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SOME SUGGESTIONS TO WILL DRAFTSMEN: COMPLEX DISPOSITIVE PLANS IN GENERAL, CLASS GIFT PROVISIONS IN PARTICULAR*

DICKSON PHILLIPS†

During the last dozen years, the North Carolina Supreme Court has been called on some one hundred times to construe dispositive provisions in wills. A compassionate but fair appraisal of these cases discloses that without much question at least fifty-five of the wills construed bear the definite imprint of a lawyer’s hand.1 The admonition by Professor Leach2 to the prospective will draftsman is brought to mind: “Success is achieved only if no litigation develops out of this instrument. It is failure if the instrument has to be litigated, but the litigation sustains your plan. It is shameful failure if litigation defeats your plan.”2a Even after we temper the harshness of this judgment as to the draftsman whose plan is upheld in litigation with the remembrance that even a perfectly good will may be put to litigation by a bull-headed lawyer or an unreasonably cautious trust officer,3 the essential point is still valid and needs no belaboring.

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*This article is based substantially on a paper presented orally and in manuscript at the North Carolina Bar Association’s Institute on Drafting Legal Instruments of April 14 and 15, 1961. Its form, conditioned by the purpose of original presentation, is retained practically unchanged here, hence the occasional conversational vernacular, and the relegation of an amount of supporting material to footnotes which is perhaps inordinate to this form of presentation.

†Associate Professor of Law, University of North Carolina.

1 This necessarily involved an exercise of judgment based on no more than a look at such language from the wills as was quoted in the reports, but it is believed to be accurate within the qualifications noted. The analysis was limited to cases construing actual dispositive provisions. Those analyzed run back through volume 230 of the North Carolina Reports.

Just by way of general and purely academic interest, it is possible to detect very little evidence of any slacking off in the will construction business over these last twelve years, although more than half of the one hundred cases were before the court in the first five years of this twelve year period. Neither can anything be declared as to the relative drafting abilities of modern practitioners as against departed brethren from this very limited exploration, since the wills construed were drafted over a great number of years. The material analyzed thus has no virtue except that it is the latest available to demonstrate how we are doing in will drafting.

2 Leach, Planning and Drafting a Will, 27 B.U.L. Rev. 157 (1947).

2a Id. at 159-60.

3 Although the court may “construe” such a will by saying that it does
By way of avoiding too much tilting at windmills or knocking down of straw men, this paper deals with those problems of conve-

nancing by will which the more recent cases demonstrate to be the most live and frequently recurring ones, hence those which should reflect the most typical testamentary desires and therefore those which are most frequently apt to recur as problems for the will draftsman in the future.

It is clear from these cases that our most persistent and bother-

some problems lie in two general areas: (1) in handling plans which require the disposition of various property interests to various suc-

cessive takers on various contingencies of survivorship, and (2) in handling class gifts generally. These problems continue to beset us in simple wills and complex ones, in the creation of legal and equitable estates and in disposing of what are obviously interests of rather small value as well as those of obviously substantial value. Consideration of these two categories will be made in order.

**MULTIPLE INTERESTS, MULTIPLE TAKERS, MULTIPLE CONTINGENCIES—ESSENTIALLY A PROBLEM IN LOGIC AND PRECISION OF THOUGHT AND COMMUNICATION**

Problems in the first category obviously can have severe implica-

tions of a purely legal nature, and lack of knowledge of the rules can certainly play havoc here in an endless variety of ways. However, their solution also involves what is essentially an exercise in sheer logic having little direct relation to any apprehension of legal rules as such. In other words, their solution will require a develop-

ment and statement of a coherent plan involving three sets of factors not need construction. *E.g.*, Rhoads v. Hughes, 239 N.C. 534, 80 S.E.2d 259 (1954); McCallum v. McCallum, 167 N.C. 310, 83 S.E. 250 (1914).

*In the original presentation, a third category, "intermittent brushes with the Rule Against Perpetuities," was listed. However, cases in the period covered which have dealt with this rule have so generally had it in the context of class gifts that herein it is treated only as it has special terror in that context. A full scale analysis of the rule's reign of terror in our state is deserving of separate treatment.

*But aside from a few real rules of law such as the Rule in Shelley's Case, the rules invoked by courts in construing this kind of dispositive plan are rules of construction aimed essentially at resolving problems raised simply by failure to think or communicate clearly, rather than by any failure to apprehend the existence and application of the rule now invoked. Thus the rules of "early vesting," of "substitutional construction" and the like so frequently called into play in respect of these multiple interests-takers-contingencies dispositive plans reveal not so much a lack of learning in the law as a more simple lack of orderly processes of thought and communica-

to be dealt with in proper relation and reaction to each other: property interests, beneficiaries to possess them successively, and contingencies which control as to interests and beneficiaries in a variety of ways. Without much question the cases reveal to this writer that it is the nonlegal aspect of the problem that predominates in giving our draftsmen trouble. The errors are of two basic types:

(1) Failures simply to analyze and visualize on a purely logical basis the interaction of different dispositive provisions, with the result that they are plainly conflicting or at least so ambiguous when considered in conjunction that court interpretation must be sought.

(2) Inadvertent or inartful use of words, punctuation or syntax which, simply as a matter of utilizing language to communicate meaning, fails to express an unmistakable meaning, so that court interpretation becomes necessary.

Very little which is not trite or merely a counsel of perfection can be said about these errors to practicing lawyers. They probably, and presumably do, usually arise out of the normal haste of a typical law office doing a volume of business and continually fighting deadlines, rather than out of any basic deficiencies in logical thought processes or grammar. Certainly nothing worthwhile on balance could be gained by probing into any number of “horrible examples” by way of showing how not to do it. The result would probably be just a few more ulcers as the thought occurs, “didn’t I say just that in Bill Jones’ will a few years ago?” and nothing more.⁶

⁶ Just as one recent example, cited here to illustrate the problem in typical form, and in complete sympathy for the draftsman dealing with a tough problem, see Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960). Here, the draftsman set up a twenty year residuary trust. In his income article he provided that A (among others) should take four per cent of income for the duration of the trust, with proviso that if A (along with other income beneficiaries) should die before termination of the trust without surviving issue, his share of income should go into the residual portion of income allotted to B, originally set up at fifty-two per cent. In the corpus distribution article, he provided that A (among others) was to take four per cent of corpus upon termination of the trust, and that B was to take the “residue” of corpus in a continuing trust for her life, with remainder after B's equitable life estate to A, or that this “residue” should go to A at the termination of the twenty year trust if B did not survive its termination. A proviso was inserted to the effect that if “either of the above parties” (corpus distributees) should die prior to termination of the twenty year trust, without issue surviving, such parties' share should inure to the “residue” of the trust estate. A died prior to termination of the twenty year trust estate, with B then still living.

Question: Did A at death have a vested interest in his four per cent income share of the twenty year trust or a vested remainder interest after B's
We are all conscious of both the dangers here and of the possibilities that any of us in haste may fall prey to them. Perhaps three fairly obvious suggestions may however be appropriate on this "non-legal" aspect of drafting wills requiring this type dispositive plan.

(1) *No will should go out of a law office until some attorney in the firm other than the draftsman (or draftsmen) has read it.*

The draftsman, if the will is at all involved, has so immeshed himself that frequently he may fail to see the forest for the trees. One provision may have given him so much trouble that his attention is distracted from its interaction with others. Certainly flat failures to communicate clearly through faulty grammar should be caught this way. But the draftsman should go further than just asking an associate to "read the will over." He should direct examination of it along particular lines; for example, "do you understand what is to happen if Jane dies before her children all attain the age of twenty-one?" In other words, this checking should be something beyond the mere "proofreading" which will be done in addition as a matter of course.

A perusal of cases involving this type error in drafting leads to the very strong conviction that most of them would have been caught by any other lawyer reading critically and free from direct involvement in the draft.

(2) *Where possible and practicable, this process should be repeated with the executor and trustee named in the will.*

Here again the checking process should be directed toward spe-

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expectant equitable life estate in the residual portion of the twenty year trust corpus, which was devisable by A, or were either or both of these shares defeated by the operation of the defeasance clauses relating to income and corpus shares upon A's death without issue prior to the termination of the trust?

Held: After considerable travail, A's remainder share in the corpus after B's equitable life estate expectant upon termination of the trust was vested in A at death of testator and not defeated by the corpus share defeasance clause, which was "construed" to relate only to "first takers" of corpus shares; hence this interest was devisable by A. But A's income share was defeated by the income defeasance clause and inured immediately upon his death without issue to B's residual income share.

Moral: The total implications of the contingency that A might predecease the termination of the twenty year trust were not sufficiently visualized or taken into account in drafting the defeasance clause, so that it did not deal specifically enough with such a contingency and left room for considerable doubt when it eventuated.
cific problems of construction; for example,

What do you understand would be required and how would you proceed in administration of this estate (or trust) pursuant to this item, if during your administration the life beneficiary should die, survived by two children over twenty-one and one minor grandchild?

This process is obviously most apt to be helpful where there is a corporate executor or trustee whose officer can be expected to read with an experienced and constructive eye, but even in the case of individual executors it may be helpful. Of course, this procedure is standard where corporate executor-trustee has participated in the planning stage, but frequently lawyers are called on to draft a will naming as fiduciary a particular bank or trust company with whom the lawyer has no continuing contact. In these cases, aside from the very real help that may be had from the standpoint of checking the draft, it is a good idea from another practical angle. When the fiduciary is contacted at this stage, it is given a chance and is actually put in the position of being required to make a judgment now as to the efficacy of the will's various provisions. This is much better than letting it await the event of testator's death when for the first time it is called on to look at the will. At such time it is apt to look at it with a fairly jaundiced eye, the jaundice probably increasing in direct proportion to the distance from its office in the city to the draftsman's residence in the hinterlands. This of course means that just in the nature of the case it is much more apt in such a situation to feel the need in complete good faith to "take the will to court" to construe some provision, as to which it might have had the opportunity earlier to exercise its judgment.

(3) Most importantly, in drafting the will, a format should be consciously adopted which of itself will help to keep the draftsman's thinking straight.

The impression is readily gained from reading "hashed-up" dispositive provisions in wills that if the cause of the difficulty could be mechanically analyzed, the analysis would reveal that somehow the draftsman just got completely lost in trying to keep track of the various property interests, the various beneficiaries and the various alternative contingencies of survivorship at once. And it is usually plain that to a great extent, the "lostness" may well have arisen primarily out of the fact that he just "struck out writing." Ob-
viously this reflects to some extent no more than the simple injustice that "some have it and some don't" in terms of orderly thought processes, but fatalism is not the only answer here. To a very real extent, a person who does not possess the orderly type mind which dotes on symmetrical organization can force himself almost bodily into sufficient orderliness to avoid this type drafting problem. This involves adopting a plan of organization of the dispositive sections of the will whose very structure will tend to keep him on track despite himself and despite the complexity of his conveyancing requirements.

The three general groups of variables in any conveyancing plan are, as above mentioned, beneficiaries, property interests and alternative contingencies, usually of survivorship. The mechanical difficulties of handling these three throughout so as to close all the gaps and leave no loose ends in their interaction is what actually causes the trouble.

A format for drafting dispositive provisions whose very structure will help the draftsman follow the devolution of each particular property interest into and out of each beneficiary in proper reaction to each contingency contemplated by the plan, is a tremendous mechanical aid. Its basic function should be to help him mentally and in his writing to pick up and deal with each property interest (or group of property interests intended to follow the same path of devolution) separately and completely apart from any other. This will involve ushering the property interest as intended safely past the lapse, non-lapse possibilities inherent in the initial survivorship contingency of every will, then past every subsequent contingency contemplated by the plan, and finally depositing the fee safely and securely past the last alternative contingency where it can be left while the draftsman turns his attention to the next property interest to repeat the process.

For this writer, the use of an outline form employing separate articles with lettered and numbered sections and subsections, each devoted in its entirety to the disposition of one interest or group of interests going the same way, is by far the best device. Its basic virtue is that it helps keep the various beneficiaries and contingencies "sorted out" and in plain view as the property interests are run by, into and through them.

As a simple illustration of the use of such an outline, suppose a testamentary plan under which T desires to give Blackacre to his
wife for life, with remainder in fee to a class composed of such of his children as survive the wife and the then surviving issue of such of his children as may have predeceased the wife, as tenants in common, per stirpes. If his wife fails to survive him, he desires that the property go in fee at his death to a class composed of such of his children as may survive him and the then living issue of any of his children who may have predeceased him. If neither his wife nor any of his children, nor the issue of any predeceased children survive him, he desires the property to go in fee to his church. And if his wife survives him and takes the life estate but is not survived at its termination by any of T’s children or the issue of predeceased children he desires the property to go to his church.

The drafting outline (without regard now to express conveyancing language to be used) would run like this:

Blackacre devised as follows:

A. If wife survives T, to wife for life, remainder in fee as follows:
   1. To children of T then living and issue then living of predeceased children of T, as tenants in common, per stirpes.
   2. If no children or issue of predeceased children of T then living, to church.

B. If wife does not survive T, to then surviving issue of T, immediate and remote, as tenants in common, per stirpes, in fee.

C. If neither wife, nor any immediate nor remote issue of T then survive T, to church in fee.

In this outline the premise of the article itself is the disposition of an identified item of property. The premise of each of the main sections and subsections is a different contingency of survivorship. Each lettered main section contemplates within itself the disposition of the entire fee upon the occurrence of the contingency which is its premise. And taken together they comprehend the complete disposition of the entire fee in this property under every alternative contingency which is contemplated by the plan, except here the one contingency of the nonexistence of T’s church at either of the potentially critical dates. Provisions against contingencies must of course stop at some point short of absurdity, and so long as the draftsman knows that he has stopped and just where that leaves him, this is all right. This structural device will certainly aid him in this
respect. And in this connection, it does not seem to this writer that the point of absurdity has been reached by always taking the course of devolution down to a final alternative disposition of the fee either into a corporate or governmental entity or into the residuary clause of the will.

Although the above illustration is of the simplest possible type of dispositive plan involving successive legal estates and class gifts, it is obviously adaptable for trust conveyancing as well, and for more complicated alternative limitations over of remainder or executory interests whether directly or through powers of appointment. The essential virtues can be retained by which the whole course of disposition can be easily seen and disposed.

There is no reason why this structural form should not be carried over from the initial outline drafting stage into the final will, retaining the actual lettered and numbered sections and subsections. Its virtues persist in the interpretative stage.

**CLASS GIFTS**—A SPECIAL CHALLENGE TO BOTH LOGIC AND LEARNING

Because wills are all addressed to the future and are necessarily planned in behalf of potential beneficiaries as they may exist or not exist at various future times, the class gift device is inevitable. It does the best job that can be done against the exigencies of the future by making flexible disposition to a group of persons not yet ascertained and designated only in terms of their common kinship to other specifically identified persons. The problems inherent in planning their use are logically obvious and well known in general, namely, what group of persons will a particular descriptive word or phrase designate; will the class as designated possibly fluctuate in size; when will its exact membership be finally determined; what

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7 The literature on this topic is of course exhaustive. Some general references: 5 AMERICAN LAW OF PROPERTY §§22.1-.63 (Casner ed. 1952); Casner, Class Gifts—Definitional Aspects, 41 COLUM. L. REV. 1 (1941). For two articles emphasizing North Carolina cases, see Bolich, Some Common Problems Incident to Drafting Dispositive Provisions of Donative Instruments, 35 N.C.L. REV. 17 (1956); Long, Class Gifts in North Carolina, 22 N.C.L. REV. 297 (1944).

8 That these do pose special and persistent problems to our will draftsmen is indicated by the fact that of the fifty-five wills assumed from the survey to be lawyer-drafted, nineteen involved class gift constructional problems.

9 For classic formulations of the technical nature of the class gift with comments upon the relative accuracy, see 3 POWELL, REAL PROPERTY ¶ 352 (1950) [hereinafter cited as POWELL].
SUGGESTIONS TO WILL DRAFTSMEN

shares will the members as finally determined take; when will the shares of the various class members "vest"; and what practical significance is there in "vestedness"?

Handling these problems obviously requires that same degree of sheer logic and precision of thought and communication divorced from any requirements of special legal learning above discussed. Indeed it is usually in the very context of the multiple interests-beneficiaries-contingencies dispositive plan that we come upon the class gift disposition as one of the constituent parts of the over-all plan. But in respect of this particular form of disposition it seems clear that we have a special need for specific knowledge of the legal rules as such. And in this connection it is at least possible that our continuing difficulties with class gifts stem at least in part from traditional methods used in imparting this body of knowledge to student and practitioner. Those methods by and large have emphasized the surgical effect of the rules as applied to completed drafting from the hindsight point of view of decided appellate cases, rather than from the preventive foresight end of the practitioner's art. The rules are the same it is true, but the angle of approach may well determine how meaningful they are in particular usage.

Furthermore, it seems likely that to the extent there has been general concern on the part of will draftsmen for the special problems involved in using class gifts it has been confined to concern for correctly designating the class assumed by the draftsman to be that contemplated by the general testamentary plan proposed, always at least somewhat inartfully, by the testator. This assumes two things which the conscientious draftsman cannot assume: first, that the testator has considered on a knowledgeable basis the extent to which various contingencies of survivorship may affect his actual desires in respect to the exact group of persons he desires to benefit; and, secondly, that the testator is not concerned with controlling or that it is beyond the power of the draftsman by artful drafting to control not only the group designation but some of the incidents of ownership of the property interest by the class members after the gift by...
will becomes operative. The first assumption is most probably not accurate; the second is surely false. The draftsman has the initial responsibility, once a class type gift is suggested by the general plan proposed, of pointing out these possibilities. To do this, he must have working acquaintance with some of the more esoteric aspects of class gift law. For his full task is no less than this: to mould the class gift required by his testator's informed and educated testamentary plan so that it includes the people the testator desires, at the time he desires, taking the shares he desires, and with the incidents of ownership that he desires. This task will assume different proportions depending upon the particular pattern of the testamentary plan and of the exact kind of class gift it contemplates.

In the belief then that a more functional approach may be helpful, our specific consideration of class gift problems will take as starting points not the "rules" of class gifts as such, but some commonly recurring patterns of testamentary plans which suggest the use of class gifts. We will then work from there, looking forward to the controlling effect of the rules. This is the way in any event that the problems come to the draftsman, in unlabeled raw packages of garbled facts and uneducated testamentary desires, and with no visible red flags flying.

Three prototype patterns\(^\text{11}\) are suggested by the survey of recent cases. To avoid repetition of material they are taken up in the order of the simplest, the not so simple, the most difficult, with problems common to all three being considered in connection with the first and simplest, and not repeated.

**Pattern number 1:** Testator with child or children now living and the practical as well as legal possibility of having more (or of adopting more), wishes to give certain property "outright" to "my children."

**Problems Involved**

This type plan raises the very simplest "class gift" problems possible. Essentially they are confined to: (a) accurately designating the class really contemplated as object of testator's bounty; (b) specifying the size of the respective shares of the members; and

\(^{11}\) The variety of possible patterns of class gifts is of course endless, but the three chosen as prototypes for this discussion may fairly be considered on most recent evidence to account for the vast bulk of our testamentary plans calling for class gifts. Of the total of nineteen "lawyer" wills dealing with class gifts in our study, fifteen involved one or the other of these three prototypes within reasonable variations.
(c) defining the method of holding these shares. The plan plainly contemplates a once and for all, clean-cut vesting time, *i.e.*, testator's death, prior to which time there really is no class to fluctuate up or down, and after which time it is effectively closed for all time.¹²

In estate conveyancing terminology, the plan contemplates the conveyance of interests to the members of a desired class to vest in both title and possession immediately and indefeasibly at the testator's death.

**Solutions: Possible and Suggested**

In choosing the appropriate group designation language, the testator may well suggest simply naming the children now living, by name, because "I want their names in the will," or "I won't have any more," or "If any more come along, we can 'change' it." This is of course one way to designate the "class." The testator's reasons are all plausible, and if either of his prophecies come true, no real harm will be done.¹³

But compelling reasons exist for not doing it this way. It

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¹²Although it is of course possible to consider that the class is in existence from the date of execution of the will and that it may then be deemed to fluctuate in size until the will becomes operative by the addition and loss of members in that interim. So viewed, only the inclusionary aspect of the general rule of construction can be involved in this pattern of gift since the death of the testator simultaneously with the effective date of the will closes the class if it is deemed to have been in existence already. The inclusionary aspect of the rule of construction is applied to give the result, in the absence of contrary expression of intent, that all children of testator whenever born may be included. *5 American Law of Property § 22.42, at 353* (Casner ed. 1952); *3 Powell § 352, at 87*. Cf. Morrell v. Building Management, Inc., 241 N.C. 264, 84 S.E.2d 910 (1954).

¹³This of course does not really designate a "class" within technical connotations of the term. The essence of the class gift concept is actually the exact reverse, that the gift is to an entity and not to any persons who make up the entity. *5 American Law of Property § 22.4* (Casner ed. 1952). As pointed out by Mr. Justice Seawell in Coddington v. Stone, 217 N.C. 714, 722, 9 S.E.2d 420, 425 (1940), where the testator had made a gift to three sons by their respective names: "As to the quality of the estate which thus vests, it must be noted that the beneficiaries are named as individuals, not as a class, and the 'roll call' principle does not apply."

We are simply suggesting here that by way of providing under this pattern of testamentary plan for the multiple objects of his bounty, a testator may express a desire to denominate his children by their several names, that this really is not the best way to accomplish what his real intention probably is, and that the class gift device is. Although if, as was the case in *Coddington* for example, there are no losses from the group named nor additions to it of others in the same degree prior to testator's death, the disposition will work out just as if the testator had used the real class gift device. In other words, his "roll call" by will happens to coincide with what a real class gift roll call would have produced at his death.
raises lapse possibilities which the anti-lapse statute\textsuperscript{14} may or may not handle satisfactorily. More importantly, it fails by its terms to provide for after-born or after-adopted children, thus raising pre-termitted children problems.\textsuperscript{16} And finally, it is never really wise to rely on making changes in wills to take care of contingencies, when simple provision against them can be made in the current will.

With this possibility dismissed, the next obvious one is to utilize language descriptive of the desired class which avoids lapse and pre-termitted children dangers and yet includes the desired beneficiaries. Here it is extremely likely that when the matter is discussed, as it should be, the class which the testator really wants to designate includes not only his children who survive him, but also the then living issue of such of his children as have predeceased him; and when informed, as he should be, of the vagaries of per stirpes versus per capita and common versus several\textsuperscript{18} ownership, it is probable that he will want them to take per stirpes as tenants in common. Assuming this to be the educated testamentary intention now, what words will do the job most certainly?

Here, despite the fact that both words do have "weasel" possibilities when used in some contexts, "children" and "issue" are well enough stabilized in legal meaning for this purpose, and so obviously satisfy ordinary habits of expression that, properly modified when required, they are the most appropriate—"children"\textsuperscript{17} to express

\textsuperscript{14} N.C. GEN. STAT. §§ 31-42 to -42.2 (Supp. 1959). See generally Leath, \textit{Lapse, Abatement and Ademption}, 39 N.C.L. Rev. 313 (1961). And for a recent case illustrating the untoward consequences of a hybrid class gift disposition (presumably non-lawyer here) on which the anti-lapse statute could not even operate to save against inartfulness, see Hummell v. Hummell, 241 N.C. 254, 85 S.E.2d 144 (1954), where the gift was to testator's children, \textit{A, B, C and D} or survivors; \textit{B} predeceased testator; testator was survived by \textit{A, C and D} and issue of \textit{B}. \textit{Held: A, C and D} take to exclusion of \textit{B}'s issue. The testator would have been better served by a denomination of \textit{A, B, C and D}, without adding "or survivors", for then the anti-lapse statute would have preserved \textit{B}'s interest for his issue surviving the testator. Of course this assumes that the testator really intended issue of predeceased children to share. On this assumption, the best way would have been a true class gift designation which would include such issue.

\textsuperscript{15} N.C. GEN. STAT. § 31-5.5 (Supp. 1959).

\textsuperscript{16} It is possible to have a true class gift with the normal incidents even though specific share gifts, in severalty, and perhaps unequal, are provided for the members. 3 Powell § 352, at 88. This of course may be required in respect to some kinds of property interests. See note 23 infra.

\textsuperscript{17} A disposition by will to "\textit{A} and his children" will invoke one of the famous two resolutions in \textit{Wild}'s case as applied in slightly modified form in North Carolina—the first resolution, so-called, giving \textit{A} a fee if he is childless at testator's death. Silliman v. Whitaker, 119 N.C. 89, 25 S.E. 742 (1896), and the second resolution giving \textit{A} and such of his children as are
immediate lineal descendants of the testator, and "issue" to express either immediate or remote lineal descendants of testator or of pre-deceased children of the testator.

Consequently, we could use substantially the following form of words: "To my surviving children, and the lawful issue surviving alive at testator’s death the fee as tenants in common. Snowden v. Snowden, 187 N.C. 539, 122 S.E. 300 (1924). And see Long, supra note 7, at 299, where the author comments hopefully that such language will only be found in "home-made wills."

In any event, it is only in this context that the word "children" has any particularly dangerous hidden rule-of-law aspects. It does not include grandchildren, nothing else appearing. Taylor v. Taylor, 174 N.C. 537, 94 S.E. 7 (1917). But see Edwards v. Edwards, 241 N.C. 694, 86 S.E.2d 268 (1956). Consequently, it is the word best suited for the obvious purpose of describing a class or portion of a class consisting of immediate offspring. However, as pointed out in notes 20 and 21 infra, in unmodified form it can raise constructional problems in respect to its applicability to such persons as step-children, adopted children, and illegitimates. See generally 3 Powell, ¶ 358.

This word has caused more trouble in getting settled down for its obviously useful purpose of describing offspring remote to any degree, as well as immediate, thereby serving in place of a lengthy chronicling of "grandchildren, great-grandchildren, etc." At least one early North Carolina case restricted its meaning to "immediate offspring." But later cases have indicated that it may have a broader meaning, to include descendants of remote degree, or be confined to children, depending in each case upon the context. E.g., Ford v. McBrayer, 171 N.C. 420, 88 S.E. 736 (1916); Etheridge v. Realty Co., 179 N.C. 407, 102 S.E. 609 (1920); Bradford v. Johnson, 237 N.C. 572, 581, 75 S.E.2d 632, 638 (1953), stating that "the word 'issue' ... is generally construed as a word of limitation and means 'lawfully begotten heirs of the body.' ... Or its meaning may be ... all persons descended from a common ancestor." Certainly North Carolina has never taken the position of presuming that "issue" in any context means lineal descendants of whatever degree, as some jurisdictions have. 5 American Law of Property § 22.36 (Casner ed. 1952). We still look to the context, and for this reason it is safest to affix "immediate or remote" where this is intended in order to make the intention plain. But here, one word of warning should be injected; if "issue" is to be used to describe a class taking after a preceding life estate in an ancestor, it must also be made clear that "issue" is intended to refer there only to those persons living at the date of the death of the life tenant to avoid the Rule in Shelley's Case. This would of course negative the idea of bodily heirs in indefinite succession necessary for invocation of the rule. Cf. Ford v. McBrayer, supra. See generally 3 Powell, ¶ 360.

This and all succeeding suggestions as to form are given with the admonition relevant to all forms, no matter how responsible their authorship, that they are apt to be snares and delusions if the user is not aware of the total range of implications involved in their use in any particular context.

This adjective "lawful" forestalls any illegitimate issue. Use of it would have to be a matter of judgment and taste. This is indicative of the fact that any number of other possible specific restrictions could be important to the testator if brought to his mind—for example, would he want to include only issue by first wife or stepchildren? But this has to stop somewhere, and probably the best rule for the draftsman is to leave sug-
me, immediate and remote, of such of my children as may have predeceased me, per stirpes, as tenants in common.” To this may be appended, if it conforms to the testator’s informed desire: “Children and lawful issue as herein used include adopted children whether of mine or of any of my children or grandchildren,” together with any other specific modifications suggested by peculiar domestic considerations.

The possibility of nonsurvival of a testator by any of the designated class of course exists, however remotely. An appraisal of this should be made and a substitutional gift expressly provided for or an educated decision made to leave this to the mercies of the future.

**Result: In Terms of Legal and Practical Consequences**

Each class member surviving testator will take an immediately indefeasibly vested, full possessory, alienable inter vivos, descendible and devisable (assuming fee gift) interest, per stirpes, which will thereupon be marketable as a practical matter either alone or in conjunction with other class members.

**Pattern number 2: Testator desires to make a gift to take effect immediately at his death, either outright in fee or of specific shares of income** for a term of trust, to the children of some living person

gestions of this type matter, usually involving peculiar domestic considerations, to the testator after pointing out all the possibilities. In this connection see 5 AMERICAN LAW OF PROPERTY § 22.38 (Casner ed. 1952).

21 This will not necessarily be the result if not spelled out. We are in real confusion here. A gift to “children” presumptively includes adopted children under appropriate circumstances. Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943); a gift to “issue” presumptively does not include adopted children. Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); a gift to “grandchildren” presumptively does not include children adopted by testator’s children. Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960); Note, 39 N.C.L. REV. 203 (1961).

22 If to be followed by a later distribution of corpus to the same class members and in the same proportions, no drafting problems different from those involved in an immediate gift outright are raised. But if (a) the shares of income are not specified (i.e., discretionary with trustee), and (b) the distribution of corpus is to be to the same class members or their representatives a problem of possible violation of the Rule Against Perpetuities is raised—i.e., the distribution must be within lives in being plus twenty-one years and the period of gestation, so that a time for distribution pegged to attainment by members of the class of ages in excess of twenty-one years would, on current authority, violate the rule. Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960), the subject of a current note in this Review, 40 N.C.L. REV. 151 (1961). And see generally 6 AMERICAN LAW OF PROPERTY § 24.19, at 61 (Casner ed. 1952).
other than himself—for example, to the children of his son A, or of his brother B.

The Problem

This raises the basic problems considered under pattern 1, plus an important additional one. Here the death of the testator does not in and of itself solve the latent class gift problem of possible increases in the size of the class after the will "speaks." Hence, decision as to his real intention in this respect must be made, and correct drafting then be used to effectuate it.

In estate conveyancing terminology, the problem is one of conveying to the members of a desired class, which by its nature may increase in number after the testator's death, interests to vest simultaneously in title and possession at least as early as testator's death.

Solutions: Possible and Suggested

Here again, and for the same reasons, the device of designating the "class" by actually naming the presently existing potential members should not be used. Here again, the precise words most appropriately descriptive of class membership are "children" and "issue," with such necessary modifications of these words as are required by the particular family situation. Here again, the

Note that this pattern as stated involves children of a presently living person other than the testator. If the gift is to be to the children of a person not presently alive, we have exactly the same situation in respect to impossibility of class increase after the testator's death that obtains under pattern 1, and so would be spared this problem.

See generally 3 POWELL ¶ 362.

The anti-lapse statute would not operate to preserve a gift to issue of predeceasing specifically named nephews, for example, unless such nephews would have been heirs of testator had he died intestate, a possibility probably remote and certainly unpredictable at time of drafting. It would operate in absence of expressed contrary intention to preserve a gift to issue of predeceasing specifically named grandchildren. See note 14 supra. But why rely on the statute when the result can be accomplished by an appropriate class designation; the court would probably be called on as a matter of precaution to invoke and formally record the working of the statute. This is to be avoided if possible even if they invoke it just as we knew they would.

Although the persons contemplated by this pattern may actually also be described as "nephews," "grandchildren," or similar descriptives, there is in each case a normally equivalent expression which employs the word "children" or "issue." Thus nephews and nieces are the children of specified or group-designated brothers and sisters of the testator. And although the unmodified use of these alternative descriptive terms raises no more constructional problems than does the unmodified use of children and issue (for example, does "nephew" include adopted male children of testa-
testator will probably, on an informed basis, want the class to include not just children of son A or brother B but also issue of children of son A or brother B who may have predeceased testator. But a new decision is required here with respect to the time within which this class will close and within which the members’ shares will vest indefeasibly. The basic alternatives possible are: (a) fix the class as being just those issue per stirpes of son A living at the date of the testator’s death—“closed class plan,” or (b) fix the class as being the issue per stirpes of son A living at the date of the testator’s death, plus any children of son A born subsequent to that date, either for a specified time thereafter or out to the limit of son A’s death—“open class plan.”

The closed class plan has the virtue of simplicity of structure and of making for immediate marketability as a practical matter of the class members’ shares immediately upon their vesting at the testator’s death, but it has an inequity and artificiality about it in that it makes a distinction between kinsmen on the basis of birth before or after a date having no relevance to the cause of beneficence, presumably common kinship. The open class plan has the virtue of equity in this respect, but the disadvantages from the class members’ viewpoint of the general inconvenience of owning property on the awkward basis of “partial defeasibility”—i.e., the possibility at any time that ownership shares may decrease quantitatively upon birth of a new class member. The most serious disadvantage here is of course the practical restraint on free marketability (as distinguished from legal alienability) which this imposes. Of course, tor’s brothers and sisters), it would be preferable to use the words which by case decisions have acquired the most stabilized meanings. We can of course get some weird results which indicate that these alternative forms of expression are not legally equivalent in some contexts; for example, apparently under current North Carolina authority “children of my son A” would presumptively include an adopted child of son A, whereas “my grandchildren” would not presumptively include that same adopted child of the testator’s son A. See note 21 supra. The point is of course that specific modification of whatever group word is utilized had best be made to insure carrying out whatever the testator’s wishes with respect to adoptives may be. See generally 3 Powell ¶ 359.

Cole v. Cole, 229 N.C. 757, 51 S.E.2d 491 (1948), is perhaps the best “hindsight” illustration of both the hazards of interpretation of inartful attempts to create this type of class gift, and of the incidents once it is found. Among other problems, the case presented exactly this problem of unmarketability of the interests by such a class gift. The court was then not inclined to resolve the problem itself, but the legislature in 1949, apparently prompted by the decision, enacted G.S. § 41-11.1, which allows sale, lease or mortgage by special proceeding of property so held by such a
any real potential inequity involved in a closed class plan would vary in relation to the relative ages, actual ages and other conditions of testator, son $A$ or brother $B$ and potential class members as of the time the will is drawn.

Since the main considerations here seem to relate primarily to convenience of ownership under one or the other of the plans, decision may well be based upon the kind of property interest involved. That is to say, ownership of land in fee as tenants in common is not particularly awkward under circumstances involving the possibility for a limited time of quantitative decreases in undivided share sizes, particularly if the land's main use is for rental income purposes, or if the situation is such that common management can be expected to work out. Ownership of shares of stock would be a bit more awkward. But if, instead of outright fee ownership, the shares were merely term incomes shares anyway, where fluctuations would involve no more than bookkeeping entries, the disadvantage of simple inconvenience practically disappears.28

The important thing is to make an educated decision with due regard for these factors, and then to effectuate it with clear and precise drafting. Because failure to indicate clearly an intention to carry out one or the other of these basic alternatives in this pattern of testamentary plan is one of the most fruitful sources of class gift litigation.29 The court has to be called in to force construction either as open class or closed class when it is not plain which

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28 Hence the sub-rule of construction that in applying the so-called Rule of Convenience to force an inartfully constructed class gift of this kind into a closed class plan, into "early vesting," the courts will not be so bent toward this resolution where real property rather than personal is involved. See 5 AMERICAN LAW OF PROPERTY § 22.41 (Casner ed. 1952). And on the application of the Rule of Convenience generally and with particular respect to income shares, see Seawell, J., in Cole v. Cole, supra note 27, at 760-61.

the testator intended. This is of course the area in which we get invocation of the constructional "rule" of preference for early vesting—for example, for closed class plan (a) under our scheme, if the will has to be construed. This may well reflect the testator's intention, but why find it out this way?

One further awkwardness in estate conveyancing generally may be involved in utilizing the open class plan under this pattern. This would arise when at the date of the testator's death no issue of son A or brother B were living, but son A or brother B is living and hence potentially capable of having children, natural or adopted, for the duration of his life, whatever his then age. The occurrence of such a contingency should be considered whatever its apparent remoteness. Provision would be made against it deliberately by making an alternative gift over upon its occurrence. Otherwise, there presumably would be a resulting executed use in testator's heirs as to this interest, completely defeasible upon subsequent birth of a child to son A or brother B. This surely could not accord with testator preference given the facts.

Finally, with respect to the method of class member ownership of shares under one or the other of these plans, it would seem that the same considerations which controlled the decision as to open or closed class vesting plans would control here. That is to say, if open class ownership with its partial defeasibility aspect is chosen, tenancy in common rather than in severalty is practically a necessity for convenience of ownership prior to indefeasible vesting of finally fixed shares, and this in turn would depend primarily upon the exact character of the property interest.

If the "closed class" plan (a) were then deliberately adopted, the form of dispositive words should be, in effect: "To the children of my son A who survive my death and to the then surviving issue of such children of my son A as may have predeceased me, per stirpes, as tenants in common."

If, on the other hand, the "open class" plan (b) were deliberately

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30 Cases cited note 29 supra; see generally 5 American Law of Property §22.42 (Casner ed. 1952).
31 "The law indulges the presumption that so long as a man lives he is capable of procreation." Parker v. Parker, 252 N.C. 399, 404, 113 S.E.2d 899, 903 (1960).
32 It is generally held that the first distributee thereafter born takes the entire gift and holds it then subject to partial defeasibility by the subsequent birth of other class members. 5 American Law of Property §22.42, at 355 (Casner ed. 1952).
adopted, the form of dispositive words should be, in effect: "To the
children of my son A who survive my death, and to the then sur-
viving issue of such children of my son A as may have predeceased
me, and to any children of my son A born at any time after my
death, per stirpes, as tenants in common."

Results: In Terms of Legal and Practical Consequences

The "closed class" plan (a) will eventuate at testator's death
in indefeasibly vested interests owned per stirpes in common by the
then surviving children of son A and the then surviving issue of
predeceased children of son A. As to each such class member, his
interest, immediately upon testator's death is fully possessory, alien-
able inter vivos, descendible and devisable (if in fee), and freely
marketable as a practical matter.

The "open class" plan (b) will eventuate at testator's death in
vested, but partially defeasible interests, owned per stirpes as tenants
in common by the then surviving children of son A and the then
surviving issue of predeceased children of son A; the partial de-
feasibility as to each would be in favor of any subsequently born
children of son A, and would be proportionate to total class mem-
bership from time to time. Consequently, until such time as the
class is closed, i.e., death of son A plus period of gestation, the in-
dividual shares are practically unmarketable alone, although in con-
junction with all class members sale or investment might be accom-
plished by special proceeding under G.S. § 41-11.1.33

Pattern number 3: Testator desires to make a gift to take effect in
possession and enjoyment after the life of some other person than
himself, either outright in fee or of income for term of trust, to the
children of some other person (usually the person to whom the pre-
ceding life estate is given)34—for example, to son A for life, then

33 See note 27 supra.
34 If the preceding estate is in the unnamed parents of the potential class
members, for example, "to the children of A for life, then to the grand-
children of A," we can get a perpetuities rule problem by failure to specify
children of A living at the death of T or born within the period of the rule
thereafter. This is true in many jurisdictions and presumably in North
Carolina even if the fact is that A is ninety-nine years old at time of T's
death or is otherwise demonstrably incapable of further procreation as a
matter of biological fact at that time. This gives rise to the absurd applica-
tion of the rule euphemistically characterized as the Rule of the Fertile
Octogenarian. 6 AMERICAN LAW OF PROPERTY § 22.42 (Casner ed. 1952).
If this is the pattern of gift required, the safeguard against perpetuities
violation is to specify "living at my death" or to name those now living and
to the children of A.35

The Problems

This raises the basic problems incident to patterns 1 and 2, plus the additional ones arising from the fact that while postponement of enjoyment of possession of their interests by all the various class members is necessarily involved, there may be moulded a title-wise "vesting" of interests earlier in members of the class as they exist at the time of testator's death; that such preliminary title "vestedness" may fluctuate from time to time thereafter as members are born and die in the interim between death of testator and termination of "first taker" life estate; and that there are important attendant consequences to the legal and practical aspects of "ownership" of these class member interests from time to time during the pre-possession stage of vested ownership.

In estate law terminology, the problem is one of conveying to the members of a desired class remainder interests which may by their nature vary quantitatively as to each member between the time of vesting in title and the time of vesting in possession, and of so shaping this disposition as to make the primary dispositive plan certain of interpretation and of accomplishing the desired secondary consequences of ownership of interests thereunder.

Solutions: Possible and Suggested

The same considerations dealt with under the first two patterns would seem to control here also to: (a) preclude the superficially easy device of designating the "class" by specifically naming those children of son A living when the will is drafted;68 (b) suggest use of "children" and "issue" as most appropriate class designation words; and (c) include in the potential final class not only children of son A but issue of deceased children of son A.

The really difficult planning and drafting problems here again have to do with deciding and providing when this class will close provide for per stirpes representation of those named who predecease, or to provide "living at the death of T or born within twenty-one years thereafter," depending upon the actualities with respect to A's procreational capacity at the time of drafting. Id. at §22.7.

68 This pattern of course covers the often desired other half of a marital deduction trust, i.e., one-half to wife for life (terminable interest), then to my children, if A is widow of T.

69 Except under that variation of the basic pattern treated in note 34 supra, where it may be prudent to specify by name to guard against fertile octogenarian application of the Rule Against Perpetuities.
and the property interests finally vest in the then members indefeasibly. This is compounded here by the fact that under this pattern we may have a preliminary vesting, titlewise, in one group of persons and a final vesting, possession and enjoyment-wise, in a group which is differently composed as to actual persons, and that consequently, very practical questions may well arise in the interim as to the exact nature of the interest of any then subsisting class member. For example, can he as a practical matter convey his interest alone; may he join with others to convey; if he dies in this interim period, is the interest which he has devisable or descendible; is his interest subject to creditors’ claims and death taxes?

The basic live alternatives are: (a) fix the class as being the issue per stirpes of son A, immediate and remote, living at the date of death of testator—“closed class plan,” or (b) fix the class as being the issue per stirpes of son A, immediate and remote, who are living at the date of death of son A—“open class plan.”

Here, the closed class plan has the virtue of simplicity of structure, but the inequity of cutting off class membership on a basis having no real relevance to the presumable basis for the testator’s beneficence, simply common kinship. From the prospective individual class member’s standpoint it has the further virtue of immediate indefeasible vesting with attendant immediate free marketability and transferability by devise or descent (assuming an inheritable estate) of his separate share even prior to time for possession. These are possibly counterbalanced from the testator’s point of view by exposure of these individual interests throughout the preceding life estate to creditors’ claims, death taxes, and that very free transferability which may not accord with a real desire to secure possession and enjoyment of the property interest to just those persons of the class who are actually on hand to enjoy possession at termination of the preceding possessory estate.

The open class plan on the other hand accomplishes the testator’s probable primary intention by keeping the class open to include those

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37 Obviously alienable inter vivos and marketable, though the market may be limited unless joined by other remaindermen and life tenants. It is also transmissible by descent or devise prior to termination of the preceding life estate. Blanchard v. Ward, 244 N.C. 142, 92 S.E.2d 776 (1956).

38 Subject to claims of creditors. Bristol v. Hallyburton, 93 N.C. 384 (1885) (dictum); subject to federal and state death taxes. Coddington v. Stone, 217 N.C. 714, 9 S.E.2d 420 (1940), despite the fact that in this case enjoyment itself was postponed and death occurred prior to time for full possession.
members of it born after as well as before the testator's death. It has the possible conflicting secondary attributes of imposing an effective barrier to free marketability and to devisability of potential members' interests during the preceding life estate, and, by the same token, of protecting those "interests" from claims of creditors and death taxes.

If preference for the open class plan is suggested by the foregoing prime considerations, further precautions in drafting must be observed with an eye on the doctrine of destructibility of contingent remainders and its practical alternative, acceleration. This plan obviously contemplates that survival of the life tenant is a condition to actual enjoyment in possession by any class member. Depending upon the form of words used to state this condition, the class members' interests prior to termination of the preceding life estate will be either contingent or defeasibly vested. This can be of more than

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89 Legally alienable inter vivos it is true, but marketable as a practical matter only under the necessarily restrictive procedure provided by statute upon judicial determination that "best interests" of all parties in esse and not in esse would be "materially promoted." N.C. GEN. STAT. § 41-11 (Supp. 1959).
41 Mercer v. Downs, 191 N.C. 203, 131 S.E. 575 (1926).
43 Free from state and federal death taxes because although "contingent" and "defeasible" interests per se are subject to state inheritance tax. N.C. GEN. STAT. § 105-2(4) (1958), and to federal estate tax, using appropriate actuarial computations of value. INT. REV. CODE of 1954, § 2033, they are not taxable when the very contingency involved is the death of the party owning the interest; a state court determination of the nature of the interest in this respect is honored for federal estate tax purposes. See 2 MERTEN LAW OF FEDERAL GIFT AND ESTATE TAXATION §§ 14.38 -39 (1959).
44 The distinction is without question recognized in the North Carolina cases. E.g., Mercer v. Downs, 191 N.C. 203, 131 S.E. 575 (1926); Bowen v. Hackney, 136 N.C. 187, 48 S.E. 633 (1904), in both of which this quote from GRAY, THE RULE AGAINST PERPETUITIES § 108 (4th ed. 1942), appears: "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remaindermen, then the remainder is contingent; but if, after the words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but if any child dies in the lifetime of A. his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent." Fully analyzed, the defeasibility of the vestedness possible in this type class gift limitation is both total and partial. That is to say, the interest of any class member may be totally defeated by his failure to survive the life
academic definitional significance if the remainder interest limited to the class is a legal interest in realty and the preceding life estate is prematurely terminated. The classic solution of the common law was to destroy the remainder interest in this situation. The alternative to destruction is to accelerate the remainder interest. In the class gift in remainder situation, acceleration raises a further problem—does it result in closing the class as of acceleration date or may it still be held open for later additions out to the time the life estate would normally have terminated? Although the North Carolina court has only rarely applied the common law rule to destroy remainders found to be contingent, it has not abrogated the rule and it has in recent years indicated that it will not accelerate in order to preserve if the remainder interest is by definitional decision contingent. Whether such pronouncements may be said, tenant, and it is also continuously subject to partial divestment by the addition of new class members during the life estate's duration. This dual character is generally recognized as to the obvious consequences flowing from each aspect, although for classification purposes the Restatement's analysis of vested remainders will not permit of simultaneous dual classification as both "subject to open" and "subject to complete defeasance." The apparent illogic of this mutually exclusive classification scheme is demonstrated by the concession that one category may have some of the peculiarities of another. The doctrine has always applied only to destroy legal interests in realty. This pattern does, however, frequently involve a legal remainder to the class, even when there has been a preceding income trust for the life tenant, so that even under a testamentary disposition whose main features are equitable income interests, we may have this old common law destroyer lurking in wait for the corpus. See generally 1 American Law of Property § 4.61, at 514 (Casner ed. 1952).

The doctrine has always applied only to destroy legal interests in realty. 5 American Law of Property § 22.43, at 366 (Casner ed. 1952). This pattern does, however, frequently involve a legal remainder to the class, even when there has been a preceding income trust for the life tenant, so that even under a testamentary disposition whose main features are equitable income interests, we may have this old common law destroyer lurking in wait for the corpus. See generally 1 American Law of Property § 4.61, at 514 (Casner ed. 1952).

Acceleration is of course no problem where the remainder interests are indefeasibly vested, whether or not in a class. E.g., Baptist Female Univ. v. Borden, 132 N.C. 476, 44 S.E. 47 (1903). We have in recent years in North Carolina safely accelerated a remainder limited to a still open class, expressly leaving it open for future additions, with no suggestion of destroying it, and without labeling it either a "contingent remainder" or a "vested remainder subject to partial divestment." Neill v. Bach, 231 N.C. 391, 57 S.E.2d 385 (1950) (renunciation by life tenant, remainder was to "her children"). This was in accord with the generally accepted rule. 2 Restatement, Property § 238, comment e (1936); 5 American Law of Property § 22.43 (Casner ed. 1952).
strictly speaking, to be reaffirmations of the destructibility rule, they certainly must be acted upon as such by the will draftsman. And on this point, while it is possible to find suggested forms of words which should get the correct definitional decision and hence the correct consequential decision, it certainly would seem wiser to operate more directly on the problem. That is to say, instead of leaving the matter to the vagaries of the constructional rules of the common law of estates, the draftsman should provide against the premature impossibility of accelerating a “contingent” remainder. Wachovia Bank & Trust Co. v. McEven, 241 N.C. 166, 84 S.E.2d 642 (1954). The devise was to wife for life, in trust, remainder in fee to four named children, “if said children are living at that date. In the event any . . . children shall have died . . . surviving . . . issue . . . entitled to its parent's share. . . .” Testator was survived by widow and four named children. The widow dis- sented. Held: Remainders vested at date of testator's death, and so accelerated upon widow's dissent. But the court used language suggesting that this holding was made possible by its not having to tag these interests “contingent” remainders. So the danger remains of a possible untoward result because of labeling. These interests were certainly not indefeasibly vested at testator's death; they were either “contingent” or “vested subject to divestment,” and by accepted formulae the language is certainly ambiguous.

The distinction is in these terms both inadequate for accurate analytical purposes and without practical consequential difference in other contexts. This is being increasingly recognized by scholars and by the courts when called on to deal with the practicalities of property ownership in relation to specific problems raising the definitional problem—“contingent remainder or vested subject to partial or complete defeasance?” Thus we find Mr. Justice Frankfurter discarding the fine distinctions as not being properly determinative for federal estate tax purposes: “Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures not so largely directed toward intangible wealth.” Helvering v. Hallock, 309 U.S. 106, 118 (1940). And we have the American Law Institute in the Restatement of Property refusing to attempt any meaningful distinctions based upon “contingent” as opposed to “vested” in those generic terms. 2 Restatement, Property § 157, particularly 542 (1936) (“Note on Terminology”). Finally, we have in recent North Carolina cases, despite continued use of the terminology to describe what are apparently considered two distinctively different animals, little evidence of any practical differences flowing from the affixation of one label as opposed to the other. Compare, for example, the forms of disposition and the labels applied in Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960) (“to [A] for and during the term of his natural life and at his death to his children, and in the event any child shall predecease him, the issue of such child shall stand for, represent and take that portion. . . .” Held: “remainders in fee defeasible. . . .”), with those in Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960) (“for the term of her life and upon her death this trust shall terminate and the property vest in fee simple, share and share alike, in her children, the child or children of any dead child . . . taking that child's share.” Held: findings by the trial court that sale would be in the best interests of the “life tenant and contingent remaindermen” under G.S. § 41-11 sufficient to justify sale).
termination of the preceding life estate by specifically setting out what is to happen in such event both as to whether acceleration is to occur in the first place and then as to whether it shall result in simultaneous closing of the class or in its remaining open for a specified period.\textsuperscript{51}

After taking all these possible consequences into account the problem is to make a deliberate, educated choice of one plan or the other, and then to effectuate it by clear language which will not require "forced" construction by the courts. In this type attempted disposition to a class more than any other we have inartful drafting which requires interpretation. This of course is the pattern wherein uncertainty invokes first the rule favoring indefeasibly vested interests over defeasibly vested interests, and, in any event, defeasibly vested interests over interests subject to a condition precedent.\textsuperscript{52} This, as we have seen, favors early alienability, and it also incidentally affords needed protection from the Rule Against Perpetuities where drafting is faulty, but there are also countervailing considerations which frequently will cause such a forced preferential construction to defeat the testator's real intention.\textsuperscript{53} The trick is to draft so as to avoid the necessity for forcing.

If the closed class plan (a) were then deliberately chosen, the form of dispositive words to the class in remainder could be, in effect: "Remainder to such of the children of my son A as are living at the date of my death, and to the then living issue of such children of my son A as may have predeceased me, per stirpes, as tenants in common." And this should be followed by alternative remainder over in the event of nonsurvival of testator by any member of the class.

Whereas, if the open class plan were adopted, the form of dispositive words to the class in remainder could be, in effect: "Remainder to such of the children of my son A as are living at the date of death of my son A, and the then living issue of such of the children of my son A as may have predeceased my son A at any time, per stirpes, as tenants in common." This should be followed

\textsuperscript{51} Neill v. Bach, 231 N.C. 391, 57 S.E.2d 385 (1949), contained quotations which, although plainly dicta in that case, suggested that such expressions of plain intent would clearly control in effectuating testamentary desire upon a premature termination of life estate ahead of remainders. See generally 5 \textsc{American Law of Property} § 21.43 (Casner ed. 1952).

\textsuperscript{52} 5 \textsc{American Law of Property} § 21.31 (1952).

\textsuperscript{53} See note 37 \textit{supra}.
by provision for alternative remainder over in event son A is not survived by any members of the specified class. And here is the place also for the provision to cover the contingency of renunciation or other termination of the preceding estate. This could provide either for an immediate indefeasible vesting in such members of the designated class as might be living under appropriate conditions at date of the renunciation, or it could provide expressly for an immediate vesting in such class members subject to partial defeasibility in favor of after-born members of the class until the death of the life tenant.⁶⁴

Results: In terms of Legal and Practical Consequences

The "closed class" plan (a) will eventuate at testator's death in indefeasibly vested remainder interests subject to the preceding life estate, owned per stirpes by the then surviving children of son A and the then surviving issue of predeceased children of son A. As to each such class member, his future remainder interest is immediately alienable, descendible and devisable, and subject to claims of creditors and to death and succession taxes.

The "open class" plan (b) will eventuate at testator's death in partially and totally defeasible vested remainder interests (or possibly "contingent remainder" interests) subject to the preceding life estate, owned per stirpes, by the children of A then living and the then living issue of predeceased children of A; each interest will also be subject to partial defeasibility in favor of after-born children of A and to total defeasibility by failure to survive A. Consequently, until such time as A dies, the share of each such member is practically unmarketable alone, marketable with fellow members only under court proceeding with an impounding of proceeds, neither descendible nor devisable, and free from creditors' claims and death taxes.

⁶⁴ See note 51 supra.