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ANALYTICAL PRINCIPLE: A GUIDE FOR LAPSE, SURVIVORSHIP, DEATH WITHOUT ISSUE, AND THE RULE

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INTRODUCTION

Bertrand Russell once defined pure mathematics as "a science in which we never know what we are talking about nor whether what we are talking about is true." This simple statement captures the problem in estates and the legal future interests through which we dispose of wealth today. The development of future interests which speaks of lapse, survivorship, death without issue, and the Rule Against Perpetuities (the Rule) is also so conditioned by history that nearly all of the major treatises on the subject begin any explanation with the year 1066 A.D. and the Norman Conquest of England. Sadly enough, the average student or scrivener has neither interest nor time for such depth.

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2. Wealth today has passed from land into the equity market, stocks, bonds, money markets, certificates of deposit, and mutual funds. Passing from an agrarian to an industrial economy has changed the nature of wealth and the tools through which it may be controlled or conveyed. To date, "the vocabulary, definitions, and classifications of the historical land law have been applied to the modern equitable future interests in securities." T. Bergin & P. Haskell, Preface to Estates in Land and Future Interests 122 (2d ed. 1984) [hereinafter Bergin & Haskell, Preface to Estates]. It remains to be seen if newer formulations, like the Uniform Probate Code, will break with history and adopt fresh approaches to control and conveyance. One fact is certain, the new manner of possessing wealth is here to stay.


4. The progression of legal future interests has burdened the student and the scrivener with an information explosion. For instance, essential knowledge for the administration and drafting of trusts include:
   (1) recent changes in estate and gift tax laws, specifically, and the myriad federal and local taxes affecting wealth generally;
   (2) Prudent Person rule and its evaluation through ERISA;
   (3) The Uniform Probate Code;
   (4) The Restatement of Conflict of Laws;

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no matter what the benefit. Thus, as Bertrand Russell correctly observes, "we never know exactly what we are talking about." This is a problem.

As the scrivener often confuses what he is saying, so too does the truth of the settlor's intention become lost. Thus, another observation can be made, another question asked: Whether what we are talking about is true? Often it is not. When the inaccuracy of the scrivener is complemented by the cryptic intentions of the settlor, neither the beneficiary nor the trustee can proceed without the aid of Solomon.

There is no substitute for the historical significance of words or phrases nor for the appreciation of what these mean in transmission of wealth through trusts. It is the purpose of this article to develop an analytical principle—meaning a logical approach—by which we can predict, explain, and even modify the often absent or bizarre intention of any settlor, donor, or scrivener. This intention includes future interests passing through lapse, express and implied conditions of survivorship, death without issue, and the Rule. These four subjects are treated as constant and yet are among the most complicated non-tax related issues of trusts and estates. Applying an analytical principle to them is meant to offer a concrete basis upon which the scrivener and the settlor can add related issues, ones that interest and complement the four discussed in this article.

Related issues to the four mentioned are ademption, exoneration, inter vivos accessions, post-mortem changes, and the use of class descriptions or powers of appointment as they relate to the intent of the creator of any interest. Each of these is always described in extensive detail. Students can recite individual cases concerning each. But as one author has observed, "The case method unadulterated is an unsatisfactory and frustrating modus operandi for all concerned." Individual cases do not easily provide analytical consistency among all. This article is an attempt to present four constant major issues and the tandem ones mentioned, in a lineal scheme that will demonstrate their interdependence. Only by a principle through which we can demonstrate interdependence can we arrive at the essence: the intent of the scrivener's client.

(5) The possibility of international administration of estates.

5. See Gulliver, Future Interests, supra note 1, at 2. "Future interests is out of this world and yet it's in it. In terms of the formulation of currently operating doctrine, the sixteenth and seventeenth centuries are but as yesterday." Id.

6. Id. at 3.
This then is not another article about lapse, survivorship, death without issue, and the Rule. It is the involvement of these four—and more—in an original and creative analytical principle through which the practitioner can interpret the intent of the creator of any instrument, inter vivos or testamentary. This is its practical approach. Then, as is so often the case, either from the four corners of the instrument or from parol evidence, when the attorney cannot discover the intent of the creator, he or she can predict—using a lineal scheme—what most approximates intent. This is especially so when utilizing modern legislative or judicial aids such as substantial compliance to legislative enactments of Wait and See, Second Look, or Cy Pres. There is clearly a desire to provide greater certainty and equity in finding intent.

The analytical principle (the Principle) is presented as a scheme, a diagram, a developing tool. While it has been described in segments, this article remains a description of the interdependence of lapse, express and implied conditions of survivorship, death without issue, and the Rule.

I. THE LINEAL SCHEME ITSELF

One of the oldest adages concerning a last will and testament is that it is ambulatory. There is a time element captured in this adage. It represents the passage of time from the execution of the instrument through the death of the testator and beyond in some cases, to the happening of an event some time distant yet commanded by the will. The Principle adopts this lineal progression as part of the scheme. It is a time line represented horizontally. This line, moving from left to right, is then divided into four separate areas by means of three vertical lines intersecting the single horizontal one.

Each of these three vertical lines represents a particular point in time and each is identified according to the simple designations of A, B, and C. The precise identification and utilization of each is important, for each marks a distinctive point in a testator's expressed or presumed intent.

Line A is that point which marks the creation of the instrument.

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7. See generally Thomas E. Atkinson, Handbook of the Law of Wills (2d ed. 1953). The ambulatory character of the will allows for changes in its contents from the time it is executed. From this results the doctrine of independent significance. Today, we can appreciate the Uniform Probate Code “Legal List” provision as a more precise capture of ambulatory character. U.P.C. § 2-513 (1982 & Supp. 1983).

8. In a testamentary instrument, line A is the execution of the last will and testament. In an
Line B is the death of the testator and line C the happening of an event or a condition. Thus, each line, intersecting the horizontal progression of time, is important. It would be disastrous to the intent of the testator and to the heirs or beneficiaries to stand at an incorrect line and ask: "Is there any possibility that any interest will not vest within a life in being plus twenty-one years?" In an inter vivos trust, one would make a grave error by relying upon a measuring life alive at the death of the settlor, but not alive at the creation of the trust instrument. The lineal scheme provides fixed and identifiable points, reducing error and allowing greater prediction.

Certainty of prediction\(^{10}\) is the objective of the lineal scheme. Line A evidences an intent to create an interest. This would constitute delivery\(^ {11}\) in an inter vivos trust or due execution of a valid last will and testament by a competent person in a testamentary trust. Volumes have been written concerning the importance of this particular point in time in the lineal progression of a trust.\(^ \ast \) Such import is recognized in the lineal scheme as line A.

Line B is the effective date of the testamentary transaction. The inter vivos trust has already been announced at line A, perhaps only to be funded in a pour over arrangement at line B. But for the testamentary dispositive plan sanctioned by the local testate statutes, this is the commencement of announced intent. The will speaks. This is not to say that between Line A and B, from the creation to the effective date of

\(^{9}\) See infra part V of text (discussion of Rule Against Perpetuities).

\(^{10}\) George Eliot once remarked that prophecy is the most gratuitous form of error. Likewise, persons inquiring as to intent—even their own—are always subject to error. Nonetheless, legislatures and judiciaries have sought intent in such statutes as pretermitted heir, see U.P.C. § 2-302 (1982 & Supp. 1983); anti-lapse, see id. § 2-605; revocation by operation of law or changed circumstances, see id. § 2-508; or even intestate statutes of distribution, see id. §§ 2-101 to -114. For examples of judicial presumptions of undue influence, see In re Estate of Simmons, 156 Minn. 144, 194 N.W. 330 (1923), and In re Estate of Novotny, 385 N.W.2d 841 (Minn. App. 1986). For examples of the weight given to the use of an attestation clause, and accordingly serving as predictive tools, see Norton v. Goodwine, 310 Ill. 490, 142 N.E. 171 (1923), and In re Estate of Krausman, 131 Ill. App. 2d 514, 268 N.E.2d 505 (1971). Use of the lineal scheme is an additional tool seeking certainty of prediction.

\(^{11}\) Inter vivos creation of a trust is often difficult to distinguish from other relationships in which property is to be managed for another. Delivery or any other act necessary for creation of the trust must first be proven by the party asserting the existence of a trust before the lineal scheme may be used. Russell v. Fish, 149 Wis. 122, 135 N.W. 531 (1912). Likewise, a valid last will and testament must exist before a testamentary trust is operative, although such a written instrument may evidence a pre-existing trust. Lail v. Lail, 281 P.2d 885 (Cal. Dist. Ct. App. 1955); Hiss v. Hiss, 228 Ill. 414, 81 N.E. 1056 (1907).

the instrument, nothing happened. For instance, the majority of the anti-lapse statutes have operated during this period of time. Yet, it is to say that with line B another substantive period commences and it is familiar to estates, that is administration, post-mortem changes.

Administration of the decedent's estate can thus begin the operation of a testamentary trust announced in a valid last will and testament. Or it can mean the added deposit of trust property in a more comprehensive estate plan. One definite characteristic of the B line is that it marks the death of the inter vivos settlor or the death of the testator/creator. The testamentary trust instrument is now operative and being administered by the trustee.

The final line, the C line, identifies the happening of an event, a condition, a date. Like the A line, the intent of the creator of the trust is important as the trustee and the probate courts must be able to posit when the trust came into existence and when it is to terminate. Line C is often the termination of a trust, but it is always the last point at which we can have vesting under the Rule. It is an excellent place to look for causal connection with the best measuring life.

Line C will often be the death of a life tenant, the occasion of a timely change, age, or condition. It could be a series of conditions, a

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13. In trust administration there is a difference between inter vivos and testamentary trusts. As is readily seen, an inter vivos trust is in existence at line A, during the lifetime of the creator. Not true with a testamentary trust. Some states make great distinctions between the two trusts, extending probate court control over decedents' estates to the testamentary trustees. The Uniform Probate Code recommends elimination of the procedural distinctions between testamentary and inter vivos trusts. See U.P.C. §§ 7-101 to -301 (1982 & Supp. 1983). The rationale behind the Code's suggestion is the familiar one of speed and efficiency of administration. Both proper administration and the Code thus advocate that testamentary trusts be treated like inter vivos ones: no administration.

14. See Restatement (Second) of Trusts §§ 74-88 (Supp. 1967) (for the necessity of property as the subject matter of the trust).

15. Once the subject of the trust has been established during the settlor's lifetime, payment of additional assets into the trust from a valid will is called a pour over. U.P.C. § 2-511 (1982) provides for this by incorporating § 1 of the Uniform Testamentary Additions to Trusts Act, 8A U.L.A. 599 (1983). The Code approves a broad range of pour over devices. There are more traditional state approaches related to incorporation by reference or description of an ambiguity in the last will and testament. See Mastin v. First Nat'l Bank, 278 Ala. 251, 177 So. 2d 808 (1965); Gibson v. Jones, 293 Ala. 616, 308 So. 2d 692 (1975). Of course, should the creator of the inter vivos trust revoke it or should it terminate, any testamentary pour over would lapse.

16. Trusts often contain many contingencies, but with regard to the Rule the primary concern is that particular future interest which hinders the power of alienation. Having all these interests—C lines—occur within the life in being at the A line (inter vivos) or the B line (testamentary) is the purpose of the Rule. 1 Scott, Trusts § 62.10 (2d ed. 1956); 5A R. Powell & P. Rohan, Real Property § 759 (1987); L.M. Simes & A.F. Smith, The Law of Future Interests § 1391 (2d ed. 1956) [hereinafter Simes & Smith, Future Interests].
multiplicity of events intended by the settlor upon which interests would vest and disbursement begin. For purposes of analyzing the four issues of lapse, survivorship, death without issue, or the Rule, this is a crucial point. It is here that the settlor relinquishes contact. Whether we conclude vesting, exercise the rule of administrative convenience, exercise a power of appointment, or simply distribute principal, this is the final point in a settlor’s dispositive plan. Contingencies become conclusions here.

There are thus three distinctive points along a spatial—ambulatory line. Running from left to right they are: the A line as starting point; the B line as the effective date of the testamentary instrument; and the C line, the occasion of an event or a condition. It is at each of these points that one can find perspective in seeking to identify the intent of a settlor, or predict what that intent could possibly have been.

Now we add another element: distinctive time frames. Before and after each lineal event there is a space of time in which changes among persons are likely to have occurred. Prior to line A, time frame 1 represents events prior to the creation of the intent of the settlor. Thus, in an inter vivos execution, it is those changes among persons before delivery or execution of an inter vivos trust. In a testamentary execution, time frame 1 encompasses those changes among persons named in the last will and testament executed at line A, but perhaps not represented correctly in this executed instrument—For instance, the will executed at line A could bequeath property to a legatee already deceased. The legatee would have predeceased both the testator and the execution of the will. Perhaps his or her legacy will have lapsed. Time frame 1 does contain a space along the lineal scheme which offers factors affecting intent and ultimate distribution of assets. But the most important fea-

17. Lapse will offer a good example of the significance of time frame 1. At common law a bequest or devise to a dead person “lapsed” under the principle that one cannot convey or devise property to a dead person. Marlborough v. Godolphin, 2 Ves. Fr. 61 (1750). Nonetheless, by statute, selective descendants of the predeceasing legatee who survive the testator are substituted. But because the common law is reversed by statute—an anti-lapse statute—persons dying before the creation of the instrument of interest are omitted from the statute’s protection. Thus, the descendants of a legatee or devisee dying during time frame 1 would lapse and become void. Some statutes protect interests in time frame 1 and 2. See, e.g., U.P.C. § 2-605 (1982 & Supp. 1983); Del. Code Ann. tit. 12, § 2313 (1979); N.J. Stat. Ann. § 3B: 3-35 (West 1983).

18. Additional references to time frame 1 will be made when we consider the Rule and the theoretical possibilities under the Wait and See approach. Also, although not discussed, time frame 1 has an effect upon ademption and accumulation. It is a circumstantial period, the best in which to gather facts.
ture of time frame 1 is its designation as a period preceding an important act. Because of this, the circumstances contained there affect intent and distribution.

Time frame 2 is that period between the creation of the instrument and its effective date. In a testamentary disposition, time frame 2 is that period between the execution of a will and the death of a testator. The will speaks as of death, line B, but the words were written at line A.

Inter vivos dispositions can be more difficult to categorize. With an inter vivos delivery or creation of a trust, the effective date is the date of creation, not the death of the settlor. Nonetheless, perhaps in an effort to spare the harsh consequences of the Rule, some courts treat line B, the death of the inter vivos settlor, as the creation, effective date for purposes of the Rule. When this occurs, perhaps only because the settlor is seen by the court as not really parting with anything until he or she loses the power to revoke, line B is crucial, for it commences the period of the Rule.

Time frame 2 is then doubly important. It is the primary ground of change for persons and property in a testamentary transaction. But even in an inter vivos disposition, time frame 2 is a zone of change and importance. For instance, time frame 2 shall concern itself with lapse,

19. See, e.g., Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958). The settlor had created an inter vivos revocable trust with powers to amend or change the beneficiaries. In deciding that the effective date for purposes of the Rule was the death of the settlor, the Georgia Supreme Court avoided deciding that the trust violated the Rule because of the mere possibility of after-born issue to settlor. The Rule is fueled by possibilities and the fact that children could be born to the settlor after line A, the creation of the inter vivos trust, would normally be a sufficient possibility to violate the Rule. The Restatement (Second) of Property (Donative Transfers) § 1.2 (1983) agrees:

The period of the rule against perpetuities begins to run in a donative transfer with respect to a non-vested interest in property as of the date when no person, acting alone, has a power currently exercisable to become the unqualified beneficial owner of all beneficial rights in the property in which the non-vested interest exists.

Comment (b) goes on to discuss revocable trusts: “The period of the rule against perpetuities with respect to these non-vested beneficial interests under the trust will not begin to run as long as the power in the settlor, acting alone, to revoke the trust is in existence.”


20. Because of previous references to history, an important change in history should be noted today as it affects the type of property that shall change after delivery or execution of a trust, inter vivos or testamentary. In an agrarian society land would be the trust res, the future interest originating as a legal interest in land. Today, the res is more often debt and equity securities: bonds, stocks, certificates of deposit. Bergin & Haskell, Preface to Estates, supra note 2, at 121. Also, these equity securities are often international in character. For more information contact the International Academy of Estate and Trust Law, One Market Plaza, San Francisco, California 94105.
individual and applications to class gifts. But it also concerns changes in property, survivorship, and death without issue as it applies to inter vivos instruments. That is, the problems of vesting and intent shall appear earlier because of the effective date being moved from line B to line A, the crucial inter vivos line.

Time frame 3 is the most complicated for scriveners drafting testamentary instruments and the attorneys, trust officers, and judges seeking to interpret what was meant. Frame 3 wakes vesting issues. This is the area between the death of the testator or testamentary settlor and the condition which we have previously defined as vertical line C. This is the usual period of estate administration and includes the bulk of problems pertaining to vesting, implied and express conditions of survivorship, death without issue, the Rule, and post-mortem changes in property and persons defined as a class. Issues pertaining to this frame include: early or late vesting, opening and closing of the class and administrative convenience, estate property increasing or decreasing, the perennial problems of powers and how their exercise affects the Rule, and when and to whom to look when the death of issue occurs.

The fourth time frame is often an extension of the same issues developed in the third. Time frame 4 is that period after vertical line C, or that period after the happenings of an event demanded by the inter vivos trust or the testamentary will. Vesting having occurred in compliance with the Rule, the crucial issue in time frame 4 is payment of corpus and the attendant problems that follow a condition being met.

Among the circumstances unique to the fourth time frame are the circumstances surrounding the exercise of a power of appointment by a donee. The projection by the donee of an inter vivos or testamentary power of appointment through the imposition of further restraints upon the fee will extend circumstances past the C line and into the fourth time frame. This period shall become even more significant as exten-

21. Written documents are treated as sacrosanct because of the Statute of Frauds and the Statute of Wills. Because the document is in existence in time frame 2, changes in property and person are not subject to the same freedom of control by the settlor/testator. See U.P.C. §§ 2-507 to -513 (1982 & Supp. 1983).

22. An increasing number of courts and legislatures are choosing to judge remoteness under the Rule from the time of exercise by the donee rather than from the time of creation of the power. This is true regardless of the classification of the power. See Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952) (the Second Look doctrine was applied to a special inter vivos power); Industrial Nat'l Bank v. Bennett, 110 R.I. 448, 293 A.2d 924 (1972); Industrial Nat'l Bank v. Barrett, 101 R.I. 89, 220 A.2d 517 (1966). There is increasing support for ameliorating the harshness of the Rule in spite of the fact that life expectancy is increasing and the length of private trusts is increasing as well. Indeed, in the case of a general power of appointment, created
sions are made regarding the Rule's effect upon powers of appointment. This is the analytical principle (the Principle). It is a tool for describing and interpreting the dispositive scheme of an inter vivos settlor or a testamentary testator. It consists of a lineal line representing time passing from left to right. Intersecting this lineal progression are three events, representing creation or execution, death, and crucial disposition. There are four time periods before and after these three events and within them take place the changes in persons and property. How these changes in persons and property are understood according to the analytical principle shall now be examined according to four particular areas of trust law: (1) lapse, (2) express and implied conditions of survivorship, (3) death without issue, and (4) the Rule.

II. LAPSE

Lapse of persons is not a particularly difficult consideration for scriveners or students, but placed in the context of survivorship, vesting, and the ambulatory nature of testamentary instruments, lapse loses individuality and becomes obtuse. Confusion is augmented by the fact that the common law rule concerning lapse has been modified by state statutes in myriad forms, each statute also possessing another layer of judicial interpretation. Nonetheless, it is possible to separate lapse into the various time segments of the Principle thereby differentiating it from issues of vesting also found in survivorship. These issues concern the Rule and the difficult issue of vesting. This is not the arena when the donor was very young in an inter vivos conveyance, and exercised by an equally young donee only at death, the time between creation and exercise could be over eighty years by today's standards. Then, if the period to establish remoteness commences from the date of exercise, another eighty years could elapse before the donor's creation dies: a period of one hundred sixty years.

23. (1) A (2) B (3) C (4)

24. The common law rule is that a devise or legacy fails or lapses if the devisee or legatee predeceases the testator. Assuming a valid testamentary instrument that does not contain an alternate gift over to another devisee or legatee, the bequest or devise would lapse into the residuary estate or pass by intestacy. The rationale was the protection of the testator's intent: if the devisee or legatee did not survive until when the will speaks, an alternate may not be imposed on the deceased testator. See, e.g., Simes, Future Interests, supra note 3, at 77.

25. Remember that lapse is a concern over survivorship: a devisee or legatee surviving until the death of the testator. But this should not be confused with survivorship until the happening of an event mandated by the deceased testator. See infra part III of text. Lapse must be differentiated from the latter. "It should be emphasized that the doctrine of lapse, and the lapse statutes, apply only to the situation of the legatee or devisee who predeceases the testator." Bergin & Haskell, Preface to Estates, supra note 2, at 127.
of lapse; lapse will almost always confine itself to survivorship during areas 1 and 2 of the Principle.\(^{26}\)

Thus, if one were to ask what issues most preoccupy the student or scrivener in consideration of lapse, a list would come to mind. With each item, clear and timely legislative pronouncement would clarify any difficulty, but often there is no determination until after the challenge and costly suit. Confusion arises when these events occur:

1. A bequest or devise is made as a class gift in the typical fashion to, for example, children, brothers and sisters, or grandchildren.
2. The anti-lapse statute applicable in any jurisdiction directs that representation be made whenever there is a pre-deceasing relative, but does not define what a relative status includes.
3. Should the anti-lapse statute be applicable to a relative predeceasing the execution of a testamentary last will and testament, as well as to the death of a potential legatee/devisee after execution of the valid will but before the death of the testator?
4. Should the anti-lapse statute be applicable to inter vivos arrangements in addition to testamentary ones?
5. Has the testator written alternative language in the will, such as a gift over in case of death of the legatee or devisee, so as to preclude the operation of the anti-lapse statute? Likewise, has the testator imposed a condition of express survival, thus wishing to avoid the imposition of the statute?
6. The effect of the anti-lapse statute upon pretermitted heir statutes, residuary clauses, simultaneous death, and choice of law provisions as in the Uniform Probate Code, also raises issues of substance for the scrivener or student.

The use of the Principle can assist in clarifying the intent of the client in each of these cases.

Before the question of the applicability of the anti-lapse statute to class gifts arises, there must be a determination that the bequest or the devise was in fact made to a class. What constitutes class language? Words such as children, grandchildren, or brothers and sisters easily signal an intent on the part of the scrivener to impart class language, but there are other cases where the result is not so readily apparent.

\(^{26}\) Only in the rare case when the anti-lapse statute applies to inter vivos transactions will there be a concern over area 3 of the Principle. Contra Hinds v. McNair, 413 N.E.2d 586 (Ind. App. 1980) (the court rejected application of the anti-lapse statute to an inter vivos trust). Nonetheless, even though the statute does not apply, the interest of the beneficiary will descend to his or her heirs if vested. Descendability in this manner is broader than the representative named in the anti-lapse statute. See Richardson v. Chastain, 123 Ind. App. 444, 111 N.E.2d 831 (1953).
For instance, a bequest "to my grandchildren, David Dumas and Darrell Dumas, in equal shares, to them, their heirs and assigns forever" seems to speak more to individuals than it does to a class. Nonetheless, the court construed the bequest in such a way that it reflected the predominant intent of the testator to constitute the named legatees a class, with rights of survivorship. There was no lapse, only survivorship. The court based its conclusion upon the whole last will and testament, construed in light of competent facts. Had lapse taken place, the named statutory representative would have taken a per stirpital share, depriving surviving members of the class survivorship benefits. This did not happen in this class gift designation, the bequest passing solely to James Darrell Dumas.

In another case, where the court looked to the "whole instrument" and the "personal relationship existing between a testator and potential takers under his will," the pertinent clause was found to be a class gift designation, rather than an individual bequest subject to the anti-lapse statute. The clause gave, devised, and bequeathed all of the estate to: "Bessie Sotman and Mrs. Louise Fournier of Mexico, Maine, to be equally divided between them, share and share alike." When Bessie predeceased the testator, the heirs claimed that her share had been to an individual and had lapsed with her death. Thus, the share so bequeathed would go to the intestate heir, a member of the testator's family. The court disagreed and, quoting from a prior case, stated: "We apply the class gift concept to effectuate her real purpose, even though the language of the residuary clause is not ordinarily calculated to create a class gift." Thus, class construction can arise, even when the traditional terminology is absent.

While the two preceding cases, In re Estate of Dumas and

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28. Id. at 912-14, 379 A.2d at 839. "We may carry out this intent although the general rule is that a legacy will lapse by the death of a legatee during the lifetime of the testator, where the bequest is made to several legatees by name, to be equally divided between them." Id.
29. Id.
31. Id. at 575. In addition to the close family ties, the court also took into consideration a clause in the will intentionally excluding all of his relatives. The clause would of course exclude representatives of lapsed legatees.
32. Id. at 574.
33. Id. at 576 (quoting In re Estate of Devin, 108 N.H. 190, 191-92, 230 A.2d 735, 736 (1967)).
Iozaiovichus v. Fournier, both present examples of obtuse language constituting class construction, they portray only the tip of an iceberg comprised of many more class designation bequests and devises. The Principle may assist the scrivener or the student in determining intent and avoiding a misapplication of the anti-lapse statute.

Because the scrivener of the last will and testament is working in the ambulatory context of a person's life, the Principle assists in positing intent by first, alerting all involved to the possibility of change from the present moment when the will is being drafted to the time when the will speaks, the death of the testator. This is the horizontal line of the Principle. But of greater import is the designation made along the horizontal line: the execution of the will on line A, and the death of the testator on line B. Taken by themselves these are not important analytical points, but seen within a context they provide perspective. The time frames between each of the lines assists with forming this perspective.

For instance, when the scrivener seeks to benefit a class of persons, that class is capable of increasing and decreasing from before the time the will is executed until well past the death of the testator. As we have seen, no matter how the court arrives at the designation of a class, be it through explicit language or construction of the will, this fluctuation will trigger the possibility of the application of the anti-lapse statute. Should the statute apply to class designations and should that class designation include those born and dying in area 1, before line A, or should it only include those born and dying in area 2, between lines A and B? The Principle provides mental benchmarks to the scrivener and the student. Finally, it also provides a mental check whereby the scrivener is warned to separate the issue of survivorship from that of vesting, the latter being an issue different from lapse.

As an example, examine the different approaches of class gift terminology applied to lapse in areas 1 and 2. But in so doing, enter the maze of varying state statutes. In their efforts to preserve the legacy for a deceased relative's representative, the states have sought to provide for the predominant intent of the deceased testator, and thus have offered multiple solutions. A major difference in the statutes is the person benefitted by the statute and who can be a representative of the

35. 308 A.2d 573 (Me. 1973).
36. See infra part III of text (discussion of survivorship).
37. The common law rule was that any bequest or devise to any person who predeceased the testator lapsed and passed as part of the residuary estate, or intestate should there be no residuary clause.
deceased legatee. For example, spouses have been traditionally excluded from the benefits of the statute, while a parent may be included in the definition of relative. Other states make distinctions based upon step-children, foster children, and adopted children. Thus, while the states seek to provide testamentary intent when none has been given, the statutes prefer blood relatives and constructions that give preference to those able to bring contest and those most likely

38. In re Estate of Haese, 80 Wis. 2d 285, 259 N.W.2d 54 (1977); In re Estate of Mangel, 51 Wis. 2d 55, 186 N.W.2d 276 (1971); In re Estate of Doge, 1 Wis. 2d 399, 84 N.W.2d 66 (1957); Cleaver v. Cleaver, 39 Wis. 96 (1875). Wis. Stat. Ann. § 853.27 (West 1971) provides:

Rights of issue of beneficiary dying before testator (lapse)

(1) Unless a contrary intent is indicated by the will, if provision in the will is made for any relative of the testator and the relative dies before the testator and leaves issue who survive the testator, then the issue as represent the deceased relative are substituted for him under the will and take the same interest as he would have taken had he survived the testator.

(2) For purposes of this section, a provision in the will means:
(a) A gift to an individual whether he is dead at the time of the making of the will or dies after the making of the will;
(b) A share in a class gift only if a member of the class dies after the making of the will; or
(c) An appointment by the testator under any power of appointment, unless the issue who would take under this section could not have been appointed under the terms of the power.

39. In re Estate of Button, 79 Wash. 2d 849, 490 P.2d 731 (1971). Wash. Rev. Code Ann. § 11.12.110 (1967) uses the phrase "other relative," and the court excludes spouse but not parent from the definition. See In re Estate of Allmond, 10 Wash. App. 869, 520 P.2d 1368 (1974) (anti-lapse statute reflects legislative determination as a matter of public policy, when testator fails to provide for possibility that consanguineous beneficiary might predecease him, the lineal descendants of that beneficiary take his share); see also In re Estate of Prather, 527 P.2d 211 (Okla. Ct. App. 1974) ("other relation" was the term used in the anti-lapse statute and this did not include spouse of the testator). On the other hand, In re Estate of Thompson, 213 Kan. 704, 518 P.2d 393 (1974), allowed a statute in effect at the date of death of the testator—but not at the time of execution of the will—to take effect and prevent the lapse of the predeceasing spouse's share.

40. See Tubbs v. Teeple, 388 So. 2d 239 (Fla. Dist. Ct. App. 1980) (where a stepdaughter who predeceased her stepmother, the testatrix, was not a "descendant" of the testatrix within the meaning of the anti-lapse statute).

41. In re Estate of Skinner, 397 So. 2d 1193 (Fla. Dist. Ct. App. 1981). The foster son of testator had been devise land by his foster father, but then predeceased the testator; the wife and children had no interest in the land as foster child was not contemplated by the statute. Note the difference between anti-lapse and the statutory exclusivity and the issue of vesting under survivorship. See infra part III of text (survivorship).

42. Adopted children are generally within the scope of present statutes. This is surely a legislative acknowledgment of family harmony. Hoellinger v. Malzwhon, 77 N.D. 108, 41 N.W.2d 217 (1950) (where brother and sister of testator predeceased him, each having an adopted child, the child takes the share of his parent). See also In re Estate of Blackssill, 124 Ariz. 130, 133, 602 P.2d 511, 513 (Ariz. Ct. App. 1979) (where the testator divided the residuary estate into equal parts and bequeathed "one of each equal parts to the children of each of my deceased children," an adopted child, absent any contrary intent expressed in the will, takes as a representative of the deceased father).
to have assisted the testator in accumulating the estates.

The third concern over the use of the anti-lapse statute is the period when the statute is to apply. Students and scriveners often confuse the distinctive time periods when the statute is to apply. For instance, should the anti-lapse statute be applicable to the period of time before the execution of the last will and testament (period 1, before line A), or should it confine itself to that period after execution of the will but before the death of the testator (period 2, between the A and B lines)? Being able to distinguish between the two time frames is essential to take advantage of any statute prohibiting lapse. Also, for those scriveners seeking to provide for lapse and "take charge" of the legacy or devise, the beneficial aspects of providing for lapse will need to be addressed precisely. The Principle allows for precision, a precision often absent when the scrivener drafts instruments containing bequests or devises to persons "in residue," or the myriad individual bequests and devises.

It would seem that the Principle, so dependent as it is upon a tes-

43. Often the statute will not be precise as to when the lapse of the legacy or devise should be prevented. See, e.g., In re Estate of Mangel, 51 Wis. 2d 55, 186 N.W.2d 276 (1971). There the anti-lapse statute, Wis. Stat. Ann. § 238.13 (1967), provided:

Rights of issue of deceased legatee.
When a devise or legacy shall be made to any child or other relation of the testator and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator unless a different disposition shall be made or directed by the will.

Cases such as Mangel, and In re Smythe's Will, 64 Misc. 2d 440, 314 N.Y.S.2d 887 (Sur. Ct. 1970) (where there were words stating "during the lifetime of the testator") indicate applicability of anti-lapse before execution. The Uniform Probate Code follows this pattern. See U.P.C. § 2-605 (1982 & Supp. 1983).

44. Whether a residuary clause and class gift bequest or devise should be protected by the anti-lapse statute was the concern of Drafts v. Drafts, 114 So. 2d 473 (Fla. Dist. Ct. App. 1959) (contained the clause, "I will devise and bequeath all the residue of my property, both real and personal, to my brothers and sisters, share and share alike"). See also Gianoli v. Gabarcia, 82 Nev. 108, 412 P.2d 439 (1966) (where the residuary clause gave the rest of the estate to "my nieces and nephews, share and share alike"). The courts arrived at opposite results; the Drafts court held the statute is inapplicable before execution, and the Gianoli court held the statute applies to a testamentary beneficiary who shall "die before the testator." There was no specification made by the legislature as to how long before the testator's death the beneficiary must die. See In re Estate of Kalouse, 282 N.W.2d 98, 107 (Iowa 1979) (Harris, J., dissenting) ("For more than fifty years it has been the policy of this state to prevent lapse where a devisee dies before the death of the testator, and this has been done by the use of the broadest and most comprehensive language.") (quoting Dowins v. Nicholson, 115 Iowa 493, 495-96, 80 N.W. 1064, 1065 (1902)).

45. The most widely cited case on class is Woolley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1899), holding that absent language to the contrary by the testator, anti-lapse statutes are applicable to class gifts so as to preserve the share of an heir. The holding in this case did not result in the protection of a person dead at the execution of the will.
tamentary scheme, would be deficient with regard to the use of an anti-lapse provision upon inter vivos trusts. But this is not the case. There really is a connection with death and inter vivos intent, a connection that is reflected in the use of the anti-lapse statute with inter vivos dispositions. For instance, the death of the settlor of the trust becomes the B line in the scheme of the Principle, and in case the settlor has provided for another life tenant, the C line will have an important reference. Of course the A line, the usual time the will is executed, will now be the time that the trust came into effect. If the settlor were to create a trust for his own benefit, followed by the benefits going to another and no disposition being made of the remainder, the applicability of the anti-lapse statute would arise. But now, when placed within the lineal progression of the scheme, we are still faced with the death of a relative-beneficiary during time frame 2, that is, after the creation of the trust, but before the death of the life tenant, the settlor in this case. If there is another life tenant, the lapse could occur during time frames 2 and 3, and the anti-lapse provisions would apply. Thus, even though anti-lapse statutes usually do not apply to inter vivos dispositions, there are applications.

This is a rational use of the anti-lapse statute unless there is a direct prohibition by the legislature. The court in *In re Estate of Button* reasoned that the only distinction between a testamentary disposition and an inter vivos one was that the latter disposed of property without the necessity of complying with the Statutes of Wills. Because the anti-lapse statute declared the policy of avoiding the lapsing

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46. Perhaps the best case to discuss the applicability of the anti-lapse statute to the interests of beneficiaries under inter vivos trust is *In re Estate of Button*, 79 Wash. 2d 849, 490 P.2d 731 (1971), and its treatment in Annotation, *Anti-Lapse Statute as Applicable to Interest of Beneficiary Under Inter Vivos Trust Who Predeceases Life-Tenant Settlor*, 47 A.L.R.3d 358 (1973). The trust contained no provision for the trust property should the settlor's mother predecease him. But it did provide:

Upon the death of the Trustor without having withdrawn the entire fund, the balance of investments and cash remaining in the trust fund shall be delivered to the Trustor's mother . . . and her receipt for the residue of said trust fund shall thereupon release the Trustee from any further responsibility therefor.

*Button*, 79 Wash. 2d at 850, 490 P.2d at 732. The statute stated that when an estate is devised or bequeathed to any child, grandchild, or other relative of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants shall take the estate. Id. at 854-55, 490 P.2d at 734. See also Nicosia v. Turzyn, 97 Nev. 93, 624 P.2d 499 (1981) (citing *Button* with approval).

47. In the *Button* case: (1) the Trustor had made no provision for the remainder interest; (2) the trust secondary beneficiary after himself, his mother, predeceased him; (3) the court interpreted the statute to include the mother as a relative; and (4) the benefits were to go to the relative after the death of the Trustor. 79 Wash. 2d at 849-55, 490 P.2d at 732-35.

48. 79 Wash. 2d at 852, 490 P.2d at 734.
of gifts to such beneficiaries as relatives, and because the legislature had not taken a strict position, the statute should apply. With the increasing use of inter vivos arrangements, the applicability of anti-lapse statutes could be more readily utilized, but unless the statute expressly provides for this, the scrivener must be very specific.

A fifth concern of the courts in interpreting anti-lapse statutes concerns language which may direct an alternate disposition of the bequest or devise, thus defeating the imposition of the statute. Quite simply, the statute should not apply if the instrument, inter vivos or testamentary, makes an alternate gift over upon the death of a legatee. A minority of courts, for example, have decided that whenever a class gift designation is made, the testator has already decided that any anti-lapse statute should not apply, and the surviving members of the class take as alternative takers for those who predecease the effectiveness of the instrument. Nonetheless, the majority of courts choose to allow members of a class that predecease the testator, usually after the execution of the will, to take. When all of the persons within the class predecease the effective date of the instrument, dicta from the courts indicate that anti-lapse statutes do apply to preserve the gift for de-

49. The same result might have been more easily accomplished without the necessity of expanding the anti-lapse statute to protect inter vivos interests if courts as in Button were to decide:

(1) the beneficiary took a vested remainder, subject to defeasance in the event the settlor revoked the trust during his life time. This inference could be less onerous than implying legislative intent.

(2) that such vested remainders descended to the heirs at law of the beneficiary upon his or her death, subject to the same condition as to defeasance by revocation.

(3) that upon death of the settlor without having revoked the trust, the remainder interest of the heirs became absolute.


50. This minority position reflects the common law approach that no technical lapse is involved. See In re Estate of Kalouse, 282 N.W.2d 98 (Iowa 1979) (where testator devised a gift to a class of first cousins and a named individual, the anti-lapse statute did not apply and only those alive on the date of the testator's death were entitled to take under such a gift); Davis v. Sanders, 123 Ga. 177, 51 S.E. 298 (1905); Weaver v. McGonigall, 170 Md. 212, 183 A. 544 (1936) (Maryland statute later amended to specifically apply to class gifts); Trenton Trust & Safe Deposit Co. v. Sibbits, 62 N.J. Eq. 131, 49 A. 530 (Ch. Ct. 1901); In re Aghella's Will, 175 Misc. 456, 23 N.Y.S.2d 951 (Sur. Ct. 1940).

51. Woolley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1889) is cited for the majority position. But see Kling v. Goodman, 236 Ala. 297, 181 So. 745 (1938); Tubbs v. Peeple, 388 So. 2d 239 (Fla. Dist. Ct. App. 1980); Drafts v. Drafts, 114 So. 2d 473 (Fla. Dist. Ct. App. 1959); In re Estate of Evans, 193 Neb. 437, 227 N.W.2d 603 (1975); Gianoli v. Gambareca, 82 Nev. 108, 412 P.2d 439 (1966); Cowgill v. Faulconer, 57 Ohio Misc. 6, 8 Ohio Op. 3d 423, 385 N.E.2d 327 (C.P. 1978); Restatement (Second) of Property (Donative Transfers) § 1.4 comment K; § 1.5 comments (e) and (g) (1983).
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ceased legatees. Avoidance of "laughing heirs" could be a reason for this.

Lapse in reference to class gift designation is always difficult to predict because the scrivener never gave any attention to the language or consequences, thinking that at least one of the class members would surely survive. Language in a will that affects individual gifts is often more precise, but often just as confusing. There is no disputing the fact that a testator can control the application of a lapse statute. The statute will not be applied where the testator uses specific language that would clearly demonstrate he or she did not wish to utilize the effect of the statute. But even in those cases where the statute does not seem applicable, there have been instances where the courts have applied the statute because of the language of the testator. For instance, when a member of a class dies prior to the execution of the testamentary instrument, the courts have allowed for the statute to apply to time frame when the will indicates that the predeceasing person was regarded by the testator as a member of the group. Thus, the language used by the scrivener is of great import; be precise, avoid inadvertent use of the statute.

Courts prefer to attribute to the testator an intent that the anti-lapse statutes apply. There seems to be a preference for including as many people as possible in the disposition of the estate. Also, there is

52. Davis v. Sanders, 123 Ga. 177, 51 S.E. 298 (1905); Trenton Trust & Safe Deposit Co. v. Sibbits, 62 N.J. Eq. 131, 49 A. 530 (Ch. Ct. 1901). Contra In re Harvey's Estate, 1 Ch. 567 (Eng. 1893).

53. Laughing heirs are persons not expecting to receive as intestate heirs.

54. Eberts v. Eberts, 42 Mich. 404, 4 N.W. 172 (1880) (the will provided for "surviving children" and these words were construed to mean only those surviving at testator's death); In re Estate of Haltforth, 298 Mich. 708, 299 N.W. 776 (1941) (the anti-lapse statute did not apply when bequest was to children of named person and "the survivor of them"); In re Estate of Evans, 193 Neb. 437, 227 N.W.2d 603 (1975) (statute does not apply when will provides "[s]hould any of my children die before my decease, I hereby give the share of deceased child to the survivor(s) of said children"); In re Estate of Leuer, 84 Misc. 2d 1087, 378 N.Y.S.2d 612 (Sur. Ct. 1976) (anti-lapse statute does not apply when residuary bequest is to brothers and sisters "living at the time of my death"); In re Harris' Will, 138 Misc. 287, 245 N.Y.S. 570 (Sur. Ct. 1930) (anti-lapse statute does not apply to "children me surviving").

55. In Todd v. Gambrill, 15 Del. Ch. 342, 138 A. 167 (1927), the testator made a specific gift to the predeceasing person in another portion of the will, thus indicating that the testator thought the individual was alive at the execution. The court adopted this intent when applying the anti-lapse statute to a class designation and preserved both bequests for her issue. See also Barnhill v. Sharon, 135 Ky. 70, 121 S.W. 983 (1909) (holding that the testator must have intended to include the descendants of the predeceasing sister under the statute).

56. Sloan v. Thornton, 102 Ky. 443, 43 S.W. 415 (1897), was one of the earlier cases where the court applied the anti-lapse statute to preserve the bequest for the representatives of the class who predeceased the testatrix. The testatrix had made a gift to children of an uncle and provided
a definite preference to include those persons classified as logical objects of bounty, or family. And this, unlike vesting and questions of survivorship, is the very group of persons protected by statutes such as anti-lapse. Two examples of this protective disposition are *In re Estate of Dumas* and *Iozapavichus v. Fournier*.

*Dumas* is interesting because the court used a construction that utilized many of the familiar principles in estate law: implied gifts, looking to the entire will, and class gifts. But what the court omitted was the use of any anti-lapse statute, instead using the language of the testator to achieve a result that would safeguard the testator’s logical object of bounty. As creativity can be used in interpreting the anti-lapse statute to protect the object of bounty, so too can the language be used to do the same without the statute. The bequest in the will was to “my grandchildren, David Dumas and Darrell Dumas, in equal shares to them, their heirs, and assigns forever.” But also, implicit in the will, was “one discerning purpose: that the testator’s widow was to receive a life estate in the real estate but nothing greater than the life estate.” At the time of death of the testator, both David and Darrell had predeceased their father, the testator, but David’s son James survived and was alive along with the widow of the testator at the effective date of the instrument. Was James a class survivor since he was an heir?

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[59. ](https://www.govinfo.gov/content/pkg/USCODE-1979-title25/pdf/USCODE-1979-title25-book02-sec00059.pdf) One case that addresses the issue of implied gifts to fill gaps is Smith v. Usher, 108 Ga. 231, 33 S.E. 876 (1899). The case refers to American authority declaring that cross remainders will be implied in a deed as well as in a will. Restatement (Second) of Property (Donative Transfers) § 4.2 comment Y (1983). However, cross remainders are not implied if the life tenant(s) or tenants in tail take as joint tenants or as tenants by the entireties. In such cases the doctrine of survivorship precludes any gaps in successive enjoyment and there is no need to imply remainders. See *Kemp v. Sutton*, 233 Mich. 249, 206 N.W. 366 (1925).
[60. ](https://www.govinfo.gov/content/pkg/USCODE-1979-title25/pdf/USCODE-1979-title25-book02-sec00060.pdf) The court in *Dumas* examined the purpose of the entire will, implying what the testator must have intended. In such a case, “the court is ascertaining not what the testator actually intended in regard to a particular matter but what he would have intended if he had thought about the matter.” *Roberts v. Trustees of Trust Fund*, 96 N.H. 223, 73 A.2d 119 (1950).
The issue confronting the court was whether or not the bequest to David and Darrell should lapse because each of the sons was individually named and not alive at the effective date of the will. Thus, their portions would pass under the residuary clause of the will to the widow. This did not seem the intent of the testator from the language that he used. Therefore, the court used his language to avoid lapse. But in so doing it also allowed for the widow to possess a life estate as directed by the will. The court employed a class gift concept to effectuate its perception that the testator wanted to protect the logical objects of bounty. By allowing for a class gift construction, the court provided that a member of the class—James—alive at the effective date of the instrument, could inherit the property, defeating the lapse that would result with the death during the lifetime of the testator (time frame 2), of named individuals David and Darrell. “Where the provisions of the will indicate a purpose which can be achieved only by construing the gift as one to a class, the gift will be so construed although the class be restricted to the beneficiaries that are named.” Thus, whether construing the provisions of an anti-lapse statute or the words of the will as drafted by the scrivener, the courts will seek to provide for the logical objects of bounty, changing language as needed.

The second case that demonstrates this practice is lozapavichus v. Fournier. Testator, a Lithuanian immigrant, who made his home with another Lithuanian family, left his entire estate to a mother and daughter to be divided equally between them, share and share alike. The testator also provided that there would be an absolute exclusion of all his relatives from the will. Between the time of execution of the will and the death of the testator, the mother, Bessie Sotman, died.

Since Bessie was not a relative under the definition of any anti-lapse statute, there was no question of the imposition of the statute. It was not applicable. But the court did want to provide for persons who

63. Id. at 912, 379 A.2d at 839.
64. Id.
65. Id.
66. 308 A.2d 573 (Me. 1973). As if to emphasize the courts’ willingness to interpret language in a will in a manner consistent with public policy, the court stated: “It has long been recognized . . . that precedents are uncertain guides in the interpretation of a will.” Id. at 575. In promoting public policy, “it is appropriate to heed the close family ties and personal relationships existing between a testator and potential takers under his will . . . .” Id.
67. The will provided, “to Bessie Sotman and Mrs. Louise Fournier of Mexico, Maine, to be equally divided between them, share and share alike.” Id. at 574.
68. Id. (“I purposely and intentionally omit all my relatives from this my Last Will and Testament.”).
had certainly become the logical objects of bounty of the testator and utilized the familiar reference "the intention of the testator at the time of the execution of the will," and the standard rule: "We look first to the whole instrument."

As with the Dumas case, the court in Iozapavichus utilized the concept of class gifts and thus prevented a lapse of the bequest made to Bessie which would have forced it into the intestate estate that would then become the property of the relatives. The relatives were not to inherit the estate. By providing for a class gift, Mrs. Fournier, by reason of the fact that she survived the testator, took the entire estate as the sole remaining member of the class.

There are other instances of the testator exercising implied control over the use of the anti-lapse statute. All involve time frames 1, 2, and 3, and can be interpreted as applying to anti-lapse or survivorship, usually that period between the effective date of the will and the occurrence of a condition, like the death of a life tenant. Some survivorship uses are easy, such as the use of phrases like, "Should any of my said children die before my decease," allowing for an alternative disposition because of death of a legatee or devisee. The anti-lapse statute will not be given effect when the testator creates a condition of survivorship. While this may result in an intestate distribution, the language of the testator controls. The essential task of the scrivener is to provide as much certainty as possible in the language of the instrument.

It would appear that in cases like In re Estate of Ulrikson, the testator did not want the anti-lapse statute to apply when he used language such as, "and in the event that either one of them predeceases

69. Id.
70. Id. at 576 ("We are satisfied that the provisions of this will, viewed in the light of the surrounding circumstances, lead to the inescapable conclusion that Joseph Ramon intended a class gift to Bessie Sotman and Louise Fournier and no one else.").
71. In re Estate of Evans, 193 Neb. 437, 227 N.W.2d 603 (1975). Provision in testatrix's will stated: "Should any of my said children die before my decease, I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike." Id. at 439, 227 N.W.2d at 604. The clause served as an alternative to the imposition of the anti-lapse statute.
72. In re Estate of Allmond, 10 Wash. App. 869, 520 P.2d 1388 (1974). Testatrix's will provided for her sister-in-law and her son, share and share alike, "or to the survivor of them if either of them be deceased." Both predeceased the testatrix and the son's children claimed under the anti-lapse statute. Even though the court applied the anti-lapse statute, it decided the way it did because there was "no clearly expressed or implied intent that the anti-lapse statute not apply." Id. at 872, 520 P.2d at 1391. The testatrix needed a stronger expression of intent than, "if either of them be deceased." Id.
73. 290 N.W.2d 757 (Minn. 1980).
me, then to the other surviving brother or sister.’”74 But when both brother and sister predeceased the testator, the court found that the anti-lapse statute saved the testamentary gift for the brother’s issue.75 Perhaps it was the fact that the bequest was in the form of the residuary clause, or perhaps it was because the court interpreted the state’s anti-lapse statute as requiring an “absolute” condition of survivorship,76 but this is one more instance where the scrivener may have thought he or she had control of the language of the disposition, only to find that control was not clearly expressed.

Even when the testator has clearly expressed his intent regarding the use of the anti-lapse statute, there are other statutes that could affect the disposition of the testator’s last will and testament. Similar to the anti-lapse statute, these statutes presume the intent of the testator and, again, similarly to the anti-lapse statutes, they provide for the logical objects of the testator’s bounty. Two types of statutes are any provision for pretermitted children77 and any simultaneous death78 provision.

74. Id. at 759:
SIXTH, All the rest, residue and remainder of my property of whatever kind or character, I give and bequeath to my brother, MELVIN HOVLAND, and my sister, RODINE HELGER, share and share alike, and in the event that either of them shall predecease me, then to the other surviving brother or sister.

75. Id. The court stated its reason for applying the anti-lapse statute: “It is apparent that the law prefers testacy over intestacy and that the anti-lapse statute applies unless a contrary intention is indicated by the will.” The presence of the anti-lapse statute was sufficient to raise the standard for the language necessary to evidence testator’s intent.

76. Id.

77. The Uniform Probate Code provides for pretermitted children in the following fashion:
Pretermitted Children:
(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:
   (1) it appears from the will that the omission was intentional;
   (2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or
   (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.
(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.
(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

78. Brundige v. Alexander, 547 S.W.2d 232, 233 (Tenn. 1976), highlights a simultaneous death statute from Tennessee: “Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as
Pretermitted heir and anti-lapse statutes are similar in a number of ways. In addition to the preference they give to logical objects of bounty, they also are contingent upon the expressed intent of the scrivener, and finally, they vary from state to state. For instance, the Missouri§79 type of pretermitted heir statute provides that if a person dies leaving a child or grandchild not named or provided for in the last will and testament, the testator shall be deemed to have died intestate as to them. The Massachusetts§80 type of statute is somewhat similar: If a testator omits to provide in his will for any of his children, or for the issue of a deceased child, that child or the children shall take the same share of his estate as in the case of intestacy unless it appears that such omission was intentional.

Intent is important. This can be seen from the case of In re Estate of Fells.§81 Testator, at the time of the execution of the will and at his date of death, had eight living sons, one predeceased son, two predeceased daughters, and assorted grandchildren who were the issue of the deceased sons and daughters. The will had given the residue of the estate to his “present living sons.”§82 He named the sons and provided an alternative gift if one should die before him. It was the grandchild of a predeceasing child that sought to change this scheme and share in the estate of his parent. Remembering that anti-lapse should not apply because of the intent of the testator to provide for an alternative gift, the court could apply the pretermitted heir statute if the issue of any deceased child was unintentionally omitted. As the testator had not referred to any grandchildren in drafting the will, the court concluded that he did not intentionally omit them and they were allowed to take under the pretermitted heir statute.§83

Also, in a case where both the anti-lapse statute and the pretermit-
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In re Estate of Todd, the court reviewed a bequest in a last will and testament to the testator's wife and son, or to the survivor of them. When the son predeceased the wife leaving issue, the court, upon the death of the testator, decided that the anti-lapse statute precluded the issue from taking. Nonetheless, the issue of the predeceasing son were entitled to a share of the estate by intestacy in accordance with the pretermitted heir statute since the testator's survivorship provision had caused the grandchildren to be omitted from the will without announced intent. If the will had disclosed an intentional omission, the result would have been different.

Finally, the anti-lapse statute can apply directly to simultaneous death statutes in situations as presented by Brundidge v. Alexander. The court found that when the testatrix and the husband beneficiary were killed in an automobile accident simultaneously, the Uniform Simultaneous Death Act as enacted in Tennessee mandated that the will be construed as if the husband had predeceased her. When the anti-lapse statute was then applied, the residuary legacies under the testatrix's will passed to the surviving issue of her husband—four children from a prior marriage—persons able to take under the anti-lapse statute because the anti-lapse statute applied to spouses who predeceased. Due to the operations of the simultaneous death statute the husband predeceased his wife and therefore four strangers inherited her estate.

Whenever the legislature attempts to provide for the absent intent

84. 17 Cal. 2d 270, 109 P.2d 913 (1941).
85. The late Justice Traynor of the Supreme Court of California wrote a concurring opinion in which he specifically compared the state's anti-lapse and pretermitted heir statutes. His concurring opinion describes how the majority's utilization of the pretermitted heir statute and its intestate portion could provide a greater inheritance than any anti-lapse protection of a particular bequest or devise. Id. at 276, 109 P.2d at 916 (Traynor, J., concurring).
86. 547 S.W.2d 232 (Tenn. 1976). The anti-lapse statute provided:
Whenever the devisee or legatee to whom, . . . an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue which survives the testator, said issue shall take the estate or interest devised or bequeathed which the devisee or legatee . . . , as the case may be, would have taken, had he survived the testator, unless a different disposition thereof is made or required by the will.
88. The court sensed the injustice of the result but felt constrained by legislative intent: Whether or not these two statutes should be construed in the manner and with the result urged by the plaintiffs depends upon the legislative intent embodied in each of them. Since both statutes deal with the devolution of property of decedents, we deem them to be 'in pari materia' and will construe them accordingly.
Brundidge, 547 S.W.2d at 233.
of the testator or the inter vivos settlor, the result is often far from what the decedent would have intended. A glance at public opinion polls regarding intestacy statutes would confirm this. Furthermore, when scriveners make broad attempts to control inadvertent mistakes through residuary clauses or choice of law statutes,\(^8\) the remedy is often no panacea.

Only through the use of more precise language can the intent of the testator be given proper inter vivos or testamentary effect. Through the use of the Principle, the scrivener can place the intent of the testator in a context that will enjoy more certainty. For instance, by explaining to the testator, or the settlor, options and possibilities available in each of four time frames, plus specific events that invite consequences, the testator can be more specific concerning goals. Furthermore, because statutes such as anti-lapse, pretermitted heir, and simultaneous death can be used to thwart intent, the necessity of strict control is both demanded and in the best interest of professional responsibility. Using the Principle as a tool for client preparation and discovery of precise intent is the purpose and design of the professional scrivener.

III. SURVIVORSHIP

The most important distinction to be made between anti-lapse and survivorship is the fact that the former is controlled by statute, while the latter is more exclusively the domain of the court. True, as has been seen, the courts can construe the anti-lapse statute, often to reach a result not contemplated by the legislature. But as a rule, the statute in anti-lapse jurisdictions controls who can benefit from the statute, when the period of anti-lapse is to commence, and to whom the bequest or devise goes when a beneficiary has predeceased the testator or, in rare instances, the inter vivos settlor.

In those jurisdictions where there is no anti-lapse statute and the bequest or devise must fall victim to the common law rule, the only way by which lapse may be prevented is through construction of language that seems to evidence the scrivener's intent to provide otherwise. When we enter the mysterious world of testator's intent and the language that evidences it, we are in the realm of survivorship and the concomitant issues of vesting, rules of administrative convenience in

\(^8\) See U.P.C. § 2-602 (1982 & Supp. 1983) ("The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument . . . .",)

class gifts, and an absence of those logical objects of bounty that were so protected in the lapse statutes.

Survivorship, quite simply, challenges the interpreters of the will to ask who is to receive the bequest or the devise when either a member of a class or an individual predeceases the testator. This is the same issue that presented itself with lapse, but the absence of a statute makes the outcome less certain. And even if there is a statute, does it apply to class gifts, to the affected class of persons, to the time frame in which the death has occurred? Again, if there is no statute, the courts are left with the vague rules of construction that allow some prediction, and prediction is very difficult to analyze.\(^9\) Courts can take various expressions of the testator and arrive at conclusions that are often contradictory.

For instance, in \textit{In re Estate of Miner},\(^9\) all the residuary legatees but one sister and brother predeceased the testator and one brother who predeceased left children who claimed a share of the estate. The court would not allow the issue of the predeceasing brothers and sisters to share in the estate, saying that the will had been drafted by an attorney and the phrase “shares shall be divided equally among the survivors thereof” should be seen as a legal intent to exclude the issue. The use of the word survivors was crucial in the case.\(^9\) A significant number of courts hold that unless there is something in the context of the instrument or the surrounding circumstances to indicate differently, the word “survivor” should be given its literal interpretation as one who outlives another, or one of two or more persons who lives after another or others have died.\(^9\) The courts mention that they are willing to enter-

\(^9\) See Annotation, \textit{Wills: Gift Over to “Survivors” of Class or Group of Designated Beneficiaries as Restricted to Surviving Members of Class or Group, or as Passing to Heirs or Representatives of Deceased Beneficiary}, 54 A.L.R.3d 280 (1974). Since the principal factor in determining whether a gift over to “survivors” of a group or class of designated beneficiaries is restricted to surviving members of a group or class, or whether it passes instead to the heirs or legal representatives of a predeceasing beneficiary is clearly that of the testator’s intent. It is difficult to formulate any generalizations from the cases other than to note references by the court to general canons of construction: testator’s intent controls, effect is to be given to all words and terms, or words of a technical meaning are presumed to be used in their technical sense.

\(^91\) 129 Vt. 484, 282 A.2d 827 (1971). The residuary estate was bequeathed to three sisters and four brothers of the testator with the qualification that if “any of the brothers and sisters so named shall predecease me, then I direct that her or his share shall be divided equally among the survivors.” \textit{Id.} at 486, 282 A.2d at 828.

\(^92\) See \textit{Carlson v. Carlson}, 39 Ill. App. 3d 281, 350 N.E.2d 306 (1976). When the phrase was “or their survivor or survivors, share and share alike,” the court also precluded inheritance by issue.

\(^93\) Testatrix bequeathed the residue of her estate to her two cousins and a half-sister in
tain different interpretations, such as when there are no survivors or conditions that decry the literal meaning of survivor, but otherwise the meaning should be taken literally.94

There are some cases that allow for the heirs, spouses or legal representatives of any predeceasing beneficiary to take along with survivors. Again, it is essential to note that these persons so taking often would not be allowed to take under any applicable anti-lapse statute; the statute would designate who could “represent” the deceased. But not so with issues of survivorship or vesting consideration. For instance, in *In re Estate of Mohr,*95 the court held that the testatrix’s use of the words “survivor and or survivors of them,” included the spouses of the beneficiaries who predeceased the testatrix. To allow the spouses to take even though there were existing survivors, the court considered a letter to a sister-in-law from the testatrix where she said she intended to include spouses. Also, there were oral assurances and, after the death of the sister, the testatrix wrote to the plaintiff telling him she would have to change her will because if her brother’s wife should “outlive all of us, I don’t want all of my money going to the family.”96 Thus, the courts prefer to restrict the bequest or devise to the survivors, but when the language of the scrivener permits interpretation,97 the courts will allow for the heirs, spouses or legal representatives to take.98

equal shares and “in the event that my said cousins or half sisters should predecease me, then and in that event I give, devise, and bequeath the share of such deceased to the survivors of my cousins and half sister.” *In re Estate of Gallop,* 248 So. 2d 686, 687 (Fla. Dist. Ct. App. 1971), *cert. dismissed sub nom.* Lee v. Atlantic Nat’l Bank, 257 So. 2d 259 (Fla. Sup. Ct. 1972). One cousin predeceased the testatrix leaving a daughter who claimed one third of the residuary estate. *Id.*


96. *Id.* at 645, 86 Cal. Rptr. at 733.

97. In one case, the language used was direct in bequeathing to a number of named beneficiaries a legacy, providing that the shares of any such nieces or nephews who predecease should be divided among those who survive. This would seem to exclude the issue of those predeceasing. Nonetheless, the will continued that in the event that “any of the above named nieces shall prede-

cease me leaving issue, then I direct that the entire share or shares of said deceased niece or nieces shall go to the issue of such deceased niece or nieces.” The court held that the second provision modified the absolute gift made and allowed the issue of the predeceasing nieces to take. *In re Heuss’ Estate,* 14 Misc. 2d 408, 411-12, 179 N.Y.S.2d 767, 770-71 (Sur. Ct. 1958).

Until now, survivorship has been compared with lapse. That is, to the period of time most associated with prior to the execution of a last will and testament, or prior to the death of the testator (time frames 1 and 2). Nonetheless, survivorship can relate to a third time frame, that between the death of the testator and the death of a life tenant. It could also refer to an inter vivos situation where we are concerned with that period of time between the effectiveness of the trust and the death of a life tenant. These are situations that are usually the province of vesting and the concomitant rule that allows for rights in heirs rather than the narrow class of beneficiaries listed in anti-lapse statutes. The issue faced is the point of survivorship: must the beneficiary survive the testator or the life tenant in order to achieve a vested interest?

The preferred construction is to require the “survivors” to survive the life tenant,\(^9^9\) but in an age that seeks to provide for early vesting, there is a definite trend toward surviving only to the earlier date, the death of the testator.\(^1^0^0\) Again, the language of the instrument controls: “[T]he presumption is that the words requiring survivorship refer not to the testator’s death but to the termination of the preceeding life estate;”\(^1^0^1\) “[a]bsent language pointing a contrary intention, words of survivorship refer to the time of the testator’s death ‘only in the case of an absolute devise or bequest to one and in case of his death to another’;”\(^1^0^2\) or, “when the testator used the words ‘my surviving heirs’ he was speaking of persons who would be living or surviving at the death of [the son].”\(^1^0^3\) The conclusion is to look to the language of the instrument for at least some evidence of intent.

Finally, it should be mentioned that there will be those cases where there are no survivors. That is, there is no conflict between one or more survivors and another class of persons identified as heirs, spouses, or legal representatives. Instead, there is a dispute among the intestate heirs, the residuary legatees, and the representatives of those who should have been survivors. The courts are more willing to provide

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100. Moorman v. Moorman, 156 Ind. App. 606, 297 N.E.2d 836 (1973); Porter v. Porter, 50 Mich. 456, 15 N.W. 550 (1883); *In re* Nass’s Estate, 320 Pa. 380, 182 A. 401 (1936). As some authors have noted, the entire problem could be resolved without litigation if the scrivener were more diligent: “The instrument should be crystal clear as to the requirements of survivorship or the absence of any such requirement.” Bergin & Haskell, Preface to Estates, supra note 2, at 132.
for the representatives, rather than the intestate heirs of the testator. In *In re Kuflik's Will*,\(^{104}\) the testator gave all of the residue of his estate to his father, two sisters, and a brother, providing that in the event the father, brother, or sisters should predecease him, the share of such beneficiary should pass to his or her issue and if no such issue, then to the survivor or survivors of such legatees. The preceding has shown such clauses to be quite common. Nonetheless, in this instance, all four of the survivors died before the testator during the Nazi occupation of Poland, and only one child of a sister survived. The court channeled all of the estate to this one child by finding that as an issue of the beneficiary he was entitled to his mother’s share. Further, the shares of the deceased brother and sister passed to him by intestacy.\(^{105}\) The court again turns to the primary intent of the testator and is unwilling to provide for any substitution when that intent can be effectuated, even though not perfectly.

When the Principle enters the realm of survivorship it does so in an effort to differentiate survivorship from lapse, identify heirs as distinct from issue, and define vesting rather than statutory preference. In the most common event of a testamentary trust ending at the death of a life tenant, the principle graphically illustrates the events as happening in time frame 3 and thus the issue is vesting. When survivorship is mentioned in a will and the legatee does not survive until the death of the testator, the possibility of lapse arises because of presence in time frame 2. Nonetheless, applicability of the anti-lapse statute is not guaranteed because of the condition of survivorship.

Intent of the settlor is still the major issue. The courts are willing to imply this intent in issues of survivorship and vesting, just as they were when lapse was discussed. How the scrivener drafts this intent must depend upon the information received from the client. The Principle is a context for explaining the options and the consequences.

IV. DEATH WITHOUT ISSUE

One of the most difficult areas of the law for students and scriveners is the area of death without issue. Indeed, “there has been considerable litigation during the past several centuries over the meaning of a


\(^{105}\) Id. at 58, 199 N.Y.S.2d at 894. There was a clause that provided an alternate disposition if any of the primary beneficiaries could not be located within five years. But the court did not find this detracted from the intent of the testator and gave the estate to the “primary” beneficiaries named in the will.
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The difficulty really evolves around rules of construction that flow from the English view of indefinite failure of construction, to a more American need for definition, and then back again to a substituted or successive type of construction. Since the debate among the different constructions has evolved over centuries, there is no reason to think that it shall abate in the near future. Nonetheless, there must be a means by which the scrivener and the student may better appreciate and generate the intent of the decedent or settlor.

The confusion resulting from the clauses drafted to contain references to death without issue results from confusion when the named taker or the issue must survive. It is a confusion over the finish line, not the doctrine itself. Indeed, as Professor Lewis Simes states: "To the layman nothing could be freer from ambiguity than the limitation 'to A, and if he dies without issue, to B.'" Since most American jurisdictions are not concerned with indefinite failure of issue—failure of issue whenever that may occur—but rather with definite failure, the question of when is not as important. What is important is the finish line: "before which failure of issue must occur." There must be a point in time after which the testator is willing to relinquish control over ultimate disposition of the property. Perhaps it was the English court's interpretation of indefinite failure of issue that created the con-

106. Bergin & Haskell, Preface to Estates, supra note 2, at 236. Other authors admit the confusion as well. "[W]hen these words [die without issue] are put together . . . at least five constructions have received some recognition by courts at one time or another." Simes, Future Interests, supra note 3, at 196.

107. By "indefinite failure of issue" is meant the failure of issue of a person whenever that may occur, whether by the person's own death without any surviving issue, or by the subsequent death of the last of the person's issue. Bergin & Haskell, Preface to Estates, supra note 2, at 236.

108. By definite failure of issue is meant the failure of issue of a person at a definite time; the definite time indicated in the cases is the death of the named person. Id.

109. Substitutional language implies that when the testator limits a bequest or devise "to A, and if he die without issue, to B," the testator means that if A dies without issue then B receives the bequest or device. If A or his issue survives the testator, B is excluded. This view is criticized by Simes. See Simes, Future Interests, supra note 3, at 196-203. Successive language demands that the issue of A survive him, A, or B receives the bequest or device. Note that there are two finish lines: the testator's death for substitutive language, and the death of A for successive language. See Warren, Gifts Over on Death Without Issue, 39 Yale L.J. 332 (1930); Bergin & Haskell, Preface to Estates, supra note 2, at 236-38.

110. Simes, Future Interests, supra note 3, at 196.

111. Id.

112. See Annotation, Remainderman—Death Without Issue, 26 A.L.R.3d 407 (1983). The point of time chosen by the creator of the trust or designated in the last will and testament could be a time for distribution of the estate (i.e., age of 30) or the period of postponement of enjoyment (i.e., when married), or until the exhaustion of a prior estate.
fusion, or perhaps it was the predominance of real property in the system and the familiar usage of indefinite construction. It is not surprising that whenever there was insufficient intent demonstrated by the scrivener, the English courts adopted the definite construction as a remedy and eventually accepted a statutory preference for definite construction. Today, the American preference for definite failure of issue construction certainly follows the lessons learned from the English courts.

The past confusion has been lessened by the adoption of definite construction by statute or common law. Thus, there must be a definite preference for A either having issue or not having issue at some point in time. This said, what is the point in time? Only two points are important to use in construing the intent of the creator: the death of the creator—which would be the B line—or the death of the life tenant, usually the person expected to have issue. This would be the C line. Using our example again, this would have the effect of saying: To A, and if A dies before the creator without leaving issue surviving the creator, then to B. Once A or any issue survives the creator, a fee simple results and B is excluded. This is a substitutional type of construction and seems to have the effect of saying: “The gift to B is substitutional if A or his issue are not available to take it at my death.” It creates immediate ownership at the death of the creator and thus would seem to fulfill the desires of those jurisdictions preferring alienability above all else. Such jurisdictions would have to rely upon precise construction provided by scriveners in various cases. It would also demand awareness of events in both time frames 2 and eventually 3.

In one case, the testator’s will provided, after giving a life estate to his wife, that “upon the death of my said wife . . . his estate to his

113. The English courts decided that “die without issue” meant the indefinite construction, implying failure at any time. This created a fee tail and may have reflected the intent of the English landowner. 4 Kent, Commentaries on American Law 274 (12th ed. 1873).

114. The English courts applied the indefinite failure of issue construction to personal property as well, creating additional problems since there was no fee tail construction for personality and any executory interest was void under the rule against perpetuities. Simes, Future Interests, supra note 3, at 198.


116. 7 Will. IV & 1 Vict., ch. 26, § 29 (1837).

117. When using the analytical principle the points in time will be the same for inter vivos instruments as well as testamentary ones: the A line is of course the point of creation, and the B line as the death of the creator (testator), with the C line the occurrence of an event such as the death of a life tenant.

118. Simultaneous death statutes and provisions within the creating instruments will always affect the word “surviving.” Scriveners and planners should be cautious.
three children” and providing further that the share of such child as may be deceased be divided equally among his heirs, but “in case there be no such heirs . . . the share . . . shall be equally divided among [the testator's] surviving children.”119 Upon the death of the testator one son was alive but predeceased the mother's life estate. The court decided that the language of the will called for a substitutional construction and thus the interest of the son became vested at the death of the father, the testator, and passed to the son’s widow.120 Many of the older cases refer to this substitutional type of construction,121 and some of the newer ones as well. In one, testator gave a life estate to his wife and upon her death to be divided among his four children. The holographic will provided that, “should either of them die without a child, their estate to be equally divided between the survivors.”122 A codicil was written nine years later stressing that the children should divide the estate among themselves. At the death of the testator there were four children surviving and they continued to survive the wife, the life tenant. Eventually, two of the children died childless and one of their nieces claimed that the two dying without issue took a conditioned fee subject to defeat upon their eventual death without issue. The court rejected this construction, deciding that the children took, upon the death of the testator, an unconditional fee simple absolute interest. This was demanded because of the construction of the last will and testament.123 Because the testator had directed the children to divide up and settle the estate among themselves, the court assumed a substitutional construction.

The substitutional construction can be used with inter vivos dispositions as well. When parents executed a deed to their daughter in 1905, the deed provided for a reversion of the property to the grantors or their estate if the daughter should die without issue. The daughter did in fact die without issue, devising the estate to others, but this was after the death of the grantors. Her brother challenged her devise claiming that his sister only had a defeasible fee and when she died

119. Ackerman v. Ackerman, 63 A.D. 370, 371, 71 N.Y.S. 780, 781 (1901).
120. Id. at 372-73, 71 N.Y.S. at 782.
121. For cases supporting the construction that “death without issue” refers to death during the testator's lifetime or substitutional construction, see Borgner v. Brown, 133 Ind. 391, 33 N.E. 92 (1893); Tarbell v. Smith, 125 Iowa 388, 292 N.W. 118 (1904); Ballance v. Garner, 161 Kan. 371, 168 P.2d 533 (1946); Lawrence v. Calam, 236 N.Y. 168, 140 N.E. 232 (1923); Korn v. Friz, 128 Wis. 428, 107 N.W. 659 (1906) (recognizing the rule).
122. Martin v. Taylor, 521 S.W.2d 581, 582 (Tenn. 1975).
123. Id. at 585.
without issue, the land reverted to the estate of his parents, and thus himself as heir. The court likened the deed to an inheritance, particularly because the evidence supported the fact that the deed was intended as an advance to the daughter against her future inheritance. Therefore, the court said, where there has been a devise or gift of property to take effect immediately with a gift over on the contingency of the first taker's death without issue, the reference is to death during the lifetime of the testator or grantor unless a contrary intent is found in the language of the instrument or the circumstances surrounding the execution. The devise by the daughter was effective. As has often been said, the language used by the testator or the creator is the most important factor.

Substitutional construction may well be the logical answer to the problems inherent in the indefinite fee tail preference of the early English courts. The fee simple determination of a substitutional interpretation would be just the opposite of what was then considered preferential. Nonetheless, the point was even then to do the will of the testator, and there is significant authority that his will might sometimes be done

125. Collins, 585 S.W.2d at 605. In Bloodsworth v. Bloodsworth, 467 S.W.2d 218 (Tex. Civ. App. 1971), the court discussed the imposition of a 20 year testamentary trust. This was a middle point between the death of the creator and the death of A, the person's issue in whom we are interested. When a son died childless but after the 20 years had elapsed, the interest created by the testator became a fee simple absolute as the termination of the trust. It is notable that this is after the death of the testator, but not to the point of the death of the named taker. See also Stanley v. Brietz, 612 S.W.2d 699 (Tex. Civ. App. 1981). A few jurisdictions have adopted the construction that where the instrument creating such a remainder interest mentions or indicates any point of time, between the donor's death and that of the primary remainderman, the contingency will be limited to the interval preceding such time absent any intent to the contrary. Desert v. Williamson, 106 S.W. 258 (Ky. 1907); St. John's Church v. Eyre, 85 N.J. Super. 905 (1964); Davis v. Scharf, 99 N.J. Eq. 88, 133 A. 197 (Ch. Ct. 1926); see generally Hughley v. Burney, 211 Ala. 397, 100 So. 817 (1924); Sterling v. Huntley, 139 Ga. 21, 76 S.E. 375 (1912); Linton v. Hail, 201 Ky. 701, 258 S.W. 279 (1924); Teasdale v. Harrison, 16 N.J. Super. 235, 84 A.2d 563 (1951).

126. In Hart v. Rogers, 527 S.W.2d 230, 231-32 (Tex. Civ. App. 1975), the testatrix gave her grandson an absolute gift of property and provided that if he "should precede me in death or if he should die without issue ... then property under this will shall descend ... to the children of my granddaughter ... in fee simple." The court decided that the gift over, unless controlled by other provisions of the will, takes effect upon the first taker's death at any time, whether before or after the testator. Thus, absent problems with the rule against perpetuities, the intention of the scrivener controls. See also Reid v. Armistead, 228 Ala. 75, 151 So. 874 (1933); Hughley v. Burney, 211 Ala. 397, 100 So. 817 (1924); Dutton v. Hughes, 219 Ga. 645, 135 S.E.2d 407 (1964); Sterling v. Huntley, 139 Ga. 21, 76 S.E. 375 (1912); Dean v. Town of Nutley, 70 N.J.L. 217, 57 A. 1089 (Ct. Err. & App. 1904).
with a successive construction. Indeed, Professor Simes argues that anytime a scrivener uses the contingency "if A die without issue," a substitutional construction should not be used. Rather, the scrivener, at the testator's request, could be seeking to keep the property within the blood line for as long as possible, or at least until the death of A, not the date of death of the testator or any additional life tenant. If successive construction is to be utilized by the court in distribution, it will usually be because the scrivener explicitly requested it, the nature of the property in question, or the presence of a statute demanding a preference for successive construction.

Some statutes may only abolish the common law rule that death without issue means an indefinite failure of issue if at any time in the future A's line of descent should come to an end (hence the contingency of without issue), then there was a gift over to the contingent remainderman. But most statutes go beyond simply abolishing the

127. See Simes, Future Interests, supra note 3, at 199. "However, the better view is that the phrase 'if he die without issue' refers to the failure of issue of A at the time of his death, whenever that may occur." Id. This is successive construction and is probably more likely to preserve the true intent of the testator.

128. Substitutional construction should be used for a contingency such as "if he die," since we know that A will die sometime and the word "if" is uncertain. Id. at 200.

129. Courts, relying on the donor's intent as disclosed by the instrument, have sometimes decided that the limitation of death without issue refers to without issue at any time. See Daniel v. Daniel, 102 Ga. 181, 28 S.E. 167 (1897); Abrahams v. Sanders, 274 Ill. 452, 113 N.E. 737 (1916); Dunn v. Dunn, 191 Ky. 817, 232 S.W. 40 (1921); Vickers v. Vickers, 205 Tenn. 86, 325 S.W.2d 544 (1959). In this construction the remainderman receives a determinable fee subject to defeasance upon the happening of the designated contingency. For instance, testator's will gave his wife a life estate and upon her death a specified sum was to be given to named children and the residue divided among seven named children and "heirs of their body." Furthermore, "should any of the above named children die without issue . . . I desire the remaining property should be divided among the remaining children." The court decided that the contingency the testator intended as the finish line was the death of a child without issue, not testator's death (the B line), or the death of the life tenant-wife (the C line). Each child took a contingent remainder in the shares of the six other children. See Krieger v. Stauffer, 34 Ohio 364, 67 N.E.2d 449 (1946); Pinkston v. Pinkston, 254 S.W.2d 196 (Tex. Civ. App. 1952); see also In re Carother's Estate, 161 Cal. 588, 119 P. 926 (1911); Lyons v. Catharin, 205 Mich. 476, 171 N.W. 406 (1919).

130. "If the future interest situation arises under a trust of personal property, then certainly the construction which gives A an absolute interest if he survives X makes good sense." An executory interest over personal property is awkward. Bergin & Haskell, Preface to Estates, supra note 2, at 238.


common law. Some state a preference for a definite failure of issue construction with successive or substitutional consequences. Some state statutes are silent and the courts have abolished the common law rule. In any case, the statute should be consulted before predicting any testator's intent.\textsuperscript{133}

Few testators can foresee the multiple consequences of the phrase "death without issue." The myriad possibility of life estates, executory interests, contingent remainders and finally a fee simple complicate the best intentions of any scrivener seeking to keep any piece of property in the family for any period of time. Being able to place the words within the context of the Principle offers some assurance of continuity and predictability. Being able to identify for the settlor or the testator particular points in time as events—A, B, or C events—provides the scrivener with a means by which he may best provide for early alienability or continuity within the family for as long as possible, a safeguarding of the bloodline.

V. THE RULE AGAINST PERPETUITIES

Within American law there are rules far more complicated than the Rule. Nonetheless, there has developed around the Rule a myth that it is "alright" to consider the Rule too complicated and too obtuse to learn.\textsuperscript{134} By countenancing any lesser professional obligation regarding the Rule, the courts or legislators will guarantee that "several more disappointed beneficiaries and their discredited counsel can point to the Rule as the cause of their grief."\textsuperscript{135}

There should be no immunity from a proper understanding of the Rule and methods to draft, remedy, and anticipate it properly. Persons like John Chipman Gray\textsuperscript{136} and W. Barton Leach\textsuperscript{137} have written and

\textsuperscript{133} For a collection of statutes affecting death without issue, see \textit{id.} \$ 526 n.25.

\textsuperscript{134} Scriveners are often negligent in considering the proper use of the Rule, and courts are reluctant to attribute blame or negligence. For instance, in 1961 the Supreme Court of California decided that a beneficiary under a will has a cause of action in tort or contract against an attorney who negligently drafts a will, but violating the Rule Against Perpetuities is not negligence as a matter of law. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961), \textit{cert. denied}, 368 U.S. 987 (1962).

\textsuperscript{135} Lynn, The Modern Rule Against Perpetuities 2 (1966) [hereinafter Lynn, The Modern Rule].

\textsuperscript{136} Gray, The Rule Against Perpetuities (1886), was first published in 1886 and most recently by his son, Roland, as the fourth edition in 1942; Gray, The Rule Against Perpetuities (4th ed. 1942). This is the seminal treatment of the Rule and it too admits: "There is something in the subject which seems to facilitate error." Lynn, The Modern Rule, \textit{supra} note 135, at XI.

\textsuperscript{137} Professor Leach has written extensively on the Rule. \textit{See}, e.g., Morris & Leach, The
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lectioned extensively in an effort to make the Rule more understandable to scriveners and hopefully, to lessen the myth of the Rule as the "technicality-ridden legal nightmare." Modern efforts to reform the Rule have also worked towards this goal. Since the "complexity of the common law rule remains despite the modern reforms," continual attempts must be made to delineate the intricacies of the Rule.

The structure of the Principle is one method of delineation, giving perspective to the common law announcement that no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. Structure is necessary so that a scrivener may draft what the Rule is meant to accomplish: "to limit the period of time between the creation of a contingent future interest and its vesting in interest." Structure is also necessary so that possibilities can be avoided; only possibilities, not actual occurrences can be considered. While this dependency on possibility has


140. Bergin & Haskell, Preface to Estates, supra note 2, at 180.
141. Gray, The Rule Against Perpetuities 191 (4th ed. 1942). Even where there have been statutory modifications this remains the current rule in the majority of American jurisdictions or the basis of the modified law.
142. Bergin & Haskell, Preface to Estates, supra note 2, at 180.
143. The fact that all interests will almost certainly vest within the period of the Rule is not enough. If there is any possibility that any will not, the interest is void. For instance, testatrix may devise her estate to such of the descendants of A as are living 22 years after the testatrix's death. Because it is only highly probable and not absolutely certain some person alive at the creation will be alive after 22 years, the devise is void. Simes, Future Interests, supra note 3, at 265. Many American jurisdictions strictly apply this construction of "possibility run wild." See Brownell v. Edmunds, 209 F.2d 349 (4th Cir. 1953); Larier v. Larier, 218 Ga. 137, 126 S.E.2d 776 (1962); Monarski v. Greb, 407 Ill. 281, 95 N.E.2d 433 (1950); Barnhart v. McKinney, 235 Kan. 511, 682 P.2d 112 (1984); In re Freeman's Estate, 195 Kan. 190, 404 P.2d 222 (1965); In re Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962); Curtis v. Citizens Bank & Trust Co., 318 S.W.2d 33 (Ky. 1958); Snyder's Estate v. Denit, 195 Md. 81, 72 A.2d 757 (1950); Nelson v. Mercantile Trust Co., 335 S.W.2d 167 (Mo. 1960); Tiefen v. Hebenstreit, 152 Neb. 753, 42 N.W.2d 802 (1950); Thomas v. Harrison, 24 Ohio Op. 2d 148, 191 N.E.2d 862 (P. Ct. 1962); In re Pruner's Estate, 400 Pa. 629, 162 A.2d 626 (1960); In re Yeager's Estate, 354 Pa. 463, 47 A.2d 813 (1946); Industrial Nat'l Bank v. Marey, 86 R.I. 15, 133 A.2d 724 (1957); Love v. Love, 208 S.C.
led to absurd results, it has also been the proximate cause of many statutory changes.

Recall the structure of the Principle. There are three vertical lines, each representing an event: (A) date of inter vivos creation or date of execution of the last will and testament, (B) date of death of the creator or testator, and (C) date of distribution. There is also a horizontal shift from left to right representing four time frames surrounding the three events. These time frames are important because if the future interest created is vested immediately or may possibly become vested within any of them, the Rule is affected.

If the scrivener seeks to draft an interest that may become vested or possessory in the future, the first concern will be the manner in which the interest is created. The Principle provides a choice: A line if this is an inter vivos trust, or B line if it is testamentary. Standing at the proper introductory point is essential because of the possibility of changes that could occur during any of the time frames after the proper line. These possibilities result because the scrivener has created a contingent future interest commencing at a particular point in time and then, because the contingency may only possibly occur, the interest may not vest properly. Thus, the contingent interest is void if, “at the creation of the interest, it appeared that it might not vest within


144. Fertile octogenarian conclusive presumptions have voided interests. See Dickerson v. Union Nat’l Bank, 268 Ark. 292, 595 S.W.2d 677 (1980); Prime v. Hyne, 260 Cal. App. 2d 397, 67 Cal. Rptr. 170 (1968) (status of persons who may not be alive at the time of creation will void the interest); Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978) (events that could occur more than 21 years after creation are void).

145. A modern suggestion for statutory reform of the Rule Against Perpetuities may be found in Langbein & Waggoner, Selected Statutes on Trusts and Estates 490-552 (1987) (the section entitled “Uniform Statutory Rule Against Perpetuities” provides suggested statutory reform and offers a comprehensive summary of reform proposals and commentary).

146. While a last will and testament may be created at the A line because of proper execution, it speaks only at the date of death because, “a living person has no heirs.” Morsman v. Commissioner, 90 F.2d 18, 26, 28 (8th Cir. 1937). See also Timberlake v. State-Planters Bank of Commerce and Trusts, 201 Va. 950, 115 S.E.2d 39 (1960) (will speaks only at death).

147. Remainders are either vested or contingent and “[i]t is frequently difficult to determine what language should be construed to create a vested remainder and what a contingent remainder.” Simes, Future Interests, supra note 3, at 19. Courts prefer vested remainders. Id. But it is notable that even when a remainder is vested it can be: (1) indefeasibly vested, (2) vested subject to open, and (3) vested subject to complete defeasance. Id. at 20. The last alternative, vested subject to complete defeasance, would occur when A conveys Blackacre “to B for life, remainder to C and his heirs; but if C does not survive B, then to D and his heirs.” C has a vested remainder subject to complete defeasance. Id. at 24.
What actually happens after the possibility at the creation does not matter; again, only possibility counts. Thus, the point of creation, be it the A line as with a deed or the B line as with a will, is the beginning of the structure of the Rule and the Principle.\textsuperscript{149}

The next stage in the process of deciphering the Rule is for the scrivener to ask a question. The question is suggested as a supplement to the familiar recitation of Gray's Rule. The scrivener should ask: Standing at this point of creation, is there any possibility that any interest will not vest within a life in being plus twenty-one years? The answer should be no. However, the result will depend on a number of factors.\textsuperscript{150} All of these factors can be discussed using the Principle.

First, reconsider the point of creation as a significant event because it is from here that any inquiry under the Rule must commence. Identifying the point from which to ask the question of possibility or to draft an instrument of validity demands a perspective. We have examined commencement at the A line and the B line if there is a power of revocation in an inter vivos instrument or a testamentary trust. Even the C line, a point representing distribution,\textsuperscript{151} could initiate commencement under certain circumstances. For instance, under situations concerning powers of appointment, the validity of the power under the Rule is determined not from the creation by the donor of the power during life (A line) or at death (B line), but at the exercise of the

\textsuperscript{148} Id. at 267-68.

\textsuperscript{149} As shall be discussed, courts have rationalized reasons and methods of commencing inquiries concerning the possibility of vesting under the Rule, for example, even though inquiry concerning vesting under the Rule should commence at the A line for an inter vivos transaction, if the settler of an inter vivos trust reserves the power to revoke the trust and revest the estate in himself, inquiries under the Rule commence when the power of revocation ceases, usually the settlor's death, or the B line. See Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958); Fitzpatrick v. Mercantile-Safe Deposit & Trust Co., 220 Md. 534, 155 A.2d 702 (1959); Dennis Rourke Corp. v. Ferrero Constr., 64 Md. App. 694, 498 A.2d 689 (1985), cert. granted, 305 Md. 243, 503 A.2d 252 (1986). Additionally, the Wait and See Doctrine and the Second Look Doctrine are relevant considerations in determining when the Rule commences.

\textsuperscript{150} While individual factors within the analysis of the Rule seem to contain so many particular intricacies, it is important to remember that taken together the factors are meant to "curtail dead hand domination and facilitate marketability" of property. Gulliver, Future Interests, supra note 1, at 76.

\textsuperscript{151} The C line as a point of distribution can be seen in an example provided by Professor Lynn: If A devises to B for life, remainder to that child of B who first attains the age of 25, the C line would be when the child of B first attains the age at some distant point in time or immediately upon the death of A. Lynn, The Modern Rule, supra note 135, at 33. If there is no child of B who is 25 at A's death, the contingent remainder in any child whenever born would be void because there is a possibility that B could have a child who might attain 25 at a remote time. Id. at 14.
power by the donee (C line). While this construction concerns the exercise of a presently exercisable general power of appointment and not the more limited special or testamentary general powers, it does demonstrate the creation potential of a C line.

Various statutory and judicial constructions can also modify the time of creation for purposes of the Rule. These include Wait and See, Cy Pres, and Second Look Doctrines. These should be considered separately from the situation of a general presently exercisable power of appointment. What all have in common is a demand for ascertainability and perspective.

Second, reconsider the possibility that an interest may not vest. The contingent remainder and the executory interest are subject to the Rule, but the possibility of reverter and the right of entry are not. While there are subclassifications of remainders, our major concern will be when X devises land to Y for life, remainder to Z and his heirs, if, but only if, Z shall attain the age of twenty-one years. In such an example Z would have a contingent remainder. It would be vested if Z’s right to possession of the land were not subject to any condition precedent except the termination of the prior particular estate.

152. Appeal of Miffin, 121 Pa. 205, 15 A. 525 (1888). This rationale is similar to that in Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958). See also In re Estate of McMurtry, 68 Misc. 2d 553, 326 N.Y.S.2d 965 (Sur. Ct. 1971); Restatement (Second) of Property (Donative Transfers) § 1.2 (1983).

153. The rationale of the creation point in time being C, rather than one based on the donor’s transfer or death, is dependent upon the general grant of ownership given to the donee and hence the loss of control by the donor. The essential difference is that the donee can appoint to himself or herself at anytime. Of course, any exercise by that donee would be subject to separate scrutiny under the Rule. See Berger, The Rule Against Perpetuities as It Relates to Powers of Appointment, 41 Neb. L. Rev. 583 (1962).

154. The historical basis for this distinction can be found in Schaefers v. Apel, 295 Ala. 277, 328 So. 2d 274 (1976); Laurel v. Powers, 366 So. 2d 1079 (Miss. 1979); Restatement (Second) of Property (Donative Transfers) § 1.4 comment (c) (1983). Stated in the simplest terms, it would appear that the Rule merged to “check the indiscriminate creation of indestructible contingent future interests,” and this after the enactment of the Statute of Uses and the Statute of Wills. Lynn, The Modern Rule, supra note 135, at 8.

155. Remainders can be classified into four distinct possibilities: (a) indefeasibly vested; (b) vested subject to open; (c) vested subject to complete defeasance; and (d) subject to a condition precedent.

156. A remainder is contingent at the time it is created if at that time the remaindermen are unborn, or, though born and ascertained, are subject to some express condition other than the termination of a prior particular estate. For example: A grants to B for life an acre of land, remainder to C and his heirs if C attains 21. When B dies C is 18 and C was only 15 when A created the interest. Thus, the contingent remainder in C, not having vested before B’s death, and not vesting at the instant of B’s death, fails under the destructibility rule. 2A Powell, The Law of Real Property § 268 (1986); 1 Simes & Smith, Future Interests, supra note 16, § 194.
An executory interest was made legal by the Statute of Uses and the Statute of Wills and they created a future interest that will become a present interest, if at all, in someone other than the creator or his successors in interest and which cannot satisfy the definition of a remainder.\(^{157}\) Such distinctions between remainders and executory interests cause confusion and may no longer be needed. Indeed, some authors advocate eliminating any distinction.\(^{158}\) Even if this were to happen, there would still exist the problem of such interests being subject to the Rule and the difficulty of vesting within the prescribed period of time.

Vesting must be examined separately from lapse.\(^{159}\) The latter, being determined from statutory formulation, is easier to predict. With vesting, the certainty is gone and the events occurring at the A, B, or C lines become like racers seeking to cross a finish line or jump a hurdle. Also, the events occurring before or after the vertical points A, B, and C become significant. Recall that each of these time frames, numbered from left to right 1, 2, 3 and 4 contain changes in persons, births, and deaths, that affect the Rule.

For instance, while vesting is essential for contingent interests under the Rule, persons signified by class rather than by individual designation are seldom vested interest holders. Class gifts and the Rule are problematic. Since the definition of class contains the increase and decrease of its members, it is possible that those already in the class may have a vested interest and those that may come afterwards have void interests.\(^{160}\) Even with this unique feature, the Rule affects the class as a unit and both the maximum and minimum membership must be determined within the period of the Rule.\(^{161}\)

Typical class gifts are to children, issue, brothers and sisters, nephews and nieces, and grandchildren. It is group minded. This lack of definiteness causes problems under the Rule. For instance, if A devises

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157. Be they shifting or springing executory interests, the essential difference between a remainder and an executory interest involves a person other than the creator and the interest cannot be defined as a remainder. See Restatement (Second) of Property (Donative Transfers) § 1.4 comments b, m (1983). Professor Simes would add that it is never vested, it is unlike a reversion, it is conditional, and it almost always terminates another vested interest. Simes, Future Interests, supra note 3, at 16-25.

158. See Dukeminier, Contingent Remainders and Executory Interests: A Requiem for the Distinction, 43 Minn. L. Rev. 13 (1959).

159. For a discussion of lapse, see supra part II of text.


161. Id. This construction is usually stated as the "All or Nothing" rule of Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).
to B for life, remainder to such of the children of B as attain twenty-five, and children of B means whenever born, the class gift is void under the Rule. Since B could have a child after A's death (the creation line) and less than four years before B himself dies, said after-born child of B could reach twenty-five (the C line) later than twenty-one years after B's death. It is possible, and with a male, especially with adoption, and in jurisdictions believing in "fertile octogenerians." Even though B could have some children who would qualify to take under the devise, since some could not, the entire devise falls as a unit.162

In the previous example, the interest in B's children was created at A's death, the effective date of the last will and testament. If the interest had been created during the life of A, the time of creation would have shifted from the B line to the A line and it is even more probable that the interest would have violated the Rule. Why? Because B would have been younger, capable of having more children, and more subject to the presumption of fertility, even in males.163 The periods of time with which we would have been concerned would have been 2 and 3, or that period from creation until the last child of B reaches twenty-five, the C line.

Vesting is a nebulous task at best and with the expansive nature of class gifts it is easy to see why legislators and judges would seek to find an amelioration of any harsh results. Some judges have looked to an intent expressed by the instrument. Such an intent could safeguard the interest created.164 And of course there are legislative remedies such as Wait and See and Second Look.165 For the student, the scrivener, and

162. Lynn, The Modern Rule, supra note 135, at 91. There are statutory and judicial exceptions to the harsh effects of this result. See Simes, Future Interest, supra note 3, at 292, and discussion of Cy Pres, Wait and See, and intent necessary to split a class.

163. Either through judicial construction or statute, more states are allowing rebuttal of the presumption of male fertility. See In re Bassett Estate, 104 N.H. 504, 190 A.2d 415 (1963); In re Scott's Trust, 8 Pa. D. & C.2d 66 (1955); Kelby Estate, 80 Pa. D. & C. 1 (1952); Frost Nat'l Bank v. Newton, 554 S.W.2d 149 (Tex. 1977).


165. Both reform doctrines are identical in that each allows courts to consider actualities rather than possibilities; courts are able to move into the future (actualities), rather than consider the possibilities. Nonetheless, Wait and See is associated with standard Rule construction and Second Look with powers of appointment. Professor Simes offers no distinction when he incorporates the case associated with Second Look (Sears v. Coolidge) into the two cases "commonly cited as supporting the Wait and See doctrine in the absence of statute." L.M. Simes, supra note 3, at 273.
the appropriate authority, however, the issue is what to do about vesting problems and the Rule when applied to class gifts. Clearly if there is an increase of class in areas 2 and 3 because an inter vivos interest is created, or only area 3, because it is testamentary, there are possibilities of violation of the Rule. This is not to confuse the situation of a decrease in class and the heirs of the deceased class member seeking to share through the decedent because of vesting. Increase and decrease of class can cause problems for vesting, but the Rule focuses on the possibility of increase.\textsuperscript{166}

In addition, we should reconsider the vesting at twenty-one years after some life in being. But life in being when? The answer directs us to the time of creation and our selection of the appropriate person or persons at that time. If the interest is created inter vivos, inquiry under the Rule should begin at the A line—unless of course it is a revocable trust, general inter vivos power of appointment, or a jurisdiction with statutory reforms.\textsuperscript{167} When the life in being must actually exist differs to the extent that the common law Rule or the statutory reforms provide. It is conceivable that any of three time events may be the starting point: the A line as the inter vivos creation, the B line as the testamentary commencement, and the C line as the point of distribution or exercise by the donee of an inter vivos power of appointment.

Once the time event is determined, the human lives in being\textsuperscript{168} must be ascertained from among persons living or in gestation about whom we can say: “Whatever may occur, we know the interest must vest, if it vests at all, not later than twenty-one years after the death of all these persons.”\textsuperscript{169} The lives need not be mentioned in the instrument;\textsuperscript{170} they can be determined through implication,\textsuperscript{171} but they must

\begin{itemize}
\item \textsuperscript{166} Because class gifts often involve family members and because they have a listing of specialty constructions—lapse, survivorship, and vesting being examples—it should not be surprising that constructional preferences surround class gifts. Nonetheless, the scrivener should adopt an attitude of attention to detail and the settlor “should adopt a critical attitude and determine for himself whether the conclusions are reasonable inferences or merely fossilized legalisms.” Bergin & Haskell, Preface to Estates, supra note 2, at 138-39.
\item \textsuperscript{167} The three most discussed statutory reforms are (1) Wait and See, (2) Second Look, and (3) Cy Pres. They do not guarantee vesting, but they do allow for inquiry as to certainty of vesting to begin at a different point in time. For a discussion of these reforms, see infra part VI.
\item \textsuperscript{168} Only human lives may be considered; neither animals nor corporations may be considered. In re Howells’ Estate, 145 Misc. 557, 260 N.Y.S. 598 (Sur. Ct. 1932). See also Fitchie v. Brown, 211 U.S. 321 (1908).
\item \textsuperscript{169} Simes, Future Interests, supra note 3, at 265.
\item \textsuperscript{170} 6 American Law of Property § 24:13 (1952); 5 Powell, The Law of Real Property § 766(4) (1986); 3 Simes & Smith, Future Interests, supra note 16, § 1223.
\item \textsuperscript{171} An example of determining measuring lives by implication is given by Professor Simes:
be neither so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.\textsuperscript{172} The lives must also come prior to the period of twenty-one years,\textsuperscript{178} although this would be an opportunity for legislators to make another statutory concession to reform.

More than likely, the life in being will be a life tenant or life income beneficiary, the donee of a contingent gift, all the members of a class who may be alive at a designated time, or in the case of a general testamentary or special power of appointment, the donee could be the measuring life.\textsuperscript{174} Today, with the advent of statutory reform, a principle of causality affects the choice of the measuring lives. Professor Jesse Dukeminier incorporates this when he writes:

At common law the measuring lives had to have a causal relationship to vesting which insured vesting within the period. Under wait-and-see, absolute certainty ab initio is not required, and hence the measuring lives are those in being at the beginning of the period whose continuance might affect vesting. These are lives which "play a part in the ultimate disposition of the property"; these are lives with a causal relationship to vesting.\textsuperscript{176}

Vesting, measuring lives, and time of creation are all focal points in any inquiry under the Rule. But with the advent of reform, the scrivener is not only more aware of alternatives but also more likely to draft an instrument which does not reflect the intent of the client. There was certainty and security in strict interpretation of rules. Also, with the complexity of inter vivos and testamentary constructions, longer life expectancies, and increased use of will substitutes in drafting, financial risks are more significant. Add to this expansion of doctrines of powers, class gifts, lapse and simultaneous death, and the tendency to fall vic-

\textsuperscript{172} Restatement (Second) of Property (Donative Transfers) §§ 1.2, 1.3 (1983). Because of advances made in comparative and federal programs such as the personal locator service of the Social Security Administration, it is less likely that notice of deaths would be unreasonably difficult to obtain. Thus a manner by which the maximum period under the Rule may be obtained could be to define the lives in being as all those babies, born on the date of creation, at any designated hospital or hospitals.


\textsuperscript{174} Possibilities as to the measuring life are listed in Lynn, The Modern Rule, supra note 135, at 43-47.

tim to death without issue, and the scrivener will need perspective and parameters. Drawing upon public policy and even history, the Rule restricts "[c]logs upon the Estate," threat from family dynasties, and the familiar complaint of dead hand control. But the Rule should never be reduced, or raised, to the level of topic for a debate. It is a device for construction and achieves its status only insofar as it furthers the objectives of the scrivener in his or her drafting of intent.

The modern scrivener must be concerned over drafting, the proper use of class, issue, and powers. Time periods and events within those periods must be identified properly as to exercise, identification, contingencies, and of course vesting. The Analytical Principle is a tool for the scrivener, be it interpreting the strict applications of the past or the modern reforms present today.

VI. MODERN REFORM AND THE ANALYTICAL PRINCIPLE

A common complaint of persons who think they have been victimized by the law is that it never would have happened if they could have afforded a better attorney. There is no certainty that a more expensive attorney would be better, but such complaints cause some to think of the Rule as "rich men's law." In an effort to avoid such complaints, three basic reform measures have been advocated or adopted by many jurisdictions: Wait and See, Cy Pres, and specific repairs for specific problems. All accept the Rule and its purpose, but they seek to follow the spirit of many ecclesiastical decisions as balancing "the interest of property owners in disposing of property in a manner of their own choosing and the interest of living beneficiaries in utilizing that property in whatever manner they determine most beneficial in light of present facts and circumstances."

American efforts at reform of the Rule can be characterized as gentle in effect and polite in application. Some say the American statutes “tend to be short and all-encompassing.” By contrast, the English Perpetuities and Accumulations Act of 1964 has fifteen sections, directly addressing the fertile octogenarians, unborn widows, and the all or nothing rule concerning class gifts. The American and British approaches are different, but the former’s present contributions are still significant as reform is sure to continue with the advent of new biology and increased inter vivos arrangements.

Wait and See approaches were not adopted in the United States by statute until Pennsylvania did so in 1947. Today, less than half of the states and the Restatement (Second) of Property have adopted the doctrine, by statute or judicial decision. All would insist that the essential contribution of Wait and See is to change the possibilities approach of the orthodox rule into an actualities test. In other words, to “wait and see” what actually happens, rather than to void the interest ab initio because of the possibilities that could occur.

Some states have combined this Wait and See approach with Cy Pres, another doctrine which allows the court to recast the dispositive provisions in such a way as to best comply with the creator’s intent and still vest properly. In 1962 Kentucky passed a statute providing:

In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest.

184. See Restatement (Second) of Property (Donative Transfers) § 1.4 note (1983) for a list of those States which have adopted the Wait and See Doctrine. The American Law Institute (ALI) adopted the Wait and See Doctrine because the “what might happen” approach is nothing more than a trap that is easily avoided by appropriate drafting. The validity of all non-vested interests should be on the same plane whether the interest is created by a skilled draftsman or one not so skilled.
While a statute seems the better approach, New Hampshire adopted both doctrines by judicial decision, and a number of states have modified versions of Wait and See and Cy Pres. Even though more than half of the states still follow the orthodox rule with no modification, the trend is certainly toward actualities and predominant intent, with suggestions to impose a fixed term of years and vesting in possession rather than interest. The intent is to simplify the Rule without any compromise of its socio-economic purposes.

Discussion concerning the Principle should concentrate upon Wait and See or Cy Pres as these are the major reform measures. Others are alternatives with similar results or specific repairs. None of the major reforms abolishes the Rule. Rather, it is in reference to actualities instead of possibilities that a difference is made; it is in reference to a different point of creation that determinations are made; and finally, it is in reference to the general intent of the creator that dispositions are made. Thus, since the Principle establishes three separate reference points—creation, death, and disposition—the doctrines should be described as moving precisely from A to B in an inter vivos disposition regardless of any power of revocation in the creator, or a movement

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190. Bergin & Haskell, Preface to Estates, supra note 2, at 228-29.

191. The Second Look Doctrine applies to powers of appointment and specifically to special and general testamentary powers which would result in a void interest if they are capable of being exercised beyond the period of the Rule. The doctrine allows us to wait until the power is exercised before determining the validity of the appointed interest and then to decide on validity based on exercise rather than creation. Warner v. Whitman, 353 Mass. 468, 233 N.E.2d 14 (1968); Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952); Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938).

192. There are numerous specific repair attempts by statute and judicial determination. They include fertile octogenarian cases, administrative contingencies, and age contingencies in excess of 21 years. The English statutes make these specific repairs in one statute. See Perpetuities and Accumulations Act, 1964, ch. 55; Perpetuities Act of 1966, N. Ir. Pub. Gen. Acts, ch. 2, § 3.

from A to C when a second look is required to find validity under a power of appointment created at the A event but not exercised until after the death of the donor, at the point of death of the donee.

Because reform in the United States has not been captured in one specific piece of legislation, any statutory or judicial reformation may appear disjunctive and perhaps be misapplied or neglected. If the Principle serves as a vehicle for assembling all of the reform measures it will be an effective part of the scrivener’s professional responsibility to his or her client. Furthermore, as the new biology presents more challenges to Gray’s classic rule against perpetuities, the Principle shall provide the perspective for growth.

CONCLUSION

Transfer of wealth has changed in the United States. International estate planning, inter vivos arrangements, substantial compliance, and new biological possibilities for persons have placed added demands upon scriveners and clients. But the same standard applies today as it has throughout history. That is, the scrivener owes a professional responsibility to his or her client that demands clarity and precise utilization of all existing and future legal formulations. The task is complicated. The Principle does not change any of the rules or formulations, but does provide a logical approach towards them.

Doctrines such as lapse, survivorship, death without issue, and the Rule have developed separately and at the same time collectively. Each can be studied and defined, along with the auxiliary rules and modifications. The Principle does not seek to add to these, nor is it a further explanation of any one of them. The Principle is a perspective, an approach by which all of them can be schematically presented. Finally, by directing the scrivener and the client through four time frames and identifying three distinct events, the Principle seeks to clarify language and allow for direction. The Principle is a tool for greater professional responsibility and another attempt to further illuminate old rules so that understanding might begin “burning anew among the old stones.”

caused the movement from inter vivos creation to death of the creator).

194. E. Waugh, Brideshead Revisited 351 (1945).