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### IMPOSING A GENERAL SURVIVAL REQUIREMENT ON BENEFICIARIES OF FUTURE INTERESTS: SOLVING THE PROBLEMS CAUSED BY THE DEATH OF A BENEFICIARY BEFORE THE TIME SET FOR DISTRIBUTION\*

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This Article addresses the question whether state legislatures should abrogate the venerable preference for indefeasibly vested future interests by imposing a statutory requirement of survival.<sup>1</sup> The conclusion is yes, *but* only if the statute also provides a satisfactory substitution of beneficiaries.

Over its almost four-hundred-year life, the preference for a vested con-

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1. The doctrine that future interests are presumed vested and not contingent, and that a construction producing earlier vesting is preferred to one that produces later vesting, dates back at least to the seventeenth century. *Roberts v. Roberts*, 2 Bulst. 123, 80 Eng. Rep. 1002 (K. B. 1613), is the first case that explicitly mentions the rule. Rabin, *The Law Favors the Vesting of Estates. Why?* 65 COLUM. L. REV. 467, 480 n.87 (1965). This doctrine is universally recognized in the United States. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 573 (2d ed. 1956).

struction has served a number of useful functions in future interests law. When contingent future interests were inalienable and destructible, construing interests as vested served the public interests in promoting alienability of property and in carrying out the donor's intent.<sup>2</sup> Even after contingent interests became inalienable and the destructibility doctrine had been generally abolished, the preference for a vested construction proved useful. It promoted marketability by reducing the uncertainties surrounding ownership.<sup>3</sup> It also reduced the number of interests subject to destruction by the Rule Against Perpetuities.<sup>4</sup>

By the middle of the twentieth century, most commentators agreed that these purposes had either become obsolete,<sup>5</sup> or could be equally well served by other doctrines, like the "wait and see" or reformation doctrines in perpetuities law.<sup>6</sup> Commentators began to call for a reevaluation of the rule favoring a vested construction.<sup>7</sup> Several characterized the rule as archaic and without any rational justification.<sup>8</sup> Although a few courts followed their lead,<sup>9</sup> most did not. Within a few years, commentators began to appreciate

2. RESTATEMENT OF PROPERTY § 243 comment h (1940).

3. *Id.* at comment i.

4. Schuyler, *Drafting, Tax, and Other Consequences of the Rule of Early Vesting*, 46 ILL. L. REV. 407, 418-19 (1951).

5. *Id.* at 437-42; Rabin, *supra* note 1, at 480-83.

6. W. LEACH, PROPERTY LAW INDICTED! 75-84 (1967); McGovern, *Facts and Rules in the Construction of Wills*, 26 UCLA L. REV. 285, 320 (1978).

7. Professor Powell called for a rethinking at least as early as 1950:

Practically, the constructional preferences of today's law, theoretically based upon serving the public interest, express conclusions reached by courts decades or centuries ago and crystallized into their present form by frequent judicial applications. In this fashion originated the shibboleths that 'early vesting' and 'early indefeasibility' are 'socially desirable' and hence that there should be a constructional preference for early vesting and early indefeasibility. Perhaps these preferences still represent sound judgments as to present social interests, but it is certain that the considerations of social policy which originally caused their formulation have for the most part been forgotten, and when dug out are found to have largely, if not wholly, ceased to function. If these rules still deserve the importance they now have in the constructional process, this must be due to new considerations of social policy which afford new support for the old conclusions. It is time our legal thinkers and courts do some hard thinking as to why there should be a constructional preference for early vesting and early indefeasibility.

2 R. POWELL, REAL PROPERTY ¶ 318[3] at 25-42 to 43 (Rohan rev. ed. 1985). Although it is impossible to determine the publication date of the particular passages (or even whether Powell wrote them) from the current loose-leaf binder form of this treatise, the quoted passage appears identical to that referred to in Rabin, *supra* note 1, at 467 n.4, and cited as 2 POWELL, REAL PROPERTY ¶ 318 at 684 (1950).

8. See, e.g., Casner & Westfall, *Construction Problems*, 5 AMERICAN LAW OF PROPERTY § 21.3 (Casner ed. 1952) ("continued adherence to this preference in modern times is at least of doubtful validity in many situations"); Leach & Tudor, *The Common Law of Rule Against Perpetuities*, 6 AMERICAN LAW OF PROPERTY § 24.19 n.1 (Casner ed. 1952) ("the present writers can find no present justifications, at least outside the perpetuities cases"); Chaffin, *Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting*, 7 GA. L. REV. 443, 444 (1973) ("The thesis of this Article is that the preference for a vested construction has little, if any, justification in modern law. It is an archaic relic. . .").

Professor Schuyler, in an article published in 1951, was the first to criticize the rule at length. Schuyler, *supra* note 4. Professor Ferrier, who, in an article published in 1952, did not question the continued utility of the rule, represented an exception to the trend. Without any discussion, he warned that the canon of construction that favored keeping property in the testator's bloodline must not be allowed "to undermine the more fundamental one in favor of early vesting." Ferrier, *Implied Condition of Survivorship in Gifts of Future Interests in California*, 40 CALIF. L. REV. 49, 63 (1952).

9. Rabin, *supra* note 1, at 479. Rabin criticized "this harsh unbalanced assessment of the rule" as being "as unfortunate as the more common tendency to accept the rule uncritically."

the significant function the rule performs in avoiding incomplete dispositions.<sup>10</sup>

By their nature, future interests create potential problems of disposition if the intended beneficiary dies before the time set for distribution.<sup>11</sup> The donor should spell out what the trustee should do with the property if the beneficiary dies prematurely, but all too often the instrument is silent or ambiguous.<sup>12</sup> When the instrument is unclear, courts are faced with trying to arrive at a disposition that, at best, is what the donor would have done if she had addressed the question, and, that at worst would not have outraged the donor.

In their efforts to ascertain what the donor would have done, courts are hampered by their unwillingness to admit the most direct evidence bearing on the question. Often the answer is obvious if the court looks at the original beneficiaries of the donor's property and their relationships to the donor and the donee, and then looks at those alive at the time of distribution and their relationships to the donor and the donee.<sup>13</sup> Rules against admitting extrinsic evidence, however, prevent most courts from taking this direct approach.<sup>14</sup>

Instead, courts look at the language of the instrument and the donor's dispositive pattern in light of the court's view of what the ordinary reasonable testator would have wanted. In selecting a disposition, courts have used

10. In 1961, Professor Halbach published an extensive examination of the constructional preference as it applied to survival requirements. He concluded that the traditional refusal to imply survival requirements often carries out the donor's intent, avoids the problems of widespread reversions, and protects the spouse and issue of predeceasing beneficiaries. Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 CALIF. L. REV. 297, 431 (1961) (pts. 1 & 2). In a 1965 article, Professor Rabin identified the rule's tendency to preserve the property for the issue of the beneficiary, rather than permitting it to pass to the surviving class members or to revert to the donor's estate, as the primary modern justification for the rule. Rabin, *supra* note 1, at 483-86. Later, Professor Waggoner, writing in 1969, agreed that the vested construction tends to carry out the donor's intent where the instrument does not express a survival condition. He emphasized that giving the beneficiary power to dispose of the property permits him to protect his family as he believes best. Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts Under the New Illinois "Anti-Lapse" Provision*, 1969 U. ILL. L.F. 423, 437-38.

11. By definition, future interests are present rights to possession or enjoyment of property in the future. The postponement of possession always entails the possibility that the intended recipient may die before distribution. L. SIMES & A. SMITH, *supra* note 1, § 575.

12. Ferrier, *supra* note 8, at 49, points out that the frequent instances of failure to draft unambiguous provisions are not restricted to home-drawn wills.

13. Professor McGovern recently suggested that courts look beyond the language of the dispositive instrument to the actual facts of the case before deciding which canon of construction to apply. He would apply the preference for a vested construction when the result would distribute the property to the issue of the deceased beneficiary, and would not apply it when the result would increase taxes or pass property outside of the family. McGovern, *supra* note 6, at 286, 290-93 (1978).

14. The New Jersey court is unusual in its willingness to go outside the donative instruments to look for the testator's "probable intent" as to the disposition that the court should make in lapse situations. The court could apply the same approach to the future interest problem. See, e.g., *Estate of Burke*, 48 N.J. 50, 222 A.2d 273 (1966); *Wagner v. Cook*, 44 N.J. 1, 206 A.2d 865 (1965). The Wisconsin court recently refused to adopt the probable intent doctrine on the grounds that it opens many wills to attack, injects an element of uncertainty into the testamentary disposition process, and allows a court "to independently ascertain the intent of the testator absent any language in the will which would be of guidance. Such a rule would bear the unpleasant appellation 'judicial will drafting' . . ." *Estate of Connolly*, 65 Wis. 2d 440, 452-54, 222 N.W.2d 885, 891-92 (1974).

See Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* 130 U. PA. L. REV. 521 (1982), for an excellent analysis of the reasons why judges are troubled by the idea of going beyond the language and pattern of the will for evidence who the donor intended to be the beneficiary.

a limited number of choices: implied gifts to surviving class members or issue of the deceased beneficiary; reversions; or distributions to the donee's estate.

Courts facing this situation may treat the instrument as an incomplete expression of the donor's intent and look for an implied gift based on the instrument's language or on the dispositive pattern. From either the language or the pattern, the court may infer that the donor intended to make a gift to the surviving class members or to the predeceasing beneficiary's issue. If the court finds no basis for implying a gift, it will hold that there is a reversion to the donor or, as will usually be the case, to the donor's estate. The preference for a vested construction allows a court to avoid either of these dispositions by finding that the instrument made a complete disposition. If the court finds that the beneficiary had a vested interest, it will order distribution to the beneficiary's estate.

Distribution to the beneficiary's estate is often an attractive solution. When the beneficiary dies, the donor is usually not available to make another disposition of the property,<sup>15</sup> so that a reversion may be an unsatisfactory alternative.<sup>16</sup> The dispositive instrument may not clearly indicate which of the competing claimants the donor would have preferred if he had anticipated the beneficiary's death. Finding the interest a vested one permits the court to avoid admitting extrinsic evidence of the donor's relationships with the various claimants. It also allows the court to avoid writing a substitute gift into the dispositive instrument.<sup>17</sup> Finally, the solution may be attractive because the court believes the donor intended this distribution, or because it avoids a distribution that the donor surely did not intend.

Although distributing the property to the donee's estate presents many attractive features, it is both cumbersome and costly. It is cumbersome because the probate process itself is cumbersome, and to make matters worse, the beneficiary may die long before the property becomes distributable.<sup>18</sup> Too often, the future interest was not recognized as an asset of the beneficiary's estate, and a probate must be opened or reopened years later to receive and then distribute the property.<sup>19</sup>

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15. The problem as it arises with future interests is different from lapse where, at least in theory, the testator can change the will to adjust to the intended beneficiary's death. Future interests are often created by will, so by definition the testator is dead before the problem arises. Even if an *inter vivos* trust creates the interest, the problem usually arises after the settlor's death.

16. Even where the donor outlives the beneficiary, reversion may not provide a satisfactory alternative. See *infra* text accompanying notes 70-74. The anti-lapse statutes were adopted to prevent reversionary dispositions.

17. One commentator criticized the Illinois statute that imposes a survival requirement on some future interests and substitutes surviving issue for the deceased beneficiary as going "dangerously far in making a will for the testator." Waggoner, *supra* note 10, at 437.

18. See, e.g., *Estate of Houston*, 414 Pa. 579, 201 A.2d 592 (1964). In *Houston* the trust terminated in 1961. The trust was distributable to the testator's grandchildren, "the children of any deceased grandchild taking their deceased parent's share." The distributees included the estates of three grandchildren who died without issue. Two died in 1918 and one died in 1934. *Id.* at 584, 201 A.2d at 594.

19. See, e.g., *In re Will of Woodcock*, 19 Misc. 2d 268, 186 N.Y.S.2d 447 (Surr. Ct. 1959) (rejecting the suggestion that distribution be made directly to the ultimate takers to avoid incurring additional administrative expenses). In some states, however, if there are no questions as to the identity of the heirs or devisees and no creditors, it may be possible to bypass the probate estate and distribute directly to the heirs or devisees. This appears to have been done in *Estate of Stanford*, 49

The process is costly for several reasons. First, the administrative expenses of the probate must be paid. Second, the value of the future interest is taxable as part of the beneficiary's estate.<sup>20</sup> Third, it exposes the property to the claims of the beneficiary's creditors and the claims of forced or pretermitted heirs.<sup>21</sup> Finally, litigation is often required to determine whether the instrument expressed or implied a survival requirement.<sup>22</sup>

Imposing a general survival requirement on the takers of future interests avoids all of these costs. This Article poses the question whether general survival requirements should be imposed by statute. The answer reached is that general survival requirements should be imposed, but only if the current rule's function of providing a useful disposition is filled in another way.

If a statute simply imposed survival requirements without providing a substitute disposition of the property, a situation very much like that produced by the lapse doctrine would result. The lapse doctrine requires that all will beneficiaries survive to the date of the testator's death. The property intended for predeceased beneficiaries passes either to the surviving class members or to the residuary or intestate takers. This produces the same result as finding a reversion after a failed future interest. Widespread unhappiness with this disposition led to almost universal adoption of anti-lapse statutes in the nineteenth century. A similar reaction would surely follow the judicial or statutory imposition of a survival requirement if it did not provide an acceptable substitute disposition.

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Cal. 2d 120, 315 P.2d 681 (1957). In *Stanford* the beneficiary died in 1918, but his sole devisee was still alive when the trust terminated and she participated in the litigation to determine whether the beneficiary had owned a transmissible interest.

20. The decedent's gross estate for federal estate tax purposes includes the value of all property to the extent of the decedent's interest at the time of his death. I.R.C. § 2033 (1982). See 3 A.J. CASNER, *ESTATE PLANNING* 973-74 (4th ed. 1980), and Chaffin, *supra* note 8, at 448, for discussions concerning the estate tax consequences of owning a transmissible future interest at death.

In *Estate of Benson*, 447 Pa. 62, 285 A.2d 101 (1971), the court held that a daughter's estate included a vested remainder interest in a trust created by her father for her mother for life, remainder to the children, the children's interests to divest in favor of their issue or surviving siblings if they died under age 32. Since the daughter died at age 47, the court included the remainder in her estate, thus adding over \$1,200,000 to the taxes payable on her death. The court refused to consider the tax consequences in construing her interest, stating that: "[C]ourts cannot be placed in the position of estate planners, charged with the task of reinterpreting deeds of trust and testamentary dispositions so as to generate the most favorable possible tax consequences for the estate." 447 Pa. at 72, 285 A.2d at 106; McGovern, *supra* note 6, at 303 (1978).

21. See Halbach, *Creditors' Rights in Future Interests*, 43 MINN. L. REV. 217 (1958). The English anti-lapse statute, § 33 of the Wills Act of 1837, 7 Will. 4 & 1 Vict., ch. 26, originally provided the same treatment for an interest devised to a descendant of the testator who died before the testator. The statute provided that the property should be distributed as if the devisee had died immediately after the testator. The statute was amended, effective January, 1983, to provide that the devise should take effect as a devise to the devisee's issue living at the testator's death. One reason for the amendment was to avoid the possibility that the property might be taken up in payment of the predeceasing devisee's creditors. 52 Halsbury's Statutes of England 1974 (3d ed. 1982).

22. Halbach, *supra* note 10, at 297, describes this as the most litigated question in the law of future interests. The fact that the litigation may not take place until the future interest becomes possessory increases the difficulties of the deceased beneficiary's executor who may not know whether to include the value of the future interest in the gross estate for tax purposes. See Chaffin, *supra* note 8, at 451.

## I. THE PRIMARY FUNCTION PERFORMED BY THE PREFERENCE FOR A VESTED CONSTRUCTION

Traditional doctrine implies survival requirements sparingly and construes express survival requirements restrictively. As a result, many future interests are transmissible. Despite the drawbacks of transmissible interests, they play a significant role in providing an alternative disposition of the property intended for a beneficiary who dies before distribution. This alternative disposition furnishes the primary, modern reason for preferring a vested construction.<sup>23</sup>

When a court holds that interests are not transmissible, it may distribute the property in three different ways. If there is an express alternative gift, the court will distribute the property as the instrument provides. If there is no express alternative, the court may either find an implied gift or hold that there is a reversion. The preference for a vested construction supplies a fourth alternative: Because the interest is transmissible, the court will distribute the property to the deceased beneficiary's estate. The availability of this alternative significantly increases a court's ability to reach a result that carries out ordinary, reasonable donor's intent.

There are drawbacks to using each of these possible distribution schemes. If the court finds an implied gift, it is to some extent rewriting the dispositive instrument. The court may actually create dispositions that the donor would not have intended, but more importantly, it may also create fears of unbridled judicial discretion to remake donative transactions.<sup>24</sup> If the court finds a reversion, it is ordering a distribution that may require passing the property through the estates of other deceased beneficiaries. Usually the donor is dead. The longer the time gap between the trust's creation and the beneficiary's death, the more likely it is that the donor's residuary or intestate takers may have died. Distribution to the residuary taker may carry the property outside the family,<sup>25</sup> and distribution to the intestate takers may produce unequal treatment of the various family branches.<sup>26</sup> On the other hand, if the court holds the beneficiary's interest transmissible, the property will certainly be distributed through the estate of a deceased person, and subjected to the costs that entails. There is also the risk that the beneficiary may have left his or her estate to someone that the transferor would not have wanted to receive the property.<sup>27</sup>

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23. Two other functions, facilitating trust modifications and terminations, and furthering marketability of land, are considered in the text accompanying notes 123-135.

24. See *supra* note 14.

25. This happens where donors establish pre-residuary trusts to provide for their family. In these situations, the donor often leaves the residue for charitable uses. A similar problem arises where the testator uses separate trusts to provide for different branches of the family. Reversion of an interest in the trust established for one branch might cause an inequality of treatment if the property is distributed to a trust for the other branch.

26. For example, the residue might establish a trust for *H*, *T*'s spouse, for life, remainder to children, *A*, *B*, and *C*. If *B* dies before *H* and leaves issue, in many states the distribution of *B*'s  $\frac{1}{3}$  share of the remainder as intestate property of *T* would result in a distribution of  $\frac{1}{3}$  to *H* and  $\frac{2}{3}$  to *A*, *C*, and *B*'s issue per stirpes. Instead of receiving  $\frac{1}{3}$  of the remainder, *B*'s issue would receive  $\frac{2}{3}$  of  $\frac{1}{3}$ , or  $\frac{2}{21}$  of the remainder.

27. Schuyler viewed this risk as substantial and therefore recommended abolishing the rule of early vesting. Schuyler, *supra* note 4, at 428-29.

If survival requirements are expressly imposed, the chances are very good that the donor considered the possibility that the beneficiary might die before the time set for distribution, and drew the disposition with that in mind. The chances are quite good that the donor expressly named an alternate taker in the instrument. If the donor did not name an alternative taker, there is at least a fair chance that the donor intended the surviving class members or the donor's own residuary or intestate takers to take the property.

The donor may have failed to impose an express survival requirement for a number of reasons: because the transferor did not consider the possibility that the beneficiary might die before distribution; because the transferor believed the disposition covered the possibility; or because the transferor intended that the beneficiary make any further dispositions of the property. Examining the situations in which courts have implied survival requirements shows that they do so only when it appears that the disposition adequately covers the possibility that the beneficiary might die before distribution, and substitutes a beneficiary that would be acceptable to the average donor. In all other cases, courts apply the preference for a vested construction and distribute the property to the beneficiary's estate.

A closer look at the cases bears out the hypothesis that the prime function of the preference for a vested construction is to provide a method of disposing of the property when it is not clear that the average donor would have done something different under the circumstances.

#### A. *Situations Where Survival Requirements Are Not Implied*

Generally, courts do not imply survival requirements in the following situations, so that the property passes to the beneficiary's estate rather than to the donor's estate or to surviving class members.

1. Courts do not imply survival requirements in gifts to named individuals unless the instrument names an alternate taker.<sup>28</sup> The doctrinal statement is that a postponement of possession does not imply a requirement of survival to the distribution date.<sup>29</sup> Thus, in a trust for *A* for life, remainder to *B*, courts do not require *B* to survive until the date of distribution. If *B* dies before *A*, the remainder is distributed to *B*'s estate. Alternatively if the court required survival, the interest would revert to the donor's estate. There is no basis in the instrument for inferring that the average donor would prefer his own residuary or intestate takers to the beneficiary's heirs or devisees, who will often be the beneficiary's spouse and issue.

By contrast, if the trust is for *A* for life, remainder to *B* or *B*'s issue, *B*

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28. Courts may hold that gifts to a person on attaining a stated age are contingent on survival to that age. That condition, however, is more accurately regarded as an express condition of survival. To the extent that it requires implying a condition, courts should abandon the old rule growing out of *Clobberie's Case*, 2 Vent. 342 (1677).

29. Halbach, *supra* note 10, at 299-300; L. SIMES & A. SMITH, *supra* note 1, at § 576; 5 AMERICAN LAW OF PROPERTY § 21.10 (Casner ed. 1952). The section in the O. BROWDER, L. WAGONER & R. WELLMAN, *FAMILY PROPERTY SETTLEMENTS: FUTURE INTERESTS* (2d ed. 1973), casebook dealing with this topic is headed: "A Basic Dogma—Futurity Does Not Imply Contingency (Survival)."

will be required to survive *A*.<sup>30</sup> In this case, implying a survival requirement does not cause a reversion. It is highly likely that the donor intended *B*'s issue to take if *B* failed to survive.

2. Courts do not imply survival requirements in gifts to single-generational classes, like children, grandchildren, brothers and sisters, and nieces and nephews. Survival to the distribution date is not implied on the basis that the interest is subject to partial divestment.<sup>31</sup> Thus, in a trust for *A* for life, remainder to *A*'s children, *A*'s children are not required to survive *A*.<sup>32</sup> If a child dies before *A*, the property will be distributed to the child's estate, rather than to the surviving children or to the donor's estate.

It is doubtful that the average donor would prefer distribution to the surviving class members in such a case because of the risk of cutting the predeceasing child's family out of the inheritance.<sup>33</sup> It is also doubtful that the average donor would prefer a reversion, because the residuary taker might be someone else entirely, like a charity. In addition, an intestate distribution of one child's share could create substantial inequality in distribution among the branches of the family.

Another possible alternative is for the court to find an implied gift to the predeceasing beneficiary's issue.<sup>34</sup> Courts, however, do not, either because of their general reluctance to imply gifts to takers not otherwise named in the instrument,<sup>35</sup> or because they doubt the ordinary transferor intends a gift to the issue of the predeceasing class member. Even if the transferor's concern for the class member's family was a prime consideration, the transferor might not have intended to substitute the issue because such a disposition is too limited: it cuts out the surviving spouse and prevents transferring the property into trust.<sup>36</sup> A distribution to the deceased class member's estate does not guarantee that the family of the beneficiary will receive the property, but the chances are very high that they will.<sup>37</sup> In addition, it gives

30. 5 AMERICAN LAW OF PROPERTY § 21.24 (Casner ed. 1952).

31. Halbach, *supra* note 10, at 308; 5 AMERICAN LAW OF PROPERTY § 21.11 (Casner ed. 1952).

32. See, e.g., *In re Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957).

33. See, e.g., *Coddington v. Stone*, 217 N.C. 714, 718, 9 S.E.2d 420, 422 (1940) ("Had any of the sons died before that date [distribution], leaving a wife or children, these would have been left unprovided for if the estate did not vest at the death of the testator.")

Courts have not attempted to treat the class member who died with issue differently from the class member who died without issue. The principal criticism of the substantive disposition made by the transmissible future interest is that it permits the beneficiary to transfer the property outside the family. See, e.g., Rabin, *supra* note 1, at 480 and n.83. A rule that the interest is transmissible if the beneficiary died leaving issue, but subject to a survival requirement and implied gift in favor of surviving class members if the beneficiary died without issue, overcomes this criticism. Such a rule, however, would encounter another criticism: It does not recognize the importance of the beneficiary's spouse, nor does it recognize the real possibility that the donor intended the beneficiary to have the power to dispose of the property in all events. See *infra* text accompanying notes 75-86.

34. The typical case where courts may imply a remainder to issue is in a gift to *A* for life, remainder to *B* if *A* dies without issue. L. SIMES & A. SMITH, *supra* note 1, § 842. If *A*'s interest is greater than a life estate, however, *A*'s interest is treated as subject to a restricted condition of survival that will be divested only on the stated event. See *infra* note 38.

35. See *supra* note 14.

36. See *infra* text following note 66.

37. Empirical studies overwhelmingly show that testators leave their property to their surviving spouses and their issue. M. SUSSMAN, J. CATES & D. SMITH, *THE FAMILY AND INHERITANCE* (1970); Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH.

the beneficiary the flexibility to determine how to provide for his or her family.

3. For similar reasons, courts usually do not expand restricted survival conditions into general ones. If the instrument names a substitute taker to take the property under some circumstances, but not others, the survival condition operates only under the circumstance when the instrument names a substitute taker.<sup>38</sup> For example, assume a donor sets up a trust for *A* for life, remainder to *A*'s children, but if any child dies without issue, to the surviving children. The child's interest is subject to a restricted rather than a general condition of survival. The trust names the surviving children as alternate takers in the event a child of *A* dies without issue, but names no alternate taker for the event that a child dies with issue.

If the child dies without issue, the survival requirement applies and the surviving children will be substituted. If the child dies with issue, no survival requirement is implied, and the property is distributed to the child's estate.<sup>39</sup> Since the instrument names no substitute taker for that event, a survival requirement would require the court to find an implied gift to the child's issue, an implied gift to the surviving children, or a reversion. The last two choices cut off the issue of the deceased child, a result that would undoubtedly frustrate the intent of the donor.<sup>40</sup> The first choice presents the same problems of inflexibility as the preceding situation: the beneficiary cannot leave the property to her spouse or put it in trust. Unless it is clear that the donor intended to limit the beneficiary's power to provide for the family, courts have not been willing to imply a survival requirement.

In these situations, applying the preference for a vested construction produces better results than requiring survival. The alternative in each case is to find a reversion, make a disposition to surviving class members, or imply a gift to others. Reversions are undesirable because the reversionary takers may be long dead, and because there is no indication that the donor would have preferred the donor's own residuary or intestate takers to those of the donee. Where the donee is likely to outlive the donor by a substantial period of time, disposition to the donee's estate has the added advantage that the donee, in disposing of the property, can take into account events occur-

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L. REV. 1303 (1969); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death & Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. 319; Fellows, Simon & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717; Ward & Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393; Comment, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa & Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978).

38. Halbach, *supra* note 10, at 451-52.

39. See, e.g., *Matter of Krooss*, 302 N.Y. 424, 99 N.E.2d 222, 47 A.L.R.2d 894 (1951). Halbach, *supra* note 10, at 455 suggests that a testator might make such a disposition to a child because it would "allow the child to make such provision for his spouse and issue as to him appears appropriate." Of course, a well-advised testator would use a power of appointment, instead, to avoid the adverse tax and expense consequences.

40. A gift over on death with issue presents a similar situation. The interest of *B* is divested only if *B* dies leaving issue. E.g., *Estate of Houston*, 414 Pa. 579, 201 A.2d 592 (1964). If *B* dies without issue, *B*'s interest is transmissible, and passes under *B*'s will or to *B*'s intestate takers. In this situation, the donor apparently intends to insist that the property go to the issue if there are any. If there is no issue, then the beneficiary enjoys complete ownership of the future interest.

ring after the donor's death.<sup>41</sup>

In these cases a distribution to surviving class members is also less desirable than a distribution to the beneficiary's estate. A distribution to surviving class members cuts off the issue and spouse of the predeceasing beneficiary where there is no indication that the donor intended such a result, and where the ordinary donor probably would not intend such a result.<sup>42</sup> Of the three alternatives, implying a gift to the deceased beneficiary's issue would often produce acceptable results, but it is still doubtful that the particular donor intended this result, or that the average donor would intend this result.

## B. *Situations Where Survival Requirements Are Implied*

By contrast, American courts usually imply survival requirements where the disposition covers the possibility that a particular beneficiary might die before distribution and provides a substitute beneficiary that would be acceptable to the average donor.

1. Survival requirements are often implied in gifts to multi-generational classes, like issue and descendants.<sup>43</sup> In a trust set up for *A* for life, remainder to *A*'s issue, courts usually imply a condition that *A*'s issue must survive until the date of distribution.<sup>44</sup> Because it is a class gift, there is no need for a reversion, and a distribution to the surviving issue appears likely to carry out the donor's intent.<sup>45</sup> There is no risk the distribution will cut off any line of *A*'s descent, nor is there any reason to believe that the donor wanted to give a predeceasing member of the class the power to dispose of the property.<sup>46</sup>

2. Survival requirements are also easily implied where there is a gift in the alternative. For example, in a trust for *A* for life with remainder to *B* or to *C*, *B*'s interest is subject to a survival requirement.<sup>47</sup> If *B* predeceases *A*, *C* is available to take the property. There is no reversion. If both *B* and *C* predecease *A*, however, the trust instrument does not provide an alternative

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41. Halbach, *supra* note 10, at 305.

42. Rabin, *supra* note 1, at 483-84, argues that the prime justification for the constructional preferences in favor of vested interests and early vesting is that they protect the issue of the predeceasing beneficiary from unintentional disinheritance. Halbach, *supra* note 10, at 306, suggests that the law should presume that the donor's solicitude extends beyond the issue of the predeceasing beneficiary to the spouse as well. Waggoner, *supra* note 10, at 437-39, adds that the donor may well have intended the beneficiary to enjoy the power to dispose of the property, a major incident of ownership.

43. Halbach, *supra* note 10, at 314-15; 5 AMERICAN LAW OF PROPERTY, *supra* note 29, § 21.13.

44. Courts usually reach this result if the issue are to take per stirpes, rather than per capita. Halbach, *supra* note 10, at 313. Following the thesis of this Article that the primary justification for finding transmissible interests is that they provide a reasonable disposition where one is otherwise lacking, there is no reason for courts to hold that issue should be determined at the death of the named ancestor rather than at the date of distribution. This is a point on which there appears to have been some question.

45. See, e.g., Old Colony Trust Co. v. Brown, 287 Mass. 177, 191 N.E. 358 (1934).

46. Where the donor has used a term like issue, there is not much room to argue that the donor intended predeceasing children or grandchildren to be able to include their spouses in the distribution. There is much more room to argue when the gift is to named individuals, or to a class described as children.

47. L. SIMES & A. SMITH, *supra* note 1, at § 581.

taker. To avoid creating a reversion, courts do not imply a survival requirement with respect to *C*'s interest. If both *B* and *C* predecease *A*, the remainder is distributable to *C*'s estate.<sup>48</sup>

3. A final situation in which a survival requirement is implied is in the gift to heirs or to next-of-kin. Since heirs technically cannot be determined for a living person, a survival requirement to the death of the named ancestor is usually implied.<sup>49</sup> Many courts do not require survival beyond the death of the testator or the ancestor, whichever is later. Once the ancestor is dead the identity of the heirs is fixed. If a court literally interprets the word "heirs," the future interest held by the heirs of a dead person is essentially the same as a future interest held by named individuals. Implying a survival requirement beyond the ancestor's death is not desirable because it causes either reversions or distribution to the surviving heirs. Implying a survival requirement in a gift to heirs, literally interpreted, causes the same problems as implying survival requirements in single-generational classes.<sup>50</sup>

The word "heirs," however, has a multi-generational aspect, like issue or descendants, and will automatically include issue of potential heirs who die before the ancestor. If a less literal interpretation is given to the word, so that the heirs are determined as if the ancestor had died at the time set for distribution, there is little risk that lines of descent will be cut off.<sup>51</sup> As a result, courts are sometimes willing to postpone determination of class membership beyond the death of the named ancestor, to the date of distribution.<sup>52</sup>

Determining the heirs as if the ancestor had died at the time of distribution is, technically speaking, more than just implying a survival requirement. Nevertheless, it provides a reasonable distribution to living people which will not cut out any continuing lines of descent. In addition, it appears to carry out the ordinary donor's intent. In a few states, statutes apply this construction to all future interests given to heirs.<sup>53</sup> Courts should be encouraged to do the same since this construction avoids the problems of transmissible future interests without incurring the risks of incomplete or intent-frustrating dispositions that implied survival requirements often create.

### C. Summary and Conclusion

To summarize, the preference for a vested construction performs a useful function in dealing with the problems created by instruments that fail to specify what should happen to property intended for a beneficiary who dies

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48. See 5 AMERICAN LAW OF PROPERTY § 21.16 (Casner ed. 1952).

49. *Id.* at § 22.60; Halbach, *supra* note 10, at 315-16.

50. See *supra* text accompanying notes 31-37.

51. The only exception is that the spouse is often an heir but the spouse's issue who are not also issue of the ancestor are not. As a result, this creates a risk of cutting out step-children. Most donors, however, would probably regard this as an advantage, rather than a drawback.

52. If the life tenant is the sole heir, the court may construe the remainder to heirs to mean the heirs determined as if the ancestor had died immediately after the life tenant. See, e.g., *In re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954); RESTATEMENT OF PROPERTY § 308 comment K (1940).

53. CAL. PROB. CODE § 6151 (West Supp. 1986); IND. CODE ANN. 29-1-6-1(c) (West 1979) (based on Pennsylvania Wills Act of 1947); PA. CONS. STAT. ANN. § 2514(4) (Purdon 1975).

before the time set for distribution. It does not require the court to rewrite the instrument or examine any extrinsic evidence to determine what the transferor would have done under the circumstances. Often it distributes the property to those people the ordinary reasonable transferor would have selected herself.

Legislatures and courts cannot simply abrogate the preference for a vested construction by imposing survival requirements on all future interests. They must also provide for a substitute disposition of the property. Failing to provide a substitute disposition would leave the courts with too many incomplete dispositions. Lacking a statutory substitute, courts would be faced with distributing property intended for a predeceased taker to the takers of the reversion or to the surviving class members. Since the resulting dispositions would often frustrate the average transferor's desires, courts would feel compelled to rewrite many dispositive instruments by implying gifts to others. Adopting the "probable intent" doctrine<sup>54</sup> would give them a doctrinal framework within which this could be done, but the costs of the additional litigation required by this approach would make the costs of the transmissible remainder look insignificant.<sup>55</sup> The only acceptable approach is to provide a substitute disposition by statute based not on what the particular donor would have wanted, but what the average reasonable donor would have wanted under the circumstances.

## II. DESIGNING A SUBSTITUTE DISPOSITION: EXISTING MODELS

Existing law supplies three models of substitute dispositions: the anti-lapse model, the lapse model, and the vested interest model. The anti-lapse model distributes the property to the beneficiary's surviving issue.<sup>56</sup> Several anti-lapse statutes substitute issue for some beneficiaries, but not others,<sup>57</sup> based on the relationship of the beneficiary's relationship to the donor. If there are no issue, or if the beneficiary does not have the required status, the

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54. See *supra* note 14.

55. The probable intent doctrine is appealing because of its simplicity and direct approach to the problem of ascertaining what the particular donor would have wanted done with the property had she known that the beneficiary would die before distribution. One, however, has only to think of the New York experience after converting the Doctrine of Worthier Title from a rule of property into a canon of construction, to decide that a reasonably clear rule determining the taker is preferable. Every remainder to the settlor's heirs in a trust of any size had to be litigated because the trustee could not safely distribute the property without a binding construction.

56. Two anti-lapse statutes do not fit this model. Iowa substitutes the heirs of the devisee; Maryland substitutes the heirs or devisees. See *infra* note 62. Maryland's anti-lapse statute fits what is here labeled as the vested interest model, although it applies only to will beneficiaries who die before the testator, not to future interests.

57. Anti-lapse statutes range from South Carolina's, which makes the substitution only for children of the testator, S.C. CODE ANN. § 21-7-470 (Law. Co-op. 1976), to eight states which do not limit the substitution. California is unique in extending the coverage of its principal anti-lapse statute to kindred of the testator and kindred of a surviving, deceased, or former spouse of the testator and providing a separate statute for appointments made by will. CAL. PROB. CODE § 6147 (West. Cum. Supp. 1986). The anti-lapse provision governing appointments applies to all appointees regardless of their relationship to the donor or donee of the power. CAL. CIV. CODE § 1389.4 (West Cum. Supp. 1986). See French, *Anti-lapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 Hastings L.J. 335, 344-47 (1985) for an analysis of all the anti-lapse statutes. The list of anti-lapse statutes that apply to future interests, *id.* at 347 n.64, should be expanded to include CAL. PROB. CODE § 6147(b), which applies to devisees required by the will to survive to a future time.

property passes pursuant to the lapse model. The lapse model distributes the property to surviving class members, if any, otherwise to the donor or the donor's estate. The vested interest model distributes the property to the beneficiary's estate.

There are two aspects to each of these models. The mechanical aspect determines how the property is distributed: whether it passes through the estate of the deceased beneficiary or others, or directly to the ultimate recipients; and whether an outright distribution is required, or whether it can be placed in further trust. The substantive aspect determines to whom the property is distributed. Each of these models has its advantages and disadvantages, some related to the mechanics of the distribution and others to the identity of the substitute takers.

#### A. *The Anti-lapse Model*

The anti-lapse model substitutes the issue of the predeceasing beneficiary, if there are any, and if the beneficiary occupied a specified relationship to the donor. The mechanical advantage of this model over the vested interest model is that it distributes the property directly to the substitute beneficiaries, thereby avoiding the taxes, delays, and expenses incurred by the vested interest model. The mechanical disadvantage is that the model distributes the property outright in set shares, which prevents the beneficiary from putting the property in trust for his or her issue, or from varying their shares to take account of their individual circumstances.

Substantively, the advantage of the anti-lapse model is that it preserves the property of the predeceasing beneficiary for his or her issue. This prevents the property from passing to the beneficiary's spouse or other strangers. If there are no issue, control of the disposition remains in the donor's estate plan, rather than permitting control to pass to the beneficiary. The property then either passes to surviving class members or reverts to the donor's estate. Critics of the substantive disposition made by the preference for early vesting uniformly embrace the anti-lapse model.<sup>58</sup> In their view, the average donor would rather substitute the surviving issue of the beneficiary than risk the possibility that the property might pass out of the family through the beneficiary's estate. There are several arguments in favor of their position.

The law has long recognized that donors prefer blood relatives to others by its canons of construction that favor keeping property in the bloodline and avoiding disinheritance of family branches.<sup>59</sup> There is no doubt that

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58. See Rabin, *supra* note 1, at 487, who suggested:

It might well be preferable to protect the issue of deceased remaindermen by legislation, rather than by the rule favoring vesting. An amendment to the anti-lapse statutes to protect the issue of persons who died after the decedent would eliminate the need for strained attempts to avoid implied requirements of survival.

See also McGovern, *supra* note 6, at 292-93; Schuyler, *supra* note 4, at 438-39; Trautman, *Class Gifts of Future Interests: When is Survival Required?*, 20 VAND. L. REV. 1, 35 (1966).

Most critics focus on the desirability of preventing the property from passing out of the bloodline through the beneficiary's estate. They fail to address the distinct possibility that the property may pass out of the bloodline under the lapse model as well.

59. 5 AMERICAN LAW OF PROPERTY, *supra* note 29, § 21.3 (e), (f).

this position reflects a strong intuitive sense of what most people want, a sentiment reinforced by substantial experience that this is what most people do.

One measure of the widespread acceptance of this idea is that commentators taking this position feel no need to explain or justify it. Another is that estate planning experts agree that instruments failing to address the survival issue expressly are incompetently drafted.<sup>60</sup> The experts routinely recommend trusts that substitute surviving issue for predeceasing beneficiaries, and if there are no issue, distribute the property either to the surviving class members, or to the donor's heirs determined as if the donor died at the time of distribution.<sup>61</sup> The forty-seven state anti-lapse statutes that substitute surviving issue for the predeceasing devisee make the same disposition.<sup>62</sup> The three states that impose survival requirements on the takers of future interests also substitute the surviving issue of predeceasing beneficiaries,<sup>63</sup> as do the California statutes applicable to appointments made by will<sup>64</sup> and future interests subject to express survival requirements.<sup>65</sup>

Some commentators assert that, in addition to preferring to keep property in the blood line, donors also wish to retain control of their property as long as possible.<sup>66</sup> Under this view, the anti-lapse model presents an additional advantage because, if there are no issue, it passes the property either to the surviving class members or back to the donor's estate.

The substantive disadvantages of the anti-lapse model spring from the same source as its advantages. It prevents the beneficiary from disposing of the property to his or her surviving spouse, even if the spouse is the other parent of the beneficiary's issue. It prevents the beneficiary from making other dispositions of the property that could adjust the basic trust plan to

60. In assessing the competence of the drafting, one must draw a distinction between instruments drafted before the federal estate tax became significant and those drafted later. Vested remainders in children and grandchildren, sometimes subject to restricted conditions of survival with divestment in favor of issue, or divestment in favor of surviving class members on death without issue, are quite common in earlier trusts set up by the very wealthy, whose legal advice must have been some of the best available. *See, e.g.*, Estate of Stanford, 49 Cal. 2d 120, 315 P.2d 681 (1957); Estate of Houston, 414 Pa. 579, 201 A.2d 592 (1964).

61. *See, e.g.*, R. Campfield, ESTATE PLANNING AND DRAFTING ¶ 2161 (1984); Trautman, *supra* note 58, at 33-34.

62. The only states that provide for a different substitution are Iowa, which substitutes the devisee's heirs, and Maryland, which substitutes either the heirs or devisees. IOWA CODE ANN. § 633.273 (West 1969); MD. EST. & TRUSTS CODE ANN. § 4-403 (1974). Louisiana does not have an anti-lapse statute. The English anti-lapse statute was recently amended to substitute issue rather than heirs or devisees. In part, they intended to eliminate the possibility that the property would be diverted to a spouse or other stranger to the blood. 52 Halsbury's Statutes of England 1974 (3d ed. 1982). California's anti-lapse statute does not impose a survival requirement on the takers of future interests, but does substitute the issue for a beneficiary who fails to survive to some future time required by the will.

63. ILL. ANN. STAT. ch. 110 1/2, § 4-11 (Smith-Hurd 1978); PA. CONS. STAT. ANN. § 2514(5); TENN. CODE ANN. § 32-3-104 (1984).

64. CAL. CIV. CODE § 1389.4 (West Cum. Supp. 1986) substitutes the surviving issue of the appointee who dies before the appointment becomes effective.

65. CAL. PROB. CODE § 6147(b) (West Cum. Supp. 1985), substitutes the surviving issue of a devisee who fails to survive until a future time required by the will.

66. Chaffin, *supra* note 8, at 455, believes that the average testator would prefer to retain control in himself to direct the disposition of the interest after the remainderman's death. He does not appear to advocate a widespread finding of reversioners as the means of accomplishing this, however. His focus, instead, is on better drafting by the transferor.

reflect conditions that changed after the settlor's death. It also prevents the beneficiary from using the property for charity or other purposes. Finally, it deprives the beneficiary of an important aspect of property ownership—the power to dispose of it.

Another disadvantage of the anti-lapse model is that it could lead to limiting the scope of the future interest statute, so that the statute would substitute issue only for beneficiaries covered by the basic anti-lapse statute.<sup>67</sup> This would produce unfortunate results. If there is any validity to the assumption that donors prefer surviving class members, or the residuary or intestate takers, to the issue of the predeceasing beneficiary, the assumption does not extend to future interest cases. The assumption may make sense in the context of wills that make gifts of present interests. Testators often leave immediate legacies to employees, mementos to friends, and substantial gifts to spouses, who may have issue who are unrelated to the testator. In each of these cases, the testator might well prefer the residuary or intestate takers to the issue of the predeceasing beneficiary. Testators, however, do not use future interests for these purposes.<sup>68</sup> There is no reason to assume that the average testator prefers that the property pass to surviving class members or revert, rather than pass to the beneficiary's surviving issue, because the beneficiary is a brother, rather than a child, or a niece of the donor's spouse, rather than of the donor.<sup>69</sup>

Thus, the anti-lapse model's primary advantage is that it protects the beneficiary's issue from disinheritance and prevents a distribution that would allow the property to pass out of the family through the donee's estate. The model has two disadvantages: mechanically, the model is too rigid; and substantively, it is too restrictive. It also creates a risk that uncritical acceptance will unduly limit the class of beneficiaries for whom the issue would be substituted.

## B. *The Lapse Model*

Under the lapse model, the property intended for the predeceasing beneficiary passes to the surviving class members if it is a class gift. Otherwise the property reverts to the donor. As applied to class gifts, the substantive advantage is that surviving class members take, rather than the beneficiary's

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67. An Illinois statute, adopted in 1969, imposes a general survival requirement on all class gifts created by will, but substitutes the issue of a class member who dies before the date of distribution only if the class member is a descendant of the testator. The provision tracks the basic anti-lapse statute. There is an exception for those interests that become indefeasibly vested before the time of distribution. Apparently this would apply only to classes where the progenitors of class members must die before the time for distribution. The statute is more limited in its application to other future interests. It applies only to gifts to the testator's descendants and then arguably, only if the descendants leave issue. It does not apply to interests created by inter vivos trusts. *See* Waggoner, *supra* note 10, at 425, 427, 429, 432.

68. The only exception would be future interests created by will substitutes that become possessory at the settlor's death. Those should be dealt with under the anti-lapse statute, not the future interest statute. *See infra* text accompanying notes 112-114.

69. The California power of appointment statute, CAL. CIV. CODE § 1389.4 (West 1982) substitutes issue for all appointees who die before the appointment becomes effective, regardless of their relationship to the donor or donee of the power, and even though the basic anti-lapse statute is restricted in its application. CAL. PROB. CODE § 6147 (West 1982).

heirs and devisees who might be strangers to the donor.<sup>70</sup> The disadvantage is that the model cuts off the beneficiary's issue, which can result in disinheriting an entire line of the donor's descendants. The model also denies the beneficiary the power to dispose of the property.

With respect to individual gifts, the advantage is that the model returns the property to the donor's disposition, rather than permitting the property to devolve from the donee. This disposition may prevent the property from passing to strangers. The disadvantages are that the donor may not have designed the residuary clause to provide for his or her family at all, but may have left the residue to charity.<sup>71</sup> If the property passes to the intestate takers, there is also the risk of creating a disparity in the treatment of the various branches of the family by taking property intended for one branch and spreading it among all the branches.

None of the critics of the preference for a vested construction has argued that the lapse model should apply when the predeceasing beneficiary has issue. If there are no issue, however, those who do not favor letting the property devolve from the donee would apply the lapse model so that the property would pass to surviving class members or revert to the donor or the donor's estate. The arguments favoring this disposition are that it tends to keep the property within the donor's bloodline,<sup>72</sup> and it allows the donor to retain control over the devolution, rather than passing it to the donee.<sup>73</sup>

None of the critics of the preference for a vested construction have discussed whether they would limit the substitution of issue to beneficiaries within certain degrees of relationship to the donor. Such limitations are found in the anti-lapse statutes and the Illinois statute imposing survival requirements on certain future interests.<sup>74</sup> These critics would presumably favor the lapse model disposition for beneficiaries falling outside the specified group, rather than the vested interest model.

There is a mechanical problem with the lapse model, as well, due to the possible gap in time between the death of the settlor and the date of distribution. The longer the gap, the greater the risk that distribution through the estates of deceased residuary or intestate takers will be required. Distribution to the estate of a deceased residuary or intestate taker is as expensive and cumbersome as distribution to the estate of the deceased beneficiary, and it is just as likely to carry the property outside of the family.

### C. *The Vested Interest Model*

The vested interest model disposes of the property of the predeceasing

70. To the extent that spouses are considered strangers, the chances are very high that this will occur, since most testators leave their property to their spouses. In most states, spouses take a share intestate. See *supra* note 37.

71. See, e.g., *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957). In *Stanford*, Stanford University, as residuary legatee, claimed that a remainder interest in the trust for the donor's family reverted when the beneficiary died before the distribution date.

72. See *supra* note 59.

73. See *supra* note 66.

74. See *supra* text accompanying notes 67-69 for a discussion of whether the statute imposing a survival requirement and making a substitute disposition should be limited along the lines of the anti-lapse statute.

beneficiary when the instrument does not subject the beneficiary to a survival requirement. The vested interest model distributes the property to the beneficiary's estate. Substantively, the advantages and disadvantages spring from the same source—the beneficiary's power to dispose of the property. Whether the donor intended the beneficiary to possess this power is the subject of widely divergent views.

Two lines of arguments favor permitting the beneficiary to determine the property's further devolution.<sup>75</sup> The first is that this disposition tends to carry out what the donor actually intended. The donor who makes no further disposition of the property probably intended to cede further control over its devolution to the beneficiary. In the absence of any indication that the donor wanted someone else to receive the property, distributing through the beneficiary's estate is as likely to carry out the donor's intent as any other disposition.<sup>76</sup> The proponents of this position point out that if the beneficiary had lived to the date of distribution, this is exactly the result that would have followed. In addition, the right to dispose of property is an important incident of ownership that the donor may have intended the beneficiary to enjoy.<sup>77</sup>

The second line of argument is that a rational transferor would have intended this result because it comes closer to what a sound estate plan would accomplish. One reason to give the beneficiary power to determine further devolution of the property is that the beneficiary will be able to take events that occur after the donor's death into account in determining how the property should be distributed.<sup>78</sup> To provide flexibility in remainder provisions, sound estate planning often calls for giving a trust beneficiary a power of appointment.<sup>79</sup> The vested remainder accomplishes the same result, albeit in a cruder form, since it unnecessarily subjects the property to tax and probate expenses.<sup>80</sup> Before the estate tax became a significant factor, a reasonable donor might well have used the vested remainder instead of a power of appointment.

Another argument in favor of permitting the beneficiary to dispose of the property is that the beneficiary is in the best position to determine how to

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75. Professors Halbach and Waggoner are the principal proponents of these arguments. See *supra* note 10.

76. Halbach, *supra* note 10, at 305, expresses this argument:

If a testator (or settlor of a living trust) has selected a particular person to receive some interest in his property and has thought no further than that selection, it seems preferable to allow the rights to vest and to let that beneficiary's own desires take effect where the testator's desires are unknown. Since the beneficiary in question is the only person known to have been intended to receive the property, he could at least be given the benefit of deciding who will take the interest in his place. This is what would have happened had he survived to the date the testator seemingly assumed he would.

77. Waggoner, *supra* note 10, at 437. Giving a power to dispose of property is one way of giving the older generation the means to maximize the respect it receives from the younger generation. This societal interest is recognized in Gaubatz, *Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 533 (1977).

78. Halbach, *supra* note 10, at 305.

79. See French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 WASH. L. REV. 405, 405 (1978).

80. See *supra* text accompanying notes 18-22. So long as the beneficiary does not possess a general power of appointment, the assets will not be taxed as part of his or her gross estate for federal estate tax purposes.

provide for his or her own family.<sup>81</sup> Even if the donor's primary concern is to provide for the beneficiary's issue if the beneficiary dies before distribution, the vested remainder accomplishes this objective better than a direct substitution of issue. The anti-lapse model substitution calls for outright distribution. Outright distribution prevents the use of trusts for the benefit of issue, and may require the creation of guardianships to administer the assets. It also prevents distribution to the other parent of the issue, an estate plan favored by many. The anti-lapse model thus eliminates any opportunity for the beneficiary to engage in sensible estate planning for his or her family.<sup>82</sup>

Another argument in favor of giving the beneficiary power to dispose of the property is that it permits the beneficiary to include his or her spouse. Commentators split on whether this aspect is an advantage or disadvantage of the vested estate model. Under the older view, distributions to spouses were to be avoided because spouses were considered strangers to the blood. The more recent view reflects an increasing tendency to recognize spouses of children and grandchildren as members of the family who should be included, in some way, in the family estate plan.<sup>83</sup> If the law gives the beneficiary the power to dispose of the future interest, the beneficiary can include the spouse in the disposition.<sup>84</sup>

Underlying these arguments that the average donor should prefer that the property pass to the beneficiary's heirs or devisees is the assumption that the beneficiary is likely to be a responsible person<sup>85</sup> who shares the donor's concerns for the family's well-being. Generally, the beneficiary is a child of the donor.<sup>86</sup> It therefore makes sense for the donor to pass the responsibility

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81. Halbach, *supra* note 10, at 455; Waggoner, *supra* note 10, at 437-38.

82. Achieving a savings in estate taxes by imposing a survival requirement can be quite costly if the substitutionary provision requires an outright disposition to issue, making a guardianship necessary. Waggoner, *supra* note 10, at 438.

83. McGovern, *supra* note 6, at 290-91, notes that the law presently tends to accord less weight to blood ties than it did in the past. This reflects the fact that today the average testator is less concerned with keeping property in the bloodline. Halbach, *supra* note 10, at 306, suggests that the law should presume that the testator's solicitude would extend to the predeceasing beneficiary's widow as well as his issue. Waggoner, *supra* note 10, at 438, points out that the Illinois statutory substitution of issue is inconsistent with both the policies underlying the forced share statutes and the trend toward increasing the spouse's intestate share as reflected in the Uniform Probate Code. J. PRICE, CONTEMPORARY ESTATE PLANNING 194 (1983), says that "[u]nfortunately the needs of in-laws are almost totally overlooked in the planning process." DRAFTING CALIFORNIA LIVING REVOCABLE TRUSTS (CEB 2d ed. 1984) § 4.57, however, suggests including spouses of issue as permissible objects of the power to be given to the testator's surviving spouse over the remainder of the family pot trust, and drafting an optional clause giving the trustee power to apply net income and principal of the credit exemption trust for the benefit of the surviving spouse of any deceased child.

84. Excluding spouses of beneficiaries from sharing in trust benefits has led to some rather bizarre efforts by life tenants who wanted to provide for their spouses. *See, e.g.,* Horne v. Title Insurance & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948) (the trust provided a remainder for the beneficiary's first wife (who died) and beneficiary who was also donee of special power to appoint among the remaindermen, unsuccessfully tried to reduce the share of a remainderman who refused to consent to a modification of the trust to substitute his second wife as trust beneficiary); Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340 (Ky. App. 1967) (life tenant adopted his wife to make her an "heir" of his mother entitled to a share of the remainder).

85. Generally, the donor knows the beneficiary. As a result, a donor would almost certainly make special provisions in the trust for a problem child. The donor certainly would not leave that child with a vested remainder.

86. Most trusts are set up for the donor's spouse and children, with remainders to children or more remote issue.

for making further distribution on to the child. The strongest argument in favor of this assumption is that if the donor did not trust the child, the donor would have subjected the gift to a survival requirement, and made some alternate disposition in the event the beneficiary predeceased.

Substantively, the prime disadvantage of the vested estate model is that it gives the beneficiary the power to leave the property outside the family. Even if the donor is willing to accept this risk as the price for achieving the advantages spelled out above, the donor might not wish to accept the risks created where the beneficiary dies intestate or where the beneficiary's devisees or heirs also die before the date for distribution. In long-term trusts, there is a substantial possibility that a significant gap may exist between the beneficiary's death and the date of distribution. If any of the beneficiary's heirs or devisees die in the interim, the vested estate model distributes the property to their estates and then to their heirs and devisees. This substantially increases the risks that the property will pass outside the donor's family. Some of the most egregious examples of problems caused by the vested estate model involve a beneficiary who dies intestate, leaving a spouse who inherits part of the vested estate, remarries, and then dies, all before the date of distribution.<sup>87</sup> Probably no one would argue that a donor, given a choice, would opt for this result.

The mechanical advantages of the vested estate model lie in the flexibility it gives to the beneficiary to determine the form in which the property can best be distributed to the ultimate recipients. In particular, it permits the beneficiary to establish trusts and custodianships for his or her issue, to vary their shares according to their circumstances, or to decide that a distribution to the other parent is the best way to provide for the issue.

The primary mechanical disadvantages of the model are the costs, taxes, and delays already discussed.<sup>88</sup> It creates a worse problem than the lapse model, since it always requires distribution through one decedent's estate and if the heirs or devisees have also died it may require distribution through several estates.

#### D. Summary

There are disadvantages to each of the models normally used to determine the substitute disposition when a beneficiary dies before the distribution date. The disadvantages are both substantive and mechanical. The basic substantive problems lie in the identity of the substitute beneficiaries the model selects. The mechanical problems lie in the inflexibility of some of the dispositions and the need to distribute through the estates of deceased people in others. In the past, commentators have tended to view the mechanical and substantive problems as inseparable. They are separable,

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87. See, e.g., *DeKorwin v. First National Bank of Chicago*, 84 F. Supp. 918 (N.D. Ill. 1949), *modified*, 179 F.2d 347 (7th Cir. 1949); *Peadro v. Peadro*, 400 Ill. 482, 81 N.E.2d 192 (1948). Schuyler, *supra* note 4, at 427-29, uses *DeKorwin* and *Peadro* to illustrate his point that the rule of early vesting sometimes "has the effect of defeating what any sensible person would assume to be the intention of a testator." Rabin, *supra* note 1, at 480 n.83, cites *Brumbach's Estate*, 373 Pa. 302, 95 A.2d 514 (1953), whose result he characterizes as "outlandish."

88. See *supra* text accompanying notes 18-22.

however, and most of the mechanical problems can be eliminated. Eliminating the mechanical problems will allow a substantive choice based on what the donor would probably want without regard to the mechanical or procedural consequences of the disposition.

### III. DESIGNING THE SUBSTITUTE DISPOSITION: ELIMINATING THE MECHANICAL PROBLEMS

Three of the problems presented by the existing substitution models are easily solved. Adopting a power of appointment concept would eliminate both the inflexibility of the anti-lapse model and the necessity for passing the property through the beneficiary's estate required by the vested interest model. This solution generates some problems with the Rule Against Perpetuities, but modern perpetuities reform doctrines and statutes can largely alleviate these problems. A problem presented by both the lapse and vested interest models is that the substitute takers also may have died. Imposing survival requirements on the substitute takers and requiring that the heirs of the donor or donee be determined as if the donor or donee had died at the time for distribution solves this problem.

#### A. *Use of A Power of Appointment Concept*

Separating the beneficiary's power to dispose of the future interest from its ownership solves the major mechanical problems presented by both the anti-lapse and the vested interest models. Treating the beneficiary as the holder of a power to dispose of the future interest, rather than as the owner of the future interest, eliminates the tax and probate costs associated with transmissible future interests. Property subject to a power does not pass through the estate of the holder of the power, but passes directly from the donor to the appointees or takers in default. Nor is it subject to federal estate tax while in the hands of the beneficiary, so long as the power is not a general power.<sup>89</sup>

The power concept can be used regardless of any substantive determination made as to what group or groups of takers should be substituted for the predeceasing beneficiary. The legislature may select as narrow or as broad a group of potential appointees as it wants. If the legislature prefers the anti-lapse model, the statute should give the beneficiary a special exclusive power<sup>90</sup> to appoint among his surviving issue. On default of appointment, the property should pass to the issue surviving at the distribution date, per stirpes. If the decision is in favor of the vested interest model, the beneficiary

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89. Only property subject to a general power of appointment is included in the donee's estate under I.R.C. § 2041 (1982). General powers are those that include the power to appoint to the donee's creditors, the donee's estate, or the creditors of the donee's estate.

90. A special power is a power, not created primarily for the benefit of the donee, to appoint among a group that is not unreasonably large. RESTATEMENT OF PROPERTY § 320 (1940). An exclusive power permits the donee to exclude any one or more of the possible appointees. *Id.* at § 360. A nonexclusive power would require the beneficiary to appoint something to each, which should be avoided because it breeds litigation and limits the beneficiary's flexibility in providing for the issue.

should be given a broad hybrid power<sup>91</sup> to appoint to anyone except the beneficiary's creditors, estate, or creditors of the estate.<sup>92</sup> On default of appointment, the property should pass to the beneficiary's heirs or devisees.

Using the power of appointment concept eliminates the rigidity of the anti-lapse model's required outright disposition to the beneficiary's issue. The power should specifically include the power to appoint present and future interests, and the power to appoint in trust or to custodianships.<sup>93</sup> If the legislature selects the anti-lapse model, the power should also include the ability to vary the shares and to exclude some of the issue from the distribution.

An additional advantage of the power of appointment concept is that the property will be removed from the statutorily determined path only if the beneficiary exercises the power. This requires an affirmative manifestation of intent.<sup>94</sup> Ordinarily, determining whether an exercise of the power has occurred does not cause problems. In those states where a residuary clause exercises a non-general power,<sup>95</sup> the statute should make an exception for this statutory power. Blanket exercises should be sufficient,<sup>96</sup> even if the beneficiary acquired the power after execution of the will.<sup>97</sup> Although this creates some risk that the beneficiary may exercise the statutory power without being aware of the power's existence, the dangers seem minimal. Under existing law, the beneficiary's will disposes of the future interest without regard to intent. The result under the statutory power should be better.<sup>98</sup>

## B. *Problems With the Rule Against Perpetuities*

Imposing a general survival requirement on the takers of future interests creates problems with the Rule Against Perpetuities because it converts previously vested interests, immune from the Rule, into contingent interests, subject to the Rule. There is a possibility that both the interest given to the beneficiary and the interests of the takers substituted by statute will violate

91. Such a power does not fit within the classic definitions of either special or general powers, and hence is labeled a hybrid. RESTATEMENT OF PROPERTY § 320 comment a (1940).

92. The Maryland anti-lapse statute, MD. EST. & TRUSTS CODE ANN. § 4-403, could serve as a model. It provides that a lapsed legacy

shall have the same effect and operation in law to direct the distribution of the property directly from the estate of the person who owned the property to those persons who would have taken the property if the legatee had died, testate or intestate, owning the property.

(c) Creditors of the deceased legatee shall have no interest in the property, whether the claim is based on contract, tort, tax obligations, or any other item.

One obvious problem created by such a statute is that the beneficiary's heirs or devisees may also have died. Thus, the property would be distributable to their heirs or devisees. See *infra* text accompanying notes 107-111.

93. See, e.g., CAL. CIV. CODE § 1387.1 (West 1982), for a statute spelling out the interests that can be created in exercise of a power.

94. French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred From a General Disposition of Property?* 1979 DUKE L.J. 747, 747.

95. Most state statutes providing for exercise by residuary clause will not cause problems because they apply only to general powers. *Id.* at 773, 792 n.225.

96. See, Rabin, *Blind Exercises of Powers of Appointment*, 51 CORNELL L.Q. 1 (1965); CAL. CIV. CODE § 1386.1 (West 1982).

97. See, e.g., *California Trust Co. v. Ott*, 59 Cal. App. 2d 715, 140 P.2d 79 (1943).

98. California's law provides an excellent model for a state interested in adopting a statute governing exercise of powers. See, CAL. CIV. CODE §§ 1384.1-1388.1 (West 1982).

the Rule because they are contingent until the time for distribution. The date set for distribution, however, is usually within the perpetuities period. Ordinarily, donors do not postpone trust distribution beyond the period of the Rule because, at that point, trustees lose their discretionary powers and the beneficiaries acquire the power to terminate the trust.<sup>99</sup>

Giving the beneficiary the power to appoint present and future interests and the power to create further trusts greatly increases the potential for violating the Rule. The validity of interests created by the exercise of a non-general power is measured from the date the power is created, not from the date the power is exercised.<sup>100</sup> The problem is not only the increased risk of invalid dispositions, but also the beneficiary's lost flexibility in disposing of the property.

Under current law, the beneficiary, as owner of the property, makes a new disposition whose validity is measured from the date of the beneficiary's death. The types of dispositions allowable may substantially differ since the period measured by lives in being at the donor's death plus twenty-one years<sup>101</sup> may be considerably shorter than a period measured by lives in being at the beneficiary's death plus twenty-one years.<sup>102</sup>

If the legislature selects a substantive disposition based on the anti-lapse model, the perpetuities price in lost flexibility is not important since without the power the beneficiary could not postpone the vesting of the interests of the issue. If the beneficiary attempts a disposition that violates the Rule, the issue should take per stirpes, as takers in default. This produces the same result as the model would have reached without the power. To the extent that the beneficiary can exercise the power within the limits of the Rule, the family is better off. To the extent that the beneficiary cannot, the family is no worse off. Acquiring the opportunity for more flexible dispositions is worth the additional complications involved.

If the legislature selects a substantive disposition based on the vested interest model or adopts an intermediate position, the perpetuities price in lost flexibility is higher. The question that must be addressed is whether the gain in avoided costs and taxes is worth the loss of flexibility in the disposition that can be made. Most donors would probably answer yes. Saving tax

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99. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS & ESTATES 581, 769, 821-22 (3d ed. 1984). The statute should provide that beneficiaries do not lose their power to consent to a modification or termination of the trust due to the survival requirement or the substituted takers provision. See *infra* text accompanying notes 123-135.

It does happen, however. See, e.g., *May v. Hunt*, 404 So. 2d 1373 (Miss. 1981). In *May* the testator, who died in 1973, left all his property in trust for his seven children. The will provided that the property was to remain in trust until the year 2022. Then the property was to be distributed outright to the children per stirpes. The court held that the children's interests were free from any condition of survival, and reformed the trust to terminate at the expiration of the lives in being.

100. J. DUKEMINIER & S. JOHANSON, *supra* note 99, at 822-23. The theory, of course, is that the property is tied up from the time it is first put in trust. Unless the beneficiary has a presently exercisable general power, it remains subject to restrictions until the interests created by the donee's exercise of the power have vested.

101. The period begins to run when the instrument creating the power becomes irrevocable. In the case of an inter vivos trust, this period may be earlier than the settlor's death.

102. The Rule Against Perpetuities requires only that the interests vest, not that they be distributed. Continuing the trust beyond the vesting period, however, is not very practical since the trustee's powers are not exercisable beyond the period of the Rule.

and probate costs is a relatively high priority with most donors.<sup>103</sup>

In most cases, the limits imposed by the Rule will not be crippling, and adopting modern perpetuities reform doctrines and statutes can alleviate potential violation problems. Under traditional doctrine, a "second-look" can be taken at the time of the beneficiary's death. Events occurring between the creation of the trust and the exercise of the power may be taken into account in determining whether the interest will vest in time.<sup>104</sup> The "second-look" doctrine allows the beneficiary to make some dispositions that would have been invalid if made by the donor.

The wait-and-see doctrine,<sup>105</sup> accepted by the *Restatement (Second) of Property*, provides that interests are valid if they *do* vest within the period of the Rule, rather than requiring that it be certain at the time of their creation that they *will* vest within the period of the Rule. The doctrine validates many previously invalid interests. The court may reform those interests that remain invalid in a way that most closely carries out the donor's intent and still complies with the Rule.<sup>106</sup> The substitute dispositions, like those suggested for this proposed statute, distribute the property to living people, rather than requiring reversions that, under prior law, often resulted in distributions through the estates of persons long deceased.

Even in a jurisdiction unwilling to adopt modern perpetuities reforms, the savings gained by imposing general survival requirements and converting the beneficiary's interest from an ownership interest to a power of appointment outweigh the costs of lost flexibility and the expense of any additional litigation engendered by interests that violate the Rule. In a jurisdiction that has adopted, or is willing to adopt these reforms, the Rule should cause little difficulty with the newly-contingent interests of the primary beneficiaries or with the newly-created interests of the substitute beneficiaries.

### C. *Imposing Survival Requirements on the Substitutes*

Both the lapse model and the vested interest model create risks if the substitute takers die after the beneficiary but before the date for distribution.

103. AS R. CAMPFIELD, *ESTATE PLANNING AND DRAFTING* ¶ 13051 (1984), points out in another context, taxpayers have shown little enthusiasm for sharing their accumulated wealth with the government.

104. J. DUKEMINIER & S. JOHANSON, *supra* note 99, at 824.

105. RESTATEMENT (SECOND) OF PROPERTY, Donative Transfers § 1.4 (1983).

106. The RESTATEMENT (SECOND) OF PROPERTY, Donative Transfers § 1.5 (1983) provides: If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution and which is within the limits of the rule against perpetuities.

California's perpetuities statutes eliminate the "unborn widow" trap, CAL. CIV. CODE § 715.7 (West 1982) permit a period in gross of 60 years, CAL. CIV. CODE § 715.6 (West 1982) and validate interests that can be reformed to comply with the rule, CAL. CIV. CODE § 715.5 (West 1982). The reformation statute provides:

No interest in real or personal property is either void or voidable as in violation of . . . [the Rule] if and to the extent that it can be reformed or construed within the limits of . . . [the Rule] to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

*Id.*

In addition to the problem of unnecessary expenses and taxation that results from passing the property through the beneficiary's estate, the property is almost certain to pass outside the group the donor intended to benefit. To a substantial extent, imposing additional survival requirements on the substituted takers can alleviate both these problems.

Whether the legislative judgment is that the property should revert to the donor or pass from the donee, the heirs of both should be determined as if the donor or donee had died at the time for distribution. Since heirs is a multi-generational term, there is no risk that any branches of the family would be cut off.<sup>107</sup> If the beneficiary's spouse is alive at the time of distribution, in many states the spouse is included as an heir. If, however, the spouse predeceases the beneficiary, the spouse's issue or kin seldom take.<sup>108</sup> This solution eliminates the problem of passing the property from the beneficiary to the spouse and then to the spouse's later spouse or kin.<sup>109</sup>

Where the property passes to the beneficiary's devisees under the vested interest model, or to the donor's residuary legatees under the anti-lapse model, the problem is a bit more complicated. Imposing a survival requirement on the devisees of either solves the problems associated with distributing the property through the estate of the beneficiary's spouse but it may create other problems. If the beneficiary's will leaves the property to a class, or makes individual gifts to her children, a survival requirement could cause the same kinds of problems caused by the basic lapse model: cutting off family branches or creating unequal distributions among family branches. Under such circumstances, the statute should substitute the surviving issue, if any, and otherwise pass the property to the surviving class members, or heirs of the donor or donee.<sup>110</sup> To avoid substituting issue of the beneficiary's spouse, the substitution should be limited to devisees who were kindred of the donor, donee, or spouse of either.<sup>111</sup>

This suggestion is consistent with the earlier recommendation that the basic statutory substitution should extend to all beneficiaries of future interests. This recommendation is designed to prevent the beneficiary from passing the property to another beneficiary, who the donor may well find acceptable because of his or her relationship to the first beneficiary, but whose own heir or beneficiary the donor would not find acceptable. Under such circumstances, it is reasonable to assume that if the second deceased beneficiary is related to the donor or donee, or to either of their spouses, the

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107. See *supra* text accompanying note 53, suggesting that the courts should always give this interpretation to a disposition involving heirs.

108. In California, the issue of a predeceased spouse take intestate shares if the decedent is not survived by issue, grandparents, or issue of grandparents. CAL. PROB. CODE § 6402(e) (West 1982). The parents or issue of parents of a predeceased spouse take if the decedent has no surviving next of kin. CAL. PROB. CODE § 6402(g) (West 1982).

109. See *supra* notes 40 and 87 and accompanying text, for a further description of this problem.

110. The substitute disposition that should be made at this point presents a problem very much like the lapse problem, and therefore should probably be treated the same. If the substitution of the issue will promote family equality, it should be made; if it will perpetuate inequality of treatment from one generational level to the next, it should not be made. See French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335 (1985).

111. This follows the pattern of California's basic anti-lapse statute. CAL. PROB. CODE § 6147 (West 1982).

donor would find the issue acceptable. If, however, the second donee was the spouse of the first, or a stranger, the donor would not want the property to go to the step-children or the stranger's issue.

No matter what substantive choice the legislature makes as to which takers the statute will substitute, the legislature should also impose survival requirements on all substitute takers to assure that distribution is never made to the estate of a deceased taker. Even if no major change is made in the current law, so that the heirs or devisees of the deceased beneficiary continue to take the property, shifting from ownership of the future interest by the beneficiary to a power of appointment, combined with provisions to assure that the takers in default are living at the time of distribution are worth doing because such a change eliminates the tax and probate expenses of current law. The savings in taxes and costs outweigh the loss of flexibility caused by the shorter perpetuities period.

Having eliminated these mechanical problems, we are left to face the more difficult question of what limits, if any, the average donor would place on the beneficiary's ability to select a substitute taker. Preliminarily, however, we must address the question whether the anti-lapse statute and the future interest statute should be the same.

#### IV. DESIGNING THE SUBSTITUTE DISPOSITION: SHOULD THE FUTURE INTEREST STATUTE AND THE ANTI-LAPSE STATUTE BE THE SAME?

In the interests of simplifying the law and applying uniform solutions to functionally identical problems, one could argue that the future interest statute and the anti-lapse statute should make identical dispositions. The problems presented are how to distribute the property intended for a beneficiary who predeceases the donor and how to distribute the property intended for a beneficiary who survives the donor but dies before the distribution date. The problems are similar, but they are not functionally identical.

This Article has already discussed this question in the context of the appropriate breadth of the future interest statute. At least, for that purpose, the immediate gifts made by the will and the future interest may serve different functions. As a result the coverage limitations appropriate for the anti-lapse statute are not appropriate for the future interest statute.<sup>112</sup> As to those beneficiaries within the coverage of the anti-lapse statute and those covered by the future interest statute, the question is whether the similarity is such that the statute should make a uniform disposition of the property intended for each of them.

Again, the answer is no because there are significant differences between the two beneficiaries. The anti-lapse statute makes a substitute disposition for the beneficiary who dies before the testator, and the substitution occurs at the testator's death. The future interest statute makes a substitute disposition for the beneficiary who dies after the testator, and the substitution oc-

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112. See *supra* text accompanying notes 67-69.

curs at the time of distribution, which may take place many years after the testator's death.

The problems with the direct substitution of the beneficiary's issue per stirpes, made by most anti-lapse statutes, are that the substitution is too rigid and makes too narrow a disposition. It prevents the beneficiary from engaging in sensible estate planning for her family, from enjoying the benefits of ownership of a power to dispose of property, and from adjusting the terms of the disposition to meet changing circumstances. These problems are not significant when the testator is still alive and can adjust the disposition to suit the situation and his own desires. Although arguments can be made that broader anti-lapse statutes would be appropriate, the need for giving the beneficiary a broader power to dispose of the property is simply not as compelling as the need for a broader power in the case of future interests.<sup>113</sup>

If the legislature selects the anti-lapse model as appropriate for the future interest statute, there is no problem coordinating the two.<sup>114</sup> The changes suggested in the last section to solve mechanical problems could profitably be applied to the anti-lapse statute. The significant differences between the situations that the two statutes are designed to alleviate, however, certainly justify adopting different dispositions. In the lapse situation, the testator can change the disposition to reflect the changing circumstances; in the future interest situation, only the beneficiary can change the disposition.

#### V. DESIGNING THE SUBSTITUTE DISPOSITION: WHO SHOULD TAKE?

Within what limits would the average donor restrict the beneficiary's power to appoint future interest property? In addressing this question, we should not forget that the "average donor" is the one who fails to mention survival<sup>115</sup> or name an alternate taker in the event the beneficiary dies before distribution.

Commentators are divided in their views as to what this average donor would want. Most believe that the donor would prefer substituting the issue of the beneficiary. A few believe that the donor would prefer substituting the heirs or devisees of the donee. Apparently, one group would limit the permissible appointees to the beneficiary's issue. The other group would give the beneficiary the broadest possible non-general power. However, none of the commentators considered the question outside the framework of the existing dispositional models, where there are no other choices. They might have favored other choices, if asked to consider how broad a power of appointment the beneficiary should be given.

Shifting the beneficiary's interest from ownership to power of appoint-

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113. The Maryland anti-lapse statute does give the beneficiary this power. See *supra* note 92.

114. If this approach is adopted, care must be taken not to limit the application of the statute to interests created by will, a mistake made in the 1969 Illinois legislation. See Waggoner, *supra* note 10, at 436. Anti-lapse statutes benefit from the provisions designed to eliminate what have been termed "mechanical" problems in creating a future interest statute. For a discussion of other improvements to the anti-lapse statute see French, *supra* note 110, and *infra* text accompanying notes 123-135.

115. Courts widely rejected the older cases that held express words of survival did not impose survival requirements beyond the testator's death. The statute should specify that express survival requirements continue to the distribution date unless the instrument indicates some other intent.

ment makes it possible to consider a wider range of options in determining what the average donor would prefer. The legislature can tailor the class of permissible appointees to fit its judgment as to which groups the average donor would want the beneficiary to be able to include as possible recipients. The power is more flexible than a direct substitution because it merely allows the donee to select from the specified groups; it does not mandate a distribution to them. The legislature can much more narrowly circumscribe the group of takers in default who will receive the property unless the beneficiary affirmatively acts to send it elsewhere.

The groups which should be considered for possible inclusion among permissible appointees include:

1. The beneficiary's issue.
2. The beneficiary's spouse.
3. The beneficiary's stepchildren (the spouse's issue).
4. Spouses of the beneficiary's issue.
5. The donor's issue.
6. The spouses of the donor's issue.
7. The beneficiary's blood relatives.
8. The donor's blood relatives.
9. The beneficiary's spouse's relatives.
10. The donor's spouse's relatives.
11. Charitable organizations.
12. Anyone except the beneficiary's creditors, estate, or creditors of the estate.

The groups which should be considered as takers in default are:

1. The beneficiary's issue.
2. The surviving class members.
3. The beneficiary's heirs.
4. The beneficiary's devisees.
5. The donor's heirs.

There are a number of choices that the legislature could reasonably make as to the combination of permissible appointees and takers in default. If current law reflects what the average donor wants, the permissible appointees should include anyone except the beneficiary's creditors, the estate, or the estate's creditors. The takers in default should be the beneficiary's heirs or devisees. The legislature, however, could reasonably conclude that the average donor would want the property to go to the beneficiary's devisees only if the beneficiary exercised the power. In that case, the takers in default should be limited to the beneficiary's heirs.

The legislature could also reasonably conclude that the average donor would willingly give the beneficiary an unrestricted power to select appointees, but only if the beneficiary's issue were the takers in default. If there are no issue, the additional takers in default could include surviving class members, or their issue, if any, and if none, the beneficiary's heirs.<sup>116</sup> The legisla-

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116. The heirs should be determined as if the beneficiary or donor has died at the time for distribution. See *supra* Part III, Section C.

ture could also conclude that the final taker in default should be the donor's heirs rather than the beneficiary's heirs.

At the other end of the spectrum, the legislature might reasonably conclude that the average donor would substitute the beneficiary's issue without regard to the wishes of the beneficiary. If so, the permissible appointees would be the beneficiary's issue. The takers in default would be the beneficiary's issue, *per stirpes*, if any, and if none, the donor's heirs. This disposition comes closest to the anti-lapse model, but it gives the beneficiary flexibility in determining which of her issue should benefit and to what extent. It also allows the beneficiary to choose the form in which the property should be held.

In between these two extremes, there are any number of combinations the legislature could select. For example, the statute might expand the power to appoint to issue to include the donee's spouse.<sup>117</sup> Or, the statute could include all members of the donee's or donor's family, or both, if they are different, as permissible appointees. The definition of family could be restricted to blood relatives or expanded to include spouses of family members and their relatives. The definition might include the relatives of the donor's spouse, but not of the donee's spouse.

The legislature could also give the beneficiary a broader power under some circumstances than under others. It could replicate the traditional remainder vested subject to divestment by death leaving issue, by giving the donee a narrow power to appoint to his issue, if there are any, and an unrestricted power if there are none.<sup>118</sup> Conversely, the traditional remainder vested subject to divestment by death without issue could be replicated by giving the donee an unrestricted power, but only if the donee had issue. In default of appointment, the issue would take *per stirpes*. If the donee had no issue, the property would pass to the surviving class members, if any, and otherwise to the donor's heirs.

There is no empirical study or concensus among the commentators to give a clear answer to the question what the average donor would want done with the property if the intended beneficiary dies before the time for distribution. Legislators could reasonably come to a number of different conclusions. It seems clear, however, that the legislature does not need to follow the anti-lapse model and restrict permissible appointees to the beneficiary's issue.

One conclusion that the legislature could reasonably draw is that the average donor would not want the beneficiary to possess the power to appoint to takers outside the family. All the criticisms directed against the vested estate model focus on the model's tendency to pass the property outside the bloodline. This conclusion does not, however, lead to the further conclusion that the beneficiary's power should be confined to selecting among his issue. Since the statute merely gives the beneficiary the power to

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117. The statute could limit the power to appoint to the spouse to a spouse who is also a parent of a child of the donee, or the power might be conditioned on there being no issue.

118. Of course the legislature should sufficiently restrict the power so as to avoid taxation as a general power.

select among, but does not mandate a distribution to, the group of permissible appointees, there is no need to confine the group to those the donor would probably have picked to succeed the donee.

Since the beneficiary's issue take in default of appointment, it is reasonable to think that the average donor would welcome the added flexibility obtained by giving the beneficiary discretionary power to include other family members in the distribution. How broadly the statute should define the term family is a question on which opinions will differ. The more traditional view limits the group to the blood relatives of the donor and donee. A more modern approach includes, at least, the relatives of the donor's spouse, and probably includes the power to appoint to the spouses of the beneficiary's issue, and perhaps to spouses of other family members.

A strong argument can also be made that the legislature should give the beneficiary a broad non-general power to appoint to anyone except her creditors, her estate, or the creditors of her estate. The statute should combine this power with passing the property on default of appointment to the beneficiary's issue, if any, and if there are none, to the surviving class members, or their issue, if any, and if none, to the beneficiary's heirs.

This combination produces the least amount of change in the current law, while eliminating the law's worst features. It provides the beneficiary the freedom to engage in modern estate planning, and the freedom to determine which family members to include in the plan. The beneficiary is in the best position to decide whether to include or exclude his spouse, children, adopted children, stepchildren or foster children.<sup>119</sup> It also leaves the beneficiary free to exclude his issue entirely. A beneficiary would rarely use such a power except in favor of a surviving spouse,<sup>120</sup> but under some family circumstances the power would be desirable.

This power also allows the beneficiary to provide for other members of the donor's family and to leave the property to charitable or educational institutions.<sup>121</sup> In addition, the beneficiary will enjoy the benefits of holding a power to dispose of property at death. If the donor has not restricted the beneficiary's interest by imposing a survival requirement, it seems reasonable to assume that the beneficiary is either someone the donor trusted, or someone so far removed in time that the donor did not feel strongly about controlling such a remote devolution. Either way, it makes sense to assume that the average donor would be content with giving the beneficiary this broad a power to choose the recipients of the property.

Even those who believe that the average donor would restrict the benefi-

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119. Any attempt to make this determination by direct statutory substitution would involve a complicated definition of children. See CAL. PROB. CODE § 6408.5 (West 1982) (defines children for intestate succession purposes).

120. See *supra* note 37, for empirical studies showing that testators overwhelmingly favor their surviving spouses when disposing of their own property. Whether they also favor their surviving spouses in exercising powers of appointment is not included in the studies. The author would guess that property subject to powers of appointment held by the settlor's children (rather than powers in marital deduction trusts) is more likely to be left to issue than owned property, which is more likely to be left to a spouse.

121. The beneficiary would be free to make any other disposition, of course, but these are the most likely.

ciary's power should not object to going at least this far in changing the current law which distributes the property to the beneficiary's estate. This proposal does not eliminate the risk that the beneficiary may exercise the power in favor of someone unacceptable to the donor, but the risk of an unwanted distribution is substantially lessened because the beneficiary must affirmatively exercise the power.

Existing law distributes the property to the beneficiary's estate, whether or not the beneficiary knows of the property's existence or intends to dispose of it. This proposal passes the property to the beneficiary's issue unless she exercises the power. Dying testate does not exercise the power. The principal differences between the current law and the proposal are that even if the beneficiary dies testate, leaving all his property to his surviving spouse, but he fails to exercise the power, the issue take the property subject to the power. If the beneficiary dies intestate, the issue also take all the trust property, rather than sharing it with the spouse who is also an heir. The proposal does not ignore the importance of the surviving spouse, but the spouse shares the trust property only if the beneficiary affirmatively chooses to include her.

If there are no issue, the property goes to the surviving class members, or their issue, before passing to the beneficiary's heirs. If it is not a class gift, or if there are no surviving takers, the surviving spouse could then take a share as an heir, but only if the spouse survived to the date of distribution.<sup>122</sup> If the legislature believes including the spouse creates too great a risk of an unwanted disposition, they could change the takers in default to name the donor's heirs in place of the beneficiary's heirs.

The combination of permissible appointees and takers in default should be selected to give the beneficiary maximum flexibility to adapt to changes after the donor's death within the limits permitted by the legislature's judgment as to how narrowly the donor would confine the group of possible recipients. Whether to restrict the beneficiary's selection to family members, or to permit the beneficiary to dispose of the property as he or she wishes will be the most difficult question to decide. Unfortunately, there are no clear indications of what the average donor would want, and equally respectable opinion can be found on both sides. Once the legislature makes its selection, there are some additional details that it must attend to in implementing the statute.

## VI. FINE TUNING THE STATUTE: EXCEPTIONS AND OTHER DETAILS

Although the only critical function performed by the rule favoring early vesting is to provide a reasonable disposition of property intended for a pre-deceasing beneficiary,<sup>123</sup> there are some lesser functions still performed by vested interests that the legislature should address in designing the proposed statute. Those functions include facilitating the modification and termination of trusts, and furthering the marketability of land. There are also some situations where application of the statute would frustrate the donor's intent.

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122. If this result is thought undesirable, the default provision could pass the property directly from the beneficiary's heirs to the donor's issue or heirs.

123. See *supra* text accompanying notes 23-55.

Finally, there is the question whether to apply the statute to interests in revocable *intervivos* trusts.

A. *Providing for Other Functions Performed By Vested Future Interests*

A trust can be modified or terminated if all of the beneficiaries consent and no material purpose of the settlor will be frustrated.<sup>124</sup> Only if all of the remaindermen are identified and of legal age can effective consents be given. Vested future interests may be deliberately used in creating trusts of modest size which are designed to care for dependent family members because the tax consequences of the remainderman's death before the life tenant will not be significant.<sup>125</sup> Application of the statute eliminates this possibility because it makes all future interests contingent on survival, and gives alternative contingent interests to the takers in default. The takers in default could not be definitely ascertained until distribution of the trust.

The legislature could preserve the function performed by the rule favoring vested constructions without sacrificing the advantages gained by the statutory survival requirement. The statute could allow apparent remaindermen to retain the power to consent to modification or termination despite the statutory condition imposed on their interests. The statute should provide that for purposes of determining a beneficiary's power to consent to modification or termination, the beneficiary's interest should be regarded as free from the statutory survival requirement, and the takers substituted by the statute should be regarded as having no interest in the trust.<sup>126</sup>

Where the donor creates a legal future interest in land, the preference for a vested construction performs a useful function in furthering the property's marketability. The holders of vested remainders may join with the life tenant to convey a fee simple interest in the property. Imposing a statutory survival requirement makes such a transaction difficult, if not impossible, because the unascertained potential substitute takers could not join in the conveyance.<sup>127</sup>

There are two ways to solve this problem. Either the legislature should

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124. *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889), is the leading case in this country. It established the material purpose requirement, often called the *Claffin doctrine*. J. DUKEMINIER & S. JOHANSON, *supra* note 97, at 573.

125. For example, a testator of moderate wealth with an incompetent child and two other adult children, usually sets up a trust to care for the incompetent child for life, with remainder to the other children. But for the incompetence of the child, the testator would have made an immediate outright distribution of the property to her children. If circumstances change so that the trust is no longer desirable or requires modification, the testator wants the other children to have the ability to consent to a modification or termination. The amount involved is not sufficient that its inclusion in the gross estates of her other children would be a cause for concern. Indefeasibly vested remainders would be a simple and sensible way to accomplish the desired result. If the trust were large enough that tax concerns were important, of course, the problem would have to be approached by including special powers to modify and terminate.

126. New York adopted a similar approach to the problem caused by eliminating the Doctrine of Worthier Title. N.Y. EST. POWERS & TRUSTS LAW § 7-1.9 (McKinney 1986 Supp.). The New York statute provides that for the purpose of determining all the persons beneficially interested in a trust whose consent is necessary for an effective revocation or modification, a disposition in favor of a class of persons described as the heirs, next of kin or distributees of the creator of the trust does not create a beneficial interest in such persons.

127. The holder of a testamentary power cannot make an effective contract to exercise it. J. DUKEMINIER & S. JOHANSON, *supra* note 99, at 646. It might be possible to release the power in

exempt future interests in land not held in trust, or a separate statute should permit the conveyance of a fee simple in the land despite the existence of unascertained contingent remaindermen. The approach proposed for the trust termination problem, providing that the statute should not affect the beneficiary's power to convey an unconditional future interest, probably would not work. In effect, it would give the beneficiary a presently exercisable general power, which would make the property includible in the beneficiary's gross estate.

## B. *Situations Where Application of the Statute Frustrates the Average Donor's Intent*

The proposed statute is based on the premise that transmissible future interests are undesirable, and that the proposed statutory substitution carries out the average donor's intent. There are a few situations where these premises do not hold true, which should be considered in designing the statute.

### 1. *Gifts to Grandchildren*

To qualify for the \$250,000 grandchild exclusion from the generation-skipping tax, the property must be includible in the grandchild's federal gross estate if the grandchild dies at any time after the generation-skipping transfer.<sup>128</sup> The easiest way to comply with this requirement is to provide that if the grandchild dies before distribution, the property should be distributed to the grandchild's estate. Although it is highly unlikely that a competent practitioner would rely on the preference for a vested construction to qualify a remainder for the grandchild exclusion, statutes like this are necessary because not all instruments are competently drafted.

The statute should contain an explicit exception to avoid jeopardizing the exclusion if the instrument does not specify that the grandchild's interest shall be paid to the grandchild's estate in the event the child dies before distribution. The legislature could model the exception after other recent remedial legislation designed to cure faulty or outdated drafting that jeopardizes the marital or charitable deductions.<sup>129</sup> The statute should provide that in a gift intended to take advantage of the grandchild exclusion, a condition of survival does not prevent distribution to the grandchild's estate of an amount sufficient to take full advantage of the available exclusion.

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such a way that all the possible interests in the property could be identified and joined, but the need to limit the power so that the donee's creditors could not be appointees would make this difficult.

128. I.R.C. § 2613(5)-(6), Treas. Reg. § 26.2613-4(a)(1) (19). Campfield, *supra* note 60, at ¶ 13603, suggests that the estate tax liability in the grandchild's estate may be much less than the generation-skipping tax incurred if the exclusion is lost.

129. See, e.g., CAL. PROB. CODE §§ 1030-1039 (West 1982). Provisions in the California Probate Code are designed to save gifts intended to qualify for the marital and charitable deductions. Section 1032 provides that the provisions of the will shall be construed to comply with the marital deduction provisions of the Internal Revenue Code and Regulations. Section 1036 provides that any survivorship requirement expressed in the will in excess of six months shall not apply to property passing under the marital deduction gift but shall be limited to a six-month period beginning at the testator's death.

## 2. *The Donor Excludes Application of the Statute*

Other situations may arise where the donor intends to create a transmissible vested future interest that would allow distribution to the beneficiary's estate if the beneficiary died before distribution. The proposed statute is remedial in character, designed to address problems the donor either failed to consider, or handled poorly.<sup>130</sup> The statute should not apply if the donor specifies that it should not or if the donor indicates that the property should be distributed to the beneficiary's estate if the beneficiary fails to survive.

There will undoubtedly be occasions on which the statutory substitution will frustrate the probable intent of the donor. In applying anti-lapse statutes, courts have been reluctant to accept such arguments as the basis for finding that the testator has manifested an intent to avoid the application of the anti-lapse statute.<sup>131</sup> A similar approach should be taken in applying the future interest statute. If the statutory substitution produces results that too frequently frustrate the intent of the donor, the legislature should change the substitution.

The alternative is to permit disappointed claimants to litigate the question of what disposition this particular donor would have made under the circumstances. If this is permitted, it will become necessary to litigate the question on the termination of every substantial trust where a beneficiary died before the time for distribution and the instrument did not provide an absolutely clear substitute disposition. The statute should apply unless the instrument manifests an intent that the statute not apply by stating in substance that no survival requirement is intended and distribution shall be made to the beneficiary's estate.

## 3. *The Instrument Expresses a Survival Requirement*

Even where the donor has expressly addressed the possibility that the beneficiary may die before the date of distribution, problems may still arise in determining what substitute disposition should be made. The donor may not have named an alternate taker or, if one is named, that taker may also have died before the date for distribution. The statute should cover both situations. It should provide a substitute disposition for all cases where the instrument fails to supply an effective disposition to takers living on the date of distribution.

Where the donor expressed a restricted survival requirement, the statute should convert it to a general survival requirement, and supply a substitute taker for the event not covered by the donor's alternative gift. For example, if the language states that there is a remainder to *A*, but if *A* dies without issue, to *B*, the statute should subject *A* to a general survival requirement. If *A* dies without issue, the instrument substitutes *B* for *A*. The statute imposes a general survival requirement on *B*, so that if *B* dies before

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130. In trusts created before 1930, the well-advised transferor did create transmissible future interests, but there is little doubt that that transferor would favor a statute rendering the interest non-transmissible to avoid the current estate tax. See *Estate of Benson*, 447 Pa. 62, 285 A.2d 101 (1971).

131. See French, *supra* note 110, at 342-43, 347-48, 364-65.

distribution, the statutory substitution for *B* will be made. On the other hand, if *A* dies with issue, the statutory substitution for *A* will be made (since the instrument provides no substitute for this event).

It could be argued that a donor who imposes a survival requirement but does not provide a substitute taker intends to create a reversion. It seems more likely that the lack of an alternate disposition is the result of oversight, and the statutory substitution should be made. A class gift to a single-generation that includes express language of survival presents a more difficult problem. Should the language be applied to cut off the issue of a predeceasing class member?

Similar problems have arisen in applying anti-lapse statutes. Courts have split on the question whether the expression of a survival requirement in that context indicates an intent that the issue should not be substituted for a class member who predeceases.<sup>132</sup> If the class is a multi-generational class, of course, there is no problem. If the class, however, consists of children or grandchildren, it seems unlikely that the average donor would intend to foreclose the possibility of the child's or grandchild's issue taking a share. The intent to favor surviving class members and foreclose their issue seems more likely in a gift to collaterals than it does in a gift to one generation of descendants.

The statute could provide that mere language of survival applied to a class gift should not indicate an intent that the statute should not be applied. However, the likelihood that this conclusion is accurate may depend on how broad a power is given to the predeceasing beneficiary. If the power is confined to appointing to issue, it may well be true that the donor would not have intended to preclude application of the statute by use of the word "surviving" in connection with a gift to "children." On the other hand, if the power permits the beneficiary to appoint the property outside the family, the donor may well have intended to preclude application. One solution is to limit the power in such cases to a power to appoint to issue, with the issue taking in default. Another is to assume that the donor meant what the instrument said, and treat the class gift as an effective alternative disposition.

### C. *Which Statute Should Apply to Interests in Revocable Inter-vivos Trusts?*

One final detail that the legislature should address in drafting the proposed statute is whether the statute should apply to beneficiaries of revocable intervivos trusts who die before the settlor. Although traditional doctrine treats the remainder interests in such trusts as future interests created when the trust is established, they are functionally identical to the interests of will beneficiaries prior to the testator's death. Since they are functionally identical, the law should deal with them under the anti-lapse statute, rather than under the future interest statute.<sup>133</sup>

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132. *Id.* at 369 n.153.

133. In *Estate of Button*, 79 Wash. 2d 849, 490 P.2d 731 (1971), the court applied the anti-lapse statute to the interest of a beneficiary of a revocable inter vivos trust who predeceased the trustor, saying that "a gift to be enjoyed only upon or after the death of the donor is in practical effect a

The significant difference between future interests and expectancies under wills that justifies differing treatment is that future interest beneficiaries die after the donor has lost the power to change the disposition. The law should treat the beneficiary of a remainder interest in a revocable inter vivos trust who dies before the settlor like the will beneficiary since the settlor retains full power to revoke the trust and to name and change the beneficiaries.<sup>134</sup> There is no difference between the beneficiary under the will and the will substitute that justifies different treatment at the beneficiary's death before the death of the testator or settlor.<sup>135</sup> However, if the jurisdiction's anti-lapse statute has limited coverage, this creates a potential problem for the beneficiary who fails to come within the required categories of relationship. If a survival requirement is imposed on the beneficiary, there will be a reversion to the settlor's estate, which would frustrate the settlor's effort to avoid the probate process. For interests in revocable inter vivos trusts, the statute should substitute the taker provided for in the anti-lapse statute regardless of the degree of relationship of the beneficiary to the settlor.

## VII. CONCLUSION

Vested, transmissible future interests create two kinds of problems if their holder dies before the interests become distributable: they create a risk that a substantial part of the property will be diverted into unnecessary taxes, probate expenses, and creditor's claims; and they create a risk that what remains will be diverted to takers that the donor would not have wanted to receive the property.

Vested interests also perform several very useful functions. They provide a substitute disposition of the property intended for the predeceasing beneficiary to someone other than surviving class members or the donor's residuary or intestate takers. They also perform some useful functions in providing interests immune from the Rule Against Perpetuities, in permitting their holders to join in efforts to modify and terminate trusts, and in furthering marketability of land whose ownership is split into legal present and future interests.

Imposing general survival requirements that convert vested future interests into contingent interests solves many of the problems caused by vested future interests. A simple statutory imposition of survival requirements, however, would leave in its wake very substantial problems of widespread undisposed of reversionary interests. Neither the legislature nor the courts

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legacy, whether it is created in an inter vivos instrument or in a will." The decision has been criticized because the court did not appear to recognize that it changed the law by imposing a survival requirement on the beneficiary, and the court did not consider the consequences of such an action. Coincidentally, the taker remained the same whether the court treated the interest as one which lapsed and was saved by the statute, or passed to the beneficiary's estate. See Fletcher, *A Critical Note on Lapse*, 8 GONZ. L. REV. 26 (1972).

134. If the anti-lapse statute is too narrow to cover the remainder to the predeceasing beneficiary, imposition of a survival requirement will change the devolution of the property, since the future interest would revert to the settlor's estate.

135. See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984), for a convincing argument that the functional equivalence of wills and "pure" will substitutes should be recognized and the courts should apply similar constructional rules to each.

should abrogate the constructional preference for vested future interests without providing for a statutory substitution of beneficiaries.

None of the existing models of substitution which either distribute the property to the beneficiary's estate, the beneficiary's issue, the surviving class members, or the donor's residuary or intestate takers, presents a satisfactory solution to the problem. Giving the beneficiary a power of appointment over the future interest instead of trying to make a direct statutory substitution solves most of the problems. By combining a broader power with a narrower set of takers in default of appointment, the legislature can provide a statutory substitute that should come as close as possible to what the average donor would prefer, without risking the substantial litigation expenses that would arise from allowing the claimants to litigate the question of what the particular donor actually would have preferred.

The legislature can achieve a major improvement over existing law by imposing general survival requirements on future interests beneficiaries and by providing that the property shall pass as the beneficiary appoints by his or her will to anyone except her creditors, her estate, or the creditors of her estate, and in default of appointment to her heirs determined as if she had died at the time for distribution. This eliminates all the tax, probate, and creditor costs of existing law, without sacrificing flexibility of disposition and with a significant reduction in the chances that the property will pass to recipients that the donor would find abhorrent.

Whether the statute can provide further improvement in reducing the chances that the ultimate disposition would displease the donor depends on the legislature's judgment as to what the average donor who does not impose a survival requirement or supply an alternate beneficiary really would want. Whatever the legislature's judgment, it is clear that the states should adopt statutes that go at least this far. The venerable preference for a vested construction should be abrogated by imposing statutory general survival requirements and providing beneficiaries with powers of appointment. The legislature should tailor the group of potential appointees and the takers in default of appointment to fit their judgment as to the preferences of the average reasonable donor. These statutes will allow the venerable preference for a vested construction to take its proper place beside the Rule in Shelley's Case and the Doctrine of Worthier Title in property law's Hall of Antiquities.