it should be presumed, in the absence of contrary indication, that the donor who provides for substitution of issue intends that the share of the other class members be enlarged if a class member fails to survive to the date of distribution and leaves no issue who so survive.

Illustration:

3. O transfers property by will to T in trust. T is directed "to pay the income to O's son S for life, then to distribute the trust property to S's children in equal shares, but if any child of S dies before S leaving issue who survive S, such deceased child's share shall be paid to such deceased child's issue on a per stirpes basis." S has four children, C1, C2, C3, and C4. C1 and C2 die after O dies but before S dies. C1 leaves issue who
survive S. C₂ dies without leaving any issue who survive S. C₁'s issue are substituted for C₁ and take the share that would have gone to C₁ had he or she survived S. C₁'s share goes to enlarge the shares of C₃, C₄, and C₅ since no issue of C₁ have survived to take C₂'s share, and the provision for substitution of issue is a sufficient indication that the donor did not intend that the gift pass as owned property of C₂.

§ 27.3. Age requirement specified. When the gift to a class is subject to the attainment of some specified age with respect to each class member, the age requirement may be a condition which must be satisfied by a class member in order for the class member to share in the gift. The failure of the class member to attain the specified age, when the attainment of the specified age is a condition precedent, results in the exclusion of the class member. The shares of the class members who satisfy the condition are increased accordingly, if the share of each class member is not a specified amount (see Illustration 2). The age contingency may operate to deprive a class member of a share after the share has been distributed. This would be the case when the gift is "to the children of A but if a child of A dies under the age of 21, such child's share is to go to X." The age contingency in this situation does not operate to enlarge the shares of the other class members when it is not satisfied.

The age requirement may not be a condition but only the description of the time to which distribution to each class member is to be postponed. In such case, the death of the class member before the attainment of the specified age does not result in the exclusion of the class member from the gift. The issue presented is whether the distribution of the class member's share should be accelerated to the date of his or her death or must be delayed to the date the class member would have attained the specified age had he or she lived. Distribution of the deceased class member's share should not be delayed until the class member would have attained the specified age, except when it is still possible for persons within the primary meaning of the class gift term to be added to the described class (see § 26.2, Comment n).

The language of the disposition that indicates the age requirement is not a condition but is only a description of the time to which distribution is delayed is when the gift is to the class members "to be paid to each class member at 21" or "when they attain 21 with income in the meantime." If the gift is to the class members "who attain 21," the age requirement is clearly a condition.

When the gift to the described class is when the "youngest" class member attains a specified age, the age requirement is
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descriptive of the time the distribution to the class is to be made. The age requirement is not a condition that relates to the share of any class member in the absence of additional language or circumstances that indicate otherwise. The problem that is presented is which class member is the “youngest.” Conceivably, the “youngest” might refer to any one of the following class members: (1) that class member who is the youngest of all the class members who come within the primary meaning of the class gift term (under this interpretation the date of distribution would have to be after it was no longer possible for a person to become a class member); (2) that class member who is the youngest when no class member is living who is under the specified age (under this interpretation the person who is the “youngest” could change from time to time); (3) that class member who is youngest on the date the dispositive instrument takes effect, and distribution is to be made when he or she attains the specified age or would have attained it had he or she lived (under this interpretation the date of distribution can be definitely determined when the dispositive instrument takes effect so far as the age requirement is concerned); or (4) that class member who is the youngest on the date the dispositive instrument is executed, and distribution is to be made when he or she attains the specified age or would have attained it had he or she lived (see § 26.2, Comment o). In the absence of additional language or circumstances that indicate otherwise, the second of the suggested meanings mentioned above should be adopted.

g. **Condition that does not relate to the attainment of any age.** An age requirement always involves the possibility of death of the class member before the specified age is attained. The gift to each class member may be subject to a condition other than age. The gift may be “to the children of A who are married on the date of distribution.” The effect of the failure of a class member to fulfill the condition precedent to the gift when the date of distribution arrives is that such class member is excluded and the shares of the class members who fulfill the condition are correspondingly enlarged, if the gift to each class member is not a specified amount.

h. **Statute provides requirement that class member must survive to the date of distribution.** An applicable statute may provide that a class member who dies before the date of distribution to the class shall be excluded from the class, in the absence of a contrary manifestation of intent (see the Statutory Note to Section 27.3).

i. **Statute provides a substituted taker if class member dies before the date of distribution.** An applicable statute may provide that the share of a class member who dies after the date a
dispositive instrument takes effect and before the date of distribution to the class shall go to some specified substitute taker, in the absence of a contrary manifestation of intent (see Statutory Note to Section 27.3). This type of statute is an extension of the so-called antilapse statutes (see Statutory Note to Section 27.1). The policy of these statutes commends itself to decisional law.

j. Cross reference. When a gift is made in favor of a class described as “issue” or “descendants,” or by similar class gift terms that describe a multigenerational class, the effect of the death of a class member after the dispositive instrument takes effect and before such class member is entitled to distribution of his or her share depends on whether the distribution to the class is per stirpes or per capita. Hence these class gift cases are considered in Chapter Twenty-Eight, where the per stirpes and per capita distribution matter is developed.

STATUTORY NOTE TO SECTION 27.3

1. The following statutes are similar to antilapse statutes but apply in the situation in which the gift is postponed to a time subsequent to the death of the testator:

California Prob.Code § 6147 (West Supp.1987) (if a devisee under a class gift who is related to the testator or the testator's spouse dies after the execution of the will but fails to survive "until a future time required by the will," the issue of the deceased devisee take in his or her place by representation) (see also statute in item 2)

Illinois Rev.Stat. ch. 1101/2, 11 4-11 (1985) ("if a legacy of a . . . future interest is to a class and any member of the class dies before or after the testator, the members of the class living when the legacy is to take effect in possession or enjoyment take the share or shares which the deceased members would have taken if he were then living, except that if the deceased member of the class is a descendant of the testator, the descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he were then living")

20 Pennsylvania Cons.Stat.Ann. § 2514(5) (Purdon 1975) ("In construing a devise or bequest to a class . . . the class shall be ascertained at the time the devise or bequest is to take effect in enjoyment, except that the issue then living of any member of the class who is then dead shall take per stirpes the share which their deceased ancestor would have taken if he had then been living.")

Tennessee Code Ann. § 32-3-104 (1984) ("Where a . . . gift is made to a class of persons . . . and the time of . . . distribution . . . 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 have issue
surviving . . . such issue shall take the share of the property which the member so dying would take if living . . . .”

2. A California statute provides that “[a] testamentary disposition, including a devise to a person on attaining majority, is presumed to vest at the testator’s death”:


3. The Louisiana statute in item 5a of the Statutory Note to Section 27.1 may also be applicable here, and the discussion of conflict of laws in item 6 of the Statutory Note to Section 27.1 is applicable here.

REPORTER’S NOTE TO SECTION 27.3

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. The rules of this section are consistent with the corresponding rule in the first Restatement of Property, § 296(2), where it was stated that “[f]rom the fact that a class can increase in membership until a future date, no inference should be made that only such members of the class as survive to such future date become distributees.”

2. Justification for the rules of this section—The justification for the rules of this section is stated in Comment a.

3. Cases supporting the rules of this section—In In re Moyer’s Estate, 389 Pa. 228, 132 A.2d 667 (1957), a testamentary trust provided for a life estate in the testator’s widow, followed by a life estate to the testator’s children, with the remainder to the “children” of the children. Some of the grandchildren died before the deaths of the life tenants. The court held that

The gift in remainder vested at the death of the testator, and notwithstanding that some of the beneficiaries or donees of those gifts, died before the termination of the preceding life estates, the title in remainder, having vested, was not divested by the death of the donee prior to the termination of the life estate.

Id. at 239, 132 A.2d at 672.

The following cases are substantially similar to Moyer’s Estate in their facts and also hold that where the holders of a future interest under a will are members of a class, the death of one or more of the class members prior to the distribution date does not result in the class member’s share being defeated. Hargett v. Hargett, 226 Ark. 910, 295 S.W.2d 307 (1956) (devise to testator’s widow for life, remainder to testator’s children; held, son of testator had vested remainder that passed under son’s will when he died prior to his mother, the life tenant); Baldwin v. Hambleton, 196 Kan. 353, 411 P.2d 626 (1966) (residuary gift to widow of testator for life, and at her death to testator’s children created vested interests in testator’s children living at his death; interest of child who died before widow passed to his heir when he died intestate); Rudy v. Wagner, 188 Neb. 508, 198 N.W.2d 75 (1972) (devise of life estate to son of testator, and at his death to son’s children; held, share of child who predeceased son was vested remainder and passed to her intestate dis-
tributees when she predeceased her father, the life tenant); Privett v. Jones, 251 N.C. 386, 111 S.E.2d 533 (1959) (devise to testator's daughter for life, remainder to daughter's children; daughter's child who predeceased her had vested remainder that passed to child's successors in interest); Industrial National Bank of Rhode Island v. Clark, 98 R.I. 434, 204 A.2d 310 (1964) (gift to testator's son for life, then to son's widow for life, remainder to children of son if he was survived by children; held, daughter of son who died between deaths of son and widow was held to have interest that vested at death of son); In re Stanford's Estate, 49 Cal.2d 120, 315 P.2d 681 (1957) (testamentary trust provided for life interest in niece, remainder to the children of niece; held, remainder vested in child of niece at death of testator, and his death before life tenant did not extinguish his interest).


The rules of this section apply when the remainder is vested subject to divestment. In Matter of Brombach's Will, 203 Misc. 1088, 119 N.Y.S.2d 421 (Sur.Ct.1953), the will provided that the income from the trust established by the will be paid to the son of the testator for his life, remainder to the son's issue, or, if he died without issue, to the sons' brothers and sisters. When the son died without issue the court held that the remainder should pass one-third each to the brother and sister who survived him, and one-third to the successors in interest of the sister who died between the deaths of the testator and the son since her interest was vested subject to divestment (by the birth of issue of the son) when the testator died. See also In re First National Bank of Ithaca, 2 A.D.2d 292, 153 N.Y.S.2d 857 (1966) (trust for benefit of testator's daughter for life, remainder to her issue, or if no issue of daughter to children of another daughter; when life beneficiary died without issue court held that children of other daughter living at death of testator took property even though some had died be-
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between death of testator and life beneficiary).

In Miller v. Brown, 215 Ga. 149, 109 S.E.2d 741 (1959), the will created successive life interests in the widow and son of the testator. On the death of the survivor the remainder interest was to pass to the son's children. The son had no children at the testator's death, but subsequently had three children. The court held that the remainder vested in each of the three children at their births, subject to partial divestment to let in more children of the son.

The rules of this section apply to deeds as well as wills. Semrad v. Semrad, 155 Neb. 269, 51 N.W.2d 264 (1952) (deed conveyed land to transferor's daughter for her life, remainder to daughter's children; held, remainder vested in all of daughter's children and those who died during lifetime of daughter were not excluded). In Old Colony Trust Co. v. Clemons, 332 Mass. 535, 126 N.E.2d 193 (1955), the settlor established an inter vivos trust, reserving the income for himself for his life, and at his death providing that the income should be paid to his widow if she survived him, with the principal to be paid to the testator's nieces and nephews at the termination of the life interests. The issue in the case was whether nieces and nephews who died between the death of the testator and the death of the widow were included in the gift. The court held that they were; the remainder interest vested at the death of the settlor.


4. Cases contrary to the rules of this section—Tennessee courts have held that in a gift of a future interest to a class only the class members living at the time of distribution are entitled to share. See, for example, Jordan v. Jordan, 145 Tenn. 378, 239 S.W. 423 (1922). However, a statute enacted in 1922 provides that if a class member dies before the time of distribution, leaving surviving issue, the issue take the share the class member would have taken if he or she had survived. See the Statutory Note to this section, item 1. Presumably, if a class member dies without issue surviving, the case law would still apply and the deceased class member's share would go to augment the other shares.

In Farmer v. Reed, 335 Ill. 156, 166 N.E. 498 (1929), where a grant of an estate was postponed pending the termination of a prior estate, only those members of the class who were in existence at the time such prior estate terminated were entitled to take. However, a statute now in force in Illinois provides that if a class member is a descendant of the testator who dies before the date of distribution, the descendants of the deceased member then living shall take per stirpes the share of the deceased member. See the Statutory Note to this section, item 1. Recently, in Harris Trust and Sav. Bank v. Beach, 145 Ill.App. 3d 682, 99 Ill.Dec. 438, 495 N.E.2d 1173 (1986), an Illinois court held that the Illinois antilapse statute was inapplicable where the testator expressly provided that each member of the beneficiary class of grandchildren must be "surviving" in order to take a share.

In Ford v. Jones, 223 Ky. 327, 3 S.W.2d 781 (1927), the will gave the
residue of the estate to the testator's two sons for their lives. At the death of the survivor the property was to be divided between all the testator's surviving children "or their natural heirs." The court held that only the children or their heirs "surviving" at the death of the life tenant took the property. In Matter of Gaunt's Estate, 204 Misc. 622, 119 N.Y.S.2d 866 (Sur.Ct. 1957) the court stated

Had the testator intended to bequeath the trust principal to the three children of his sister who were living at the time of the will's execution, and who were known to him, it is to be assumed that he would have provided gifts nominatum to such persons with substitutionary gifts to be effective in the event one or more of such persons should predecease him. It must be concluded that the testator's failure to identify the legatees by name was expressive of an intent that the takers were to be ascertained at a time subsequent to the date of the will.

The court held that the date of ascertainment was the date of distribution of the principal. See also In re De Fay's Will, 64 Misc. 2d 675, 164 N.Y.S.2d 565 (Sur.Ct. 1957) (gift to husband of testator for his life, remainder to children of two named persons; held, members of class determined as of death of life tenant so that child who died between death of testator and life tenant was excluded). In Tootle v. Tootle, 22 Ohio St.3d 244, 490 N.E.2d 878 (1986), the will gave gifts to the testator's daughter and her husband for their lives, and then to "the heirs of their bodies." The court held that the class of contingent remaindermen closed with the death of the final life tenant. Only the class members living at the time of the death of the final life tenant were entitled to share.

5. Age requirement specified—Comment f states that a gift to, class members "to be paid to each class member at 21" or "when they attain 21 with income in the meantime" is not a condition "but is only a description of the time to which distribution is delayed . . . ." The statement is supported by the case of In re Sessions' Estate, 217 Or. 340, 341 P.2d 512 (1959). In that case the will provided that "when" the beneficiary "shall have attained the age of twenty-five (25) years, my Trustee shall pay over . . . all the estate." "The words of futurity are not attached to the substance of the gift, but, on the other hand, they are referable to paying over, or the time of distribution, payment and ultimate possession by the beneficiary." Id. at 367, 341 P.2d at 512.

In Brizendine v. American Trust & Savings Bank, 211 Ala. 694, 101 So. 618 (1924), the will devised one-half of the testator's real estate to her grandson "when he becomes twenty-one years of age. . . ." The court held that the grandson's attaining the age of 21 was not by the will made a condition precedent to the vesting in him of an undivided one-half interest in this real estate; it was the time fixed when he should take possession of it.

Id. at 697, 101 So. at 621. In Shannon v. Pentz, 1 App.Div. 331, 37 N.Y.S. 304 (1896), the will provided that following certain life interests, the residue of the estate was "to be divided equally between my daughter's issue at the age of twenty-
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one." Pointing to Radley v. Kuhn, 97 N.Y. 26 (1884), the court held that the issue had a vested remainder. In Radley the court applied the rule that

where nothing is interposed between the infant and his enjoyment of the possession of the estate, except his own minority, he has a vested estate.

Id. at 308. Consequently, a gift to the grandchildren of the testator "when they arrive at the age of twenty-one" resulted in a vested estate in the grandchildren, and if they died underage the property would pass to their heirs. See also Pickering v. Miles, discussed below.

If the gift is to the class members when they attain a stated age, with the income in the meantime going to the same class members, the courts have generally held that there is no requirement that the class member survive to the stated age in order to have a vested interest in the remainder. See 5 American Law of Property § 21.20(A.J. Casner ed. 1952). On the other hand, if a gift is to be paid "provided" a stated age is reached, the class member will not receive anything unless he or she survives. See Annotation, Gift "Provided" Certain Age Be Attained, 71 A.L.R. 1051 (1931).

Other cases relating to the position taken in Comment f include Allen v. Burkhiser, 125 N.J.Eq. 524, 6 A.2d 656 (1939), in which the residue of the estate was to go to the testator's grandnephews and grandnieces "when they reach the age of twenty one years." The court held that the devises would only become effective if the grandnieces and grandnephews reached the age of twenty-one. In so holding, the court pointed to language in Gifford v. Thorn, 9 N.J.Eq. 702, 705 (1855), to the effect that

Where the time specified in the bequest is annexed to the payment only, as where the legacy is given, payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift. The time of payment only is postponed. But where the time is annexed not to the payment only, but to the gift itself, as when the legacy is given to the legatee at twenty-one, or 'if' or 'when' he attains the age of twenty-one, the legacy does not vest until the legatee attains that age. The gift is upon the condition that the legatee shall attain the age specified. His attaining that age is a condition precedent; and if the condition be not fulfilled, the legacy never vests. The cases upon this subject are very numerous, and with few exceptions the rule will be found to have been for more than a century inflexibly maintained.

Use of the word "when" also resulted in the finding of a contingent rather than a vested remainder in Heberton v. McLain, 135 Fed. 226 (E.D.Pa.1905), and Giles v. Franks, 17 N.C. (2 Dev.Eq.) 521 (1834). In Grothe's Estate, 237 Pa. 262, 85 A. 141 (1912), a gift to each of the male children of the testator's son living at the son's death "as" they became 25 years of age was held to be a condition such that the death of one of the children after his father but before he reached the age of 25 resulted in the failure of the gift to him. The court felt that the "plain meaning of testator's language" indicated that the gift was contingent on the child's reaching age 25. See
also Colt v. Hubbard, 33 Conn. 281 (1866) (use of word "as" resulted in finding of contingent gift).

In Miles v. San Angelo National Bank, 465 S.W.2d 452 (Tex.Civ.App. 1971), the will established a testamentary trust for the benefit of the testator's son for his life, then for the benefit of the son's children living at his death "until his youngest child reaches the age of twenty-one . . . then it is to be delivered to them in fee . . . ." The son died, and at that time his youngest child was 12 years old. That child died three years later. The court of appeals noted that

To say that the testator intended that the remainder or residue of his estate should vest in the grandchild or grandchildren at their father's death would be to say that the testator was willing that part of the property would pass by intestacy in event one of the children should die before the youngest attained the age twenty-one.

Id. at 457. The court held that the estate should be delivered to the two surviving children when the youngest of them attained age 21. The Texas Supreme Court reversed, holding that an undivided one-third interest vested in each of the son's three children living at his death, subject to the legal title in the trustee until the termination of the trust. Pickering v. Miles, 477 S.W.2d 267 (Tex.1972).

REPORTER'S TAX NOTE TO SECTION 27.3

When the share of a class member who dies after the effective date of the dispositive instrument and before the date of distribution passes as part of the owned assets of the deceased class member, an estate tax may be imposed on the value of such interest before it is enjoyed in possession. The valuation for estate tax purposes of the deceased class member's interest when it is still subject to partial divestiture by additional class members coming into existence may be made on the assumption that there will be no additional class members. It is undesirable from an estate tax standpoint to allow the rule of § 27.3 to apply.
Chapter Twenty-Eight

SHARE OF EACH CLASS MEMBER

Introductory Note

Section
28.1 Beneficiaries of Gift in Same Generation in Relation to Donor
28.2 Class Gift to “Issue” or “Descendants”
28.3 Beneficiaries of Gift Described as Named Individual and Named Individual’s “Children” or “Issue”
28.4 Beneficiaries of Multigenerational Gift Described as Named Individual (Not a Parent of the Class) and a Class
28.5 Beneficiaries of Multigenerational Gift Described as Several Classes

Introductory Note: This Chapter considers the fourth and final problem in relation to a gift to a class when the class description is other than “heirs” or the like. This fourth problem is presented when the class members are fully ascertained in that it is known who comes within the primary meaning of the class gift term (Chapter Twenty-Five), it is known what class members have come into being in time (Chapter Twenty-Six), and it is known what class members in gifts to others than “issue” and the like have dropped out of the class because of a failure to meet a requirement of survival to some specified date (Chapter Twenty-Seven). The fourth problem that then arises is what is the share in the property disposed of by the gift that each class member is entitled to receive, and whether there is a requirement of survival to the date of distribution with respect to gifts to “issue” and the like.

This fourth problem insofar as it relates to the share of each class member has several aspects to it. First, the total amount that is to be divided among the class must be ascertained. If the only beneficiaries of the gift in which the class shares are the members of a single class, as when the gift is “to the children of A,” obviously the total amount to be divided among the class is the entire subject matter of the gift to the class. If, however, the gift is to several classes, as when the gift is “to the children of A and the children of B,” or is to a named individual and a class, as when the gift is “to A and the children of B,” it must be determined first whether the gift is to be divided into two parts, or treated as one whole gift, for division among the beneficiaries.

The second aspect is the determination of whether the class members who are entitled to take the total amount that is to be divided among the class take equally on a per capita basis or take on some other basis. For example, if the class gift is to the grandchildren of the donor and the donor has two children, will the
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children of one child of the donor receive one-half of the gift for division among them and the children of the other child of the donor receive the other one-half of the gift for division among them, or will the gift be divided per capita among all the grandchildren, each one taking an equal share?

Section 28.1 considers the matter of the division among the class when all beneficiaries of the gift are in the same generation in relation to the donor. Section 28.2 examines both the division problem and the survival problem when the class is described as the “issue” or “descendants” of some person, a class gift term that carries a primary meaning that includes persons in more than one generation. Section 28.3 takes up the case of gifts to a parent and his or her “children,” or a parent and his or her “issue,” a disposition that inherently describes beneficiaries in more than one generation. Section 28.4 moves to a gift to an individual (not a parent of the class) and a class where the individual is in a different generation in relation to the donor than any class member. Finally, Section 28.5 deals with the situation where two or more classes are described as the beneficiaries and class members of each class are not all in the same generation in relation to the donor.

§ 28.1 Beneficiaries of Gift in Same Generation in Relation to Donor

If a gift is made to a class or classes described as “children,” “grandchildren,” “brothers,” “sisters,” “nephews,” “nieces,” “cousins,” or by a similar one-generation class gift term, and

(1) the class members are in the same generation in relation to the donor, and

(2) any individuals named to take with the class are in the same generation in relation to the donor as the class members,

each beneficiary is entitled to an equal share per capita in the subject matter of the gift, in the absence of additional language or circumstances that indicate otherwise.

Comment:

a. Rationale. If the class gift terms used to describe the beneficiaries of a gift have a primary meaning that limits the classes to persons in the same generation in relation to the donor, it is reasonable to conclude that the donor intends each member of the classes to share equally in the subject matter of the gift, in the absence of additional language or circumstances that indicate some
other division among the classes is intended. The fact that a named
individual in the same generation in the relation to the donor as the
class members is to share the gift with the class members in effect
makes such person a member of the class for purposes of determin-
ing such named person's share.

b. Determining whether beneficiaries of the gift are in the
same generation in relation to the donor. The "children" of a
designated person are in the first generation so far as such person
is concerned but, in relation to the donor, the "children" may be in
the second or more remote generation. For example, a gift to "the
children of my son S and to the children of my granddaughter A"
describes class members in two different generations in relation to
the donor, and such gift is not governed by the rules of § 28.1 (see
§ 28.5).

If the gift is to a named individual and a class or to several
classes, and the named individual and the class members are related
to the donor or the members of the several classes are related to
the donor, that relationship will determine whether all the benefi-
ciaries are in the same generation in relation to the donor. For
example, a gift to "my son S and the children of my daughter D"
does not describe beneficiaries in the same generation in relation to
the donor, and such gift is not governed by the rules of this section
(see § 28.4).

The following chart describes the generations of beneficiaries
related to the donor.

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<table>
<thead>
<tr>
<th>Grandfather and Grandmother</th>
<th>Grandfather and Grandmother</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uncle</td>
<td>Father</td>
</tr>
<tr>
<td>Cousin</td>
<td>Brother</td>
</tr>
<tr>
<td>Child of Cousin</td>
<td>Nephew</td>
</tr>
<tr>
<td>Grandchild of Cousin</td>
<td>Child of Nephew</td>
</tr>
<tr>
<td>Great-Grandchild of Cousin</td>
<td>Great-Grandchild of Nephew</td>
</tr>
</tbody>
</table>
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This chart may also be adapted to determine the generations in
relation to the donor of beneficiaries related by affinity.
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A gift may conceivably include or be exclusively to beneficiaries who are unrelated to the donor. If the gift is exclusively to such beneficiaries, the rules of this section are applied as though all were in the same generation in relation to the donor, so that the division among them is on a per capita basis, in the absence of additional language or circumstances that indicate otherwise. If the gift includes such beneficiaries along with related beneficiaries who are all in the same generation in relation to the donor, the unrelated beneficiaries are treated as in the same generation in relation to the donor as the related beneficiaries in applying the rules of this section, in the absence of additional language or circumstances that indicate otherwise.

c. Gift to the “children” of the donor. If a gift is made to the “children” of the donor, the strongest case for equal per capita division among the described class is presented.

A gift to the “children” of the donor may include more than the donor’s children under some circumstances. The circumstances may indicate that the donor used the word “children” to include also the donor’s grandchildren (see Illustration 2 and § 25.1). If this is true, then the class gift term describes more than one generation in relation to the donor and the rules of this section are not applicable in the absence of additional language or circumstances that indicate the class members are to be treated as though they are all in the same generation (see § 28.5).

If the gift to the “children” of the donor is made by the donor’s will and a child of the donor dies before the will takes effect, the share the deceased child would have taken had he or she lived may pass in accordance with an antilapse statute to substituted takers provided by such statute (see §§ 27.1 and 27.2). In such case, the rules of this section apply to determine the share of the subject matter of the gift that passes to the substituted takers. The substituted takers do not take from the deceased class member and may be in a different generation in relation to the donor than the deceased class member. In other words, when by statute or by the express terms of the disposition, substituted takers in a different generation are brought into the picture by the death of a class member, the rules of this section apply to determine the share of the deceased class member for which substituted takers are provided.

A gift to the “children” of the donor may become vested before the date of distribution to the class and on the distribution date become distributable to a deceased child’s estate. The fact that on the date of distribution persons in a different generation in relation to the donor will be entitled to the share of the deceased class
member does not prevent the rules of this section from applying in determining the share that passes through the deceased child's estate.

Illustrations:

1. O transfers property by will "to my son S and my daughter D and any other children I may have." S and D are adults on the date O executes the will. O adopts the two infant children of his deceased sister's deceased daughter. The adoption makes the adopted persons "children" of O for class gift purposes (see § 25.4). Prior to the adoption, these children were in the second generation in relation to the donor. O dies. The rules of § 28.1 apply in the absence of additional language or circumstances and the property disposed of by O's will is divided into four equal shares, one for S, one for D, and one for each of the adopted children.

2. O transfers property by will "to my beloved children." At the time O executed his will he had two adult children by a previous marriage and his present wife had a child by a previous marriage. Her previous husband would not consent to the adoption by O of this child. The child, however, was raised in O's household. Under these circumstances the gift is construed to include the wife's child as well as O's children.

3. O transfers property by will "to my issue" and in other provisions in the will O uses the term "issue" as clearly referring only to O's "children." In such case the conclusion is justified that the class gift is to O's "children," and the rules of this section apply in determining the share of each class member.

d. Gift to the "grandchildren" of the donor. If a gift is made to the "grandchildren" of the donor, the grandchildren traced through one child of the donor may be more numerous than the grandchildren traced through another child of the donor. This fact, if present, does not in and of itself change the equal division among the class members under the rules of this section, in the absence of additional language or circumstances that indicate otherwise. By the use of the class gift term "grandchildren," the donor has placed all of the grandchildren on the same footing.

Illustrations:

4. O transfers property by will "to my grandchildren to be divided equally between them." On the date O executed the will and at O's death, O had six grandchildren, two of whom were children of O's daughter D and four of whom were
children of O's son S. The use of the word "between" rather than "among" is not sufficient to overcome the rules of this section. In the absence of additional language or circumstances that indicate otherwise, the rules of this section apply and each grandchild of O is entitled to a one-sixth share in the property given to O's grandchildren under O's will.

5. Same facts as in Illustration 4 except that the plan of O's will in all other respects very carefully treated D and her family and S and his family equally in all other dispositions. Also, during O's lifetime and prior to making his will, in making gifts to the grandchildren O always gave a total amount to D's children though only two in number that was the same as the total amount O gave S's children. These additional circumstances justify the conclusion that the property given to O's grandchildren under the will is to be divided one-half to D's two children and one-half to S's children.

6. Same facts as Illustration 4 except that the controlling statute of descent, if O had died intestate, survived only by his six grandchildren, would have given D's children one-half of the intestate property and S's children one-half of the intestate property. This additional fact does not change the result in Illustration 4. It is, however, a supporting fact if present in Illustration 5.

e. Gift to the "children" of the donor's "children." If a gift is made to "the children of my daughter D and the children of my son S," the donor has described the donor's grandchildren but has divided them into two classes by the descriptions that are used. Nevertheless, in the absence of additional language or circumstances that indicate otherwise, the situation is the same as when the donor describes the class as "my grandchildren" so far as the application of the rules of this situation are concerned (see Comment d.).

Illustration:

7. O transfers property by will "to the children of my son S and the children of my daughter D to be equally divided between them." The use of the word "between" rather than the word "among" is insufficient in itself to overcome the rules of this section, but may be a supporting factor if there are other facts that tend to overcome the rules of this section.

f. Gift to the "nephews and nieces" of the donor. If a gift is made to the "nephews and nieces" of the donor, the nephews and nieces traced through one brother or sister of the donor may be more numerous than the nephews and nieces traced through another-
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er brother or sister of the donor. This fact, if present, does not in and of itself change the equal division among the class members under the rules of this section, in the absence of additional language or circumstances that indicate otherwise (see the Illustrations under Comments d and e). By the use of the class gift term "nephews and nieces," the donor has placed all of the nephews and nieces on the same footing.

The fact that the donor may describe the beneficiaries as the "children of my brother A and the children of my sister B" is not sufficient in and of itself to change what would otherwise be the distribution among "my nephews and nieces." (see Comment e).

The primary meaning of a gift to "nephews and nieces" of the donor does not include nephews and nieces by affinity (see § 25.8). If the additional language or circumstances indicate that nephews and nieces by affinity are included in the class, this fact alone does not overcome the rules of this section so that, absent additional language or circumstances that indicate otherwise, the division among the class will be in equal shares per capita and not on the basis of one-half going to the donor's nephews and nieces and one-half to the nephews and nieces of the donor by affinity.

g. Gift to named individual and a class. If a gift is made "to John, the only child of the donor's deceased son S and the other grandchildren of the donor," the issue is whether the fact that one grandchild of the donor has been described by his name overcomes the rules of this section in determining the shares of the grandchildren. Subsection (2) recognizes that such named grandchild is treated the same as would be the case if he had been included under the class gift to "grandchildren," in the absence of additional language or circumstances that indicate otherwise.

If a gift is made "to James, the only child of the donor's deceased brother, and the children of the donor," the named individual is in the same generation in relation to the donor as the donor's children. Hence, the fact that the nephew of the donor is described by name does not prevent the rules of this section from applying in determining the shares of the beneficiaries, in the absence of additional language or circumstances that indicate otherwise.

If a gift is made "to Joseph, a child of the donor's deceased brother and the grandchildren of the donor," the named individual is not in the same generation in relation to the donor as the grandchildren of the donor. Hence, the rules of this section do not apply in determining the division of the subject matter of the gift among the beneficiaries (see § 28.4).
h. Gift to several different classes. If a gift is made “to the donor's children and the children of the donor's brother,” the members of the two classes described are in the same generation in relation to the donor. In the absence of additional language or circumstances that indicate otherwise, the rules of this section apply in determining the shares of each class member.

Illustration:

8. O transfers property by will “to my grandchildren and to the grandchildren of A, my college roommate.” The members of the two classes described are in the same generation in relation to the donor (see Comment b). The rules of this section apply in the absence of additional language or circumstances that indicate otherwise, and the subject matter of the gift is divided among the members of the two classes on a per capita basis.

9. O transfers property by will “to my children and the children of my brother.” At the time O executed the will and at O’s death, O had two children and O’s brother had ten children. If the property disposed of by O’s will is divided among the two classes on a per capita basis, the portion of the property passing to O’s children will be one-sixth of the total and five-sixths will go to the children of O’s brother. The fact that a family imbalance would be produced by the rules of this section in favor of O’s nephews and niece as compared with O’s own descendants is a circumstance that overcomes the rules of this section. In the absence of other factors that would justify a per capita division between the two classes, the conclusion is justified that O would intend one-half of the property to go to O’s children and one-half to O’s brother’s children, and the rules of this section would not apply even though all the beneficiaries are in the same generation in relation to the donor. If, however, O had the ten children and O’s brother had only two children, such imbalance should not be significant and the per capita division under the rules of this section would apply in the absence of additional language or circumstances that indicate otherwise.

10. O transfers property by will “to my children and the children of my deceased brother's deceased son.” The members of the two classes described are not in the same generation in relation to the donor. Hence, the rules of this section do not apply (see § 28.5).

i. Effect on a one-generation class gift term if the gift is “per stirpes.” If a gift is made to the “children” of a designated
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person "per stirpes," all the class members are in the first generation below the designated person and hence the words "per stirpes" cannot affect the per capita division among the class that is called for by the rules of this section. If some meaning is to be attributed to the words "per stirpes" in this context, it must be that a share of a class member who dies before the date of distribution is to go to such deceased class member's issue as substituted takers.

If a gift is made to the "grandchildren" of a designated person "per stirpes," the described class members stem from different children of the designated person. In such case, the words "per stirpes" suggest an initial division of the subject matter of the gift into shares, one share for the children of each child of the designated person, thereby overcoming the per capita division otherwise called for by the rules of this section. In this situation, the words "per stirpes" having been given a meaning, that meaning should carry over to cause the share of a deceased class member to go to his or her descendants. Thus, the words "per stirpes" have a double operation.

**Illustrations:**

11. O transfers property by will "to my wife W for life, then to the children of my son S and to the children of my daughter D and to the grandchildren of my brother John, on a per stirpes basis." S has two children, C₁ and C₂; D has three children C₃, C₄, and C₅; and John has five grandchildren, GC₁ and GC₂ who are children of John's son, and GC₃, GC₄, and GC₅, who are children of John's daughter. The conclusion is justified that the words on a "per stirpes basis" require the division of the subject matter of the gift initially into four equal shares, one share for S's children, one share for D's children, one share for the children of John's son, and one share for the children of John's daughter. The one-fourth share allocated to S's children is divided per capita between C₁ and C₂. The one-fourth share allocated to D's children is divided per capita between C₃, C₄, and C₅. The one-fourth allocated to the children of John's son is divided per capita between GC₁ and GC₂. The one-fourth allocated to John's daughter is divided per capita among GC₃, GC₄, and GC₅.

12. Same facts as Illustration 11, except that C₁ dies before W, leaving two children. The conclusion is justified that the words "on a per stirpes basis" also require that the share the deceased C₁ would have taken, if C₁ had lived, is to go to C₁'s children as substituted takers, rather than to C₁'s estate.
A similar one-generation class gift term. A similar one-generation class gift term means a class gift term such as "great-grandchildren," "grand-nephews," or "grand-nieces," etc. The phrase does not refer to gifts to a class described as "issue" or "descendants" (see § 28.2 as to such class gifts). Also it does not refer to gifts to "heirs" and the like unless in the particular case the word "heirs" is construed to mean "children."

STATUTORY NOTE TO SECTION 28.1

1. A Florida Statute provides:

Unless the will provides otherwise, all devises shall be per stirpes.


REPORTER'S NOTE TO SECTION 28.1

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. They are consistent with § 300 and § 301 of the first Restatement. The first Restatement, however, does not base its results on the beneficiaries being in the same generation in relation to the donor.

2. Justification for the rules of this section—The justification for the rules of this section is set forth in Comment a.

3. Cases supporting the rules of this section—The basic principle of this section, that when all class members are in the same generation in relation to the donor the distribution should be per capita in the absence of language or circumstances that indicate a contrary intent, is so deeply rooted that it is rarely even called into question. The points where there is a degree of controversy, discussed in subitems b through d, are what a donor must do to bring about some other pattern of distribution, and what sorts of classes fall within the scope of these rules (compare §§ 28.4 and 28.5).

a. Distribution per capita. In Hack v. Woodward, 248 Ga. 504, 284 S.E.2d 411 (1981), the "Delta Plantation" was conveyed to the grantor's wife and children for life, "and on their decease to such child or children . . . as her said children may leave in life." The court held that "children of children" are the same as "grandchildren" (see also Comments d and e) for purposes of distribution as well as identity, and found "no indication that the grantor intended an unequal distribution to his grandchildren" [emphasis in original]. Id. at 507, 284 S.E.2d 413. Per capita distribution was therefore ordered among the grandchildren.

Ayres Estate, 35 Pa.D. & C.2d 506 (1965), provides a particularly clear demonstration of the same principle as applied to "children of brothers and . . . sisters" (see Comment f). The residue of the testator's estate was divided into two shares, each to be held in trust. Upon termination of the first trust, the principal was to be paid "to all my nephews and nieces in equal shares." The
DONATIVE TRANSFERS (PROPERTY, SECOND) Pt. VI

principal of the second was to go to the descendants of the testator's daughter, but she died childless, and the gift over was to be divided "among the children of my said brothers and sisters in equal shares." The court ordered a per capita distribution among all the nephews and nieces, rejecting both the contention that "equal shares" referred to the brothers and sisters, and the contention that the "said" brothers and sisters did not include two predeceased brothers who were not mentioned elsewhere in the will, either by name or by the use of the word "brothers."

Even where the controlling descent statute calls for per stirpes distribution, gifts to single-generation classes should still be distributed per capita absent language or circumstances that indicate a contrary intent. See In re Scott's Estate, 163 Pa. 165, 29 A. 877 (1894), in which the residue of the testatrix's estate was "to be divided among my nephews and nieces," and distribution per capita was ordered (see Comment J). "The intestate laws, which would have required a distribution per stirpes, are passed over in order to exclude brothers and sisters, and give the estate directly to nephews and nieces," Id. at 169-170, 29 A. at 877. Similarly, in Patchell v. Groom, 185 Md. 10, 43 A.2d 32 (1945), the court observed, "where the first takers are the grandchildren not by accident but by design, the grandchildren take equally." Id. at 23, 43 A.2d at 38.

All of the cases cited elsewhere in this Reporter's Note, except for the (clearly atypical) cases collected in item 4a, recognize an initial presumption in favor of per capita distribution, whichever mode of distribution is eventually found to have been intended by donor in the case before the court. The most extreme example is found in the cases collected in item 4b, in which some courts have held, in effect, that even the phrase "per stirpes and not per capita" is insufficient to effect a distribution per stirpes.

b. "To my grandchildren per stirpes": who are the stocks? A gift made simply to the donor's "grandchildren" or "nephews and nieces" will be distributed per capita; if the donor intends equality of treatment at that level, nothing more need be said. But sometimes the donor intends to treat his or her children, or brothers and sisters, equally (or to treat their families equally), though the gift is to the generation below. The phrases "per stirpes," "by representation," or "according to the stocks" are commonly used to express such intent. This is recognized in Illustration 6 and in Comment f, but it conflicts with the old common-law rule, still followed by a few courts, that a gift "to a class per stirpes" means per capita to the surviving members of the class, with per stirpes distribution only to the descendants of deceased class members.

In Bradlee v. Converse, 318 Mass. 117, 60 N.E.2d 345 (1945), the corpus of a testamentary trust was to be distributed "by right of representation to and among . . . my nephews and nieces . . . including by right of representation, the issue then living of any . . . then deceased." Citing Lord Simonds' opinion in Sidey v. Perpetu-
al Trustees, [1944] A.C. 194, the court held "that where a gift is made to a number of persons of different stocks, per stirpes and not per capita, it is manifest that the stocks must be found in their ancestors. Such was the case in Siders v. Siders, 169 Mass. 523, 48 N.E. 277 [1897], and in Matter of Diefenbacher's Estate, 165 Misc. 86, 300 N.Y.S. 370 (1937)." Id. at 119, 60 N.E.2d at 346. See also In re Hickey's Estate, 73 N.Y.S.2d 508 (Rensselaer Co. Surr.Ct.1939).

In Ballenger v. McMillan, 205 Md. 94, 106 A.2d 109 (1954), the corpus of an inter vivos trust was to be paid to the grantor's descendants per stirpes after the grantor's children were all dead. Again, Sider was cited as authority that the "stirpes" should branch from the grantor himself rather than from an initial per capita distribution among his grandchildren, the first generation capable of taking under the terms of the will. In re Marshall's Estate, 377 Pa. 41, 103 A.2d 420 (1954), reached the same conclusion from similar facts. Cf. also Hartford-Conn. Trust Co. v. Gowdy, 141 Conn. 546, 107 A.2d 409 (1954), and In re White's Estate, 127 Vt. 28, 238 A.2d 791 (1968), applying the same rule to "heirs of donor's children, per stirpes." Other cases construing "issue per stirpes," "heirs per stirpes," and the like are collected and discussed in items 3b and 4b of the Reporter's Note to Section 28.2.

Similarly, in Rehm v. Core, 54 Ohio L.Abs. 535, 52 N.E.2d 364 (1948), "I give, devise, and bequeath all the same to such of my nieces and nephews as may then be living, and the heirs of the body of any . . . as may then be deceased . . . Division be-
tween such nieces and nephews shall be made per stirpes and not per capita." The court held, "The first sentence clearly bequeaths an equal part to each niece and nephew . . . . The second sentence, however . . . expressly provided how distribution should be made . . . [notwithstanding] that the testator referred to his living nieces and nephews as such, instead of referring to them as his [sic] then living heirs of the body of his brothers and sisters. This language may have been more artful, but the result is the same. . . . This sentence requires a distribution per stirpes." Id. at 538, 82 N.E.2d at 866.

Other courts follow the spirit of the rule, while rejecting the letter. In O'Reilly v. Jackson, 269 S.W.2d 631 (Mo.1954), the corpus of the residuary trust was to be paid per stirpes to "the descendants of my said children" upon the last child's death. The court directed that the grandchildren take as representatives of the children, but warned that the literal meaning of the will was being set aside in order to give the testator's "true intent and meaning full effect": "Respondents correctly assert that . . . technically one may not take by representation . . . unless the deceased ancestor himself was a possible taker under the terms of the will." Id. at 635.

O'Reilly was followed in Teller v. Kaufman, 426 F.2d 128 (8th Cir.1970), affirming, 293 F.Supp. 1397 (E.D.Mo.1968) ("in equal shares per stirpes among such of my nephews and niece . . . as may then survive"). Ritter's Estate, 53 Pa.D. & C. 318 (1945), reached the same conclusion from
similar facts. See also MacGregor v. Roux, 198 Ga. 520, 32 S.E.2d 289 (1944), in which the principal of a testamentary trust was "to be divided equally among the grandchildren of my [named] sisters, ... per stirpes and not per capita," held, that the sisters rather than the grandnieces should head the stirpes.

Teller citing O'Reilly, also pointed out that the testatrix's use of the phrase "per stirpes," when there were so many other ways to provide for a per capita distribution, indicated an intent to overcome the usual rules of construction and to choose a pattern of distribution other than that provided by the intestate succession laws; cf. Illustration 7. Although a few jurisdictions handle intestate succession differently if the heirs happen to be nephews and nieces than if they are grandchildren, none gives any indication of applying different rules of construction depending on which group is the subject of a class gift.

c. Gift to individuals and a class. In re Campbell's Estate, 395 Pa. 385, 50 A.2d 333 (1959), dealt with a remainder "to the children of A and B, son of C, and D, daughter of E, deceased." A and E were sisters-in-law of the testatrix, and C was a brother-in-law. In ordering a per capita distribution among all the nephews and nieces, the court held "that the cases involving varying degrees of kinship are not in point." Id. at 385, 50 A.2d at 334. (Such cases are collected and discussed in the Reporter's Notes to the other sections of this chapter. This subitem corresponds to § 28.4, and subitem d to § 28.5.)

In re Bayard's Estate, 340 Pa. 488, 17 A.2d 361 (1941), also illustrates the reasoning of Comment g. An annuity was given to a niece of the testatrix, "should she die childless, the amount to be divided between her sister A and the surviving daughters of my brother B." The court directed a per capita distribution, holding the equal relation of the various nieces to the testatrix to be more important than her choice of the preposition "between" with its implication that the division should be between the two families.

In Neil v. Stuart, 102 Kan. 242, 169 P. 1138 (1918), the estate was to be divided "among my brothers and sisters children and David R. Neil and Andrew Neil and Lula Keith equally." The court recognized that per capita distribution of gifts "to A and the children of B" is usually inappropriate (compare the discussion of Smith v. Rekeweg, infra item 4c), but that in this case "the language and circumstances indicate that she regarded her nephews and nieces, the one stepniece and the two nephews by marriage, as the equal objects of her benefaction." Id. at 245, 169 P. at 1139.

Most other cases also support the principle set forth in Comment f that relatives by affinity and steprelatives, when mentioned in a class gift, are on a par with blood relatives in the same generation. See First Nat. Bank of Cincinnati v. Gaines, 15 Ohio Misc. 109, 237 N.E.2d 182 (1967), in which "equally among my sisters and my wife's sisters" was construed to call for equality as to the individuals rather than equality as to the families. See also Campbell v. Clark, infra
subitem d. Cf. also Estate of Frailey, 625 S.W.2d 241 (Mo.App. 1981), in which a gift "to my brother [A]; my sisters, [B and C]; and to my deceased wife's sisters, [four names], and to their descendants, per stirpes [with the exception of a named substituted taker for one of the sisters-in-law]" was held to be a class gift on the basis of the relationship, though all the members were named.

In Matter of Lopez, 64 Haw. 44, 636 P.2d 731 (1981), the income from an inter vivos trust was payable to the settlor's wife and to eight named individuals, or to their issue per stirpes. The "named eight" were the settlor's seven children and a godchild. Upon the death of the last income beneficiary, the trust was to terminate, the corpus to be distributed among "all of the children of the 'named eight.'" Applying the principle set forth in Comments b and g, that it is essential to determine to which generation a named beneficiary, unrelated to the donor, can be said to belong, the court directed a per capita distribution of the trust corpus, holding that the godchild should "be treated on an equality with the children," so that "the members of the class [of 'grandchildren'] stand in identical relation to the settlor." Id. at 56, 636 P.2d at 739.

d. Gift to two or more classes. In McIntire v. McIntire, 192 U.S. 116, 24 S.Ct. 196, 48 L.Ed. 389 (1904), a will-construction case reached the Supreme Court, having arisen in the District of Columbia. The residue of the estate of "David McIntire, tin-plate worker . . . is to be equally di-
vided between my Brothers Edwin and Charles children." Because the various nephews were in the same generation, "the children of several persons described as standing in a certain relation to the testator, the objects of the gift take per capita and not per stirpes." Id. at 121, 24 S.Ct. at 197, 48 L.Ed. at 371. Likewise, in Cowgill v. Faulconer, 57 Ohio Misc. 6, 385 N.E.2d 327 (1978), two devises "in equal shares to the children of my deceased brother, A, and to the children of my brother, B," were distributed per capita: "A class of beneficiaries designated by their relationship . . . to the testator or to someone else . . . share per capita and not per stirpes, especially if they are all of the same degree." Id. at 8, 385 N.E.2d at 329.

In Campbell v. Clark, 64 N.H. 328, 10 A. 702 (1887), the testatrix gave and devised "the remainder . . . to my nieces and nephews, and to the nieces and nephews of my former husband, A." The court held that all took per capita, as a single class (and that the offspring of the marriage of the testatrix's brother with the husband's sister would not take a double portion): "It is as if she said, 'I give,' etc., 'to my nephews and nieces by blood, and by my marriage.'" Id. at 332, 10 A. at 704.

4. Cases contrary to the rules of this section—
a. Distribution per stirpes. One of the few cases on record in which a court has gone out of its way to distribute a gift stirpitaly to a one-generation class is Barfield v. Aiken, and that case
was reversed on appeal, 209 Ga. 483, 74 S.E.2d 100 (1953). The lower court cited Fraser v. Dillon, 78 Ga. 474, 3 S.E. 695 (1887) (a gift to four named children and "the children of" a deceased child) as authority that "the presumption is that the testator intended that his property should go where the law carries it, which is supposed to be the channel of natural descent." Id. at 487, 74 S.E.2d at 104. The supreme court approved of the general principle, but held that it would be too exuberant to apply it to a legacy to be "divided equally among any and all children of my deceased brothers and sisters, showing no preference." Subsequent Georgia decisions have not taken up the suggestion that a per stirpes distribution might be preferred in a gift "to grandchildren" without the Barfield will's expression of per capita intention; compare Hack v. Woodward, supra item 3a.

Florida has established a statutory preference for stirpital distribution (see the Statutory Note to this section), but a Florida Court of Appeal has held that the statute "merely codifies the common law." See In re Estate of Skinner, 397 So.2d 1193 (Fla.App. 1981). It seems likely, therefore, that a gift "to grandchildren" without the Barfield will's expression of per capita intention; compare Hack v. Woodward, supra item 3a.

Stoutenburgh acknowledged the per capita rule but found a per stirpes distribution. Mellen v. Mellen, 148 Me. 153, 90 A.2d 818 (1952), on the other hand, found a per capita distribution but questioned the general rule. The income from a testamentary
trust was divided equally among testator's four children, the children of any deceased child taking by representation. Upon the death of the last child, “all said estate shall then vest in my grandchildren.” The grandchildren from the less prolific branch marshaled a long list of cases arguing for a stirpital distribution of the corpus, but with the exception of Stoutenburgh (which depended on the remainder vesting upon the death of the first of testator’s children), they relied on cases dealing with multigenerational classes. Rather than basing the decision on those grounds, the court conceded that no general rule applied, basing the decision instead on the testator’s intent as inferred from the rest of the will: because the testator had given each grandchild a cash legacy of $1000, he intended a general pattern of equal treatment; because the testator had explicitly provided for stirpital distribution of the income, the absence of such a provision for the principal implied a different pattern of distribution.

Murphy v. Fox, 334 Ill.App. 79, 78 N.E.2d 337 (1948), is a rare case calling into question the principle that “children of brothers and sisters” should be treated just like “nieces and nephews” unless it is explicitly directed that the “children” take as representatives of their parents. (See Comment f.) Here the residuary estate was to be divided “equally between my two sisters above named and my living nieces and nephews.” It was held that half the estate went to the two sisters as a class, half to the nieces and nephews as a class. Although directing a per capita distribution, the court acknowledged that there was a problem, and pointed to the use of the phrase “nieces and nephews” in support of its decision suggesting that “the children of my brothers and sisters” might have taken per stirpes.

b. Who are the stocks? As discussed in O’Reilly, supra item 3b, the traditional rule was that the phrase “per stirpes” in a class gift merely indicates that when a class member dies, leaving issue before the date of distribution, that member’s (per capita) share should be distributed (per stirpes) among his or her descendants rather than lapsing or being distributed (per capita) among the surviving class members. This rule was nullified by the testator’s contrary intent in O’Reilly and similar cases, and was rejected outright in Bradlee, supra item 3b, and similar cases. A few courts, however, still cling to the spirit as well as the letter of the rule. In Matter of Griffin’s Will, 411 So.2d 766 (Miss.1982), the testator left his entire estate “unto my nieces and nephews, [11 names], in equal shares, per stirpes and not per capita” [emphasis added by the court]. The court held that “the phrase ‘per stirpes and not per capita’ has no application to devisees in a will designated by name . . . but . . . only to substituted legatees.” Id. at 769. In re Estate of Luke, 184 N.W.2d 42 (Iowa 1971), came to the novel determination that “per stirpes” refers only to substituted takers in a gift “to [six named individuals] per stirpes,” while the same gift “per stirpes to the named individuals” would have indicated that the leg-
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atees themselves were to take per stirpes. In finding a per capita distribution among the legatees, the court was strongly influenced by the fact situation: the legatees being two of the testator's daughters-in-law, their three children, and testator's other grandchild, “there could in no event be a stirpital distribution as between the six named parties.” *Id.* at 45.

In Matter of Estate of Evans, 704 P.2d 35 (Mont.1985), testator left the residue “to my grandchildren, [six names], in equal shares, per stirpes and not per capita.” A closely divided court held that the grandchildren were the stocks, because the takers were mentioned by name as well as relationship, because the children were not potential takers, and because the children were still living. (“Persons who take per stirpes . . . stand in the place of a deceased ancestor.”) *Id.* at 38. The dissenting justices, concerned that the distribution ordered conflicted with the “not per capita” instruction, wanted to remand the case to the district court to consider evidence of the testator's intent.

Hartford Nat. Bank and Trust Co. v. Thrall, 184 Conn. 497, 440 A.2d 200 (1981), cited the first Restatement in holding that the corpus of a testamentary trust “to be divided among [testator’s children’s] children per stirpes,” should be distributed per capita with representation. *Gowdy,* supra item 3b, was distinguished on the ground “that the language of the wills was different,” in particular, that the testator in the instant case already had living grandchildren, while the sisters whose “children” were to take per stirpes in *Gowdy* were unmarried when the will was executed, indicating that they, not the nieces and nephews, were the primary objects of the gift.

The first Restatement also figured in Ritter's Estate, supra item 3b. The “dual significance” of Comment f to § 300 was that a gift to “nephews per stirpes” signified both that the original distribution among the nephews should be stirpital and that “the share thus obtained” [emphasis added] by any deceased nephew should go to his issue by representation. The court, however, cited the Comment as supporting rather than repudiating the common-law rule, treating the above constructions as alternative rather than simultaneous. But the court then refused to follow that rule, holding as in *O'Reilly,* supra item 3b, that the testator's intent overcame the rule of construction.

A few states, by statute or by judicial construction, have gone beyond the common-law rule, at least for purposes of intestate succession and substitution, and defined the heads of “stirpes” to be, not even the first generation of potential takers, but the first generation of actual takers, with members living at the date of distribution. States following the Uniform Probate Code define “representation” similarly, but retain the usual meaning for “per stirpes.” See item 3 of the Statutory Note and item 6 of the Reporter's Note to Section 28.2.

c. Gift to individuals and a class. From the point of view taken in this section, In re Wochos' Estate, 256 Cal.App.2d
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338, 63 Cal.Rptr. 924 (1967) reached the right result for the wrong reason, directing a per capita distribution to "the then living nephews and nieces of [testatrix's husband] and to A, the nephew of" testatrix, but basing the holding on the common-law rule that a per capita distribution is preferred in gifts "to A and the children of B."

As such gifts usually involve a child and some grandchildren, or a sibling and some nephews and nieces, or some similar configuration within the scope of § 28.4, a per capita distribution is more likely than not to be inappropriate in such gifts. A few courts, recognizing this fact, have laid down an equally categorical rule in the other direction rather than acknowledging the centrality of the relationship between "A" and "B." In Smith v. Rekeweg, 3 Ill. App.2d 350, 122 N.E.2d 71 (1954) (app. den.), 1/2 of the residuary estate was left to "said [A], my great-nephew and the children of [B a niece] to share equally." The court gave half to A, observing, "The feature—which we believe clearly indicates the testatrix' intention is the fact that it identifies the plaintiff by name while it refers to the defendants only as the children of" plaintiff's aunt. Id. at 355, 122 N.E.2d at 73.

d. Gift to two or more classes. In re Moore's Estate, 157 Pa. Super. 296, 43 A.2d 359 (1945) involved a holographic will: "the remainder to be Devided Between my Nephues & Niece and Bob Nephues & Nieces." [sic] The court distributed half to the testatrix's family, half to Bob's, because "the nephews and nieces of her husband stand in a different relationship to the nephews and niece of the testatrix. They are not in the same class with her own kin." Id. at 298, 43 A.2d at 359. Herman's Estate, 90 Pa. Super. 512 (1927) was cited to the same effect. See also Humphrey v. Lawson, 225 Ga. 803, 171 S.E.2d 534 (1969), in which the testators were held to be the "stocks" for a bequest in a joint will "to the brother of [testatrix] and the brothers and sisters of [testator] per stirpes, share and share alike."

In De Leo v. Maffee, 19 N.J. Super. 307, 88 A.2d 369 (1952), the testator left the residue "in equal shares, share and share alike, among the then living children of my deceased brother, A and my sister B." The court directed a per capita distribution, but to the sister and to A's children rather than among all the nieces and nephews, perhaps influenced by the fact that B and her children were in Italy while A's children were in court. The court remarked that "while full force is to be given the intent of the testator as gathered from the will, yet that intent must be gathered by the application of known rules of construction established by longstanding adjudications of the courts." Id. at 309, 88 A.2d at 360.

5. Factors supporting a per stirpes distribution—

a. Prior life interest in the preceding generation. The gift "to the children of my children," discussed in Comment e, generally arises when the donor's children have some sort of life interest, with remainder to the
grandchildren; indeed, most class gifts to the donor's grandchildren arise in this way. The life interest could either be a life estate in realty, or the right to receive income from a trust. When realty is involved, the rule is that the remaindermen take per stirpes after a tenancy in common, since each share goes to the corresponding remaindermen immediately upon the death of the life tenant. See, e.g., Small v. Tucker, 61 N.J.Super. 553, 161 A.2d 561 (1960); Mewborn v. Mewborn, 239 N.C. 284, 79 S.E.2d 398 (1954). If there is ambiguity, most courts will find a joint tenancy in the life estate, so that the remaindermen, since they take simultaneously as one class, take per capita. See Dew v. Shockley, 36 N.C.App. 87, 243 S.E.2d 177 (1978), review denied, 295 N.C. 465, 246 S.E.2d 9 (1978).

In Rendle v. Wiemeyer, 374 Mich. 30, 131 N.W.2d 45 (1964), rehearing denied, 374 Mich. 30, 132 N.W.2d 606 (1965), a probate decree had divided the land among the children "in equal shares of one-fifth each, and after their death to their respective children, according to the will." In the will, the testator had devised land to the children for life "in equal shares, and after their death it shall become the property of my grandchildren in equal shares." The court held that because the remaindermen were to take per capita, the statutory preference for tenancy in common was overcome and the children's "equal shares of one-fifth each" were to be held in joint tenancy.

A few courts have gone the other way. The will in Clapper v. Clapper, 246 Iowa 899, 70 N.W.2d 145 (1955), was similar to the Rendle will. The land was devised to the testator's children for life, "and at their death shall be divided equally and shall vest in "fee simple" between their children." The court held that "'their death' will be read 'their respective deaths,'" creating a tenancy in common with each group of remaindermen to take per stirpes as soon as the group's ancestor dies. Id. at 902, 70 N.W.2d at 147.

In Gaughen v. Gaughen, 172 Neb. 740, 112 N.W.2d 285 (1961), reversing, 171 Neb. 763, 107 N.W.2d 652 (1961), the land was devised to the testator's children for life, or to their respective widower(ers) until death or remarriage, then "to the children of my son A and the children of my son B, share and share alike and to the children born naturally of my daughter, C, if any." The court held that the statutory presumption of tenancy in common was reinforced by the intermediate remaindermen, so that when the grandchildren's turns came, they took per stirpes.

With the notable exception of Stoutenburgh, supra item 4a, the courts have spoken much more with a single voice when a trust is involved, dividing the principal per capita among the children of the original income beneficiaries notwithstanding the stirpital distribution of the income while the trust remains in force. See Hack, supra item 3a; Lopez, supra item 3c; Mellen, supra item 4a; Thrall, supra item 4b; Smith v. Thayer, 28 Ill.2d 363, 192 N.E.2d 375 (1963).
See also White v. Wachovia Bank & Trust Co., 251 F.Supp. 155 (M.D.N.C.1966), in which the testator established a complicated formula for the division of the income among his collateral relatives. One of his nephews died without issue, and his share of the income was assigned "to his surviving brother and sisters or their legal representatives." The court ordered that this distribution should be per capita rather than pro rata according to their own original shares in the income.

In re Rosengarten's Estate, 349 Pa. 32, 36 A.2d 310 (1944), involved the more common testamentary trust pattern, income to children or their issue per stirpes and corpus to grandchildren, with the additional feature that while the trust was in force the corpus was divided into separate funds, each of the testator's sons empowered to withdraw from "his" fund up to 60 percent of the principal. When the last child died, the trustees were to "pay over the principal of my said residuary estate to my grandchild or grandchildren or their issue living at the time, such issue taking the share their parents would have taken if living," any advancement of principal to be deducted from "the share which may thus be paid to the . . . issue of any of my sons." Although the analogy with tenancy in common in a life estate would suggest that this case could be distinguished from the other trust cases discussed (cf. Illustration 5), the court directed a per capita distribution: "Had it been testator's unequivocal intention to pass the corpus stirpital . . . it would have been quite a simple matter for testator to provide that the grandchildren or their issue should take the share of principal upon which their respective parents had enjoyed the income. But this testator did not do." Id. at 39, 36 A.2d at 314.

The testator did this in McDowell's Estate, 29 Pa.D. & C.2d 469 (1965), and successfully convinced the court to allow a stirpital distribution of most of the principal. But one child died without issue. The will, in that contingency, called for payment of "the income . . . equally to my surviving children during their respective lives and at their death share and share alike to their child or children." The share of the principal that would have gone to his issue was therefore distributed per capita among all his nephews and nieces.

In re Bixby's Estate, 55 Cal.2d 819, 13 Cal.Rptr. 411 (1961), superseding, 8 Cal.Rptr. 812 (Cal. App.1960), carried the doctrine a step further, suggesting that the life interest/remainder format in and of itself supports a per capita, not a per stirpes, distribution: "We are persuaded . . . that Mr. Bixby, Sr. plainly intended that . . . his grandchildren, were to share per capita . . . otherwise . . . it is reasonable to assume that he would have given the entire estate to his children outright without the intervention of a trust." Id. at 824, 13 Cal.Rptr. at 414.

b. Division "between" two classes. The direction that a gift be divided equally "between" two lines of descent (rather than equally "among" the various beneficiaries) can be helpful in clari-
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fying the donor’s intent that the gift be distributed per stirpes. Many gifts, however, are less carefully drafted, and the courts have been divided as to how much weight should then be given to the donor’s choice of preposition. Compare Moore, supra item 4d “Illiteracy does not raise a presumption that words are used incorrectly,” with McIntire, supra item 3d, where Justice Holmes observed that “the will is an illiterate will, and as the popular use of the word is not accurate no conclusion can safely be based upon that.”

In the construction of “literate” wills, the prevailing view is that such language can be called upon as additional supporting evidence if it reinforces the conclusion suggested by the other evidence. In Cole v. Bailey, 218 Md. 177, 146 A.2d 14 (1958), the principal of the residuary trust was to be “divided equally between my nephews and nieces, children of my brother, A, and of my sister, B . . . share and share alike per representation.” In ordering distribution per stirpes, the court held that the per capita rule “will yield to a very faint glimpse of a different intention.” Notwithstanding the possibility that what the testator meant to say was “with representation,” the court found that the phrase “per representation” provided “more than a faint glimpse,” and further noted that “the use of the word ‘between’ tilts the scale slightly further.” Id. at 183, 146 A.2d at 17.

The court, however, did not give so much weight to “between” as to direct an equal division between the class of nephews and the class of nieces. In re Lenhart’s Estate, 344 Pa. 358, 25 A.2d 725 (1942), relied more heavily on the wording. The residue was given, simply, “to the children of my sister A and the children of B,” while a legacy earlier in the will was “to be equally divided between the children of A and the children of B.” The court held that the “equal” division would be stirpital, and because it “show[ed] that testator or his scrivener know how to pass an interest per stirpes,” the residue would be distributed per capita: “It is true that . . . we said that ‘this mode of construction will yield to a very faint glimpse of a different intention in the context,’ but we find no such different intention present here. On the contrary, we find in the circumstances additional reasons for applying the rule.” Id. at 361, 25 A.2d at 727.

In Teller, supra item 3b, the lawyer advocating a per capita distribution had pointed to the word “among”; the court replied that there was no dispute that the “nephews and niece” were the object of the preposition, whichever mode of distribution was intended. The court went on to warn that “among” and “between” were often used incorrectly, and should not be relied on unduly even when the choice really would affect the literal meaning of the disputed clause. See also Bayard, supra item 3c.

c. Relative sizes of branches of family. If, as in Rosengarten, supra, subitem a, one branch of the family has ten children while the other branches have only one child each, the distinction between a per capita distribution and a per stirpes distribution is magnified.
As recognized in Illustration 9, it then becomes all the more important to ascertain the donor's true intention rather than relying excessively on rules of construction.

Wooley v. Hays, 285 Mo. 566, 226 S.W. 842 (1920), was in a sense the mirror image of Illustration 9: here, a multigenerational gift was distributed per capita on the basis of the family configuration. The testator gave his entire estate to his "lawful heirs . . . [with the exception of two wealthy brothers] They having been amply provided for." The beneficiaries were several nieces and nephews, and an institutionalized brother in his 70's who was supported by a pension. The court held that to give a larger share to the brother than to any of the nephews and nieces would defeat the testator's intention: "he did not mean to give to them 'that had;' but to them that 'had not,'" the pension and the smaller share would be more than adequate for the brother who "needed little in his unfortunate condition and would not need that little long." Id. at 580, 226 S.W. at 845.

In Laisure v. Richards, 56 Ind. App. 301, 103 N.E. 679 (1913), the testator left a life estate to his widow, the remainder "share and share alike to the nearest blood relation I may have at that time and the nearest blood relation of my beloved wife at the time of her death." Half went to his wife's father, half to his two brothers and sister. In rejecting a per capita distribution, the court pointed to the injustice that would be done to his father-in-law if the "nearest relation" on the testator's side had comprised "30 or more nephews and nieces." The fact that remote descendants generally outnumber immediate descendants is important in the treatment of multigenerational gifts; see §§ 28.2-28.5, 29.6.

d. "Per stirpes in equal shares." Language such as "share and share alike per representation," Cole v. Bailey, supra subitem b, or "in equal shares per stirpes," Teller supra item 3b, is not uncommon in the wills and trusts dealt with in cases arising under this section. Similar clauses, though not always quoted in this note, appear in O'Reilly, Hickey, Thrall, Griffin, Evans, and Humphrey, supra, and in Murphy, in item 8a of the Reporter's Note to Section 28.2. See also item 7 of the Reporter's Note to Section 28.2, and items 5a and 5b of the Reporter's Note to Section 29.6.

In almost all such cases, the courts have emphasized the importance of giving full effect to all of the carefully chosen language, rather than using part of the disputed document to defeat the rest. In Lee v. Moxley, 286 Ala. 134, 237 So.2d 656 (1970), the testator "hired the professional services of an excellent lawyer to draft a will." The lawyer testified that when he wrote "share and share alike," he meant that the shares of the testator's lines of descent, not the shares of the individual descendants, should be alike: "Q. In other words, are you saying that the share and share alike means among the issue of the deceased child? A . . . You might say that the issue was to take per stirpes." Id. at 138, 237 So.2d at 659.
Illustration 6 recognizes this as the usual intent when the donor directs distribution to be both equal and stirpital. In re Murphy's Will, 103 Misc.2d 719, 426 N.Y.S.2d 923 (1980), discussed in item 8a of the Reporter's Note to Section 28.2, recognized this rule even while calling for a per capita distribution among the testatrix's grandchildren on other grounds than the "equal shares."

But it is also possible to "give full effect to all of the language in the will" by holding, along the lines of the cases discussed in item 4b, supra, that "equal shares" refers to the primary takers, "per stirpes" only to substituted takers. Sometimes, language or circumstances demonstrate that this was the donor's clear intent. Courts have also applied this interpretation when the law of their jurisdiction gives great weight to the initial presumption that the gift should be distributed per capita, and when (as seemed to be the case in Griffin) the scrivener knew what "equal shares" meant but may not have known what "per stirpes" meant.

Rarely, the latter possibility has been openly acknowledged. In Wachovia Bank & Trust Co. v. Livengood, the principal of the residuary trust was "to be paid over in equal shares to my nieces and Nephews per Stripes." [sic] The intermediate court, 54 N.C.App. 198, 282 S.E.2d 512 (1981), called for equality among the "Stripes," holding that a per capita presumption was overcome by the explicit language of the will. The supreme court reversed, 306 N.C. 550, 294 S.E.2d 319 (1982): "the words 'in equal shares' can only mean per capita . . . the use of those words . . . indicates that the term per stirpes (which the testator spelled per stripes) was not intended to be given its technical meaning." Id. at 553, 293 S.E.2d at 321. California has taken a similar approach by statute (see the last paragraph of item 3 of the Statutory Note to Section 28.2), establishing a presumption that legacies "per stirpes in equal shares" should be distributed in accordance with the intestate succession laws.

6. Similar one-generation class gift terms—

a. Children of a class. In addition to "children of my children" and "children of my brothers and sisters," discussed under the rubrics of "grandchildren" and "nieces and nephews," donors also make class gifts "to the children of" other classes. In Matter of Ross, 102 Misc.2d 796, 424 N.Y.S.2d 661 (1980), a gift "to the children of my two nephews, A and B" was distributed per capita. The gift was held to be a gift to a single class rather than a gift to two classes, and it was noted that "[a]ll five [great-nephews and great-nieces] are of equal relationship." Id. at 800, 424 N.Y.S.2d at 663.

Often, as in Lopez, supra item 3c and Thrall, supra item 4b, the parent class is also a beneficiary under the same instrument. When the first generation takes per capita and the second generation is referred to only as "the children of" the first, with no indication that they are to take as the representatives of their parents, it is presumed that the donor intended to treat them as a single
class, regarding them as standing in an equal relation even if biologically this may be inaccurate, as in Thrall where the first “generation” had originally comprised two of testator’s children and a grandchild; the grandchild had simplified matters by dying without issue.

b. “Issue” construed to mean “children.” The term “issue,” whose technical meaning is “descendants,” has been construed in certain contexts to mean “children.” See the cases collected and discussed in item 3b of the Reporter’s Note to Section 25.9. In such cases, the class becomes a one-generation class and is covered by the rules of this section rather than by the rule of § 28.2, and distribution is per capita. Similarly, item 5a of the Reporter’s Note to Section 29.1 discusses cases where terms like “heirs” have been construed to mean “children.”

Often, per capita distribution is the cause, not the effect, of the restricted construction of “issue.” As discussed in item 5c of the Reporter’s Note to Section 28.2, courts bound by the traditional rule, that gifts to issue should be distributed per capita, have often attempted to mitigate the inequities of such distribution by construing “issue” to mean “children.” See, e.g. Central Hanover Bank & Trust Co. v. Helme, 121 N.J.Eg. 406, 190 A. 53 (1937). Courts have also done this when distribution “to issue per capita” is expressly directed by the donor. See Rogers v. Atlantic Nat. Bank, 371 So.2d 174 (Fla.App. 1979), discussed in item 5c of the Reporter’s Note to Section 28.2.

On the other hand, as discussed in Comment c, “children” may also be used to mean “issue,” taking the gift out of the scope of this section and into the scope of § 28.2, so that distribution per stirpes is called for. Often, it is the donor’s intent that distribution should be per stirpes that leads the court to conclude that “children” comprise more than one generation. See the cases collected in items 5b-c of the Reporter’s Note to Section 25.1. See also, e.g., In re Reagan’s Estate, 533 P.2d 1004 (Okl.App. 1975); In re McNeil’s Estate, 18 A.D.2d 170, 238 N.Y.S.2d 389 (1963), reversing, 35 Misc.2d 891, 233 N.Y.S.2d 581 (1962) (“All the remainder . . . shall be divided . . . into a number of shares equal to the number of brothers or sisters surviving me and the number of deceased brothers or sisters surviving them . . . One (1) share to the children of each deceased brother and sister.” Id. at 171-172, 238 N.Y.S.2d at 390.)

c. Other one-generation classes. As in Laisure, supra item 5c, “nearest blood relation” and similar terms have often been construed to exclude more distantly related representatives of deceased class members; the class is then a one-generation class within the scope of this section. See also, e.g., Estate of Robison v. Carter, 701 S.W.2d 218 (Tenn.App.1988). But the term is often treated as synonymous with “next of kin,” which is now almost universally considered a form of gift “to heirs and the like.” See item 6c of the Reporter’s Note to Section 29.1.

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440, 353 N.E.2d 1129 (1977), a gift “to each of my servants, [four names] . . . in equal amounts” was held to be a class gift, notwithstanding that testatrix named the servants in order to clarify the membership of the class.

7. Secondary references—The general question of distribution of class gifts is discussed in Chapter 36 of Page on Wills, in §§ 368–70 of Powell on Real Property, and in §§ 21.13, 22.13–14 of American Law of Property (A.J. Casner ed.). A.L.R. has a lengthy series of annotations collecting cases on the topic, beginning with 16 A.L.R. 15 (1922), and ending with 13 A.L.R.2d 1023 (1950). The comment in 16 A.L.R. at 16 is frequently quoted (see, e.g., Mellen, supra item 4a, 90 A.2d at 821; In re Bowler’s Trust, 56 Wis. 2d 171, 201 N.W.2d 573, 575 (1972)).

It is a common remark that the decisions on the question as to when beneficiaries under a will are to take per capita, and when per stirpes, are in hopeless confusion. Analysis and comparison show, however, that their diversity of result is due to a difference, not as to the principles of construction, but as to the amount of evidence of a contrary intent which will overcome the general presumption that where the proportions in which the beneficiaries are to take are not specified, they take per capita.

This language appears verbatim in 80 Am.Jur.2d Wills § 1449 (1975), although there is much less “confusion” in the modern decisions, especially concerning gifts to issue and the like, the major area of controversy in 1922, where the per capita presumption now seems to have been abandoned altogether. Now that most jurisdictions have discarded the presumption for multigenerational gifts, where it has been seen to be inappropriate, the application of the presumption to one-generation gifts has, if anything, been strengthened, as it can now be supported by reason as well as by tradition.

§ 28.2 Class Gift to “Issue” or “Descendants”

If a gift is made to a class described as the “issue” or “descendants” of a designated person, or by a similar multigenerational class gift term, in the absence of additional language or circumstances that indicate otherwise,

(1) A class member must survive to the date of distribution in order to share in the gift; and

(2) such class member in order to share in the gift must have no living ancestor who is a class member; and

(3) the initial division into shares will be on the basis of the number of class members, whether alive or deceased, in the first generation below the designated person.

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Comment:

a. Rationale. The primary meaning of the class gift term “issue” includes descendants of the designated person in any degree of relationship (see § 25.9). Thus it is inherently a multigenerational term. Even though the possible takers under a gift to “issue” include primarily descendants of every degree of relationship to the designated person, the conclusion is justified that the average donor does not intend that descendants in a lower degree of relationship to the designated person are to share equally with persons in a higher degree of relationship to the designated person. This average donor’s intention is carried out in subsections (1) and (2) by requiring a class member to survive to the date of distribution, and by denying a class member a share even if he or she survives to the date of distribution, if such class member has an ancestor who is a class member and such ancestor survives to the date of distribution. The initial division into shares provided for in subsection (3) keeps the division equal among family lines. It follows the pattern of distribution adopted by some descent statutes in case of an intestacy although a statute governing intestate succession is not adopted as a controlling factor.

b. Operation of subsection (3). If a gift is made to the “issue” or “descendants” of a designated person, in the absence of additional language or circumstances that indicate otherwise, the initial division of the subject matter is made into as many shares as there are issue, whether living or not, of the designated person in the first degree of relationship to the designated person. Each issue in the first degree of relationship who survives to the date of distribution takes one share of the subject matter of the gift to the exclusion of any of such first degree issue’s descendants. The share of an issue of the first degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, of that deceased issue who are in the second degree of relationship to the person whose issue are designated. Such issue in the second degree of relationship that survive to the date of distribution each take one share resulting from such division to the exclusion of their respective descendants. The share of an issue of the second degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, in the third degree of relationship to the designated ancestor who are also descendants of the deceased second degree descendant, etc. This is referred to as a per stirpes plan of distribution.

Illustrations:

1. O transfers property by will “to my wife W for life, then to my issue.” O has three children, C₁, C₂, and C₃, on the
date he executes his will. C₃ dies before O, leaving two children, GC₁ and GC₂. O dies. W dies. The descendants of O living on the death of W are C₁ and three children of C₂; C₂ and four children of C₃; and GC₁ and GC₂ the children of the deceased C₃. In the absence of additional language or circumstances that indicate otherwise, the rule of this section applies and the distribution to the issue of O is one-third to C₁, one-third to C₂, one-sixth to GC₁, and one-sixth to GC₂.

2. Same facts as Illustration 1, except that the only descendants of O that survive W are C₁’s three children; C₂’s four children; and GC₁ and GC₂, the children of C₃. In the absence of additional language or circumstances that indicate otherwise, the rule of this section applies and the distribution to the issue of O is one-third to the children of C₁, one-third to the children of C₂, and one-third to the children of C₃.

c. Contrary intent—distribution to “issue” or “descendants” controlled by a statute on descent. The donor may direct that the distribution to the “issue” or “descendants” of the designated person is to be made in the manner it would be made if the designated person had died intestate on the date of distribution, domiciled in the state in which the donor resided, owning only the subject matter of the gift, and survived only by his or her issue. The controlling statute of descent in such case may call for a distribution that is the same as the one provided under the rule of this section or it may call for some other distribution.

Illustration:

3. Same facts as Illustration 2, except that the donor directs that distribution is to be made in accordance with the statute of descent in O’s jurisdiction, applied as though O had died intestate on the date of the death of the survivor of O and W, owning the property available for distribution and no other property, and survived by his issue living on the date of the death of the survivor of O and W. The statute of descent in O’s jurisdiction provides in substance that the initial division into shares will be on the basis of the number of descendants in the highest level of descendants in which there is a living descendant. In such case, the initial number of shares in this Illustration would be nine; and the three children of C₁, the four children of C₂, and GC₁ and GC₂ would each take one-ninth of the property. If the statute had called for a per stirpes distribution, the three children of C₁ would divide one-third, the four children of C₂ would divide one-third, and the two children of C₃ would divide one-third.
d. **Contrary intent—distribution to issue to be made per capita.** The donor may direct that the distribution to the issue of the designated person is to be made on a per capita basis. If the donor so directs, the fact that multi-generations are described as beneficiaries has no relevance. The beneficiaries are all given equal standing in the gift and the division into shares is governed by § 28.1 as though they were all in the same generation in relation to the donor, in the absence of additional language or circumstances that indicate otherwise. When the distribution to the described issue is to be made on a per capita basis, there is no implied requirement of survival to the date of distribution, as there is when the issue are not to take on a per stirpes basis. Furthermore, in a per capita distribution, an issue in a lower degree of relationship can take concurrently with a living ancestor, which is not true when the distribution is on a per stirpes basis.

**Illustrations:**

4. O transfers property by will to T to hold in trust. T is directed “to pay the income to O’s son S for life, then to distribute the trust property to S’s issue on a per capita basis.” S has three children, C₁, C₂, and C₃. C₁ has two children, GC₁ and GC₂; C₂ has three children, GC₃, GC₄, and GC₅; and C₃ has four children, GC₆, GC₇, GC₈, and GC₉. O dies. S dies. The trust property will pass to C₁, C₂, C₃, GC₁, GC₂, GC₃, GC₄, GC₅, GC₆, GC₇, GC₈, and GC₉, each one being entitled to one-twelfth of the trust property.

5. Same facts as Illustration 4, except that C₁ died after O and before S. C₁ had a vested remainder interest in the trust property at C₁’s death, subject to partial divestiture by additional issue of S being born before the death of S. Consequently, C₁’s remainder interest passed as an asset in C₁’s estate and the distribution, described in Illustration 4, would change only in respect to the determination of the person or persons who would take C₁’s one-twelfth interest which passed through C₁’s estate.

6. Same facts as Illustration 4, except C₁ died before O and S. As a result of C₁’s death before O’s will took effect, the property interest C₁ would have taken goes to augment the shares of the other class members, unless there is an applicable antilapse statute. Assuming there is no applicable antilapse statute, the distribution described in Illustration 4 would change in that C₁ would be eliminated and each of the recipients would be entitled to one-eleventh of the trust property. If there is an applicable antilapse statute and the statute would
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give a deceased class member's share to the issue of the deceased class member, then the distribution described in Illustration 4 would change in that C₁'s share would go to GC₁ and GC₂, the children of C₁, and GC₃ and GC₄ would be entitled not only to their respective one-twelfth shares as class members but they would also divide C₁'s one-twelfth share that came to them under the antilapse statute.

7. Same facts as Illustration 4, except that C₁ died before the survivor of O and S and the remainder gift under the trust is "to the issue of S living on the death of the survivor of O and S, such issue to take per capita." As a result of the imposition of a requirement of survival to the date of distribution, no antilapse statute could apply and C₁ would not acquire a vested interest of any kind if C₁ survived O and died before S. Consequently, the distribution described in Illustration 4 would change in that C₁ would be eliminated and each of the recipients would be entitled to one-eleventh of the trust property.

e. Contrary intent—gift to "issue" or "descendants" as joint tenants with right of survivorship. The donor may direct that the gift to the "issue" or "descendants" of a designated person is to them as "joint tenants with right of survivorship." One of the requirements for a true joint tenancy is that the undivided share of each joint tenant must be the same. Consequently, the distribution to the issue of the designated person will give each taker the same undivided interest in the subject matter of the gift.

Illustration:

8. O transfers Blackacre by will "to my son S for life, then to S's issue and their heirs as joint tenants and not as tenants in common." S is survived by two children, C₁ and C₂, and by two grandchildren, GC₁ and GC₂, the children of C₃, who is a deceased child of S. Blackacre is owned by C₁, C₂, GC₁, and GC₂ as joint tenants, each having an underlying one-fourth undivided interest.

f. Contrary intent—"issue" construed to mean "children." The word "issue" as used in the dispositive instrument may be construed to mean "children" (see § 25.9, Comment d). In such case, the rule of § 28.1 is applicable in determining the shares of each class member.

g. A similar class gift term. Class gift terms that are similar to the term "issue" and to the term "descendants" are "offspring," "progeny," and under some circumstances "family" (see § 25.10 for primary meaning of the term "family"). The term "heirs of the body" is not a similar term.

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STATUTORY NOTE TO SECTION 28.2

1. The following family tree can be used to distinguish among the various patterns of descent that have been used in intestate succession laws or in the construction of gifts to "issue." O, A, and B are all dead. The others are living unless expressly stated otherwise:

A) Per stirpes: C takes 1/6, which is what A would have taken had A lived; D and E each take 1/6, which totals the one-half B would have taken had B lived.

B) Per capita


B2) excluding heirs with living ancestors—C, D, and E each take 1/6. But if D is dead, then C, E, F, and G each take 1/6.

C) Hybrid: Per capita among first takers, then by representation. C, D, and E each take 1/3. But if one or more of them is dead, the possible modes of "representation" include

C1) Representation per capita—If D is dead, then C and E each take 1/6; F, G, I, J, and K each take 1/18.

C2) Representation retroactive to the common ancestor—If D is dead, then C takes 1/4, E takes 1/4, F and G each take 1/6. But if D and E are both dead, then H takes E's 1/6. And if D, E, F and G are all dead, then C and H each take 1/6, I takes 1/6, and J and K each take 1/12.

C3) Representation per stirpes (with respect to first takers)—If D is dead, then C and E each take 1/6, F and G each take 1/6. But if D and E are both dead, then H takes E's 1/6. And if D, E, F and G are all dead, then C and H each take 1/6, I takes 1/6, and J and K each take 1/12.

C4) Representation by repeating the "per capita among first takers" rule—Same as pattern C3 as long as at least one of D, F, and G is alive. But if D, E, F, and G are all dead, then C and H each take 1/6, I, J, and K each take 1/12.

C5) Per capita by generations—Same as pattern C4 as long as D or E is alive. But if D and E are both dead, then C takes 1/6, H takes 1/6,
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and I, J, and K each take $\frac{1}{27}$ (dividing, as a class, $\frac{1}{3}$ of the share that would have gone to F, G, and H as a class).

2. Intestate succession laws. Formerly, many states had followed the pattern established in England after the abolition of primogeniture: realty "descended" per stirpes, pattern "A," while personalty was "distributed" according to pattern "C3." Today, the differences between the treatment of realty and personalty are negligible except in a few states where the surviving spouse's portion is different. England adopted a pure per stirpes statute of distribution in 1926.

The Uniform Probate Code provides that any part of the estate of a decedent not "effectively disposed of by will" or passing to the surviving spouse, passes:

to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation. § 2-103(1).

Up to this point, this codifies the usual rule at American common law, followed by most state statutes of descent and distribution. Many statutes do not define "representation"; of those that do, either expressly or by judicial construction, a clear majority of the older statutes either expressly or implicitly call for representation per stirpes with respect to the first takers, pattern "C3." The Uniform Probate Code, however, has adopted pattern "C4":

If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner. § 2-106.

In the Comment to § 2-106, the drafters of the Code justify their choice by pointing out the anomaly that could arise under pattern "C2." In terms of the family tree in item 1, consider the effect on C's share if D or E dies leaving issue; to increase the dramatic effect, suppose D and E have 10 siblings, so that C's share jumps from $\frac{1}{12}$ to $\frac{1}{2}$ on the death of any of C's cousins. The cases calling for this mode of distribution, "C2," however, are exceptional (see item 6 of the Reporter's Note to this section), and the question of an heir's share depending on the survival or death of a collateral relative is far more likely to arise with regard to B's death: if A is dead, then C gets half the estate as the representative of A as long as B survives O, but takes per capita with D and E (and their 10 siblings) if B predeceases O. This problem, of course, arises under any of the per stirpes/per capita hybrids, and can be solved only by a pure stirpital distribution.

A revised 2-106 as follows was approved by the Joint Editorial Board for the Uniform Probate Code in November of 1987:

If representation is called for by this Code, the estate is divided into as many equal shares as there are (i) surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who
survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner. Each then-living heir in that nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the remaining then-living descendants as if the descendants already allocated a share and their descendants had predeceased the decedent.

In November 1987, the Joint Editorial Board approved the following:

SECTION 2-707 [Class Gifts in Favor of “Descendants,” “Issue,” or “Heirs of the Body”; Form of Distribution.]

If a class gift in favor of “descendants,” “issue,” or “heirs of the body” does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession if the designated ancestor had then died intestate owning the subject matter of the class gift.

a. The following statutes contain language substantially identical to the language quoted from the Uniform Probate Code:

- Nebraska Rev.Stat. §§ 30-2303, 30-2306 (1979)
- New Jersey Stat.Ann. §§ 3B:5-4, 3B:5-6 (West 1983)
- Oklahoma Stat. tit. 84, § 213 (Supp.1986)
- Utah Code Ann. §§ 75-2-103, 75-2-106 (1979)
- Wisconsin Stat.Ann. §§ 852.01, 852.08 (1983-84)

b. The following statutes also provide for “type C4” representation in the manner of the Uniform Probate Code, either expressly, implicitly, or by judicial construction:
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West Virginia Code § 42-1-3 (1982)

c. The following statutes either expressly, implicitly, or by judicial construction provide for “type C3” (“common-law”) representation after distributing per capita to the surviving heirs most closely related to decedent:

Indiana Code Ann. § 29-1-2-1 (West 1979)
Massachusetts Gen.L. c. 190 § 3 (1986)
Missouri Ann.Stat. § 474-020 (Vernon 1956)
New York Estates, Powers & Trusts Law §§ 2-1.2, 4-1.1 (McKinney 1981)
Texas Probate Code Ann. § 43 (Vernon 1980)
Virginia Code Ann. § 64.1-3 (1980)

d. The following statutes provide that intestate distribution shall be per capita by generations, pattern “C5”:

e. The following states provide that decedent's lineal descendants, if any, take per stirpes, pattern “A,” but that collateral heirs take according to the “common-law” pattern, “C3”:
Georgia Code Ann. § 53-4-2 (Supp.1986) [formerly § 113-403] ***

* The Nevada statutes carefully provide that when there is a surviving spouse, the part of the estate not going to the spouse passes according to pattern “C3.” When there is no surviving spouse, § 134.100 and § 134.110 simply provide that distribution is to per stirpes. There do not seem to be any cases either recognizing this distribution or construing it away by redefining “per stirpes.”

** South Dakota enacted the Uniform Probate Code in 1924, but repealed it in 1976.

*** If all heirs are nephews and nieces, they take per capita, but if all heirs are grandnephews and grandnieces, they take as representatives of their deceased parents.

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Texas Probate Code Ann. § 43 (Vernon 1980)
f. The remaining states provide, either expressly, implicitly, or by judicial construction, for distribution per stirpes, pattern “A”:
   Florida Stat. § 732.104 (1985)
   Iowa Code § 633.219 (1985)
3. Definitions applicable to wills and trusts. A California statute provides:
   “[I]f a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner, the property shall be divided [in accordance with the pattern of intestate succession].”
   California Probate Code § 245 (West Supp. 1987)
The following statutes have a similar effect:
   Maryland Estates & Trusts Code Ann. § 1–210.1 (Supp. 1986) (The Maryland statute also provides that the class members, not their children, are the stocks of the stirpes in a gift to the issue of a class (see item 8a of the Reporter’s Note).)
   Wisconsin Stat. § 700.11 (1983–84)
The Georgia statute actually says “issue” shall be construed to mean “children,” but a provision for representation gives this the same effect as Georgia’s per stirpes descent statute. The Rhode Island and Wisconsin statutes apply only to remainder interests.
   South Dakota Codified Laws Ann. § 29–5–15 (1984) provides: “A testamentary disposition to ‘heirs,’ . . . ‘issue,’ [or] ‘descendants’ . . . without other words of qualification, and when those words are used as words of donation and not of limitation, vests the property on those who would be entitled to succeed to the property of such person according to
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the provisions of Chapter 29-1.” This chapter, although using the term “issue” without defining it, does make a distinction between “issue,” “surviving spouse,” and “collateral kindred.” It seems unlikely, therefore, that § 29-5-15 could be construed as defining “issue” to mean all of the intestate takers. Although New Jersey, which formerly had a per stirpes descent statute, made a comprehensive revision of its laws based on the Uniform Probate Code in 1982, a statute originally enacted in 1952 (see the last paragraph of item 4a of the Reporter’s Note to this section) still provides:

Where under any will or trust provision is made for the benefit of issue and no contrary intention is expressed, the issue shall take per stirpes. N.J.Stat.Ann. § 3B:3-41 (West 1983)

The New Jersey courts have not yet had to decide whether this means that the statute calls for a distribution to “issue” somewhat different from the intestate succession pattern. Estate of Morton, discussed in item 3b of the Reporter’s Note to this section, indicates that they might so decide, but the courts could also treat the new descent statute as a legislative redefinition of “per stirpes.” Although the Comment to § 2-106 of the Uniform Probate Code carefully distinguishes between “representation” as defined in the Code and “per stirpes” distribution, Arkansas Stat.Ann. § 61-135 (1971 & Supp.1985) defines “per stirpes” to mean pattern “C4.”

California also passed such a statute in 1983, but repealed it before it took effect. See the discussion of Maud v. Catherwood in item 6 of the Reporter’s Note to this section. Section 246 of the Probate Code, enacted in 1985, now codifies the traditional definition of “per stirpes” as pattern “A.” Another new section, § 247, defines “per capita at each generation” as pattern “C5.” And § 245(b)(2) provides that “contradictory wording such as ‘per capita and per stirpes’ or ‘equally and by right of representation’” does not defeat the presumption that devises and dispositions to “issue” and the like shall pass according to the intestate succession pattern, “C4.” California Probate Code § 245 (West Supp.1987)

REPORTER’S NOTE TO SECTION 28.2

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. Some courts in states with “hybrid” intestate succession laws have stated that, if such a situation were to arise and donor had not indicated a contrary intent, they would follow the rule of § 303 of the first Restatement and apply their respective descent statutes as if the person whose issue are designated had died intestate survived only by lineal descendants; Comment a to § 303 states that “conveyors normally use ‘issue’ as substantially the equivalent of ‘heirs of the body.’” Other decisions have said that all gifts to issue should be distributed “per stirpes” but have found the stocks in the first generation of A’s descendants with surviving members.

2. Justification for the rules of this section—The justification for the rules of this section is set forth in Comment a.
3. Adopting some type of per stirpes distribution—

   a. Cases holding that distribution should be some type of per stirpes distribution rather than per capita. The traditional rule, a theme which pervades Chapter 28, is that all class gifts are presumptively to be distributed per capita. Not only did this rule apply to gifts to "issue" (item 4a, infra), it was sometimes regarded as applying even to gifts to "heirs"; see item 4 of the Reporter's Note to Section 29.6. In re Mayhew's Estate, 307 Pa. 84, 160 A. 724 (1932), was a case where the Pennsylvania Supreme Court "must for the first time fully decide the construction" to be used when "the word 'issue' is neither qualified, explained, nor modified by any context." The court, in a lengthy discussion of the history of the question, observed, "the only courts we have found that still follow the English [per capita] rule are those of New Jersey," and concluded that "the justice of a per stirpes distribution cannot be denied. Ordinarily, a testator in creating a life estate... would next naturally consider only the immediate issue of such life tenant. ... A parent's solicitation is usually paramount for his child. ... We therefore agree with the growing minority of states which hold that, where the word "descendants" or "issue" is unexplained in the context of the instrument, children do not take concurrently... with their parents, but take per stirpes. The inequity of the per capita rule in the present case is manifest." The "branches of the family [would] receive various shares in proportion to the number of children in each at the death of the life tenant. Eleanor, the unmarried child of the life tenant, and Francis, married but without children, would each receive but one-eighth." *Id.* at 87, 160 A. at 725.

New Jersey has now also adopted the per stirpes rule, doing so by statute in 1952; see item 3 of the Statutory Note to this section.

The most influential cases marking the birth of the modern rule are Dexter v. Incbes, 147 Mass. 324, 17 N.E. 551 (1888) and Jackson v. Jackson, 153 Mass. 374, 26 N.E. 1112 (1891). In Dexter, the testator established a trust for one of his sons, the corpus to be distributed after the son's death "equally to and among [his] issue." By another clause in the will, "if Charles had died 'before the receipt of his share,' his issue would have 'represented' him." The court held, "we are of the opinion that the word 'issue,' as here used, means descendants taking by right of representation." *"The difficulty which was felt by Lord Loughborough, in Freeman v. Parsley, [infra item 4a]... does not strike us as insuperable, supposing he would have felt it in such a case as this." *Id.* at 325, 17 N.E. at 554. However, as all the son's children were living, the same result could have been reached by construing "issue" to mean "children," and Massachusetts Reports reported Dexter under the heading, "*Held,* that the son's children were entitled to his share, to the exclusion of his more remote descendants." In Jackson, one child was dead, so that the result was an unambiguously per stirpes distribution.
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Again, the word "representation" had been used in the will, but the Jackson court did "not think it necessary to determine" whether testator expressly intended it to apply to the particular gift to issue being construed. "The English decisions . . . do not seem wholly satisfactory even to the English Judges . . . . We are of the opinion that when . . . on the death of [the income beneficiary of a testamentary trust] the principal sum [is to be paid] to his issue then living, it is to be presumed that the intention was that the issue should include all living descendants, and that they should take per stirpes, unless from some other language of the will a contrary intention appears." Id. at 318, 26 N.E. at 1113.

In Mercantile Trust Co. Nat. Ass'n v. Brown, 468 S.W.2d 8 (Mo.1971), the question was how soon Missouri had adopted the "Massachusetts Rule." The will in question was made in 1913 "with the help of competent legal counsel familiar with the language of testamentary trusts," and probated in 1920. The trial court ordered a per capita distribution "to the descendants of my aforesaid grandniece," finding that "at the time of the execution of the will, and also at the time of testator's death, 'it was very generally held, except in Massachusetts, that under a gift to 'descendants' . . . the children of the ancestor and the issue of the ancestor and the issue of such children, although the parent was living . . . took in equal shares per capita.'" Id. at 10. The supreme court reversed and ordered distribution per stirpes, holding that many states, either by pre-1913 decisions, by later decisions construing pre-1913 wills, or by pre-1913 statute, had already abandoned the per capita rule. Finding no Missouri decisions on point, and no clear nationwide consensus, the court concluded that the 1913 "statutes of descents and distributions furnish 'a safe guide.' Such statutes announce public policy and are generally accepted as being fair and just. . . . [I]n the factual situation in this case, it would indicate a per stirpes distribution." Id. at 13.

The extent to which the per capita rule has been repudiated by judicial authority can be seen in the reluctance of courts to direct a per capita distribution among all descendants even in cases where the gift is "to issue per capita." See Rogers, infra item 5c.

b. Cases holding that the stirpes should branch from the common ancestor. In practice, in almost all cases, a rule mandating a per stirpes distribution with the first takers as the stocks, and a rule mandating distribution according to a statute of descent will lead to identical results. Because of the infrequency with which gifts to "issue" arise under fact situations that make some difference in result, the case law is inconclusive. The cases collected in this subitem are the only such cases that have been found involving a gift described as one to the "issue" of an individual (compare the cases collected in items 4b and 4c, infra). They arose in "per stirpes" states, and therefore also support the rule that "issue" should take as "heirs of the body," or involve explicit
direction that the issue should take "per stirpes."

In In re Morton's Estate, 48 N.J. 42, 222 A.2d 185 (1966), "the single question is whether the trust remainder is to be divided into seven equal shares, one for each of the testator's grandchildren, or into two equal parts, representing the deceased daughters." The will, drafted at a time when New Jersey still adhered to the presumption that gifts "to issue," without more, should be distributed per capita, directed that the corpus be divided "into equal shares for my issue who shall survive my said wife, such division to be made in equal shares per stirpes, however, and not per capita." One of the testator's daughters, who had three children, was already dead when the will was executed. The other, who had four, survived her father but predeceased her mother. In holding that the daughters rather than the grandchildren were nonetheless the stocks of the stirpes (see Comment b), the court observed, "it certainly seems unnatural to us for a testator to say to certain of his grandchildren . . . that you will take more from my estate if your mother dies before your grandmother than you would receive through your mother if she had lived." Id. at 49, 222 A.2d at 189.

In Weller v. Sokol, 271 Md. 420, 318 A.2d 193 (1974), the trust corpus was to "be divided . . . among the issue and descendants of . . . my children . . . per stirpes and not per capita." The court found, "that a stirpital division was unintended as [sic] obvious. The appellants . . . would have us frustrate this by finding the stocks among the first takers rather than among the children." "[H]ad [testator] intended that the corpus be disproportionately divided among family groups, by awarding an equal share to each grandchild, he naturally would have used words indicating that each grandchild would take in his own right and not by representation." Id. at 431, 318 A.2d at 200.

In Altman v. Rider, 291 S.W.2d 577 (Ky.1956), the testator left $10,000 to the descendants of a boyhood friend in Germany. "Wolf Bodenheimer was not related to Leopold Samuel. Therefore, and considering the fact that Samuel would have had a natural desire to benefit those most closely related to Bodenheimer, we think it must be concluded that Samuel intended the distribution to be made in accordance with the degree of relationship of the takers to Bodenheimer, or in other words, per stirpes." Six children of Bodenheimer's, all deceased, had left surviving descendants, "resulting in there being six basic shares." Id. at 580.

As Maryland and Kentucky have per stirpes intestate succession laws, as did New Jersey at the time of Morton, none of these cases rejects the rule that the intestate succession law should govern. Indeed, Weller expressly relied on the Maryland law. See also Lombardi v. Blois, 230 Cal. App.2d 191, 40 Cal.Rptr. 899 (1964). After the settlor's daughter, her husband, and their children were all dead, the corpus of an inter vivos trust was "conveyed to the descendants [of the daughter and son-in-law] per stirpes and not per capita." The court cited Ballenger and Sidey,
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discussed in item 3b of the Reporter's Note to Section 28.1, and the Maud v. Catherwood, infra item 6, line of California cases, to demonstrate that the stocks should not be found in the first takers, and remarked that "appellants' reliance on section 301 of the Restatement [holding that the children are the stocks in a gift "to the children of B and C per stirpes"] is misplaced. Were it necessary to supplement or reinforce our conclusions with constructional rules of the Restatement of Property we would probably conclude that section 303, not section 301, was applicable. Under section 303 . . . distribution would be made under applicable California statutes of intestate succession, and thus . . . under . . . Maud v. Catherwood . . . the same result would be reached." Id. at 216-217, 40 Cal.Rptr. at 916.

Bank of New England, N.A. v. McKennan, 19 Mass.App.Ct. 686, 477 N.E.2d 170 (1985), review denied, 395 Mass. 1102, 483 N.E.2d 197 (1985), arose in a state with a hybrid intestate succession law. After the death of the testator's last child, the corpus of the residuary trust was to be distributed "'to my issue then living, according to the stocks'. . . . There is only one issue: whether the phrase . . . calls for the stocks to he the three children . . . or to be the nine grandchildren. . . . Had the will not included the phrase . . . the estate would have passed in accordance with the Massachusetts statute of descent and distribution." Id. at 688, 477 N.E.2d at 172. The court found, in effect, that the rule that the intestate succession law should be applied would yield to a faint glimpse of contrary intention, holding that Bradlee v. Converse (discussed in item 3b of the Reporter's Note to Section 28.1), rather than the statute, should control who the stocks are.

In re White's Estate, 127 Vt. 28, 238 A.2d 791 (1968), has a dictum to similar effect. On the death of the testatrix's husband, the corpus of the residuary trust was to go to her two children "and their heirs forever per stirpes and not per capita." One child had died without issue, and the other was living, but the court found the meaning of "per stirpes" to be indirectly relevant to its holding. The court found, "It is a general rule that a devise to heirs or next of kin will be construed to accomplish a stirpital distribution whenever possible. In re Estate of Valiquette 122 Vt. 364, 173 A.2d 839 [1961]. It would appear here that the testatrix, in order to make doubly sure that the residual estate would be shared evenly between any family of Frederick and any family of Dorothy, added the 'per stirpes' phrase. It does serve to rebut the statutory 'per capita' presumption at the level of grandchildren." Id. at 32, 238 A.2d at 794. This statutory presumption is the result of judicial construction; see Martin, infra item 6. Valiquette, cited above, held that a gift to he distributed to the testator's heirs "according to the stock in like manner as if I had then died intestate" would be distributed per stirpes rather than according to the intestate succession law. The dispute, however, was not over the stocks of the stirpes, but over whether only testator's three living first cousins were entitled to take, to the
exclusion of descendants of deceased cousins. See also Marshall, infra item 8a; In re Gould's Estate, 28 Misc.2d 1067, 213 N.Y.S.2d 375 (1962), affirmed, 15 A.D.2d 641, 223 N.Y.S.2d 855 (1961), ("the fact that the legislature . . . did not adopt a complete stirpital method of distribution is irrelevant to the interpretation of this testator's language." Id. at 1070, 213 N.Y.S.2d at 379.)

4. Cases not adopting a plan of distribution where the stirpes branch from the common ancestor—

a. Cases holding that distribution should be per capita across all generations. Freeman v. Parsley, 3 Ver. 421 (Ch.1797), cast a long shadow over the American cases in the 19th and early 20th centuries. Most of the legatees named in a will had predeceased the testator, and the gifts over were to their "issue." The Lord Chancellor decreed that each gift to "issue" should be distributed per capita, but expressed misgivings: "I very strongly suspect, that . . . I am not acting according to the intention: but I do not know, what enables me to control it. If a medium could be found between a total exclusion of the grandchildren and allowing them to share equally with their parent," as "not one grantor in a thousand would suppose that by using such a word he would . . . permit two or three generations . . . to share concurrently and per capita . . . most testators employ the term in the sense of descending heirs." Id. at 405, 43 S.W. at 773.

A per capita distribution was also found in Pearce v. Rickard, 18 R.I. 142, 26 A. 38 (1893), but the legislature responded in 1896 by enacting the predecessor to R.I.Gen.Laws § 33-6-9 (see item 3 of the Statutory Note to this section). Utah, Montana, New York, and New Jersey also enacted statutes removing the per capita presumption, but the New York statute did not go into effect until 1921, and the New Jersey statute was enacted only after the New Jersey Supreme Court unanimously affirmed the per capita distribution of a gift to "issue" in Stickel v. Douglass, 7 N.J. 274, 81 A.2d 362 (1951).

The repudiation of this rule a century later by the Massachusetts courts was controversial. In Ridley v. McPherson, 100 Tenn. 402, 43 S.W. 772 (1897), the court cited Jackson, supra item 3a, as authority that "issue" included all lineal descendants, but followed Freeman as to the distribution among them, sharing Lord Lougborough's "regret that there was no medium between the total exclusion of grandchildren and allowing them to share equally with their parent," as "not one grantor in a thousand would suppose that by using such a word he would . . . ." Id. at 1070, 213 N.Y.S.2d at 379.

See also items 5b and 7, infra.

b. Cases holding that the stirpes should branch from the first
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generation with surviving members. In B.M.C. Durfee Trust Co. v. Franzheim, 349 Mass. 335, 207 N.E.2d 913 (1965), the corpus of the residuary trust was to be distributed, when both of testator's children, the income beneficiaries, died childless, "to and among the issue of my sister, [A], and my sister [B]." The court was applying Rhode Island law, and noted that if it were to follow the first Restatement and apply the Rhode Island intestate succession law, "the testator's sisters themselves should be treated as the original stocks . . . the gift, however, was to the sisters' issue. Read in light of the circumstances that the testator's sisters, when the will was executed, were of an age at which neither of them was likely to have further issue, we think it more probable that the testator's ambiguous provision was intended to designate his sister's [sic] children whom he knew . . . as the original stocks." Id. at 342, 207 N.E.2d at 917. The court used similar reasoning when applying Massachusetts law in B.M.C. Durfee Trust Co. v. Borden, 329 Mass. 461, 109 N.E.2d 129 (1952), and in Gleason v. Hastings, 278 Mass. 409, 180 N.E. 129 (1932).

In Warren v. First New Haven Nat. Bank, 150 Conn. 120, 186 A.2d 794 (1962), the corpus of the residuary trust was to be distributed "to the lawful issue of my said son and of my deceased daughter . . . share and share alike." The probate court had ordered a per capita distribution among the testatrix's five grandchildren and 14 great-grandchildren. The supreme court discussed the history of the construction of the term "issue," and found that "in the absence of any direction to the contrary, we have uniformly held in analogous cases that the "per stirpes" rule of distribution should be adopted." Connecticut has a per stirpes descent statute, and the court consistently used "per stirpes" and "according to intestate succession law" interchangeably, e.g.: "A statute was enacted [in New Jersey] providing, in substance, that where a will or trust makes a gift to 'issue' and contains no contrary expression, the issue will take per stirpes [citation]. This more modern and majority rule of construction has been adopted by the American Law Institute as follows: 'When a conveyance . . . [is] in favor of a group described as the "issue of B," . . . then, unless a contrary intent of the conveyor is found . . . distribution is made . . . [as] if B had died intestate on the date of the final ascertainment of the membership of the class, owning the subject matter of the class gift.' Restatement, 3 Property § 303(1)." Id. at 126-127, 186 A.2d at 797. After holding that the great-grandchildren were not entitled to take, the court ordered a per capita distribution among the five grandchildren. (The court did not mention the possibility that the children rather than the grandchildren might have been the stocks of the stirpes.)

c. Cases holding that a statute of descent and distribution should control. As discussed in item 3c, supra, cases exactly on point are hard to find. Although there are few decisions in support of the rule of this section, as against the rule of § 303 of the first Restate-
ment, and these decisions could be interpreted on other grounds, the judicial authority supporting § 303 as against this section is equally limited. A number of cases, either in states with per stirpes descent statutes, or in situations where the individual, whose "issue" was the beneficiary of the gift, had living children, have used intestate succession laws in support of per stirpes distribution (see item 3b supra). But only in New York, one of the states where the result is mandated by statute, have courts actually used the applicable intestate succession law to defeat a per stirpes distribution, or to find the stocks of the stirpes in the grandchildren rather than the children of the common ancestor.

The modern judicial authority is found in dicta in the courts of Michigan and Massachusetts. In re Horrie's Estate, 365 Mich. 448, 113 N.W.2d 793 (1962), found that "the meaning of a bequest over to the 'surviving issue' of primary beneficiaries [although an ancient problem in other jurisdictions, . . . is presented to us as a matter of first impression.]" Id. at 454, 113 N.W.2d at 795. The court explained why the per capita rule was discredited, and found that, "Other courts, now constituting a majority . . . have held . . . that distribution is to be made per stirpes (citing Dexter and Mayhew, supra item 3a, Farmers' Loan, infra item 5a; In re Beach's Estate, 103 Vt. 70, 151 A. 654 (1930)) . . . Finally, still other courts have followed what now is the rule set forth in 3 Restatement, Property, § 303(1) . . . [no citations]." The court adopted the rule of § 303 "not only because we favor 'that construction of a will which will make a distribution as nearly conform to the rule of inheritance as the language will permit,' [citations], but also because it seems profoundly unlikely to us that a testator would . . . intend a result by which 1) descendants would share his bounty equally without regard to remoteness of degree of kinship, 2) children would participate simultaneously and equally with their parents, and 3) the share of beneficiaries in one family branch would be determined by the number of beneficiaries in other family branches regardless of the degree of kinship with the ancestor . . . our laws of descent and distribution require that persons on the same degree of kindred to the common ancestor take equally." Id. at 454, 113 N.W.2d at 796. The ancestor had a surviving child, however, so that the statutory and per stirpes distributions were identical.

In Massachusetts, the dicta are as recent as McKen nan, supra item 3b, and as ancient as Dexter, supra item 3a, in which Justice Holmes said, "what the principle of division would have been had there been no descendants alive nearer than grandchildren, we need not discuss. Possibly in that case each grandchild would have formed a new stirpes, after the analogy of the statutes." Id. at 326, 17 N.E. at 554. In the two cases where the Supreme Judicial Court actually had the opportunity to apply the rule, however, it found, in ambiguous circumstances, a contrary intent of the testator, overcoming the Massachusetts descent statute in McKen

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ennan, and overcoming the Rhode Island descent statute in Franzheim, supra item 4b.

Compare also In re Love’s Estate, 362 Pa. 105, 66 A.2d 238 (1949), discussed in item 4c, of the Reporter’s Note to Section 29.4. The will was executed before the enactment of a statute fixing the time at which the beneficiaries of a postponed gift to “heirs” were to be identified. In justifying the application of the principle embodied in the statute, the court cited Mayhew, supra item 3a, as authority that gifts to “issue” in Pennsylvania are distributed in accordance with its descent statute. Although on the facts of Mayhew, the per stirpes distribution ordered by the court is indeed in accordance with Pennsylvania’s hybrid descent statute, the opinion itself made no reference at all to descent statutes or intestate succession. The Mayhew court’s explicit statement that the term “issue” is not equivalent to “heirs of the body,” however, should not be read as a definitive statement that the descent statute should not be applied, but only that “issue” is a word of purchase rather than limitation.

5. “A faint glimpse of a different intention” —

a. Cases finding a different intention. During a transitional period, when courts recognize that the weight of common law clearly supports a rule which the weight of common sense clearly opposes, there is a tendency to pay lip service to the rule while finding any available excuse to avoid applying it. Many courts, reluctant to adopt other than a per capita rule for multigenerational class gifts, nevertheless avoided applying the per capita rule whenever possible. A leading example is In re Farmers’ Loan & Trust Co., 213 N.Y. 168, 107 N.E. 340 (1914), dealing with a gift to “his or her issue, if any, such issue to take equally what would have been the parent’s share.” Judge Cardozo wrote for a unanimous court: “The presumption in this state favors a per capita distribution . . . but the presumption yields to ‘a very faint glimpse of a different intention.’” Id. at 174, 107 N.E. at 342. Despite a recognition that “parent” should probably be construed to mean “ancestor,” the sight of that term was found to be a sufficient glimpse to allow “issue” to be construed as implying a stirpital distribution, not only in this clause but on other clauses which made no reference at all to representation: “The word ‘equally,’ standing by itself, imports a division per capita, but it may get another meaning from the context. Another meaning is given to it here by the direction that the issue shall take their parent’s share.” Id. at 174, 107 N.E. at 343.

b. Cases failing to find a different intention. The formula that multigenerational class gifts should be distributed per capita absent a faint glimpse of a different intention was the majority view for much of the early part of this century, but by the time the first Restatement was written, as discussed in Comment a to § 303, “the change ha[d] been finally recognized.” Cf. Mayhew, supra item 3a; Horrie, supra item 4c.
The dangers of such a rule are illustrated by Petry v. Petry, 186 A.D. 738, 175 N.Y.S. 30 (1919). A gift "unto the issue of my deceased brother [A] absolutely and forever" was distributed per capita in an anguished opinion. The court cited Farmers' Loan, supra subitem a, but held that "there is nothing in the context of this will upon which we can predicate an intention to give the word 'issue' any other meaning than that fixed upon it by the decisions of the courts. . . . The exceptions . . . seem to have a more general application than the rule. . . . Such a result argues a fallacious rule." Id. at 743, 175 N.Y.S. at 31. Nevertheless, the court could find no countervailing authority to Freeman, supra item 4a "of which Judge Holmes makes light in Dexter [supra Item 3a] . . . stating that the 'finding of a medium . . . does not strike us as insuperable'. . . . There was no such difficulty under the laws of Massachusetts . . . but there was an insuperable difficulty under the laws of England." Id. at 745, 175 N.Y.S. at 35. Although Farmers' Loan gave rise to a degree of optimism regarding the laws of New York, the judge found it beyond his power to extend the rules himself: "If I were not controlled by the decisions of the Court of Appeals, I would construe the word 'issue,' when not controlled by the context of the will, to mean lineal descendants . . . [taking in the manner provided] under our Decedent Estate Law . . . we can only express the hope that the Court of Appeals will do so." Id. at 747, 175 N.Y.S. at 36. But the Court of Appeals, almost identical in membership to the Farmers' Loan court, affirmed per curiam, sub nom. Petry v. Langan, 227 N.Y. 621, 125 N.E. 924 (1919). Petry was one of the cases cited by Judge Cardozo as "deploring" the per capita rule in New York Life Insurance & Trust Co. v. Winthrop, 237 N.Y. 98, 142 N.E. 431 (1923), discussed in item 3a of the Reporter's Note to Section 29.6.

When the per capita rule is repealed only by statute, courts must continue to follow it in construing earlier wills. In Plainfield Trust Co. v. Hagedorn, 28 N.J. 483, 147 A.2d 254 (1958), paragraph "1st" of Article "Third" of a pre-1952 will referred to "issue per stirpes and not per capita," with a detailed description of the stirpital distribution desired. The last sentence again used the phrase "issue . . . per stripes [sic, but text of opinion is riddled with transposed letters] and not per capita." Paragraphs "2nd" and "3rd" simply referred to "issue," and it was one of these gifts which was before the court. By a 4–3 vote, the court ordered distribution per capita. "The scrivener did not employ language loosely and there is nothing to indicate that when he used the unqualified term 'issue' he meant it in other than its primary signification. Quite the contrary, for it is clear that he well understood the legal effect given to the word 'issue' when not further explained." Id. at 489, 147 A.2d at 257. Chief Justice Weintraub, for the dissenters, found the distribution "arbitrary and fortuitous." He discussed the history of the "antiquated" per capita rule and its
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"strained" treatment in New Jersey, and noted, "Curiously at war with the prima facie signification of 'issue' is the oft-repeated proposition that if there is doubt the construction should favor per stirpes distribution because it accords with the more probable intent of the testator and the policy of the law [citing, inter alia, Stoutenburgh v. Moore, discussed in item 4a of the Reporter's Note to Section 28.1]." Id. at 495, 147 A.2d at 261.

Hagedorn was the last reported New Jersey case to fail to find the requisite glimpse of a contrary intent. When In re Moses' Estate, 58 N.J.Super. 67, 155 A.2d 273 (1959) came to the Supreme Court on appeal, it was affirmed per curiam, 32 N.J. 341, 160 A.2d 809 (1960). Justice Proctor, who wrote a dissenting opinion reaffirming his commitment to Hagedorn, was alone in his dissent.

Even wills written after the effective date of the statute are not always immune from such treatment. In re Phares' Estate, 38 Misc.2d 1, 237 N.Y.S.2d 925 (1963), held, contrary to the principle set forth in Comment g, that although gifts to "issue" are to be distributed per stirpes, gifts to "descendants" should still be distributed per capita. "This Court is inclined to feel that had the legislature intended the meaning of the word 'descendants' to be governed by [the predecessor to EPTL § 2-1.2], it would have in some manner made it clear . . . this Court is reluctant to add to the scope of such a statute in derogation of the common law rule." Id. at 2, 237 N.Y.S.2d 927. See also In re Gardiner's Will, 20 Misc.2d 772, 191 N.Y.S.2d 520 (1959). But see Estate of Outerbridge, 91 Misc.2d 886, 398 N.Y.S. 2d 517 (1977); Matter of Libby's Estate, 206 Misc. 723, 134 N.Y.S. 2d 839 (1954). Cf. Will of Dow, infra item 7.

c. Cases construing "issue" to mean "children." As was noted in Jackson v. Jackson, supra item 3a, a number of earlier cases had mitigated the effect of the per capita rule by construing "issue" to mean children. (See Comment j.) For example, in Sibley v. Perry, 7 Ves. 522 (Ch. 1802), Lord Eldon, though expressing considerable doubt as to the innovation he was promulgating, held that when the will directed that "if all or any of [the legatees named] shall die before I do, then I will, that the lawful issue of every one of them so dying before me shall share and share alike have and enjoy that [legacy] which their respective parents if living would have had and enjoyed," the reference to "parents" meant that "issue" did not include the grandchildren. King v. Savage, 121 Mass. 303 (1876), followed Sibley. Twentieth-century pre-statute New Jersey and New York cases have taken the same approach; see, e.g., Central Hanover Bank & Trust Co. v. Helme, 121 N.J.Eq. 406, 190 A. 53 (1937).

Note that when an antilapse statute can be invoked, orphaned grandchildren need not be disinherited and a full per stirpes distribution is brought about indirectly.

In Rogers v. Atlantic National Bank, 371 So.2d 174 (Fla.App. 1979), the per capita distribution was acknowledged by the court to be the reason for its decision.
Here, the distribution was the consequence not of a rule of construction, but of the testatrix's own words: "if both shall be dead then to the living issue of each or either of them per capita, in fee simple forever." The court, contrary to the rule set forth in Comment d, held that the testatrix had a per capita distribution among the children (testatrix's grandchildren), with more remote descendants taking as necessary by representation. "Whatever may have been the original rule, the courts today tend strongly to the view that the children of living parents do not take under a gift to 'issue' as against their parents." Id. at 176. Compare Rembert v. Vetoe, infra item 7, which excluded the children of living parents but then carried out a full per capita distribution.

In Gowthorpe v. Goodwin, 72 Mich.App. 648, 250 N.W.2d 514 (1976), reversed sub nom. Estate of Butterfield, 405 Mich. 702, 275 N.W.2d 262 (1979), a "will which had been carefully drawn by distinguished counsel" established a testamentary trust, the income to be distributed "in equal portions to each of my children, or to the surviving issue of my deceased child." On the death of the last child, the corpus was to go "share and share alike, to all of my grandchildren then living," or to the testator's "heirs" if all the grandchildren predeceased the last child. The trial court and the intermediate court found that as great-grandchildren and beyond were excluded from the distribution of the corpus (except under the gift over to heirs), they must also have been excluded from the distribution of income, so that testator intended the "issue" of his children to comprise only grandchildren. The supreme court reversed, holding that it was well established that the income and principal of trusts could be distributed according to entirely different plans (see item 5a of the Reporter's Note to Section 28.1), and ordered that any deceased child's share of the income be distributed per stirpes among all of that child's descendants.

d. Cases holding that "issue" is a word of limitation. In some older cases, the entire problem of how to distribute gifts to "issue" was avoided by invoking the Rule in Shelley's Case (see § 30.1) and treating "issue" as a word of limitation rather than a word of purchase. South Carolina followed this rule much later than any other jurisdiction. In Lucas v. Shumpert, 192 S.C. 208, 6 S.E.2d 17 (1939), the testator left a tract of land to his widow for life, then to be divided according to a specified plan among his four daughters "during their natural lives and after their deaths to their bodily issue if any surviving them." Citing Rembert v. Vetoe, infra item 7, to the effect that "issue" meant "heirs of the body," the court held, "as used in a will, designating beneficiaries, the word 'issue' is ordinarily a word of limitation and not a word of purchase." Id. at 213, 6 S.E.2d at 19.

6. Judicial construction of descent statutes—as mentioned, some of the details of the classification in item 2 of the Statutory Note to this section are tentative, because the law provides for "representation" but does not define it, or defines it in a way allowing more than one
construction. The 1947 official comment to 20 Pa.Cons.Stat.Ann. § 2104 (West Supp.1986) says, "This appears as the first rule of descent to eliminate any question concerning the manner in which the shares shall be divided. . . . Definition of the words 'by representation' is not needed because they are a term of art well known to lawyers and about which there can be no dispute except [that resolved in this law] as to the top level at which the stirpital distribution starts. See 2 Blackstone 217."

But see In re Estate of Martineau, 126 N.H. 250, 490 A.2d 779 (1985): "The argument [that New Hampshire enacted most of the Uniform Probate Code, and therefore the failure to enact § 2-106 indicated that 'representation' should be per stirpes when heirs are of unequal degree] is unpersuasive. The formula contained in § 2-106 of the Code merely states what 'representation' has traditionally been taken to mean. . . . the legislature's failure to enact it suggests no more than economy." Id. at 253, 490 A.2d at 781.

As discussed in the introduction to item 3b, supra, fact situations that distinguish between the "per stirpes" and "hybrid" descent patterns are already relatively uncommon; situations similar enough to that in item 1 of the Statutory Note to this section as to distinguish among the various types of hybrid patterns are rare indeed. Colony, v. Colony, infra, Reporter's Note to Section 29.4, item 4a, was able to test whether New Hampshire's descent statute was of type "C3" or "C4" only because the testator called for his brother's "heirs" to be ascertained as if his brother had survived until the termination of the trust, at the death of the testator's daughter. Nevertheless, several jurisdictions have had the opportunity to consider the problem, and almost invariably they have at least agreed that their statutes did not fall into category "C1" or "C2."

Dicta in these cases imply that "C3" (as in Pennsylvania) is the prevailing construction. In Balch v. Stone, 149 Mass. 39, 20 N.E. 322 (1889), the intestate was survived by "eighteen nephews and nieces, and five grand-nephews and grand-nieces, the issue of four deceased brothers and sisters." The relevant statute, essentially identical to the present Mass.Gen.Laws c. 190 § 3(1), read, "if all such issue are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation." The court observed, "The pronoun 'they' . . . has no antecedent directly expressed, except 'all such issue,' and if this is controlling, it would follow that all such issue must [represent the four deceased brothers and sisters]." Id. at 40, 20 N.E. at 323. The court held, however, that the legislature, in using that language in 1805, did not intend to change the substance of the earlier law that "the inheritance shall descend equally to the next of kin in equal degree, and those who represent them." The court therefore held, "The policy of our law is that heirs or next of kin who are in equal degree of kindred to the ancestor inherit per capita, while those in a more remote degree inherit per stirpes, or such portion that their immediate ancestor would take if living." Id. at 42, 20 N.E. at 324.

Compare also In re McKeon's Estate, 25 Misc.2d 550, 199 N.Y.S.2d
158 (1960), discussing the historical background of the similar New York statute. In re Veitch’s Estate, 192 N.Y.S.2d 229 (1959) held that a widow and seven nieces and nephews were not “in unequal degree of consanguinity” within the meaning of the statute; the nieces and nephews therefore took per capita rather than per stirpes.

In some statutes, the ambiguity runs deeper. Vermont Stat.Ann. 14 § 551 (1974) simply provides, “The real and personal estate . . . not otherwise appropriated . . . shall descend in the following manner:

(1) In equal shares to the children of such decedent or to the legal representatives of deceased children. . . .” In re Martin’s Estate, 96 Vt. 455, 120 A. 862 (1923), construed this statute to be hybrid rather than per stirpes: “The appellant insists that these grandchildren, being ‘representatives of deceased children,’ take by representation; and if this is so, it will be difficult to avoid her conclusion that they take per stirpes . . . [but] we get our law of descent largely from the English statute of distributions . . . under which . . . when the claimants . . . were equally related to him, they took directly and per capita, not by representation and per stirpes. For, it was said, the latter method would not then be necessary to prevent the exclusion of those in a remoter degree of relationship, and therefore would be contrary to the spirit and policy of the statute, which aimed at a just and equal distribution. . . . Such equality of benefit is the unmistakeable spirit of our statute of descent. It runs all through it. Thus, children, under Canon I, share equally; father and mother, under Canon III, share equally; brothers and sisters, under Canon IV, share equally.” Id. at 466–467, 120 A. at 862.

The spectacular exception to the general rule is Maud v. Catherwood, 67 Cal.App.2d 636, 155 P.2d 111 (1945). The corpus of an inter vivos trust, after the death of settlor’s last child, was to be distributed according to intestate succession law among settlor’s heirs. The court held that rather than six primary shares, corresponding to the six grandchildren who survived or left issue, there would be four shares corresponding to the children who died leaving issue. The court conceded that in all of the cases cited, from states where the grandchildren (or nieces and nephews) would have inherited per capita if all had survived, the survivors still inherited per capita as among themselves. However, with the exception of Massachusetts and Maine cases following Balch, supra, all of those cases involved “statutes with different provisions,” and, “The error appearing in the Massachusetts cases does not require that we should likewise adopt an incorrect interpretation. . . . If there is unfairness in the rule, we are reminded that ‘Succession to estates is purely a matter of statutory regulation, which cannot be ‘ianged by the courts.’” Id. at 651, 155 P.2d at 119.

In 1983, the California legislature acted to “change the rule of Maud v. Catherwood.” Both “representation” and “distribution per stirpes” were defined, effective as of January 1, 1985, to mean “pattern C4” (as in § 2-106 of the U.P.C.). In 1984 this was amended by adding to § 240 of the Probate Code, “if a will or trust calls for distribution per stirpes or by right of representa-
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tion, these terms shall be construed under the law that applied prior to January 1, 1985." See Cal.Prob. Code § 240 and commentary (West Supp.1985). In 1985 the present law, set forth in item 3 of the Statutory Note to this section, was enacted to take effect in 1986.

In re Brown's Estate, 158 Mont. 413, 492 P.2d 914 (1972) arose under Montana's old intestate succession laws, similar to those of California and Massachusetts. The court ordered a per stirpes distribution among decedent's living nephews and nieces and the children of the predeceased nephews and nieces. As all of the heirs were descendants of decedent's one sister, the distribution would be the same whichever generation was taken as the stocks, but the court cited Maud as authority for the definition of "per stirpes." Montana enacted the Uniform Probate Code in 1974.

No other court outside California has cited Maud with regard to distribution, and the only 20th century non-California case found that could be construed as imposing pattern C2 is Succession of Jacobs, 129 La. 432, 56 So. 358 (1911). The intestate was survived by the daughter of a predeceased brother, two granddaughters of a predeceased sister, and unspecified descendants of a predeceased half-brother. Section 902 of the 1870 Civil Code provided, "they inherit in equal portions and by heads if they are in the same degree, and inherit by their own right; they inherit by roots if all or some of them take by representation." (Quoted from 10 Tulane L.R. at 613.) The court held that the "roots" were intestate's mother and father rather than his nephews and nieces. Thus the niece took ⅛, and the descendants of the half-brother were to divide the remaining ⅕ per stirpes. (Louisiana half-blood law treats the maternal and paternal lines of descent separately.) The prevailing opinion, however, (though no test cases have been found), seems to be that Jacobs was not another Maud, but merely an application of a general per stirpes pattern. See Comment: Inheritance by Grandchildren in Their Own Right and by Representation, 10 Tulane L.R. 613 (1936).

The theory is that grandchildren take per capita only when they take "in their own right," not because all of the children are dead but because all living children have renounced their heirships or been disinherited. The new intestate succession law enacted in 1981 is harder to reconcile with this view: although it retains in the second clause the possibility that "all of them" might take by representation, it deletes from the first clause the reference to taking "by their own right" that had been construed to be a precondition rather than a consequence. La.Civil Code § 888 (West Supp.1985.)

Per capita representation, pattern "C1," seems to have been confined to testamentary gifts to issue and to "heirs, share and share alike." The annotation in W.Va.Code Ann. § 42–1–3 (1982) does say that "representation," when used in the descent statute, means "equal division among the members of" "each class of the descendants of those [who are being represented]." However, in the case referred to, Overton v. Heckathorn, 81 W.V. 640, 95 S.E. 82 (1918), the "descendants" among whom the per capita division was made were children.

7. Contrary intent of the donor: distribution per capita—In Welch v.
Phinney, 337 Mass. 594, 150 N.E.2d 723 (1958), the corpus of a testamentary trust was to be distributed "to and among the issue then living of my said nephews and said niece, per capita and not per stirpes." The court followed the reasoning set forth in Comment d, determining that "per capita and not per stirpes" did not refer merely to the distribution at the level of the great-nephews and great-nieces (compare Rogers, supra item 5c), and distinguishing the cases where gifts "to issue share and share alike" were distributed per stirpes on the ground that "share and share alike" and similar phrases were compatible with stirpital distribution while "per capita and per stirpes" was intrinsically incompatible.

This principle, recognized in Comment d, that language such as "to issue share and share alike" or "equally among the issue" should be construed as calling for an equitable distribution rather than for a per capita distribution, is the one followed in the clear majority of modern cases. See, e.g., Morton, supra item 3b; Farmers' Loan, supra item 5a; Butterfield, supra item 5c; Warren, supra item 4c; Moses, supra item 5b. In Warren, the court observed, "A direction that distribution be made among the issue 'equally' or 'share and share alike' or 'in equal portions' is less decisive. These words may indicate the intent to have equality either as between the ultimate members of the class or as between the lines of descent from the designated ancestor.' Restatement, 3 Property, § 303(1) Comment i. In the case before us, there is no express direction that the distribution be made per capita." Id. at 797. See also item 5d of the Reporter's Note to Section 28.1.

Some courts, however, have taken the opposite view. In Neafie Estate, 74 Pa.D. & C.2d 380 (1976), the corpus of a testamentary trust, at the end of the perpetuities period, was to be divided "among such of the descendants of [testator's daughter, sister, and brother] as may be living at the time of this distribution, share and share alike." The court held, "the plain meaning of ' . . . share and share alike, is that every descendant is to receive an equal per capita share, regardless of his or her family line and regardless of the existence of a living parent . . . who will concurrently share. This was the law in 1891 when the will was made; it was the law in 1898 when testator died and it is the law today." Id. at 370. See also Estate of Mills, 352 Pa.Super. 222, 507 A.2d 853 (1986), where language elsewhere in the will satisfied the court that the settlor knew how to make a stirpital gift expressly when such was her intent: "Which is the fairest or most equitable distribution is not for this court to say. Settlor determined this herself and the words of her deed bind us." Id. at 225, 507 A.2d at 854.

In Will of Dow, 55 A.D.2d 323, 390 N.Y.S.2d 721 (1977), the testator was survived only by two nephews and their many descendants. Two shares of the income from a complicated trust were to be paid, respectively, to (a) the two nephews and a named grandnephew, "divided equally"; (b) the "living issue" of those three, "divided equally." The circumstances indicated that the testator really did intend a per capita distribution among the more distant relatives, and the court so ordered.
The case, however, was governed by District of Columbia law, which incorporates Maryland common law both by tradition and by statute, and the court noted that Maryland strongly favors stirpital distributions (See, e.g., Weller, supra item 3b; Ballengor, discussed in item 3b of the Reporter's Note to Section 28.1.) "However, research of decisional precedents of the District of Columbia discloses no such declaratory adoption of the so-called Massachusetts rule . . . we do, however, glean some insight from In re Robins' Estate, 38 F.Supp. 468 (D.C.1941), wherein the court, although finding that stirpital distribution was there intended, implied that a different result would have been reached had words importing an equal distribution been used by the testator." The court found that the "limited deference to be extended to the decisional law of Maryland" was overcome by the "dicta expressed . . . in the Robins case" together with the fact that the Maryland decisions "involv[e] rejection of a common law principle." Id. at 333-334, 390 N.Y.S.2d at 728. See also Murphy, infra item 8a.

Rembert v. Vetoe, 89 S.C. 198, 71 S.E. 959 (1911), is often cited as one of the landmarks in the transition from the "English" rule to the "Massachusetts" rule. The remainder after a life estate in the testator's daughter was "to be equally divided among [her surviving] issue." The court held that "issue" was equivalent to "heirs of the body," and used the descent statute (a per stirpes statute) to determine who those heirs were, thereby excluding all descendants of living descendants. To determine the shares, however, the court apparently held that "equally divided" mandated a per capita distribution among those descendants who shared in the gift, "Pattern B2" in the classification of item 1 of the Statutory Note.

8. Similar class gift terms—
a. Issue of a class. As discussed in item 4b, when a gift is made "to the issue of" more than one person, as a single class gift, most courts will distribute the gift per stirpes, but find the stocks in the first takers rather than the common ancestor. This mode of distribution extends by representation the per capita distribution to "children of a class" (see item 6a of the Reporter's Note to Section 28.1), and suggests a view that "issue" refers primarily to children, and secondarily to representatives of deceased children.

Weller, supra item 3b, rejected this approach: "appellants pin their hopes on language contained in comment h to section 301(a) calling[d] for a per capita distribution of a gift to . . . 'children of B and children of C'. . . . While there is an indication in comment h that in a stirpital distribution, the stocks may be found among the first takers, we remain unpersuaded. The answer is found, of course, in the use of the word "children" in section 301, which brings into being a concept totally different from that created by a dispositive provision using the words 'issue' or 'descendants.'" Maryland now mandates this result by statute; see item 3 of the Statutory Note to this section. Rogers, supra item 5c, decided in a state similarly inclined toward a stirpital distribution wherever possible, suggests that in such a
state the purpose of a gift "to issue per capita" is to defeat this presumption and establish the stocks in the first takers.

In re Murphy's Will, 103 Misc. 2d 719, 426 N.Y.S.2d 923 (1980), dealt with a gift "in equal shares per stirpes to the issue of my children living at the time of my decease." One child had two children, the other five. The court held, "The manner of distribution hinges on whether the phrase 'per stirpes' refers to 'children' or 'issue' . . . If . . . to 'issue,' the will merely states the statutory presumption [of EPTL § 2-1.2; see item 3 of the Statutory Note to this section] and as such . . . is superfluous. If 'per stirpes' refers to children . . . then the direction to pay equal shares to the issue would seem to call for a per capita distribution . . . given these alternatives, the court must construe Paragraph SECOND in the manner which most simply follows the statutory presumption." Id. at 721, 426 N.Y.S.2d at 923. Following the statutory presumption, the court then ordered a per capita distribution among the seven grandchildren because all were "in equal degree of consanguinity to their common ancestor."

Estate of O'Brien, N.Y.L.J., Feb. 17, 1984, at p. 12 Col. 6, (N.Y.Co.Surr.Ct.1984), posed the problem of who the "common" ancestor is when the gift is to the "issue" of a multigenerational class. The testatrix had two brothers, A and B, and a sister, C, all of whom survived her if the court was precise in its references to "deceased" relatives. The income from the residuary trust was to be used to pay a fixed annuity to A, the remaining income to go to A, Jr. "If my said nephew shall predecease my said brother, to pay over and divide [A, Jr.'s share] to and among the issue then surviving of my said nephew [A, Jr.], and my sister [C] and my brother [B]." After the death of the survivor of A and A, Jr., the corpus was to be divided "to and among [the same class description] per stirpes." There was no discussion of the possibility that B and C themselves, rather than their issue, might be the intended beneficiaries, and the court ordered distribution per capita among the two children of B, the one child of C, and the one child of A, Jr. Similarly, the court held that these four would be the stocks of the stirpes when the corpus was divided on A's death. There is a statutory presumption that testamentary gifts to issue are to be distributed per capita when all takers are "in equal degree of consanguinity to their common ancestor," EPTL § 2-1.2 (McKinney 1981), and the court held that in this context, the degree should be computed for each taker with respect to the ancestor named in the will. As authority, the court cited Murphy, supra, and Matter of Ross, 102 Misc.2d 796, 424 N.Y.S.2d 661 (1980), discussed in item 6a of the Reporter's Note to Section 28.1, neither of which dealt with the issue of a multigenerational class. In Ross, the court had held that EPTL § 2-1.2 applied to a gift "to the children of my nephews" because children were among those covered by the statutory definition of "issue" as "descendants in every degree." Dow, supra Item 7, involved an even more compli-
cated multigenerational situation, but the court did not have to consider what a stirpital distribution would equal when some "stocks" are children of others. See also Estate of Luke, discussed in item 4b of the Reporter's Note to Section 28.1.

When a stirpital distribution is more natural, as in item 3c, supra, the phrase "per stirpes" may be used to override the constructional preference for a per capita distribution at the level of the first takers. See In re Marshall's Estate, 377 Pa. 41, 103 A.2d 420 (1954), involving a gift to the "descendants [sic]" of my married children. The court held that the children, not the grandchildren, were the stocks: "He could have provided a per capita distribution for his grandchildren if he so desired, by merely dividing the proceeds 'among the descendants of my married children' . . . He well knew that Sarah had one and Margaret five children." Id. at 44, 103 A.2d at 422.

b. "Children" construed to mean "issue." As discussed at the end of item 6b of the Reporter's Note to Section 28.1, the term "children" is occasionally used when donor's true intent is simply to arrange for representation. In re Barnum's Will, 53 Misc.2d 413, 278 N.Y.S.2d 934 (1967) involved a testamentary trust, the corpus to be distributed on the death of the testator's daughter "to [her] child or children to be divided between them equally." The daughter had one child at the time the will was executed, who predeceased his mother. The court ordered distribution per stirpes among all of the daughter's descendants, holding that the testator did not intend his grandson born after the will was executed to be the sole beneficiary, to the exclusion of the testator's great-grandchildren by the other grandson. This case was reversed, however, in 29 A.D.2d 945, 289 N.Y.S.2d 25 (1968).

c. Female issue. In Prince v. Nugent, 93 R.I. 149, 172 A.2d 743 (1961), each of three shares of the income from an inter vivos trust was to be distributed "per stirpes, to and among the female children and more remote female issue" of one of three named individuals. The court held that the natural daughter of the adopted son of one of the named individuals was his "female issue" and therefore entitled to the corresponding share of the income. In Prince v. Roberts, 436 A.2d 1078 (R.I.1981), the court held that the woman who had been receiving all of the income of the other shares would now have to divide it with her brother's newborn daughter. Thus the interest of any beneficiary was subject to partial divestment under a distribution scheme that, in effect, treated all men in the family as "fertile decedents."

d. Offspring. Gifts to "offspring" are generally considered to be equivalent to gifts to "issue." In fact, in First Nat. Bank of Cincinnati v. Gaines, 15 Ohio Misc. 109, 237 N.E.2d 182 (1967), discussed in item 3c of the Reporter's Note to Section 28.1, the meaning of "issue" was clarified by defining it as "offspring." The only recent cases which have been found that actually involve gifts to offspring, however, have acknowledged the rule only to find an exception and construe
the term to mean "children." In Bowman v. Weer, 204 Md. 344, 104 A.2d 620 (1954), the testator left to his niece "the whole of my Estate, with the understanding that she does not marry. She shall not sell the Real Estate, if she marries, and there is offsprings of course, her assets would go to her children." [sic] The court noted that the Rule in Shelley's Case would apply if "offsprings" was a word of purchase, unless the testator meant to use it interchangeably with "children": "the word 'children' has been well recognized, unless it is clearly shown by the context to be otherwise intended, to signify immediato 'offsprings' and is a word of purchase and not of limitation." Id. at 350, 104 A.2d at 623. See also Hilton v. Kinsey, 185 F.2d 885 (D.C.Cir.1950), in which construing "offspring" to mean "children" avoided the rule against perpetuities. When "offspring" has been construed to mean "issue," it has almost invariably been held to be a word of limitation. See, e.g., Massingale v. Parker, 193 Ky. 523, 236 S.W. 959 (1922).

§ 28.3 Beneficiaries of Gift Described as Named Individual and Named Individual's "Children" or "Issue"

If a gift is made to a named individual and a class described as the "children" or "issue" of the named individual, or by a similar class gift term, in the absence of additional language or circumstances that indicate otherwise,

(1) the named individual is entitled to a life interest in the subject matter of the gift; and

(2) the class members are entitled to a remainder interest in the subject matter of the gift.

Comment:

a. Rationale. If a gift is made in terms to a named individual and his or her "children" or "issue," or a similar class gift term, the problem initially presented is whether the named individual and the class members are to enjoy the benefits of the gift successively or concurrently. Because it is more usual for a named individual and his or her "children" or "issue" to enjoy the benefits of property successively, rather than concurrently, it is reasonable to conclude that the donor intended such beneficiaries to have successive enjoyment. Hence, the rule of this section provides for a life interest in all of the subject matter of the gift in the named individual with the remainder in the "children" or "issue" of the named individual, in the absence of additional language or circumstances that indicate otherwise.
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b. Historical note—Wild's Case. Wild's Case, 6 Coke 16b (K.B.1599), promulgated two resolutions relating to a devise to a parent and the parent's "children" or "issue." The first resolution provided that if the parent had no child at the date of the devise, the parent would take a fee tail estate. The second resolution provided that if the parent had children on the date of the devise, the parent and the children would take concurrently as joint tenants. Whatever justification there may have been at the time of Wild's Case for the rules of construction set forth in the resolutions in that case, there is no justification for applying them blindly today. Hence, the rule of construction in § 28.3 repudiates both resolutions of what may be referred to as the Rule in Wild's Case.

c. Share of each class member in remainder interest. If the class described is the "children" of the named individual, the share of each class member is determined under § 28.1. If the class described is the "issue" of the named individual, the share of each class member is determined under § 28.2.

Illustrations:

1. O transfers Blackacre by will "to my son S and his children." On the date O dies, S has had no children. In the absence of additional language or circumstances that indicate otherwise, S is entitled to a life estate in Blackacre. A contingent remainder in Blackacre is in S's currently nonexistent children in fee simple, and there is a reversion in Blackacre. This reversion is disposed of by the residuary clause in O's will, and if there is no residuary clause, the reversion in Blackacre is in the persons who take O's property on O's death intestate.

2. Same facts as Illustration 1, except that a child is born to S two years after O dies. The child who is born to S has a vested remainder in fee simple subject to partial divestiture by more children being born to S or adopted by S, and the reversion in Blackacre is eliminated.

3. Same facts as Illustration 1, except that a child was born to S before O died but such child predeceased O, and S had no children at the time O died. If an antilapse statute is applicable, the share in remainder that S's deceased child would have taken had such child lived will pass to the takers under the antilapse statute, and a reversionary interest in Blackacre will never come into existence. The takers under the antilapse statute will have vested interests subject to partial divestiture by more children being born to S or adopted by him. If there is no applicable antilapse statute, the result is the same as the result in Illustration 1.
4. O transfers tangible personal property by will "to my daughter D and her issue." On the date that O dies, D has two children, C₁ and C₂. C₁ has one child, GC₁, and C₂ has three children, GC₂, GC₃, and GC₄. In the absence of additional language or circumstances that indicate otherwise, D is entitled to a life interest in the tangible personal property and will be entitled to possession thereof. D's issue determined under § 28.2 are entitled to the remainder interest in the tangible personal property. If C₁, C₂, GC₁, GC₂, GC₃, and GC₄ survive D, the tangible personal property in which D had a life interest will pass to C₁ and C₂ under § 28.2. If C₁ dies before D and the others survive D, GC₁ and C₂ will be entitled to the tangible personal property in equal shares under § 28.2. If both C₁ and C₂ predecease D, GC₁ will be entitled to one-half and the other one-half will go to GC₂, GC₃, and GC₄ under § 28.2.

d. Gift in remainder to named individual and his or her "children" or his or her "issue." The gift to the named individual and his or her "children," or his or her "issue" may be a gift of a remainder interest with a preceding life interest in someone else. This fact does not in and of itself affect the application of the rule of this section.

Illustration:

5. O transfers Blackacre by will "to O's wife W for life, then to O's son S and his children." In the absence of additional language or circumstances that indicate otherwise, W is entitled to a life estate in Blackacre, S is entitled to a vested remainder for S's life in Blackacre, and S's children are entitled to the ultimate remainder interest in fee simple in Blackacre. If no child of S has come into being at the time of O's death, see Illustrations 1 and 2 for the analysis of the remainder interest in S's children.

e. Transfer in trust for the benefit of a named individual and his or her "children" or his or her "issue." If O transfers property by deed or by will to T in trust for the benefit of a named individual and his or her "children," or his or her "issue," the effect of the transfer being in trust on the application of the rules of this section depends on whether the benefits under the trust are in income or in the ultimate distribution of the corpus on the termination of the trust. It is not unusual for concurrent enjoyment of the income by a parent and his or her children as income beneficiaries of a trust to be intended. Spreading the income among family members may have an income tax advantage. Hence, the rule of this section is not applicable in a gift of an income interest under a
trust to a named individual and his or her "children," or his or her "issue," and they enjoy the income interest concurrently, in the absence of additional language or circumstances that indicate otherwise. The fact that a trust is involved, however, has no effect on the rule of this section in regard to the distribution called for on the termination of the trust, in the absence of additional language or circumstances that indicate otherwise.

Illustrations:

6. O transfers property by deed to T in trust. O retains the right to amend or revoke the trust. On O's death, if O has not amended or revoked the trust, T is directed to pay the income from time to time "to O's daughter D and her children living from time to time until D dies, and on D's death, to pay the trust property to D's issue." T is required to pay the income in equal shares to D and D's children who are in being on each income payment date (in regard to a child of D in gestation or in the process of being adopted on an income payment date not being entitled to an income payment, see § 26.2, Comment g). The takers of the corpus on D's death under the remainder in D's issue are determined under § 28.2.

7. O transfers Blackacre by will to T in trust. Under the terms of the trust T is directed "to pay the income to O's wife W for life, and, on the death of the survivor of O and W, to distribute the trust property to O's son S and his children." On W's death after O, T should terminate the trust and distribute the trust property to S for life with remainder to S's children, in the absence of additional language or circumstances that indicate otherwise.

f. Contrary intent—named individual and his or her "children" or "issue" to take as "tenants in common." If the gift to a named individual and his or her "children," or his or her "issue," provides that they are to take as "tenants in common," this additional language clearly indicates that the beneficiaries are not to enjoy the gift successively. The problem is presented, however, whether the parent's share as a tenant in common is in an undivided one-half interest or an undivided interest equal to the undivided interest of each class member. In the absence of additional language or circumstances that indicate otherwise, an undivided one-half interest in the named individual should prevail because of the likelihood that the average donor would not intend to place the ancestor of the class on the same footing as the descendants of the ancestor in the determination of shares in the subject matter of a gift.

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Illustrations:

8. O transfers Blackacre by will "to my daughter D and her children as tenants in common." At O's death, D has two children, C1 and C2. D will be entitled to an undivided one-half interest in Blackacre and C1 and C2 will each be entitled to an undivided one-fourth interest in Blackacre, in the absence of additional language or circumstances that indicate otherwise. After-born and after-adopted children of D will not be entitled to share in the gift of Blackacre (see § 26.1).

9. Same facts as Illustration 8, except that D has had no children at O's death. In this situation, the class stays open to admit all children of D whenever they come into being (see § 26.1(2)). Consequently D is entitled to the entire fee simple interest in Blackacre subject to divestiture of an undivided one-half thereof when a child of D comes into being, and such child of D will hold the undivided one-half interest in Blackacre of which D is divested, subject to partial divestiture by additional children of D coming into being.

g. Contrary intent—named individual and his or her "children" or "issue" to take as "joint tenants." If a gift is made to a named individual and his or her "children" or "issue" in the manner that would create a valid joint tenancy under the applicable local law, the undivided shares of the beneficiaries in the subject matter of the gift must be the same. The unities of time, title, interest and possession, requisites of a joint tenancy, make this essential.

Illustrations:

10. O transfers Blackacre by will "to my son S and his children as joint tenants and not as tenants in common." At O's death, S has two children, C1 and C2. Two years after O dies S has another child, C3. S, C1, and C2 own Blackacre as joint tenants. C3 is excluded because he was born too late (§ 26.1). S dies. C1 and C2 own Blackacre as joint tenants. C1 conveys his interest in Blackacre to his wife W. C1 dies. W and C2 own Blackacre as tenants in common, each owning an undivided one-half interest. C1's conveyance to W destroyed the right of survivorship that previously existed when C1 and C2 owned Blackacre as joint tenants.

11. O transfers Blackacre by will "to my son S and his issue as joint tenants and not as tenants in common." At O's death S has two children, C1 and C2, and five grandchildren: GC1, a child of C1; GC2, and GC3, children of C2; and GC4 and GC5, children of a deceased child of S. If the issue of S are determined under the rule of § 28.2, such issue would be C1, C2,
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GC_4 and GC_5, and they along with S would take Blackacre as joint tenants, each one being entitled to an undivided one-fifth interest (see § 28.2, Comment e). If, however, the issue of S are determined on a per capita basis, such issue would be C_1, C_2, GC_1, GC_2, GC_3, GC_4, and GC_5, and they would take Blackacre as joint tenants along with S, each one being entitled to an undivided one-eighth interest.

12. O transfers Blackacre by will “to my wife W for life, remainder to my daughter D and her children as joint tenants and not as tenants in common.” At O’s death, D has two children, C_1 and C_2. Two years after O dies, D has another child, C_3. Though C_3’s interest vests later than the interests of D, C_1, and C_2, the requirements for a joint tenancy are met even though C_3 is included in the class. W dies. D, C_1, C_2, and C_3 own Blackacre as joint tenants.

h. Subject matter of the gift. If the gift is to one named individual and his or her “children,” or his or her “issue,” the subject matter of the gift is the property described. If, however, the gift is to several different named individuals and their respective “children” or “issue,” as when the gift is “to A and A’s children and to B and B’s children,” the subject matter of the gift to A and A’s children is one-half of the property described and to B and B’s children is the other half of the property described, in the absence of additional language or circumstances that indicate some other sharing in the property described is intended.

STATUTORY NOTE TO SECTION 28.3

A Nebraska statute provides as follows:

When an otherwise effective conveyance of property is made in favor of a person and his children, or in favor of a person and his issue, or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested.


A Kansas statute achieves the identical result using different language:


The Nebraska statute is § 13 of the Uniform Property Act, promulgated in 1938 and adopted only by Nebraska.

REPORTER’S NOTE TO SECTION 28.3

1. Comparison with present state of the law—Although the rule of this section takes a minority position, several jurisdictions are in ac-
of course, recognized the familiar rule that where a devise is to a parent and his children, the parent receives a life estate with the remainder vesting in the children unless there is something in the will showing a contrary intention. . . . The chancellor found such contrary intention from the fact that the testatrix had expressly devised life estates to her sons, and concluded that she knew how to give a life estate and had not done so. . . . We do not attribute a controlling significance to the fact that the [predeceased] sister . . . was, and would continue to be childless. . . . It seems to us [testatrix] was more likely to have been thinking of her sisters and brother and their children collectively . . . us[ing] the term ‘and their children’ in the ordinary sense. . . . We conclude the legal presumption of life estates and remainders in fee is strengthened rather than overcome.” Id. at 116-118.

In Chambers v. Union Trust Co., 235 Pa. 610, 84 A. 512 (1912), the testator devised “my farm . . . to my nephew, [A], and to his children.” The nephew died without issue. The court discussed Wild’s Case and a number of Pennsylvania cases in which the court held that the parent “took a life estate with remainder to her children in fee. In all of the cases just referred to children were living at the death of the testator, so we may take it as firmly established that the second resolution of Wild’s case is not the law in Pennsylvania. But the question arises, does the first resolution apply when there are no children? . . . The theory was
that, if there were no children in existence . . . the provision in their favor would fail altogether, unless their parents were given a fee-tail. But with us, where the children take in remainder, it is immaterial whether they are, or are not, in existence at the time of the devise or at the time of the death of the testator." *Id.* at 614–615, 84 A. at 514. Accordingly, the court held that the farm reverted to testator's heirs rather than passing under the nephew's will. With the possible exception of Tennessee (see 554.8 Acres, infra item 5a) other states rejecting either resolution in Wild's Case have also rejected the other.

In Young v. Munsey Trust Co., 111 F.2d 514 (C.A.D.C.1940), the testator devised some real estate to his 11-year-old daughter "until [she] shall marry or attain the age of twenty-one, . . . [then] to the said Malinda and her children." She had one son, who predeceased her, "killed in the Knickerbocker Theatre disaster . . . intestate, unmarried, and without issue." The court held that the gift over to her brother "if she marries and dies without leaving child or children" was inapplicable, so that her residuary devisees took the land. The court below had reached the same result on the basis of "[t]he rule in Wild's case . . . an ancient rule of the common law by which . . . the word 'children' becomes a word of limitation . . . [if] '(a) the limitation [is] in a devise; (b) the form [is] 'to A and his children' . . .; and (c) A [has] no children at the time of the devise.' If all these requisites occur . . . A takes an estate tail," converted by District of Columbia law to a fee simple.

"The applicability of the rule has never before arisen in the District of Columbia. . . . It has been rejected in Kentucky, Pennsylvania, and Tennessee." The court noted, however, that the rule had been followed in at least seven states, and held that it was unnecessary to decide the issue: "Even if we do not adopt the much-criticized First Resolution in Wild's case . . . the result would be the same." *Id.* at 515. Following the principle recognized in Illustration 3, the court held that the son's remainder would be a vested one (subject to partial divestment had other children been born) so that Malinda would inherit the fee simple from her son. The court noted that a construction requiring the son to survive his mother would have resulted in the disinheritance of his own children had he left any.

In Buntin v. Plummer, 164 Tenn. 87, 46 S.W.2d 60 (1932), the court recognized, "The general rule is that if property is devised to a daughter and her children, she having no children at the time, the daughter takes a life estate and the children the remainder." *Id.* at 90, 46 S.W.2d at 61. But the court, unlike the Young court, rejected the rule of Illustration 3, holding that the remainder was contingent. As a result, the court held that when testator devised his realty to his daughter A "and the children of her body," she inherited the reversion as her father's sole heir, which merged with her life estate to become a fee simple determinable. Hence an inter vivos conveyance by A in 1912 (reserving a life estate) was held to be valid, A's only child having predeceased her
in 1922 without issue: "The grantees in the deed of 1912 would have been divested of their title had Mrs. Craighead been survived by a child, but that contingency never happened." Id. at 91, 46 S.W.2d at 62. Perhaps because the court was able to uphold the conveyance despite conceding that A's son took a contingent remainder, the court did not consider the question of whether the son, being adopted, fell outside the description of "children of her body." Hassel v. Sims, 176 Tenn. 318, 141 S.W.2d 472 (1940), involved a confusing deed which was held to create a life estate in grantor's wife, remainder in their children, and finally in their grandchildren. There seems to be nothing, however, in the grant to the wife and children that clearly states that the children have only a remainder interest. The court does not even raise the question of the wife and children taking concurrently.

Hutchison v. Board, 194 Tenn. 223, 250 S.W.2d 82 (1952), involved a conveyance "unto the said R.A. Hutchison and to his lawful children born to him now who shall hereafter be born to him after him" (emphasis supplied by court); the court naturally found a life estate and remainder, but did not find it necessary to decide whether the result would have been different had the phrase "after him" been omitted. Id. at 231, 250 S.W.2d at 83.

As discussed in the Statutory Note to this section, Kansas and Nebraska have repealed the Rule in Wild's Case by statute, Kansas doing so explicitly. In Ellingrod v. Trombla, 168 Neb. 264, 95 N.W.2d 635 (1959), the court held that the Wild's Case statute, providing for a life estate with remainder, and not the statute providing that any attempt to create a fee tail or fee simple conditional would result in a fee simple, was the statute applicable to a devise "to my daughter, [A], and her descendants."

Other cases holding that the parent and children take successively rather than concurrently, but (at least ostensibly) as the exception rather than as the rule, are collected in item 5a of this Note. Observe also that the first resolution in Wild's Case accomplishes the goal of this section rather than defeating it in those states converting fees tail to life estates in the parent with remainder in the children; see the Statutory Note to Section 30.1.

b. Cases holding that the parent takes half and the children as a class take half. The principle of Comment f, that it is unlikely that a donor would intend that each child should take as much as his or her parent, has seldom received judicial support. One reason is that when a court is inclined to reject the presumption that all class gifts are to be distributed per capita, the court will be inclined to hold that the children take successively or substitutionally, not concurrently. The other reason is that when the parent and children do take concurrently, the primary rationale for stirpital distribution vanishes, as the children are obviously not dividing their parent's share.

Comment e recognizes that when the income from a trust is involved, tax considerations sug-
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guest that donors, whatever their intent would have been otherwise, do intend a per capita distribution. Nevertheless, one of the rare cases holding that the donor did not intend a per capita distribution, Peoples Bank of Bloomington v. Rankin, 94 Ill.App.2d 368, 236 N.E.2d 770 (1968), involved a testamentary trust, from which the income “shall be divided equally between my daughter Jane, and her children, or the descendants of any deceased child per stirpes, share and share alike.” The court rejected a contention that Jane’s exclusion from the division of the corpus indicated an intent to favor the grandchildren at her expense: “We deem it at least as logical to say that the testator intended to give the daughter a major portion of the income during her lifetime, when the need for it may exist, and to discontinue this preference when the need can no longer exist.” The court did not find the use of “between” dispositive, relying instead on the proposition that the “words ‘share and share alike’ are not compatible with the words ‘per stirpes.’” It stated that “To give any meaning to the words ‘share and share alike’ they must be regarded as referring back to the direction that the income ‘shall be divided equally between my daughter Jane, and (her descendants).’” Id. at 370-371, 236 N.E.2d at 772.

4. Cases contrary to the rule of this section—

a. Cases endorsing the first resolution in Wild’s Case. In Wild’s Case, 6 Coke 16b (K.B.1599), “Land was devised to A. for life, the remainder to B. and the heirs of his body, the remainder to ‘Rowland Wild and his wife, and after their decease to their children’. . . . B. died without issue, Rowland and his wife died, and the[ir] son had issue a daughter, and died; if this daughter should have the land or not, was the question . . . and the case for difficulty was argued before all the Judges of England; and it was resolved, that Rowland and his wife had but an estate for life with remainder to their children for life, and no estate tail.” Id. at 288-89. The land therefore reverted to the testator’s heirs, for want of the testator’s use of words of inheritance, and the Wild’s granddaughter took nothing. But “this difference was resolved for good law, that if A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate-tail; for the intent of the devisor is manifest and certain that his children or issues should take.” Id. at 290. The testator having expressed an intent that the children take immediately rather than by way of remainder, the court concluded that the closest approximation to this intent, when no children were available to take immediately, was to construe ‘children’ as a word of limitation. This is the “first resolution in Wild’s case.”

In Gilchrist v. Butler, 214 Ala. 288, 107 So. 838 (1926), the testator left some land “and all the negroes” thereon “to my youngest and beloved son, [A], and his children.” A conveyed part of the land in 1859, and part in 1886. When A died in 1915, his children claimed title to the land. The court rejected the claim: “Under
the doctrine of Wild’s Case . . ., it is clear that the children . . . took nothing by the will because [A] at the time of the devise, had no children. The statute converted the common-law estate tail thus created into a fee in the first taker . . . it is true, as stated in Williams v. McConico, 36 Ala. 29, (1860) that, in such cases, notwithstanding the rule adverted to, slight indications in the context have frequently been thought sufficient to justify a holding that the parent shall take for life, with a remainder to his children, especially where, in a devise of land, there are children in esse.” Id. at 290, 107 So. at 839. In this case, however, the court found no such contrary intention, and pointed to a devise to the testator’s other sons “to themselves and children, after them” as indication that the testator knew how to specify a life estate when such was his intent. See also Larew v. Larew, 146 Va. 134, 135 S.E. 819 (1926): “It is most significant that in the devise to his wife he limited her to a life estate, but he put no such express limitation on the remainder and the devise to his son . . . While the rule [in Wild’s Case] is ancient, it is not absolute. Estates tail may be created in Virginia . . . and when such estates are created the established rules still apply. While since th[e] Act (1776) there should be no implication of an estate tail, if it can possibly be held to be a different estate . . . whenever such an estate is created, it follows that by operation of the statute it is a fee.” Id. at 139, 135 S.E. at 821. In James v. James, 189 S.C. 414, 1 S.E.2d 494 (1939), the land was conveyed by deed “unto my said son [A] and his lawful children.” The court held: “Unless . . . the word ‘children’ can be so construed as to make it a word of limitation, the deed would be meaningless . . . Dillard v. Yarboro, 77 S.C. 227, 57 S.E. 841 [1907] . . . is controlling here and requires the deed . . . to be construed as having granted an estate in fee conditional . . . and aside from the fact that the case appears to be binding authority, I think it is founded upon sound reasoning. It is true that the opinion in the Yarboro case follows the rule of construction announced in the celebrated Wild’s case . . . hence . . . has been criticized to some extent because it holds that the rule should be extended to deeds. But when the reasons for the rule are analyzed it seems to me they apply as well to deeds as to wills, the fundamental purpose . . . being to effectuate the intention of the devisor or grantor.” Id. at 417–418, 1 S.E.2d at 496.

Ewing v. Ewing, 198 Miss. 304, 22 So.2d 225 (1945), the subject of a lengthy annotation on gifts to parents and children, also involved a deed, and did not even consider the possibility that different rules might apply to grants and to devises. The court noted that, although the first resolution had not yet arisen in Mississippi, the second resolution had been adopted, and held that consistency demanded that just as the parent and any living children share in a fee, so the parent should have the fee alone when there are no children to share with. Furthermore, the court observed, “the relation of life tenant and remainderman is not favored under our land title and economic
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system." Id. at 312, 22 So.2d at 227. The chief justice, in dissent, stated that it was the majority which was inconsistent: "At common law the word 'children' in a deed . . . [is a word] of purchase . . . Both branches of this rule are well established by authorities, 3 Rest. Property, § 283 . . . what the court has here done is to reject the second branch of this rule, and substitute another for it. . . . 'The relation of life tenant and remainderman' . . . has been [recognized and protected] by this court and its two predecessors since our judicial system was organized." Id. at 314, 22 So.2d at 228.

In Armstrong v. Smith, 287 Ala. 254, 251 So.2d 216 (1971), land was conveyed "unto our said daughter and offsprings." The grantor's daughter, alleged to be "under the influence of her present husband who wants to squander the property," sued her "offsprings" to quiet title, and the court held that she owned the land in fee simple, because the donors, in saying, "'to have and to hold the same forever. Be it known this land is not to be mortgaged or sold,'" had manifested an intent to create a fee tail, converted to a fee simple by statute. The court stated that it was giving the children the benefit of the doubt by "'assum[ing] that some or all of the respondents were in existence at the effective date of the deed." Otherwise, the court held, citing Gilchrist, supra, "it seems clear beyond question that respondents can take nothing" because the rule in Wild's case would yield a fee tail without the need to examine grantors' intent. Id. at 256, 251 So.2d at 217.

Although no recent cases are directly on point, the reluctance of courts to overturn the Rule in Shelley's Case, in the absence of a statute, suggests that the first resolution in Wild's Case would receive similar treatment. See § 30.1.

b. Cases rejecting the first resolution but giving the parent a fee simple. In Davis v. Ripley, 194 Ill. 399, 62 N.E. 852 (1902), the testatrix left her estate, including some real estate in Illinois, to her two daughters and their children. One daughter, who was married, filed suit for construction of the will against the other, who was unmarried, contending that the devise gave each a life estate with a remainder to her children, if any, and a reversion over to the testatrix's heirs. Neither daughter had any children at the time of the suit. This is precisely the effect that the first resolution in Wild's Case would have produced under the applicable Illinois statute. Casner, infra item 8, at 449 n. 37. But the court held that "the rule in Wild's case is no longer necessary; for it would cut down the estate, and not enlarge it, as it was intended to do." Id. at 402, 62 N.E. at 853. The court did not discuss whether Wild's Case had intended to give the children as well as the parents the largest estate then available. The holding, that the parent takes a fee simple and the children take nothing, has been followed in subsequent Illinois decisions; see, e.g., Boehm v. Baldwin, 221 Ill. 59, 77 N.E. 454 (1906). In Bank of Graymont v. Kingery, 170 Ga. 771, 154 S.E. 355 (1930), the grantor, 10 months be-
fore the birth of his daughter's first child, conveyed a tract of land to his daughter "and her children now born, and those that may hereafter be born, the daughter and grandchildren of the said James Rountree." The court held that the daughter took a fee simple: "It is now a well-established principle of law in this state that a deed to an immediate estate in land made to a person not in esse is absolutely void." *Id.* at 771-772, 154 S.E. at 355. 

Lofton v. Murchison, 80 Ga. 391, 7 S.E. 322 (1888), was one of the cases cited as authority; here a devise rather than a deed was involved, and the court had found a fee simple not in place of a fee tail, but as the statutory consequence of the fee tail decreed by Wild's Case.

c. Cases endorsing the second resolution in Wild's Case. In the second resolution in Wild's Case, *supra* subitem a, it was further "resolved for good law" that "if a man devises land to A. and to his children or issue, and they [*sic*] then have issue of their bodies, there his express intent may take effect . . . and therefore in such case, they shall have but a joint estato for life." 6 Coke 16b at 290. Now that the presumptions in favor of joint tenancies and against estates in fee have been reversed, jurisdictions following the second resolution give the parent, and each child living at the effective date of the devise, equal shares in fee simple, in almost all states as tenants in common.

In re Parant's Will, 39 Misc.2d 285, 240 N.Y.S.2d 558 (1963), found that "it appears that [the] second resolution in] Wild's case is followed more often than rejected [by other jurisdictions] and we apprehend it is the law in this state, insofar as the factual situation now before us is concerned." *Id.* at 291, 240 N.Y.S.2d at 564. The mother, the testatrix's niece, had two children both at the execution of the will and at the testatrix's death, by which the court distinguished a New York case contrary to the second resolution, Hannan v. Osborn, 4 Paige (N.Y.) 396 (1884), in which the court held that the use of the word "children," at a time when the mother had only one child, indicated that the children were not to take immediately.

In Biggs v. McCarty, 86 Ind. 352 (1882), no such distinction between "child" and "children" was made. The testator, before leaving in January of 1850 to join the California gold rush, had made a will devising some land to his daughter and her children. The daughter then had one child, who soon died in infancy. A second child was born in November of 1851 and died three days later. The testator was never heard from after leaving, and the will was probated when the word of his death reached his family in November of 1851. The court held, "we think it fair to infer that the testator died after the quickening of the second child." *Id.* at 363. The second resolution in Wild's Case therefore applied, the mother holding a fee simple in common with the child in utero. She inherited that share upon the child's death, and her after-born children took nothing.

In Conner v. Everhart, 160 Va. 544, 169 S.E. 537 (1933), the testator left a farm in trust with the
rent to go to his son, A, for life or until a creditor sought to subject it to the payment of a debt, then "to the support and maintenance of the wife of said [A] and his children" until A’s death, then to A’s wife until death or remarriage, at which time the trust would terminate and the corpus go to A’s children. A creditor obtained a judgment against A, his wife, and one of A’s sons, and contended that under Virginia law, the “words in favor of the children are construed as a motive for the gift to the wife, and she becomes the donee to the exclusion of the children.” The court rejected this argument, holding that in Wallace v. Dold’s Ex’rs, 30 Va. (3 Leigh) 258 (1831) and the cases following it: “the children are excluded only when it appears from the context of the whole instrument taken together that it was the intention to exclude them. We insist that the resolution in Wild’s case . . . is still the law in Virginia.” Id. at 551, 169 S.E. at 859.

In Guilliams v. Koonsman, 154 Tex. 401, 279 S.W.2d 579 (1955), reversing, 274 S.W.2d 135 (Tex. Civ.App.1954), the court held that a devise “to my son . . . and to his child or children if any survive him” gave him a life estate with remainder in his surviving children. The court stated that without the phrase “if any survive him” and the provision for a gift over, “the great majority of the courts of this country [would] follow the second resolution of Wild’s case . . . This is also the view adopted by the American Law Institute.” The court implied that it was also the law in Texas. Id. at 403, 279 S.W.2d at 581.

In Jernigan v. Lee, 9 N.C.App. 582, 176 S.E.2d 899 (1970), reversed, 279 N.C. 341, 182 S.E.2d 351 (1971), the testatrix left a tract of land to her son, A, but “if [A] shall die without issue or heirs by him begotten, then said tract of land shall pass in fee to [B], and if she should die without any heir of her body living at her death, then said tract of land shall pass to [C] and his heirs, if any, otherwise to his next of kin.” Both A and B died without issue. C predeceased them both, but left one child, D. The court held that the use of the phrase “if any” and the contrast with “next of kin” indicated that “heirs” was intended to mean “children,” and that C and D therefore took as tenants in common; C having conveyed his remainder interest to A, D now owned a half-interest, A’s heirs the other half. The court held that, although D was not in being at the time of the testatrix’s death, the first resolution in Wild’s Case did not apply because the gift to C and his [children] was not immediate. The supreme court reversed, holding that the devise was not one “to C and his children,” but that the testatrix had intended to give C the same fee simple determinable she had given to A and to B. C having died with surviving issue, the heirs of his grantee A took the entire remainder in fee simple.

In Schlemeyer v. Mellencamp, 159 Kan. 544, 156 P.2d 879 (1945), the grantors conveyed land to a mother and her children. The deed having been executed before the effective date of the statute repealing the Rule in Wild’s Case,
the court held that the mother and those children in being when the deed was executed were the owners, per capita, as tenants in common.

In re Keegan's Estate, 37 N.Y.S.2d 368 (Sur.1942), involved legacies to the "families" of the testatrix's deceased brothers. The court held that the "family" consisted of the widow and children, and "the gift being one to a class, there will be imported an equal division of the property." Id. at 371. One of the brothers had one child, who predeceased him; his widow and two grandchildren each took one third.

In Fullagar v. Stockdale, 138 Mich. 363, 101 N.W. 576 (1904), A's father conveyed land to A, her husband, "and the heirs of said A," with the intention to "cut off" [the husband's] daughter by his first marriage." The court held that "heirs" meant "children" in this context, so that each of A's children by her first marriage took a one-third interest as tenants in common with A and her husband, who took the other one-third by the entirety. Their own son, being born after the conveyance, took nothing under the deed.

In Phipps v. Hardwick, 273 S.C. 17, 253 S.E.2d 506 (1979), the grantor conveyed a life estate to his son A with remainder to the son's "children and his wife [B] their heirs forever and also his wife [B] shall have a lifetime right on the above mentioned premises so long as she shall bear the name of Mrs. [A]." The court held that B and her children held the remainder in fee, as tenants in common, per capita; James and Dillard, supra subitem b, were distinguished on the ground that testator here clearly indicated that "children" was a word of purchase. The court "conclude[d] that the Rule in Shelley's Case is not applicable because the limitation is to . . . a restricted class or number." Id. at 25, 253 S.E.2d at 510.

5. Cases finding exceptions to the Rule in Wild's Case—

a. Cases holding that the parent and children take successively. In United States v. 654.8 Acres of Land in Roane County, Tenn., 102 F.Supp. 937 (E.D.Tenn. 1952), the grantor had conveyed the 654.8 acres "in consideration of the love and affection I have for [A]," his wife, "unto [A] her heirs, the children of [grantor] and the said [A] forever." The court did not discuss the Tennessee cases rejecting the first resolution, but held on the basis of some 19th century cases, notably Livingston v. Livingston, 84 Tenn. 448 (1886), that the second resolution was the law in Tennessee: "Such is the rule, but its votaries have been none too ardent." Id. at 940. In finding that the children took only a remainder interest after a life estate in the mother, the court distinguished Livingston on the ground that: "In the Livingston deed, wife and children were joined together in the grantor's love and affection. In the Brooks Deed, love and affection were limited to Alice Brooks, the wife . . . It is true that the indication of the grantor's intention to create a life estate in his wife is slight. But a study of the cases shows that the rule in Wild's case is not so firmly
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 entrenched in this State, but that a slight indication of a variant intention is sufficient to justify a court in by-passing it." Id. at 940.

 In Talley v. Ferguson, 64 W.Va. 328, 62 S.E. 456 (1908), the mother, brothers, and sisters of a man “embarrassed with debt,” conveyed a tract of land to be held in trust, “the rents, issues, and profits . . . to the use and benefit, maintenance, and support of [his] wife and children . . . the property shall not in any mode or manner be subjected to” his debts. The court held that the wife took a life interest, the children a remainder in fee upon termination of the trust “when the family ceased to exist, and not earlier . . . Was it not the intention to preserve the estate together as long as the family should be held together as only a mother can hold it? Only a life estate in the wife and mother is consistent with such intention.”

 “This was not a conveyance directly to the wife and children. In such case ‘wife and children’ would be words of purchase, and [they] would take jointly.” Id. at 331, 62 S.E. at 457. See also Desmond v. MacNeill, 90 Conn. 142, 96 A. 924 (1916), (gift to testator’s cousin “for herself and children” held to give herself a life estate and children a remainder in fee).

 In Conover v. Cade, 184 Ind. 604, 112 N.E. 7 (1916), the testator directed, “I want it distinctly understood that my real estate does not get away from my children and to be entailed So that when my children are done with it that it goes to their children. . . . I do not want it to get away from my heirs to outside parties that never cared for me or expected anything from me or mine.” One of the daughters, who had no children, claimed that her fee tail was converted by law to a fee simple. The court held that the word “entail” was not used in its technical sense; and that testator’s intent that “the result of his toil and sacrifice [not] fall by descent into the ownership of . . . strangers to his blood” led him expressly to grant a life estate to his children and remainder to his grandchildren. The case therefore did not fall under the first resolution in Wild’s Case, but under “the last resolution there adopted [which] has been sometimes overlooked,” in other words, the actual holding in the case, stripped of the archaic feature that the remainder itself was only a life estate. Id. at 613–614, 112 N.E. at 12. As in Illustration 2 and in all of the other cases discussed in this Note finding a life estate in the parent, the class of “children” would include any children that might be born later, so that the remainder was not extinguished by appellant’s childlessness.

 b. Cases holding that the parent takes a fee simple. In Payne v. Kennay, 151 Va. 472, 145 S.E. 300 (1928), the testatrix left one tract of land to her daughter and her children, another to her son and his children. They were to select arbitrators to appraise this land and the rest of her estate, “the value . . . to be equally divided between the two above-mentioned heirs.” The court held that the testatrix’s grandchildren had no interest in the land: “It has been sometimes said, without
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qualification, (Siebel v. Rapp, 85 Va. 30, 6 S.E. 478 [1888]) that a gift to the wife and her children is a gift to the wife, the reference to the children indicating the motive . . . but this is too broad a statement. . . . The children are excluded only when it appears from the context of the whole instrument . . . that it was the intention. . . . [Here] the key which unlocks and discloses [this] intention . . . [is the provision] that her entire estate . . . should be equally divided between two persons." Id. at 477, 145 S.E. at 301. The court further pointed to the technical complications of joint tenancy, especially where the daughter's share was more valuable than the son's even after giving the son the testatrix's entire personal estate. "Is it to be conceived that the testatrix, owning this small estate, intended that guardians should be appointed for each of these infant children, that separate accounts should be kept, and that these little children should be charged with owelty of partition, when apparently they had no means of paying it?" Id. at 479, 145 S.E. at 302.

In re Cressler's Estate, 161 Pa. 427, 29 A. 90 (1894), held that a devise to the testator's daughter, "for the support of herself and her children" was held to give her a fee simple title: the gift was to her alone, not to the children, and no trust would be created because its possible duration, for the life of a child born after testator's death, would violate the rule against perpetuities. This in turn supported the court's conclusion that in the residuary bequest "unto my daughter [A], and to her children, and to my son-in-law [B], and his wife, [C], and their children'. . . . The grouping of the children with the parents seems to have been loosely done, with no intent to give them a legal interest in the property." The alternatives, according to the court, would be either a per capita distribution among A, B, C, and all of testator's grandchildren, or "to give the fee to these children, born and unborn, in preference to his own daughter," leaving but a life estate to "the principal object of the testator's bounty." Id. at 436, 29 A. at 94.

In Sellers v. Sellers, 270 Ala. 173, 117 So.2d 386 (1960), the testator directed that "what little property I may have shall be divided equally with my family, ¼ to my wife, [A], ¼ to [B] and family, ¼ to [C] and family, ¼ to [D] and family." The court held that A, B, C, and D held the testator's real estate as tenants in common in fee simple, the use of the term "family" in place of "children" or "issue" making "the rules announced in Wilde's case" inapplicable. Moreover, these are rules of construction rather than rules of law, and to hold that testator intended "to confer any present interest in his property to his grandchildren . . . would immediately contradict the equality with which testator purposed to bestow his bounty on his widow and three sons." Id. at 177-178, 117 So.2d at 388.

6. Contrary intent of donor—In Wilson v. Morrill, 205 Ky. 257, 265 S.W. 774 (1924), the testator left "all of my home place" after a life estate in his widow, to his grandson "and his children forever and without the right to sell or in any way dispose of it during his life or the
life of his children.” Although in Kentucky, “ordinarily a devise to a son or daughter and his or her children is construed as giving the son or daughter a life estate and his or her children the remainder in fee.” Id. at 261, 265 S.W. at 776. Here the testator was held to have manifested an unambiguous intent to entail the estate. By statute, the grandson therefore received a fee simple. See also Franklin Real Estate Co. v. Music, 392 S.W.2d 66 (Ky.1965).

In Festinger v. Kantor, 272 Ark. 411, 616 S.W.2d 455 (1981), the testator left his entire estate in trust, the income to go to his wife and three daughters, “share and share alike, and unto the heirs of their body, and the survivor or survivors of them per stirpes.” Upon termination of the trust, the corpus was to pass, “in fee simple and absolute, to the beneficiaries under this trust, share and share alike, and unto the heirs of their body,” etc. The court held that a fee tail had been created, not in the parent, but in the parent and children as tenants in common. The fee tail being converted to a life estate with remainder, and the mother having died, each daughter owned a one-twelfth interest in fee simple as heir of her mother, and a one-fourth interest for life, with remainder in her issue per stirpes, and reversion over to the testator’s heirs at law.

7. Complex classes including parents and their children—

a. Cases finding a substitutional gift. In a gift such as one “to my children and grandchildren” or “to my brothers and sisters and nephews and nieces,” the most common construction adopted in recent decisions is that the gift is intended as substitutional. In Condee v. Trout, 379 Ill. 89, 39 N.E.2d 350 (1942) the testator, “a lawyer of prominence in the city of Chicago,” directed that 15 years after his death, “my executors shall distribute all of my property in equal parts to my children and grandchildren then living. In case of the death of any one of my children leaving heirs of their body or blood, such children shall take the part of parts from my estate that would have gone to their mother if living.” The court observed that the testator’s direction for per stirpes distribution in the event of the death of one or more of his children was favored by Illinois law, as the beneficiaries would then be of unequal degree, and held that this was all he had meant by describing the gift as one to his children “and grandchildren”: “If a per capita distribution was intoned there clearly could be no necessity for the provision for per stirpes distribution to the grandchildren whose mother had deceased, nor could such have been a fair and even distribution to them.” Id. at 94, 39 N.E.2d at 352.

In re Fahey’s Estate, 360 Pa. 497, 61 A.2d 880 (1948), also pointed to “the justice of a per stirpes division” in multigenerational gifts, and held that when the testator directed that his property be held “in trust for my Children and grand Children,” he had in mind the children of his two predeceased children: “After appointing by name, his surviving son and daughters executors of the will he therein expressly ‘charge[d] them to be Just & true one to the other and to their nephews and nieces, [naming the chil-
dren of his predeceased children].' If the testator had meant more than the children of his predeceased son and daughter, is it not reasonable to suppose that he would have used some all-inclusive phrase such as 'all of my grandchildren,' and would he not, moreover, have charged his surviving son and daughters to be 'Just & true' to 'all' of their nephews and nieces, and not merely to [those named]?' Id. at 502, 61 A.2d at 882.

In Dunlap v. Lynn, 166 Neb. 342, 89 N.W.2d 58 (1958), the testatrix left her estate to her mother, or to her mother's 'heirs [construed to mean 'children']... share and share alike, and should there be grand children... they shall share and share alike of the share falling to their parent, under this will.' The grandchildren contended that under the terms of the will, and the Nebraska Wild's Case statute, their parents' shares were reduced to life estates, and they would take the remainder in fee. The court held that only the grandchildren whose mother was deceased were entitled to a share in the estate, noting, "The words 'should there be grand children'... must be given a rational meaning," and that when all the grandchildren were in being at the execution of the will, "the words 'if their parents should predecease me' [must be] read into the paragraph in dispute." Id. at 353-354, 89 N.W.2d at 65.

See also Cross v. Manning, 211 Ark. 803, 202 S.W.2d 584 (1947) (gift to testator's "parental family"); Haywood v. Rigabee, 207 N.C. 684, 178 S.E. 102 (1935) ("equal distribution of the [corpus of a testamentary trust, 30 years after testator's death] among my children and their issue"); Hill and Jensen, discussed in the Reporter's Note to Section 28.5.

b. Cases finding a per capita distribution. In Burnett v. McHaney, 347 Mo. 499, 148 S.W.2d 495 (1940), the court considered but rejected the argument that the testator intended a per stirpes distribution in calling for his estate to be "divided equally between the then living brothers, sisters, nieces and nephews of myself and wife," holding that the testator, having made specific bequests ranging from $5 to $1000, had shown no inclination to follow the channel of descent and distribution, so that there was no reason to read the disputed clause other than literally. The court likewise rejected the testator's in-laws' contention that a division by families was intended: "In the will he referred to them collectively as brothers and sisters of himself and wife, placing them, we think, in one class and intending to treat all on the same footing." Id. at 506, 148 S.W.2d at 497.

In Wills v. Foltz, 61 W.Va. 262, 56 S.E. 473 (1907), the testator devised his all of his estate, (reserving "a support" for "a woman [who] lived in his house") to his three daughters by that woman "and their children." The court held that all of his children and grandchildren, except for one grandchild born after the testator's death, took as joint tenants. After a lengthy discussion of Wild's Case, the court held that "we cannot find a fee in Mrs. Grapes... I am morally, though not legally, satisfied that
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Foltz . . . a farmer drawing the will with his own hand . . . never intended to give the children of his daughters equal shares with their mother. . . . But there are plain words. . . . This will uses the word 'children,' a word of purchase. . . . When a deed is made to a dozen grantees, they take equally; that is, per capita. What is in this will to make this case different?" *Id.* at 271, 56 S.E. at 476-77.

In re Williamson’s Estate, 45 S.D. 180, 186 N.W. 827 (1922), found a per capita distribution among the testator’s “brothers and their families,” holding that “family” consisted of wife and children, and that the indication of contrary intent necessary to provide for a per stirpes distribution was lacking: “But nothing that is said in this opinion is to be understood as indicating our view as to what share each individual would have taken, provided one or more of the children of decedent’s brothers had died prior to the death of decedent and left surviving children.” *Id.* at 184, 186 N.W. at 828.

In re Battle, 227 N.C. 672, 44 S.E.2d 212 (1947), found a per capita distribution among the testator’s surviving children and grandchildren when the testator provided that if his eldest son died without issue “then I devise this said tract in fee to such of my children and grandchildren as may survive him.” See also Jones v. Donelson, 37 Tenn.App. 467, 264 S.W.2d 828 (1953) (cert. den.): *Luke,* discussed in item 4b of the Reporter’s Note to Section 28.1; *Dow,* discussed in item 7 of the Reporter’s Note to Section 28.2.

c. Cases finding another mode of distribution. In *Murphy v. Fox,* 334 Ill.App. 7, 78 N.E.2d 337 (1948), discussed in item 4a of the Reporter’s Note to Section 28.1, the residue of the testator’s estate was to be divided “equally between my two sisters above named my living nieces and nephews.” The court, finding strong corroboration for its decision in the use of the word “between,” held that the two sisters would share half the estate, and the 17 nieces and nephews would share the other half.

In re Pfost’s Estate, 139 Neb. 784, 298 N.W. 739 (1941), turned on similar language. After the death of the testator’s wife, the $12,000 corpus of a trust was to be “divided equally, in equal shares, share and share alike between my son [A], and my twelve (12) grandchildren, said grandchildren being the eight (8) children of my daughter [B], and the four (4) children of my son [A].” The court held: “The only resort then is to examine what is found in the will . . . and give to the word ‘between’ its generally accepted literal and grammatical meaning. In doing so it becomes necessary to hold that the testator intended that [A] should have, on distribution, one half of the trust fund in question, and that the twelve grandchildren should participate equally in the other half.” *Id.* at 786-787, 298 N.W. at 741. The court noted that A “appears to have been favored by the testator,” being the sole residuary legatee while his sister “was to receive but $5 . . . having been previously given or advanced $14,000. From this it is apparent that substantial equality on the
ultimate division of the estate between the two children of the testator was not intended." Id. at 786, 298 N.W. at 741. A more significant piece of evidence indicating that the court may have guessed the testator's intention correctly was overlooked by the court—the amount placed in trust, chosen by the testator, divides evenly into 24 shares, but not into 13.

In Agricultural Nat. Bank of Pittsfield v. Miller, 316 Mass. 288, 55 N.E.2d 442 (1944), the testator "devised and bequeathed the residue of his estate . . . 'in equal shares to my children, [A, B, and C] and to my grandchildren.'" The court held that each child would take one-fourth of the estate, and the other share would be divided per capita among the grandchildren "living at [testator's] death," including one who was en ventre sa mere. The court, observing that "The present case is not one of a bequest and devise to persons in the same degree of kindred," held that the grandchildren should not take on an equal basis with their parents. The possibility that the grandchildren's share might be distributed per stirpes was not raised. Id. at 294, 55 N.E.2d at 445.

8. Secondary sources—Casner, *Construction of Gifts to A and his children* (herein the rule in Wild's case), 7 U.Chi.L.Rev. 438 (1940), provides a thorough analysis, with detailed annotations, of the pre-1940 case law falling within the scope of this section. The author strongly recommends the life estate with remainder, noting, "Any doctrine which today creates a presumption that a testator intended to create an estate in fee tail is completely divorced from reality." Id. at 447.

§ 28.4 Beneficiaries of Multigenerational Gift Described as Named Individual (Not a Parent of the Class) and a Class

If a gift is made to a named individual and a class described as the "children" or "issue" of a person other than the named individual, or by a similar class gift term, and if the named individual is not in the same generation in relation to the donor as the described class members, in the absence of additional language or circumstances that indicate otherwise, the following rules of construction apply:

1. If the named individual and the class members have a common ancestor, the gift to the named individual and the class is treated as though it was a gift distributed as provided in § 28.2 to the "issue" of the common ancestor, and they were the only issue.

2. If the named individual and the class members do not have a common ancestor, the named
individual is considered as a member of the class and the subject matter of the gift is divided among the class on a per capita basis.

Comment:

a. Rationale. If a gift is made in terms to a named individual and a class described as the “children” or “issue” of a person other than the named individual, or by a similar class gift term, and the named individual is not in the same generation in relation to the donor as the class members, the beneficiaries do not make a group the members of which are equally close to the donor. It is reasonable to conclude that if the named individual and the class have a common ancestor, the donor intended the initial division of the subject matter of the gift should be into shares as though the gift had been made to the common ancestor’s “issue,” with the individual and the class described being the only issue, in the absence of additional language or circumstances that indicate otherwise. This is accomplished under subsection (1). If, however, the individual and the class do not have a common ancestor, it is reasonable to conclude that a per capita distribution among the individual and the class was intended. This is accomplished under subsection (2).

Illustrations:

1. O transfers property by will “to my daughter D and the children of my deceased son S.” O is the common ancestor of D and the children of S. In the absence of additional language or circumstances that indicate otherwise, the distribution is made as though the gift had been made to O’s issue, and under § 28.2, D is entitled to one half of the subject matter of the gift and the children of S are entitled to the other one-half of the subject matter of the gift. The share going to the children of S is divided among them as provided in § 28.1.

2. O transfers property by will “to my brother John and the children of my deceased sisters, Mary and Jane.” Mary has two children, N₁ and N₂, and Jane has three children, N₃, N₄, and N₅. O’s parents are the common ancestors of O’s brother John and the children of Mary and Jane. If distribution is made as though the gift had been to the issue of O’s parents, the initial division of the subject matter of the gift under § 28.2 is into three equal shares. One share goes to O’s brother John, one share goes to the children of O’s sister Mary, and one share goes to the children of O’s sister Jane. This means that N₁ and N₂ will each take one-half of one share, and N₃, N₄, and N₅ will each receive one-third of one share.
3. O transfers property by will "to my son S and the issue of my deceased daughter D." D has two children, C₁ and C₂, and five grandchildren, GC₁ and GC₂, children of C₁; GC₃ and GC₄, children of C₂; and GC₅ a child of D's deceased child C₅. The common ancestor of the beneficiaries is O. Under § 28.2, if the gift had been made to O's issue, S would receive one-half of the subject matter of the gift and D's issue would be entitled to one-half of the subject matter of the gift. Under the rule of § 28.2, the share of the gift that goes to D's issue is divided among C₁, C₂, and GC₅, each one taking one-third of such share.

4. O transfers property by will "to my grandchild Joseph and to my children." Joseph is the only child of O's deceased child, C₁. O has two other children, C₂ and C₃. O is the common ancestor. In the absence of additional language or circumstances that indicate otherwise, the initial division under § 28.2, if the gift had been made to O's issue, would give one-third of the subject matter of the gift to Joseph and one-third to C₂ and one-third to C₃. The gift to O's children excludes O's deceased child C₁ by necessary implication, so that an antilapse statute would not apply to give Joseph an additional share as a substitute for C₁ under the antilapse statute.

5. O transfers property by will "to my son S, the children of my deceased daughter D, and the children of my deceased brother John." D has three children and John has two children. The common ancestors are O's parents. Under § 28.2, if the gift had been made to the issue of O's parents the initial division of the subject matter of the gift would be into two shares, one for S and the children of O's deceased daughter D, S taking one-half of that share and the children of D taking the other one-half, and one share for the children of O's brother John.

b. Gift to named individual and class as "tenants in common." If the named individual and the class are to take as "tenants in common," this additional fact does not overcome the rule of this section, because the shares of tenants in common in the subject matter of the gift do not have to be equal.

c. Gift to named individual and class as "joint tenants." If the named individual, or named individuals, and the class or classes are to take as "joint tenants," this additional fact overcomes the rule of this section, because the undivided shares of each joint tenant must be equal. In such case, the named individual is entitled to the same share in the subject matter of the gift as each class member.
§ 28.4 DONATIVE TRANSFERS (PROPERTY, SECOND) Pt. VI

REPORTER'S NOTE TO SECTION 28.4

1. Comparison with present state of the law—The rules of this section are consistent with judicial authority. However, a minority of jurisdictions, possibly still a substantial minority, still adhere to the rule set forth in § 301 of the first Restatement, that gifts of this type are presumptively to be distributed per capita. Comment g to § 301 does recognize that the multigenerationality of beneficiaries may serve as evidence helping to support the inference that the donor had intended a distribution like that of § 28.2.

2. Justification for the rules of this section—The justification for the rules of this section is set forth in Comment a.

3. Cases supporting the rules of this section—In Fraser v. Dillon, 78 Ga. 474, 3 S.E. 695 (1887), mentioned in item 4a of the Reporter's Note to Section 28.1, the testator left the residue of his realty to [A], the children of [B], [C, D, and E], children of [W]. W was the testator's wife; A, B, C, D, and E were his children; B had died before the execution of the will. The court ordered a per stirpes distribution, holding that "the presumption is that the ancestor intended that his property should go where the law carries it; which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect. . . . [I]t is manifest to us that the testator intended . . . to give those children the same share or part which their mother . . . would have taken had she been in life." Id. at 475, 3 S.E. at 696.

In White v. Holland, 92 Ga. 216, 18 S.E. 17 (1893), the testatrix's estate was to be "equally divided between D, H, and the lawful children of G." D and H were her two sisters, and G was her brother. All three of them survived the testatrix, but "she did not desire that her brother should have any of her property, both on account of his financial embarrassment and of certain conduct in his past life." The court ordered a per stirpes distribution, citing Fraser with approval, but distinguishing it on the ground that "the rules of inheritance [are] not applicable to the case at bar" because the children of G were not the testatrix's heirs. The court expressed strong sympathy with the view that "the will considered by itself" unambiguously directed a per stirpes distribution, but stated: "There are, however, respectable authorities to the contrary, and we do not deem it necessary in the present case to decide this question. We prefer to avail ourselves of the aliunde facts" that if there was any one favored branch of her family, it was not the brother's. Id. at 219, 18 S.E. at 18.

Dollander v. Dhaemers, 297 Ill. 274, 130 N.E. 705 (1921), has been cited in many other states. "Upon [my wife's] death or in the event of her remarriage all my said property shall be vested in my children, [A], the children of [B], deceased, [C, D, E, F, G, H, and I], share and share alike." The court ordered a per stirpes distribution, observing, "The will gives the names of all his children, but does not give the particular names of any of the grandparents. It simply groups them all
together as ‘the children of [B],’ and
the arrangement . . . would indi-
cate that he was thinking of them
as a class, representing the de-
ceased daughter.” The court dis-
cussed the authorities, found them
to be “in hopeless conflict,” and
held, “while, perhaps, the conclusion
we have reached may not be sup-
ported by the majority of the Ameri-
can and English authorities, judging
them only by number, we think it is
fully supported by the weight of
authority where the question has
been exhaustively considered.” The
court conceded that when a phrase
such as “share and share alike” is
used, “the persons among whom the
division is to be made are usually
held to take per capita, unless a
contrary intention is discoverable
from the will . . . the presump-
tion, however, . . . yields readily
in favor of a faint indication of the
testator that the distribution shall
be per stirpes.” Id. at 278, 130
N.E. at 706. The court quoted Mc-
Lean v. Williams, 116 Ga. 257, 42
S.E. 485 (1902): “The estate in ei-
ther event is divided into shares,
and equal shares, although in the
one case each share goes to an indi-
vidual, and in the other case the
equal shares go to a class of individ-
uals.” Id. at 259, 42 S.E. at 486.

Perry v. Leslie, 124 Me. 93, 126 A.
340 (1924), took a cautious ap-
proach. The testatrix left the resi-
due of her estate to three cousins
and the unnamed daughters of a
fourth. The court ordered distribu-
tion per stirpes, though citing Dol-
lander as authority that the then-
prevailing rule was that “when a
device or bequest is made to a per-
son and the children of another per-
son . . . the beneficiaries take per
capita, not per stirpes.” The court
went on to observe that “it requires
but . . . ‘a very faint glimpse’ if
[sic] a different intention . . . to
lead to a distribution per stir-
pes . . . If we have strict re-
gard to the language . . . and to
the facts . . . the rule referred to
is not applicable because (1) the
word ‘children’ as distinguished
from ‘heirs’ is not used, and (2) the
gift is not to the [five] children of
[testatrix’s cousin] . . . but the
daughters, four in number.” Id. at
98, 126 A. at 343.

In re Adkins’ Estate, 30 Del.Ch.
608, 55 A.2d 145 (1947) ordered a per
stirpes distribution among the testa-
trix’s two sons and “heirs of” her
deceased daughter, but acknowledged
“very reputable authority” support-
ing “what has been called the English
rule . . . That rule has met with
considerable disapproval in this coun-
try and has been criticised [sic] even
by some of the Courts which follow
it. Many American authorities have
adopted the opposite view, especially
where the beneficiaries do not all
stand in the same relation to the tes-
tator . . . This finding seems to
be in harmony with modern judicial
thought; it more probably represents
what this testatrix actually had in
mind.” Id. at 608, 55 A.2d at 117.

In Gray’s Estate, 85 Pa.D. & C.
160 (1953), the remainder after a
life estate in testator’s widow was
“to be equally divided, share and
share alike, to my sons [A, B], to
the children of my son [C], de-
ceased, to my daughters, [D, and
E].” The scrivener of the will testi-
fied that a per stirpes distribution
had been intended. The court held,
“where there is a class comprised of
members of different generations
. . . the law favors that construc-
tion . . . allowing each class to
take as their parents would have
done, per stirpes . . . Even
were the court to ignore the testimony of the scrivener, and ascertain testator's intention solely from the words used in the will, the result would be the same." *Id.* at 165. But see In re Scheffler's Estate, *infra* item 4a.

In re Tonneson's Estate, 136 N.W.2d 822 (N.D.1965), applied the rule of this section to relatives by affinity. The testatrix left her estate to "my beloved relations as follows: [A, B, C]; to the children of my deceased sister, [D], [E, F], and to the children of my beloved brother, now deceased, [G] . . . . It is my desire that all my above named relations get an equal portion of my estate and that they all be treated equally." The court held "that the purpose and intent of the testatrix was to leave her estate to the brothers of her deceased husband . . . and to the children of her deceased sisters and brother, *per stirpes*," *Id.* at 827, and ordered a division into seven primary shares, one for each of the brothers and sisters of the testatrix and her husband. Language implying equality of division was also held compatible with a stirpital distribution in 233 N.W. 41 and 294 S.W. 935.

In Jones v. Hudson, 122 W.Va. 711, 12 S.E.2d 533 (1940), a holographic will said, "sell and divide equally all my stock, real estate, etc., except my nephew George Booth give him fifty dollars." The court held that the "division" should be among the other named legatees: "Mr. Thompson" (testatrix's husband), two nieces, a sister, another niece, a grandniece, "Sister Mary" (testatrix's sister-in-law), another niece, and two nephews. And the "equal" division should be stirpital: "having regard to the different degrees of relationship of those benefiting from her bounty, the language 'divided equally' cannot reasonably be taken to mean that grandnieces should share equally with a sister—such would be the result per capita. Circumstances considered, the direction for equal division should be considered to require a distribution in conformity with the law of intestacy, that is to say, equally in accordance to stocks; and not an unnatural distribution "by the head."" *Id.* at 713-714, 12 S.E.2d at 534. One Justice concurred in the result (a remand), but maintained: "I am in accord with the opinion of the majority that it was evidently not the purpose of testatrix to . . . [call for] a per capita distribution. . . . [But] the beneficiaries named . . . form a class which plainly conflicts with the statutory method of distribution. I am of the opinion that the residuary provision is too indefinite to be enforceable." *Id.* at 715, 12 S.E.2d at 535.

Bradley v. Jackson's Estate, 1 Kan.App.2d 695, 573 P.2d 628 (1977), involved a residuary bequest "to Mattie Grubb of Esborne, Kansas, and to my lawful heirs." Although the court held that "a *per stirpes* distribution would not be possible if Mattie Grubb ['an unrelated acquaintance'] were to participate," the result was in accordance with the rules of this section: a distribution with Mattie Grubb and the testatrix as the stocks, half going per stirpes to the testatrix's heirs. Compare In re Rauschenplat's Estate, *infra* item 4a.

4. Cases contrary to the rules of this section—

a. Cases holding that the initial presumption should always favor a per capita distribution. In Collins v. Feather's Executors, 52 W.Va. 107, 48 S.E. 323 (1903),
the residue of testator's estate was to "be equally divided between my children, and grandchildren of [sic]" a deceased daughter. The court ordered a per capita distribution among the testator's children and his grandchildren by the deceased daughter: "as a general rule . . . they take per capita; and the same rule prevails whether the devise or bequest is to one who is living, and the children of one who is dead, and that without regard to the relation of the parties to each other. For the appellees it is insisted that the weight of American authority is against this rule, and owing to the principle of equality embedded in our law of descents . . . the beneficiaries should take per stirpes." Id. at 110, 435 S.E. at 324. In a lengthy comparison of the two rules, the court concluded that the rule of Fraser v. Dillon, supra item 3, properly applied only to gifts to "heirs" of a named person, and that the court's reliance on "the aliunde facts" in White v. Holland, supra item 3, demonstrated that even the Georgia courts had not fully "abrogated [the per capita rule] and replaced [it] by another rule." Cases finding per stirpes distributions in other jurisdictions were similarly dismissed as relying on further evidence of testator's intent. The per capita distribution, "it may be said, is inequitable and unjust . . . but how are we to determine the views of the testator concerning the equity . . . . May he not have said: 'These grandchildren are motherless. Some of them are infants and helpless. Their necessities . . . demand more ample provision for them. . . .'? . . . It must be admitted that the [per capita] rule has been approved and applied in Virginia cases, decided before the organization of this state, and which are binding authority upon this court. They have never been overruled. . . . While in some cases the broad principle asserted in opposition to the doctrine of these cases would prove to be equitable and just in its operation, cases will undoubtedly arise in which the strict application of it contended for here would work injustice and inequality." Id. at 119, 435 S.E. at 327.

One of the leading Virginia cases referred to in Collins was Crow v. Crow, 28 Va. (1 Leigh) 74 (1829). The testator directed "that the balance of my slaves shall be equally divided between my children, to wit, the heirs of [A], namely, [seven first names], the children of [A] deceased, [B, C, D], and the children of my deceased daughter [E], and the children of my deceased daughter [F] . . . ; but the children of my daughter [E] are to take only such part as their mother would take if she was still alive, that is to say, a child's part; and in like manner the children of [F] are to take . . . a child's part." The court ordered a division into 12 primary shares, corresponding to the seven named grandchildren and the five children, B, C, D, E and F: "The cases all lay it down, that . . . however the statute of distributions may operate upon such relations, equality of distribution shall be the rule, unless testator shall have established a different one." The court pointed out that the testator's language in this case reinforced the rule, with a clear implication that the children of A were not to divide "a child's part." Id. at ??
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In Peoples Nat. Bank of Greenville v. Harrison, 198 S.C. 457, 18 S.E.2d 1 (1941), the testator "was frequently appointed as . . . acting Associate Justice of the Supreme Court of this State. In this field he also displayed unusual ability." He directed that the residue of his estate "be equally divided between the children of my nephew, [A], my niece [B], and my nieces, [C and D]." C and D were sisters. All four nephews and nieces named, and five others, survived testator, all with children. The Court ordered a per capita distribution among B, C, D, and the seven children of A: "While he had in mind the branches of the family from whom the named beneficiaries stemmed, he did not select those branches as a class. On the contrary, he selected individuals from these branches and named them, thus showing that he intended them to take not in groups but as individuals. He intended all of the children of [A] to take, and instead of naming them he described them by their relation to their father." The court noted that the per capita "rule has been criticized in our own as well as other jurisdictions. Chancellor Harper observed in Cole v. Creyon [10 S.C. 311 (1839)]: 'I am not sure that if a different rule had been adopted, the intention of testators would not have been more frequently effected.' But he adds, 'The rule being settled however, must be adhered to. . . . It may not be amiss to add that in the large majority of the cases where the per capita rule has been criticized, there was [sic] involved direct descendants of the testator. . . . In the case of Wessenger v. Hunt, [9 Rich. Eq. 459 (1856)], our court said: 'The intensity of a man's love for his offspring, is in proportion to their propinquity.' But 'this sentiment does not extend to collaterals.'" The court noted that a per stirpes distribution would have been appropriate had the testator specified that after-born children of A were included in the gift, or had the gift been to the "heirs" of A: "Wherever the Court is compelled . . . to resort to our Statute of Distributions for the purpose of ascertaining the objects of a gift, we must also resort to the statute to ascertain the proportions." Id. at 464, 18 S.E.2d at 4.

In re Rauschenplat's Estate, 212 Cal. 33, 297 P. 882 (1931), rev'g 291 P. 432 (Cal.App.1930), takes the opposite view from Bradley, supra item 3. The testator left his entire estate to "[A], my sister, of Hamburg, Germany, to all the living children of my deceased half-brother [B], late of Hamburg, Germany, and to [C], daughter of [the executor of the will], of San Luis Obispo, California, share and share alike." The court emphasized a dictum from In re Morrison's Estate, 138 Cal. 401, 71 P. 453 (1903): "It is quite true that the words 'share and share alike' would have prevented discussion as to the intention of the testatrix." The court then discussed the other cases cited in the dissenting opinion below as authority for the per capita rule. The only recent case was Neil v. Stuart, involving a one-generation class and discussed in item 3c of the Reporter's Note to Section 28.1. The dissenting judge below also asked, "does it seem possible that testator would actually have
desired that [C] should receive one-third of the estate . . . is it likely that the wishes of the testator were that a stranger to the blood should receive three times as much . . . as would one of his own nieces or nephews?” 291 P. at 434.

(In Morrison, the court had ordered a per capita distribution of a residuary legacy “to be divided between my sister [A] and her daughters and my brother [B]”; other clauses in the will, but not the residuary clause, had used the phrase “share and share alike.”)

In re Estate of Schuette, 3 Wis. 2d 421, 88 N.W.2d 370 (1958), does not really fall within the scope of this section, as the only question was whether there was a class gift at all, but it involves the same basic principles. The testatrix gave “($1,000.00) dollars to each of the following, namely [A, B, C, D], and the children of [E], deceased. The first two named are the children of my deceased brother, [F], and the last three named are the children of my deceased sister, [G].” The court held that $1000 should go to each of the children of E, on the basis of the principle that “one or more persons named and the children of another . . . take per capita.” Id. at 423, 88 N.W.2d at 371. The court found support in the “stranger to the blood” principle, noting that $1,000 had also gone to a woman who “was not a blood relative of the testatrix.” (She was also one of the residuary legatees.) In contrast to Gray, supra item 3, which had found the scrivener’s testimony to be admissible but redundant, the court held that the scrivener’s testimony was inadmissible: “all parties contend that the will is not ambiguous. We agree.” The dissenting justices pointed out that the residuary legatees’ claim, that the will unambiguously stated that $1000 was left to be divided among the children of E as a class, was hardly a stipulation that the court should disregard external evidence such as the notes from which the scrivener had drafted the will, which read, in part:

| [A] | each 1000 |
| [B] |
| children of [E] | -1000 |
| [C] | -1000 |
| [D] | -1000 |

See also In re Symond’s Estate, 424 F.2d 928 (D.C.Cir.1970), which used the “stranger to the blood” principle to conclude that the testatrix could not have intended the sub-paragraph divisions of the residuary clause to correspond to shares in the residuary estate.

b. Cases holding that “share and share alike” or similar language directs a per capita distribution. In Johnson v. Johnson, 13 Ohio Misc.2d 15, 468 N.E.2d 945 (1984), the testatrix left her estate “to my children, their heirs and my foster child as follows: [A, B, C, D, E], the children of my deceased daughter, [F] and [G], share and share alike.” The court ordered a per capita distribution: “The devise is to a class referred to as ‘my children, their heirs, and my foster child.’ It is not necessary that a class consist of persons of the same relationship to the deceased. . . . The members of this class are to take ‘share and share alike’ . . . defined in Black’s Law Dictionary (5
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Ed.1979) as: 'In equal shares or proportions. The words commonly indicate a per capita division . . .' Naming of a foster child . . . further strengthens this conclusion . . . An exception to the general rule of construction exists if the gift is to persons named and the heirs of another person . . . However, if the word 'heirs' is tantamount to 'children,' the persons named take per capita. [80 Am.Jur.2d, Wills § 1468]. In the instant case, both the words 'heirs' and 'children' were used by testatrix . . . The question is not what the testator should have done, but what he did do . . . " Id. at 17-18, 468 N.E.2d at 945-47.

In re Hoover's Estate, 417 Pa. 263, 207 A.2d 840 (1965), dealt with a residuary trust: "When all of my said children except one are dead, I direct my trustee, to pay to the last remaining child, and the children, if any [ ] of my children deceased, the principal held in trust, share and share alike." The court ordered a per capita distribution: "Testator's gift of the trust-principal was coupled with the words 'share and share alike'—words [footnote: Like the words 'equally' or 'in equal shares'] which have perplexed courts for years. Testator . . . pertinently provided for . . . a gift of income per stirpes to the issue of each deceased child . . . . Testator demonstrated in and by the clearest language that he knew how to create . . . a per stirpes distribution . . . when that was his intent . . . the lower court decided that this will is sui generis and that testator intended a per capita distribution of the principal . . . With this construction we agree . . . The language in each and all of those wills [in the cases cited by both sides] is so different from Hoover's Language as to furnish no controlling precedent." Id. at 269-69, 207 A.2d at 841-43.

In Chisholm v. Bradley, 99 N.H. 12, 104 A.2d 514 (1954), "the decedent bequeathed and devised the bulk of his estate . . . 'in equal shares' to his four sisters, therein named, and his three nieces, also named, 'daughters of my deceased sister Nina Lord, late of Acton, the same to be to them and their heirs.' . . . The will plainly provided that the residue should go 'in equal shares' . . . That a per capita division was intended is further indicated by a contrasting provision of the prior clause that on stated contingencies two nieces of a former wife of the testator should . . . receive a share in said residuary estate, in equality with the legatees and devisees named in . . . the residuary clause.' " [Emphasis added] "This was plain indication that the 'legatees . . . named' were to share equally." Id. at 13-14, 104 A.2d at 515-16.

§ 28.5 Beneficiaries of Multigenerational Gift Described as Several Classes

If a gift is made in favor of several different classes described as "children" or "issue" of designated persons, or a similar class gift term, and the class members of the
several different classes are not all in the same generation in relation to the donor, in the absence of additional language or circumstances that indicate otherwise the following rules of construction apply:

(1) If the class members of the several classes have a common ancestor, the gift to the several classes is treated as though it was a gift distributed as provided in § 28.2 to the “issue” of the common ancestor, and they were the only issue.

(2) If the class members of the several classes do not have a common ancestor, they are regarded as a single class and the subject matter of the gift is divided among the classes on a per capita basis.

Comment:

a. Rationale. If a gift is made to several different classes and the members of the different classes are not all in the same generation in relation to the donor, the several different classes do not make a group the members of which are equally close to the donor. It is reasonable to conclude that, if the several classes have a common ancestor, the donor intended the initial division of the subject matter of the gift should be into shares as though the gift had been made to the common ancestor’s “issue” and the several classes were the only issue. This is accomplished under subsection (1). If, however, the several classes do not have a common ancestor, it is reasonable to conclude that a per capita distribution among the several classes was intended. This is accomplished under subsection (2).

Illustrations:

1. O transfers property by will “to my children and the children of my deceased son S.” O has four children, C1, C2, C3, and C4, in addition to his deceased son S. S has three children, GC1, GC2, and GC3. O is the common ancestor. In the absence of additional language or circumstances that indicate otherwise, the subject matter of the gift is divided as though the gift had been made to O’s issue, that is into five equal shares. O’s children, C1, C2, C3, and C4 are each entitled to one equal share and S’s children GC1, GC2, and GC3 are each entitled to one-third of an equal share.

2. O transfers property by will “to the children of my deceased son S and the issue of my deceased daughter D.” S has two children, C1 and C2. D has two children, C3 and C4, and
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a grandchild, GC₁, a child of D's deceased child, C₅. O is the common ancestor. In the absence of additional language or circumstances that indicate otherwise, the subject matter of the gift is divided as though the gift had been made to O's issue, that is into five equal shares. C₁ and C₂ are each entitled to one equal share, and C₅, C₄, and GC₁ are each entitled to one equal share.

3. O transfers property by will "to the issue of my deceased son S, the issue of my deceased daughter D, and the issue of my deceased sister, Jane." S has two children, C₁ and C₂. D has three children, C₃, C₄, and C₅. O's sister has four children, C₆, C₇, C₈, and C₉. The members of two of the classes (the issue of S and the issue of D) are all in the same generation in relation to O. The issue of Jane, however, are in a higher generation in relation to O. O's parents are the common ancestors. If the gift is treated as though it had been made to the issue of O's parents, the subject matter of the gift under § 28.2 would be divided into two equal shares, one equal share for the issue of O, and the one equal share for the issue of Jane.

4. O transfers property by will "to my son S, my daughter D, my nephew N, who is the only child of my deceased brother, and to the children of my deceased sister Mary." Mary has two children, and S, D, N, and the two children of Mary are all in the first generation below O. In the absence of additional language or circumstances that indicate otherwise, the rules of construction of § 28.1 apply and the initial division of the subject matter of the gift is into five shares, one share for S, one share for D, one share for N, and one share for each of the children of Mary.

. REPORTER'S NOTE TO SECTION 28.5

1. Comparison with present state of the law—The rules of this section are consistent with judicial authority. However, a minority of jurisdictions, possibly still a substantial minority, still adhere to the rule set forth in § 301 of the first Restatement, that gifts of this type are presumptively to be distributed per capita. Comment g to § 301 does recognize that the multigenerationality of a class may serve as evidence helping to support the inference that the donor had intended a distribution like that of § 28.2.

2. Justification for the rules of this section—The justification for the rules of this section is set forth in Comment a.

3. Cases supporting the rules of this section—In re Porter's Estate, 238 Wis. 181, 298 N.W. 624 (1941), construed a residuary clause calling for a division "in equal shares among my cousins, hereinafter named, to wit, [13 names] and the
[11] children of [A] and [B] who survive me." The trial court held that the estate should be divided into 24 primary shares, the share of each of the nine first cousins dying between the execution of the will and the testatrix's death to be divided among his or her children. The supreme court reversed, holding that each class of "children" of first cousins dying before the execution of the will should divide one share, just as did those cousins once removed who were named in the will but who had predeceased the testatrix: "the trial court was largely governed by the rule stated in Will of Asby, 232 Wis. 481, 487, 287 N.W. 734, 737, 126 A.L.R. 151, as follows: ' . . . if a testamentary gift is made . . . to A and the children of B, the persons entitled will ((presumptively)) take per capita. . . . ' While as indicated in . . . 16 A.L.R. 15, the general rule originally was that under such circumstances the distribution was per capita . . . a very slight circumstance is sufficient to overcome the rule." Id. at 184-85, 298 N.W. at 625. The court found "the use of the word 'children' in a bequest to the children of a named person" to be such a circumstance. In Bear v. Pitzer, 131 W.Va. 374, 47 S.E.2d 219 (1948), the testator directed that his estate "be equally divided between my Brothers and sisters living and the children of my deceased Brother and sister whose names I have written out above in this will." The court ordered a per stirpes division, holding that the above language by itself would indicate a per capita division, but that testator's intent was clarified by testator's references to "his" or "her share of the estate" when he enumerated the children of the deceased brother and of the deceased sister.

In Ward v. Ottley, 166 Va. 639, 186 S.E. 25 (1936), the testator left his estate "equally unto my nephews and nieces, [names], and to the children of [A]." The individuals named as "nephews and nieces" were all of the testator's nephews and nieces except for A, who "was having trouble with her husband. To have left a share of the real estate . . . to [her] would have given her husband at least some control over it." The court ordered a per stirpes division, holding that the long-established "presumption of a per capita distribution . . . is not a strong presumption and is easily overborne." Id. at 643, 186 S.E. at 26.

In Hill v. Wallace, 253 S.W.2d 464 (Tex.Civ.App.1952), the testator left approximately 500 acres to his daughter and eight named grandchildren. Elsewhere in the will, the grandchildren had been identified as the children of the testator's predeceased sons, and had been grouped by families. (The testator also had a surviving son, who was devised a separate parcel of land.) The court ordered a per stirpes division, finding additional support in the provision that if the testator's children had all predeceased him, the division among the grandchildren should be "according to the general laws of descent and distribution," although the Texas descent statute is ambiguous as to whether the grandchildren would have taken per stirpes or per capita in that contingency. (See Comment, Determination of Per Capita and Per Stirpes Distribution Among Grandchildren and More Remote Lineal Descendants in Texas: Plea for Amendment, 23 So.Tex.L.J. 187
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(1982.) The court further noted that, "since the beneficiaries were of unequal degrees of relationship in the same paragraph, the presumption ordinarily is that the classes should benefit equally." Id. at 465.

See also Condee and Fahey, discussed in item 7a of the Reporter's Note to section 28.3, in which the courts held that the testators had intended per stirpes distributions among their "children and grandchildren," and that the gifts should therefore be construed as gifts "to my children then living and to the children of my predeceased children."

In Perry v. Bulkley, 82 Conn. 158, 72 A. 1014 (1909), the will provided: "If my niece . . . dies without issue. . . . I wish the homestead . . . to go to the children of my uncle, [A], in equal shares; and they are to participate equally with my legal heirs in whatever balance there may be." The court held that half of the residuary estate should go to the cousins who took the homestead, and half to [the estates of] the testator's heirs, who were a sister and the above-mentioned niece.

4. Cases contrary to the rules of this section—in re Davis's Estate, 319 Pa. 215, 179 A. 73 (1935), held that a distribution of the corpus of the residuary trust "in equal shares to and among the [two] children of my daughter, [A], then living, and the [eight] children of my brother [B], then living" should be per capita: "True . . . 'this mode of construction will yield a very faint glimpse of a different intention. . . . But no such different intention appears here. On the contrary, the fact that testatrix passed over her [living] daughter . . . indicates . . . that the reference to the parents was simply for the purpose of designation. . . . The use of the word 'among' naturally suggests that testatrix . . . was thinking of a distribution to several individuals rather than to two classes, for which the appropriate word would have been 'between' . . . Appellants urge upon us the analogy of the intestate laws. . . . In the present case, however, testatrix' next of kin was her daughter, who survived her, and not the beneficiaries named in the will. The rule therefore has no application here." Id. at 219, 179 A. at 74.

5. Contrary intent of the donor: division by husband's and wife's families—in Dickerson v. Yarbrough, 212 S.W.2d 975 (Tex.Civ.App.1948), a joint will directed "that at the death of [the] survivor our said estate shall be equally divided between the nearest of kin to the said [testator] and the said [testatrix]." Testator, the survivor, died without issue after "conveying by general warranty deed his 'one-half undivided interest' " in his realty to his wife's "nearest of kin," her daughter by a former marriage. The apparent intent was that she would then take the other half under the terms of the will. The court held that the deed conveyed only a life estate, but that she would take half of the remainder under the terms of the will rather than sharing per capita with testator's 15 nephews and nieces, "the word 'among' being correct etymology had the testators intended a per capita distribution to a single class." Id. at 980.

See also Hardin v. Crow, 310 Ky. 814, 222 S.W.2d 842 (1949), in which
the remainder after a life estate in the testator’s widow was “equally divided between her nearest relatives and my nearest relatives” in the same fashion.
Chapter Twenty-Nine

GIFTS TO HEIRS AND THE LIKE AS WORDS OF PURCHASE

Introductory Note

Section
29.1 Class Members Identified by Some Statute Governing Intestate Takers
29.2 Determination of Controlling State
29.3 Applicable Statute in the Controlling State
29.4 Time When Applicable Statute Is Applied
29.5 No Requirement of Survival of Class Members to a Date Subsequent to the Date on Which Statute Is Applied
29.6 Share of Each Class Member
29.7 Determination of the Amount of the Subject Matter of a Gift That Is Distributable to the Class Members if the Gift Is to a Named Individual and a Class
29.8 Determination of the Amount of the Subject Matter of a Gift That Is Distributable to Several Different Classes

Introductory Note: If a gift to the “heirs” of a designated person is effective to describe persons who take an interest in the subject matter of the gift, the first step is to determine the primary meaning of the word “heirs.” This is somewhat comparable to the task fulfilled by Chapter Twenty-Five in the case of gifts to others than heirs and the like.

The development of the primary meaning of the word “heirs,” and of similar class gift terms, involves several distinct steps. First, does the donor intend that a statute governing the intestate takers of property be used to identify the members of the class (see § 28.1)? Second, if some statute governing the intestate takers of property is to be used, since all such statutes are state statutes, which state statute is controlling (see § 29.2)? Third, the statute in the controlling state may differ in the selection of the intestate takers from time to time over the years and may differ on the basis of the subject matter that is passing on intestacy, and consequently, the particular statute within the controlling state must be identified (see § 29.3). Fourth, the time when the identified statute is to be applied, that is as of the death of the person whose heirs are designated, or prior to that time or subsequent to that time, must be determined to complete the discovery of the primary meaning of the class gift term (see § 29.4).

After the primary meaning of the class gift term has been ascertained, the possible takers under the gift are known. Atten-
tion then turns to whether the possible takers must survive to some future date to share in the gift (see § 29.5), a problem similar to that considered in Chapter Twenty-Seven with respect to gifts to others than heirs or the like. Finally, the division of the subject matter of the class gift among the class members must be considered (§ 29.6), a problem similar to that considered in Chapter Twenty-Eight with respect to gifts to others than heirs and the like.

The rules developed in Chapter Twenty-Nine are rules of construction. They apply to a particular case only in the absence of additional language or circumstances that indicate otherwise.

§ 29.1 Class Members Identified by Some Statute Governing Intestate Takers

If a gift is made to a class described as the “heirs” of a designated person, or by a similar class gift term, in the absence of additional language or circumstances that indicate otherwise, a statute governing the intestate takers of property is used to determine the persons who come within the primary meaning of the class gift.

Comment:

a. Rationale. If the word “heirs,” or a similar class gift term, is used to describe the beneficiaries of a gift, the donor usually has no particular takers in mind but is simply indicating his desire that the law should take its course; namely, that some law relating to the takers of property on a person’s death intestate should be applied. The rule of construction set forth in this section takes the first step in identifying the takers under a gift to “heirs” and the like by giving effect to such probable intent of the donor. There remains for determination the law of what state governing intestate takers is to apply (§ 29.2); which statute within the governing state is to be used (§ 29.3); and the time as of which the statute within the governing state is to be applied (§ 29.4).

b. A similar class gift term. The word “heirs” is the word most frequently employed to indicate that the donor has exhausted his specific desires by previous gifts and is now ready to let a statute determine who will take. Other class gift terms that depend on the applicability of some statute governing intestate takers to give them meaning are “heirs of the body,” “next of kin,” and “relatives.” Each one is “a similar class gift term” to which the rule of this section applies.

If some statute governing the intestate takers of property is to be applied to a gift to the “heirs of the body” of some designated
person, obviously a narrower class is involved than a class described as the "heirs" of some designated person. The similar terms "next of kin" and "relatives," however, should receive treatment that is synonymous with the word "heirs."

c. **Contrary intent—**in general. The rule of this section applies in the absence of additional language or circumstances that indicate otherwise. The additional language or circumstances that indicate otherwise must show the donor does not intend some statute governing intestate takers to be used to determine the class members. Usually, if some statute governing intestate takers is not to be used, the donor will have manifested an intent that the word "heirs," or a similar term, means "children" or "issue" of some designated person.

d. **Contrary intent—**interchangeable use of words. The fact that the word "heirs," or a similar class gift term, is used in the dispositive document interchangeably with the word "children" or "issue," tends to establish that the donor did not have in mind a group to be ascertained in accordance with a statute dealing with the intestate succession of property. In the absence of other factors that indicate the donor had in mind a statutory group, the interchangeable use of the words "heirs," "children," and "issue" should result in the words "children" or "issue" dominating the description of the class (for the primary meaning of a gift to "children," see § 25.7; for the primary meaning of a gift to "issue," see § 25.9).

**Illustration:**

1. O transfers property by will to T in trust. T is directed to pay the income "to my heirs living on each income payment date, and on the death of my surviving child, to distribute the trust property to my issue then living, such issue to take per stirpes." A previous provision in O's will made a gift "to my heirs, C, and C₂." On O's death, O has two children, C₁ and C₂, and two grandchildren, GC₁ and GC₂, who are children of O's deceased child, C₃. The conclusion is justified that the word "heirs" in the income payment provision under the trust means "children" of O because he had referred to C₁ and C₂ as his heirs in another provision. Consequently, GC₁ and GC₂ do not share in any income payments, in the absence of additional language or circumstances that indicate otherwise.

e. **Contrary intent—**"heirs" to take "parents'" share. The fact that the gift to the "heirs" of a designated person is in substitution for the share a "parent" of theirs would have enjoyed, if the parent had lived, tends to establish that the donor did not
have in mind a group to be ascertained in accordance with a statute dealing with the intestate succession of property. This tendency is very strong because a spouse or brother or sister of the designated person might be an heir under a statute governing intestate takers but the designated person could not be a "parent" of any such person. The word "parent" suggests that the substitutional gift to the "heirs" should be construed to mean the "children" of the designated person. A conclusion, however, that the word "heirs" means "issue" and not just "children" may be justified when the word "heirs" is being construed in this context.

Illustration:

2. O transfers property by will to T in trust. T is directed to pay the income "to O's son S for life, and on S's death, to distribute the trust property to S's children then living and the heirs of a deceased child of S, such heirs to take the same share their deceased parent would have taken if living." O dies. S has two children, C₁ and C₂. C₁ dies. C₁ is survived by a child, GC₁, and a wife, W. S dies. A conclusion is justified that the word "heirs" means "children" of S's deceased child, C₁, so that W does not share in the substitutional gift.

Contrary intent—gift over on death without "heirs."

The fact that the gift to the "heirs" of a designated person is, in terms, subject to a gift over to others who are or could be heirs of the designated person tends to establish that the donor did not have in mind a group to be ascertained in accordance with a statute dealing with the intestate succession of property. If the persons that are to take under the gift over are collateral heirs of the designated person, the likely meaning of the word "heirs" in the gift to the "heirs" is "issue" of the designated person, as that construction gives the widest meaning to the gift to "heirs" and at the same time prevents the gift over from being a nullity.

Illustrations:

3. O transfers Blackacre by will "to O's daughter D for life, then to D's heirs, but if D dies without heirs to D's brothers and sisters in fee simple." At O's death D has two children, C₁ and C₂. C₁ and C₂ predecease D, leaving no descendants surviving them. D dies. D has not died without heirs because D is survived by brothers and sisters. Unless the word "heirs" is construed to mean either "children" or "issue" of D, the gift over to the brothers and sisters of D would be defeated. The conclusion is justified that the word "heirs" means "children" or "issue" of D and the gift over to the brothers and sisters of D is effective.
4. Same facts as Illustration 3, except that C₁ left a child, GC₁, which child survived D. It is now necessary to determine whether the word “heirs” means “children” or “issue” of D. It is not likely that O would intend the gift over to the brothers and sisters to take effect if D left any issue surviving her. Hence, the conclusion is justified that the word “heirs” means issue of D, and GC₁ is entitled to Blackacre.

$g$. Contrary intent—donor defines the word “heirs” in a manner that does not involve the use of any statute dealing with intestate succession. If the donor makes a gift by will to his own “heirs” and defines that term as meaning “all the persons to whom I have devised or bequeathed property in other provisions of this will,” no statute dealing with the intestate takers of property is applicable in determining who the donor’s “heirs” are for the purpose of a gift in the will to the donor’s “heirs.”

Illustrations:

5. O transfers property by will “to my heirs heretofore named.” The prior provisions in O’s will made gifts to O’s brother, to O’s sister, and to O’s grandchild. No one of the persons named in the prior gifts under O’s will would be a person that would take O’s property if O died intestate under any statute dealing with intestate succession. For the purpose of the gift to O’s “heirs,” O has defined as the heirs the brother, the sister, and the grandchild. No statute dealing with intestate takers is applicable.

6. Same facts as Illustration 5, except that, under every statute dealing with the intestate succession of property, the grandchild named in the prior gift would be the sole taker of any intestate property of O. Nevertheless, the conclusion is justified that, for the purpose of the gift to O’s “heirs,” O has defined as the heirs the persons who were recipients of prior gifts under the will.

$h$. Statutes which overcome the rule of this section. Statutes which declare that the word “heirs” means “children” unless a contrary intent of the donor is found from additional language or circumstances prevent the employment of any statute dealing with the intestate succession of property, unless such contrary intent is found. See the Statutory Note to this section.

$i$. Effect of express exclusion from the gift to “heirs” of a person who would clearly be included as a taker under a statute dealing with the intestate succession of property. The donor may manifest an intention to exclude as a taker under the gift to “heirs” a person who would or might be in the group of intestate takers
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under every statute dealing with the intestate succession of property. This fact does not overcome the rule of this section. The issue raised by such exclusion is whether a statute dealing with the intestate takers of property is to be applied initially as though such excluded person had not been excluded and then exclude such person from those so ascertained, or applied initially as though such excluded person predeceased the person whose “heirs” are designated. In the absence of additional language or circumstances that indicate otherwise, the excluded person is to be treated as deceased in applying the statute dealing with the intestate succession of property.

Illustrations:

7. O transfers property by will to T in trust. T is directed to pay the income “to O’s son S for life, and then to distribute the trust property to O’s heirs exclusive of S. O is survived by his wife W, his son S, and two grandchildren, who are children of S. O’s heirs under the applicable statute on intestate succession are W and S. If S is deemed deceased, O’s heirs under the applicable statute on intestate succession are W and the two children of S. The conclusion is justified that W and the two children take under the gift to O’s heirs.

8. Same facts as Illustration 7, except that W dies before O. If the “heirs” of O are determined first as though S survived and then S is excluded, the gift to O’s heirs would fail because S would be O’s sole heir under the applicable statute governing the intestate takers of property. Under these circumstances, the statute is clearly applied as though S predeceased O, thereby allowing the gift to O’s heirs to pass to S’s children.

i. Effect of exclusion by implication from the gift to “heirs” of a person who would be included as a taker under a statute dealing with intestate succession of property. The mere fact that one of the persons who comes within the meaning of the word “heirs” under an applicable statute governing the intestate succession of property is a spouse of the person whose “heirs” are designated does not justify his or her exclusion. The exclusion of the spouse is accomplished by implication if the gift is to the designated person’s “heirs as though such person died unmarried,” or if a life interest in the subject matter of the gift is given to the spouse, “in lieu of all other claims.”

If the class gift is to the “heirs of the body” of a designated person, the spouse of the designated person obviously is excluded. Such gift also excludes an adopted child of the designated person,
though the adopted child is a taker under the applicable statute governing the intestate takers of property.

Illustrations:

9. O transfers property by will to T in trust. O's will directs T "to pay the net income to O's wife W for life, and then to distribute the trust property one-half to O's heirs and one-half to W's heirs. O is survived by W and by two brothers, A and B. Under the applicable statute governing the intestate takers of property, O's heirs are W, A, and B. If W is allowed to take as one of O's heirs, more than one-half of the remainder interest will pass to the group consisting of W and her heirs. The conclusion is justified that W is excluded from the gift to O's heirs.

10. Same facts as Illustration 9, except that the remainder is given only to O's heirs. The fact that W is given a life interest under the trust does not in and of itself exclude her from taking a share of the remainder interest as an heir of O, in the absence of additional language or circumstances that indicate otherwise.

11. Same facts as Illustration 10, except that the life interest given to W is "in full satisfaction of all claims she may have against O's estate." The additional language is sufficient to justify the exclusion of W from a share of the remainder interest under the trust.

12. Same facts as Illustration 10, except that the remainder to O's heirs is "to O's heirs determined as though O had never married," and O is survived not only by his two brothers, A and B, but also by two children, C₁ and C₂. The additional language is sufficient to justify the exclusion of W from a share of the remainder interest under the trust. Does such additional language also exclude C₁ and C₂ on the ground they would not have come into existence if O had never married? The fact remains that C₁ and C₂ are in existence, and if O had never married they would have been born out of wedlock. If under the applicable statute governing intestate takers children of O born out of wedlock would be entitled to intestate shares, the heirs of O would be C₁ and C₂, and O's brothers, A and B, would not share in the remainder interest under the trust.

13. O transfers property to T in trust. O's will directs T "to pay the net income to O's son S for life, and then to distribute the trust property to O's heirs determined as though S predeceased O." O is survived by S and two grandchildren, GC₁ and GC₂, who are children of S. Under the applicable
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statute governing the intestate takers of property S is the sole heir of O. S, however, is excluded from taking under the gift to O's heirs. The effect of the requirement that O's heirs be determined as though S predeceased O is to make GC and GC_{2}, O's heirs under the applicable statute, and they take the remainder interest under the trust.

k. State as claimant under gift to "heirs." Under statutes governing the intestate succession to property, the State may be entitled to take intestate property if all other possible heirs are deceased at the time the statute applies to determine the heirs. This may be referred to as the right of escheat. The conclusion is justified that the donor does not intend that the subject matter of a gift is to pass to the State under a gift to the "heirs" of a designated person. In the absence of additional language or circumstances that indicate otherwise, the State is not an "heir" of the designated person and if there is no "heir" to take the gift, the gift fails and the subject matter of the gift is disposed of accordingly.

STATUTORY NOTE TO SECTION 29.1

The Uniform Probate Code provides as follows:

[Unless the context otherwise requires, in this Code . . . "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.] § 1-201(17) (6th Ed. 1983).

The following state statutes use the same or equivalent language:

Alaska Stat. § 13.06.050(17) (1985)
Colorado Rev.Stat. § 15-10-201(20) (1973)
Delaware Code Ann. tit. 12, § 101(b) (1979)
Florida Stat. § 731.201(18) (1985)
Michigan Comp.Laws § 700.6(3) (1979)
Nebraska Rev.Stat. § 30-2209(18) (1979)
Oregon Rev.Stat. § 111.005(18) (1985)
Texas Probate Code Ann. § 3(o) (Vernon 1980)
Wisconsin Stat. § 852.01(1) (1983-84)

Although the drafters of the Uniform Probate Code consciously chose not to address the construction of the term “heirs” in class gifts, courts in several states have used a statutory definition of “heirs” as a guideline for construction of class gifts, although the definition was enacted only for purposes of the construction of the statute itself.

The Delaware statute on the other hand expressly makes the definition applicable to wills. Wisconsin Stat. § 700.11 (1983-84) makes the statutory definition applicable to all conveyances of remainder interests, whether testamentary or inter vivos.

The Wyoming statute expressly states that “heirs” means any person, except the surviving spouse, who is entitled to property of a decedent under the statutes of intestate succession.


The following statutes also define “heirs” to be the intestate takers, but do not specifically mention the surviving spouse:

A Pennsylvania statute provides:

A devise or bequest of real or personal property, whether directly or in trust, to the testator’s or another designated person’s “heirs” or “next of kin” or “family” or to “the persons thereunto entitled under the intestate laws” or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate . . . owning the estate so devised or bequeathed. 20 Pa.Cons.Stat.Ann. § 2514(4) (Purdon 1975)

The following statutes are similar in effect:
California Probate Code § 6151 (West Supp.1986)
Indiana Code Ann. § 29-1-6-1(c) (West 1979)
Oklahoma Stat. tit. 84, § 168 (1981)
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Wisconsin Stat. § 700.11 (1983-84)

The New York, North Carolina, and Wisconsin statutes apply to inter vivos as well as testamentary dispositions of property; in Pennsylvania inter vivos dispositions are governed by 20 Pa.Cons.Stat.Ann. § 6114(1) (Purdon 1975), which is otherwise identical to § 2514(4), supra. The California statute mentions "relatives," and the Oklahoma and South Dakota statutes have considerably longer lists of synonyms for "heirs." The New York and North Carolina statutes, on the other hand, do not mention "family;" (see item 4c of the Reporter’s Note to Section 28.3 for gifts to "family" in New York), and the North Carolina statute does not even expressly apply to "heirs"). The Wisconsin statute applies only to remainder interests.

Although the Georgia descent statute, Ga.Code Ann. § 53-4-2 (Supp. 1986) [formerly § 113-903], defines "heirs" to be the intestate takers, this definition is overridden in cases falling within the scope of the Shelley’s Case Statute, which provides:

Limitations over to "heirs," "heirs of the body," "lineal heirs," "lawful heirs," "issue," or words of similar meaning shall be held to mean "children" whether the parents are alive or dead. Under such words the children and the descendants of deceased children in being at the time of the vesting of the estate shall take. Ga.Code Ann. § 44-6-23 (1982) [formerly § 85-504]. See Dodson v. Trust Co. of Georgia, discussed in Item 4a of the Reporter’s Note to this section.

A North Carolina statute provides:

A limitation by deed, will, or other writing, to the heirs of a living person, shall be considered to be to the children of such person, unless a contrary intention appear by the deed or will. N.C.Gen.Stat. § 41-6 (1984).

In general, the effect of adoption, artificial insemination, and illegitimacy on heirship is governed by the statutes collected and discussed in the Statutory Notes to Sections 25.2–25.6, the dispositive point being the recognition or non-recognition of the parent-child relationship. A Texas statute explicitly provides that "next of kin" includes adopted children (and adoptive parents, when parents are the next of kin). Tex.Prob.Code Ann. § 3(j) (Vernon 1980). Vermont, on the other hand, provides that adopted children, although "heirs" of the adoptive parent(s), are not "heirs" of the adoptive parents’ relatives nor "heirs of the body" of the adoptive parent(s). The adopted child continues to be the "heir" of the natural parent(s), but is not the "heir" of the natural parent’s relatives unless the natural parent is the spouse of the adoptive parent. Vermont Stat.Ann. tit. 15, § 448 (1974). Such statutes were once more prevalent, but most have been repealed, and a number of states have now passed statutes expressly including adoptees as "Heirs of the Body"; the Uniform Probate Code does not do so explicitly, but strongly suggests such an interpretation.

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REPORTER’S NOTE TO SECTION 29.1

1. Comparison with present state of the law—The rule of this section is supported by judicial authority. It is almost identical in effect with §§ 305-307 of the first Restatement, the only difference being that under § 307 of the first Restatement, a gift of realty to the designated person’s “next of kin” might purport to give it to aliens, who are still forbidden from owning realty in a few states.

2. Justification for the rule of this section—The justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—

a. Surviving spouse included. It is now accepted in almost all jurisdictions that, in the absence of language or circumstances that indicate a contrary intent, the term “heirs” includes all those who would take in the event of intestacy, including the surviving spouse. Except for the cases noted in item 4a, all of the cases in this Reporter’s Note have adhered to this principle; if they have excluded a surviving spouse, it was on the basis of the donor’s intent.

See, e.g., Dodge v. Detroit Bank & Trust Co., 121 Mich.App. 527, 330 N.W.2d 72 (1982). The testator directed that the corpus be conveyed “to the heirs of my said children.” Although any share of income that would otherwise go to a deceased child went to that child’s “issue,” the court “declined(d) to conclude that the draftsman of the will made a ‘mistake’. . . . On the contrary, we believe that the attorney drawing the will used these two different words in their known, technical legal sense with the intention that the trust corpus descend differently from the trust income.” Id. at 541, 330 N.W.2d at 79. (See Comment d.) “We are satisfied that, in 1918 when the will of John F. Dodge was drawn and signed, the word ‘heirs’ was a technical term with a well and clearly defined meaning . . . including the spouse of the decedent.” Id. at 540, 330 N.W.2d at 79. We acknowledge that a strong, visceral countering argument is made that the testator never intended that any part of his estate . . . would pass outside of his bloodlines and that the testator intended that natural objects of his bounty were not spouses of his children . . . at the outset, in weighing the merits of this argument, we note that the law does not permit that we indulge in speculation regarding the testator’s intention.” Id. at 541, 330 N.W.2d at 80.

In footnote 2 to In re Jamieson Estate, 374 Mich. 231, 132 N.W.2d 1 (1965), the court remarked, “The Michigan cases holding that a widow is an heir of her husband are not without precedent. See the laws of Hammurabi, promulgated sometime prior to 1669 B.C.” Id. at 236-237, 132 N.W.2d at 3.

b. Adopted and illegitimate children included. Again, in the absence of language or circumstances that indicate a contrary intent, adoption and illegitimacy affect a gift to “heirs” only when under the applicable statute they
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would also affect the intestate succession. In New England Trust Co. v. Sanger, 151 Me. 235, 118 A.2d 760 (1955), a share of the residuary trust corpus was to go to the income beneficiary's "lineal descendants," or to his "heirs at law." The court held that even though adopted children were not "lineal descendants," they were nevertheless "heirs at law." Will of Tousey, 260 Wis. 150, 50 N.W.2d 454 (1951), applied similar reasoning in holding that two men adjudged in paternity suits to be the testator's sons, not the testator's collateral heirs, were "my heirs in the manner provided by law": "The presumption that a devise to children refers to legitimate rather than illegitimate children is . . . not destroyed, by [a statute giving bastards the right to inherit . . . [but we have in the instant will the use of the word 'heirs,' not 'children.' Testator had no legitimate children . . . he is presumed to have known that [his illegitimate sons] were his heirs." Id. at 153, 50 N.W.2d at 456. See also Gadberry v. Swavze, 140 Miss. 720, 106 So. 442 (1925); Paul v. Willoughby, 204 N.C. 595, 169 S.E. 226 (1933) ("lawful" does not mean "legitimate").

Comment j recognizes that a gift to heirs "of the body" suggests an intent on the donor's part to exclude adopted children. Except in jurisdictions where this presumption has been reversed by statute, most courts have followed this rule. In First National Bank of Kansas City v. Sullivan, 394 S.W.2d 273 (Mo.1965), the testator, senior partner in a Kansas City law firm, died in 1928. His will established a system of trusts with detailed provisions for contingencies. The disputed clause called for a share to be paid to the heirs of his daughter's body, or if none, then to testator's heirs at law. The court held that the heirs were to be determined as of the daughter's death in 1963, but that 1928 law would be applied. The daughter had two children, both of whom predeceased her without issue. She adopted her son's widow. As Missouri did not enact legislation providing that adoptees are "heirs of the body" until 1947, the court held that the adopted daughter did not take as an "heir of her mother's body," she did, however, take as one of "testator's heirs at law." Adopted children also took under a gift over to "heirs at law" rather than under a gift to "heirs of the body" in Davis v. Waldron, 463 S.W.2d 458 (Tex.Civ.App.1971).

In Tootle v. Tootle, 22 Ohio 3d 244, 490 N.E.2d 878 (1986), the testator's daughter and son-in-law were given a joint life estate, with remainder "to the heirs of their bodies." They had two children, one of whom predeceased her mother, survived by two adopted children. The court held that descendants by adoption were not "heirs of the body," over a dissent which argued that the legislature, in repealing a statute barring adoptees from taking as heirs of the body," had effectively declared that adoptees were now included within the class. The court did not rule clearly on that issue, the plurality implying that the law in force at the time of the testator's death was more relevant than the law in force at the time of the life tenants' deaths.
Estate of Rhodes, 271 Wis. 342, 73 N.W.2d 602 (1955), involved a gift of half the estate to the testatrix's sister, or to "her natural heirs, as defined in the Wisconsin laws of descent and distribution." The sister predeceased the testatrix, survived by an adopted daughter and five nieces. The court observed that the nieces would not take even if "natural heirs" were construed to mean "heirs of the body," and held: "Even though [the descent statutes] do not define 'natural heirs,' as the will supposed, the key to the intent of the testator must be in such statutes. By this reference we consider she meant to call attention to the fact that between [testatrix's niece and grand-niece] the relationship was that of mother and daughter and that the latter had the status of a natural daughter and heir." Id. at 348, 73 N.W.2d at 606.

The court did, however, remark that the lower court's "bald statement" that the adopted daughter was the "lineal descendant" of her adoptive mother, rather than merely one endowed by statute with that status "... is contrary to fact and no statute could alter her natural birth." Id. at 349, 73 N.W.2d at 606.

In re Estate of Ogden, 353 Pa. Super. 273, 509 A.2d 1271 (1986), appeal denied 513 Pa. 634, 520 A.2d 1385 (1987), recognized adoptees as "heirs of the body" without the aid of explicit statutory language: "It is a question of first impression in this state whether the [the] terms ['heirs of the body' and 'children of the body'] express an intent to limit the class of beneficiaries to blood relatives to the exclusion of adopted relatives. In this case we hold, with a growing number of jurisdictions, that they do not." Id. at 283-284, 509 A.2d at 1277.

c. Effect of life tenancy. As discussed in Comment j, the fact that a remainder to a designated person's "heirs" follows a life tenancy in one or more of the same heirs is rarely considered sufficient ground to exclude the life tenant. In re McKenzie's Estate, 246 Cal.App.2d 740, 54 Cal.Rptr. 888 (1966), exemplifies this principle. The income from the residuary trust was payable to testator's nephew for life, then to his wife for life, then the corpus to the testatrix's "heirs at law... at the time of my death." The court held that the life-tenant nephew's estate should take equally with the stirpes of the testatrix's other nephews and nieces. The court distinguished the cases where the life tenant was the sole heir, and observed that even though the nephew was over 70 and his wife was over 50 when the will was executed, and they were childless, they might have adopted a child, or the nephew might have remarried. "Besides, one close to a testatrix... may be thought by her to have very good use of a remainder for his own testamentary disposition to friends, to charities, or even possibly to one or more of his cousins... appellants herein... if testatrix wished to exclude Albert, an heir, from the category of heirs, she could have done so very simply, by saying so." Id. at 747, 54 Cal.Rptr. at 893. See also Old Colony Trust Co. v. Stephens, 346 Mass. 94, 190 N.E.2d 110 (1963) (wife and three daughters, although life tenants,
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take remainder as testator's "heirs.")

As noted in McKenzie, supra, the situation where the sole life tenant is also the testator's sole heir is usually regarded as an exception to the rule. This is especially true in the situation of Illustration 9, where a life tenancy in the surviving spouse is followed by an equal division of the corpus between the testator's heirs and the spouse's heirs. As the court observed in Dailey v. Houston, 246 Miss. 667, 151 So.2d 919 (1963), "In short, if the wife is allowed to take as the testator's sole heir, all, not one-half, of the remainder will pass to a group consisting of the wife and her heirs. And in this event, [testator's] plan to benefit equally his own heirs and the heirs of his wife would be defeated." Id. at 681-682, 151 So.2d at 925. See also In re Burk's Will, 298 N.Y. 450, 84 N.E.2d 631 (1949), reversing, 273 A.D. 1012, 79 N.Y.S.2d 437 (1948); the Court of Appeals denied reargument twice. The first time, 299 N.Y. 308, 86 N.E.2d 759 (1949), the court also corrected the Appellate Division, by pointing out that distribution "per stirpes" to representatives of a deceased heir does not give anything to the heir's surviving spouse.

In South Norwalk Trust Co. v. White, 146 Conn. 301, 152 A.2d 319 (1959), the income beneficiaries of the residuary trust were the testator's widow and son, an only child; the corpus went to the testator's "legal heirs." The court held that the wife and son were not the "heirs" the testator had in mind: "the testator having given a limited interest in a fund, such as a life estate, it would appear that he did not also intend to give the same beneficiary an additional interest." Id. at 395, 152 A.2d at 321-322. Other cases where the heir(s) at the testator's death were precisely the life tenant(s), and the court held that testator must have intended that the "heirs" be determined as of the date they took possession, include: Abbott v. Continental National Bank of Lincoln, 169 Neb. 147, 98 N.W.2d 804 (1959) (wife); Felts v. Felts, 188 Tenn. 404, 219 S.W.2d 903 (1949) (two daughters); Camden Trust Co. v. Matlock, 125 N.J.Eq. 170, 4 A.2d 502 (1939) (wife and daughter); Delaware Trust Company v. Delaware Trust Company, 33 Del.Ch. 135, 91 A.2d 44 (1952) (husband and son; here testatrix's reference elsewhere in the will to her husband's heirs indicated that she thought her own heirs would be a different class). Cf. also Rawls v. Rideout, 74 N.C.App. 368, 328 S.E.2d 733 (1937), discussed in the Reporter's Note to Section 29.4.

Cf. also Van Winkle v. Berger, 228 N.C. 473, 46 S.E.2d 305 (1948) (involving a gift over to "residuary legatees" rather than to "heirs," and holding that the life tenant was excluded: "That Elia Buchanan could take an interest . . . virtually created by the contingency of her own death, involves a formidable legal paradox
which appellants seem to circle but not surmount." *Id.* at 478, 46 S.E.2d at 308.

Note that for obvious reasons, a construction allowing a surviving spouse/life tenant to take under a gift to testator's "heirs" is particularly disfavored when the eventual take: is the surviving spouse's surviving spouse. See, e.g., *McLane*, infra item 4a; *White*, infra item 5b.

d. Other considerations. As discussed in *Comments c* and *d* to § 29.4, a gift to the "heirs" of a living person indicates a view toward the more distant future, and is generally taken to refer to the "heirs apparent" at the effective date of the gift. More precisely, the donor usually has the blood relatives in mind, so that a spouse will be excluded from such a gift; see item 5a of this Reporter's Note. See, e.g., *Harris v. Ingalls*, 74 N.H. 339, 68 A. 34 (1907), in which the testator left one-fourth of his estate to the "heirs" of each of his aunts and uncles, and one of the uncles survived him. The court held: "It is not a very uncommon thing for a person to speak of the children or other near relatives of a living person as his heirs; and, in this instance, the word manifestly refers to the persons who would be the legal heirs of Benjamin at the time of the testator's death, in case Benjamin was then dead." *Id.* at 344-345, 68 A. at 37.

In *Linn v. Bowman*, 77 Pa. Super. 261 (1921), the testatrix made a special bequest of one dollar to each one of the two plaintiffs, who were her heirs at law. She then left everything else to her brother-in-law's "heirs"; since the brother-in-law was living, plaintiffs contended that the residuary devise was void, and that the testatrix therefore died partially intestate. The court held that the testatrix clearly designated her nephews and nieces by affinity as the beneficiaries, and remarked: "We are indebted to the research of the learned counsel for the appellee for the information that in the English statute 25th Edward III, it is declared to be treason 'to kill the heir of the king.' That was at a period when the human mind revolved in subtle distinctions and all of the niceties of the law of feudal tenures were in full flower." *Id.* at 264. See also, e.g., *Bradshaw v. Parkman*, 254 S.W.2d 865 (Tex.Civ.App.1953), error refused n.r.e.

In *Comment k* it is mentioned that the state cannot take under a gift to "heirs," that such a gift will lapse, not escheat, if the designated person is not survived by any relatives within the degree required by statute. No cases have been found in which this was an issue, but the basic common law principle that escheats are disfavored clearly supports this rule. In *Delaney v. State*, 42 N.D. 630, 174 N.W. 290 (1919), a decree of distribution had been entered "that the state of North Dakota is the only heir of said deceased." The decree was reversed, the court noting, "The very language of [the statute of descent and distribution] excludes the idea that the state takes property in the line of succession . . . [although] the fact that the principles of feudal tenure do not obtain in this country has, in some instances, led to the confus-
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ing statement that the state takes as the last heir." Id. at 635, 174 N.W. at 291-292. See also In re Clark's Estate, 271 A.D. 691, 68 N.Y.S.2d 487 (1947) ("the state takes not by succession or as the last heir of decedent but because there are no heirs." Id. at 696, 68 N.Y.S.2d at 492).

4. Cases contrary to the rule of this section—

a. Surviving spouse excluded. In Semones v. Cook, 185 Va. 929, 41 S.E.2d 13 (1947), a testamentary trust was established for the life of one of the testator's nephews, the corpus to go to "his natural heirs at law." The court held that the nephew's widow was not a "natural heir," noting that the testator's legatees were his sisters, nephews, and nieces: "The will shows that he intended to make a final and complete disposition of his property to his blood kin. . . . [H]e did not contemplate . . . the passing of a part of his estate from the natural objects of his bounty to strangers to him by blood. . . . [This nephew being the only legatee to receive his gift in trust rather than outright, testator] obviously believes [sic] that beneficiary was not competent to handle his own affairs and that some advantage might be taken of him by marriage or otherwise. . . . Id. at 934-935, 41 S.E.2d at 15-16."

In McCarthy v. Walsh, 123 Me. 157, 122 A. 406 (1923), the testator left his entire estate in trust to his wife for life; after her death, there were various specific gifts, and the residue was to "be disposed of according to the laws of inheritance of the state of Maine." The court held that the widow's estate took nothing, relying not on any inference that testator intended the life estate to be in lieu of any other claims, but on the fact that in intestate succession "she still takes not as heir, but as widow. . . . It is worthy of note . . . that the testator did not use the phrase 'laws of descent,' which would have clearly indicated" the complete intestate succession law, including the share of the surviving spouse. Id. at 163, 122 A. at 408.

In Linnell v. Smith, 153 Me. 288, 137 A.2d 357 (1957), the testator established trusts for his sons, the corpus to be distributed on each son's death "to his legal heirs according to the laws at that time governing the descent of intestate estates." The court noted that without the reference to the statute, it "has long been established . . . that even though the statute had enlarged the widow's interest . . . to an estate in fee, 'she still takes, not as heir. . . .'" Id. at 290, 137 A.2d at 358 (citation omitted). The court then cited an article by "a recognized authority in this field, stating in 52 Harvard Law Review 207, 221: ['A] specific reference to the law of intestacy . . . ought to remove all doubt of the intention of the testator to provide for . . . distribution including the spouse, where otherwise she or he is presumptively excluded . . . .'" Id. at 290-291, 137 A.2d at 358-359. Cases from several jurisdictions were cited to the same effect, but the court held that it was bound by McCarthy, supra. Noting that the McCarthy court had cited with approval an opinion which
did use the words "laws of descent," the court disregarded the dictum in McCarthy that such a reference would have affected the result. Linnell has not been cited in any way in any subsequent Maine case. Although Maine has since adopted the Uniform Probate Code, a statutory definition of the surviving spouse as an "heir" with respect to intestate succession does not automatically carry over to the construction of wills. The only case in any jurisdiction following Linnell is McLane v. Marden, 111 N.H. 164, 277 A.2d 315 (1971). The testatrix had left her home to her husband for life "with the right at his death to dispose of the same by will among his heirs or my heirs," and the husband had attempted to devise the home to his second wife. The court held, "[t]echnically speaking a surviving spouse is not an 'heir'. . . . Their rights are determined by waiver of dower or homestead. . . . Cases in other jurisdictions reaching a different result generally involve statutes of descent and distribution designating surviving spouses as heirs." Id. at 165, 277 A.2d at 317. In those other jurisdictions courts would have to justify such a result in terms of donor's intent; see infra item 5b.

In re Waring's Will, 275 N.Y. 6, 9 N.E.2d 754 (1937), involved the construction of a statute abolishing "[a]ll distinctions between the persons who take as heirs at law or next of kin . . . the descent of real property and the distribution of personal property shall be governed by this article." Decedent Estate Law § 81. The testator established a trust for his son, who died without issue. The corpus then went to the son's "next of kin," a class the court held did not include the son's widow: "[B]y abolishing the distinction between 'next of kin' and 'heirs at law,' the Legislature did not intend the class [to be expanded to include all of the intestate takers]." Id. at 11, 9 N.E.2d at 756. In 1938, the legislature amended the law to make it clear that the spouse was indeed an "heir" and a "next of kin." This statute, however, applies only to post-1938 instruments; see, e.g., In re Clark's Will, infra, item b. Myers v. Bank of Delaware, 38 Del.Ch. 228, 149 A.2d 745, 79 ALR 1433 (1959), also determined that a surviving spouse was not an "heir," and was also overturned by statute.

In Murphy v. Murphy, 190 Iowa 874, 179 N.W. 530 (1920), the question was whether a descent statute, saying that the share of an intestate decedent's predeceased child would go to the child's "heirs," referred to a surviving spouse. The court held that it did not: "The rule of descent and distribution . . . is the same in the case of [the daughter's] death before that of her father as it would have been in the case of her death had she survived him. . . . A fiction is sometimes called into operation for the purpose of casting the descent, and that is its only purpose in cases of this kind. When a fiction is assumed, it is . . . in furtherance of justice, not to do an injustice." Id. at 878-882, 179 N.W. at 532-533.

As mentioned in the Statutory Note to this section, the Georgia statutes expressly state that the

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surviving spouse is an "heir" only for purposes of intestate succession, and not for the construction of "limitations over." In Dodson v. Trust Company of Georgia, 216 Ga. 499, 117 S.E.2d 331 (1960), the court noted that, in effect, any future or contingent interest, legal or equitable, was a "limitation over" for the purposes of this statute. The original beneficiaries of the residuary trust were the testator's two sons. One son was institutionalized; upon his death his share of the income would go to his widow for life. The other son's share of the income would go to his "legal heirs." Upon the death of the last of the three life beneficiaries, the corpus "shall then pass to my heirs-at-law who may then be in life." The court had to keep straight the "legal heirs," "heirs-at-law," and heirs at law. Both sons died without issue, so all of the gifts failed; the second son's wife had no right to the income, but on her sister-in-law's death she would take half of the corpus as the sole heir of her husband, who had inherited half of a vested reversionary interest. Beecher v. Hall, infra item 5b, was a Georgia case involving an immediate and outright gift to "heirs." In this context, the court stated that "the words 'legal heirs' means [sic] those who would inherit under the laws of descent and distribution." Id. at 825, 165 S.E.2d at 157.

b. Adopted and illegitimate children excluded. Almost without exception courts have followed the rule of this section in holding that adoption and illegitimacy affect a devise to "heirs" only if they would also affect the nature of the intestate succession. For example, in Dodge, supra item 3a, the court held that adoptees were not "heirs," but did so because it was applying 1918 law rather than 1982 law.

In re Clark's Will, 137 N.Y.S.2d 252 (Warren Cty.Sur.1964), may have taken a stronger position in excluding the adopted children of the testatrix's son, the income beneficiary, from the distribution of the corpus of the testamentary trust. The court was applying 1929 law, but did not indicate that there was anything ephemeral about its conclusion that the law giving inheritance rights to adopted children "determine[s only] the rights and obligations of the adopted child and the foster parents. In this case, the children are not the adopted children of [testatrix] but of her son. It is her Will that is under consideration here." Id. at 254. The court noted, "When she executed her will the son had three natural born children and [two years before testatrix's death] he had another child. Following the birth of this child, the testatrix made a codicil which ratified her will. It is quite clear that when she used the expression 'among them,' she referred to those of the natural born children who might survive her son. . . . It is difficult to imagine that she anticipated that four years after her decease that the son would adopt other children." Id. at 256-257.

In Ford v. Cleveland, 112 Ind. App. 420, 44 N.E.2d 244 (1942), the court stated the analogous principle with regard to illegitimacy: "Any right of the appellee to inherit from her putative father must be by virtue of our statute for under the common law such
right was denied. . . . Liberal construction of a statute does not permit us to substitute for the words 'dying intestate' the words 'dying testate or intestate.'" *Id.* at 428, 44 N.E.2d at 247. Thus testator's illegitimate daughter, although his sole heir at law for purposes of intestate succession, could not take under a will in which several remainders were to go to testator's "heirs, share and share alike." Here, the testator's intent was clear enough that the court had no need to apply the broad principle it had set forth: not only had the testator, with no wife or legitimate children, clearly indicated his belief that his "heirs" were plural, he had also set forth who they were in describing, after the first use of the phrase "heirs, share and share alike," a per stirpes distribution among his brothers, sisters, nephews, and nieces. Moreover, the daughter was described in the will as "my friend, Lula Holloman," and made the income beneficiary of a trust.

In re Powell's Will, 239 Miss. 10, 121 So.2d 1 (1960), apparently also held that the testator's illegitimate daughter could not take under a gift over to "all the heirs of the estate." The testator was a ninety-year-old "Negro of Covington County, Mississippi," with no living legitimate children. The testator left her elder son "one featherbed," the rest of her household furniture, and the rest of her estate, went to the "wife and heirs" of her younger son, or to the elder son's heirs if his brother died without wife or heirs. The younger son was alive and unmarried at his mother's death, and the court held that "heirs"
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obviously referred to his prospective family, and not to his disinherited brother. See also Gilbert v. Wenzel, 247 Iowa 1279, 78 N.W.2d 793 (1956).

In Maloney v. Johnson, 24 Del. Ch. 77, 5 A.2d 660 (1939), the remainder after a life estate in the testatrix's husband was to be divided "among or between my brothers and sisters and brothers and sisters heirs, [names];" all persons named were brothers, sisters, nephews, or nieces of the testatrix, and included three "heirs" of one of her living brothers.

As discussed in Comment d, the interchangeable use of "heirs" and "children" indicates that they should be treated as synonyms. In Connor v. Biard, 232 S.W. 885 (Tex.Civ.App.1921), the testator left his estate to his wife for life, and one share of the remainder to each of his brothers and sisters, and one share to the "heirs" of each of his brothers who died before the execution of the will. The will provided: "I have but one sister . . . and two brothers living . . . if either or both of these should die before my wife, then the share devised to him or them shall go to his or their children, the intention being that the heirs of my sister, or any of my brothers, shall take only the share devised to her, or in case of my brothers the share devised to the deceased father." Id. at 885. (See Comment e and Illustration 2.) The court held that "heirs" must have also meant "children" with reference to the deceased brothers, and that the testator's description elsewhere in the will of plaintiff's grantor as the "only heir" of one of the brothers was consistent with the rest of the will, and did indeed exclude the defendants, the "only heir's" nephews and nieces, children of his sisters who died before the execution of the will.

In re Hill's Estate, 432 Pa. 269, 247 A.2d 606 (1968), involved language that included a surviving spouse as an "heir," but excluded collaterals. Shortly after the testator's marriage, he drafted a will: "If at my demise I have no other heirs than my dear wife" his entire estate was to be placed in trust, with the income to his wife until death or remarriage, then the corpus to Bucknell University. But if "I have more heirs than my dear wife [A] I direct that my entire estate go to her solely." The court noted that the presumption that the term "heirs" should be interpreted according to its technical meaning "is regularly applicable where the technical words employed are used by one learned in probate law." This will was made "without the help of a lawyer," and the court held: "The initial question as presented is whether the testator used the word 'heirs' in its legal sense or in its popular sense, i.e. 'children.' . . . [I]f we construe the word 'heirs' in this will in its technical sense, we reach an absurd result. . . . 'Testator's outright gift to his wife, if he had "children," makes sense; she could reasonably be expected to give them what was left at her death. . . . Why would the testator be more generous to his wife if he was survived by collateral relatives than he would be if he had no one to survive him except his wife?'"
In Orme v. Northern Trust Co., 25 Ill.2d 151, 183 N.E.2d 505 (1962), affirming, 29 Ill.App.2d 75, 172 N.E.2d 413 (1961), "The will . . . essentially provided life estates for the granddaughters, and on the death of the last surviving granddaughter the trust estate was to be divided equally among the 'children or heirs' of the granddaughters; 1/3 to the 'child or children, heir or heirs' of each of them . . . . The will, apparently drafted by an American lawyer, was executed in Switzerland . . . . In construing this classic example of inept legal draftsmanship, the words 'children or heirs' must be viewed in the light of the context of the will." Id. at 155, 183 N.E.2d at 508, 510-511. The court observed that the Rule in Shelley's case would apply if "heirs" meant "heirs," and that the draftsman had provided for gifts over if any of the granddaughters had died "without issue," the court therefore held that the reference to "children or heirs" meant "issue per stirpes."

See also Warren Boynton State Bank v. Wallbaum, 143 Ill.App.3d 628, 97 Ill.Dec. 539, 493 N.E.2d 21 (1986), in which the grantor provided that if his daughter, the life tenant, died without issue, the land "shall descend to the heirs of said [grantor], Share and Share alike. The children of any deceased child taking only the share which their parent would inherit if living." The court held: "when it is clear from the language employed that the grantor intended to use the term heirs in other than its strict, technical sense, the Doctrine will not be allowed to defeat the intent of the drafter . . . . In examining this deed, and in particular the . . . provision for a substitutionary gift to the offspring of [grantor's] children, we are satisfied that the grantor was using the word 'heirs' in its nontechnical sense to indicate a group or class of individuals comprised [sic] of his children." Id. at 632, 97 Ill.Dec. 543, 493 N.E.2d at 25. The court noted that, although as a general rule the estate of the life tenant would be one of the "heirs" sharing in the remainder, grantor had indicated that his issue should take the remainder per stirpes, and the per stirpes provision would be meaningless if applied at the date of grantor's death.

But see Jarecky v. Jarecky, 194 S.C. 456, 9 S.E.2d 922 (1940): "Counsel for the appellant suggests that the rule in Shelley's Case should not apply here, on the ground that the word 'heirs' may have been used by the testator as synonymous with the word 'children'. . . . The theory that the popular signification of the word 'heirs' is that of 'children,' and that where a will is drawn by a layman it might be assumed that he had this signification in mind, is of course completely untenable." Id. at 461, 9 S.E.2d at 924.

As recognized in Comment d, the mere fact that "heirs" and "children" or "issue" are used in somewhat related contexts does not prove that they were used interchangeably. See, e.g., Dodge, supra item 3a. See also Trenton Trust Co. v. Gane, 125 N.J.Eq. 389, 6 A.2d 112 (1939), decree affirmed, 128 N.J.Eq. 273,
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8 A.2d 708 (1939), construing a holographic will in which the testator left life estates to his many children and to his brothers, with some remainders to the life tenant's "children," others to the life tenant's "lawful heirs." The court held that the testator meant what he said, noting that some of the properties for which the remainders were to "children" were properties such as the "Mansion House," which the testator had expressly indicated should stay in the family. In other cases, he had named individually the "children" who were to take as remaindemen.

Another common way for the donor to indicate that "heirs" means "children" is to make other provision for the surviving spouse and the collateral relatives, in a manner that indicates they are not the intended beneficiaries of the gift to "heirs." As discussed in Comment f, this is often done by providing for a gift over to collateral relatives if there are no "heirs," as in Knowles and Orme supra. See also, e.g., In re Kappell's Will, 120 N.Y.S.2d 52 (Special Term, N.Y.Cty.1953) ("To say that the testatrix used the word 'heirs' [of her son] in the technical legal sense would be to say that her designation of her cousins and nephews as remaindemen was meaningless." 120 N.Y.S.2d at 55.); Dyer v. Lane, 202 Ark. 571, 151 S.W.2d 678 (1941) ("The statement in the will that if [the testator's] son died without heirs the property should go to the testator's heirs would be meaningless . . . as the son could not die without heirs if the father had heirs at the son's death.") Id. at 576, 151 S.W.2d at 680.; Federal Land Bank v. Little, 130 Tex.App. 173, 107 S.W.2d 374 (1937); Kellis v. Ewert, 248 Ill. 612, 94 N.E. 105 (1911) (to four of testator's six sisters "or their heirs," the other sisters or heirs to divide the portion of any sister dying without "heirs").

Knowles, supra, also involved a gift over to the surviving spouse, another indication that "heirs" refers to descendants rather than to all of the intestate takers. See also Gadberry, supra item 3b; Hall v. Crandall, 25 Del.Ch. 339, 20 A.2d 545 (1941) ("to their heirs, if they should have heirs, or to their widows, if they should have widows without issue").

In Theen v. Miller, 250 Iowa 1144, 96 N.W.2d 734 (1959), the testator gave his wife an undivided one-third interest in his estate, and gave the balance to his "heirs-at-law." The court held that earlier decisions, indicating that the widow took one-sixth of the intestate estate as an "heir" and one-third as "dower," did not make the widow an "heir" for the purpose of will construction in the absence of contrary intent on the part of the testator. Here, donor's intent was clear, and reinforced rather than negated the presumption that the widow was excluded.

The family configuration was also important in Bostwick v. Bostwick, 301 Ill.App. 196, 22 N.E.2d 272 (1939). A trust, to last for 10 years or the lifetime of the testator's wife, was established for the testator's wife, sister, and nieces. After the wife's
death, all of the income would go to the sister “or her heirs.” The corpus would go to the sister; if she was dead, then to her three daughters “or their heirs.” In addition to other provisions in the will indicating that “heirs” was used interchangeably with “children,” the court noted that the testator would not have intended the income to go to the testator’s brother-in-law and the corpus to his nieces. Therefore the sister’s “heirs” were her daughters, so the nieces’ “heirs” must, in turn, be their children. See also Jones v. Lewis, 70 Ohio App. 17, 44 N.E.2d 735 (1941) (“my children’s heirs” were testator’s grandchildren). But see Robbins v. Springer, 119 Ind.App. 560, 88 N.E.2d 573 (1949) (in a gift, if the testator’s sister should predecease him, “to the child or children of said decedent, or to their heirs,” the widow was held to be the “heir” of the testator’s nephew.)

In some states, a direction that heirs are to take “per stirpes” or “by representation” is taken to indicate that “heirs” should be construed to mean “issue.” In re Pistor’s Estate, 53 N.J.Super. 139, 146 A.2d 685 (1958), judgment affirmed, 30 N.J. 589, 154 A.2d 721 (1959), construed remainder interests in each of the testatrix’s grandchildren’s “heirs at law, equally, per stirpes and not per capita.” The court held “that testatrix did not use the words ‘heirs at law’ to mean simply statutory distributees. The word ‘equally’ . . . repels the notion . . . since statutory distributees do not normally take equally. Id. at 148, 146 A.2d at 690. ‘Per stirpes,’ even when considered as referring solely to a mode of descrip-

tion, by its very meaning carries with it the idea of blood descend-

ants.” Id. at 149, 146 A.2d at 691. See also In re Post’s Trust, 61 Misc.2d 98, 304 N.Y.S.2d 954 (1969).

The Massachusetts courts, on the other hand, have consistently rejected this interpretation. See, e.g., Sweeney v. Kennard, 331 Mass. 542, 120 N.E.2d 910 (1954) (“The appellants argue as though the only ‘heirs’ who take are ‘heirs by right of representation,’ whereas it seems clear that the gift is to ‘heirs,’ and that it is their manner of taking which is to be ‘by right of representation.’ [This refers to the complete pattern set forth in the descent statute, and] is not confined to issue.” Id. at 545, 120 N.E.2d at 912. See also Gustafson v. Svenson, 373 Mass. 273, 366 N.E.2d 761 (1977), affirming, 4 Mass.App.Ct. 338, 347 N.E.2d 701 (1976), in which the scrivener’s testimony was inadmissible to show that the testatrix, leaving her residuary estate to her brother “or his heirs per stirpes,” had intended to prevent her sister-in-law from taking her brother’s portion if he died. Similarly, in Kanawha Valley Bank v. Hornbeck, 151 W.Va. 308, 151 S.E.2d 694 (1966), the court held: “It is the contention of the appellants that the words ‘per stirpes’ mean lineal descendants, and that inasmuch as [the individual whose ‘heirs, per stirpes’ were designated as beneficiaries] had no descendants, the gift over . . . would fail. . . . Although per stirpes is usually used in connection with issue or blood relatives, it is not limited thereto. It is a method of distribution by stocks or by class and not per
capita or by head. It has a much broader meaning than descendants. It means any group or class, such as nieces and nephews and even relatives by marriage. . . . Per stirpes relates to the method of distribution, not the relationship, and it is usually used as a method of division in a substitutional gift because the exact persons to take will not be known until a future time. Irvin v. Brown, [160 S.C. 374, 158 S.E. 733 (1931)]." \textit{Id.} at 320, 151 S.E.2d at 701. See also White v. White, 241 S.C. 181, 127 S.E.2d 627 (1962).

Dicta in a Vermont case, In re White's Estate, 127 Vt. 28, 238 A.2d 791 (1968), also indicate that a surviving spouse is an "heir per stirpes." The testatrix's husband was the life beneficiary of a trust, the corpus to go to her two children "and their heirs forever per stirpes and not per capita." Her son survived his mother, but predeceased his father, leaving a widow but no issue. The court held that his remainder interest became vested at the testatrix's death, so that his widow took by descent. The court went on to state that the phrase "per stirpes" made "heirs" a word of purchase, so that even if the remainder was contingent, the widow would still have taken, under the gift over to "heirs" in her mother-in-law's will.

b. Other intent to restrict the class of "heirs." As discussed in \textit{Comment i}, the donor may indicate that specific individuals, although falling within the primary meaning of "heirs," are to be excluded from the class of beneficiaries under the will. For example, [in] Matter of Wiedemann, 358 N.W.2d 139 (Minn.App.1984), the settlor created an inter vivos trust as part of a divorce settlement, with an interest in his daughter's "heirs at law," and specified that "the Trustor, father of said daughter, shall not be considered as an heir at law in any respect."

Although the intent to exclude a life tenant usually, as discussed in subitem a, supra, is connected to an intent to use the term "heirs" to mean "issue," or at least to make the property descend within a particular family, in Fidelity Union Trust Co. v. Egenolf Day Nursery Ass'n of Elizabeth, 64 N.J.Super. 445, 166 A.2d 402 (1960), the life tenant, the testatrix's sister, was excluded in favor of more remote collateral relatives in order to postpone the vesting of a charitable remainder. The income from Lena Egenolf's residuary trust was to go, on her sister's death, to the Egenolf Day Nursery. "Should the said nursery be abandoned or cease to function or become extinct during the lifetime of my next of kin who are living at the time of my decease, or during the lifetime of any of their children," the corpus would go to the next of kin and their children. Otherwise, the corpus would go to the Nursery at the death of the last alternative beneficiary. In addition to the more obvious indications of the testatrix's intent that her sister not be regarded as her sole "next of kin," the court called attention to the testatrix's use of the phrase "or their children," and noted that the life tenant was in her 70's and childless at the execution of the will, and that she was a "she" rather than a "they."
In First Agricultural Nat. Bank of Berkshire County v. Shea, 351 Mass. 1, 217 N.E.2d 779 (1966), the testatrix's nephew, A, received the income for life from a testamentary trust, "upon his death the principal to go to his heirs excepting those by his first marriage." He was survived by his second wife, one child by his first marriage, and two nephews. A's nephews argued that since A "left issue," the widow's portion was only one-third, and that they took the other two-thirds by virtue of being next in line of succession after the disinherited child, but the court held: "the express exclusion of the heirs by his first marriage left the widow as the sole heir. Since she takes by the will and not by intestacy, she is not limited to the share she would have taken on intestacy." Id. at 4, 217 N.E.2d at 781.

In Matter of Taff's Estate, 63 Cal.App.3d 319, 133 Cal.Rptr. 737 (1976), the residuary estate went to the testatrix's sister, or "to my heirs." Apparently, the testatrix had intended the gift to be "to her (the sister's) heirs" and the court admitted parol evidence, including the scrivener's testimony and a letter from the testatrix to her sister at the time the will was being drafted, to prove that "she felt she was making adequate provision for . . . her predeceased husband's family" elsewhere in the will. Once it was established that the testatrix had intended to exclude her "heirs by marriage" (who would have been entitled to half of the estate under California's community property law), the sister's three children took three-fourths of the estate, the testatrix's other niece taking the other share. Id. at 322-324, 133 Cal.Rptr. at 739-740.

In re Layton's Estate, 217 Cal. 451, 19 P.2d 793 (1933), involved an exclusion rendered ambiguous by some unfortunate draftsmanship. The testator left the bulk of his estate in trust to go to the Christian Science Church, and provided that any excess over what could be legally devised to the church should go "to my then living heirs-at-law, excluding my [only] daughter." Elsewhere in the will, the testator explained that his daughter and his daughter's descendants were intentionally and emphatically excluded "and I hereby generally and specifically disinherit each and any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs-in-law, except as otherwise mentioned in the will." The court held that the disinheritance clause did not preclude the testator's collateral relatives from taking under the gift over to "heirs-at-law," although the testator's wife was the only heir mentioned by name in the will (except for the daughter).

South Norwalk Trust Co. v. White, 146 Conn. 391, 152 A.2d 319 (1959), illustrates the principle of Illustration 7. The corpus of the residuary trust was to "be lawfully divided among my legal heirs, exclusive of the lawful issue up to this time of my said son" if the testator's son died without issue other than "his present living issue; my determination being that no issue of my said son up to the time of the execution of this will shall partake in my estate." The will was executed shortly after the testa-
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tor's son's divorce; the "present living issue" was an eight-year-old son, who had two children "long after the testator's death." The court did not even consider the possibility that these children might be the testator's "legal heirs," although that would have been the result if the testator's grandson merely had been treated as if he were dead at the date the "heirs" were determined, the death of the testator's widow, the surviving life beneficiary. But cf. Beecher v. Hall, infra item 6d, where the court could not ascertain who the testatrix's "other heirs" were, besides her niece, who had been left half the estate rather than totally disinherited.

In Dodge, supra item 3a, one of the testator's children, E, was disinherited. He had contested the will, and received a settlement, assigning in return to his mother and sisters "all of his rights, present or future, to his father's estate." The court held that because "the testator simply did not say that in all events he desired to exclude his son [E] from the possibility of taking trust corpus," although he was expressly excluded from taking as an income beneficiary (unlike a pretermitted daughter, F, born after the execution of the will but dying, intestate, unmarried, and without issue at the age of five), E was therefore entitled to take as an "heir" of his brother A who died without issue, but his share would be assigned to his mother and sisters under the settlement agreement. The mother, meanwhile, had elected to take against the will, which did disqualify her from taking her share of E's share, as that passed under the settlement agreement rather than under the will. Finally, B also died without issue, but by this time her brother A was already dead, so that her "heirs" were her sisters and E's daughter (her mother being barred, as before, by her election against the will), and the court held, "[E's daughter] claims . . . an interest separate and independent from that of her father [rather than through her father's estate]. The issue of ancestors who may have been disinherited . . . are not impliedly divested of their own independent rights under the will." Id. at 569-571, 330 N.W.2d at 92-93.

c. Inclusion of additional heirs. As discussed in Comment g, "heirs" is often used inaccurately to mean "legatees," and this usage appears from time to time in lay wills. In Evans v. Cass, 23 Ohio Misc. 300, 256 N.E.2d 738 (1970), the residue of the testator's estate was left to "the heirs set forth in Item 5," which was a list of names and cash legacies. Two of the legatees were sisters-in-law rather than heirs of testator, but the court rejected the contention that the gift was only to those individuals named in Item 5 who were actually "heirs." See also, e.g., Jennings v. Jennings, 299 Ky. 779, 187 S.W.2d 459 (1946) ("In all those cases [where 'heirs,' in similar fact situations, was not construed to mean 'legatees'] the context was different . . . nor were any of them so full of technical terms wrongly used." Id. at 791-792, 187 S.W.2d at 466. The
court held that the "heirs" were blood relatives, relatives by affinity, and a church.) Several cases have been found going the other way, but none is a recent case. See In re Johnson's Will, 199 Wis. 154, 225 N.W. 818 (1929): "It is claimed that the testatrix could not have used the term in its legal sense because it is qualified by the indefinite [sic] article "the" rather than the possessive pronoun 'my' . . . . After making specific bequests to a number of persons, including strangers to her blood, she leaves the rest, residue, and remainder to "the heirs herein named in this will." . . . It is apparent that her remembrance of her husband's relatives in her will was not due to natural love and affection. The will itself reveals the fact that she did not know the names of a number whom she made beneficiaries." (She had made bequests "to the children of" the various predeceased nephews and nieces of her husband.) "It seems quite probable that the specific bequests of $39,000 closely approximate one-half of the estate of which [her husband] died seized. If this be true, it should be considered a voluntary and conscientious discharge of a duty which would not characterize the conduct of all persons." Id. at 159, 225 N.W. at 820. See also Jacobs v. Prescott, 102 Me. 63, 65 A. 761 (1906), where the court held that, as the testatrix could have meant either to include or to exclude the relatives by affinity from the residuary legacy to "my heirs by my family herein named," the ambiguity would be resolved in favor of the "prima facie [meaning of 'heirs'], those who would be entitled to it had the testator died intestate." Id. at 66, 65 A. at 762.

In Gore v. Bingaman, 29 Cal. App.2d 460, 85 P.2d 172 (1938), a holographic will directed that if any of the income beneficiaries died while the residuary trust was in force, "his next of kin shall take his share." The testator's wife's niece, A, was one of the beneficiaries "and [B, described in the 'specific bequests' section of the will as testator's 'Niece'] was a child whom [A] and her husband took into their home and reared as their child but never adopted . . . . They never had any children of their own and when the respondent was only six (6) days old they took her into their home; she was given the[ir] name and was baptized as their child . . . being kept in ignorance of the fact that she was not their own child. This fact was known to not more than a score of persons, most of whom resided in England." But the court held that no extrinsic evidence of this sort was relevant, as the term "next of kin" was unambiguous. If the testator, who was in on the secret, wanted to include B, "the will should have mentioned [her], so as to include her as having equal rights with "next of kin," she being a stranger to the blood of [A] and not an adopted child." Id. at 464-473, 85 P.2d at 174-178.

Bank of California of Seattle v. Turner, 198 Wash. 270, 74 P.2d 987 (1938), involved an attempt by the testatrix herself to distinguish the "relatives" from the other legatees: "In case there is not enough . . . to pay all of the bequests made . . . pay first the bequest made to relatives and
thereafter any estate remaining to be divided pro rata among the other legatees.” The court held that “the will . . . contains 32 provisions and a codicil. The bequests may be classified as follows: First, to ‘beloved’ relatives by consanguinity and affinity; second, to friends; third, to two persons undescibed; and, fourth, to charitable and religious organizations. We find that the bequests to those related by consanguinity and to those related by affinity are not classified separately in the will, but are commingled together . . . [h]ence the beneficiaries related either by consanguinity or affinity are entitled to be paid first. . . .” Id. at 274, 74 P.2d at 989. See also In re McDonald’s Will, 190 Misc. 856, 76 N.Y.S.2d 695 (Chemung Co.Sur.1948).

But see McMenamy v. Kampelmann, 273 Mo. 450, 200 S.W. 1075 (1918), involving a residuary legacy to “all immediate relatives herein named . . . but limited to those residing in the United States.” The pattern of specific bequests was similar to that in the Turner will, but the court held that “the term ‘relatives’ . . . does not prima facie refer to husband, wife, or marriage connections . . . We must confess that the rather ingenious argument made in their brief by the learned counsel for the appellants does in a way tend to create a suspicion that the testator may have intended to include more than his own named blood relatives in said clause, but after all it is nothing more than a suspicion.” Id. at 459-460, 200 S.W. at 1077.

6. A similar class gift term (See Comment b)—

a. Heirs of the body. Traditionally this phrase is the limitation creating a fee tail, but it may be construed as words of purchase in order to effectuate the donor’s intent. In that case, the term is similar to “issue,” except that there is an explicit indication that distribution should be according to the statute. As discussed in Tootle and the other cases in item 3b, supra, the term is often, though not always, construed to exclude all descendants by adoption. The plurality in Tootle, however, stated in a footnote, “We . . . expressly do not endorse, utilize, or adopt the stranger-to-the-adoption rule in today’s decision.” Id. at 247, 490 N.E.2d at 881.

Gifts to “heirs of my blood,” or other references to consanguinity, will include collateral relatives, but exclude a surviving spouse. See, e.g., Casey v. Gallagher, 11 Ohio St.2d 42, 227 N.E.2d 801 (1967) (“The lawful heirs of my said children who are of my blood”); Daniel v. Donohue, infra subitem b; Chinn v. Downs, infra subitem c; Estate of Robison v. Carter, infra subitem d.

b. Relatives. In order to give validity to an otherwise amorphous term, courts have generally held the term “relatives” to be equivalent to “heirs.” In several states this result was accomplished by statute; see the Statutory Noto to this section. In re Bernheim’s Estate, 82 Mont. 198, 266 P. 378 (1928), involved a will leaving, “To my wife . . . all which the law allows a wife to inherit out of the estate of her
husband. The rest of my estate is to go to my relatives . . . distributed as the executor of my will, my nephew, David Bernheim ['an attorney at law'] sees fit, except that" testator's sister-in-law and her two daughters "shall receive out of my estate only twenty-five dollars each and no more." The court held that the widow (who had not claimed that she was entitled to the entire estate) would take half of the estate, which would have been her intestate share, and that the sister-in-law was entitled to twenty-five dollars. An intestacy was declared as to the rest of the estate, with distribution to the testator's heirs-at-law with the sole exception of the widow. The disinheritance of the nieces was void because it was part of the scheme of distribution to the testator's "relatives," which in turn was void for uncertainty: although the prima facie meaning of "relatives" was "heirs, under the law of succession," the testator had indicated that he used the term in some "enlarged meaning" by describing as "relatives" both a sister-in-law, whose disinheritance would otherwise be redundant, and a grandniece, to whom the testator had urged his nephew, the executor, to treat with "special care" along with her living mother.

In Daniel v. Donohue, 215 Or. 373, 333 P.2d 1109 (1959), the corpus of a testamentary trust was to be distributed equally, on the testator's daughter's death without issue, "among the blood relatives of my deceased mother and myself:" "Who, then, is intended to be benefited? The general rule is that when a limitation is in favor of the testator's ‘blood relations,’ then, in the absence of language or circumstances indicating a contrary intent, the class is made up of those persons related to the testator by consanguinity who would take under the appropriate descent statute . . . . We construe the term to mean the next of kin of the testatrix on the maternal side of her family." Id. at 379, 387, 333 P.2d at 1113, 1116.

c. Next of kin. It is generally accepted that a gift to "next of kin" is equivalent to a gift to "heirs" (see the Statutory Note to this section), now that the major distinctions between descent of realty and distribution of personality have been abolished; as discussed in § 29.3, when the type of property is relevant, it is the nature of the property that controls rather than donor's choice of terminology.

In re Young's Estate, 113 N.J. Eq. 233, 166 A. 159 (1933), reversing, 11 N.J.Misc. 27, 163 A. 433 (1932), involved a residuary bequest "to my next of kin to be divided between them equally as nearly as may be." The testatrix was survived by cousins and the children of deceased cousins, and the question was whether there should be representation, according to the statute, or whether only the surviving first cousins, the "nearest" relatives, should take. The court below found "a hopeless conflict" of authorities. Some states followed New York in holding that "next of kin" meant the intestate takers of personality (as "heirs" meant the takers of realty) while others followed England and Massachusetts, holding that "'Next' means nearest. 'Kin' means blood rela-

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...Next of kin, therefore, means nearest blood relations. 2 Jarman on Wills." The court below held that applying the statute of distribution "is a forced and strained construction to meet the exigencies of the particular case and to prevent those relatives by blood or marriage from being disinherited who would ordinarily have been the natural objects of testator's bounty. . . . I am unable to find that the words 'next of kin,' when used in a bequest, have acquired any technical meaning in New Jersey." The Appellate Court found, "the difficulty is that ['next of kin'] has two technical legal meanings," not that it has none. The court held that, as "heirs" denoted all takers of realty under the statute of descent "rather than the stricter meaning of 'those lineal descendants upon whom the law casts the succession to real estate.' Upon the basis of consistency . . . a similar determination should be the rule in the case of a testamentary gift of personalty to 'next of kin.'" Id. at 234, 166 A. at 160-161.

In Chinn v. Downs, 421 A.2d 915 (Del.Ch.1980), the corpus of an inter vivos trust was to be paid over "unto such persons as shall be the next of kin, by consanguinity of [the life beneficiary], according to the statute of the State of Delaware." The court noted that the only statute containing any term similar to "next of kin" was the statute providing "'Kin' and kindred' as applied to the descent of estates signify kin or kindred by blood and the degree of consanguinity shall be computed by the civil law method." The court held that if this, rather than the statute of distribution, were the "statute" referred to, "the corpus of the [life beneficiary's] estate would unreasonably descend only to her surviving siblings to the exclusion of the issue of a deceased brother or sister. . . . In short, I am satisfied that in the case at bar, it is only by the application of the per stirpes principle of descent and distribution, which is favored in Delaware . . . that the unfair result . . . is to be avoided." 421 A.2d at 918.

But see Agricultural Nat. Bank of Pittsfield v. Schwartz, 325 Mass. 443, 91 N.E.2d 195 (1950): "It is, however, settled in this Commonwealth, adopting the early English view, that the original and primary meaning of next of kin is the nearest blood relatives. . . . The principle has become too firmly embedded in our jurisprudence to be changed. . . . [T]he testimony of the attorney who drafted the will . . . and the letter written . . . by this attorney to one of the respondents, stating that he had advised the testator that those words meant those who would take under the statute of distributions, should have been excluded." Id. at 446-448, 91 N.E.2d at 197, 198. See also First Safe Deposit Nat. Bank of Bedford v. Westgate, 346 Mass. 444, 193 N.E.2d 683 (1963) ("In this Commonwealth, the words next of kin are limited to blood relations and do not include spouses, unless there is a clear intention to the contrary; such an intention will not be inferred from mere reference to the law of descent and distribution." Id. at 453, 193 N.E.2d at 688); In re Cobb's Will, 271 N.C. 307, 156
S.E.2d 285 (1967). ("The words \textit{next of kin} have a well defined legal significance. . . . Without more, the term does not permit a representation. . . . [T]he draftsman's mistake . . . is to be regarded as a mistake of the testator and binding upon him."") (citation omitted) \textit{Id.} at 309, 312, 156 S.E.2d at 287, 290.) Cobb was overturned by statute, but Mass.Gen.Laws ch. 184, § 6A, passed in 1964, concerning the time at which "'heirs' or 'next of kin'" are to be determined (see Statutory Note to Section 29.4) does not seem to have altered the rule that these are nevertheless two distinct classes of beneficiaries.

d. "Nearest" heirs. As in the minority construction of "next of kin," when the donor uses a phrase such as "nearest heirs," courts have often been reluctant to treat the adjective as surplusage, and have concluded that the donor did not intend to benefit the more remote of those relatives who would be entitled to take had the designated person died intestate. See In re Dicks' Will, 187 Misc. 1075, 66 N.Y.S.2d 264 (1946) ("nearest heirs"); Estate of Robinson v. Carter, 701 S.W.2d 218 (Tenn.App.1985) ("closest living relatives").

On the other hand, in Kello v. Kello's Executors, 127 Va. 368, 103 S.E. 633 (1920), the court found it significant that the testator had referred to nearest "heirs" rather than nearest "relations": "The person or group of persons, who take in any given case by the terms of the statute, may be regarded by the law as the nearest heirs, since they take to the exclusion of all others." Id. at 378, 108 S.E. at 636. See also Rawls v. Rideout, \textit{supra}, item 3c, where the testatrix had in effect used both terms: "my nearest (relatives) heirs." The court held: "From the common law it is clear that the phrase 'nearest heirs' is itself a technical phrase synonymous with 'heirs.'" Id. at 371, 328 S.E.2d at 785. Although "nearest relatives" would have had the same meaning as did "next of kin" before the enactment of a statute defining "next of kin" as synonymous with "heirs," the court held that the testatrix did not mean that surviving brothers and sisters should take to the exclusion of nephews and nieces, and that her use of the term "(relatives)" was merely to exclude her husband, the life tenant.

In Zeigenfus v. Snelbaker, 38 N.J.Super. 304, 118 A.2d 876 (1955), the testatrix left her house to her daughter for life. If she died without issue, "then the same to go to my next nearest heirs at law." The court apparently thought that "next" modified "heirs at law" rather than "nearest," and that this manifested an intent to use the term "heirs at law" in a nontechnical sense; therefore the testatrix's surviving grandchildren took to the exclusion of the daughter of her predeceased granddaughter.

In Beecher v. Hall, 224 Ga. 823, 165 S.E.2d 155 (1968), the testatrix left her home to her uncle for life, with remainder to one of her 10 grand-nieces. Half the residue went to her two surviving nieces, the other half to "my other legal heirs." The two nieces were her sole heirs, and the court could not determine whether the "other
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heirs" were the nieces' children (other than the one named to take the home), or the testatrix's cousins, her closest relatives after the uncle, the nieces, and the nieces' issue. Accordingly, "since there were no 'other legal heirs' it must be concluded that there was an intestacy as to such part of the estate." Id. at 826, 165 S.E.2d at 157.

§ 29.2 Determination of Controlling State

If a gift is made to a class described as the "heirs" of a designated person, or by a similar class gift term, and a statute governing the intestate takers of property is to be used to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, such statute is the one chosen by the State whose law, including its approach to choice of law, would apply in determining intestate takers from the designated person if such person had died intestate owning the subject matter of the gift.

Comment:

a. Rationale. If a donor describes his or her beneficiaries as the "heirs" of a designated person, it is essentially the same as if the donor had said "those persons who would have succeeded to the property of the designated person if such person had died intestate." The statutes that govern the intestate takers of property are not uniform in all States. Consequently, it is necessary to identify the particular State, the law of which is applicable. This process of identification should be the same as it is if the designated person had owned the subject matter of the gift and had died intestate, because the true heirs of such person would be so determined. The rule of this section is based on that analysis. Additional language or circumstances that indicate otherwise would result in the ascertainment of an artificial group described as the "heirs" of the designated person for purposes of the particular gift, but would not result in a gift to the designated person's true heirs.

b. Real property the subject matter of the gift. If a person dies intestate owning real property, the intestate takers of such person are determined by the law of the State, including its approach to choice of law, in which the real property is located. The intestate takers of property other than real property of a person who dies intestate are determined by the law of the State, including its approach to choice of law, of such person's domicile. If the subject matter of a gift to the "heirs" of a designated person consists of both real property and property other than real property
and the real property is located in a State other than the designated person's domicile, two different State statutes governing the intestate takers of property may have to be used and the "heirs" of the designated person may be two different groups, in the absence of additional language or circumstances that indicate otherwise.

Illustrations:

1. O transfers Blackacre by will "to O's son S for life, then to the heirs of S." The will gives the residue of O's estate, which does not include any real property, to T in trust and directs T "to pay the income to S for life, and then to distribute the trust property to the heirs of S." O is domiciled in State X on his death. S is domiciled in State Y when O dies but S is domiciled in State Z when S dies. Blackacre is located in State Y. The "heirs" of S for purposes of taking Blackacre are the persons who would take under the statute of that State governing intestate succession of real property that would be chosen by the approach to choice of law used in State Y. The "heirs" of S for purposes of taking distribution of the trust property on S's death are the persons who would take under the statute of that State governing intestate succession of other than real property that would be chosen by the approach to choice of law used in State Z.

2. Same facts as Illustration 1, except that T, prior to S's death, invested trust funds in real property located in State X, and this real property is part of the trust property at the death of S. The trust property that is real property located in State X shall pass to the persons who are the "heirs" of S under the statute of that State governing intestate succession of real property that would be chosen by the approach to choice of law used in State X. The balance of the trust property shall pass to the persons who are the "heirs" of S under the statute of that State governing intestate succession of other than real property that would be chosen by the approach to choice of law used in State Z.

3. Same facts as Illustration 2, except that the trustee disposes of the real property in the trust that is located in State X before S dies and, at the death of S, the trust property does not include any real property. The result is the same as the result in Illustration 2 with respect to the balance of the trust property.

c. Contrary intent. The donor may select the State the law of which is to be applied to determine the "heirs" of the designated person. If the State selected by the donor is different, or might be
different, than the State the law of which would otherwise apply, then the donor has identified an artificial group described as the "heirs" of the designated person for purposes of the particular gift.

Illustrations:

4. O transfers Blackacre by will "to O's daughter D for life, then to the heirs of D," and the will directs that "the heirs of D are to be determined under the law of State X." O dies domiciled in State X. Blackacre is located in State Y. D is domiciled in State Z. Under the approach to choice of law used in State X, the law of State Y, where Blackacre is located, would apply in determining the intestate takers of Blackacre. The same is true under the law of State Z, where D is domiciled. Consequently, O has not selected an artificial group as the "heirs" of D but has simply directed what would otherwise be the case if O had made no selection.

5. Same facts as Illustration 4, except that the will directs that "the heirs of D are to be determined as though Blackacre was located in State X." O has selected an artificial group as the "heirs" of D, even though it turns out that the intestate takers of Blackacre would be the same whether Blackacre is located in State X or in State Y.

STATUTORY NOTE TO SECTION 29.2

The following statutes provide that a "designated person's heirs," or persons described by words of similar import, shall be determined as if the designated person were a resident of California, Indiana, or Pennsylvania, respectively.

California Probate Code § 6151 (West Supp.1987)
Indiana Code Ann. § 29-1-6-1(c) (West 1979)

The Pennsylvania statute is expressly applicable to inter vivos as well as testamentary dispositions.

The Uniform Probate Code provides:

The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to [provisions of the Code relating to the elective share or exempt property], or any other public policy of the state otherwise applicable to the disposition. § 2-602 (6th Ed.1982).

A number of state statutes, even in states not adopting the Uniform Probate Code, have similar provisions.
REPORTER'S NOTE TO SECTION 29.2

1. Comparison with present state of the law—The weight of judicial authority runs contrary to the rule of this section, holding instead that the law of the donor's domicile is controlling, even if the designated person's domicile or the situs of the real estate is in another State. The rule of this section is consistent with § 305 of the first Restatement (see Comment e to § 305).

2. Justification for the rule of this section—The justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—

   a. When the designated person is the donor. There is no serious controversy as to the rule that the donor's own "heirs" are to be determined by the law of the donor's domicile when the subject matter of the gift is personality. See, e.g., Second Bank-State Street Trust Co. v. Weston, 342 Mass. 630, 174 N.E.2d 763 (1961): "[T]he term 'heirs at law' as used in art. Third is not directly limited (as would have been appropriate . . .) by any express statement of the . . . law by which they are to be determined. . . . Although the testatrix at her death had her domicile in Maryland, she was the widow of an inhabitant of Massachusetts. . . . She seems to have intended that the trust be administered in Massachusetts so that Massachusetts law would govern matters affecting trust administration . . . [but] we find no indication that the testatrix affirmatively intended that the substantive provisions of her will should be construed in accordance with Massachusetts rules. Accordingly, we are remitted to the Maryland law." Id. at 633, 635-636, 174 N.E.2d at 766, 767. The result was that the "heirs" would be determined as of the death of the testatrix's last daughter, the surviving life tenant, rather than at testatrix's death under the then-applicable Massachusetts law.

   Harrison v. Nixon, 34 U.S. (9 Pet.) 483, 9 L.Ed. 201 (1835), has been cited in support of the doctrine that the testator's domicile is always controlling (absent language or circumstances that indicate a contrary intent), but this case also involved a bequest of personality to the testator's own "heir at law." The testator died in England, where the will was probated, and an "heir-at-law" was determined according to English law. Rather than addressing immediately the question of whether the same man would also be "heir-at-law" in Pennsylvania, the Supreme Court held that it was necessary to remand the case to determine the testator's domicile, both at the execution of the will, and at his death.

   The Harrison court also declined to answer which domicile's law would be controlling should they turn out to be different. No cases have been found in which this would make a difference in the construction of a gift to "heirs." Dicta have gone both ways: compare Weston, supra and Pistor, infra subitem b (domicile at death) with Riesenberg, infra item 4b, Lincoln, infra
In other contexts, the courts are not agreed as to the effect of the testator's moving: compare In re Barton's Estate, 196 Cal. 508, 238 P. 681 (1925) (testator executed a will disposing of his personal property in Rhode Island and New York, then moved from Rhode Island to California; California law applied in determining that a gift lapsed) with In re Flager's Will, 4 Misc.2d 705, 158 N.Y.S.2d 941 (1957) (New York testatrix gave her grandchild a testamentary power of appointment over trust corpus. Grandchild died domiciled in Nevada, with a will executed while she lived in Pennsylvania. New York law used to determine whether the power was exercised, Pennsylvania law to determine whom the grandchild meant by "issue"—domicile at execution because it was a matter of "interpretation of the will" rather than of the substantive law to be applied.) The domicile-at-execution rule (see Illustration 2 to § 264 of the Second Restatement of Conflict of Laws) is consistent with the "donor's chosen method" theory applied by the courts using donor's law to determine "heirs" of other designated persons, while the domicile-at-death rule set forth in Illustration 1 is consistent with the "let the law take its course" theory of this section. The problem in § 28.3, what effect a change in the intestate succession law should have, is analogous; note that, in the case of the testator's own "heirs," the testator is far more likely to be aware of a change of domicile than of a change of law within the domicile.

b. When the designated person lives in another State from the donor. The New Jersey courts, in dicta, have endorsed the rule of this section. In re Pistor's Estate, 53 N.J.Super. 139, 146 A.2d 685 (1958), judgment affirmed, 30 N.J. 589, 154 A.2d 721 (1959), required the determination of the "heirs at law" of one of the testatrix's grandchildren, who "travelled extensively in Bermuda, Canada, New York and Florida, but apparently never established a permanent home in any one place." The court held that New Jersey law applied to the construction of the will, and that under New Jersey law, all real estate involved having been sold (see Illustration 2), "absent a showing of contrary intention on the part of testatrix [the property in question] would be distributed to those who are the statutory beneficiaries of the personal property" of the testatrix's grandson, according to the law of his domicile at the time of his death. However, since his domicile was indeterminate, "it must be presumed that the intestate laws of his domicile are the same as those of New Jersey . . . [b]ut even were we compelled to the conclusion that [he] was domiciled in any one of the jurisdictions mentioned . . . the statute of distribution [of each of those jurisdictions] would operate in the same way," without any need for the presumption that an indeterminate foreign law is the same as the law of the forum. Id. at 146, 146 A.2d at 689. Moreover, the court went on to hold that the testatrix had intended "heirs at law" to mean "issue," rather than referring to any statute at all.
See the discussion of this case in item 5a of the Reporter's Note to Section 29.1.

See also Trenton Trust Co. v. Gane, 125 N.J. Eq. 389, 6 A.2d 112 (1939), decree affirmed, 126 N.J. Eq. 273, 8 A.2d 708 (1939): "[T]he meaning of the words surviving lawful heirs, as used by testator, is the same as if he had said 'those entitled to take by intestate succession. . . .' It is further obvious that the identity of those persons. . . . must be,—can only be,—determined at the death of such decedent and under and in accordance with the statute of distribution in force at such death, in the state in which such decedent was domiciled at the time of his death." But again, "It does not appear, either by the pleadings or the proofs, where [testator's son] was domiciled. . . . [I]t is to be presumed that the law of that state is the same as that of this state,—there being no proof as to the law of such foreign state." Id. at 405, 6 A.2d at 120.

c. When the subject matter of the gift is real estate. In re Good's Will, 304 N.Y. 110, 106 N.E.2d 36 (1952), applied the principle set forth in Comment b to a gift to the "issue" of the testator's daughter. The testator was a resident of New Jersey, but the property included land in New York. Under New Jersey law, gifts to "issue" were still divided per capita in 1952, but the court held that New York law governed the land in New York: "Where a testator, by a single will, devises lands lying in two or more states, the courts of such states will, respectively, construe it. . . . as if they had been devised by separate wills [quoting McCartney v. Osburn, 113 Ill. 403, 411, 9 N.E. 210, 212 (1886)]." Id. at 116, 106 N.E.2d at 39. (The New Jersey Chancery Court had previously held, in a connected case, "what disposition is to be made of the New York and Colorado real estate is not for this court to decide, that matter is governed by the law of the States in which the property is situated." Hoyt v. Orcutt, 59 A.2d 17, 22 (N.J.Ch. 1948), decree reversed, 1 N.J. 454, 64 A.2d 212 (1949). See Illustration 4.)

4. Cases contrary to the rule of this section—

a. When the designated person is the donor. No cases have been found in which the law of donor's domicile was not applied. As discussed in item 3a, supra, cases have indicated in dicta that the domicile at execution rather than the domicile at death should be controlling, and the cases collected in item 4c, infra, although not involving the donor's own "heirs," clearly indicate that those courts would also apply the law of the domicile rather than that of the situs if donor's own "heirs" had been the beneficiaries.

b. When the designated person lives in another State from the donor. In re Estate of Sewart, 342 Mich. 491, 70 N.W.2d 732 (1955), involved a provision that if any legatee predeceased the testatrix without appointing a substituted taker by will, "the aforesaid legacy shall be distributed to the heirs-at-law of such deceased person in accordance with the laws of intestacy in force at the time of my death." Although the trial
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court held that the legacy to A, the testatrix's husband's sister, should all go to A's husband, according to Florida law, the supreme court noted "that [testatrix] made no reference to the statutes of Florida, although it may be assumed that she was aware when she made her will that A was living in that State." After discussing several cases from other jurisdictions, including Lincoln, Keith, and Rose, infra subitem c and Harrison, supra item 3a, the court held that Michigan law should control: "It may be assumed that [testatrix], having been a resident of Michigan for many years, was familiar with the laws of this State. There was nothing to indicate that she was advised with reference to the statutes of other States in which her beneficiaries might be living. . . ." Id. at 496, 501, 70 N.W.2d at 735, 737. The court also found support in the testatrix's designation of the law in force at the time of her own death, when the gift was to be distributed, because a reference to her own death indicated the law that would have been applicable had she died intestate, which would have been Michigan law.

In Dodge v. Detroit Bank & Trust Co., 121 Mich.App. 527, 330 N.W.2d 72 (1982), a Michigan testator had again left a legacy to the "heirs" of a Florida resident. The court stated, "The issue . . . presents a close and difficult question. . . . Where personal property is involved the normal and technical meaning of 'heirs' requires the use of the statute of intanticy of the state of the last domicile of the decedent whose heirs are being deter-

mined." Id. at 551, 553, 330 N.W.2d at 84-85. The court quoted at length from Comment e to § 305 of the first Restatement and from 5 American Law of Property § 22.58(a), which support the rule of this section, but held that Stewart, supra, was controlling.

See also In re Battell's Will, 286 N.Y. 97, 35 N.E.2d 913 (1941), re-argument denied, 286 N.Y. 722, 37 N.E.2d 454 (1941) ("He was providing for the distribution of his own property, not that of his niece and not on any theory 'as if' it were that of his niece." Id. at 103, 35 N.E.2d at 915; In re Riesenberg's Estate, 116 Mo.App. 308, 90 S.W. 1170 (1905) ("[T]he presumption is that the testator had in view the laws of Missouri (the place of his domicile) when he made his will. To rebut this presumption something more should be found in the will than the mere designation of [A] as a resident of Flensburg, Germany.") Id. at 315, 90 S.W. at 1172.

c. When the subject matter of the gift is real estate. In Lincoln v. Perry, 149 Mass. 368, 21 N.E. 671 (1889), Lincoln v. Aldrich, 149 Mass. 368, 21 N.E. 671 (1889), the testator was born in New Hampshire, but moved to Massachusetts, where he made his will and died. A quarter of the residuary estate, consisting of personal property in Massachusetts and real property in New Hampshire was to go to his niece, a resident of New Hampshire, for life, then "to her heirs at law." The court did not rely on the conversion of this reality to personalty, but instead held: "The testator has ap-

pointed a common destination for all of said fourth part of the resi-
due... The words should not be construed to mean that the real estate should go to one set of persons, and the personal estate to another... It has been argued that the word ‘heirs at law’ should be held to mean those who would be the actual heirs of Judith upon her decease... and that therefore, the determination should be made according to the laws of New Hampshire. [But testator's] true meaning is to designate a set of persons who were to take the estate upon Judith's death, and that those persons are styled her heirs at law. This set of persons would not fluctuate with any change of residence that she might make.” *Id.* at 373, 21 N.E. at 671-672. See also *In re Winslow's Estate*, 138 Misc. 672, 247 N.Y.S. 506 (1930).

In *Keith v. Eaton*, 58 Kan. 732, 51 P. 271 (1897), the testator, domiciled in Missouri, left his son a life estate with remainder to "the heirs of his body." Some of the land in dispute was in Kansas, where an illegitimate child became an "heir of the body" upon recognition by the father, while under Missouri law the father was also required to marry the mother of the child. The court held that only the legitimate children could inherit: "[T]he subject of interpretation is the will of William Eaton. It is not that of the statutes of Kansas or Missouri... Neither of the contending parties claims under the statute. If they did so claim, ... [t]he law of the state in which land is situated invariably governs its disposition... [T]he question [should not be]: "Do the laws of Missouri or of Kansas govern...?" It should rather be: Will a testator residing in Missouri, and owning lands in that and other states, and devising them to the heirs of the body of his son, be presumed to have used the descriptive words... in accordance with the laws of his domicile, or the laws of the states where the lands are situated?" *Id.* at 734-735, 51 P. at 272. See also *Rose v. Rambo*, 120 Miss. 305, 82 So. 149 (1919) (law of domicile applied, so widower not an "heir").

In *Harris v. Ingalls*, 74 N.H. 339, 68 A. 34 (1907), the court found that it was impractical to divide the real estate in question, scattered over several States, into equal parts, one for the "legal heirs" of each of testator's four brothers and sisters. The court therefore ordered that the real estate be sold (unless all interested parties agreed to take as tenants in common), so that by the principle discussed in Illustration 2, the law of the domicile rather than of the situs was controlling. The court, however, did not indicate that the conversion of the entire estate to personalty influenced its decision that "the words 'legal heirs... were used with reference... to the laws of this state [and not to] the laws of the states where the real estate is situated." *Id.* at 344, 68 A. at 37.

5. Contrary intent of the donor—*Comment c* recognizes that when the donor expressly indicates that a particular foreign law should govern, courts will follow that direction unless the result would be contrary to public policy. Many States, including all which have adopted the Uniform Probate Code, have stat-
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utes to this effect; see the Statuto-
y Note to this section.

In Kanawha Valley Bank v. Hornbeck, 151 W.Va. 308, 151 S.E.2d 694 (1966), a West Virginia testator, formerly a New York resi-
dent, called (in a will apparently ex-
ecuted after he moved to West Vir-
ginia, in view of the property devised, and the choice of a West Virginia trustee and West Virginia charitable beneficiaries) for the in-
terest of any of the testator's nieces
and nephews "dying before the ter-
mination of the [residuary] trust to
go to his or her heirs at law accord-
ing to the statute of descent and
distribution of the laws of the State
of New York then in force, per stir-
pes." The court duly applied New
York law, but, as the discussion of
this case in item 5a of the Reporter's Note to Section 29.1 illustrates,
it did not interpret New York law
regarding "heirs per stirpes" as in
In re Post's Trust, 61 Misc.2d 98,
304 N.Y.S.2d 954 (1969). Although
Post was a later decision, and ac-
knowledged that its precedent, Mat-
ter of Moffitts' Estate, 171 Misc. 84,
12 N.Y.S.2d 909 (1939), affirmed,
258 A.D. 992, 16 N.Y.S.2d 765
(1940), affirmed, 283 N.Y. 743, 28
N.E.2d 969 (1940), had not always
been followed, the Hornbeck court
did not address the body of New
York case law on the subject. Cf.
also B.M.C. Durfee Trust Co. v.
Franzheim, discussed in Item 4b of
the Reporter's Note to Section 28.2
(Massachusetts court applying Rhode Island law).

In re Kadjar's Estate, 200 Misc.
268, 102 N.Y.S.2d 113 (1950), decree
affirmed, 279 App.Div. 1008, 113
N.Y.S.2d 245 (1952), appeal denied,
(1952) held that the will of the ex-
ilied Shah of Persia should be con-
strued according to Iranian law, so
that the testator's brothers would
take twice as much as his sisters,
and the children of predeceased
brothers and sisters would take
nothing, in a gift to the "heritiers
directe" [sic] of testator's mother.

The testator died in France and
wrote a will in French disposing of
personal property located in New
York. The court held: "[W]here
the testator makes it clear that the
will is to be interpreted according to
the laws of a given jurisdiction
... effect will usually be given to
such intention." Ambiguities as to
the testator's and mother's domiciles
were therefore beside the point, as "the entire will of the tes-
tator . . . [from] the directions for
the funeral ceremonies . . . fol-
low[ing] as far as possible the Is-
lamique Schyite rites . . . [to the]
div[ision] among his mother and his
children [of the great bulk of his
property], the shares corresponding
to their [Iranian] rights of forced
heirship . . . followed Iranian
law." Id. at 273, 102 N.Y.S.2d at
120.

In Sewart, supra item 4a, the tes-
tatrix had changed her will from
one expressly directing that Michi-
gan law be applied to one merely
specifying "the laws of intestacy in
force at the time of my death." The
court held that the new lan-
guage, when there was no indica-
tion that the will was changed for
the purpose of removing the refer-
cence to Michigan law, was as consis-
tent with a belief that such refer-
ence would be redundant as with an
intent that some other law should
govern.
§ 29.3 Applicable Statute in the Controlling State

If a gift is made to a class described as the “heirs” of a designated person, or by a similar class gift term, and a statute in a particular State governing the intestate takers of property is to be used to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, the relevant statute in such State is the one that applies to property like the subject matter of the gift and that is in force when the designated person dies.

Comment:

a. Rationale. If the particular State, the law of which is applicable to ascertain the beneficiaries under a gift to the “heirs” of a designated person, has been identified, it must be determined whether the law in that State describes the intestate takers differently if the subject matter of the gift is real property than if it is other than real property. If there is a difference, and if the true heirs of the designated person are to take under the gift, to the extent the subject matter of the gift is real property, the statute in the controlling State that relates to real property should be applied. To the extent the subject matter of the gift is other than real property, the statute in the controlling State that relates to other than real property should be applied. The rules of this section so provide, in the absence of additional language or circumstances that indicate otherwise.

Generally, the law governing the intestate succession of property is the same whether the subject matter involved is real property or other than real property. In the past this was not true. The part of the rule of this section that gives significance to the subject matter of the gift in determining the intestate takers is not relevant if the intestate law applicable to real property and property other than real property is the same. One instance where the intestate law may be different relates to the position of the spouse of the person whose heirs are designated. If under the controlling statute, the spouse is entitled only to dower in real property, the spouse is not an intestate taker of real property and is not included in a gift to the “heirs” of real property, in the absence of additional language or circumstances that indicate otherwise.

After the particular State, the law of which is applicable to determine the intestate takers, has been identified, it may be the case that the law in that State has changed from time to time over the years. A donor conceivably may have had in mind the law of
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the controlling State as it was when the donor executed the dispositive instrument, or as it was when the donor's dispositive instrument took effect, or as it is at the time the designated person dies. If the true heirs of the designated person are to be the beneficiaries, the law of the controlling State in force at the time the designated person dies should be the applicable law, and this section so provides. The use of the law in force at an earlier date or a subsequent date would necessarily result in describing an artificial group not the true heirs of the designated person.

If the controlling State is not the one whose laws would apply if the designated person died intestate, the gift is to an artificial group even though the law of such controlling State in force on the death of the designated person is to be applied and the law in that State as it relates to the subject matter of the gift is to be applied.

If the designated person whose "heirs" are the beneficiaries of a gift survives the date the dispositive instrument takes effect, the law of the controlling State in relation to intestate succession will be the law of that State in force after the date the dispositive instrument takes effect. If, however, the designated person dies before the date the dispositive instrument takes effect, in the absence of additional language or circumstances that indicate otherwise, the "heirs" of the designated person will be ascertained under the statute in force when the designated person died because they are such person's true heirs.

b. Subject matter of gift changes from real property to other than real property or vice versa. If the subject matter of a gift changes between the date the dispositive instrument takes effect and the date of death of the person whose "heirs" are designated as beneficiaries, the changed subject matter is the subject matter of the gift. Hence, under the rule of this section, the statute in the controlling State that applies to determine the intestate takers is the one that applies to determine the intestate takers of the subject matter that is to be distributed to the "heirs," in the absence of additional language or circumstances that indicate otherwise.

Illustrations:

1. O transfers the residue of his or her estate by will to T in trust. Under the trust, T is directed "to pay the income to O's son S for life, and then to distribute the trust property to the heirs of S." O dies a resident of State X. O's residuary estate consists of real property located in State X and of other than real property. S dies a resident of State X. The law of State X governing the intestate succession of real property is
not the same in all respects as the law that is applied to the intestate succession of other than real property. If there is no change in the character of the trust property between O's death and S's death, T is required to distribute the real property in the trust on S's death to S's heirs determined under the statute governing intestate succession in State X that relates to real property, and to distribute the property other than real property in the trust on S's death to S's heirs determined under the statute governing intestate succession in State X that relates to other than real property.

2. Same facts as Illustration 1, except that the terms of the trust direct T to dispose of the real property in the trust and reinvest the proceeds in other than real property. This direction to T converts the real property in the trust (equitable conversion) into other than real property and on S's death all of the trust property will be distributed to S's heirs determined under the statute in State X governing the intestate succession of property other than real property.

3. Same facts as Illustration 1, except that T, under his general power to invest and reinvest trust property, sells the real property held in the trust and reinvests the proceeds in other than real property. Consequently, when S dies the trust assets available for distribution consist only of property other than real property. If the statute in Stato X governing the intestate succession of property other than real property governs the determination of the intestate takers on S's death, T by virtue of his power to invest and reinvest has in effect a power of appointment to the extent that the intestate takers are different if real property is involved rather than property other than real property. If T could benefit himself or herself by changing the trust property from real property to property other than real property, or vice versa, T would have a general power of appointment for tax purposes. The conclusion is justified that there was no intention that T is to have such a power, and consequently the change of the trust property from real property to other than real property or vice versa does not change the statute governing intestate succession of property that would have applied had there been no change. If T cannot benefit himself or herself by changing the trust property from real property to property other than real property, or vice versa, the nature of the trust property on S's death governs the statute in State X that applies in determining the "heirs" of S.
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personal representative. If a person dies intestate owning real property and property other than real property, the title to the real property may vest immediately in the intestate takers, but the title to other than real property may vest initially in the personal representative. If this is the law in the controlling State, such law has no relevance in ascertaining the "heirs" of a designated person who take as purchasers under a gift. Even though the "heirs" of the designated person are ascertained under the State law governing intestate succession of property, the fact remains that the property involved is not property owned by the designated person.

d. Statute in controlling State changes from time to time. The statute in the controlling State governing the intestate succession of property may change from time to time over the years. The changes that have typically occurred relate to the inclusion of adopted children and children born out of wedlock in the group of intestate takers. Even though the donor knew at the time the dispositive instrument was drafted that the statute governing the intestate succession of property enforced in the controlling State excluded adopted children and children born out of wedlock, a change in the law of such State, before the designated person dies, to include adopted children and children born out of wedlock as intestate takers would apply to determine the "heirs" of the designated person, in the absence of additional language or circumstances that indicated otherwise.

Illustration:

4. O transfers the residue of his or her estate to T in trust. Under the trust T is directed "to pay the income in equal shares to O's son S and O's daughter D, and on the death of the first to die of S and D, to distribute one-half of the trust property to such decedent's heirs, and on the death of the survivor of S and D, to distribute the remaining trust property to the survivor's heirs." O, S, and D all reside in the same State. The intestate law of that State at the time of the death of the first to die of S and D excludes adopted children as intestate takers. On the death of the survivor of S and D, the intestate law of that State includes adopted children as intestate takers. The evidence discloses that O inquired of his attorney whether adopted children of S or D would be distributees of trust property when one or the other dies and the lawyer advised O that adopted children would not be included under existing law. On the death of S, he being the first to die, S's adopted children would not share in the gift to S's heirs. On the later death of D, however, her adopted children would share in the gift to her "heirs."
STATUTORY NOTE TO SECTION 29.3

A Delaware statute provides:

In the construction or interpretation of any . . . will or trust instrument [not] expressly provid[ing] to the contrary, the determination of a class shall be governed by the law in effect on the date of execution of the will or trust instrument.


A Minnesota statute provides:

If a person has executed a will or other instrument on or before December 31, 1986, which directs disposition . . . pursuant to the intestacy laws of the state of Minnesota, the laws to be applied shall be [the pre-1987 laws] unless the will or instrument directs otherwise.

Minn.Stat. § 524.2-114 (1986)

California, Indiana, Massachusetts, Pennsylvania, and Wisconsin, on the other hand, apply the law in force at the effective date of the gift; see the Statutory Note to Section 29.4.

REPORTER'S NOTE TO SECTION 29.3

1. Comparison with present state of the law—The rule of this section takes the majority position, but there is also judicial authority for the minority position that the law at the time of the execution of the will is the applicable law, and for the position that a mixed devise of realty and personality should pass to “heirs” as realty. The rule of this section is consistent with Comment e to § 305 of the first Restatement, but § 307 of the first Restatement maintained that a devise of realty to “next of kin” should be governed by the statute applicable to personal property.

2. Justification for the rule of this section—The justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—

a. As to the effect of amendment of the statute. As discussed in Comment d, the general rule is that when the intestate succession law is amended so that different laws are in effect at the time of the donor’s execution of the dispositive instrument and at the time the designated person’s “heirs” are to be ascertained, the law as amended applies. In Lincoln v. Perry, 149 Mass. 368, 21 N.E. 671 (1889), Lincoln v. Aldrich, 149 Mass. 368, 21 N.E. 671 (1889), the life tenant’s husband would not have taken under a gift to her “heirs” under the law of her domicile, but the court determined that the law of Massachusetts, the testator’s domicile, would apply. The court held that the husband was entitled to take, even though the Massachusetts “statute giving him this right was passed after the death of the testator. . . . [Testator] must be held to have meant [life tenant’s] heirs at law as ascertained by the laws in force at her decease. Un-
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Til then it could not be determined who her heirs would be. Testimony to show that the testator did not wish to have Judith's husband receive anything . . . was incompetent. . . . At the time the will was drawn he would not have been included. . . . His right arises from the subsequent change in the statutes, and the testator must be held to have been content to take this chance, since he did not in terms provide against it. "Id. at 375, 21 N.E. at 672. See also Holt v. Miller, 133 Ohio St. 418, 14 N.E.2d 409 (1938) ("He must also be charged with knowledge that the persons who would be John's heirs at his demise might be entirely different from those who were his prospective or presumptive heirs when the will was executed, either by natural processes or by legislative enactment." Id. at 421, 14 N.E.2d at 410.); Trenton Trust Co. v. Gane, infra item 3b; Swee-ney v. Kennard, infra item 4b.

In re Winslow's Estate, 138 Misc. 672, 247 N.Y.S. 506 (1930), also determined the life tenant's "heirs" by applying the statute of distribution at the life tenant's death, permitting grandnephews to take as representatives of a deceased niece: "The claim of the executors of the estate of [a nephew who died after the life tenant] that . . . such statutoe as it existed at the death of the testator should be applied, is contrary to the well established rule that, where a testamentary gift of personal property is made to a class to be determined upon the happening of a future event, the members of the class are to consist of all the persons who answer the description and are capable of taking at the time of distribution." Id. at 678, 247 N.Y.S. at 511. Subsequent New York cases have also professed adherence to this rule, but by statutory construction have applied the statute in effect at the execution of the will; see Post and Waring, infra item 4a; Campbell, infra item 5.

One of the many questions raised in Dodge v. Detroit Bank & Trust Co., 121 Mich.App. 527, 330 N.W.2d 72 (1982), was similar to Illustration 4. The corpus, upon the death of the last of the life beneficiaries, the testator's widow and four children, was to be divided into four shares, one for the "heirs" of each child. The widow had subsequently remarried and adopted two more children. A law allowing adoptive siblings to inherit as if natural siblings was passed in 1966, after two of the testator's children had died without issue. The court held that their "heirs" would be determined by the pre-1966 law, while the "heirs" of the other two (who left issue, making the point moot) would be determined by the post-1966 law. The rights of surviving spouses, not yet "heirs" under the law at the testator's death, were also in question: "The will provides specifically that the heirs of the testator's four named children should take 'in proportion as by law such heirs shall [emphasis by court] be entitled to receive same.' Furthermore, since the vesting of the heirs' interests should occur upon the death of each of the four named children, the application of any statutes other than those in effect on the dates of the four named children's respective deaths would
be inconsistent." *Id.* at 549–550, 330 N.W.2d at 83.

In Tootle v. Tootle, 22 Ohio St. 3d 244, 490 N.E.2d 878 (1986), discussed in item 3b of the Reporter's Note to Section 29.1, the court was divided as to whether the law at execution or the law at the surviving life tenant's death should determine whether life tenants' adopted children were "heirs of their bodies." The two dissenting justices noted that the statute excluding adopted children from taking as "heirs of the body" had been repealed before the heirs of the life tenants' bodies were to be determined, and maintained: "Although in 1925, the class . . . did not include adopted children, it is not necessarily valid to presume that the use of the term indicates [testator's] intent to expressly exclude or bar adopted children who later, by operation of statute, become . . . eligible to take under his will . . . . A testator is presumed to know that the law is subject to change." *Id.* at 251, 490 N.E.2d at 884. Two concurring justices also agreed that the law at the life tenant's death governed, but held that, the new statute indicates [testator's] intent to expressly exclude or bar adopted children who later, by operation of statute, become . . . eligible to take under his will . . . .

b. As to the type of property involved. The rule of this section is summarized in a dictum in Sevel v. Swarzman, 33 N.J.Super. 198, 109 A.2d 685 (1954). In supporting its conclusion that "heirs" is not always used in its technical sense of "those who would take real estate under the statute of descent," the court observed: "[I]n numerous occasions courts have concluded that where the words 'heirs-at-law were used in a will with reference to personalty they should be construed to mean 'next of kin' and the converse where the words 'next of kin' have been used dealing with realty,—they should be deemed 'heirs-at-law.'" *Id.* at 202, 109 A.2d at 687.

One of the cases cited was Trenton Trust Co. v. Gane, 125 N.J.Eq. 389, 6 A.2d 112 (1939), decree affirmed, 126 N.J.Eq. 273, 8 A.2d 708 (1939) discussed in item 3b of the Reporter's Note to Section 29.2. The court held that in various gifts to the "lawful heirs" of certain children of testator, the personal property would pass according to the statute of distribution, and the real property according to the statute of descent.

Camden Trust Co. v. Matlock, 125 N.J.Eq. 170, 4 A.2d 502 (1939), follows the rule recognized in *Comment b* and Illustration 2: "There can be no doubt, that, testator having ordered his estate to be converted into personality . . . the term 'heirs-at-law' used in decedent's will [must] be con-
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sidered as next of kin." Id. at 174-175, 4 A.2d at 503.

See also *Dodge*, supra subitem a. The court observed that even if "heirs" were to be determined under the law in effect at the testator's death, the statute of distribution, under which a surviving spouse was included, would govern, and not the statute of descent: "We are satisfied that the inclusion of a single piece of real estate, namely the boat house, appraised at $40,000 [in a 40-million-dollar trust corpus] . . . was an obvious oversight. Thus, we do not believe that those cases which depend for decision on a conclusion that the property involved is 'mixed' . . . are here applicable. . . . Furthermore, the real estate parcel included was sold in 1929, and by the time the first [life beneficiary] died in 1938, the trust property consisted entirely of personal property." Id. at 550, 330 N.W.2d at 83-84.

See also *Skinner*, infra item 4b, where the court suggested the personalty might be considered "converted to realty."

4. Cases contrary to the rules of this section—

a. As to the effect of amendment of the statute. Although the rules of this section, unlike the related rule of § 29.2, reflect a clear majority position, some jurisdictions hold that the law of the donor's domicile "with which donor is familiar" should be treated as static rather than evolving—that donor, when executing the will, incorporated a particular statute by reference because it coincided with his or her wishes. In *Orme v. Northern Trust Co.*, 25 Ill.2d 151, 183 N.E.2d 505 (1962), cert. denied, 371 U.S. 935, 83 S.Ct. 308, 9 L.Ed.2d 271 (1962), the court held that an adopted child could not take as an "heir" of the testatrix's granddaughter: "In construing this classic example of inept legal draftsmanship. . . . We recognize . . . that the testatrix is presumed to have executed her will in accordance with the existing adoption law . . . which in this case was the act of 1867." Id. at 161-163, 183 N.E.2d at 510-512.

In *re Post's Trust*, 61 Misc.2d 98, 304 N.Y.S.2d 954 (1969), recognized that "it is the law in effect at the death of the life beneficiary which determines who is to take the remainder as his 'legal heirs.'" Id. at 100, 304 N.Y.S.2d at 957. However, it was not intestate property of the life beneficiary that was being distributed, but property passing under a will executed while the old statutes on wills and intestate succession were in force. The court therefore held that the new law itself, in specifying that it applied only to estates and wills of persons dying after its effective date, mandated that the term "heirs" be construed according to the old statute of distribution rather than the new one. (But the court held that the testatrix had intended "heirs" to mean "issue," so that in the end, neither statute was applied.) The court was following *In re Waring's Will*, 275 N.Y. 6, 9 N.E.2d 754 (1937) (involving a statutory change in the meaning of "next of kin," discussed in item 4a of the Reporter's Note to Section 29.1). *Winslow*, supra item 3a, was distinguished in *Waring* on the ground that, as the *Winslow* court itself had pointed out,
Winslow involved a change only in the intestate succession laws, so that the prospectivity clause applied only to "the estates of persons dying intestate before [the effective date, and] does not contemplate or refer to the wills of persons dying before that date." *Id.* at 678, 247 N.Y.S. at 512. See also *In re Campbell's Will*, infra item 5.

In First National Bank of Kansas City v. Sullivan, 394 S.W.2d 273 (Mo.1965), "While testator intended that his [own] heirs at law be ascertained and determined . . . as of the date of [his daughter's] death . . . we do not find that testator intended that the qualifications of those who were to make up the class 'heirs of the body of my said daughter' were to be judged according to the laws in effect at the time of [the daughter's] death. On the contrary, we believe that testator intended that their qualifications be judged at the time the will was executed; that testator used the terms . . . according to the meaning and effect the law attached to them at the time he used them, and that he wanted them so interpreted at the time these classes were to be ascertained and determined." *Id.* at 281.

b. As to the type of property involved. In *Lincoln*, *supra* item 3a, although all that was involved was personal property, the court held that "the whole residue must go to the heirs, according to the meaning which the word bears at common law, namely, those who would be entitled to succeed to real estate. . . . It is true that in point of fact no land in Massachusetts was included in the residuary devise, but the devise was broad enough in its terms to include such land, . . ." *Id.* at 373-374, 21 N.E. at 672.

Although no 20th century case has been found in which a donor's choice of the term "heirs" in and of itself mandated the use of the statute applicable to real estate, *Sweeney v. Kennard*, 331 Mass. 542, 120 N.E.2d 910 (1954), held: "Where a will gives both realty and personality to the heirs of a person, the gift is to those entitled to that person's real estate by descent." *Id.* at 544, 120 N.E.2d at 912. See also *100 Tenn.* 391, 45 S.W. 676 where treating a mixed devise as realty allowed representation of collaterals, which was barred by the applicable statute of distribution of personality.

Similarly, in *Skinner v. Brunsen*, 69 R.I. 159, 32 A.2d 263 (1943), the court held, "The greater weight of the decided cases, however, . . . supports the position that when the subject matter of the gift, at the time of distribution, is partly realty, actually or to be so considered, and partly personality the testator does not, in the absence of an indicated intent to the contrary, intend different persons to take under the single limitation different parts of his gift, he having described the class . . . simply as heirs or heirs at law, or by some similar term. Some recognition is thus accorded to the fact that the terms . . . [have] some technical meaning." *Id.* at 167. The court also found additional support for its decision, that the personality should be distributed as if it were realty, in testator's direction that the personal property in the trust corpus, or proceeds...
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from its sale, be spent if necessary for the upkeep of the buildings and improvements upon the real estate in the trust corpus, so that there was "no such intent on the conversion of realty into personalty. In fact, it was clear that the testator's intent in that connection was just the reverse." Id. at 164, 32 A.2d at 267.

5. Contrary intent of the donor—Courts that choose to apply "the law with which testator is familiar" have no particular reason to prefer the law at the execution of the will to the law at the testator's death, since that is "the time at which the will speaks," and it could be presumed that the testator, if the will remains the same after the statute has changed, has ratified the change in the law. No cases have been found, however, which hold that the rule is that the heirs of a designated person other than the testator should be determined by the law in effect on the date when the designated person's death, unless the testator has expressly stated that this law, rather than the law at the designated person's death or the law at the execution of the will, should govern. Such clauses are not uncommon in wills. See, e.g., In re Estate of Sewart, 342 Mich. 491, 70 N.W.2d 732 (1955) ("to the heirs-at-law of such deceased person in accordance with the laws of intestacy in force at the time of my death").

As discussed in Comment a, in the absence of a clause like that in the Sewart will, the law to be applied should be the law in effect on the date when the heirs are ascertained (i.e., the date of the designated person's death), even when the dispositive instrument does not take effect until a later date. The same reasoning suggests that when the donor intends to defer (or to accelerate, if the designated person is living) the ascertainment of the "heirs" until the date the dispositive instrument takes effect (see item 5a of the Reporter's Note to Section 29.4), the law in effect on that date should be applied rather than the law in effect at the designated person's death. See Second Bank-State Street Trust Co. v. Weston, 342 Mass. 630, 174 N.E.2d 763 (1961): "We conclude that the remainder gift to the testatrix's heirs at law was inserted simply to ensure that, if all the earlier dispositions should fail, the intestacy law would 'take its course.'" Id. at 634, 174 N.E.2d at 766. Accordingly, when the court determined that the testatrix's heirs should be determined as if she had lived until the death of the last life tenant, the law in force at that date was the law to be applied. See also In re Holt's Trust Estate, 42 Hawaii 129 (1957), discussed in item 4a of the Reporter's Note to Section 29.4, applying case law as well as statute law in effect at the date when the "heirs" were ascertained.

Sullivan, supra item 4a, in applying the law at execution both to the testator's "heirs" and to the "heirs of the" life tenant's "body," distinguished an earlier case, Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo.1958), which had applied the adoption law in effect when the trust terminated at the end of the perpetuities period to determine the life beneficiaries' "lineal descendants," on the grounds that the Weed will had provided that in default of lineal descendants, the remainder would go "to my heirs at law, whoever they may be at the time of
such termination, according to the laws of Missouri then in force."

See also Haskell v. Wilmington Trust Co., 304 A.2d 53 (Del.1973), affirming, 292 A.2d 636 (Del.Ch. 1971), in which the corpus of an inter vivos trust, after the death of the survivor of the settlor's wife and two children, was to go to the "the living issue of Trustor . . . or failing any such issue . . . [to] the distributees of Trustor by the application of the intestacy laws of the State of Delaware then in effect, irrespective of whether or not Trustor shall then be living." The court held that "issue" should be determined under the adoption law in effect at the death of the last life tenant: "We cannot say that [the Chancellor's] conclusion is wrong . . . but we prefer a slightly different approach . . . leading to the same result. The Chancellor [held] that the law at the date of the creation of the trusts would [have] governed, had the instruments in question [not] manifested a clear intention to the contrary. We think, however, the better and more modern rule is that the applicable law to the determining of a class following the termination of a life interest is the law as it exists on the date of ascertainment . . . if a will or trust instrument makes a gift to 'heirs' or 'next of kin' after the expiration of a life estate, the remainder beneficiaries are normally determined by the law in effect at the death of the life tenant . . . [N.b.: the cases cited involve 'heirs' of the life tenant]. The cited authorities dealt with gifts to 'heirs' or 'next of kin,' but we think they are equally applicable here to the situation." \textit{Id.} at 54-55.

Only in New York have courts failed to give full effect to a clause that could be construed as such a "choice of law" clause. In re Camp- bell's Will, 190 Misc. 705, 74 N.Y.S.2d 355 (1947) involved a gift to "the next of kin of such sister of my daughter Minnie who would have been entitled to receive the same according to the laws of the State of New York in case such sister of my daughter Minnie had been the absolute owner of such sub-share at the time of her death." The court, following \textit{Waring}, supra item 4a, held that as the statute defining "next of kin" to mean "heirs at law" was passed subsequent to the execution of the will (though before Minnie's sister's death), the will must be construed according to the former meaning of "next of kin," as "closest blood relatives," a meaning itself the product of the \textit{Waring} decision's construction of the statute applicable when the will was executed. (Before \textit{Waring}, it had been contended that an earlier amendment had already defined "next of kin" to include all of the statutory distributees, including the surviving spouse; the amendment passed subsequent to \textit{Waring} finally settled the matter.) Actually, \textit{Campbell} was, in its own way, applying the law in effect at the life tenant's death; see Post, supra item 4a.

\section{29.4 Time When Applicable Statute Is Applied}

If a gift is made to a class described as the "heirs" of a designated person, or by a similar class gift term, and a particular statute governing the intestate takers of prop-
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Property is to be used to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, such statute is applied as of the designated person's death.

Comment:

a. Rationale. A statute that prescribes the rules applicable to intestate takers of property operates by ascertaining the takers thereunder at the moment of the death of the person who died intestate. Such intestate takers are the "heirs" of such person. If the statute were to operate to ascertain the takers thereunder at a time prior to or subsequent to the death of the person who died intestate, the takers would not be the true "heirs" of such person but would be an artificial group. If a gift is made to the "heirs" of a designated person and a statute governing intestate succession of property is to be used to determine the takers under the gift, the designated person's true heirs should be deemed to be described, in the absence of additional language or circumstances indicating that the donor had in mind some artificial group. The rule of this section takes the position that presumptively the true heirs of the designated person are described.

Even though the applicable statute on intestate takers of property is applied on the death of the person whose "heirs" are named as the beneficiaries of a gift, the persons thus ascertained may not be the designated person's true heirs. This would be the case if the controlling State statute is one in force at some time prior to the death of the designated person, or varies in some other way from the statute that would be applied to determine the intestate takers of property owned by the person whose "heirs" are designated.

Illustration:

1. O transfers Blackacre by will "to my son S for life, then to such persons as would succeed to the real property of S on S's death under the terms of the statute of descent for real property in force in State X at O's death." S survives O and after O's death and before S dies, the law in State X concerning the descent of real property is changed. Nevertheless, the statute in State X as it was at O's death is applied as of S's death to ascertain the takers under the gift. The persons thus ascertained are not the true heirs of S but represent an artificial group.
b. **Contrary intent—in general.** The rule of this section applies only in the absence of additional language or circumstances that indicate otherwise. The indication otherwise may be that the statute is to be applied as of a date prior to the death of the designated person or as of a time subsequent to the death of the designated person. In either case, the donor has described an artificial group to serve as the "heirs" of the designated person for purposes of the gift involved.

c. **Contrary intent—immediate gift to the "heirs" of a designated person who is alive.** If the donor makes an immediate gift to the "heirs" of a living person, such gift cannot take effect immediately in favor of such person's true heirs, because a living person cannot have true heirs. Such person can only have apparent heirs, that is, those persons who would be such person's true "heirs" if he died on the date the immediate gift is to take effect in possession. The donor normally intends the benefits of an immediate gift to be enjoyed by the beneficiaries on the date the gift is made. This fact justifies the conclusion that the donor intends the applicable statute governing the intestate takers of property is to be applied as though the person whose "heirs" are designated died on the date the gift is made, so that the takers can be ascertained at that time.

**Illustrations:**

2. O transfers Blackacre by will "to the heirs of O's daughter D." D is alive when O dies. At the death of O, D has two children, C₁ and C₂, and two grandchildren, GC₁ and GC₂, children of D's deceased child C₃. On the date O's will becomes effective, D's apparent heirs are C₁, C₂, GC₁, and GC₂, under the statute governing intestate takers of property that would apply in determining D's heirs if D owned Blackacre. The conclusion is justified that the applicable statute governing intestate takers of real property is to be applied as though D died on the date O's will became effective and that C₁, C₂, GC₁, and GC₂ are the owners of Blackacre, in the absence of additional language or circumstances that indicate otherwise.

3. Same facts as Illustration 2, except that at O's death D has just married and thus has no children. If it were assumed that D died at the time O's will became effective, under the applicable statute governing the intestate takers of real property, D's "heir" would be her brother. The fact that it is likely in this case that D will have children who would naturally be closer to her than her brother is sufficient to overcome the manifested desire of O that the gift of Blackacre be enjoyed
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beneficially at O's death. Consequently, the conclusion is justified that the applicable statute governing intestate takers of real property is to be applied on D's death. This means that there will be a reversion of Blackacre to the persons who would take the residuary gift under O's will, to last until D's heirs are ascertained at her death.

d. Contrary intent—postponed gift to "heirs" of a designated person who is alive at the end of the postponed period. If the donor makes a postponed gift to the "heirs" of a living person and such person is alive at the end of the postponed period, there is not the same likelihood that the donor contemplates that the apparent heirs of such person are intended by the donor as when the gift is an immediate one. Nevertheless, if the designated person is alive when the donor contemplated the gift to the "heirs" of the designated person would be enjoyed in possession by them, the enjoyment in possession by the beneficiaries can begin only if the gift is to such person's apparent heirs as of the end of the postponed period. Under these circumstances it is reasonable to infer that the intent of the donor is to have the "heirs" ascertained either at the death of the designated person or at the end of the postponed period, whichever occurs first.

Illustrations:

4. O transfers Blackacre by will "to O's son S for life, then to the heirs of O's daughter D." S and D survive O. S dies survived by D. At the death of S, D has two children, C₁ and C₂, and two grandchildren, GC₁ and GC₂, children of a deceased child of D. On the death of S, D's apparent heirs are C₁, C₂, GC₁, and GC₂, under the statute governing intestate takers of real property that would apply if D died then owning Blackacre. The conclusion is justified that the applicable statute governing intestate takers of real property is to be applied as though D died on the date of S's death and that C₁, C₂, GC₁, and GC₂ are the owners of Blackacre, in the absence of additional language or circumstances that indicate otherwise.

5. Same facts as Illustration 4, except that on S's death, D has had no children. If it were assumed that D died at the time of S's death, under the applicable statute governing the intestate succession of real property, D's "heirs" would be S's issue. Under these circumstances, a gap between the termination of S's life estate and the beginning of enjoyment by D's "heirs" is justified to give a chance for persons closer to D to be her "heirs" by applying the statute governing the intestate takers of real property at D's death, particularly if the gap will
be filled by a reversion to S and D, who would take any undisposed of interest under O's will.

e. **Contrary intent—donor designates date prior to death of person whose “heirs” are beneficiaries as date upon which statute governing intestate takers of property is to be applied.** The donor can effectively designate a date prior to the death of the person whose “heirs” are the beneficiaries of a gift as the date upon which the statute on intestate takers is to be applied. If the gift is to the “present heirs” of a living person, the word “present” indicates that the statute on intestate takers is to be applied as of the date the dispositive instrument takes effect.

If the gift is to the “apparent heirs” or “presumptive heirs” of a living person, the words “apparent” and “presumptive” indicate that the statute is to be applied as of the time the donor contemplated that the described group should have the beneficial enjoyment of the subject matter of the gift, even though the designated person may still be alive.

**Illustrations:**

6. O transfers property by will to T in trust. The terms of the trust direct T “to pay the income to S for life, then to distribute the trust property to the persons who on the date this will is executed are the heirs of S.” The “heirs” of S are determined by the statute on intestate takers in force in the State where S resides on the date O’s will is executed, and that statute is applied as of the date the will is executed to determine the beneficiaries of the remainder interest.

7. Same facts as Illustration 6, except that the remainder is “to the persons who are the heirs of S at the time of O’s death.” S is alive at O’s death. The “heirs” of S are determined by the statute on intestate takers in force in the State where S resides on the date of O’s death, and the statute is applied as of the date of O’s death to determine the beneficiaries of the remainder interest.

8. Same facts as Illustration 6, except that the remainder is “to the apparent heirs of S.” S is alive at O’s death and his apparent heirs at O’s death under the statute on intestate takers then in force in the State where S resides are his children, C1 and C2, and his grandchildren, GC1 and GC2, children of a deceased child of S. C1 dies before S. At the death of S, S’s heirs under the statute on intestate takers then in force in the State where S resides are C2, GC1, and GC2. The issue is whether the applicable statute to determine the “apparent heirs” of S is to be applied at the death of O or the death of
S. If, as in this case, the gift is to "apparent heirs," the statute should be applied at the latest date feasible in the circumstances so that the "apparent heirs" are more likely to be the same persons as the true heirs. This means the statute in this case should be applied as of the death of S.

f. Contrary intent—interest prior to gift to "heirs" of designated person is in sole heir of such person. If a person to whom a prior interest in the subject matter of the gift has been given is the sole "heir" of the designated person at the time the applicable intestate statute would be applied, there is some incongruity in also giving such prior interest holder the balance of the interests in the gift. The incongruity is presented if O makes a gift by will "to S and his heirs but if S dies without issue to my heirs," and S is the sole heir of O. The same is true if the gift in O's will is "to S for life then to my heirs," and S is the sole heir of O. In these cases, there is an indication that the heirs of O should be ascertained as of the death of S, so that S is prevented from sharing in the gift to O's heirs.

Illustrations:

9. O transfers property by will to T in trust. The terms of the trust direct T "to pay the income to O's son S for life, then to distribute the trust property to the heirs of O's daughter D." S and D survive O. D dies survived by S and, at D's death, S is her sole heir under the applicable statute on intestate takers. The issue is whether the fact that as events turn out, although they might have turned out differently looking at the situation on the date O's will became effective at O's death, the holder of a prior interest is D's sole heir justifies applying the applicable statute on intestate takers as of a date subsequent to D's death, that is as of the date S dies. If, as in this case, it is not clear from the beginning that the gift to the "heirs" of the designated person will go to the taker of the prior interest, the rule of this section that the heirs of the designated person are to be ascertained as of such person's death should prevail, so that the true heirs of such person will turn out to be the recipients.

10. Same facts as Illustration 9, except that on S's death the trust property is to be distributed "to the children of S, but if S dies without leaving children, to the heirs of O's daughter D." Even though S is D's sole heir on D's death, it is not certain that S will end up with all interests under the trust. The interest in S's children must fail in order for S to receive any benefit under the gift to D's "heirs." In this situation, the
rule of this section is not overcome, and the heirs of D should be ascertained by applying the applicable statute on intestate takers on the death of the person whose heirs are designated as the beneficiaries.

g. Contrary intent—person whose “heirs” are described dies before the effective date of the dispositive instrument. If a gift is made to the heirs of a designated person and such person is deceased on the date the dispositive instrument is executed, the donor has used a class gift term to describe beneficiaries he could have named. No inference should be drawn from this fact that he intended to describe a class that could not yet be ascertained, as would be the case if the heirs of the deceased person were to be ascertained as of the date the dispositive instrument took effect. If, however, the designated person whose heirs are the beneficiaries of the gift is alive on the date the dispositive instrument is executed, it is reasonably inferable that the donor did not intend the described “heirs” to be identifiable before the dispositive instrument became effective, unless additional language or circumstances indicate otherwise. If this inference prevails, the “heirs” of the designated person, if the designated person dies before the effective date of the dispositive instrument, will be the intestate takers under the applicable statute in force when the dispositive instrument takes effect, and the statute will be applied as though the designated person died on the date the dispositive instrument took effect.

Illustrations:

11. O transfers Blackacre by will “to O’s daughter D for life, then to O’s heirs determined as though O had died immediately after D.” D predeceases O. The literal language of this disposition would require O’s heirs to be determined as of D’s death, which would be prior to the date O’s will became effective. It is obvious that O was thinking of a date subsequent to O’s death for the ascertainment of O’s heirs. The conclusion is justified that the applicable statute on intestate takers is to be applied as of O’s death, the date on which the dispositive instrument takes effect.

12. O transfers property by will to T in trust. The terms of the trust direct T “to pay the income to O’s brother X for life, and then to distribute the trust property to the heirs of O’s sister Y who would take if Y died immediately after X.” X dies before O. Y dies after X but before O. It is obvious that O contemplated that the order of deaths would be O first and then X, and that whether Y died before or after X, Y’s heirs
were to be ascertained as of X's death. Under these circumstances, the conclusion is justified that the applicable intestate statute is to be applied to determine Y's heirs as of O's death, when the dispositive instrument takes effect, rather than at X's death, when X predeceases O.

h. Contrary intent—donor designates date subsequent to death of person whose “heirs” are beneficiaries as date upon which statute governing intestate takers of property is to be applied. The fact that the gift to the “heirs” of a designated person is to heirs “living” or “surviving” at some time subsequent to the death of the designated person raises the issue whether the statute governing intestate takers of property is to be applied at the death of the designated person and the beneficiaries thus ascertained are to be subject to a requirement of survival to the subsequent date, or whether the application of the statute is to be postponed to the subsequent date. In the absence of additional language or circumstances that indicate otherwise, the postponement of the application of the applicable statute on intestate takers or property to the date the heirs are to be “living” or “surviving” should be adopted, because otherwise the entire gift might fail. This would be the case if the beneficiaries ascertained at an earlier date failed to meet the requirement of “living” or “surviving” at the subsequent date.

Any language of the donor that clearly manifests an intention of the donor to postpone the application of the statute on intestate takers to some date subsequent to the death of the person whose “heirs” are designated is given effect.

Illustrations:

13. O transfers property by will to T in trust. The terms of the trust direct T “to pay the income to O's daughter D for life, and on D's death, to distribute the trust property to the persons who are then the heirs of O's son S.” The position of the word “then” in the directions to T as to the distribution of the trust property on D's death indicates that the “heirs” of S are to be ascertained as though S died immediately after D. The conclusion is justified that the applicable statute governing the intestate takers of property is to be applied as though S died immediately after D, regardless of whether S in fact dies before or after D.

14. Same facts as Illustration 13, except that the directions to T as to the distribution of the trust property on D's death is “on D's death, then to distribute the trust property to the heirs of S.” The position of the word “then” in this context
does not have any relevance in regard to when the applicable statute governing the intestate takers of property is to be applied.

15. Same facts as Illustration 13, except that the directions to T as the distribution of the trust property on D's death is "on D's death, to distribute the trust property to S's heirs according to the law governing intestate takers of property in force at D's death." S dies before D. It is unlikely that a donor would intend a statute governing intestate takers of property to be applied as of a date prior to the date when the statute becomes effective. Hence, the conclusion is justified that the statute governing intestate takers of property in force at D's death is to be applied as though S died immediately after D.

i. Statutory modification of rule of this section. The rule of this section is modified to whatever extent a statute in the controlling State requires that, in a gift to the "heirs" of a designated person, the statute on intestate takers is to be applied as though the designated person died on the date distribution to the "heirs" is to be made. See the Statutory Note to this section.

STATUTORY NOTE TO SECTION 29.4

The following statutes provide that a designated person's "heirs," or (except in Wisconsin) persons described by words of similar import, shall be determined as if the designated person were to die intestate at the time when the gift is to take effect in enjoyment:

California Probate Code § 6151 (West Supp.1987)
Indiana Code Ann. § 29-1-6-1(c) (West 1979)
Massachusetts Gen.L. Ch. 184, § 6A (1984)
Wisconsin Stat. § 700.11 (1983-84)

The Pennsylvania and Wisconsin statutes are expressly applicable to inter vivos as well as testamentary dispositions. The Wisconsin statute is restricted to remainder interests.

See also the Statutory Notes in Chapters Twenty-Six and Twenty-Seven for statutes applicable to the time of ascertainment of classes in general.

REPORTER'S NOTE TO SECTION 29.4

1. Comparison with present state of the law—The rule of this section is supported by judicial authority, and is identical, except for stylistic changes, to § 308 of the first Restatement. A significant minority of jurisdictions, however (most of them controlled by statute), hold that the "heirs" are to be
ascertained on the date the gift is to take effect in enjoyment.

2. Justification for the rule of this section—The justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—

a. In general. In Wilmington Trust Co. v. Coyne, 373 A.2d 867 (Del.Ch.1977), the income from an inter vivos trust was to go to the settlor’s wife during the minority of his son A, then to A, then to A’s issue until 21 years after A’s death, then the corpus to A’s issue; in default of issue, income and then corpus to A’s “heirs-at-law” according to Delaware law. A died without issue, and his heirs, his nephews and nieces, claiming that they had both the present interest and an indefeasible vested remainder, sued to terminate the trust. Their children contended that the “heirs” who would receive the corpus would only be determined on the date the trust was to terminate. The court held: “[W]hen the rule against perpetuities is clearly in mind . . . an intention that the trust continue for the maximum amount of time allowed is implied. . . . However, by [settlor’s] failure clearly to indicate that the time for determining [A’s] heirs at law was to be at a time other than his death . . . the death of A must be the time for determining [them] . . . in- deed . . . [this is] the only time reasonable for such determination to be made. . . . [Otherwise] there would be doubt as to who should receive income and dividends during the interim. . . . Finally, to determine who are heirs-at-law [of the same person] at different times would be unreasonable. . . . [T]he use of the word ‘then’ in connection with fixing the time of payment of principal . . . to [A’s] heirs at law is not enough to fix the time for the determination of such heirs.” Id. at 869–870.

In Dodge v. Detroit Bank & Trust Co., 121 Mich.App. 527, 330 N.W.2d 72 (1982), the heirs of each of the income beneficiaries were determined at that person’s death, though none would receive any share of corpus until the termination of the trust. As each life beneficiary died, his or her heirs took vested future interests in shares of the corpus.

In re Preston’s Will, 203 Misc. 985, 124 N.Y.S.2d 578 (1953), involved a life estate to the testator’s wife, with remainder to her heirs. The testator and his wife had twin sons, one of whom survived his father but predeceased his mother, without issue. The mother’s devisee claimed that the dead son had held a vested remainder interest, which passed to his mother, but the court found it absurd that one could inherit from one’s own heirs, and held that the sons’ remainder was contingent because the mother had no heirs until her own death. The court noted that even if the remainder were to be regarded as “vested,” it would have been subject to defeasance on failure to survive the mother. See also Smith v. Dolan, 86 S.D. 421, 197 N.W.2d 416 (1972); Casey v. Gallagher, infra item 5b; Jamieson, infra subitem b.

In Daniel v. Donohue, 215 Or. 373, 333 P.2d 1109 (1959), the
trust corpus was "to be divided by said trustees . . . among the blood relations of my deceased mother and myself." The court held that the term referred to those of the testatrix's heirs at law (first cousins, without representation of predeceased cousins) who were on her mother's side, as determined at the testatrix's death rather than at the life tenant's death (or at some date prior to the execution of the will when all of the cousins were still living): "The word 'then' is used here merely to indicate when the remaindermen are entitled to possession . . . . A majority of the courts do not adopt . . . [the divide and pay over rule[,] universally criticized by the text-writers. . . . We expressly reject it." *Id.* at 394, 338 P.2d at 1119. See also Second Bank-State Street Trust Co. v. Weston, 342 Mass. 630, 174 N.E.2d 763 (1961) ("The use, probably fortuitous, of the words 'to divide,' 'to be paid,' and 'shall go' in the various contingent remainder gifts seems to us of no help in determining [as the court did, for other reasons] that the testatrix intended that her 'heirs at law' were to be determined at her surviving daughter's death." *Id.* at 640, 174 N.E.2d at 770.)

In *Hyde*, *infra* item 4b, although the court held that the designated person's heirs were to be determined as of the testatrix's death, his heirs at his own death were the same, and the issue was whether the ascertainment of the heirs should be postponed until the life tenant's death: "The words, *upon the death* of my said beloved sister, constituting a phrase of time, referred only to the postponement of enjoyment . . . and not the vesting." 122 N.Y.S.2d at 311.

In *Trugman v. Klein*, 82 Ill. App.2d 389, 226 N.E.2d 521 (1967), the settlor and her two sons owned the Klein Noodle Company; when one son died, part of his share of the company ended up in a trust for the benefit of the other son and his immediate family, with remainder to the mother's "heirs at law" upon the son's death. The mother died and the business was bought by Sunshine Biscuit. The trustees were unable to agree that the profits on the sale should be paid out as "accumulated income" rather than retained as corpus for the benefit of the ultimate remaindermen, whom some of the trustees maintained were the mother's "heirs ascertained as of the son's death. The court held that the money in dispute should be paid to the son, who was his mother's sole heir: "Mrs. Klein's close relationship with her son seems much more likely to have produced in her a cooperative rather than an antagonistic attitude toward's [sic] Bertram's tax-saving plan (she made Bertram a trustee of the trust in question); and to have produced in her an intention to create, through the trust, a temporary haven for Bertram's purchase contract rather than a well-camouflaged trap which would permanently deprive him of the substantial trust income of which she herself had designated him as the beneficiary." *Id.* at 397, 226 N.E.2d at 525.

In *Klein*, there was a contingent gift to the settlor's "then living" heirs had Bertram left no
widow or descendants. The court noted that this reinforced rather than contradicted its interpretation of the overall plan, and demonstrated that the settlor knew how to postpone the ascertainment of the heirs when such was her intent. This principle was carried further in Cole v. Plant, 440 So.2d 1054 (Ala.1983): “Looking at the will as a whole, we note that . . . [i]n every other paragraph in which a future interest is devised, the testator plainly states . . . that upon failure of the initial gift, the remainder shall ‘revert to the then heirs of my estate.’ The provision devising the Haigler place to [testator’s daughter] merely says: ‘shall revert to my other heirs or descendant’s . . . . Because of this discrepancy and the obvious intent of the testator, we agree with the trial court that ‘heirs’ etc. of the testator are to be determined at the date of his death.” Id. at 1057. The daughter’s mother, brother, and sister having conveyed to her all their future interest in the land, she was therefore able to convey a fee simple to General Electric.

In re Johnson’s Estate, 48 Misc. 2d 148, 264 N.Y.S.2d 450 (1965), involved a distribution to the testator’s “then surviving next of kin, per stirpes and not per capita” on his daughter’s death without issue. The court held, “in the absence of an express contrary intent ‘heirs’ or ‘next of kin’ are determined as of the date of testator’s death”, and, “although such a contrary intent would appear to be set forth” in the reference to “then surviving” next of kin, the court found that determining the next of kin at the surviving life tenant’s death would defeat the testator’s desire for a per stirpes distribution. Id. at 151, 264 N.Y.S.2d at 453–454. “Per stirpes” distribution among the testator’s seven grandchildren and two-great-grandchildren, according to the court, would be based on eight primary shares; the only way to make the primary shares correspond to the testator’s four children who left issue would be to find that the children themselves were the next of kin. In both Cole and Johnson, the court found support for its decision in the testator’s use of a clause designating the “present laws” of his domicile as the laws to be used to determine his heirs or next of kin.

b. When the designated person has predeceased the testator. In Youngblood v. Youngblood, 11 Ohio C.C. (N.S.) 276 (1908), aff’d (mem.) 78 Ohio 405, 85 N.E. 1135 (1908), the testator left the remainder, after a life estate in his widow, to “be divided in equal shares among the heirs of my deceased brother,” who left “four children surviving him as his only heirs at law.” One of the children had also died before the will was executed, leaving six children of his own. The court held: “[W]e must conclude that he used the word ‘heirs’ advisedly, [even] if the effect of that be to give these six children six shares instead of one, although we might personally think that the testator did not so intend. . . . The only thing left for the court to determine is who are the heirs. . . . [A]ll persons who do take any portion . . . under the statute, no matter how small it may be, is [sic] an heir. . . . so
that an hour before [the brother's] death he had no heirs . . . but at his death, they became his heirs and that class became fixed and certain and can never be changed by any subsequent event . . . except for the one exception of posthumous issue . . . We are therefore clearly of the opinion that these grandchildren never were the heirs . . . They could only become the heirs by the death of their father before the death of their grandfather." *Id.* at 279-281. The testator's grandnephews therefore took per stirpes, under the anti-lapse statute, rather than per capita, under the court's construction of the will. (See item 5a of the Reporter's Note to Section 29.6.)

In *re Jamieson Estate*, 374 Mich. 231, 132 N.W.2d 1 (1965), severely criticizes the "error" in Wagar, *infra* item 4h, "which seems to have a fatal attraction for many courts," stating that "the correct rule appears in New England Trust Co. v. Watson [*infra* subitem c]: ' . . . unless a contrary intention appears, a gift in a will to the heirs of a person, whether he be the testator or a life tenant or another, will be construed as a gift to such heirs determined as of the time of death of that person.'" *Id.* at 239, 251, 132 N.W.2d 11-12. However, this statement is at best dictum when applied to determining the heirs of a person who has predeceased the donor, because in *Jamieson* the designated person predeceased the life tenant but survived the testator.

c. When the life tenant is an heir. Item 3c of the Reporter's Note to Section 29.1 dealt with gifts of the form "to A for life, then to the heirs of B," where A was one of B's legal heirs. The question of whether A was intended to be a remainderman as well as a life tenant is closely tied to the question of when B's heirs are to be ascertained, as the simplest and most straightforward way to exclude A from taking more than a life interest is to postpone the ascertainment of the heirs until the gift becomes possessory, at A's death.

In *re McKenzie's Estate*, 246 Cal.App.2d 740, 54 Cal.Rptr. 888 (1966), involved a testamentary trust with the testatrix's nephew and his wife as the life beneficiaries, then the corpus to go to the testatrix's "heirs at law, as the same shall be determined at my death under the laws of the state of California." The court stated that even without the testatrix's explicit mandate that the heirs be determined at her death, "the case before us does not fall into any of the exceptions. It is not a 'sole heir' case, because there were other heirs than [life tenant]. . . . Nor is the case one of substituted gift . . . Nor is the case one which is covered by the decree of distribution. . . . Finally . . . there is . . . no expression of futurity in the description of the heirs." *Id.* at 745-746, 54 Cal.Rptr. 892.

In *re Thompson's Estate*, 363 Pa. 85, 69 A.2d 112 (1949), involved an inter vivos trust to last for the life of one of the settlor's granddaughters and the minority of any children she might have and "in default of any such child reaching twenty-one years, to transfer said stock to my own heirs." Although the life tenant's only child did reach 21, she prede-
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cessed her mother without issue, so it was necessary to decide whether the settlor's heirs included this grandchild along with the others. The court held: "The gift to heirs or next of kin . . . refers to those who were such at the time of settlor's death unless a different intent is plainly manifest. And if the tenant for life is of next of kin, he is not thereby excluded. [21 citations]."

Id. at 89, 69 A.2d at 113. See also White v. Whito, 241 S.C. 181, 127 S.E.2d 627 (1962). ("The words 'at her death' are construed as only fixing the time when the remaindermen are entitled to the possession of the property and not the time of the vesting of the title . . . nor is the time of vesting altered by the fact that the life tenant can never come into the enjoyment of the remainder. [Testator's widow] takes a vested remainder jointly with the others."

33 Am.Jur. 600, sec. 139." Id. at 186, 127 S.E.2d at 630.

Although most courts draw the line between the case where the life tenants' estate(s) would take part of the remainder and the case where the "life tenants" would be identical with the "remaindermen" if the heirs were to be determined immediately on the designated person's death, in New England Trust Co. v. Watson, 330 Mass. 265, 112 N.E.2d 799 (1953), the income beneficiaries of the residuary trust were the testator's widow and four children. "Upon the death of the last survivor of my wife and children, I direct my trustees to pay over and distribute [the corpus] among my heirs at law . . . per stirpes." The court held that the testator's "heirs at law" were his wife and children: "We see no indication in the will that the testator did not expect the life beneficiaries to have any future interest in principal . . . [nor] that the determination of heirs at the later time was intended because the gift to the heirs is an initial gift and not 'a catch-all after the testator had exhausted his specific intentions'. . . . We do not agree . . . that the only reasonable purpose for delaying the possession of the remaindermen was to determine who the distributees would be.' More reasonable, in our opinion, was a purpose to enlarge the respective payments of income to those who continued to live to receive it." Id. at 268-269, 112 N.E.2d at 800-802.

Usually, when the court determines that the donor did not intend the life tenant to be an "heir," the ascertainment of heirs is postponed; see infra item 5c. However, if there is an equally simple way to exclude the life tenant while ascertaining the heirs at the designated person's death, that alternative is preferred. For example, in a state where a surviving spouse is not an "heir," and the testator gives a remainder "half to testator's heirs, half to spouse's" after a life estate in testator's spouse, the testator's own heirs will generally be determined at the testator's own death. See Burton v. Kinney, infra item 4a; Gardner v. Vanlandingham, 334 Mo. 1054, 69 S.W.2d 947 (1934).

Even when the spouse is legally an heir, it is easy to determine the heirs as if the spouse were not. In Rawls v. Rideout, 74 N.C.App.
368, 328 S.E.2d 783 (1985), the testatrix left the remainder, after a life estate in her husband, to "my nearest (relatives) heirs" and the court found an intent to ascertain the heirs at the testatrix's death, but to exclude her husband, who would have been the sole heir. The testatrix's "heirs" were therefore her one surviving sister and the eight children of her predeceased brother and other sister. "As in White v. Alexander [290 N.C. 75, 224 S.E.2d 617 (1976)], if we exclude testatrix' husband from the class of 'heirs,' others step forward to qualify. . . . Thus we need not take the [Central Carolina Bank & Trust Co. v.] Bass [265 N.C. 218, 143 S.E.2d 689 (1965)] court's approach and postpone the class closing until the life tenant's death." Id. at 375, 328 S.E.2d at 788. The testatrix's sister and one of the nieces predeceased the life tenant, each leaving two children. Thus, under the North Carolina "per capita by generations" descent statute, had the "heirs" been determined as if the testatrix survived her husband, each of nine surviving nephews and nieces would have taken one-tenth, the deceased niece's children dividing the other share. As it was, the sister's estate took one third, and seven nephews and nieces and the estate of the deceased niece each took one-twelfth.

In Continental Illinois Nat. Bank & Trust Co. of Chicago v. Kelley, 290 Ill.App. 361, 8 N.E.2d 537 (1937), the settlor created a spendthrift trust for his sons A and B, then for their widows until death or remarriage, then for their "heirs at law." The trust was scheduled to terminate 21 years after the death of the surviving son, but termination was accelerated by one of the spendthrift provisions; half the corpus was to go to the widow and descendants of each son, or to the son's "heirs at law." A's stepdaughter contended that her mother, though she did not live until the termination of the trust, was still A's sole "heir," but the court found this contrary to the settlor's plan, because A, who had left everything to his wife, had no transmissible interest; furthermore, A's wife was not to have any interest at all in the principal until the termination of the trust. But the court also rejected a contention that the heirs were meant to be ascertained only at the termination of the trust, stating that "we can arrive at no other conclusion than that the term 'heirs at law' of [A] was intended to and does mean the heirs at law at the date of his death, and that his widow was intended to be and was excluded." Id. at 376, 8 N.E.2d at 544. The court gave no further explanation for its decision to determine A's heirs at his own death, except to cite a case where that result was expressly provided for in the will.

In White v. Alexander, cited in Rawls, supra, the life tenant being excluded was not a surviving spouse, but the testatrix's son. Distinguishing cases where the alternate takers were more distantly related than the life tenant and therefore not truly "next" of kin, the court held: "She clearly limits his interest to a life estate. She intended his child or children, had there been any, to have had the fee. . . . Only [when] Sam
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died without having had a child [did his] widow get a life estate, and 'my heirs' take the remainder. When testatrix envisioned that event, as she must have done, her thoughts would naturally have turned to her two daughters, her only other heirs expectant, and their progeny. . . . Sam who, when and if the remainder took effect in possession, would be dead . . . was clearly not in testatrix' contemplation. . . . In the case before us there are others beside Sam who at testatrix' death fit the description 'my heirs.'" Id. at 81-82, 224 S.E.2d at 621-622.

Kimberly v. New Haven Bank N.B.A., 144 Conn. 107, 127 A.2d 817 (1956), did not make this distinction, giving the remainder, 51 years after the testatrix's death, to the estates of the testatrix's collateral relatives rather than to their living descendants, who would have been the testatrix's heirs had she survived the life tenants, her only grandchildren, who died without issue: "[W]e regard it as obvious that the beneficiaries she had in mind were those who were then living. . . . We cannot assume that she would be willing to leave the determination of her bounty to some statute to be passed in the unknown future. . . . It would be necessary to trace the interest of seventeen of [testator's 18 nephews and nieces] through their estates and further through the estates of any deceased successors in title [and] if there was early vesting a substantial part of the estate would go to non-Colonys contrary to testator's intent to provide for 'proper maintenance of family position' [one of the objects on which testator's daughter was permitted to spend income from the trust]." Id. at 392-393, 89 A.2d at 913. See also, e.g., In re Davis' Estate, 108 N.H. 163, 229 A.2d 694 (1967); Watson v. Young, 102 N.H. 436, 158 A.2d 290 (1960). Although these cases

4. Cases contrary to the rule of this section—

a. In general. A few states have established judicially a rule that "heirs" are to be determined at the effective date of the gift. In Colony v. Colony, 97 N.H. 386, 89 A.2d 909 (1952), if the testator's daughter died without issue, the corpus of the residuary trust was to go "one share each . . . to my brothers [A, B, C, & D] if living, otherwise to their heirs—and one share to the heirs of my late brother [E], deceased." The court held: "If he had intended to limit these remainders to the heirs of his brothers determined as of the date of his death, he could have so indicated by designating the then heirs of [E] by name [and done the same for A by codicil]. As a matter of fact had he intended to grant remainders which were to vest early he could have named all of his nephews and nieces in his will. His failure to do so indicates to us a realization on his part that the distribution might be in the distant future . . . and he was content to have the heirs of his brothers determined as of the time for distribution at [his daughter's] death. No worthwhile purpose would be accomplished by expanding on the other arguments . . . such as [that] by doing otherwise. . . . It would be necessary to trace the interest of seventeen of [testator's 18 nephews and nieces] through their estates and further through the estates of any deceased successors in title [and] if there was early vesting a substantial part of the estate would go to non-Colonys contrary to testator's intent to provide for 'proper maintenance of family position' [one of the objects on which testator's daughter was permitted to spend income from the trust]." Id. at 392-393, 89 A.2d at 913. See also, e.g., In re Davis' Estate, 108 N.H. 163, 229 A.2d 694 (1967); Watson v. Young, 102 N.H. 436, 158 A.2d 290 (1960). Although these cases
all acknowledge that "heirs" of a designated person should be ascertained at that person's death in the absence of a contrary intent, the only recent New Hampshire case failing to find such intent is In re Farwell's Estate, 106 N.H. 61, 204 A.2d 239 (1964). Here, the testator had left his wife a life estate with no remainder specified at all; the court held that the "no-contest" clause in the will was not sufficient to imply a remainder in testator's "heirs" determined as of his wife's death, so testator's true heirs took the reversion.

In In re Holt's Trust Estate, 42 Hawaii 129 (1957), the testator left the residue of his estate in trust "for as long a period as is legally possible," with income to his widow until death or remarriage, then "to all of my heirs in equal shares per stirpes." The court held, "when the law requires it . . . to [be] divide[d] among the persons entitled to the same under the law per stirpes." The corpus was, "when the law requires it . . . to [be] divide[d] among the persons entitled to the same under the law per stirpes." The court held, "Heirs of a designated person are ordinarily determined as of the death of such a person, unless the testator shows a contrary intent. This court has held that where a gift to heirs is postponed until the termination of a preceding estate a contrary intent is shown." Id. at 133. The court further held that the "heirs" were to be reascertained with each income payment, so that (unless the lines of descent of all 11 of testator's children died out before the end of the perpetuities period), every payment of income and the eventual payment of corpus would go to the testator's then-living issue, per stirpes. This had the effect of keeping the interest in the trust in the testator's bloodline, despite the attempts of one of his children to devise his "vested" income interest to his wife. It also meant, however, that the son's adopted daughter (the illegitimate child of one of the testator's daughters) was now one of testator's "heirs," because the current adoption law rather than the adoption law at the time of execution would be followed. (Compare Coyne, supra item 3a.) In re Kanoa’s Trust Estate, 47 Hawaii 610, 393 P.2d 753 (1964), is a post-statehood Hawaiian case following the same rule.

In Union & New Haven Trust Co. v. Ackerman, 114 Conn. 152, 158 A. 224 (1932), the life tenants themselves, the testator's wife and daughter, were his "next of kin" at his death, and the testator further indicated his intent that the "next of kin" were to be determined after the life tenants' deaths by specifically disinheriting one of his nieces as a remainderman. The court's language, however, was more sweeping: "Whether issue be born or not, the division of the principal is to take place upon the decease of the last survivor and among the legal heirs of the testator. The legal heirs take at the death of the last survivor. . . . If the heirs existing at the decease of the testator took on the death of the last survivor, a large share of his estate would go to strangers to the testator's blood." Id. at 162, 158 A. at 228. Although Ackerman is frequently followed in cases where the life tenant is a potential "heir," there is no consistent "Connecticut rule" that heirs are not to be ascertained.
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until the effective date of the gift; cf. Kimberly, supra, item 3c.

In Forrest v. Porch, 100 Tenn. 391, 45 S.W. 676 (1898), the testator devised a parcel of land to his wife, "To have and to hold as long as she lives. At her death the said land is to be divided between my heirs at law." The court held that "the testator obviously intended the land to be divided at the death of his widow among such persons as should then sustain to him the relation of heirs at law. . . . At his death, when the will took effect, those persons were 'dubious and uncertain.' Therefore the remainder must be contingent." Id. at 392, 45 S.W. at 676. Subsequent Tennessee decisions have distinguished Forrest. See e.g., Burton v. Kinney, 191 Tenn. 1, 231 S.W.2d 356 (1950); the remainder after a life estate in the testator's widow was to be divided equally between his heirs and her heirs. The court cited Forrest as authority that the wife's "heirs" had no vested interest at the testator's death, but held that the testator's own heirs (a class that did not, under the applicable law, include the wife) were to be determined at his death: "In Forrest v. Porch, supra, the testator clearly, and without equivocation, declared that those persons should take a remainder interest who 'sustained to him the relation of heirs at law' at the death of the life tenant. If the testator in the case at bar did not fix a time . . . we cannot do it for him under the guise of judicial interpretation." Id. at 9, 231 S.W.2d at 359.

b. When the designated person has predeceased the testator. Contrary to the theory set forth in Comment g, even if the designated person is already dead at the execution of the dispositive instrument, most courts have considered this situation to be an exception to the general rule that A's "heirs" are to be determined at A's death even if they do not come into possession until much later. This may be motivated by the desire to avoid a lapse, as the "heirs at testator's death" can only be different from the true legal heirs if some of the heirs have themselves predeceased the testator. A gift "to the heirs of my beloved deceased spouse," even today is likely to fall outside the scope of the antilapse statute, and is likely, if construed literally, to make the testator's own estate a beneficiary, with the gift to pass by testator's will back to testator's estate ad infinitum. See in re Estate of Austin, 236 Iowa 945, 20 N.W.2d 445 (1945) ("Much is made too, of the incongruous result of the theory adopted by the trial court by which the testator himself became the beneficiary under the residuary clause." Id. at 947, 20 N.W.2d at 447.)

Mockbee v. Grooms, 300 Mo. 446, 254 S.W. 170 (1923), quoted the Cyclopedia of Law and Procedure: "It is true, that 40 Cyc. 1481, 1482, cited by appellants, is as follows: 'B. Where the gift is to the heirs or next of kin of another, it ordinarily refers to the death of such other . . . '[but] in a note to paragraph B, the learned author says: 'Where such other dies before the date of the will, it has been held, his heirs or next of kin may be ascertained at the dato of the death of the testator.' So that, in this case, the rule laid down in the note, and not
in the text, is applicable." Id. at 476, 254 S.W. at 178.

The Mockbee court also pointed out that the gift was one to a class, and quoted § 237 of Ruling Case Law: "Since a will speaks from the date of the testator's death, the members of a class ... must prima facie be determined [then]." In re Hyde's Will, 122 N.Y.S.2d 304 (Broome Co.Sur. 1953), decree affirmed, 282 App. Div. 1100, 126 N.Y.S.2d 468 (1953) used the same reasoning, and also noted: "In the Matter of White's Will, [213 App.Div. 82, 209 N.Y.S. 433 (1925)], the court said: 'There must be a clear intention manifested by the will ... to take it out of the rule that heirs at law and next of kin so described will be determined as ... at the time of testator's death.' Id. at 436, 122 N.Y.S.2d at 310. White however, involved a gift to the testator's own heirs.

See also, e.g., Ewing v. Gibson, 199 Va. 860, 102 S.E.2d 327 (1958) (citing Driskill v. Carwile, infra item 5b, a case involving a gift to "heirs" of persons who survived the testator and might have been living at the time their "heirs" were to take); In re Wagar's Estate, 292 Mich. 452, 290 N.W. 865 (1940) (criticized in Jamieson, supra item 3b for delaying, without giving any explanation, the ascertainment of the "heirs" of the testator's predeceased grandchild until the life tenants' deaths); Haley v. Heirs of Somerville, infra item 5a, Dunlap v. Lynn, infra item 5b (falling outside the scope of this line of cases only because the designated person was alive at the execution of the will and the gift could not take effect unless the designated person were dead, even though such death would inevitably be before the testatrix's death.).

c. Effect of statutes. As mentioned in the Statutory Note to this section, several states have enacted statutes providing that "heirs" will be ascertained on the date the gift takes effect in enjoyment. See Comment i. The prototype is the Pennsylvania statute, first enacted in 1923. The statutes are prospective in application, so that Thompson, supra item 3c, involving a pre-1923 instrument, was decided according to common law. In re Love's Estate, 362 Pa. 105, 66 A.2d 238 (1949), involved a gift to the heirs of the testator's brother and sister. The testator died before the statute was extended to cover such gifts, but the court stated: "These Acts do, however, throw light on the problem of a gift to 'heirs,' because ... they may be: 'referred to as a legislative establishment of a statutory presumption, and it is reasonable to believe that this presumption, is 'a conclusion firmly based upon the generally known results of wide human experience'" (quoting In re Laughlin's Estate, 336 Pa. 529, 9 A.2d 383 (1939)). Id. at 107, 66 A.2d at 239-240.

The Pennsylvania courts had not always treated the statute as a guide to donors' presumed intentions; see In re Knerr's Estate, 130 Pa.Super. 383, 197 A. 528 (1938). Upon the testator's wife's death, half the corpus of the residuary trust was to go to the testator's son "or his heirs." Meanwhile, half of any income beyond a certain amount was to go to the same son, "or his heirs." The court held that the son's cred-
The statute as it stood at the time only mentioned gifts to the testator's own heirs, so there was no postponement of the determination of the son's heirs. In fact, there was no determination of the son's heirs at all: having survived his father, although predeceasing his mother, the court held that he took a vested indefeasible interest.

The statutes still only establish presumptions, which can be overcome by evidence of contrary intent. In re Lawrence Savings & Trust Co., 354 Pa. 6, 46 A.2d 494 (1946), involved a direction that the trust corpus, upon the deaths of the testator's son and grandson before the termination of the trust, "revert back to my original estate and be distributed under the intestate laws of the Commonwealth of Pennsylvania." The court held that the corpus must therefore "be distributed exactly as it would have been distributed in its 'original' condition on the date of his death," to the testator's "original" heirs, who were apparently life tenants. Id. at 7, 46 A.2d at 495.

5. Contrary intent of the donor—

a. Explicit language in the dispositive instrument. In Lawrence, supra item 4c, the court noted that although the statute was applicable because the testator died after its effective date, the will was executed before the enactment of the statute; the testator's intent to have his heirs ascertained as of his death could therefore be inferred from the lack of a clause expressly directing that the heirs be ascertained at the termination of the trust. See Comment h. Such clauses are not uncommon: Kanawha Valley Bank v. Hornbeck, 151 W.Va. 308, 151 S.E.2d 694 (1966), discussed in item 5a of the Reporter's Note to Section 29.1 and in item 5 of the Reporter's Note to Section 29.2, and McLane v. Marden, 111 N.H. 164, 277 A.2d 315 (1971), discussed in item 4a of the Reporter's Note to Section 29.1, are examples of cases involving wills containing such clauses.

In Bank of Delaware v. Bank of Delaware, 289 A.2d 639 (Del.Ch. 1972), affirmed, 301 A.2d 280 (1973), the income from an inter vivos trust was to be paid to the settlor if his wife and daughter were both dead and his daughter had no surviving issue. Upon the settlor's death, the corpus was to be paid "to such person or persons as may then be his next of kin according to the statutes of distribution of the State of Delaware then in force." The chancellor noted that "only the least likely series of events is literally contemplated by the provision"; although the settlor lived well into his 80's, his daughter still survived him by more than 20 years. The chancellor held that the "then" obviously referred to the termination of the trust: "Viewing the document as a whole, there would be a certain incongruity in a construction which would, under one provision, limit [settlor's daughter's] interest to that of a life tenant whose children must survive her to benefit, and which would, under a second provision, give [her] the benefits of a sole remainderman. Such contrary intentions should not

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normal be found in the same instrument." 289 A.2d at 641-642. The supreme court affirmed because "the trust instrument, taken as a whole, manifests clearly and unambiguously an intent" to postpone the ascertainment of the settlor's next of kin. "We emphasize, however, that our decision is not to be taken as overruling the rule of construction that, absent [such manifestation], next of kin will be determined at the time of death of the ancestor." 301 A.2d at 280-281.

As discussed in Illustration 15, a clause directing that the donor's heirs be determined by the law in force at the life tenant's death, even if not explicit as to the time of determination, implies fairly conclusively that the gift is to those who would have been the donor's heirs at the life tenant's death. See, e.g., In re Miner's Trust, 214 Cal.App.2d 533, 29 Cal. Rptr. 601 (1963). In re Herrick's Will, 10 Misc.2d 213, 169 N.Y.S.2d 835 (1957), stood this reasoning on its head. The settlor had directed that his "heirs" be determined according to the statute in force at the time of his death, and the court held that the settlor thereby "evidenced an intent as to the particular statute to be applied, but a statute in force at a time different from the time intended for vesting. Otherwise those words are surplusage ... while determination of the heirs was thus left to determination [sic] of the trusts, the settlor did not wish to anticipate the description of this class as it may be found in the statute at that time." Id. at 214, 169 N.Y.S.2d at 836. The court did not explain why the settlor of an irrevocable inter vivos trust chose to apply the statute at his death rather than the statute at execution. Compare McKenzie, supra item 3c. The court in Herrick also noted that the settlor specified that his "heirs" should take "per stirpes," and the settlor's one child was his sole heir.

As discussed in Illustration 13 and Comment h, a gift to the "living" heirs of a predeceased person indicates that the heirs are to be ascertained on the effective date of the gift. See, e.g., In re Layton's Estate, discussed in item 5b of the Reporter's Note to Section 29.1. See also In re Love's Estate, 362 Pa. 105, 107, 66 A.2d 238, 240 (1949) ("the direction of this will is that the heirs be 'living at that time'. . . . A contingent gift to a 'then living' . . . class subject to fluctuation, requires the postponement of both vesting and membership. . . . [T]he rule that the 'heirs' of a person [except as otherwise provided by statute] are those living at such person's death, is over- come by the express direction that they be 'living at . . . the death of the life tenant. We conclude, therefore, that the 'heirs' . . . are the three children who were living . . . and the living issue of those who predeceased."); Bolon v. Dains, 54 Ill. App.2d 64, 203 N.E.2d 293 (1964) (rejecting a contention that "such heirs of the bodies of any or all of my said three daughters respectively as shall survive the survivor of my said three daughters" referred to those who were "heirs" at their mother's death and also survived their aunt; holding instead that the testator "intended to include all the de-
scendants of his daughters”). Distribution was made to “all de-
scendants” surviving the life ten-
ant, but no person took who had a living parent; whether this was
coincidence or an indication that “all” referred to potential rather
than actual takers is unclear.

In Haley v. Heirs of Somerville, 108 So.2d 780 (Fla.App.1958), the
testatrix left the future install-
ments from the sale of her farm
to the “living heirs” of her brother-in-law. The court rejected the
appellant’s contention that the gift had lapsed because the testa-
trix’s sister, the sole “heir,” was no longer “living” (and in fact
was already dead when the will
was executed). In deciding that
the heirs should be ascertained as
of the testatrix’s death, the court
did not rely on the reference to
“living” heirs, but, citing inter
alia Austin and Mockbee, supra
item 4b, relied on the fact that the
testatrix’s brother-in-law had died
before the execution of the will.
In re Love’s Estate, supra item
4c, also involved a reference to
“living” heirs.

Those clauses do not always take care of every contingency.
Matter of Evans’ Estate, 31 Ill.
App.3d 753, 334 N.E.2d 850
(1975), involved a will executed in
1920 devising a joint life estate to
the testator’s wife and married
daughter, with remainder, upon
the daughter’s death without is-
issue, “to my own heirs at law liv-
ing at the time of the death of my
said daughter.” The court held
that if “heirs at law” were used
in the technical sense, the remain-
der would go to his widow’s con-
servator, but that the pattern of
the will as a whole indicated that
he intended to exclude his widow
from the class of “heirs at law.”
See also Matter of Wiedemann,
358 N.W.2d 139 (Minn.App.1984),
where the income from an inter
vivos trust was to go to each of
the children of the settlor’s
daughter in equal shares until
age 30, at which time each
grandchild would receive his or
her share of the corpus. There
were two grandchildren, one of
whom “did not survive her 29th
year,” so that her share of the
corpus was to “be paid over to
the heirs at law of [her mother]
as determined . . . at the time
distribution of such principal is
required to be made.” The trial
court held that the settlor clearly
had not anticipated that one of his
grandchildren would die young
but leave issue, but the supreme
court reversed: “[Settlor’s other
grandchild] receives approximate-
ly 75% of the principal [his own
share and half of his sister’s
share], but he is one generation
closer to the trustor than is [set-
tlor’s great-grandchild]. While
this result may seem harsh to
William [the great-grandchild],
this court cannot substitute its
own view of what might be fair
for the unambiguous words of the
trust instrument.” Id. at 142.
The court pointed out that the
settlor had given his daughter a
testamentary power of appoint-
ment, which could have led, had it
been exercised, to a result looking
even less fair.

b. Circumstances indicating a
contrary intent. As discussed in
Comment c, when a gift is made
to the “heirs” of a living person,
it is highly unusual for the gift to
be postponed until that person’s
death in order to ensure that the
ture “heirs” are the persons who
take. See item 3d of the Reporter's Note to Section 29.1. Illustration 3 represents a significant exception to this rule; when a gift is made to the "heirs" of a young person in apparent anticipation of the person's starting a family, the gift is construed as a future gift to children rather than an immediate gift to collaterals. See Knowles v. Knowles, discussed in item 5a of the Reporter's Note to Section 29.1. Usually, however, as in Harris v. Ingalls, 74 N.H. 339, 68 A. 34 (1907), discussed in item 3d of the Reporter's Note to Section 29.1, "the words manifestly refer to the persons who would be the legal heirs . . . at the time of the testator's death, in case [the designated person] was then dead." Id. at 344, 68 A. at 37.

In Driskill v. Carwile, 145 Va. 116, 133 S.E. 773 (1926), the testator left a joint life estate to his sister and her husband, with remainder to "the living heirs of my brothers and sisters." Although some or all of the testator's other brothers and sisters apparently predeceased the surviving life tenant, all were alive at the execution of the will. The court therefore held that the term "heirs" could not have been used in its technical sense, and must have meant "children." Thus the beneficiaries were those persons who were nephews or nieces of testator in being at the time of his death, and who were still living at the death of the surviving life tenant. Compare Comment d.

In Dunlap v. Lynn, 166 Neb. 342, 89 N.W.2d 58 (1958), the testatrix left her entire estate, upon her death without issue, predeceased by her mother, to her mother's heirs. The court held: "It is convincingly obvious that the testatrix did not intend to be an heir to a part of the property she owned. She was an heir of her mother . . . when the will was made and [was still an heir] when her mother died . . . There is nothing to indicate that [she] intended to die partially intestate. It must be concluded that the word 'heirs' . . . is used in a nontechnical sense to denote a hypothetical or artificial class and that the heirs of [testatrix's mother] must be determined as of the time of the death of [testatrix]." Id. at 349, 89 N.W.2d at 63.

In Casey v. Gallagher, 11 Ohio St.2d 42, 227 N.E.2d 801 (1967), the testator established a trust for his wife and issue, the corpus to go "to the lawful heirs of my children who are of my blood" on the death of the last of his children. The testator had three children, A, B, and C. A and C both had sons who predeceased C without issue; the court held that "heirs of my children" did not simply mean "grandchildren," so that C's predeceased son was not a member of the class. But A's son, having survived him, would have been an heir under the "usual rule of construction." This, however, would have defeated the testator's intent to keep his bounty within his own bloodline, so that court held that all three sets of "heirs" would be ascertained as of the termination of the trust at C's death, because "it would be incongruous to allow rules of construction, which are supposed to aid in the determination of testator's intention, to cause the desolution of testator's property
contrary to such express intention.” *Id.* at 51, 227 N.E.2d at 809.

c. When the life tenant is an heir. Except for Rawls, White, Kelley, and Kimberly, supra item 3c, all of the cases discussed in item 3c of the Reporter’s Note to Section 29.1, holding that the donor did not intend the life tenant(s) to be included in the class of “heirs” taking the remainder interest, carried out the donor’s intention in the usual way, by ascertaining the heirs as of the date they came into possession.

In *In re Latimer’s Will*, 266 Wis. 158, 63 N.W.2d 65 (1954), the corpus of the residuary trust was to go half to the testatrix’s heirs, and half to her predeceased husband’s heirs upon the death without issue of their granddaughter, their only living descendant at the testatrix’s death. The court held: “[T]here would be an incongruity if the will were to be construed as requiring the heirs to be determined as of the date of the death of testatrix . . . Respondents contend that such incongruity is avoided if the words of the will ‘heirs of said [husband]’ be construed ‘heirs of said [husband] excluding [life beneficiary].’ However, to reach such result a reformation of the language of the will is necessary. Furthermore, such construction attempts to make persons heirs at law . . . who never were such heirs. On the other hand, if the . . . determination . . . [is] to be made as of the date of the death of the life beneficiary, there is no incongruity present and therefore no necessity of reformulating the language of the will.” *Id.* at 164–165, 63 N.W.2d at 68–69. The court cited Comment k to § 308 of the first Restatement in support of its decision. The court expressed regret that the descent statute did not allow representation among collaterals, but felt that letting the testatrix’s husband’s sole surviving niece take the entire corpus was the lesser evil, as against dividing the property among the various successors in interest of the deceased nephews and nieces. See also *Harrison v. Shippen*, 419 S.W.2d 557, 560 (Ky.1967) (“It is unlikely the testatrix intended to control her estate up to this point and then turn it over to her daughters to pass on to strangers should they die without issue . . . it seems reasonable that when [she] was faced with th[is] possibility . . . she thought: who should be next in line . . . but her brothers and sisters and [their] descendants? To Alice Harrison writing her will in 1881, these were surely the ‘heirs’ to whom she wanted her estate to ‘revert’”); *Arnold v. Wells*, 100 Fla. 1470, 131 So. 400 (1930) (excluding the life tenant by ascertaining heirs as of testatrix’s death, but imposing an additional condition of survivorship. The effect was to enlarge the class of beneficiaries—the descent statute did not allow for representation among collaterals, so that the descendants of deceased brothers and sisters could take indirectly under the antilapse statute what they could not take directly were the determination of the heirs postponed until their ancestor’s deaths.)
§ 29.5 No Requirement of Survival of Class Members to a Date Subsequent to the Date on Which Statute Is Applied

If a gift is made to a class described as the "heirs" of a designated person, or by a similar class gift term, and a statute governing the intestate takers of property is applied to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, the interest of such persons in the subject matter of the gift is not subject to a requirement of survival to any date later than the time such statute is applied.

Comment:

a. Rationale. If a gift is made in favor of a class described as the "heirs" of a designated person, or by a similar class gift term, there is an inherent requirement that in order to be an "heir" a person must be alive when the statute governing the intestate takers of property is applied. Class gift terms such as "heirs" and the like, however, carry no implied requirement of survival to some date beyond the date the statute is applied. Hence, in the absence of additional language or circumstances that indicate otherwise, there is no requirement of survival by the persons ascertained by the applicable statute governing intestate takers of property to any date beyond the date the statute is applied. This rule also increases the likelihood that the takers under the gift will be the true heirs of the designated person and not an artificial group.

Illustration:

1. O transfers Blackacre by will "to O's son S for life, then to the heirs of O's daughter D. O is survived by both S and D. D dies and is survived by two children, C₁ and C₂, who are D's heirs at her death. C₁ and C₂ each has an indefeasibly vested remainder in an undivided one-half of Blackacre. C₁ dies intestate before S. C₁'s remainder interest in an undivided one-half of Blackacre passes as an owned interest of C₁ to C₁'s heirs.

b. Statute governing intestate takers of property applied as of a date prior to the effective date of the dispositive instrument. If the applicable statute governing the intestate takers of property is applied as of a date prior to the effective date of the dispositive instrument, and one of the beneficiaries thus identified dies before the dispositive instrument becomes effective, the result is the same as when any intended beneficiary is dead when the dispositive
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instrument takes effect. One cannot make a gift to a dead person. Consequently, there always is a requirement that a beneficiary survive to the date the dispositive instrument takes effect. The issue is whether the share the intended beneficiary who is deceased would have taken had he or she survived the effective date of the dispositive instrument fails or goes to the members of the described class who do survive until the effective date of the dispositive instrument. The implication when a class gift is involved is that the members of the class who do survive to the date the dispositive instrument takes effect will take the entire gift, in the absence of additional language or circumstances that indicate otherwise and in the absence of an applicable antilapse statute.

Illustrations:

2. O transfers Blackacre by will “to O’s daughter D for life, then to the heirs of O’s son S determined on the assumption that S died on the date this will is executed.” On the date O’s will is executed, the heirs of S determined as on that date are S’s two children, C1 and C2. C1 dies before O’s will becomes effective on O’s death. In the absence of an applicable antilapse statute, since C1 and C2 are described by a class gift term, C2 will take as the survivor the entire remainder interest given to the class (see § 27.1, Reporter’s Note, item 3).

3. Same facts as Illustration 2 except that there is an antilapse statute that applies to class gifts under a will, and in this case the antilapse statute provides a substitute taker for a class member who dies before the will becomes effective. In such case the share C1 would have taken had C1 survived the effective date of O’s will passes to the substituted taker under the antilapse statute.

4. Same facts as Illustration 2, except that the remainder interest is simply “to the heirs of O’s son S.” In this situation, if the statute governing the intestate takers of property is not applied until O dies, even though S predeceases O, then C1 never becomes a member of the class and an antilapse statute is not applicable to provide a substitute taker for the interest C1 would have taken had C1 survived until O died.

c. Statute governing intestate takers of property applied as of a date subsequent to the effective date of the dispositive instrument. If the gift is in terms to the “heirs” of a designated person “living” or “surviving” at some time subsequent to the death of the designated person, such language postpones the application of the applicable intestate statute until the time when the requirement of survivorship ends. When the “heirs” are ascen-
tained in such case, there is no further requirement of survival to a
date later than such ascertainment. If, however, the donor imposes
a requirement of further survival on the group after the group is
ascertained by the application of the applicable statute governing
the intestate takers of property, such requirement of survival is
effective. The issue, if a member of the group fails to meet the
requirement of survival to a later date, is what happens to the
share a deceased class member would have taken had he or she
survived to the later date. Since a class gift is involved, the rule is
that the class members who meet the additional requirement of
survival take the entire subject matter of the gift, in the absence of
additional language or circumstances that indicate otherwise (see
§ 27.2).

Illustrations:

5. O transfers property by will to T in trust. The terms
of the trust direct T “to pay the income to O’s son S for life,
then to distribute the trust property to those persons who
would be the heirs of O’s deceased daughter D if D had died
as of the date O’s will is executed, and who survive O.” The
heirs of O’s deceased daughter D of the date O’s will is
executed, are C₁ and C₂, and they become the members of the
described class. C₁ dies before O. C₂, the surviving member
of the class, is entitled to the entire subject matter of the gift
on surviving O. The will contains the words “who survive O”
in referring to the ascertained class. These words serve only
to prevent the application of an otherwise applicable antilapse
statute.

6. Same facts as Illustration 5, except that the remainder
interest under the trust is “to those persons who would be the
heirs of O’s deceased daughter D if D had died immediately
after O and who survive S.” The heirs of D on the assumption
that D had died immediately after O are her children, C₁ and C₂.
The gift of the remainder interest is to the described class
members “who survive S.” C₁ dies after O and before S. S
dies survived by C₂. The entire trust property passes to C₂, the
class member who meets the requirement of survival. If the
requirement of survival to the death of S had not been imposed
on the class members, C₁’s death after O and before S would
not have caused C₁’s interest to fail, and it would have passed
as an owned interest of C₁ to the persons who were entitled to
take C₁’s property on C₁’s death.

7. Same facts as Illustration 5, except that the remainder
interest under the trust is “to those persons who would be the
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heirs of O's deceased daughter D if D had died immediately after O, but if any such heir of D dies before S, the interest of the one so dying shall go to his or her children.” C dies before S, survived by two children, so that when S dies, C's and the two children of C take the remainder interest, the children of C standing in C's place to take the share C would have taken had C survived S.

8. Same facts as Illustration 7, except that C never had any children. The substituted gift for C's share fails, and the issue is whether C takes the entire class gift as the survivor of S or whether C's share is defeasible only if there are takers under the substituted group. The conclusion is justified that C's share is defeasible only if there are takers under the defeasance clause and if there are not, as in this case, the defeasance clause is ignored.

9. Same facts as Illustration 7, except that the children of C survive C but fail to survive S. The mere fact that C's share was defeasible if C did not survive S does not necessarily mean that the substituted group that is to take C's share under the defeasance clause must meet any requirement of survival. The conclusion is justified that the interests in the children of C under the defeasance clause are not subject to any requirement of survival with respect to either C or S.

STATUTORY NOTE TO SECTION 29.5

The antilapse statutes are collected and discussed in the Statutory Note to Section 27.1. Related statutes dealing specifically with future interests are collected and discussed in the Statutory Note to Section 27.3.

REPORTER'S NOTE TO SECTION 29.5

1. Comparison with present state of the law—The rule of this section is supported by judicial authority, and is identical, except for stylistic changes, to § 309 of the first Restatement.

2. Justification for the rule of this section—The justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—

a. In general. In re Jamieson Estate, 374 Mich. 231, 132 N.W.2d 1 (1965), involved a distribution of the corpus of the residuary trust, half to the testator's sister "if living [at the death of the testator's wife], or to her heirs if she is not then living," half to the testator's brother if living and or to his heirs. The testator's brother survived the testator, but predeceased the life tenant. At the brother's death, his sole heir was his wife, but she also predeceased the life tenant, and the question was whether the testator's sister-in-law's legatees would take the
gift to the brother's "heirs," or whether it would go to the testator's surviving sister and two children of a deceased sister. The court held: "There can be no doubt that [testator] intended that [his brother] had to survive the life tenant in order to render his interest . . . indefeasible. Testator did not, however explicitly attach a like condition of survivorship to the heirs . . . who were the alternative takers. . . . [I]t has long been the law in Michigan that vested estates are to be favored, and that conditions of survivorship will not lightly be implied. . . . [T]estator, although expressly requiring that the primary remainderman survive the life tenant, makes glaring by his omission any such requirement as to the primary remainderman's heirs. . . . To argue that vesting should be postponed [merely because distribution is postponed] is, of course, absurd, for if such were a general rule no remainder ever could be vested." Id. at 237, 240, 44 N.E.2d 735, 743 (1942) ("Under the common law, vested remainders were always descendable, devisable, and alienable, and since 1932 we find expression in the statute law of Ohio reflecting the common trend that all . . . expectant estates are . . . in the same manner as estates in possession. We are therefore of the opinion that . . . upon their death prior to the death of the last child of testator their respective interest passed, if they died intestate . . . to their heirs-at-law and as to [testator's grandchildren] who died testate to their legatees.")

In Dodge v. Detroit Bank & Trust Co., 121 Mich.App. 527, 330 N.W.2d 72 (1982), discussed in the Reporter's Notes to the preceding four sections, one-fourth of the trust corpus went to the "heirs" of each of A, B, C, and D at the death of D, the survivor. A died first, followed by B. Both died without issue. The estates of B, C, and D shared in the portion going to the heirs of A, while the estates of C and D shared in the portion going to the heirs of B.

In Daniel v. Donohue, 215 Or. 373, 333 P.2d 1109 (1959), discussed in the Reporter's Notes to Sections 29.1 and 29.4, the testatrix left the corpus of the residuary trust to the "blood relations of my deceased mother and myself," a group which was held to mean those persons who would have been her heirs at law if the life tenant and all exclusively paternal heirs were disregarded. The testatrix had 14 first cousins on her mother's side, 10 of whom survived the testatrix and six of whom survived the life tenant. The court held that the descendants of the four cousins who predeceased the testatrix could not take: the antilapse statute did not apply because the gift was only to those "blood relations" who were heirs of the testatrix, and under Oregon law that class was precisely the 10 surviving cousins. "On the other hand, we do not find sufficient evidence that testatrix intended to exclude the four first cousins who were in existence at the time she made her will and [at] her death but who failed to survive [the life tenant] . . . [their shares] pass[.] to
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their respective successors in interest." *Id.* at 394, 333 P.2d at 1119.

h. Death before the dispositive instrument takes effect. As discussed in *Comment b*, when the "heirs" of a designated person are ascertained at that person's death, and the designated person has predeceased the testator, the gift fails as to any heirs who also predeceased the testator. See Youngblood v. Youngblood, 11 Ohio C.C. (N.S.) 276 (1908), *affirmed mem.*, 78 Ohio 405, 85 N.E. 1135 (1908), discussed in *Item 5b* of the Reporter's Note to Section 29.4, in which the descendants of the testator's predeceased brother living at the testator's death took per stirpes under the antilapse statute rather than per capita under the court's interpretation of the phrase "in equal shares among [the brother's] heirs."

c. Postponed gift to the "living" heirs. As discussed in *Comment c*, a gift to the heirs of a designated person "living" at the life tenant's death or "surviving" the life tenant is almost invariably taken as an implicit instruction that the "heirs" are to be ascertained as of the date at which they were required to be "living." See *Item 5a* of the Reporter's Note to Section 29.4; for example, in Haley v. Heirs of Somerville, had the gift been held to be a gift to those of the true heirs who had survived to the date specified, the gift would have been void and an intestacy would have resulted. Consider also *Matter of Wiedemann*. Had the gift been "to her then living heirs at law . . .," and had the court held that the requirement of survivorship, and reference to future statutes of distribution, did not manifest an intent that the settlor's daughter's "heirs" be determined other than at her death, the settlor's grandson would have taken not just 75 percent, but 100 percent, and the great-grandson would have had nothing at all.

An implicit requirement of survivorship, rather than an express one, is a common motivation for postponing the ascertainment of heirs. See, e.g., Casey v. Gallagher, 11 Ohio St.2d 42, 227 N.E.2d 801 (1967), discussed in *item 5b* of the Reporter's Note to Section 29.4, where the testator's direction that takers be "of his blood" indicated that legatees of his deceased grandchildren should not be the eventual takers, and therefore the "heirs" were ascertained as of the surviving life tenant's death.

In Lyons v. Brown, 352 S.W.2d 549 (Ky.1960), the testator gave his wife a life estate, with remainder to his "living heirs at law." The court held that the heirs should be ascertained as of the testator's death, but as a corollary "living" also referred to the testator's death. Cf. also *Trenton Trust Co. v. Gane*, 125 N.J.Eq. 389, 6 A.2d 112 (1939) ("surviving" heirs of the life tenants).

4. Cases contrary to the rule of this section—A handful of cases have been found in which "living heirs" or words of similar import were taken to denote only those who were heirs at the designated person's death and who survived the life tenant. This seems to have been the holding in Rinks v. Gordon, 160 Tenn. 345, 24 S.W.2d 896 (1930), where the remainder after a life
estate in the testatrix's unmarried sister was to go to her brothers and her married sisters "or their heirs, who may be living at the [life tenant's] death." Of the four primary remaindermen, only A survived the life tenant. B and C left issue, while D, who left neither issue nor a widow, had conveyed his interest to A's daughter. The court held that the share of the remainder he had attempted to convey in fact belonged "to his heirs who were living at the death of the life tenant," a class which, notwithstanding the use of the plural and the likelihood that the lead plaintiff was B's daughter, apparently consisted solely of A. The court's reasoning, however, supports the rule of this section equally well: "By this language the testatrix obviously contemplated . . . that the determination of the persons by whom the remainder should be enjoyed would be made as of that date. . . . We have no doubt . . . that the testatrix intended her land to be divided among her brothers and sister who should then be living, with the heirs . . . then living taking the share of [any] deceased brother or sister." Id. at 349, 24 S.W.2d 896.

In Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930), the court held that a remainder to the heirs of the body of the testatrix's grandson, the life tenant, "if he should die without heirs of his body then to my heirs forever," was outside the scope of the rule in Shelley's Case because it was one of those "remaining known to the profession as 'alternative remainders'. . . . The second remainder in fee (to the heirs of testatrix) takes effect . . . only in case the first never takes effect at all." The court held that the remainder in the testatrix's heirs was therefore incapable of vesting until the life tenant's death, so that only "heirs" who survived the life tenant were members of the class. Otherwise, as the court noted, "the first taker . . . would not be excluded from the class who took under the limitation over." Id. at 1483, 131 So. at 405. The court, however, found nothing in the will that would rebut the presumption that the testatrix's "heirs" were to be ascertained as of her own death. See also In re Ryan's Estate, 2 Misc.2d 376, 153 N.Y.S.2d 942 (1956), affirmed, 3 A.D.2d 658, 159 N.Y.S.2d 688 (1957), where the will contained an express limitation to the "heirs-at-law or next-of-kin surviving at that time," and the court held: "By necessary implication, those heirs surviving must have been so prior to the death of the life beneficiary, at the only other time they could be so classified—the date of the death of the testator. . . . This construction is not changed by the fact that a life estate may precede the bequest . . . nor by the circumstance that the bequest . . . is contingent on an event that may or may not happen. Id. at 378, 153 N.Y.S.2d at 944.

In Beardsley v. Fairchild, 87 Conn. 359, 87 A. 737 (1913), the testator devised a remainder interest he had held to "my then living lawful heirs." Unfortunately, the "then" referred to "when paid over to the executor or other person qualified to receive it," which threatened to trigger the rule against perpetuities. The heirs at the testator's death, however, were lives in being, and the court held that the ascertainment of testator's heirs at his own death "is more in accordance with the natural mean-
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[Text]

§ 29.6 Share of Each Class Member

If a gift is made to a class described as the "heirs" of a designated person, or by a similar class gift term, and a statute governing the intestate takers of property is applied to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, the size of the share of each such person in the subject matter of the gift to the class is determined by the application of the same statute.

Comment:

a. Rationale. The statutes governing the intestate takers of property describe the shares in intestate property that the ascertained intestate takers receive. Consequently, if the donor of property intends that a particular statute governing the intestate takers of property is to be applied to determine who takes under the gift, it is reasonable to assume that the donor intends the shares of the beneficiaries to be determined under the same statute, in the absence of additional language or circumstances that indicate otherwise.

b. Usual pattern of distribution under statutes governing intestate takers. The members of the group ascertained by the application of a statute governing the intestate takers of property either may be in different degrees of relationship to the person whose heirs are designated or, if they are in the same degree of relationship to such person, the number descending from one stirpes may be greater than the number descending from another stirpes. A per capita distribution among the takers in either of these two situations would be likely to cause an unequal distribution among the various branches of the family of such person.

Illustrations:

1. O transfers property by will to T in trust. The terms of the trust direct T "to pay the income to O's wife W for her
life, then to distribute the trust property to O's heirs." O is survived by two children, C1 and C2, and by three grandchildren, GC1, GC2, and GC3, who are children of O's deceased child, C3. The heirs of O determined at his death under the applicable statute governing intestate takers of property are W, C1, C2, GC1, GC2, and GC3. The same statute provides that a spouse takes one-half and the other one-half goes to the issue of the person whose heirs take. The children of deceased children take by representation the share their parent would have taken had the parent lived. In the absence of additional language or circumstances that indicate otherwise, W takes one-half and the other one-half goes to C1 and C2 and GC1, GC2, and GC3. C1 and C2 each have a vested remainder under the trust in one-third of one-half of the trust property, and GC1, GC2, and GC3 each have a vested remainder in one-third of one-third of one-half of the trust property.

2. Same facts as Illustration 1, except that C1 and C2 both predeceased O. C1 left four children who survived O and C2 left five children who survived O. The heirs of O determined at his death under the applicable statute governing intestate takers of property are W, the four children of C1, the five children of C2, and GC1, GC2, and GC3, the children of O's deceased child C3. In this situation, all the heirs of the designated person other than W are in the same degree of relationship to such person, and the statutes governing the intestate takers of property may differ as to whether the distribution to them is per stirpes or per capita. If the statute that is applied to determine the identity of the heirs other than W calls for a per stirpes distribution even when all of the ascertained takers are in the same degree of relationship to the designated person, each of the four children of C1 has a vested remainder in one-fourth of one-third of one-half of the trust property, each of the five children of C2 has a vested interest in one-fifth of one-third of one-half of the trust property, and each of GC1, GC2, and GC3 has a vested interest in one-third of one-third of one-half of the trust property. If the statute that is applied to determine the identity of the heirs calls for a per capita distribution when all the ascertained takers are in the same degree of relationship to the designated person, each grandchild of O has a vested interest in one-twelfth of one-half of the trust property.

c. Contrary intent. The rule stated in this section is only a rule of construction and does not apply if there is additional language or circumstances that indicate otherwise. The contrary intent may indicate a per capita distribution among the heirs when
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the applicable statute governing the intestate taker of property would call for a per stirpes distribution, or may indicate a per stirpes distribution among the heirs when the applicable statute would call for a per capita distribution.

Illustration:

3. Same facts as Illustration 1, except that the remainder interest under the trust is "then to distribute the trust property to O's heirs equally." If the word "equally" is to have any significance, it would have to change the otherwise per stirpes plan of distribution called for by the statute to a per capita plan of distribution. The conclusion is justified that the word "equally" would cause each of W, C1, C2, GC1, GC2, and GC3 to have a vested remainder in one-sixth of the trust property.

STATUTORY NOTE TO SECTION 29.6

The following statutes expressly provide that the shares as well as the identity of the class will be determined by the intestate succession law:

California Probate Code § 6151 (West Supp.1987)
Wisconsin Stat. § 700.11 (1983–84)

Pennsylvania does the same by implication, providing that when a surviving spouse is an "heir" of a designated person other than the testator or conveyor, the surviving spouse will take only the designated fractional share of the estate, and not the additional allowance, currently the first $30,000. 20 Pa.Cons.Stat.Ann. §§ 2102, 2514(4), 6114(1). (Purdon 1975 and Supp.1987).

REPORTER'S NOTE TO SECTION 29.6

1. Comparison with present state of the law—The rule of this section is supported by judicial authority, and is identical, except for stylistic changes, to § 310 of the first Restatement.

2. Justification for the rule of this section—The justification for the rule of this section is set forth in Comment a.

3. Cases supporting the rule of this section—As discussed in the Reporter's Note to Section 28.2 and elsewhere in Chapter 28, the old common-law rule was that all class gifts should be distributed per capita. Gifts to heirs and the like were occasionally, though rarely, held to fall within the scope of this rule, but it has been universally held for a fairly long time now that gifts to heirs are presumptively to be distributed according to the statute of descent; the only significant remaining point of controversy is whether phrases like "in equal shares" should be construed as manifesting a contrary intent. See items 5a and 5b infra.

In New York Life Insurance & Trust Co. v. Winthrop, 237 N.Y. 93, 142 N.E. 431 (1923), Judge Cardozo held that gifts to "next of kin" should be distributed per stirpes.
The court had previously repeated "refused the invitation" to "commit [itself] to the declaration of such a rule," basing its decision either on an explicit reference to the statute, "In the most recent case [Matter of Barker, 230 N.Y. 364, 130 N.E. 579 (1921)], . . . there was a gift to 'lawful heirs' . . . ", or to a direction that distribution be "share and share alike." "A stubborn rule of law bound the courts [until overturned by statute] to the holding that a gift to 'issue' was to be treated as a gift per capita. The rule was often deplored. . . . It yielded to 'a very faint glimpse of a different intention'. . . . It was followed, when there was no escape. . . . The court is now asked to perpetuate and enlarge what has been felt to be a mischief . . . [But we think a gift to heirs or 'next of kin' is the same in meaning and effect as one to 'legal heirs' or 'legal next of kin,' and that one as much as the other imports a reference to the statute. This is the view that has prevailed in many other jurisdictions. . . . The word 'issue,' viewed alone, is neutral in its suggestion of division upon one plan or another. The words 'heirs' and 'next of kin' take their color and connotations from the schedules of the statute." Id. at 105-106, 109, 142 N.E. at 433, 435.

See also Rodgers v. Rodgers, 218 Miss. 655, 666-667, 669, 67 So.2d 698, 702-703 (1958) ("It was only by fate that the heirs of [the maker's daughter's] body at her death consisted only of grandchildren, and that chance was contrary to the accepted tables of mortality. We are asked to construe this deed as if it were a grant to the maker's great grandchildren as a class, in which event they would take per capita . . . . [The court later quoted Comment d to § 310 of the first Restatement, which begins, almost verbatim, with the language of Comment b to this section, and continues.] 'To prevent such inequality the various statutes governing the intestate succession of property usually provide for distribution on a per stirpes basis when the takers are in different degrees of relationship . . . and sometimes . . . even when they are in the same degree. . . . 'As we have already pointed out, [a pure per stirpes distribution is] our statutory plan.'); Colony v. Colony, 97 N.H. 386, 393, 89 A.2d 909, 913 (1952) ("One view is that the testator was more interested in the Colony family and its tradition than in particular individuals of that family. He therefore had no preference among his many nephews and nieces, and grandnephews and nieces some born, some unborn. Such a man with equal feelings toward his relatives would want . . . [to] distribut[e] this residue per capita among them, regardless of their degree of relationship." This, however, is the view the court rejected.).

In First Trust Co. v. Meyers, 351 Mo. 899, 174 S.W.2d 378 (1943), the testator left his entire estate "to my legal heirs, who are as follows: [a brother and six nephews and nieces, indicated by name, address, and relationship]. The testator then disinherited his half-brother's son "whom I have not heard of for many years," should he be living. The court held that listing the "heirs" by name, though it would make it unnecessary and in fact erroneous to use the statute to identify them, did not overcome the presumption that the heirs should take according to the statute. Accord-
ingly, the court ordered distribution per stirpes, except that the "nephews and nieces" named were in reality relatives of the half blood, so that the testator's full brother received twice the portion the other stirpes received.

4. Cases contrary to the rule of this section—Cases holding that "heirs" should take per capita in the absence of any other reference to a statute of intestate succession are extremely rare. Even the 19th century cases occasionally cited for contrast or by losing parties have almost invariably involved a direction that the heirs are to share "equally": see item 5a, infra.

One of the rare cases actually holding, unambiguously, "when heirs take by purchase, they do not take as heirs," is Campbell v. Wiggins, 14 S.C.Eq. 10 (1838), where a grant was made by a special bill to "the heirs at law of John Taylor and of Blake Baker Wiggins," and the court held that they "took by purchase, [not] by right of representation . . . and the apportionment must be made . . . in the same manner as if the act of 1829, instead of using the terms, 'heirs at law,' had particularized each child by name." Id. at 12. Campbell was followed in Lemacks v. Glover, 18 S.C.Eq. 141 (1843), but Chancellor Harper dissented strongly, and later South Carolina decisions followed the general rule that "heirs" presumptively take according to the statute.

In Records v. Fields, 155 Mo. 314, 55 S.W. 1021 (1900), the residue was to be "equally divided between the heirs of [A and B], deceased"; A and B were the testator's two brothers. The court held: "Now it is evident that there were no joint heirs of [A and B]. There were heirs of [A] and there were heirs of [B] . . . While 'between' is often incorrectly used for 'among,' . . . certainly neither the context nor the admitted relationship of the parties requires us to give it an improper meaning. . . . [H]e did not devise it to be divided equally among certain persons, but between two families. . . . [However,] there yet remains to be settled the division as among the heirs of [A]. If we are right in our conclusion that the words 'equally divided . . . ' referred to the two classes, and not the individuals, then we have no words in the will directing how the respective heirs in each class shall take. . . . While they are designated by the word 'heirs,' it is clear that they take as purchasers directly from [testator]. . . . As none of them take in a representative character, but as purchasers from their uncles and granduncle, it must be ruled . . . that they take per capita." Id. at 324–325, 55 S.W. at 1022–1023.

In Wright v. Copeland, 241 Iowa 447, 41 N.W.2d 102 (1950), the testatrix directed that her residuary estate "be converted by my executor into cash and divided among my legal heirs as provided by law and according to the statutes of Iowa." The testatrix's heirs were four aunts, two uncles, and seven cousins, and under Iowa law "if testatrix had died intestate half her estate [w]ould have gone to [one of] her cousin[s] as the sole representative of [her] father" and the other half would have been divided per stirpes among her maternal relatives. The court held that the will did not unambiguously direct that the intestate laws control the shares as well as the identity of the takers,
and remanded for clarification of the "ambiguous" provision. The court noted that the word "among" was used, and "A single class is designated. There is no direct mention of two classes such as the relatives on the father's side and those on the mother's side." Id. at 453, 41 N.W.2d at 105. But see Crittenden v. Lytle, 221 Ark. 302, 253 S.W.2d 361 (1952) ordering distribution according to a similar statute in a similar fact situation: "It is conceivable that in some instances apparent inequities may result . . . but . . . 'if this was not the case, titles to estate would be daily unsettled, to the ruin of thousands.'" Id. at 307, 253 S.W.2d at 364.

5. Contrary intent of the donor—

a. Cases finding "share and share alike" to manifest a contrary intent. As with gifts to be divided "equally" among issue (see item 7 of the Reporter's Note to Section 28.2), an increasing number of courts are holding that a direction that a gift be divided "equally" among a designated person's heirs does not mean that a per capita distribution should be used in place of a statutory distribution. However, the rule set forth in Comment c and Illustration 3, that such language is used for the purpose of avoiding the statutory distribution, is still widely followed, and probably still represents the majority view.

In Ramsey v. Stephenson, 34 Or. 408, 56 P. 520 (1899), the testator directed that his executor "'convert [his estate] into cash, and divide the proceeds equally among my heirs at law.' . . . [H]e left, surviving him, a brother and sister, [and] 17 nephews and nieces representing three deceased brothers and sisters]; and the question is whether these heirs take per capita, or by right of representation. . . . [T]estator's intention . . . must be gathered from the clause-quoted. . . . It is difficult to conceive what language the testator could have used better adopted to make his intention manifest. . . . It is true some of the authorities cited by defendants do not support this conclusion. . . . Th[eir] reasoning overlooks the fact that the testator himself has indicated the quantum of the estate which each heir shall take, and that it is only necessary to consult the statute for the purpose of determining who are heirs. In other words, the statute governs in ascertaining who shall take, but . . . [t]here is no necessity for resorting to the statute to ascertain the manner of the distribution." Id. at 409-411, 56 P. at 520-521.

In Lyons v. Brown, 352 S.W.2d 549 (Ky.1960), the remainder after a life estate in the testator's wife was to be "divided equally among my living heirs at law." The court held, "What did the testator say? He said he wanted his estate divided equally. . . . To divide his estate equally among [his brother, sister, nephews, and nieces] is to allot each an eleventh share of the estate. . . . There is a subtle temptation to depart from this construction on the assumption a testator would normally wish his nearer relatives to be preferred over those more remote, and by using the term 'heirs-at-law' he may have anticipated the statutory method of distribution. . . . This reasoning
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overlooks the fact that while the law may lean toward such manner of distribution, the testator by will quite properly may favor some other plan. . . . The Hafner case (306 Ky. 93, 206 S.W.2d 196 [1947]) stands alone in Kentucky law. To the extent it is inconsistent with this settled rule of construction, it must be and is overruled. In the present case another word used by the testator indicates an intention to direct a per capita distribution. The testator referred to 'living' heirs. A per stirpes interest arises only by derivation through a deceased heir. The testator in this case clearly forestalled a construction that any beneficiary should take as the representative of a deceased heir. . . . Regardless of whether we deem it fair or wise, he directed that his estate be divided equally. . . . We know of no other way to do it except by doing it." Id. at 550.

See also, e.g., Hagan v. Hanks, 80 S.C. 94, 97, 61 S.E. 245, 246 (1908) ("[T]he gift to the lawful bodily heirs of any who may not be living . . . is an original and not a substitutional gift."); Miller v. Smith, 179 Or. 214, 219, 170 P.2d 583, 585 (1946) ("The reason for applying the rule of per capita distribution in similar will clauses is well stated in the Ramsey case [supra] and there is no need for repetition."); Coppedge v. Coppege, 234 N.C. 173, 178, 66 S.E.2d 777, 781 (1951), rehearing denied, 234 N.C. 747, 67 S.E.2d 463 (1951) ("The argument of the appellees to the effect that to allow an equal distribution per capita will result in an unfair and unnatural distribution as between the brothers of the testator and other legatees, will not be permitted to disturb the express provisions in the will.")

In re Hamilton's Estate, 454 Pa. 495, 312 A.2d 373 (1973), acknowledged that "it can also reasonably be argued that the testatrix intended the intestacy laws to govern both the designation of the distributees and the manner in which they are to receive their shares. Rather than creating a single class, the intestacy law divides all the heirs into several classes, according to their degree of relationship to the decedent. Mindful of this distribution scheme, the appellants urge that by the words 'share and share alike,' the testatrix intended to have each of these classes receive an equal share. This argument also is consistent with the language of the will, and we have previously given recognition to similar arguments . . . being unable to determine [testatrix's] intent from the scheme of her will or the circumstances surrounding its execution, we are relegated to our canons of construction. Even these, however, do not supply a ready answer. . . . It is significant, however, that the testator in Baskin's Appeal and Hoeh's Appeal used the word 'heirs' and that the will before us used the words 'such persons as would be entitled to share . . . under the intestate laws,' the latter language being more susceptible to the interpretation that the testatrix intended that those laws be used only for designating her beneficiaries, and not for determining the share each is to receive." Id. at 499-503, 312 A.2d at 375-377.
Occasionally the surrounding circumstances dictate a per capita distribution. In Rogers v. Burress, 199 Ky. 766, 251 S.W. 980 (1923), construing "jointly and equally to my heirs and the heirs of my wife" as directing a per capita distribution prevented the testator's mother-in-law from taking half the estate herself while "his numerous heirs" were left to divide the other half. In Trenton Trust Co. v. Gane, 125 N.J.Eq. 389, 6 A.2d 112 (1939), decree affirmed, 126 N.J.Eq. 273, 8 A.2d 708 (1939), the court had held that a remainder to the life tenant's "unlawful heirs, share and share alike" was not the same as a remainder to his "heirs," and that the Rule in Shelley's Case was therefore inapplicable; the only possible difference in the nature of the interests would be the prescribed modes of distribution.

b. Cases finding "share and share alike" not to manifest a contrary intent. In re Boldt's Will, 67 Misc.2d 985, 326 N.Y.S.2d 58 (1971), held that land to "be equally divided among any heirs living at [the life tenant's] death" should be divided according to the statute of descent: "from decedent's will it is apparent to this court that the testator was interested in his family and . . . surely would be more solicitous of the welfare of [his surviving] child than of the more remote issue, as in this case great grandchildren whom he never knew." Id. at 986, 326 N.Y.S.2d at 60.

In McLean v. Williams, 115 Ga. 257, 42 S.E. 485 (1902), "it is . . . insisted that, while we must go to the statute to find who are the persons within the descriptive terms, after having determined this the statute has no further bearing. . . . Is the use of the expression 'equal shares' alone enough to overcome the per stirpes presumption? The shares under the statute of distributions are equal. . . . Persons standing in unequal degrees are allowed to take per stirpes 'to fulfill the equity of the statute, whichcontemplates an equal distribution'. . . . If some stand on different degrees from others, they take per stirpes, but they take equally nonetheless. . . . While a testator is allowed to ignore, either in part or altogether, the rules laid down in the statute, it will not be presumed that it was the intention of the testator to disregard the law . . . unless the terms of the will are such as to make this intention manifest." Id. at 259-260, 42 S.E. at 486. See also, e.g., Butts v. Trust Co. of Georgia, 209 Ga. 787, 75 S.E.2d 745, 747 (1953) (regarding it as settled law "that the use of terms such as 'in equal shares' or 'equally divided' will not alone be sufficient to overcome this presumption.")

In Lowlimore v. First Savings & Trust Co. of Tampa, 102 Fla. 740, 140 So. 891 (1931), modifying 140 So. 887 (1931), the testator left the remainder after a life estate in his wife to be divided "between my next of kin, share and share alike." The court held: "The words 'share and share alike' as used in the will should be given appropriate effect, and such words were apparently used to prevent statutery or other discrimination between relatives of the half blood and those of the whole blood, but not to give the
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testator's brother only an equal share with his nephews and nieces." Id. at 754, 140 So. at 893. The earlier opinion had dealt with a contention that "next of kin" did not refer to the statutory distributees at all, but meant "nearest relatives"; the court noted that the testator had only one nearest relative so the court emphasized, paradoxically, the significance of the phrase "share and share alike" in determining the testator's intent for a stirpital distribution. The court had also held in its earlier opinion that distribution would be by statute, but it had ascertained the "next of kin" as of the date the life tenant elected to take against the will, so that distribution would have been per capita even under the statute, the testator's brother having died by that time.

See also Tucker v. Nugent, 117 Me. 10, 102 A. 307 (1917), and Runyan v. Rivers, 99 Ind.App. 680, 192 N.E. 327 (1934), discussed in the Reporter's Note to Section 29.8; in these cases, courts construed gifts to he "divided equally" or "share and share alike" among the heirs of several persons to call for equality as between the designated ancestors rather than as between the heirs.

c. Other manifestations of contrary intent. Besides per capita distribution, other nonstatutory distributions that donors may specify among a class described only as a designated person's heirs include: a pro rata distribution, in the proportions in which the class members received pecuniary bequests as individuals earlier in the will, as in McMenamy v. Kampelmann, 273 Mo. 450, 200 S.W. 1075 (1918); or a per stirpes distribution, in states with "hybrid" descent statutes. As discussed in item 3b of the Reporter's Note to Section 28.2, courts in some of these states have held, as in In re White's Estate, 127 Vt. 28, 238 A.2d 791 (1968), that "the 'per stirpes' phrase . . . does serve to rebut the statutory 'per capita' distribution at the level of grandchildren." Id. at 32, 238 A.2d at 794.

§ 29.7 Determination of the Amount of the Subject Matter of a Gift That Is Distributable to the Class Members if the Gift Is to a Named Individual and a Class.

If a gift is made to a named individual and a class described as the "heirs" of a designated person, or by a similar class gift term, and a statute governing the intestate takers of property is applied to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, the following rules of construction apply:

(1) If the named individual and the person whose heirs are designated is the same and the "heirs" are to take as purchasers, the named individual takes a life interest in the subject matter of the
gift, and the described class takes a remainder interest in the subject matter of the gift.

(2) If the named individual and the person whose heirs are designated are different persons but have a common ancestor, the subject matter of the gift is divided among the named individual and the class in the same manner it would have been divided among them under the statute that would be used to determine the "heirs" of the common ancestor if it had descended to them from the common ancestor and they were the only heirs.

(3) In situations not governed by subsection (1) or subsection (2), the named individual is entitled to one equal share of the subject matter of the gift and the described class is entitled to one equal share for division among such class.

Comment: (Subsection (1))

a. Gift to "A and his (or her) heirs." The traditional way to create a fee simple interest in a person is to use the language "A and his heirs" or "A and her heirs." The word "heirs" in such a disposition is not a word of purchase describing an interest in the "heirs," but is a word of limitation describing a fee simple interest in A. Nevertheless, it is possible for the donor of such a disposition to provide that the designated "heirs" are to take an interest by purchase in the subject matter of the gift. This would be the case if the disposition is to "A and his heirs, the heirs to take by purchase." If the donor does so specify, since the true "heirs" of the designated person cannot be ascertained until such person is dead, the rule of subsection (1) is that the presumed intent of the donor is that A take a life estate and A's heirs take a remainder in fee simple, a remainder that does not vest until A dies, at which time A's heirs are ascertained under the applicable statute governing intestate takers of property.

b. Gift to "A and the heirs of his (or her) body." The traditional way to create a fee tail estate in a person is to use the language "A and the heirs of his body" or "A and the heirs of her body." The words "heirs of his (her) body" in such a disposition are not words of purchase describing an interest in the "heirs of the body," but are words of limitation describing a fee tail estate (or in a few states a fee simple conditional) in A. The statutes existing in the various states today convert what was a fee tail estate into something else, and the final effect of a gift to "A and the heirs of
his (or her) body" depends on the controlling statute on fee tail
estates. Nevertheless it is possible for the donor of such a disposi-
tion to provide that the designated "heirs of the body" are to take
an interest by purchase in the subject matter of the gift. If the
donor does so specify, since the true heirs of the body of the
designated person cannot be ascertained until such person is dead,
the rule of subsection (1) is that A takes a life estate and the heirs
of A's body take a remainder in fee simple, a remainder that does
not vest until A dies, at which time the heirs of A's body are
ascertained under the applicable statute governing intestate takers
of property.

Comment: (Subsection (2))

c. Common ancestor. If the named individual and the person
whose heirs are designated are different persons but have a com-
mon ancestor, the named individual and the described class should
take statutorily determined shares as if the subject matter of the
gift descended to them from the common ancestor. In view of the
fact that the statute governing the intestate takers of property has
to be employed to ascertain the members of the described class, it
indicates the donor had in mind a statutory plan of distribution and
this indication is carried out by using a statute also to determine
the share in the subject matter of the gift that the named individual
is entitled to receive and the share that goes to the class for division
among the class.

Illustrations:

1. O transfers Blackacre by will "to O's son S and the
heirs of O's deceased daughter D." The heirs of D under the
applicable statute governing intestate takers of property are
her children GC\textsubscript{1} and GC\textsubscript{2}. If Blackacre had descended from O,
the common ancestor of S and D, the statute governing intestate
takers applicable to real property in the jurisdiction where
Blackacre is located would give S an undivided one-half interest
in Blackacre and would give GC\textsubscript{1} and GC\textsubscript{2} the other undivided
one-half interest in Blackacre. Consequently, the named indi-
vidual, S, takes an undivided one-half interest in Blackacre and
the other undivided one-half interest goes to GC\textsubscript{1} and GC\textsubscript{2}, each
owning an undivided one-fourth interest in Blackacre.

2. Same facts as Illustration 1, except that there is added
to the language quoted in Illustration 1 the following: "to be
shared equally among them." This additional language would
cause S, GC\textsubscript{1}, and GC\textsubscript{2} to hold equal undivided one-third inter-
est in Blackacre.
Comment: (Subsection 3)

d. Situations not within subsection (1) or subsection (2). A typical situation not within subsection (1) or subsection (2) is a gift "to my son S and the heirs of my wife W," with W's heirs being her children by a previous marriage. The rule of construction under subsection (3) would give one-half of the subject matter of the gift to S and the other one-half to the children of W by her previous marriage, in the absence of additional language or circumstances that indicate otherwise.

REPORTER'S NOTE TO SECTION 29.7

1. Comparison with present state of the law—The rules of this section are supported by judicial authority, and are consistent with § 311 of the first Restatement.

2. Justification for the rules of this section—The justification for the rules of this section is set forth in Comments a through d.

3. Cases supporting the rules of this section—

   a. In a gift "to A and A's heirs." Courts have almost never treated "heirs" as a word of purchase in such a gift. In the only cases found in which a court of record has done so, "heirs" was construed to be a word of purchase because it appeared that the testator intended it to mean "children." Therefore, the rule in Wild's case was applied. See item 4a, infra.

   b. When the individual and class have a common ancestor. As discussed in Comment c, such gifts are distributed according to the statute of descent; as a practical matter (though artificial counterexamples can of course be constructed), the "heirs" will either be the named individuals themselves, or will be in a different degree of relationship to the common ancestor from the named individuals; thus distribution per stirpes will be called for under any type of descent statute. In re Adkins' Estate, 30 Del.Ch. 603, 55 A.2d 145 (1947), discussed in item 3 of the Reporter's Note to Section 28.4, involved a gift "unto [A, B] and heirs of [C] . . . to be divided equally." The court held that there was a conflict between the use of the term "heirs," indicating representation, and the phrase "to be equally divided" . . . a technical term implying per capita distribution." The court held that "equally" referred to A, B, and C, the testatrix's three children: "it is not to be lightly assumed that [testatrix] intended a more remote relative to share equally with a nearer relative. This principle is not applied in all jurisdictions but I conceive it to be sound. . . . This finding seems to be in harmony with modern judicial thought." Id. at 608-609, 55 A.2d at 147-148.

   In McAvoy v. Sammons, 140 Ind.App. 552, 224 N.E.2d 323 (1967), the testatrix devised realty "to my brothers and sisters, living at the time of my death, or to the heirs of my brothers and sisters who may precede me in death." The court held that the
heirs of the testatrix's two brothers dead at the execution of the will, as well as the heirs of the one brother living at the execution of the will who predeceased the testatrix, were entitled to share in the gift: "[I]n the absence of factors pointing to a contrary result, it should always be assumed that in making an alternative gift in favor of the issue of my deceased person, otherwise within the class, the object of the testator is to assure equal division among the branches of his relatives designated, and the branch represented by the issue of a class member, dead when the will is executed, is just as important to the testator as the issue of any other class member who dies later. . . . American Law of Property § 22.51. . . . [T]he heirs of the two deceased brothers . . . share in the property per stirpes but not per capita." Id. at 555-558, 224 N.E.2d at 325-326. Apparently, that the various brothers, sister, nephews, and nieces should take per stirpes was considered so obvious by this court that no reasons needed to be discussed nor authority cited for this aspect of the decision.

In Canfield v. Jameson, 201 Iowa 784, 208 N.W. 369 (1926), the residuary estate was to "be equally divided between my above named children, their heirs or assigns, share and share alike." "The heirs of" one predeceased daughter were among those named above, and the question was whether each heir would take per capita with the other children. The court held: "It cannot be doubted that . . . had one of the then living children died [before testator], his or her heirs would, under the clause in question, have taken only the share such child would have taken. . . . [D]oes the fact . . . that one daughter was [already] dead require a different construction with respect to her heirs? We think not. . . . When the bequest is to several named individuals and to others as a class, the latter generally take per stirpes. . . . The use of the words 'share and share alike' would ordinarily indicate an intention that the distribution should be per capita . . . were it not for the fact that he used the expression not in reference to the heirs of Anna and his living children, but in reference to all of his children. . . . The will provides that not only the heirs but the assigns of the children shall take. But it could not be claimed that, had one of the children assigned his interest to two or more persons, the mere number of assigns would have affected the proportions the other legatees would take. No more, we think, does the fact that in the same terms the will provides that the heirs of the legatees shall take, without regard to the known fact that one of them was then dead, require a construction that would change the proportions of the other legatees by the number of such heirs." Id. at 786-787, 208 N.W. at 370.

As discussed in Illustration 2, when the donor unambiguously states that the gift is to be "shared equally among" the individuals rather than the classes, the explicit direction of a per capita distribution overrides the constructional preference for a per stirpes distribution. As the court discusses in Adkins, supra (see
item 3 of the Reporter's Note to Section 28.4), there is a considerable difference of opinion as to what language is sufficient to manifest such a contrary intent (this is one of the recurring themes in Chapters 28 and 29; see, e.g., item 5 of the Reporter's Note to Section 29.6.) Compare Adkins and Canfield, supra, with Houts v. Jameson, 201 N.W.2d 466 (Iowa 1972). The corpus of a testamentary trust was to go "to the heirs of my nephew, [A], now deceased, * * * and to [B, another nephew,] or his heirs in the event he is not living at the time, in equal shares, share and share alike." The surviving nephew and the heirs of the deceased nephew sued, while the trust was still in force, to determine the extent of their remainder interests. The court held that, should B predecease the life tenant, the various "heirs" would all take per capita (see item 3a of Reporter's Note to Section 29.8), and, "Assuming [B] survives, . . . [t]he will provision in relevant part would then read, 'to the heirs of [A] . . . and to [B] . . . in equal shares, share and share alike.' It would be illogical to assume the testator intended a per capita distribution in the first alternative possibility but a per stirpes distribution in the second . . . [However, o]bvously, the district court's holding for a per capita distribution while simultaneously freezing the shares at one-fifth for each of [B and the four heirs of A] cannot be approved. Such result would ignore the alternative gift provision . . . If [B] survives, the shares shall he those specified by the trial court. If he does not, then the shares may well be in a fractionally lesser amount. It should be noted an estate is not contingent merely because the portion . . . remains uncertain until a future date." Id. at 468-470.

c. When there is no common ancestor. In Bradley v. Jackson's Estate, 1 Kan.App.2d 695, 573 P.2d 628 (1977), the testatrix left the residue of her estate "to Mattie Grubb of Eskoore, Kansas, and to my lawful heirs." In accordance with the principle set forth in Comment d, the court ordered distribution half to Mattie Grubb, half per stirpes to the testatrix's heirs. Almost all other cases found in which the takers have no common ancestor have involved gifts to the testator's heirs and to the testator's spouse's heirs, and are discussed in items 3b and 4b of the Reporter's Note to Section 29.8.

4. Cases contrary to the rules of this section—

a. In a gift "to A and A's heirs." In Fullagar v. Stockdale, 138 Mich. 363, 101 N.W. 576 (1904), discussed in item 4e of the Reporter's Note to § 28.3, A's father conveyed land to A, her husband, "and the heirs of said [A]," a term the court construed to refer to the donor's own grandchildren to the exclusion of his step-grandchildren. Applying the second resolution in Wild's case, the court held that A, her husband, and each of A's children by her first marriage took in equal shares as tenants in common, with A and her husband taking a single share by the entirety. See also Jernigan v. Lee, 9 N.C.App. 562, 176 S.E.2d 899 (1970), re-
versed, 279 N.C. 341, 182 S.E.2d 351 (1971), also discussed in item 4c of the Reporter's Note to Section 28.3, where the court below had construed "heirs" to mean children and applied the second resolution in Wild's case, but the supreme court held that "heirs" was a word of limitation.

b. When the individual and class have a common ancestor. As discussed in item 4 of the Reporter's Note to Section 29.6, even in the era when all class gifts were presumptively distributed per capita, gifts to "heirs" were almost universally treated as an exception unless the donor had also used language calling for equality of division; as discussed in item 3b, supra, it has been the effect of such language which has led to controversy. In Crow v. Crow, 28 Va. (1 Leigh) 74 (1829), discussed in item 4a of the Reporter's Note to Section 28.5, the testator called for an equal division among his "children," but in listing his children, he included "the heirs of [A], namely, [seven first names], heirs of [A] deceased," and in the case of A, his eldest son, he did not specifically state that his heirs would collectively "take . . . a child's part," as he had with two predeceased daughters. The court therefore held that each child of A should take per capita with the testator's surviving children and the classes representing testator's other predeceased children.

In Johnson v. Johnson, 13 Ohio Misc.2d 15, 468 N.E.2d 945 (1984), discussed in item 4b of the Reporter's Note to Section 28.4, the gift was "share and share alike" to "my children, their heirs and my foster child," and the court held that "share and share alike" indicated a per capita distribution, but only because "heirs" was used synonymously with "children"; had the court found that testatrix had really meant "heirs" to be used in its technical sense, "an exception to the general rule of construction [would have] exist[ed]." Id. at 15-16, 468 N.E.2d at 946. Cf. Collins v. Feather's Executors, 52 W.Va. 107, 43 S.E. 323 (1903) and Peoples Nat. Bank of Greenville v. Harrison, 198 S.C. 457, 18 S.E.2d 1 (1941), discussed in item 4a of the Reporter's Note to Section 28.4, where the per capita distribution was upheld because the word "children" rather than the word "heirs" had been used.

Arguably, the court's reasoning in Perry v. Bulkley, 82 Conn. 158, 72 A. 1014 (1909), in holding that a provision that the testator's uncle's children "are to participate equally with my legal heirs" called for an equal division between two distinct classes, ran contrary to the rule of this section. But the distribution would have been the same had the court ordered a per stirpes distribution as if the property had descended from the testator's grandfather; the only way a different result could have been obtained would have been to order a per capita distribution, or to ascertain the testator's "heirs" as of the death of the surviving life tenant, in which case the heirs would have been the cousins themselves.

c. When there is no common ancestor. No cases have been found.

Ch. 29  
CLASS GIFTS  
§ 29.8

§ 29.8  Determination of the Amount of the Subject Matter of a Gift That Is Distributable to Several Different Classes

If a gift is made to two or more classes described as the "heirs" of designated persons, or by a similar class gift term, and a statute governing the intestate takers of property is applied to determine the persons who come within the primary meaning of each class gift, in the absence of additional language or circumstances that indicate otherwise, the following rules of construction apply:

(1) If the several persons whose "heirs" are designated have a common ancestor, the subject matter of the gift is divided among the several classes in the same manner it would have been divided among them under the statute that would be used to determine the "heirs" of the common ancestor if the subject matter of the gift had descended to the several classes from the common ancestor and they were the only heirs.

(2) In situations not governed by subsection (1), each described class is entitled to one equal share of the subject matter of the gift for division among such class members.

Illustrations:

1. O transfers Blackacre by will "to the heirs of my deceased children C₁, C₂, and C₃." The heirs of C₁ under the applicable statute governing intestate takers are GC₁ and GC₂. The heirs of C₂ under the applicable statute governing intestate takers are GC₃, GC₄, and GC₅. The heirs of C₃ under the applicable statute governing intestate takers are GC₆, GC₇, GC₈, and GC₉. Subsection (1) applies because C₁, C₂, and C₃, the persons whose heirs are described as the beneficiaries of the gift, have a common ancestor, namely O. If Blackacre had descended to the heirs of C₁, C₂, and C₃ from O, each group of heirs would be entitled to a one-third undivided interest in Blackacre for division among them. Hence GC₁ and GC₂, the heirs of C₁, each has an undivided one-sixth interest in Blackacre; GC₃, GC₄, and GC₅, the heirs of C₂, each has an undivided one-ninth interest in Blackacre; and GC₆, GC₇, GC₈, and GC₉, the heirs of C₃, each has an undivided one-twelfth interest in Blackacre.
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2. Same facts as Illustration 1, except that the controlling statute governing intestate takers of real property from O would divide Blackacre on a per capita basis when all the intestate takers are in the same degree of relationship to the decedent. Under the rule of subsection (1), GC1, GC2, GC3, GC4, GC5, GC6, GC7, GC8, and GC9 would each be entitled to an undivided one-ninth interest in Blackacre.

3. O transfers Blackacre by will “to O's heirs and the heirs of my deceased wife W.” The heirs of O under the applicable statute governing intestate takers of real property are his brothers B1 and B2. The heirs of W under the applicable statute governing intestate succession of real property are her brothers B3, B4, and B5. Under the rule of subsection (2), an undivided one-half interest in Blackacre would go to B1 and B2, the heirs of O, for division between them, and an undivided one-half interest in Blackacre would go to B3, B4, and B5, the heirs of W, for division among them.

4. O transfers Blackacre by will “to O's wife W for her life, and on her death to O's children, but if any child of O dies before W, such child's heirs to be substituted in such deceased child's place.” O is survived by three children, C1, C2, and C3. C1 dies before W, and the heirs of C1, under the applicable statute governing intestate takers, are GC1 and GC2. W dies. The remainder interest in Blackacre goes to two classes; one is the children of O and the other is the heirs of C1. The gift to the heirs of C1 is a substitutional gift, and hence its amount is controlled by the share that would have gone to C1 had C1 lived. Thus an undivided one-third interest in Blackacre goes to GC1 and GC2, the heirs of C1, for division between them.

REPORTER'S NOTE TO SECTION 29.8

1. Comparison with present state of the law—The rules of this section are supported by judicial authority, and are consistent with § 311 of the first Restatement.

2. Justification for the rules of this section—When a donor names the “heirs” of certain persons as beneficiaries, it ordinarily indicates both that the donor had in mind the pattern of descent provided by law, and that the primary objects of the donor's bounty were the designated persons who could not themselves be beneficiaries. When the beneficiaries form a single family, the intestate succession laws specify what is presumed to be the common intention of ancestors with regard to the disposition of their property and the “natural” pattern of descent within the family. When the beneficiaries do not form a single family, the use of a term such as “heirs” to describe the class ordinarily indicates a primary division into family groups; in particular, a bequest or devise to the heirs of the
testator and of the testator's spouse ordinarily reflects the testator's view that the property bequeathed or devised belonged in life to the two marriage partners equally.

3. Cases supporting the rules of this section—

a. When there is a common ancestor. In Sandford v. Stagg, 106 N.J.Eq. 71, 150 A. 187 (1930), the testator left his children a life estate, with remainder "unto their respective heirs forever." The court held: "[T]he method of distribution of the remainder depends of course on the intention of the testator, who was free to provide according to his wish as to whether the descendants of his children should all share on an equal basis in the distribution of the corpus of the estate, or whether on the other hand the descendants of each of his children, whether more or less numerous, should themselves share the one-third interest which their parent enjoyed. . . . In my opinion the distribution should be made per stirpes [with testator's children as the stocks]. . . . [T]he use of the word 'respective' necessarily implies a substitutional or representational intention by the testator. . . . The use of the word 'heirs' instead of the word 'children' carries with it the idea of representation. . . . There are several cases cited by complainant's counsel in which the court made a distribution per capita, but an examination of these cases shows that in every such instance the will provided that the corpus should be divided equally or used some equivalent expression." Id. at 72-74, 150 A. at 188.

In Lobe v. Goldheim, 153 Md. 248, 138 A. 5 (1927), the remainder after life estates in the testator's wife and children was left "to the heirs of all my said children absolutely." All of the testator's grandchildren survived the life tenants, and the court ordered a per stirpes distribution: "[I]t is highly improbable that he should have had in mind any particular individual or class as constituting the heirs of his children. If one of the testator's grandchildren had died leaving direct descendants prior to the death of the last surviving child of the testator, it could scarcely be contended that the great-grandchildren of the testator should take equally with the grandchildren; yet the term 'heirs' would as certainly include great-grandchildren as grandchildren." Id. at 252, 138 A. at 5-6.

The above cases arose under per stirpes descent statutes; in a state with a hybrid descent statute, the rule of subsection (1) calls for a per capita distribution in the same fact situation. See, e.g., In re Love's Estate, 362 Pa. 105, 66 A.2d 238 (1949); "the second question is whether the heirs [of testator's brother and sister] shall be divided into two classes and each class receive one-half of the estate, or whether they shall be treated as one class and each [nephew or niece] receive a per capita share, the issue of a deceased [nephew or niece] taking the parent's share? . . . In a distribution among 'issue' . . . or 'heirs' . . . those nearest in degree take per capita, and those more remote a deceased parent's share." Id. at 108-109, 66 A.2d at 240-241. See also Casey v. Gallagher, 11 Ohio St.2d 42, 227
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N.E.2d 801 (1967), discussed in item 5b of the Reporter's Note to Section 29.4. Had the testator not expressly called for his children to be taken as the stocks in a stirpital distribution to their heirs, "the root generation would be the nearest generation of heirs at law having living members." Id. at 53, 227 N.E.2d at 810.

In cases within the scope of this section, where classes are already mentioned in the language of the dispositive instrument, the likelihood that "share and share alike" or words of similar import refer to classes rather than to individuals is greatest. In Runyan v. Rivers, 99 Ind.App. 680, 192 N.E. 327 (1934), the testatrix called for the residue of her estate to be "divided equally between the heirs of my deceased brothers and sisters, [A, B, C, and D]." The court held, "to be divided equally" may be applied as well to a division among classes as among individuals. . . . [A] gift of personal property to 'heirs' is, in effect, to those who would take under the statute of descent and distribution; and in the same proportions as they would take under such statute. . . . The [per capita] rule has been so far abrogated by the courts of the different states that it no longer has any practical effect in the construction of wills, and the weight of the authority is to the effect that the beneficiaries take per stirpes, unless . . . the language of the will [does not] leave the question of distribution in doubt." Id. at 658–684, 192 N.E. at 328–329.

In Bayley v. Beekman, 62 Misc. 567, 117 N.Y.S. 88 (1909), affirmed, 197 N.Y. 599, 91 N.E. 1110 (1910) where the testatrix left her estate "to the children who may then be living of my [named] sisters . . . or to the heirs of either or any of them . . . per capita and not per stirpes," and the court held, "[I]f beneficiaries under a will be of different degrees of relationship, the presumption ordinarily is that the two classes should not be benefited equally, unless the intention to do so can be clearly and unequivocally gathered from the instrument itself. . . . Had the [substitutional gift to the heirs] been bracketed . . . there would be but little question that the distribution per capita and not per stirpes referred to such a distribution among the nephews and nieces only. . . . The sense of the words is not altered by the fact that the brackets do not appear in the will, as they are clearly separated from the context both by commas and by the fact that they were added after the original drafting of the document. Id. at 569–572, 117 N.Y.S. at 89–91.

On the other hand, some courts find that any language indicating equality of distribution does unequivocally manifest a contrary intent on the part of the donor. In Houts v. Jameson, 201 N.W.2d 466 (Iowa 1972), discussed in item 3b of the Reporter's Note to Section 29.7, the court held that in a gift "to the heirs of my nephews [A], now deceased . . . [and to B's] heirs in the event he is not living at the time, in equal shares, share and share alike." . . . The term 'heirs' in a testamentary gift to the heirs of two or more persons is usually used in the sense of 'children' or 'descendants,' and a per capita distribution is indicat-
ed at least, where, as here, testator had used some term implying equality of division. . . . In short, and in this contingency ([B] not surviving), we hold testator used 'heirs' to indicate those who shall inherit and the words, 'in equal shares, share and share alike' to indicate how they shall inherit." *Id.* at 468-469. See also Bolon v. Dains, 54 Ill.App.2d 64, 203 N.E.2d 293 (1964) ("Where a legacy is to . . . the children of A and B, it will be presumed . . . that such children were to share per capita. [T]estator's intention that final distribution be made on a *per capita* basis is specifically expressed by his use of the words 'share and share alike.' Plaintiffs' theory could be adopted only by ignoring such plain provision and substituting in lieu thereof a provision for *per stirpes* distribution" among the heirs of testator's daughters' bodies. *Id.* at 72-73, 203 N.E.2d at 297.)

b. When there is no common ancestor. As discussed in Illustration 3, a gift to the heirs of the donor and of the donor's spouse will ordinarily be construed as calling for a division into two equal shares, one going to each set of heirs. Such gifts, however, are usually accompanied by language implying equality of division, so that the usual controversy arises as to the interpretation of such language. In Tucker v. Nugent, 117 Me. 10, 102 A. 307 (1917), the testatrix called for the remainder after a life estate in her husband to be "equally divided between my heirs and the heirs of [my husband]," and for the corpus of the residuary trust to go "to my legal heirs and the legal heirs of my said husband . . . share and share alike." The court held that "divided equally between" obviously referred to a division between the two classes of heirs, unless "share and share alike" were construed to call for a per capita division and to override the language of the earlier clause. The court held, "it is a well-recognized rule of testamentary construction that a devise or bequest to heirs designates not only the persons who are to take, but also the manner and proportions . . . that is, *per stirpes*. . . . The words 'share and share alike' have caused us some hesitation, for they have been usually construed to call for an equal division among all the persons entitled. But the authorities hold that such construction is not imperatively necessary, especially where, as in this case, the will makes a division of property equally between two designated classes, since the words may be satisfied by being applied to the division between the classes, and not to that between the individuals . . . the case at bar is plainly distinguishable from Doherty v. Grady, 105 Me. 36, 72 Atl. 869 [1908], where the provision was 'to my legal heirs, in equal shares'; for in that case there was no division between two classes." *Id.* at 15, 102 A. at 309-310. See also Dickerson v. Yarbrough, 212 S.W.2d 975 (Tex.Civ.App.1948), discussed in item 5 of the Reporter's Note to Section 28.5.

But see Ewing v. Gibson, 199 Va. 860, 102 S.E.2d 327 (1958), where the testator left the residue of his estate "in equal shares, to my lawful heirs and the lawful
heirs of my beloved wife, [A], who departed this life on April 19, 1952, in accordance with the Statutes of the State of Virginia."
The court held that distribution should be per capita: "Since there is, of course, no statute of descent under which a wife's heirs will inherit from her husband, [appellants] say, the reference to the statute shows the intent to create two separate classes . . . each class to take the same share as the other. A reading of this paragraph as a whole shows that this contention is not sound. The reference . . . is merely to identify those who take . . . How they are to take is otherwise prescribed. They are to take 'in equal [shares]' . . . To follow the interpretation urged by the appellants would mean that the beneficiaries would not get 'equal shares'. . . . There would be a further inequality of division between the wife's [two] brothers and sister on the one hand, and the [nine] children of the deceased sister on the other. There is nothing in the language used by the testator to indicate that such was his intention." Id. at 862-863, 102 S.E.2d at 328-329.

In Rogers v. Burress, 199 Ky. 766, 251 S.W. 980 (1923), "the only controversy is whether . . . [testator's] numerous heirs and the sole heir of his wife take per capita and as one class, as the [appellants] contend, or, as two classes and per stirpes, as the lower court adjudged. . . . In every one of the above cases relied on by appellee, where similar words were used . . . and a per stirpes distribution was ordered, the rule [that 'share and share alike' ordinarily indicates a per capita division] was recognized, [but] there was found in the will itself language that showed [per stirpes] distribution to have been intended by the testator, or which rendered his meaning so obscure as to permit of oral testimony to explain the ambiguity. In this will there is no other provision or language that can control, or even aid in the construction of the provision that the property of the testator 'shall descend jointly and equally to my heirs and the heirs of my wife.' . . . But even if we could resort to the extraneous facts . . . we could not ignore, as does counsel for the appellee, that Mrs. Rogers' separate estate . . . passed entirely to her heirs." Id. at 767-770, 251 S.W. at 981-982.

4. Cases contrary to the rules of this section—As discussed in the Reporter's Notes to §§ 29.6 and 29.7, cases rejecting the basic rule that "heirs," even the "heirs" of a class, should ordinarily take according to the statute, are almost nonexistent. But see Records v. Fields, 155 Mo. 314, 55 S.W. 1021 (1900), discussed in item 4 of the Reporter's Note to Section 29.6, in which a gift to the "heirs" of the testator's two brothers was divided initially into two equal shares, but was then divided per capita within each class despite the court's holding that the phrase "equally divided" in the will applied only to the division into two classes.
Chapter Thirty

EFFECT OF LIMITATIONS TO "HEIRS," "HEIRS OF THE BODY," "NEXT OF KIN," OR "RELATIVES" UNDER THE RULE IN SHELLEY'S CASE AND THE DOCTRINE OF WORTHIER TITLE

Introductory Note

Section

30.1 Rule in Shelley's Case
30.2 Transfer to the Heirs or Next of Kin of the Transferor

Introductory Note: The purpose of this chapter is to state the rules that cause the words "heirs," "heirs of the body," "next of kin," or "relatives" to be either words of limitation or a nullity.

A limitation to "A and his heirs" has been traditionally recognized as the commonly accepted formula for the creation in A of an estate in fee simple. In such a limitation, therefore, the words "and his heirs," which, under other circumstances, may be sufficient to designate a donee, are words of limitation designating the extent of the interest of A.

In connection with two other types of limitations where the words "heirs," "heirs of the body," "next of kin," or "relatives" are used, certain rules developed that prevented such group designations from being words of purchase. The first type of limitation involved a transfer of land to "A for life, then to the heirs of A." Such a limitation presented the problems involved in the Rule in Shelley's Case (see § 30.1) and, if the limitation was controlled by the Rule in Shelley's Case, the words "the heirs of A" were words of limitation, not words of purchase, and described a remainder interest in fee simple in A. When, as in this example, there were no interests in other persons in the land, A's life estate in possession and A's remainder in fee simple merged and A had an estate in possession in fee simple. Though the Rule in Shelley's Case has been widely abolished prospectively by statute (see Statutory Note to Section 30.1), and should be abolished prospectively to the extent it has not been abolished prospectively by statute, it cannot be ignored because it continues to apply to the period prior to its prospective abolition and may come into the picture in the process of title examination.

The second type of limitation involves an inter vivos transfer of land to the heirs of the donor. Such a limitation presents the problems involved in the inter vivos aspect of the Doctrine of

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Worthier Title (see § 30.2) and, if the limitation is controlled by this Doctrine, the words which purport to designate the heirs of the donor as the donees are a nullity, in the sense that they designate neither a donee nor the extent of the interest of some other described person. The statutory abolition of this doctrine is not nearly as widespread as the statutory abolition of the Rule in Shelley's Case (see Statutory Note to Section 30.2).

§ 30.1 Rule in Shelley's Case

(1) Under the Rule in Shelley's Case, if a transfer of real property was made by an owner in fee simple to a designated person for life and the same transfer also limited a remainder, either mediate or immediately, to the heirs or to the heirs of the body of the designated person, and the estate for life and such remainder were both legal or both equitable, then the transfer created a remainder in the designated person and the words describing the heirs or the heirs of the body were words of limitation determining the type of such person's estate in remainder.

(2) The estate for life in the designated person and the remainder in the designated person that resulted from the operation of the Rule in Shelley's Case merged unless there was an intervening estate.

(3) The Rule in Shelley's Case has been abolished prospectively in practically all States and should be abolished prospectively by judicial decision to the extent it has not been abolished prospectively by statute. The Rule in Shelley's Case was not applicable to a transfer in personal property.

Special Note: In the formulation of the Rule in Shelley's Case it was sometimes said to operate when the designated person was given a "freehold." Subsection (1) deals only with limitations in which the designated person was given an estate for life. No American case has been found where the Rule was applied to a limitation where the designated person had an estate of freehold other than an estate for life.

Illustrations:

1. O transferred Blackacre by deed "to O's son S for life, then to the heirs of S." If the Rule in Shelley's Case applied, the remainder limited "to the heirs of S" became a remainder in S in fee simple. The rule stated in subsection (2) applied and the estate for life in S merged with the estate S had in
remainder and S had an estate in fee simple absolute in possession.

2. O transferred Blackacre by will "to O's daughter D for life, then to the heirs of the body of D." If the Rule in Shelley's Case applied, the remainder limited "to the heirs of the Body of D" became a remainder in D in fee tail. The rule stated in subsection (2) applied and the estate for life in D merged with the estate D had in remainder and D had an estate in fee tail in possession. The controlling local statute on fee tail estates would then be applied to determine the final state of the title.

Comment on Subsections (1) and (2):

a. Historical background and rationale. The rule stated in subsection (1) has been known as the Rule in Shelley's Case. It originated at least as early as the 14th century [see Abel's Case, Y.B. 18 Edw. II, 577 (1324)]. The conditions existing at the time the Rule originated afford several justifications or explanations for the adoption of the Rule.

The transfer of property inter vivos at that time was unusual. On those rare occasions when an owner wished to make such a transfer, the assent of the overlord normally was required. Furthermore, a devise of land upon death was forbidden by a rule of law except with regard to certain types of tenure in certain localities, as for example, the species of socage tenure called gavelkind tenure. Therefore, when property came into the ownership of a person it was usually still in that person's ownership at the time of such person's death and passed by descent to such person's heir. Thus, a transfer "to A for life and then to A's heirs" could be regarded as spelling out what was expected to happen in the normal course of events and as meaning in the mind of the transferor the same thing as a transfer "to A and his heirs." Under this explanation the Rule in Shelley's Case originally effectuated the intention of the transferor.

Another justification for the origin of the Rule is found in the preference for title by descent rather than title by purchase, which preference had its origin in the peculiarities of the feudal system. Under the feudal system the overlord was entitled to the valuable incident of relief (an early form of inheritance tax) when an heir inherited property. In addition, as to many types of land ownership, the overlord was entitled also to the valuable incidents of wardship and marriage when an inheriting heir was a minor. These incidents were preserved in a transfer "to A for life and then to A's
heirs" only if the heir of A was deemed to take by descent from A, rather than by purchase under the terms of the transfer.

At the time the Rule in Shelley's Case originated, what later became known as a "contingent remainder" could not be created. When a transfer was made "to A for life and then to A's heirs," the limitation to the heirs would necessarily be contingent because a living person can have no heirs. Thus the courts had to treat the words "then to A's heirs" either as words of limitation descriptive of an estate in A, or as of no effect. Faced with this situation, the courts chose to give some effect to the words by treating them as words of limitation.

Even after contingent remainders were recognized, the doctrine of primogeniture made it impossible to read the plural "heirs" as meaning takers by intestacy in the first generation, since it was of the essence of the doctrine of primogeniture that there was only one heir in any generation. Even if daughters inherited property as co-parceners, they were considered as a single heir. Consequently, some meaning other than that of the heir of A in the first generation had to be ascribed to the plural word "heirs." The meaning which best fitted legal tradition was that of "heirs in successive generations." Thus construed, the meaning became substantially equivalent to "A and his heirs" and hence could be construed to create in A an estate in fee simple.

The application of the Rule in Shelley's Case today defeats the intention of the transferor. The Rule has been widely abolished prospectively by statute (see Statutory Note to this section). As stated in subsection (3), it should be eliminated prospectively by judicial decision to the extent it has not been abolished prospectively by statute.

b. Requirement if Rule applied—subject matter of the transfer must be land. The rule stated in subsection (1) applied only to transfers of interests in land. It did not apply, however, if the subject matter of the transfer was a non-freehold interest in land because, in such case, the requirement of an estate for life in the designated person was impossible of fulfillment (see Comment c).

If the subject matter of the transfer was both land and things other than land, the rule of subsection (1) applied only to the disposition of the land (see Comment s on dispositions of things other than land). The rules of equitable conversion were applicable to determine whether the subject matter of the transfer was land or other than land.
The consideration of easements and profits is not included in the material on donative transfers and, therefore, no consideration is given herein to the application of the rule stated in subsection (1) to such interests in land.

c. Requirement if Rule applied—limitation of an estate for life to a designated person. The rule stated in subsection (1) required that there be limited in favor of a designated person an estate for life. Since an interest for life in a non-freehold estate is not an estate in real property for life, the rule stated in subsection (1) did not apply in such case. The Rule in Shelley's Case was avoided by a limitation “to A for 99 years if A so long lives, then to A's heirs.” The required estate for life could be defeasible by the occurrence of an event stipulated in a special limitation, condition subsequent, or executory limitation (see Illustration 3). The estate for life could be measured in duration by the life of a person other than the designated person (see Illustration 4). The estate for life did not have to be an interest in possession but could be an interest in remainder (see Comment n). The estate for life could also be in an undivided interest in the land transferred (see Comment r). The fact that the designated person of the required estate for life was also given a power of disposal, qualified or unqualified, did not prevent the application of the rule stated in subsection (1).

When an attempted estate for life in the designated person failed because it was in terms created to last for a restricted time only, which time expired prior to the time when the transfer became operative, the requirement of an estate for life was not satisfied. The most common event that brought about such a termination prior to the time when the transfer became operative was the death of the intended life tenant (see Illustration 5-I). It could happen in other ways. The requirement of an estate for life was not prevented from being satisfied, however, by a disclaimer by the designated person of the interest limited in such person's favor (see Illustration 5-II).

If the person designated to take the estate for life was unborn at the time the dispositive instrument took effect, the required estate for life came into existence immediately on the birth of such person and the requirement discussed in this Comment was satisfied (see Comment n, Illustration 21).

Illustrations:

3. O transferred Blackacre by deed “to O's daughter D during widowhood, then to her heirs.” The required estate for life was present. The rule stated in subsection (1) operated to give D an indefeasibly vested remainder in fee simple. The
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rule stated in subsection (2) applied, and D's remainder merged with her estate for life and D had an estate in possession in fee simple absolute.

4. O transferred Blackacre by will "to O's daughter D for the life of X, then to the heirs of D." The required estate for life was present. The rule stated in subsection (1) operated to give D an indefeasibly vested remainder in fee simple. The rule stated in subsection (2) applied, and D's remainder merged with the estate for life and D had an estate in possession in fee simple absolute.

5. O transferred Blackacre by will "to O's son S for life, then to S's heirs."
   I. S died before O. The required estate for life was not present and the rule stated in subsection (1) did not apply.
   II. S disclaimed his interest under the will. The required estate for life was present at the date the will took effect, and therefore the rule stated in subsection (1) applied to give S an indefeasibly vested remainder in fee simple. The rule stated in subsection (2) applied, and S's remainder merged with his estate for life so that S had an estate in possession in fee simple absolute. S's disclaimer was of an estate in fee simple absolute.

d. Requirement if Rule applied—designated person. The designated person could be either the transferor or some other designated person. Thus, a transferor could set up a trust for the benefit of himself or herself for life with a limitation of a remainder to his or her own heirs. The rule stated in subsection (1) applied to such a limitation, if the other requirements for such applicability were satisfied. The rule stated in § 30.2 also applied when the transfer was by deed and the designated person was the transferor (see § 30.2, Comment g).

e. Requirement if Rule applied—a remainder. The rule stated in subsection (1) required that the transfer include a limitation of a remainder. Thus if the future interest limited after the estate for life was an executory interest, this requirement was not satisfied (see Illustration 6). When the interest following the estate for life became a remainder after the effective date of the conveyance, the requirement of a remainder was then satisfied and the rule stated in subsection (1) applied (see Comment p). The fact that the remainder was only in an undivided portion of the land was immaterial (see Comments q and r). The remainder required for
the operation of the rule stated in subsection (1) could be implied as well as created by specific language.

Whenever the transferor had a future interest of such a type that he or she could transfer it to "A for life, then to the heirs of A" the requirement discussed in this Comment could be satisfied even though the future interest of the transferor was a reversion, a possibility of reverter, or an executory interest.

Illustration:

6. O transferred Blackacre by deed "to O's son S for life, then to O's daughter D and her heirs, but if D dies without issue, to S's heirs." The interest limited in favor of the heirs of S was an executory interest and, therefore, the requirement of a remainder was not satisfied and the rule stated in subsection (1) did not apply. The heirs of S took as purchasers under the limitation in their favor. If D died without issue before S, the limitation to S's heirs became a remainder and the rule of subsection (1) then applied.

f. Requirement if Rule applied—remainder to heirs or heirs of the body of the designated person: English background. Though the Rule in Shelley's Case was stated as a rule of law, there always was a construction problem presented in connection with the requirement of the Rule that there must be a remainder limited to the heirs or heirs of the body of the designated person. This problem of construction caused most of the litigation concerning the Rule in Shelley's Case. To understand fully the English approach to this construction problem, it must be realized, as is pointed out in Comment a, that the Rule in Shelley's Case originated under the system of primogeniture, in pursuance of which there could be only one heir in any generation, and originated when the alienation of property was an infrequent and sometimes forbidden occurrence. In such a society the words "heirs" and "heirs of the body" acquired a significance different from the modern interpretation of such words. Such words were construed to describe all the heirs or heirs of the body the ancestor might have from generation to generation and not just the person (for example, the eldest son) or persons (daughters taking as a single heir) who took by intestacy in the first generation. Thus, in England, the requirement of the Rule in Shelley's Case that there must be a limitation to the heirs or heirs of the body of the ancestor meant that the limitation had to be construed to describe the heirs or heirs of the body of the ancestor from generation to generation. This idea was sometimes expressed by the statement that the limitation had to be to the heirs or heirs of the body in an indefinite line of inheritable succession.
The technique adopted by the English courts to determine whether the requirement under discussion was satisfied was to insist that the words "heirs" or "heirs of the body" be given the technical meaning just stated, even though the transferor used somewhat inconsistent words, unless those inconsistent words made it perfectly clear that the transferor did not mean to use the words in their technical sense. The words of Lord Redesdale in the case of Jesson v. Wright, 2 Bligh 1 (1820) are: "The rule is that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." This same thought was expressed by some English judges in the rule that where there is a general intent, which would be the intent inferred from the technical meaning assumed for the words "heirs" or "heirs of the body," and a particular intent, which would be the intent to be deduced from inconsistent words, the particular is to be sacrificed to the general intent. Thus, under the English approach to this problem of construction, the technical meaning of the words "heirs" or "heirs of the body" was adhered to, unless the other words conclusively showed that the conveyor had used them with some other meaning.

The American cases purported to adopt the technique of the English cases for the solution of this problem of construction. But, in fact, many departed from the English approach by rejecting the technical significance assumed for the words "heirs" or "heirs of the body" in England in favor of a new technical meaning, namely, those persons who take as heirs or heirs of the body on the death of the ancestor intestate, and ruling that the words "heirs" or "heirs of the body" as thus construed were sufficient to make applicable the Rule in Shelley's Case (see Comment g). This construction corresponded with the natural meaning which a transferor in modern times had when he made a limitation in favor of the heirs or the heirs of the body of a designated person. Thus, a transferor of land "to A for life, then to the persons who will inherit real property from A on his death intestate" came within the Rule in Shelley's Case under the approach of these American cases but did not under the English approach.

The American approach to the solution of this problem of construction also permitted a limitation to the heirs or the heirs of the body of a designated person to be more easily construed to have a meaning other than the technical one (see Comment g).

**g. Requirement if Rule applied—remainder to heirs or heirs of the body of the designated person: American rule.** The rule stated in subsection (1) required that there be a remainder limited to the heirs or the heirs of the body of the designated person.
person. Such a remainder was limited when the language used to describe it was construed to refer:

1. to the persons who as heirs would inherit the real property of the designated person on his or her death intestate (see Illustration 7); or

2. to the persons who as heirs of the body, general or special, would inherit the real property of the designated person on his or her death intestate (see Illustrations 8 and 12).

The problem of construction with which the court was here confronted was to determine the persons whom the transferor intended to describe by the language used in the limitation of the remainder. The court was confronted with exactly the same construction problem when it was called upon to ascertain the beneficiaries under a gift to "heirs" or "heirs of the body" of some person, when the Rule in Shelley's Case was inapplicable. The problem as to what persons the transferor intended to describe by the language used was the same whether the issue was the satisfaction of this requirement of the Rule in Shelley's Case or the ascertainment of the takers under a gift to the "heirs" or "heirs of the body" of a designated person. Consequently, the material dealing with this construction problem is developed separately so that it can be utilized in connection with any type of problem where it becomes significant (see Chapter Twenty-Nine).

The terms "heirs," "heirs of the body," "heirs male of his body," "heirs of his body by his wife, Mary," were all sufficient to meet the requirement discussed in this Comment, unless an intent was found to use them in other than their true sense. They were used in other than their true sense whenever they were construed to mean children (see Illustration 11); whenever a person was excluded who otherwise would come within the term employed; whenever no statute of descent was to be employed to ascertain the takers; whenever the statute employed to ascertain the takers was the one applicable to other than real property or, even though it was applicable to real property, it was not the same as the one that would be employed on the death of the designated person intestate; whenever the time at which the statute was to be applied was other than the time of the death of the designated person (see Illustrations 9 and 10); whenever the group ascertained by the application of a statute was required to survive to some future date; or whenever the share to be received by each person was different from the share given him or her by the statute.

If the word "heirs" was necessary to create an estate of inheritance by deed and the dispositive instrument was a deed, the requirement of the Rule in Shelley's Case discussed in this Com-
ment was satisfied only by the word "heirs." Wherever certain words were not required to create an estate in fee simple or an estate in fee tail, other combinations of words could be construed to describe the heirs or the heirs of the body of the designated person. For example, if the word "issue" primarily meant the persons who as heirs of the body would inherit the real property of the designated person on his or her death intestate, a remainder limited to the "issue" of the life tenant satisfied the requirement herein discussed. The word "children" did not normally satisfy the requirement stated in this Comment because, in the absence of a finding of a contrary intent, it excluded persons who might be the heirs of the designated person, namely his or her descendants more remote than those of the first generation. The mere fact that the persons described turned out to be the same as the persons who were the heirs or the heirs of the body of the designated person on his or her death intestate did not satisfy the requirement herein discussed. The limitation had to be in such form that necessarily the persons described would be the heirs or the heirs of the body of the designated person at such person's death.

Illustrations:

7. O transferred Blackacre by will "to O's son S for life, then to the persons who on the death of S will inherit his real property." The remainder was limited to the heirs of the life tenant and the requirement stated in this Comment was satisfied.

8. O transferred Blackacre by will "to O's daughter D for life, then to D's issue." The word "issue" was construed to mean the heirs of the body of D. The remainder was limited to the heirs of the body of the life tenant and the requirement stated in this Comment was satisfied.

9. O transferred Blackacre by will "to O's son S for life, then to such persons as are the heirs of S at my death." The remainder was limited to a group ascertainable before the death of S, and therefore the remainder was not limited to the heirs of the life tenant and the requirement stated in this Comment was not satisfied.

10. O transferred Blackacre by deed "to O's son S for life, then to O's daughter D for life, then to the heirs of S determined as of D's death." The remainder was not limited to the persons who would inherit the real property of S at his death, and therefore the remainder was not limited to the heirs of the life tenant and the requirement stated in this Comment was not satisfied.
11. O transferred Blackacre by deed "to O's son S for life, then to the heirs of S, but if S dies without immediate offspring, then to S's brother C." The word "heirs" meant "children" in this disposition, and therefore the remainder was not limited to the heirs of the life tenant and the requirement stated in this Comment was not satisfied.

12. O transferred Blackacre by deed "to O's son S for life, then to the heirs of the body of S and his wife W." The remainder was construed to mean the heirs of the body of S by W. Thus, the remainder was limited to the heirs of the body of the life tenant and the requirement stated in this Comment was satisfied.

h. Requirement if Rule applied—estate for life and remainder must both be legal or both be equitable. The rule stated in subsection (1) required that the estate for life of the designated person and the required remainder both be of the same quality, that is, both be legal or both be equitable (see Illustration 13). When a transferor transferred a legal interest in land to a trustee for the benefit of the designated person for life with a remainder to the heirs of such person, it was important to determine whether the active duties of the trustee extended to the remainder or were confined to the duration of the life interest. If the latter construction was made, the rule stated in subsection (1) was inapplicable, because the life interest was equitable and the remainder was legal. The duty of the trustee to convey at the termination of the estate for life, however, was sufficient to extend the active duties of the trustor to the remainder.

The terms of a trust could direct the trustee to convey certain land to a designated person for life with a remainder to such person's heirs. If the directions to the trustee were deemed mandatory as to the form of the conveyance, then the designated person was entitled to demand a conveyance in such form and the rule stated in subsection (1) applied to the conveyance when made. The directions to the trustee, however, might not require that the trustee follow any particular form in the conveyance in favor of the designated person and such person's heirs. In such case, the directions normally indicated the desire of the transferor to create separate interests in the designated person and in such person's heirs. Thus, the trustee was not privileged to use a form of conveyance to which the rule stated in subsection (1) was applicable (see Illustration 14).

At the time the transfer took effect the estate for life in the designated person might be of one quality and the required remainder another, but latter this situation might change so that both
became legal or both became equitable. If such change did occur after the effective date of the dispositive instrument and occurred automatically as a result of the terms of the instrument, the requirement that the estate for life and the required remainder both be legal or both be equitable was then satisfied and the rule stated in subsection (1) applied, if the other requirements were satisfied (see Comment p, Illustration 24). Once the two estates became the same in quality, so that the rule stated in subsection (1) applied, no subsequent change in the quality of either was material (for a similar problem, see Comment o).

Illustrations:

13. O transferred Blackacre by deed “to T and his heirs in trust to collect the rents and profits and pay the same to O's son S for life, then the land to belong to S's heirs.” The active duties of the trustee applied only to the estate for life of S. Thus, the estate in S was equitable and the remainder in his heirs was legal. The rule stated in subsection (1) did not apply.

14. O transferred Blackacre by deed “to T and his heirs in trust to collect the rents and profits and pay the same to O's son S for life, then to convey Blackacre so as to secure its benefits for O's daughter D for life and then to her heirs.” The trustee was not privileged to make a conveyance in such form as to bring into operation the rule stated in subsection (1), which would give D more than an estate for life.

i. Requirement if Rule applied—estate for life in the designated person and the required remainder must be created by the same dispositive instrument. The estate for life in the designated person and the required remainder must both have originated in the same dispositive instrument (see Illustrations 15 and 16). If, at the date the dispositive instrument took effect, the estate for life in the designated person and the remainder in such person's heirs were not both legal or both equitable and a subsequent transfer of one of the interests occurred which made them both the same in quality, the rule stated in subsection (1) did not apply because the requirement discussed in this Comment was not satisfied. If they both became legal or both became equitable automatically as a result of the terms of the original instrument, however, then the requirement discussed in this Comment did not prevent the operation of the rule stated in subsection (1) (see Comment p). Likewise, if under the terms of the original instrument the limitation to the heirs of the designated person started out as an executory interest and later, by virtue of the terms of the original instrument, the executory interest was converted into a remainder, the estate for life in the
designated person and the remainder originated in the same instrument (see Comment p).

Illustrations:

15. O transferred Blackacre by deed "to O's son S for life, then to the heirs of O's daughter D." S then transferred S's estate for life to D. The estate for life in D and the remainder limited to the heirs of D did not originate in the same dispositive instrument. The rule stated in subsection (1) did not apply.

16. O transferred Blackacre by deed "to O's son S for life." O left a will in which there was a devise of O's reversionary interest in Blackacre "to S's heirs." The required estate for life and the limitation to the heirs of the life tenant did not originate in the same dispositive instrument. The rule stated in subsection (1) did not apply.

j. Effect if the rule stated in subsection (1) was inapplicable. The rule stated in subsection (1) was a rule of law. Thus, when the requirements for its operation were satisfied, it applied even though the transferor specifically provided that the Rule in Shelley's Case should not apply, or that the designated person should have an estate for life only, or that the heirs should take as purchasers. The draftsman of an instrument, however, could prevent the operation of the rule stated in subsection (1) and could carry out the intention of the transferor by drafting the provisions of the dispositive instrument so that one of the essential requirements previously discussed was not satisfied. Thus, if A wanted to create in B an estate for life in land followed by a remainder in such land in the heirs of B, A could do it (1) by giving B an estate for years rather than an estate for life ("to B for 99 years if B so long live, then to B's heirs"); (2) by creating a springing executory interest in the heirs of B rather than a remainder ("to B for life and one day after B dies to B's heirs"); (3) by creating the estate for life in B and the remainder in B's heirs in such a way that one was legal and the other was equitable ("to T in trust to collect the rents and profits and pay the same to B for life and on B's death Blackacre to belong absolutely to B's heirs"); (4) by creating the estate for life in B in one instrument and the remainder in the heirs of B in another instrument. This listing of the ways in which the rule stated in subsection (1) could be avoided is not exhaustive but includes those which were most obvious.

k. Operation if Rule applied—in general. When the various requirements for the application of the rule stated in subsection (1) were satisfied, the effect was the same as if the remainder
had been limited to the designated person. The extent of interest
thus received by such person depended on the form of the limitation
of the remainder. If the remainder was to such person's heirs, he
or she had a remainder in fee simple. If the remainder was to the
heirs of such person's body, general or special, he or she had a
remainder in fee tail, general or special (the effect, on the operation
of the rule stated in this section, of the local law on estates in fee
tail had to be considered), or in some jurisdictions a remainder in
fee simple conditional (in some states the estate in fee simple
conditional is recognized).

The rule stated in subsection (1) operated only to convert what
appeared to be a remainder in the heirs or the heirs of the body of
the designated person into a remainder in the designated person.
After the rule stated in subsection (1) had operated, however,
another and different doctrine might apply to the resultant inter-
est and bring about a further change in the effect of the transfer.
The additional doctrine was the rule stated in subsection (2) and is
the Doctrine of Merger. The estate for life in the designated
person and the remainder in such person that resulted from the
operation of the rule stated in subsection (1) merged, unless there
was an intervening estate (see Illustrations 1–5 and 17–28).

1. Operation if Rule applied—intervening estate. The pres-
ence of an estate, which was to take effect in possession after the
termination of the estate for life in the designated person and
before the remainder limited to the heirs or the heirs of the body of
such person, did not prevent the operation of the rule stated in
subsection (1). Such intervening estate did, however, as is stated in
subsection (2), prevent the merger of the designated person's estate
for life and the remainder in such person that resulted from the
operation of the rule stated in subsection (1). The merger could be
prevented even though the intervening estate was subject to a
condition precedent.

When a merger was prevented by the presence of an interven-
ing estate, the designated person then had two estates—an estate
for life and a remainder. He or she might dispose of the remainder
in various ways so that the heirs would not take it at his or her
death.

Illustrations:

17. O transferred Blackacre by deed "to O's daughter D
for life, then to O's son S for life, then to the heirs of D." D
had an estate for life in possession and S had a remainder for
life. The rule stated in subsection (1) operated to give D an
indefeasibly vested remainder in fee simple. D's estate for life
and her remainder did not merge. If S died before D, the intervening estate was eliminated and the two estates in D then merged to give D an estate in fee simple absolute in possession.

18. O transferred Blackacre by deed “to O's daughter D for life, then if X marries D to X for life, then to the heirs of D.” D had an estate for life in possession and X had a remainder for life subject to a condition precedent. The rule stated in subsection (1) operated to give D an indefeasibly vested remainder in fee simple. D’s estate for life and her remainder did not merge. If the condition precedent to X's remainder became impossible of performance before the death of D, as would be the case if X died before D, the intervening estate was eliminated and the two estates in D then merged to give D an estate in fee simple absolute in possession.

m. Operation if Rule applied—estate for life of the designated person was a future interest. The estate for life in the designated person that was required for the operation of the rule stated in subsection (1) did not have to be an interest in possession.

Illustration:

19. O transferred Blackacre by deed “to O's son S for life, then to O's daughter D for life, then to the heirs of D.” S had an estate for life in possession and D had a remainder for life. The rule stated in subsection (1) operated to give D an indefeasibly vested remainder in fee simple. The rule stated in subsection (2) applied, and the two estates in D merged so that D had only an indefeasibly vested remainder in fee simple.

n. Operation if Rule applied—estate for life in the designated person subject to a condition precedent. The estate for life in the designated person might be subject to a condition precedent that was not also applicable to the remainder limited to the heirs or the heirs of the body. In such case, the rule in subsection (1) did not apply until the condition precedent to the life estate was satisfied. If the estate for life was subject to a condition precedent that was also applicable to the remainder, the rule stated in subsection (1) might apply as well as the rule stated in subsection (2).

If the designated person was unborn when the transfer took effect, the estate for life limited in such person's favor was subject to the condition precedent that he or she be born. The same condition precedent would necessarily attach to the remainder limited in favor of the heirs of the unborn person. The rules stated in subsections (1) and (2) applied to such a limitation, however, with the result that there was a remainder in fee simple limited in favor of the designated unborn person (see Illustration 21).
Illustrations:

20. O transferred Blackacre by deed "to O's son S for life and, if O's daughter D marries X, then to D for life, remainder to the heirs of D." The marriage of D to X was a condition precedent to D's estate for life but not to the remainder limited to the heirs of D. The rule stated in subsection (1) did not apply unless and until D married X.

21. D transferred Blackacre by deed "to O's son S for life, then to S's first son (S is a Bachelor) for life, then to the heirs of S's first son." S had an estate for life in possession and a remainder was limited in favor of S's first son for life. The rule stated in subsection (1) operated to limit another remainder in favor of S's first son in fee simple. The two remainders limited in favor of S's first son merged so that only a remainder in favor of S's first son in fee simple was limited.

o. Operation if Rule applied—required remainder subject to an additional condition precedent. When the required remainder was subject to a condition precedent other than that implicit in the use of the words "heirs" or "heirs of the body," the rule stated in subsection (1) applied, but the remainder created in the designated person continued subject to the condition precedent. The fact that the remainder in the designated person was subject to a condition precedent to which the estate for life was not subject would prevent it from merging with the estate for life under the rule stated in subsection (2).

The additional condition precedent of the required remainder could consist in the non-fulfillment of a condition precedent of another interest. In such case, the wording of the limitations might be such that, if the other interest became vested, it might still be subject to defeasance and the required remainder would be converted into an executory interest. This possibility did not prevent the operation of the rule stated in subsection (1), and once the rule had applied the interest would remain in the designated person (see Illustration 23 and compare Comment p).

Illustrations:

22. O transferred Blackacre by deed "to O's daughter D for life, then if D marries X to D's heirs." D had an estate for life in possession. The rule stated in subsection (1) operated to give D a remainder in fee simple subject to a condition precedent. The two estates in D did not merge until after the condition precedent to the remainder had been performed.

23. O transferred Blackacre by deed "to O's daughter D for life, then if O's son S marries Y to S and his heirs, and if S
does not marry Y or if S does marry Y but dies without issue, then to the heirs of D.” D had an estate for life in possession and S had a remainder in fee simple subject to a condition precedent and also subject to defeasance. The rule stated in subsection (1) operated to give D a remainder in fee simple subject to a condition precedent. The two estates in D did not merge. If S married Y, his remainder became vested subject to complete divestiture by his death without issue, and the remainder in D was converted into an executory interest. The rule stated in subsection (1) having applied, the executory interest, into which the remainder had been converted, remained in D.

p. Operation if Rule applied—satisfaction of requirements subsequent to the effective date of the instrument. The rule stated in subsection (1) applied both when the requirements stipulated were satisfied at the time when the dispositive instrument spoke and when they were satisfied subsequent thereto, if the subsequent satisfaction came about automatically in accordance with the terms of the original dispositive instrument. Thus, the requirement that the estate for life in the designated person and the required remainder both be legal or both be equitable could be satisfied subsequent to the effective date of the dispositive instrument (see Illustration 24). Likewise, the required remainder could be established by a change of an executory interest into a remainder (see Illustration 25).

Illustrations:

24. O transferred Blackacre by deed “to T and his heirs in trust to collect the rents and profits and pay the same to O’s son S during the life of X and, on the death of X, to convey Blackacre to S for his life and, on the death of S, Blackacre to belong to the heirs of S.” X died. S, after the death of X, acquired a legal estate for life and there was a limitation of a legal remainder to his heirs. The rule stated in subsection (1) then applied, and S had an indefeasibly vested remainder in fee simple. The rule stated in subsection (2) applied, and S’s estate for life and his remainder merged and S had an estate in fee simple absolute in possession.

25. O transferred Blackacre by deed “to O’s son S for life, then to O’s daughter D and her heirs but, if D dies without issue, to the heirs of S.” D died without issue. The executory interest in the heirs of S was converted into a remainder and the rule stated in subsection (1) then applied. S had an estate for life in possession and S had an indefeasibly vested remainder in fee simple. The rule stated in subsection (2) applied, and
the two estates in S merged and S had an estate in fee simple absolute in possession.

q. Operation if Rule applied—estate for life in the designated person in an undivided portion of the land. If the estate for life of the designated person was in an undivided portion of the land transferred, and the remainder limited in favor of the heirs or the heirs of the body of such person was in all, or a larger undivided portion, of such land, the remainder created in the designated person under the rule stated in subsection (1) was confined to the same fractional share in the land as the estate for life (see Illustration 26). The balance of the remainder limited in favor of the heirs or the heirs of the body of the designated person was taken by the designated group as purchasers. If the remainder limited in favor of the heirs or the heirs of the body of the designated person was in a smaller undivided portion of the land transferred, the rule stated in subsection (1) applied, provided all other prerequisites therefor were satisfied, and if it did so apply, then all of such remainder was converted into a remainder in the designated person.

If the designated person was given, either in terms or by implication, an estate for life in the entire land conveyed, on condition that he or she survived the other co-tenants, such person then had a contingent estate for life in the whole and the rule stated in subsection (1) applied to the entire remainder, limited in favor of the heirs or the heirs of the body of such person if and when the condition was performed (see Comment n). The rule stated in subsection (1) was applicable immediately to the entire remainder if the designated person was a joint tenant for life or a tenant by the entirety with his or her spouse for life because, in theory, each joint tenant and each tenant by the entirety was seised of the whole. In such case, however, the rule stated in subsection (2) would not apply unless and until the designated person became the sole owner of the life estate as the survivor.

Illustration:

26. O transferred Blackacre by deed "to O's son S and O's daughter D as tenants in common for their respective lives, then, on the death of each, an undivided one-half to the heirs of S." S had an estate for his life in an undivided one-half. The rule stated in subsection (1) operated to give S an indefeasibly vested remainder in one-half of Blackacre. The rule stated in subsection (2) applied, and S had an estate in fee simple absolute in an undivided one-half of Blackacre. The heirs of S took the remainder in the other undivided one-half as purchasers.
r. Operation if Rule applied—multiple required estates for life and multiple required remainders. The rule stated in subsection (1) applied to transfers in which were created several estates for life, either as concurrent estates or as successive estates, and several remainders limited to the heirs, or the heirs of the body, of the several life tenants. Once it had been determined that the rule stated in subsection (1) applied to those limitations, then there was presented the further problem of determining the nature of the concurrent estate, whether it was a tenancy in common, joint tenancy, or tenancy by the entirety (see Illustrations 27 and 28). Also there was presented an additional problem of construction when the remainder was limited to the “heirs of the body” of the several life tenants. It had to be determined whether “joint heirs of the body” of the several life tenants, or heirs of the body of each life tenant, was meant. If the several life tenants were married to each other, or capable of becoming husband and wife, and no contrary intent of the transferor was found from additional language or circumstances, the language was construed to mean joint heirs of their bodies. Thus the application of the rule stated in subsection (1) resulted in the creation of a remainder in special tail.

Illustrations:

27. O transferred Blackacre by deed “to O’s son S and O’s daughter D for their lives, then to their heirs.” The local law created a presumption in favor of tenancies in common. S and D had estates for life as tenants in common. The rule stated in subsection (1) applied, and S and D had estates in fee simple absolute as tenants in common.

28. O transferred Blackacre by deed “to O’s son S for life, then to O’s daughter D for life, then to the heirs of S and D.” S had an estate for life in possession and D had a remainder for life. The local law created a presumption in favor of tenancies in common. The rule stated in subsection (1) operated to give S and D indefeasibly vested remainders in fee simple as tenants in common. The rule stated in subsection (2) applied, and an undivided one-half of D’s remainder for life merged with her remainder in fee simple. Thus, S had an estate for life in possession, D had an indefeasibly vested remainder in fee simple in an undivided one-half, D had a remainder for life in the other undivided one-half, and S had an indefeasibly vested remainder in fee simple in such other undivided one-half.
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Comment on Subsection (3):

s. Subject matter of the transfer is other than real property. When the subject matter of the transfer was other than real property and there was a limitation to the heirs of the holder of a life interest, the heirs of the life beneficiary took as purchasers under the terms of the limitation. The meaning of the term "heirs" is set forth in Chapter Twenty-Nine.

STATUTORY NOTE TO SECTION 30.1
(Including Judicial Abolition of the Rule In Shelley's Case)

1. The following statutes provide that when a remainder created by a will or deed is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of the life tenant take as purchasers by virtue of the remainder so limited to them (23 States):

Alabama Code § 35-4-230 (1977) (limitations to "issue" also included)
Florida Stat. § 689.17 (1985) (statute applies in giving effect to "any instrument" and specifically states that the Rule in Shelley's Case is abolished)
Illinois Rev.Stat. ch. 30, ¶ 186 (1985) (statute simply states that Rule in Shelley's Case is abolished)
Iowa Code §§ 557.20–21 (1985) (first statute simply states that Rule in Shelley's Case is abolished, second statute applies where initial transferee receives life estate or "other limited estate")
Kentucky Rev.Stat.Ann. § 381.090 (Michie/Bobbs Merrill 1972) (limitations to "issue" and "descendants" also included)
Massachusetts Gen.L. ch. 184, § 5 (1986) (applies to real property dispositions only)
Mississippi Code Ann. § 89-1-9 (1972)
Nebraska Rev.Stat. § 76-112 (1981) (statute applies in giving effect to "conveyances" and includes limitations to "issue" and "next of kin")
Nevada Rev.Stat. § 111.101 (1985) (applies to real property dispositions only)
New Jersey Stat.Ann. § 46:3-14 (West 1940) (statute applies where initial transferee received "an estate or freehold in any property")
(not necessarily a life estate) and specifically states that it abolishes the Rule in Shelley's Case)

Ohio Rev.Code Ann. § 2107.49 (Anderson 1976) (effective 1840 as to wills, 1941 as to deeds; statute applies to dispositions of real property only and specifically states that it abolishes the Rule in Shelley's Case)

20 Pennsylvania Cons.Stat.Ann. §§ 2517, 6117 (Purdon 1975) (limitations to "issue," "next of kin," and others described by words of similar import included, statutes specifically state that Rule in Shelley's Case is abolished)

Rhode Island Gen.Laws § 34-4-2 (1984) (statute applies to real property dispositions only)

South Carolina Code Ann. § 27-5-20 (1976) (statute applies to real property dispositions only and specifically states that it abolishes Shelley's Case)

Texas Civ.Code Ann. art. 1291a (1980) (statute applies where first transferee receives an "interest" (not necessarily a life estate) and specifically states that it abolishes the Rule in Shelley's Case)

Virginia Code § 55-14 (1980) (limitations to "issue" and others described by words of similar import included; statute applies where first transferee takes an "estate of freehold in land or takes such an estate in personal property as would be an estate of freehold if it were an estate in land" (not necessarily a life estate))

West Virginia Code § 36-1-14 (1985) (same as Virginia)

Wisconsin Stat. § 700.10 (1983–84)

When Alaska adopted the Uniform Probate Code in 1972, among the sections repealed were two sections that taken together abolished the Rule in Shelley's Case:


Judicial decisions in Vermont and Hawaii refuse to recognize the Rule in Shelley's Case. See Kennedy v. Rutter, 110 Vt. 332, 6 A.2d 17 (1939); Gilkey v. Shepard, 51 Vt. 546 (1879); Smith v. Hastings, 29 Vt. 240 (1857); Thurston v. Allen, 8 Hawaii 392 (1891). Dictum in a Wyoming case, Crawford v. Barber, 385 P.2d 655 (Wyo.1963), indicates that it is "doubtful that the rule in Shelley's Case could be applicable in Wyoming." Id. at 657.

2. The following statutes resemble the statutes listed in item 1 above, but do not specifically state that they apply to remainder "created by will or deed" (13 States):

California Civil Code § 779 (West 1982)
Idaho Code § 55–206 (1979)
Michigan Comp.Laws § 554.28 (1979)
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Missouri Ann.Stat. § 442.490 (Vernon 1986) (latter statute applies to wills only) and § 474.470 (Vernon 1956)
New York Estates, Powers & Trusts Law § 6-5.8 (McKinney 1967)
North Dakota Cent.Code § 47-04-29 (1978)

3. The following statutes resemble the statutes listed in items 1 and 2 above, but apply only in giving effect to remainders created by will:

In Washington a statute providing that a devise of real estate to any person for life vests in the devisee an estate for life, and, if the remainder is not specifically devised, providing for a reversion to the heirs at law of the testator (Washington Rev.Code § 11.12.180 (1986)), was construed to have abolished the Rule in Shelley's Case as to devises in Rubenser v. Felice, 55 Wash.2d 862, 365 P.2d 320 (1961).

4. The following statute provides that the Rule in Shelley's Case does not apply in determining the meaning of trust terms:
   Indiana Code Ann. § 30-4-2-7(b) (West 1979)

5. The Rule in Shelley's Case was abolished in England effective January 1, 1926:
   Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 131

6. A Georgia statute provides that limitations over to "heirs," "heirs of the body," "lineal heirs," "lawful heirs," "issue," or words of similar import are presumed to mean "children" whether the parents are alive or dead. The statute has been held to have the effect of abolishing the Rule in Shelley's Case unless the language of the instrument in question indicates that children are not intended. See Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888):

A similar statute in North Carolina provides that a limitation by deed, will, or other writing to the heirs of a living person will be presumed to mean the children of such person unless a contrary intention appears:

The statute has been held not to affect the operation of the Rule in Shelley's Case, but to remedy the situation at common law whereby a conveyance to the heirs of a living person would have been void since a living person has no heirs. Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1889). The Rule in Shelley's Case is still in force in North Carolina.
Colorado does not have a statute dealing with the Rule in Shelley's Case. There is dictum in a Colorado case, Barnard v. Moore, 71 Colo. 401, 406, 207 P. 332, 334 (1922), that suggests Colorado recognizes the Rule.

7. Statutes that abolish fee tail estates may affect the operation of the Rule in Shelley's Case (see the American Law of Property § 4.52 (A.J. Casner ed. 1952)).

a. The following statutes provide that estates tail are converted into estates in fee simple:

- Georgia Code Ann. § 44–6–24 (Supp.1986) (as to some types of conveyance only: limitations which, by the English rules of construction, would create an estate tail "by implication" give a life estate to the first taker with a fee simple to the first taker's children and their descendants)
- Maryland Real Prop.Code Ann. § 2–102 (1981) (this statute states that a tenant in tail can convey a fee, but, together with a statute dealing with the law of descent of an estate in fee tail, has been construed to make that which before was an estate tail into an estate in fee simple absolute. Newton v. Griffith, 1 Har. & Gill 111 (Md.1827); Posey's Lessee v. Budd, 21 Md. 477 (1864); the latter statute, Art. 46, § 1 of the 1939 Code, was repealed in 1969)

b. The following statutes provide that estates tail are converted into estates in fee simple, either absolute or, where there would have been a valid remainder limited on the entail, subject to an executory limitation taking effect only if the first taker dies unsurvived by issue:

- California Civ.Code §§ 763, 764 (West 1982)
- Indiana Code Ann. § 32–1–2–33 (West 1979)
- Michigan Comp.Laws § 554.3 (1979)
- New York Est., Powers & Trusts Law § 6–1.2 (McKinney 1967)
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Wisconsin Stat. § 700.08 (1983–84)


c. The following statutes provide that estates tail are converted into an estate for life in the first taker, remainder in fee simple absolute in the person or persons who would have succeeded to the estate tail on the first taker’s death:


Georgia Code Ann. § 44–6–24 (Supp.1986) (as to limitations which, by the English rules of construction would create an estate tail “by implication” only; see item 7a above)


d. The following statutes provide that estates tail are converted into an estate tail for life in the first taker, remainder in fee simple absolute to the issue, lineal descendants, or children of the first taker:


Florida Stat. § 689.14 (1985) (remainder to lineal descendants of first taker)


Rhode Island General Laws § 33–6–10 (1984) (as to estates tail created by wills only: estate tail for life in first taker, remainder to children of first taker in fee; transfers by deed are governed by separate provision, see item 7f below)

e. In Texas, the Constitution forbids entailments:

Texas Constitution Art. I, § 26

f. Estates tail may still be created in some states, evidenced by the existence of a statute providing that the owner of an estate tail in possession may convey in fee simple, defeating the entail, and expressly or impliedly providing that creditors may levy upon the property and bring about its conveyance in fee to satisfy the debts of the tenant in possession:


Rhode Island Gen.Laws § 34–4–14 (1984) (as to estates tail created by deed only; see item 7d above)
Wyoming also has such a statute despite the fact that a statute enacted in 1949 provides that estates tail are converted into estates in fee simple (see item 7b above):


The Maryland statute listed in item 7a above is in form similar to the statutes listed in this item, but (together with a second statute) has been construed to abolish fee tail estates so that what was before an estate tail is now an estate in fee simple absolute.

g. In the States of Alaska, Hawaii, Idaho, Louisiana, Nevada, New Hampshire, Utah, and Washington there are no statutes recognizing, modifying, or abolishing estates tail. In New Hampshire and Hawaii courts have made the declaration that estates tail cannot exist in their respective States in that the estate tail is a type of estate unsuited to the States' "conditions" or "institutions." The first case on this point in New Hampshire, Jewel v. Warner, 35 N.H. 176 (1857), was based on an interpretation of a statute providing that owners of estates of inheritance could convey or devise the property as they pleased, and if not devised the property would descend in equal shares to the heirs of the owner. The statute was construed to apply to estates tail so that they might be conveyed, devised, and inherited the same as estates in fee simple. Hawaiian courts have held that language elsewhere sufficient to create an estate in fee tail will be construed to create either an estate in fee simple or an estate for life plus a remainder in fee simple, depending on the intention of the transferor. See, e.g. Rooke v. Queen's Hospital, 12 Hawaii 375 (1900), and Rosenbledt v. Wodehouse, 25 Hawaii 561 (1920).

h. By virtue of the Statute De Donis, enacted in 1285, a limitation that before would have created an estate in fee simple conditional was held to create an estate tail. South Carolina and Iowa have neither the Statute De Donis nor an equivalent statute and hence sustain the estate in fee simple conditional as an existent interest in land. The transferee of such an interest in these two States can convey the property in fee simple absolute after birth of issue, but if no issue is born to the transferee the property reverts to the transferor on the death of the transferee. See e.g. Murrell v. Matthews, 2 Bay 397 (S.C. 1802); Blume v. Pearcy, 204 S.C. 409, 29 S.E.2d 673 (1944); Pierson v. Lane, 60 Iowa 60 (1882); Kepler v. Larson, 131 Iowa 438, 108 N.W. 1033 (1906); Shope v. Unknown Claimants, 174 Iowa 662, 156 N.W. 850 (1916); Sagers v. Sagers, 158 Iowa 729, 138 N.W. 911 (1912). Additional cases are collected in American Law of Property § 2.11 (A.J. Casner ed. 1952) and Note, The Fee Simple Conditional in South Carolina, 18 S.C.Law Rev. 476 (1966).

§ 30.2 Transfer to the Heirs or Next of Kin of the Transferor

(1) If a person purports to make an inter vivos transfer of an interest in real property, or of an interest in personal property, to his or her own heirs or next of kin, such purported transfer is a nullity in the sense that it designates neither a transferee nor the type of interest of a transferee,
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unless additional language or circumstances indicate the heirs or next of kin are to take as purchasers or indicate that they are to take as purchasers unless such person revokes the transfer to them.

(2) Neither a rule of construction corresponding to that stated in subsection (1), nor a rule of law analogous thereto, applies to a devise of an interest in real property or of a bequest of an interest in personal property.

Comment on Subsection (1):

a. Historical background and rationale. The rule stated in subsection (1) is the Doctrine of Worthier Title as applied to inter vivos transfers. The justification for the origin of the Doctrine of Worthier Title is found in the preference for title by descent rather than title by purchase, which preference had its origin in the feudal system. Under the feudal system the overlord was entitled to the valuable incidents of relief (the original inheritance tax) when an heir inherited land and, as to many types of land ownership, the overlord was entitled also to the valuable incidents of wardship and marriage when an inheriting heir was a minor. These incidents were preserved if, in an inter vivos transfer by A "to my heirs," the limitation to the heirs of A was deemed a nullity. By this construction the heirs acquired whatever interest they acquired in the subject matter of the purported transfer by descent from A rather than by purchase. In the early stages of the development of the rule stated in subsection (1), it was a rule of law applicable only to transfers of land. Due to the prevalence in modern times of a policy to effectuate the intention of the transferor when no good reason requires its frustration, the modern authorities have relaxed this rule of law into a rule of construction. The rule thus diluted has been extended to interests in personal property with a resultant symmetry in the law.

The continuance of the rule stated in subsection (1) as a rule of construction may be justified on the basis that it represents the probable intention of the average transferor. However, additional language or circumstances may establish that the transferor intends the heirs or next of kin to take as purchasers under all circumstances, or that they take as purchasers only if the transferor does not revoke their interests.

The increased alienability of the subject matter of the transfer which results from the application of the rule stated in subsection (1) is also a justification for it.
b. Requirement—inter vivos transfer. The rule stated in subsection (1) is concerned only with inter vivos transfers. For the rule applicable to testamentary transfers, see Comment j.

c. Requirement—limitation of an interest to the heirs or next of kin of the transferor. The rule stated in subsection (1) requires that there be limited an interest to the heirs or next of kin of the grantor. There is such an interest limited when the language used is construed to refer:

1. to the persons who would inherit the real property of the grantor on the grantor's death intestate, if the subject matter of the purported transfer is real property; or

2. to the persons who would inherit the personal property of the grantor on the grantor's death intestate, if the subject matter of the purported transfer is personal property.

The problem of construction, with which the court is here confronted, is to determine the persons appropriately described by the language used by the grantor. The court is confronted with exactly the same construction problem when it is called upon to ascertain the beneficiaries under a class gift to "heirs" or "next of kin" (also see § 30.1. Comment g, for a similar problem in connection with the Rule in Shelley's Case). Consequently, the material dealing with this construction problem is developed separately so that it may be utilized in connection with any type of problem where it becomes significant (see Chapter Twenty-Nine).

The word "heirs," whether the subject matter of the transfer is real or personal property, and the words "next of kin," when the subject matter of the transfer is personal property, are sufficient to meet the requirement discussed in this Comment unless an intent is found to use them in other than their usual sense. They are used in other than their usual sense whenever they are construed to mean children; whenever a person is excluded who otherwise would come within the term employed; whenever no statute is to be employed to ascertain the takers; whenever the statute employed to ascertain the takers is the one applicable to realty when the subject matter of the transfer is personalty or vice versa; whenever the statute employed has changed at various times and the form of the statute as of some time other than the death of the grantor is to be controlling; whenever the time at which the statute is to be applied is other than the time of the death of the grantor; whenever the group ascertained by the application of a statute is required to survive some future date; or whenever the share to be received by each person is different from the amount given him or her by statute.
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Other combinations of words may be construed to have the same meaning as the words "heirs" or "next of kin" and, when such construction of other words is proper, the requirement discussed in this Comment is satisfied. The word "children" does not normally satisfy the requirement of this Comment, because, in the absence of a finding of a contrary intent, it excludes persons who might be the heirs or next of kin of the grantor, namely, descendants more remote than those of the first generation.

The mere fact that the persons described turn out to be the same as the persons who are the heirs or next of kin of the grantor on the grantor's death intestate does not satisfy the requirement herein discussed. The limitation must be in such form that the persons described will necessarily be the heirs or next of kin of the grantor at his or her death.

Illustrations:

1. O transfers Blackacre by deed "to O's son S for life, then to the heirs of O determined as of the death of S." The rule stated in subsection (1) does not apply because the limitation is not to the heirs of O at O's death.

2. O transfers Blackacre by deed "to O's daughter D for life, then to the issue of O." The rule stated in subsection (1) does not apply because the limitation is not to the heirs or next of kin of O.

d. Operation—in general. When the requirements for the operation of the rule stated in subsection (1) are satisfied, the limitation in favor of the heirs or next of kin of the grantor is a nullity in the sense that it designates neither a transferee nor the extent of the interest of a transferee. This will normally result in the retention by the grantor of a reversion in fee simple (see, however, Comment f).

Illustration:

3. O transfers Blackacre by deed "to O's son S for life, then to the heirs of O." The rule stated in subsection (1) applies. S has an estate for life in possession and O has a reversion in fee simple, in the absence of additional language or circumstances that indicate otherwise.

e. Operation—controlled by a manifestation of contrary intent. The rule stated in subsection (1) is a rule of construction based on the inference that the average grantor does not intend by a limitation to his or her own heirs to create in them an interest that is indestructible by the grantor during the grantor's own lifetime. Hence, the contrary manifestation of intent that is effective to
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overcome the constructional preference stated in subsection (1) is an indication from the words or circumstances of the purported transfer that the grantor intended under all or some circumstances to create an interest as purchasers in his heirs or next of kin.

Illustrations:

4. O transfers Blackacre by deed "to O's daughter D for life, then to the heirs of O, who are to take under the terms of this instrument and not by descent." The heirs of O take as purchasers an irrevocable interest under the terms of the limitation in their favor.

5. O transfers by deed designated personal property "to T in trust to collect and pay the income to O's daughter D for life, and upon the death of the life beneficiary the trust estate is to be returned to O; provided, however, if O is then dead, the trust estate is to be turned over to such persons as O by his last will shall have appointed, and in default of appointment, is to be turned over to such person or persons, and in such shares, interests, and proportions, as the same would have been distributable if O had been the owner thereof at the time of O's death and died intestate." The completeness of the plan of the grantor indicates that the gift to O's heirs is to them as purchasers, and thus it can be affected by O only by the exercise of his general power of appointment.

f. Operation—transfer to the heirs of the grantor subject to a condition precedent. The fact that the inter vivos transfer to the heirs or next of kin of the grantor is subject to a condition precedent does not prevent the application of the rule stated in subsection (1).

Illustrations:

6. O transfers Blackacre by deed "to O's son S for life, then if O's daughter D marries X, to D and her heirs, and if D does not marry X, to the heirs of O." The rule stated in subsection (1) applies, and O has a reversion in fee simple subject to divestiture by D marrying X, in the absence of additional language or circumstances that indicate otherwise.

7. O transfers Blackacre "to O's son S and his heirs but, if S dies without children, to the heirs of O." The rule stated in subsection (1) applies, and O has a reversionary interest, in the absence of additional language or circumstances that indicate otherwise.

g. Operation—trust created in favor of grantor for life and then to grantor's heirs. When an inter vivos transfer is made
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which creates a trust for the benefit of the grantor for life and limits a remainder in favor of the grantor's heirs, the conclusion is justified that the grantor intends the heirs to take as purchasers if the grantor does not revoke the limitation to the heirs (see Illustrations 8 and 11). The revocation may be expressly made or made by a transfer that specifically includes the remainder interest limited to the heirs. The transfer may be in an inter vivos transfer made by the grantor or in the grantor's will.

h. Significance—in general. The significance of the rule stated in subsection (1) is threefold. First, it causes the grantor rather than the grantor's heirs to be the owner of an interest in the property with all the legal consequences that flow from that fact. Second, it prevents any interest from arising in any persons as presumptive heirs prior to the death of the grantor. Third, it causes the heirs to receive whatever interest they receive by descent, rather than by purchase, in the absence of additional language or circumstances that indicate otherwise.

Illustrations:

8. O transfers $100,000 to T in trust to pay the income "to O for life, then to divide the corpus among the heirs of O." The fact that O has retained a life interest and provided for the disposition to his heirs on his death is evidence of an intent that the trust property is to pass as it would if O died intestate. Such intent on O's part is revocable, and hence the heirs take as purchasers unless O revokes their interest before he dies.

9. O transfers Blackacre by deed "to O's son S for life, then to the heirs of O." O then makes a will in which O devises Blackacre "to O's daughter D and her heirs." O dies. The rule stated in subsection (1) applies, and D is entitled to the possession of Blackacre after the death of S. The heirs of O have no interest in Blackacre under the deed.

10. O transfers Blackacre by deed "to O's brother B for life, then to the heirs of O." O dies. The rule stated in subsection (1) applies, and the creditors of O can reach the reversionary interest in Blackacre which is retained by O subject to the estate for life in B.

i. Relevancy of statutes. Statutes that abolish the Rule stated in § 30.1 (see Statutory Note to Section 30.1) do not affect the rule stated in subsection (1) of this section. Statutes that create a presumption that the word "heirs" when used in a conveyance means children, in the absence of a finding of a contrary intent, do prevent the satisfaction of one of the requirements of the rule stated in subsection (1) and hence prevent its application. For
statutes that directly abolish the rule of subsection (1), see the Statutory Note to this section.

Illustration:

11. O transfers Blackacre by deed "to O for life, remainder to O's heirs." The State in which Blackacre is located has a statute that in terms abolishes the Rule in Shelley's Case, but has no statute abolishing the Doctrine of Worthier Title as applied to inter vivos transfers. The abolition of the Rule in Shelley's Case has no effect on this Illustration. Here, as in Illustration 8, the fact that O has retained a life interest in Blackacre justifies the conclusion that the heirs take as purchasers unless O revokes their interest.

Comment on Subsection (2):

j. Development of the rule stated in subsection (2) concerning devises and bequests to the heirs of the testator. At one time there was an important rule of law, applicable to devises of land to the testator's heirs, which was to the effect that a devise to the heirs of the testator was a nullity if the interest limited in their favor was identical to that which such heirs would have taken by descent if there had been no devise to them. No such rule existed as to bequests of personalty. This rule originated under the feudal system to preserve the feudal incidents of relief, wardship, and marriage. These incidents were preserved only if the new tenant of land acquired an interest by descent from the former tenant, rather than by purchase under the terms of a devise. The reason which caused the origin of this rule no longer exists.

The rule as to devises of land was somewhat broader than the rule stated in subsection (1) as to inter vivos transfers to the heirs of the grantor. The rule stated as to inter vivos transfers applies only when the gift is in form to the heirs of the grantor, whereas the rule as to testamentary transfers applied whenever the devise was to persons who in fact were the heirs of the testator, even though they were described by their individual names.

Subsection (2) states that there is neither a rule of construction corresponding to that stated in subsection (1), nor a rule of law analogous thereto, applicable to devises of interests in land or bequests of personalty. The statement in subsection (2) as to personalty has always been true. The statement in subsection (2) as to land is true today because the rule that developed under the feudal system has completely lost significance in the solution of modern problems.
At one time it was important to determine whether a person acquired his or her title by descent or devise, because the further descent of the property was controlled by the rule that a person had to be an heir of the last purchaser before he or she could acquire property by descent. This doctrine that required a person to trace such person’s heirship to the last purchaser has been abrogated well-nigh universally by the descent and distribution statutes in the American States. Statutes may exist today that do make different rules for the descent of property that has come to the decedent from one parent or the relative of one parent, but these statutes treat alike acquisitions by the decedent from the particular specified source whether the acquisition is by descent, devise, or gift. Thus, it is no longer of any significance to determine whether an heir acquired his or her title by descent or by devise when the question involved is the further descent of such property from the heir.

It has been suggested that the rule that a testator cannot make a devise to the testator’s own heirs is significant today where the question involved is the order in which the assets of a decedent will be used to pay debts. Likewise, it has been suggested that if the heirs of the testator take by purchase under the terms of the devise, the statute that calls for the deduction of advancements from the share an heir receives on intestacy will have no application, whereas such advancement statute would apply if the heir took by descent. The order in which assets are used to pay the debts of the decedent and the deduction of advancements from the share an heir receives are subject to control by the manifested intent of the deceased. The fact that the deceased has attempted to make a devise to his or her heirs shows an intention on the decedent’s part to attach to the interest which the heirs may take the consequences of a devise insofar as these questions are concerned. Thus the rule that a testator cannot make a devise to his or her own heirs is of no significance in the solution of these problems.

Finally, it has been suggested that whether an antilapse statute applies to a devise to the heirs of the testator depends on whether the rule that such a devise is a nullity is in force. The fallacy of this is easily illustrated. In the first place, the word “devisee” or “legatee” as used in the antilapse statute must mean purported devisee or legatee, because in all cases to which the statute applies the devisee or legatee predeceases the testator. Even under the rule that a testator could not devise to the testator’s own heirs, the heirs designated were purported devises or legatees and so within the terms of the statute. In the second place, the antilapse statutes are preeminently concerned with the
type of case that involves a devise to the testator's heirs, and to
rule out such case from the statute would frequently nullify the
significance of such statutes. Thus, it is clear that the applicability
of an antilapse statute in no way depends on whether the heirs, had
they survived, would have taken by descent or by the devise.

In the absence of any discoverable circumstance in which the
rule that a devise to the heirs of the testator is a nullity has
significance in the solution of modern problems, the rule stated in
subsection (2) is justifiable.

For statutes that expressly abolish the Doctrine of Worthier
Title as applied to devises, see the Statutory Note to this section.

STATUTORY NOTE TO SECTION 30.2

1. The following statutes provide that the Doctrine of Worthier Title
is abolished (11 States):

California Civ.Code § 1073 (West 1982) (enacted 1959)
Merchants National Bank of Aurora, 3 Ill.App.3d 377, 278 N.E.2d
10 (1972) (statute does not require trust to be construed so as to
override expressed intent of the grantor))
New York Est., Powers & Trusts Law § 6–5.9 (McKinney 1967) (en-
acted 1966)

The Joint Editorial Board for the Uniform Probate Code approved in
principle in November 1987 the following:

Section 2–709

(a) The doctrine of worthier title is abolished as a rule of law and as a
rule of construction. Language in a governing instrument describing the
beneficiaries of an interest as the transferor’s “heirs,” “next of kin,” or
“distributees,” or language of similar import, does not create or presumpt-
ively create a reversionary interest in the transferor.

(b) Language in a governing instrument describing the beneficiaries of
an interest as a person’s “heirs,” “next of kin,” or “distributees,” or
language of similar import, creates an interest in the heirs who would take
the person’s intestate estate under Sections 2–101 through 2–114 if the
person died when the interest is to take effect in possession or enjoyment,
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to be divided among them as determined under those sections. For the purpose of determining the heirs who would take the person's intestate estate if he [or she] died when the interest is to take effect in possession or enjoyment, the remarriage of the person's surviving spouse and the adoption of a descendant of the person after the person's death are not disregarded.

2. The following statute abolishes the Doctrine as it applies to wills:

3. The following statute provides that the Doctrine shall not be applied to determine the meaning or application of trust terms:
   Indiana Code Ann. § 30-4-2-7 (West 1979) (enacted 1971)

4. In addition to the New York statute in item 1 above, New York has a statute that provides, solely for the purpose of revoking trusts, that a disposition contained in a trust in favor of a class of persons described only as the heirs, next of kin, or distributees (or by any terms of like import) of the settlor does not create a beneficial interest in such persons:

The statute in effect preserves one aspect of the Doctrine of Worthier Title, that a settlor of such a trust can revoke the trust without the "remaindermen's" consent, even without having reserved such a power. All other aspects of the doctrine are abolished by § 6-5.9.

5. The following statutes have an indirect effect on the Doctrine in that they provide in certain contexts that the word "heirs" is presumed to mean children unless a contrary intention appears:

The Georgia statute applies to all limitations to a person's "heirs," but the North Carolina statute applies only to transfers to the "heirs" of a living person. The North Carolina statute was held to have the effect of avoiding the Doctrine in Thompson v. Batti, 168 N.C. 333, 84 S.E. 347 (1915). North Carolina has since enacted a statute explicitly abolishing the Doctrine (see item 1 above).

6. A Georgia statute provides that a trust shall not be revocable because the settlor has a life interest therein and a remainder interest vests in the settlor or his estate:
   Georgia Code Ann. § 108-111.1(c) (Harrison Supp.1986)

   A Nevada statute provides that if the settlor of any trust declares in the instrument creating the trust that such trust is irrevocable it shall be irrevocable for all purposes, even though the settlor is also the beneficiary of the trust, and that such trust shall, under no circumstances, be construed to be revocable for the reason that the settlor and beneficiary are the same person:
7. The following statutes provide that unless the trust is expressly made irrevocable by the trust instrument, the trust shall be revocable by the settlor:

California Probate Code § 15400 (West Supp.1987)
Oklahoma Stat., tit. 60 § 175.41 (1981)

REPORTER'S NOTE TO SECTION 30.2

1. Comparison with present state of the law—The rules of this section are supported by judicial authority. Also, there is limited judicial authority abolishing the Doctrine of Worthier Title.

2. Justification for the rules of this section—The justification for the rules of this section is stated in Comment a. (subsection (1)) and Comment j (subsection (2)).

3. The inter vivos Doctrine of Worthier Title applied as a rule of construction—

a. Cases applying the inter vivos Doctrine of Worthier Title as a rule of construction. Justice Cardozo's opinion in Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919), is generally recognized as the leading case standing for the proposition that the inter vivos Doctrine of Worthier Title exists not as a rule of law but as a rule of construction. In that case a house and lot were conveyed "in trust to pay from the rents and profits to the use of the grantor the yearly sum of $1,500." Upon the death of the grantor, the trustee was to "convey the said premises (if not sold) to the heirs at law of the [grantor]." The case holds that the trust deed did not create a remainder interest in the heirs of the grantor, but that, under the Doctrine of Worthier Title, the grantor retained a reversion. Justice Cardozo went on to state: "We do not say that the ancient rule survives as an absolute prohibition limiting the powers of the grantor. . . . But at least the ancient rule survives to this extent. That, to transform into a remainder what would ordinarily be a reversion, the intent to work the transformation must be clearly expressed. Here there is no expression of such a purpose." Id. at 311-12, 122 N.E. at 222. Doctor v. Hughes was confirmed in subsequent cases before the New York Court of Appeals (including Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929); Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948); In re Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293 (1949)) and was the law in New York prior to the enactment (in 1951 and 1966) of two statutes. The first of the two statutes [New York Est., Powers & Trusts Law § 7-1.9 (McKinney 1967 & Supp.1987)] in effect preserves one consequence of the inter vivos Doctrine of Worthier Title as a rule of law, so that a settlor of a trust that has an end limitation to the grantor can revoke the trust without their consent. All other aspects of the Doctrine are revoked by New York Est., Powers & Trusts Law § 6-5.9 (McKinney 1967).
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the Statutory Note to this section, items 4 and 1.)

*Doctor v. Hughes* has been widely followed by courts in jurisdictions other than New York. In *McKenna v. Seattle First National Bank*, 35 Wash.2d 668, 214 P.2d 664 (1950), the court clearly applied the Doctrine as a rule of construction, not as a "rigid mandate of law."

Even if regarded as a rule of construction, the rule against a remainder to the grantor's heirs is subject to the uncertainty of any rule based on intent, and its application may, in peculiar circumstances, bring about unfortunate or inequitable results [cit. om.]. But an examination of the cases invoking the rule, as cited earlier in this opinion, does not indicate that this is the usual consequence. Rather it shows that the rule has on the whole, proved a useful device to aid courts in determining the probable intent of the grantor where his actual intent is not clear.

We, therefore, have no hesitation in holding that, in an inter vivos conveyance, where nothing in the instrument discloses a contrary intent, a remainder limited in the grantor's heirs will be regarded as the equivalent of a reservation of a reversion in the grantor himself.

*Id.* at 674, 214 P.2d at 670.

After a thorough consideration of cases involving the Doctrine of Worthier Title, the court in *Wilcoxen v. Owen*, 237 Ala. 169, 185 So. 897 (1938), applied the rule as a rule of construction. In *Clark v. Judge*, 84 N.J.Super. 35, 200 A.2d 801 (1964), *affirmed on basis of lower court opinion*, 44 N.J. 550, 210 A.2d 415 (1964), the court pointed to *Fidelity Union Trust Co. v. Pfaffner*, 135 N.J.Eq. 133, 37 A.2d 675 (Ch. 1944), among other cases, to show that "the Doctrine of Worthier Title exists in New Jersey as a rule of construction, creating an inference or presumption that a settlor intends to create a reversion, but that the inferred or presumed intention may be overcome by evidence showing a contrary intention." *Id.* at 49, 200 A.2d at 809.

Additional cases in which the court explicitly states that the Doctrine is being applied as a rule of construction are *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954) (citing predecessor to this section in first Restatement) and *Pewitt v. Workman*, 289 Ky. 459, 159 S.W.2d 21 (1942).

The Supreme Court of Connecticut has not rendered a decision directly involving the Doctrine of Worthier Title. (Phoenix State Bank & Trust Co. v. Buckalew, 15 Conn.Sup. 149 (Super.Ct.1947), a Superior Court decision, holds that "the Doctrine of Worthier Title, as it existed in the Common law of England, was not adopted in Connecticut and that it has not been and is not a rule of law binding on this court." *Id.* at 151.) In *Griems v. Bankers Trust Co.*, 308 N.Y. 718, 124 N.E.2d 335 (1954), *affirming*, 283 App.Div. 783, 129 N.Y.S.2d 493 (1954), *reversing*, 124 N.Y.S.2d 594 (Sup.Ct.1953), however, a case construing a trust that was to be governed by Connecticut law, the New York Supreme Court, Appellate Division, applied the Doctrine...
as a rule of construction. (See also Beach v. Busey, 156 F.2d 496 (6th Cir.1946), in which the court stated, "How the courts of Ohio would treat this ancient rule is not clear. There is a bald statement of the common-law doctrine in Kuhn v. Jackman, 32 Ohio App. 164, 166 N.E. 247 (1929), but the case was decided on other grounds." 156 F.2d at 498. The *Beach* court went on to apply the Doctrine as a rule of construction.)

Courts in four States have applied the Doctrine as a rule of construction prior to the enactment of statutes abolishing the Doctrine. See Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018 (1949); May v. Marx, 300 Ill. App. 144, 20 N.E.2d 821 (1939); National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E. 2d 113 (1944); Shaw v. Arnett, 226 Minn. 425, 33 N.W.2d 609 (1948) (holding that statute enacted in 1939 did not apply retroactively).

If a court purports to apply the Doctrine of Worthier Title as a rule of construction, but, under the facts before it, resort to the Doctrine is unwarranted, there is nevertheless an indication of how the same court would treat the Doctrine given a proper fact situation. In *All Persons v. Buie*, 386 So.2d 1109 (Miss.1980), the opinion states that "correct and applicable here" is the rule that a limitation to one's own heirs in a deed is void, leaving a reversion in the grantor, and that the Doctrine of Worthier Title remains active in Mississippi as a rule of construction, but it is difficult to see how the facts before the court required any reference to the Doctrine. (The grantor executed a deed by which he conveyed a tract of land to his son and his son's wife for their lives, and "to the heirs of the body of the said [son] in fee simple at the death of both." The court apparently assumed that the reversionary interest contingent upon there being no live issue of the body of the son brought the Doctrine into play.) See also Davidson v. Davidson, 350 Mo. 639, 167 S.W.2d 641 (1943) (court pointed to the rule of this section in the first Restatement but the reversion in the case did not arise as a result of the Doctrine); *Adams v. Adams*, 147 Fla. 267, 2 So.2d 855 (1941), *appeal dismissed sub nom.*, O'Keefe v. Adams, 314 U.S. 572, 62 S.Ct. 99, 86 L.Ed. 464 (1941) (trust provided that on death of settlor trust property was to be distributed under the terms of the settlor's will).

In Comment c it is stated that when persons who are heirs of the grantor are excluded under the terms of the dispositive instrument (and as a result, the gift is not in fact to the grantor's "heirs"), the Doctrine does not apply. (See also Illustrations 1 and 2.) In *Dunnett v. First National Bank & Trust Co.*, 184 Okl. 82, 85 P.2d 281 (1939), the court pointed to *Doctor v. Hughes* as authority for their finding of a reversion despite the fact that in the case before it the "heirs" were to be determined as of the death of the life tenant rather than as of the death of the grantor. Similarly, in *Dreyer v. Lange*, 74 Ariz. 39, 243 P.2d 468 (1952), the court purported to adopt the view of Justice Cardozo to find a reversion where the limitation was to the
heirs of the grantor "in equal shares on the Dreyer side of the family."

b. Factors showing intent to create a remainder. In In re Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293 (1949), the court pointed out that in determining the intent of the grantor under the Doctrine of Worthier Title as a rule of construction, "It is impossible to set up absolute criteria to serve as a measuring standard for all cases." Id. at 361, 87 N.E.2d at 297. Nevertheless, certain factors have repeatedly been singled out by courts that go on to find that the grantor intended to create a remainder in his or her heirs.

In Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948), the settlor, four days prior to her marriage, placed securities of substantial value in trust. The trust instrument directed the trustees to pay the income from the trust to the settlor for her life, and on her death to distribute the principal of the trust to the appointees designated in her will, or, failing such designation, to the settlor's mother if she was then living, "then said principal shall go to such persons as would be entitled to the same under the intestacy laws of the state of New York." The settlor's mother having died, the settlor argued that as the sole surviving beneficiary she could revoke the trust. The court found that the settlor evidenced her intention to give a remainder to her next of kin, noting that: "In our decisions we have attached considerable importance to at least three factors which are present in the instant case, viz.: (1) that the settlor has made a full and formal disposition of the corpus of the estate; i.e., disposed of the principal on several contingencies other than having it revert to himself, (2) that the settlor has made no reservation of a power to grant or assign an interest in the property in his lifetime, and (3) that he has reserved only a testamentary power of appointment." Id. at 140, 81 N.E.2d at 56. The settlor was thus denied the right to cancel the trust agreement. The factors pointing to a finding of a remainder cited by the Richardson court are derived from Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929). The Richardson court seems to have given additional emphasis to the retention of only a testamentary power of appointment, however, noting that, "Had she intended to create a reversion the power would have been superfluous." Id. at 143, 81 N.E.2d at 59.

In In re Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293 (1949), two cases were consolidated for argument given the similarity of the disputed trust provisions. In each the settlor conveyed property to trustees who were directed to pay the income to the settlor during her life and upon her death to convey the principal of the trust estate as the settlor should appoint in her will, or, in default of appointment, to the settlor's next of kin as in intestacy. The court noted that the trust agreement in the Richardson case differed only slightly from the two before it, and ruled that both trust instruments created remainder interests in the heirs of the settlors. As in Richardson the court gave special emphasis
to the reservation of a testamentary power of appointment as "the sole control over the subsequent disposition of the corpus of the real estate." The fact that the trust instrument reserved a power of appointment is evidence that the settlor believed she had created an interest in the property on the part of others and reserved the power in order to defeat that interest or to postpone until a later date the naming of specific takers." *Id.* at 360, 87 N.E.2d at 297. The court also noted that "the presumption which exists from the use of the common-law doctrine as a rule of construction has lost much of its force since Doctor v. Hughes, supra. Evidence of intent need not be overwhelming in order to allow the remainder to stand." *Id.* at 360, 87 N.E.2d at 297. Judge Fuld, dissenting, felt that the majority attached too much weight to the creation of the power of appointment, and that that act alone was not sufficient to overcome the presumption of a reversion.

The court in Clark v. Judge, 84 N.J.Super. 35, 200 A.2d 801 (1964), *affirmed on basis of lower ct. op.*, 44 N.J. 550, 210 A.2d 415 (1964), cited several factors leading to its conclusion that the settlor intended to create a remainder interest. As in *Whittemore* the court felt the trust instrument purported to make a full and complete disposition of the trust property. "After the limited period in which the settlor could revoke or amend the trust, she retained no power to grant, assign, control or alienate the property." *Id.* at 50, 200 A.2d at 810. Another aspect of the case was the fact that, under the terms of the trust, during the limited period that the trust could be revoked or amended the settlor was required to receive the permission of at least one of her sons in order to do so. It was concluded that this was inconsistent with the intention to create a reversion. The court also pointed out that the reservation of a power to revoke is itself inconsistent with the intention to create a reversion since such a power would have been included in the reversion. (See also United States v. Ritter, 416 F.Supp. 777 (S.D.W.Va.1976), reversed on other grounds, 558 F.2d 1165 (4th Cir.1977), where the court reasoned that since a trust with no beneficiaries other than the settlor is revocable even without reserving the power to revoke, reservation of such power indicates a belief on the part of the settlor that a remainder in the heirs was created. "Otherwise, the act of expressly reserving the power to revoke was a useless act." *Id.* at 784.)

The elaborate requirements imposed on the settlor in order to appoint the corpus of a trust ("by an instrument duly acknowledged by him and under his seal and deposited with the trustees") seems to be one of the reasons for the finding in National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944), that the settlor intended to create a remainder interest in his heirs. (See American Law of Property § 4.22 (A.J. Casner ed. 1952).) Very little attention is given to the factors singled out by other courts as indicative of a remainder, however, with the court directing much more atten-
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The opinion reports that the legatees argued that the gift in default of appointment, to the "person or persons... entitled to take... under the laws of intestacy" was to have effect only in the event the settlor should actually die intestate. They argued that (since the default provision was phrased in the indicative and not the subjunctive) the provision did not refer to the persons who would be the statutory next of kin if the settlor died intestate, but referred to persons who because of intestacy in fact became entitled "under" and by actual operation of the laws of intestacy. The legatees argued that the settlor failed to provide for the contingency that actually occurred, that is death with a will combined with failure to exercise the power of appointment, with the result that there was a reversion of the trust property to the settlor's estate. Since the will purported to dispose of all of the settlor's estate, the legatees were entitled to the property. It should be noted that this argument on the part of the legatees has nothing to do with the Doctrine of Worthier Title. The only thing that the argument has in common with the Doctrine is that both point to a finding that the settlor retained a reversionary interest in the property. Nevertheless, the court responded to the legatees' argument with a discussion of the Doctrine, pointing out that, "In a number of cases gifts over to the heirs of a settlor have been held to give them title by purchase and not by descent." Id. at 464, 53 N.E.2d at 118. The legatees' argument (in the words of the court) that the settlor "expressly but uselessly" declared the result of his dying intestate, but failed to make a similar declaration of the result of his leaving a will, was rejected with the court noting, "It is a canon of construction that every word and phrase of an instrument is if possible to be given meaning, and none is to be rejected as surplusage if any other course is rationally possible." Id. at 466, 53 N.E.2d at 119.

Having disposed of the legatees' argument, the court inquired no further into the intent of the settlor, and affirmed the finding of the probate court that he intended to create a remainder in his heirs, three cousins living in England. "The construction adopted by the Probate Court results in a simple, logical and complete disposition of the trust property after the life estates." Id. at 466, 53 N.E.2d at 119. As a result, the legatees took nothing (since the trust comprised nearly all of the settlor's property) despite the fact that there was evidence that the settlor felt closer to the friends that he made legatees under his will than to his relatives in England. Although it is far from clear in the opinion, it seems that the court, having first decided that it would apply the Doctrine of Worthier Title as a rule of construction, went on to apply a second rule of construction (that every word and phrase be given meaning if possible), or to combine the two rules to tilt the balance in favor of a finding of a remainder. As one commentator has pointed out, the two rules directly conflict with one another. By giving effect to every word of an instrument, the presumption in a
disposition “to the heirs of the grantor” would be in favor of a remainder, and would mean the virtual abolition of the Doctrine of Worthier Title. M. Morris, The Inter Vivos Branch of the Worthier Title Doctrine, 2 Okla.L.Rev. 133, 160 (1949). (See also In re Brolasky’s Estate, 302 Pa. 439, 158 A. 739 (1931). In applying the Doctrine the court noted that, “We are aware that this conclusion antagonizes a cardinal rule in the present day construction of written instruments, in that it usually eliminates a portion of the language of the deed, to which portion due effect might readily be given, but we are also aware that through the centuries the conclusion reached in the cases cited has been a rule of property, to overturn which might unsettle many titles. . . .” Id. at 447, 158 A. at 741-742.)

Another questionable case is Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939). In that case certain real property was conveyed by a father to his daughter for her life, remainder to the heirs of her body, but if she should die without bodily heirs, “then the title to the above described Real Estate, at her death, shall revert to and vest absolutely in the heirs-at-law of the [father].” The daughter died without bodily heirs, leaving a will that purported to devise her interest in the property. It was argued on the part of the devisees that the father retained a reversion and that on his death intestate prior to the daughter, a share of the property passed to the daughter, and by her will to them. The devisees also pointed out that the same result would be obtained if the father created remainder interests in his heirs, since the daughter was an heir of the father. Noting that the estate created was not a “technical reversion” since “[i]t was created by an act of the parties,” the court went on to construe the word “revert” in the deed to mean only “pass” or “to go.” Having dismissed the devisees’ initial argument that the grantor intended to retain a reversion, the court held that a remainder was created in the heirs of the father surviving on the death of the daughter. The opinion concluded with the following:

We think the instant grant manifests grantor’s intention that, at the termination of the life estate, persons of the owner’s blood take his title and enjoy and possess his property, and a desire to avoid technical rules involving the title to real estate, having their foundation in ancient feudal tenancies, and ancient rules for the construction of instruments creating remainders, involving refinements of learning, to the end that unknown strangers to the owner’s blood [referring to the daughter’s devisees] be excluded from coming into the enjoyment and possession of his property at the termination of said life estate; all of which is in harmony with the recited consideration of love and affection.

Id. at 300, 126 S.W.2d at 192-193.

c. Factors showing intent to create a reversion. Courts applying the Doctrine of Worthier Title as a rule of construction start with the presumption that a
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Remainder in the grantor's heirs will be regarded as a nullity (or as the equivalent of the retention of a reversion) absent a showing of contrary intent. Stated another way, the burden of proof is on those persons who are maintaining that the grantor intended to create a remainder. Nevertheless, any element that shows the intention of the grantor is important, and factors showing intent to create a reversion should be considered. It should also be noted that courts are not as reluctant to find a remainder as they once were. For example, the New York Court of Appeals in In re Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293 (1949), noted that "the presumption which exists from the use of the common-law doctrine as a rule of construction has lost much of its force since Doctor v. Hughes, supra. Evidence of intent need not be overwhelming in order to allow the remainder to stand." Id. at 360, 87 N.E.2d at 297.

In Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948), the court concluded that the settlor in that case had evidenced her intention to give a remainder to her next of kin because (among other factors discussed in item 3b above) she "made no provision for the return of any part of the principal for herself during her lifetime." Id. at 144, 81 N.E.2d at 50. This statement was in response to City Bank Farmers Trust Co. v. Miller, 278 N.Y. 134, 15 N.E.2d 558 (1938). That case involved the construction of a trust instrument which provided that the trustee should pay to the settlor the sum of $500 weekly out of the income and principal of the trust until the principal was reduced to $5,000. At that time the trust was to terminate and the remaining principal was to be distributed to the settlor. The settlor also had the right to dispose of the principal via a testamentary power of appointment, and, in default of such appointment, the principal was to be distributed to parties who would be her next of kin under the laws of the State of New York. The settlor died prior to the termination of the trust and without exercising the power of appointment, and the issue arose whether the trust principal would be included in the settlor's estate for the purpose of calculating the husband's elective share. The court felt that no one had any interest in the trust except the settlor. "The intent as expressed in the trust agreement was that the property was to be returned to the donor if she lived long enough. If not then it should go to her legatees or next of kin. In either event it would go as her property. . . . In such case no remainder was created but a reversion only." Id. at 143, 15 N.E.2d at 555. The trust property was included in the surviving husband's elective share.

Under the terms of the trust in McKenna v. Seattle-First National Bank, 35 Wash.2d 662, 214 P.2d 664 (1950), $6300 was to be used to purchase a house for the use of the settlor's mother and grandmother for their lives. Upon the death of the survivor the property was to be reconveyed to the settlor, or, if he was no longer living, to the "legal heirs" of the settlor. Subsequently, a default judgment was awarded against the settlor,
and his interest in the property held in trust was sold at sheriff's sale. The settlor died, and, following the death of the two life tenants, the purchasers at the sheriff's sale claimed title to the property, basing their claim on the Doctrine of Worthier Title. On the other side it was argued that the settlor intended to create a remainder in his heirs, contingent on his predeceasing the life tenants, and that, as the contingency happened, the remainder vested. The court, noting that there was a presumption of a reversion, found no intention to create a remainder. "The main purpose of the entire transaction appears to have been the acquisition of the property and the protection of the settlor's mother and grandmother in the occupancy thereof. That purpose being accomplished, it seems reasonable to suppose that the settlor intended that the property should return to him, and naturally, in the event he were no longer living, to any who might inherit from him. The fact that he specified that the property should pass to him, if he survived the life tenants, would seem, if anything, to strengthen the presumption that he reserved a reversion." *Id.* at 678, 214 P.2d at 672.

In *Stewart v. Merchant's National Bank of Aurora*, 3 Ill.App. 3d 337, 278 N.E.2d 10 (1972), the settlor of a 10-year irrevocable trust sought to revoke the trust after three years had elapsed from the date of its execution. Under the terms of the trust the settlor was the sole beneficiary, but in the event of his death during the 10-year period the remaining principal and accumulated income was to be used to pay the settlor's funeral expenses, the claims against his estate, administration expenses, and estate taxes. Any amount remaining was to be distributed as the settlor provided by his will, or to the settlor's "heirs-at-law in equal shares," should the settlor die without a valid will. The trustees argued (and the lower court held) that the settlor could not revoke the trust since interests of minors and unborn heirs were involved. Reversing the circuit court, the appellate court held that the settlor did not intend to create a contingent remainder in his heirs, and that he could revoke the trust. In so holding, the court rejected an argument that the statute abolishing the Doctrine of Worthier Title in Illinois ([Ill.Rev. Stat. ch. 30, § 188 (1981)]), which provides that:

> Where a deed, will or other instrument purports to create any present or future interest in real or personal property in the heirs of the maker of the instrument, the heirs shall take, by purchase and not by descent required a finding that the heirs took a vested interest under the trust deed. "Imperative as that language may seem, we refuse to believe that it would require a trust to be construed in such a way as to override the expressed intent of the maker of such instrument." *Id.* at 340, 278 N.E.2d at 13. The court went on to find that the settlor expressed an intent to have the trust assets remain his property, "a conclusion buttressed by the fact that considerable expenditures were contemplated under the trust for the payment of expenses in the
event of his death, and further under the trust he could designate such legatees he might desire." *Id.* at 341, 278 N.E.2d at 14.

Courts have generally found that the settlor intended a reversion where the dispositive instrument provides that after the death of the life tenant the property shall "revert" to the heirs of the grantor. In Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897 (1938), for example, the grantor conveyed to his wife "for her natural life and to my children of her body" certain real estate, subject to the condition that he would manage and control the lands during his life. The deed further provided that "should my said wife outlive me and die without children of her body by me surviving her, then in that event said lands are to revert to my next of kin." By his will the grantor made his adopted son the residuary taker and expressly provided that he should receive the property "to which my estate may be entitled in reversion conveyed to my wife . . . , for the period of her life. . . ." On the death of the widow without children, the heirs of the grantor claimed title to the lands on the theory that the deed created a vested remainder in them. After a thorough consideration of cases invoking the Doctrine of Worthier Title, the court held that no remainder was created, but that the grantor retained a reversion. In the course of the decision the court stated "suffice it to say the use of the word 'revert' is not to be ignored." *Id.* at 177, 185 So. at 904. A reading of the entire opinion, however, leaves no doubt that this was the crucial factor in the case.

Similarly, in Braswell v. Braswell, 195 Va. 971, 81 S.E.2d 560 (1954), the court found that the grantor intended a reversion by the use of language in a deed conveying a tract of land to his son "during his natural life and to his lawful heirs at his death, and if [the son] should die leaving no lawful heirs from his body; then the land herein conveyed shall revert back to the grantor or to his lawful heirs." The court felt that, "By using the word 'then' in conjunction with the word 'revert,' and without other language to the contrary, the grantor clearly intended that if the life tenant should die without issue of his body, 'in that case' the land should 'come back,' and pass as if no conveyance had been made." *Id.* at 973, 81 S.E.2d at 564.

In the following cases there was use of the word "revert" in the dispositive instruments, but the court did not place particular emphasis on that fact in finding a reversion: Shaw v. Arnett, 226 Minn. 425, 33 N.W.2d 609 (1948); Clark v. Hillis, 134 Ind. 421, 34 N.E. 13 (1893) (Doctrine of Worthier Title not recognized but principle invoked); Conrad v. Funnell, 106 Okl. 56, 232 P. 950 (1924) (following life estate property was to "revert" to heirs of settlor, naming children of settlor); cf. Wilson v. Pharris, 203 Ark. 614, 158 S.W.2d 274 (1941) (land was "to revert to the grantor's heirs" following the life estate; court applied Doctrine as rule of law).

In Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939), use of
the word "revert" in the deed did not persuade the court that the grantor intended to retain a reversion. (For a more complete discussion of Norman, see item 3b above.)

d. Cases in which the issue is whether the settlor may revoke a trust. By the great weight of authority it is held that if the settlor is the sole beneficiary of a trust he or she can revoke the trust even though the purposes for which the trust was created have not been accomplished. (See Restatement, Second, Trusts § 339.) If a trust established for the benefit of the settlor also provides for a remainder interest in the heirs of the settlor and the Doctrine of Worthier Title is applied to make the remainder a nullity, then the trust, which would otherwise be irrevocable (given the fact that the consent of the heirs (persons not ascertainable until the death of the settlor) could not be obtained) can be revoked. As a result, many of the cases in which courts have been called upon to invoke the Doctrine of Worthier Title arose because of a desire on the part of a settlor to revoke such a trust. Indeed, one of the arguments for continuing to apply the Doctrine in modern times is that it provides for the alienability of property that would otherwise be tied up in a trust. (See Comment a, last sentence.) It follows that a court predisposed to permitting settlors to revoke trusts would be more likely to apply the Doctrine of Worthier Title.

In stating the facts of the case, the court in Fidelity Union Trust Co. v. Parfner, 135 N.J.Eq. 133, 37 A.2d 675 (Ch.1944), noted that the settlor and her husband "are in receipt of $2500 a year, including the income from the trust. They are hard-pressed to live on this amount." Id. at 135, 37 A.2d at 676. The settlor was seeking to revoke the trust, arguing that under the Doctrine of Worthier Title she was the sole beneficiary. Under the terms of the trust the settlor was entitled to the income from the trust for her life and on her death the trust property was to go to the settlor's daughter. If the daughter predeceased the settlor (which in fact was the case), the trust property was to be distributed among such persons as the settlor should appoint in her will, and in default of such appointment to the settlor's next of kin. The court, applying the Doctrine of Worthier Title as a rule of construction, concluded that, "The present case is on the border line and even slight indications of intention may influence the result. . . . Certainly Mrs. Parfner created the trust primarily for the benefit of herself and her daughter and, after some hesitation, I have come to the conclusion that she had no other beneficiaries in mind. She has now become the sole beneficiary and may revoke." Id. at 138-139, 37 A.2d at 678. In Clark v. Judge, 84 N.J.Super. 35, 200 A.2d 801 (1964), affirmed on basis of lower ct. op. 44 N.J. 550, 210 A.2d 415 (1964), the court held that the settlor could not amend a trust because a remainder interest was created in the heirs of the settlor. In distinguishing the case before it from Parfner, the court indicated that the fact that the settlor in Parfner had a limited income was
of "obvious importance" in the finding of a reversion.

Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018 (1949), held that under the Doctrine of Worthier Title a trust provision that the settlor would have the income for life, and on his death the remainder would be "distributed and delivered to the heirs at law [of the settlor] in accordance with the laws of succession of the state of California then in effect" did not create a property interest in the heirs. In the present case there is nothing which shows an intent on the part of [the settlor] to create remainder interests in his heirs at law or to justify a departure from the usual rule of construction." Id. at 498-9, 202 P.2d at 1020. The settlor was therefore allowed to revoke the trust. In his concurring opinion, Justice Carter stated that he believed that the decision in the case should have been based on a "sounder ground." He would not have bothered with the inquiry into whether or not the settlor intended to create a remainder interest in his heirs, but would have allowed revocation based on public policy considerations. "[C]ourts look with disfavor upon the 'tying up' of property for long periods of time without any concomitant proper economic interests being served." Id. at 500, 202 P.2d at 1020.

Illinois has a statute designed to abolish the Doctrine of Worthier Title, which provides that

Where a deed, will or other instrument purports to create any present or future interest in real or personal property in the heirs of the maker of the instrument, the heirs shall take, by purchase and not by descent.

Ill.Rev.Stat. ch. 30, § 188 (1983). Stewart v. Merchant's National Bank of Aurora, 3 Ill.App.3d 337, 278 N.E.2d 10 (1972), the first case to arise under the statute, was a case in which a settlor was attempting to revoke a trust. Refusing to construe the statute narrowly, the court created an exception where application of the statute would "override the expressed intent of the maker of the instrument." Id. at 340, 278 N.E.2d at 13. The pertinent provision of the instrument in question was as follows:

On May 25, 1977, upon the beneficiary's death, or upon the exhaustion of the principal and income by disbursements as herein provided, whichever first occurs, the Trust shall terminate. Upon the beneficiary's death, if there be any principal or accumulated income remaining in the Trust Estate, the Trustee shall pay the beneficiary's funeral expenses, the claims against the estate and the administration expenses of his estate, the taxes due by reason of his death and distribute the remainder as the Last Will and Testament of the beneficiary may provide, or to the beneficiary's heirs-at-law in equal shares if beneficiary leaves no valid will.

Id. at 339, 278 N.E.2d at 12. The court did not indicate clearly which words showed the "expressed intent" on the part of the settlor to retain a reversion, but it is clear from the opinion that the last words of the provision ("re-
remainder... to the beneficiary's heirs-at-law in equal shares if beneficiary leaves no will"") were ignored. The only basis for not giving the words their full effect is the Doctrine of Worthier Title, and the opinion has been read as a judicial reinstatement of the Doctrine. See Note, The Doctrine of Worthier Title as a Rule of Construction in Illinois, 67 N.W.L. Rev. 773 (1972). The same note suggests that "the court of appeals paid a high price to revoke Stewart's trust." Id. at 778.

Under the rule of this section the application of the inter vivos branch of the Doctrine of Worthier Title is limited to situations in which the end limitation is to the heirs of the grantor. If the dispositive instrument provides for a remainder in a class excluding some of the persons who would be the heirs of the grantor, the Doctrine does not apply and the remainder is effective. In the following cases the end limitation is to a class other than the heirs of the grantor, but the courts nevertheless apply the doctrine to allow the settlors to revoke the trusts: Dunnett v. First National Bank & Trust Co., 184 Okl. 82, 85 P.2d 281 (1938) (end limitation was to the settlor's heirs at law "to be determined the same as if [the settlor's] death had occurred at the time of the death of [the life tenant]"); Dreyer v. Lange, 74 Ariz. 99, 243 P.2d 468 (1952) (trust was for the benefit of settlor for her life and on her death as she should appoint by will, and in default of appointment to "her heirs on the Dreyer side of the family"); Bottimore v. First & Merchants National Bank, 170 Va. 221, 195 S.E. 593 (1938) (end limitation was to settlor's issue, or if settlor died without lawful issue, to her sisters and the issue of those sisters who predeceased her, court noted that class was "in effect her possible heirs or next of kin"). See also Stewart v. Merchant's National Bank of Aurora, supra (end limitation was "to heirs-at-law in equal shares"). Cf. Bixby v. California Trust Co., supra (concurring opinion argued that if the grounds for the court's allowing the settlor to revoke the trust was the policy against "tying up" property, it followed that the same result should be reached in cases in which the heirs were to be determined as of a date other than the settlor's death).

The New York Court of Appeals did not attach any particular significance to the fact that the settlor was attempting to revoke a trust. Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929), and Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948), both involved situations in which the settlors had created a trust with an end limitation in favor of their heirs, and in both cases the court found that a remainder had vested in the heirs such that the trusts could not be revoked. In re Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293 (1949), involved two cases with similar fact situations. (The settlor in each case conveyed property to trustees who were directed to pay the income to the settlor during her life and upon her death to convey the principal of the trust estate as the settlor should appoint in her will, or in default of appointment to the settlor's next of kin as in intestacy.) In the first case the issue of
whether a remainder or reversion was created arose in the course of the administration of the estate of the deceased settlor. In the second case the settlor argued that she had the power as sole beneficiary to revoke her trust. The court noted that the trust agreements differed only slightly from the trust agreement in the Richardson case, supra, and found that both trust agreements created remainder interests in the heirs of the settlor. Judge Bromley, writing for the majority of the court, suggested that the Doctrine might be abrogated by statute, such that language limiting an interest to heirs of the grantor would be "unequivocally given its full effect" as creating a remainder, eliminating the necessity of searching for evidence to support it. Judge Fuld, dissenting, stated: "[T]he volume of litigation on the subject, the diversity of opinion, not to mention the difficulty, frequently, of decision, point to the advisability, if not the urgency, of clarifying legislation." Id. at 362, 87 N.E.2d at 298-99.

Responding to the call, a study was prepared by the New York Law Revision Commission resulting in the enactment of a statute. The solution proposed by the Commission took particular notice of the fact that the Doctrine of Worthier Title was often applied in situations in which the settlor was trying to revoke a trust. The Commission felt that a statute (such as proposed by Judge Bromley) that simply abolished the Doctrine "would indeed bring an end to the difficulties and expensive litigation required under the present rule. It would result further, however, in making irrevocable every trust which purports to create an interest in heirs or next of kin. The Commission believes that this would be undesirable." Recommendation and Study of the Law Review Commission, Leg.Doc. No. 65(D) at 85 (1951). The report went on to propose a statute that singled out one application of the Doctrine of Worthier Title such that a settlor would be able to revoke a trust in which there was a remainder interest created in his or her heirs. Under the proposed statute the consent of members of a class described in the trust instrument as heirs and next of kin, or as the persons who would take in the event of intestacy, would no longer be required to revoke the trust. The issue of whether the settlor intended to create a remainder would be dispensed with. In this narrow area then, the Doctrine of Worthier Title would effectively be applied as a rule of law. The report justified the proposed statute as follows:

In their capacity of "distributaries upon intestacy" [the heirs] have no more than an expectancy while [the settlor] lives, and their own death prior to his, or in many cases the birth of other persons or the marriage of the creator of the trust, will prevent any interest from vesting in them. This uncertainty is inherent in the description of such a group, and exists to the same extent with respect to their inclusion in a class of beneficiaries even where the trust instrument creates a remainder interest in the group.

The very form of language typically used to describe such
a class indicates that they are thought of not as individuals who may be objects of the specific regard of the creator of the trust, but as the group prescribed by law as the ultimate recipients of his property failing all other dispositions he may make.

*Id.* at 85-86. The Commission proposal was enacted in 1951 [New York Est., Powers & Trusts Law § 7-1.9 (McKinney 1967)]. Situations not specifically covered by the statute (such as the distribution of estates where there was an inter vivos instrument with an end limitation to the heirs of the grantor) were presumably not affected and in those situations the Doctrine would have continued to apply as a rule of construction.

In 1966, however, a second statute was enacted that abolished the Doctrine [Estates, Powers & Trusts Law § 6-5.9 (McKinney 1967)]. Read together, the two sections abolish the Doctrine of Worthier Title and vest a remainder in the grantor's heirs, with the exception that a settlor can nevertheless revoke a trust in which there is an end limitation to his or her heirs without the heirs' consent.

In Hatch v. Riggs National Bank, 361 F.2d 559 (D.C. Cir. 1966), the court noted that "It is perhaps tempting to say that the settlor intended to create no beneficial interest in his heirs when he said 'to myself for life, remainder to my heirs' when the question is revocation of the trust, or whether creditors of the settlor should be able to reach their interest. But the same result is far from appealing if the settlor-life beneficiary dies without revoking the trust and makes no provision for his heirs-at-law (whom he supposed to be taken care of by the trust)." *Id.* at 563. The court concluded that abolishing the Doctrine so that an end limitation to the heirs of the grantor would create a vested remainder in them would avoid litigation and uncertainty. To allow for the possibility of revocation the court established a procedure whereby a guardian ad litem would be appointed to represent the interests of the unknown persons who would become the settlor's heirs at her death. The guardian would be in a position to give consent for modification or revocation of a particular trust, perhaps in return for a quid pro quo offered by the settlor. The court also stated: "We think it important to make clear that, in rejecting the doctrine of worthier title, we do not mean to put settlers and life tenants of trusts in which the remaindermen are the settlor's heirs at an unwarranted disadvantage with respect to legitimate efforts to modify trust arrangements concluded largely for their own benefit." *Id.* at 566.

In Peter v. Peter, 136 Md. 157, 110 A. 211 (1920), a spendthrift trust was created "to protect an improvident gentleman who had reached the age of 30 years from wasting his substance," with the siblings of the settlor acting as trustees. Under the terms of the trust deed the settlor was to have the income from the trust property for his lifetime, and on his death the property was to go as the settlor should by his will appoint, or, if he died without a will, to his heirs at law. In addition,
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the trustees were given the power to terminate the trust and reconvey the property to the settlor in their sole discretion. Claiming that the reasons for the trust no longer existed and invoking the Doctrine of Worthier Title, the settlor sought to have the trust cancelled. Without much discussion the court concluded that the settlor had "created rights in others which cannot be disposed of on the demand of himself alone; at least, as the case now stands." Id. at 172, 110 A. at 217.

In 4 A. Scott, The Law of Trusts § 339 (3rd ed. 1967) (1981 Supp.), it is noted that a trust that would otherwise be revocable because the settlor is the sole beneficiary is not revocable if it is provided by the terms of the trust that the trust shall not be terminated without the consent of the trustee. "In that situation it cannot be said that the settlor in a moment of folly has tied up his property in such a way that he should not be permitted in a moment of wisdom to terminate the trust. He has simply delegated the power to terminate the trust to the trustee who is thereby given discretion, but a discretion which must not be abused. It is indeed a very sensible way in which a person may protect himself against a dissipation of his property, if he feels, either on account of his age or improvident tendencies, that he needs the control which a trustee could exercise over his property." Id. It would seem that the decision in Peter could be resolved under this reasoning.

4. Cases in which the inter vivos Doctrine of Worthier Title was applied as a rule of law—The Doctrine of Worthier Title was applied as a rule of law in In re Brolasky's Estate, 302 Pa. 439, 153 A. 739 (1931); Gould v. Harris, 132 A. 2 (R.I.1926); Robinson v. Blankinship, 116 Tenn. 394, 92 S.W. 854 (1906); Glenn v. Holt, 229 S.W. 684 (Tex.Civ.App. 1921) and Wilson v. Pharris, 203 Ark. 614, 158 S.W.2d 274 (1942). In Tennessee, Texas, and Arkansas, however, statutes have been enacted abolishing the Doctrine (see the Statutory Note to this section, item 1). From Kuhn v. Jackman, 32 Ohio App. 164, 166 N.E. 247 (1929), it is not clear whether the Doctrine would be applied as a rule of law or construction in Ohio. The Circuit Court of Appeals in Beach v. Busey, 156 F.2d 496 (6th Cir.1946), noting that it was not clear how the courts of Ohio would treat "this ancient rule," applied the Doctrine as a rule of construction.

As is noted in item 3d above, in New York a statute effectively preserves the Doctrine as a rule of law in instances in which a settlor is attempting to revoke a trust.

5. Cases in which the inter vivos Doctrine was rejected—In Hatch v. Riggs National Bank, 361 F.2d 559 (D.C.Cir.1966), the court rejected the settlor's argument that under the Doctrine of Worthier Title she retained a reversion with the result that she was the sole beneficiary and could revoke or modify the trust without the consent of her "heirs." The court held that the Doctrine is no part of the law of trusts of the District of Columbia, either as a rule of law or as a rule of construction, and that "[a]ny act or words of the settlor of a trust which would validly create a remainder interest in a named third party may create a valid remainder
interest in the settlor's heirs.” Id. at 564. The court justified its decision in that it saw no reason “to plunge the District of Columbia into the rank of those jurisdictions bogged in the morass of exploring, under the modern doctrine of worthier title, the almost ephemeral qualities which go to prove the necessary intent.” Id. at 564. The court also expressed doubt whether the Doctrine accords with the intent of the average settlor. “In the normal case an adult has a pretty good idea who his heirs will be at death, and probably means exactly what he says when he states in the trust instrument, ‘remainder to my heirs.’” Id. at 563. The court also pointed to the volume of litigation presented when the Doctrine is applied as a rule of construction and established a separate mechanism whereby a settlor desiring to revoke a trust could do so (see item 3d above).

The Supreme Court of Connecticut has not rendered any decision directly involving the Doctrine of Worthier Title. However, a Superior Court decision, Phoenix State Bank & Trust Co. v. Buckalew, 15 Conn.Sup. 149 (Super.Ct.1947) held that “the Doctrine of Worthier Title, as it existed in the common law of England, was not adopted in Connecticut and it has not been and is not a rule of law binding upon the court.” Id. at 151. But see Griems v. Bankers Trust Co., 308 N.Y. 718, 124 N.E.2d 335 (1954), affirming, 283 App.Div. 783, 129 N.Y.S.2d 493 (1953), reversing, 124 N.Y.S.2d 694 (1964) (applying Connecticut law; court concluded that highest Connecticut court would treat the future interest before it as a retention of a reversion rather than a remainder).

The court in Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939), does not explicitly abolish the Doctrine, but shows a good deal of antagonism toward it.

Several states have enacted statutes abolishing the Doctrine (see the Statutory Note to this section).

6. The testamentary Doctrine of Worthier Title—

a. Cases rejecting the Doctrine. There are relatively few cases specifically rejecting the testamentary Doctrine of Worthier Title. This is probably attributable to the fact that at the present time there is practically no distinction between property that has passed by will and property that was passed by intestacy, and there is therefore no reason to have the issue of whether the testamentary Doctrine of Worthier Title will be applied decided by a court.

The Doctrine was specifically rejected in an early Georgia case, Lucas v. Parsons, 24 Ga. 640 (1857). In that case the testator’s will provided for “distribution of all my property under the laws of Georgia. . . . It was contended that the paper was inoperative as a will because it disposes of the entire estate precisely as the law would distribute it, and the heirs-at-law, in such case, take by descent, and not by purchase, that is under the will.” Id. at 659. The court pointed out that there was no reason for the rule contended for, and held that the paper was testamentary in character.

In Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532, 142 S.W. 2d 181 (1940), the court stated “[a]fter a careful considera-
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tion we are convinced that the doctrine of worthier title seeks to hinder, rather than aid, in the ascertainment of the intention of a testator, which is the cardinal purpose in the construction of wills and that it was no place in our jurisprudence.” *Id.* at 538, 142 S.W.2d at 184.

In City National Bank of Birmingham v. Andrews, 355 So.2d 341 (Ala.1978), a daughter was given the same share under her mother’s will as she would have received under the laws of descent and distribution. She later renounced the devise. A creditor of the daughter contended that under the testamentary Doctrine of Worthier Title she did not take the property by devise but by descent, and that as she could not renounce an inheritance, the creditor was entitled to garnish funds in the mother’s estate. Noting that the application of the Doctrine has often been said to hinder rather than aid in the ascertainment of the testator’s intention, and that the Doctrine has been condemned by legal scholars and abandoned in England where it originated, the court was persuaded that

The wills branch of the worthier title doctrine is an anachronism in the law and should not be applied. If applied as a rule of law to this case, it would have the effect of voiding the testatrix’ will; if applied as a rule of construction, it would have the effect of defeating her expressed intentions, simply to serve a purpose which ceased to exist 250 years ago. We are not inclined to abdicate our responsibility to the legislative body. The legislature did not formulate the rule—the courts devised it to protect the feudal dues of overlords at an earlier time. We have no hesitation to abandon it as a judicial rule in a different time.

*Id.* at 344.

Prior to the decisions in two recent cases, the Iowa Supreme Court recognized and applied the testamentary Doctrine. A number of cases held that Iowa’s antilapse statute was inapplicable to a devise to the heir apparent because of the Doctrine of Worthier Title. In Matter of Kern’s Estate, 274 N.W.2d 325 (Iowa 1979), the court stated that “we thus abrogate the worthier title doctrine in antilapse statute situations.” *Id.* at 328. Three years later, in Matter of Campbell, 319 N.W.2d 275 (Iowa 1982), the court abolished the rule as it would apply in situations other than those involving the antilapse statute, “to end in Iowa what is left of the wills branch of the worthier title doctrine. . . .” *Id.* at 278.

Several States have enacted statutes abolishing the Doctrine of Worthier Title. See the Statutory Note to this section.

b. Cases applying the testamentary Doctrine of Worthier Title. Joseph W. Morris, in The Wills Branch of the Worthier Title Doctrine, 54 Mich.L.Rev. 451 (1956), points to several jurisdictions where the testamentary Doctrine of Worthier Title was recognized. Since the article was published, statutes abolishing the Doctrine have been enacted in five of the listed jurisdictions (Illinois, Massachusetts, New York, North Carolina, and Tennessee). In Indiana a statute abolishes the
Doctrine insofar as it might be invoked in the interpretation of trust instruments. (For these statutes, see the Statutory Note to this section, items 1-3.) As is noted above, the Doctrine has recently been abandoned judicially in Alabama and Iowa, and in the District of Columbia and Connecticut courts have ruled that the inter vivos Doctrine will not be applied and it is doubtful that the same courts would adhere to the testamentary aspect of the rule. In all but three of the remaining jurisdictions listed by Morris as recognizing the Doctrine, the cases date from before the turn of the century, and in most of these latter cases, the testamentary Doctrine of Worthier Title was not applied but merely recognized. See Lord v. Bourne, 63 Me. 368, 18 Am.Rep. 234 (1873) (Doctrine recognized but not applied); Mitchell v. Mitchell, 21 Md. 244 (1864) (Doctrine applied); Donnelly v. Turner, 60 Md. 81 (1883) (Doctrine recognized but not applied); Latrobe v. Carter, 83 Md. 279, 34 A. 472 (1896) (Doctrine recognized but not applied); McDaniel v. Allen, 64 Miss. 417, 1 So. 356 (1887) (Doctrine recognized but not applied); M'Afee v. Gilmore, 4 N.H. 391 (1828); Bond v. Swearingen, 1 Ohio 395 (1824) (Doctrine applied); Seabrook's Executor v. Seabrook, 1 McMul. Eq. 201 (S.C.1841); Biedler v. Biedler, 87 Va. 300, 12 S.E. 753 (1891) (Doctrine recognized but not applied); In re Root's Will, 81 Wis. 263, 51 N.W. 435 (1892) (court found it unnecessary to decide whether heirs took by descent or purchase given that outcome of case would not be affected either way; dictum to effect that if outcome would have been affected, court would have applied Doctrine).

As is noted above, courts in three jurisdictions have applied the testamentary Doctrine in this century and do not have a later case or statute abrogating the Doctrine. In Banes v. Finney, 209 Pa. 191, 58 A. 136 (1904), a father devised certain real estate to his son John, subject to payments of $1700 to another son and $700 to a daughter. Apparently invoking the testamentary Doctrine of Worthier Title the court stated: "Under the said will the said John Finney took the real estate devised to him as if by descent, and not as a purchaser, notwithstanding the payments to the other heirs charged upon it by the testator." [Citing Kinney v. Glasgow, 53 Pa. 141 (1866).] Application of the Doctrine did not affect the outcome of the case.

In an Oklahoma case, Horton v. Cronley, 270 P.2d 306 (Ok.1953), it is questionable whether resort to the Doctrine was warranted. The court found that the wife of the testator did not take under the will, which would have given her a life interest in her husband's property, but "elected to exercise her statutory right and took a fee simple title under the laws of succession." Id. at 313. The opinion also states: "Under the Worthier Title Doctrine it must be presumed that Henrietta took as a forced heir, rather than under the will." Id. In an opinion dissenting on this point, William, J., pointed out that the Worthier Title Doctrine has no application where the estate given by the will is not identical in quantity and quality to that given
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by the law. The dissent also pointed out that the court had never had the occasion to adopt or reject the Worthier Title Doctrine, citing Beamer v. Ashby, 204 Okl. 530, 231 P.2d 668 (1951).

In Gordon v. Gregg, 164 Or. 306, 97 P.2d 732 (1940), rehearing granted, 101 P.2d 414 (1940), the testator devised all of his property in trust for the benefit of his son with directions that the devised property should be transferred to the son free from trust when he reached age 21. The son was 17 years old at the death of his father and was also his father's sole heir at law. The son died intestate, unmarried, and without issue two months after the death of his father, leaving as his sole heir at law, his mother, the divorced wife of the testator. An Oregon statute [Oregon Code § 10-101 (1930) (repealed in 1969)] provided that

When any child shall die under the age of twenty-one years and leave no husband nor wife nor children, any real estate which descended to such child shall descend to the heirs of the ancestor from which such real property descended the same as if such child died before the death of such ancestor.

The heirs of the testator claimed that they were entitled to the property on the basis of two arguments. First, they argued that the word "descended" in the statute should not be given the narrow, common-law meaning of a succession of real property to an heir upon the death of his ancestor by operation of law and exclude the passage of any property that passed by devise, but should be read to encompass any passing of property, whether it be by devise or descent. Second, the heirs of the testator argued that even if the word "descended" was given its common law meaning, the son in fact took by descent and not devise because, under the Doctrine of Worthier Title, as the testator's sole heir the son could not take by devise when he could take the same estate by descent. The court stated that the Doctrine of Worthier Title would not be applied. "We do not believe that this rule does or ever has prevailed in this state . . . ." Id. at 311, 97 P.2d at 734. The court held for the testator's heirs, however, on the basis of their first argument.

On rehearing the court changed its mind. "[W]e are now convinced that the rule [the testamentary Doctrine of Worthier Title] does prevail in this state." 164 Or. 315, 315, 101 P.2d 414, 415. This determination by the court did not change the outcome of the case, since the court had previously decided that the statute applied whether the minor son took the property by devise or descent. The court also stood by this determination. (A concurring opinion would have confined the word "descended" in the statute to its common law meaning so that there would have been a different result if the Doctrine of Worthier Title did not apply.)

The statute at issue in Gordon v. Gregg (providing that if decedent died unmarried and underage and acquired an interest in property by inheritance, such property would not pass in the same manner as property acquired by devise or by purchase)
was repealed in 1969. At one time similar statutes existed in several states, but the number has been diminished. Such statutes still exist in California (Cal. Prob.Code § 227 (West 1956)), Nevada (Nev.Rev.Stat. § 134.080 (1981)) and Oklahoma (Okla.Stat. tit. 84, § 213 (1981)).
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