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# What's in the Third and Final Volume of the New Restatement of Property that Estate Planners Should Know About

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# What's in the Third and Final Volume of the New Restatement of Property That Estate Planners Should Know About

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I. INTRODUCTION .....	24
II. RECURRING AMBIGUITIES AND HOW THE RESTATEMENT RESOLVES THEM .....	25
A. Is It a Class Gift or Not? .....	25
B. Future Interests; Conditions of Survival .....	26
III. SIMPLIFICATION OF THE LAW: SIMPLIFIED CLASSIFICATION OF PRESENT AND FUTURE INTERESTS ...	28
A. Remainders and Reversions .....	31
B. Vested Versus Contingent .....	32
C. Postponed Class Gifts .....	33
IV. ADDRESSING NEW ISSUES: CLASS-GIFT RIGHTS OF CHILDREN OF ASSISTED REPRODUCTION .....	33
A. Non-surrogate Birth Mother .....	34
B. Posthumous Conception .....	36
C. Post-mortem Sperm Retrieval .....	37
D. Surrogate Birth Mother .....	38
E. Class Closing .....	39
V. POWERS OF APPOINTMENT .....	40
A. Decanting Powers .....	40
B. Creditors' Rights .....	41
C. Spousal Elective-share Rights .....	42
D. Miscellaneous Features .....	42
VI. PERPETUITIES AND THE DEAD HAND .....	42
A. Shift from Lives in Being to Generations.....	44
B. Shift from Time of Vesting to Time of Termination...	44
C. Judicial Modification .....	45
VII. CONCLUSION .....	45
APPENDIX: TABLE OF CONTENTS FOR VOLUME 3 .....	46

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\* Lawrence W. Waggoner is the Reporter for the *Restatement (Third) of Property: Wills and Other Donative Transfers* and the Lewis M. Simes Professor Emeritus of Law at the University of Michigan. Copyright 2012 by Lawrence W. Waggoner. All rights reserved.

## I. INTRODUCTION

Professor John Langbein and I have just concluded a twenty-year project for the American Law Institute to restate the law of donative transfers. The official title of our three-volume Restatement is the *Restatement (Third) of Property: Wills and Other Donative Transfers*.<sup>1</sup> We refer to it herein simply as the Property Restatement. The third and final volume of the work was published in the last days of 2011. Professor Langbein spoke about certain of the initiatives in the two earlier volumes, which set forth the principles governing the law of wills, intestacy, interpretation of instruments, and the nonprobate system. The concluding volume covers class gifts, powers of appointment, future interests, and perpetuities. In our division of labor today, I will be speaking about that material. Because I will not be able to cover all of the topics in the third volume, I have added an Appendix to the print version that reproduces the Table of Contents for that volume.

Although the Property Restatement does not address the tax-planning side of the work of estate planners, it *does* address the state-law side of the practice: the everyday work of drafting and construing dispositive provisions in wills, trusts, and other types of donative documents, as well as preparing to argue cases at both trial and appellate levels. When it comes to litigation, the courts pay attention to the Restatement and usually follow it.<sup>2</sup>

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<sup>1</sup> 1-3 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (2012) [hereinafter PROPERTY RESTATEMENT].

<sup>2</sup> Following are instances of judicial reliance on parts of the new Property Restatement previously released. These are cases in which the court changed existing law or made new law on the basis of the Restatement. Countless other cases could be cited in which the court cited the Restatement in support of existing law.

“In sum, we agree with [the Restatement].” *Ruotolo v. Tietjen*, 890 A.2d 166, 177 (Conn. App. Ct. 2006), *aff’d per curiam*, 916 A.2d 1 (Conn. 2007) (adopting the Restatement position that mere survival language does not trump an antilapse statute).

“We adopt the Restatement view on this subject.” *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191, 1200 (Ind. 2008) (adopting, in a tax reformation case, the new Restatement’s position that a mistake of law as well as of fact can be the basis for reforming a provision in a testamentary trust).

“We agree with [the Restatement] and [other] authorities that the latent/patent distinction . . . no longer serves any useful purpose.” *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 535 (Ind. 2006) (abandoning the distinction between types of ambiguity in construing instruments).

“We adopt the view of the American Law Institute on this issue.” *Sieh v. Sieh*, 713 N.W.2d 194, 198 (Iowa 2006) (adopting the new Restatement’s position that a revocable trust created before the marriage is subject to the forced share of the surviving spouse, even when the forced share statute refers only to the probate estate).

The Property Restatement, not the Trusts Restatement, deals with the interpretative matters applicable to dispositive provisions in trusts as well as in wills and will substitutes. Consequently, in construing the meaning of a dispositive provision in a trust, the relevant Restatement is the Restatement of Property, not the Restatement of Trusts.

## II. RECURRING AMBIGUITIES AND HOW THE RESTATEMENT RESOLVES THEM

In the case law, a fairly discrete group of ambiguities tend to recur. The second volume of the Property Restatement contains general rules dealing with how ambiguities are resolved by techniques of construction, rules of construction, and constructional preferences.<sup>3</sup> My focus in this portion of the Lecture is on specific instances of ambiguity and how the rules in the third volume resolve them.

### A. Is It a Class Gift or Not?<sup>4</sup>

Does a disposition “to my children” in a will or trust create a class gift? What about a disposition “to my three children, A, B, and C”?<sup>5</sup> And, what difference does it make? The short answers are that the disposition “to my children” presumptively creates a class gift, the disposition “to my three children, A, B, and C” presumptively does not create a class gift, and it makes a lot of difference whether it is a class gift or not.

The presumption that a disposition “to my children” creates a class is rarely rebutted. Assuming that the presumption is not rebutted, and that the disposition is classified as a class gift, the identities and shares of

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“We follow the Restatement . . . on this point, for the reasons explained.” *In re Estate of Beauregard*, 921 N.E.2d 954, 958 n.5 (Mass. 2010) (adopting the new Restatement’s position that preponderance of the evidence, not clear and convincing evidence, is the proper standard of proof for rebutting the presumption that a lost will that is traced to the testator’s possession was revoked by act).

“The rationale of the Restatement . . . should be applied here.” *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007) (terms “issue” and “descendants” in trusts included children conceived posthumously by means of in vitro fertilization with cryopreserved semen of grantor’s son).

“[I]t seems logical to this court to choose the path . . . recommended by the Restatement . . .” *In re Estate of Herceg*, 747 N.Y.S.2d 901 (Sur. Ct. 2002) (adopting the new Restatement’s position that a will can be reformed on the ground of mistake).

<sup>3</sup> See 2 PROPERTY RESTATEMENT, *supra* note 1, §§ 10.1 – 11.3.

<sup>4</sup> For a more complete discussion of this question, see Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property* (Univ. Mich. Public Law, Working Paper No. 266, 2012), available at <http://ssrn.com/abstract=2006627>.

<sup>5</sup> In the same category are dispositions “to my children, A, B, and C” and “to my three children.”

the beneficiaries are not static, but are subject to fluctuation until the time when a class member is entitled to distribution; and upon distribution, the property is divided among the then-entitled class members on a fractional basis. Thus, if the transferor has another child, D, that child becomes a beneficiary (a class member): A, B, C, and D take a one-fourth share.

Assuming that the presumption that a disposition “to my three children, A, B, and C” does not create a class prevails, the identities and shares of the beneficiaries are fixed. Thus, if the transferor has another child, D, that child does not become a beneficiary: A, B, and C take a one-third share.<sup>6</sup> How strong is the presumption? Because of the inflexibility of a gift to individuals whose shares and identities are fixed, as compared with the flexibility of a class gift, the Property Restatement makes it clear that presumption against class-gift classification is not strong.<sup>7</sup> For estate planners, the drafting lesson is clear: If a transferor really does want the shares and identities of the beneficiaries to be fixed, the disposition should be drafted so that it states that intent clearly and directly: “one-third to my daughter A, one-third to my son B, and one-third to my daughter C.” Drafting “to my three children, A, B, and C” is never a good idea.

#### B. Future Interests; Conditions of Survival

At common law, and under the Property Restatement,<sup>8</sup> conditions of survival are not implied. The law-school classic is “to A for life, remainder to B” or “to A for life, remainder to A’s children.” If B predeceases A in the first case or if one, some, or all of A’s children predecease A in the second case, a share passes through the estate of any predeceased beneficiary.

Standard planning goes the other way: Impose a condition of survival by making it explicit in the document. The problem is that expressing a condition of survival can be tricky. Let’s start with two dispositions:

“To A for life, remainder to A’s *surviving* children.”

“To A for life, remainder to A’s children *who survive* A.”<sup>9</sup>

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<sup>6</sup> If the disposition was in a will, D might be awarded a share of the property under an applicable omitted-child statute. See, e.g., UNIF. PROBATE CODE § 2-302 (2010).

<sup>7</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, § 13.2 cmt. d.

<sup>8</sup> *Id.* § 26.3. For the Restatement’s rationale, see *id.* § 26.6 cmts. c-e. See *id.* § 15.3 (an exception to the rule that a condition of survival is not implied arises in the case of a future interest to a multiple-generation class, i.e. “to A for life, remainder to A’s descendants”). See *id.* § 26.6 (same for an age specification, i.e. “to A for life, remainder to A’s children at age 21.”).

<sup>9</sup> It is not a good idea to say “remainder to A’s children *if they survive* A,” unless

The second version is unambiguous. The first is quite ambiguous. There is case law that construes that requirement of survival as referring to surviving the testator or settlor, not A's death.<sup>10</sup> The Restatement (First) of Property, supported by other case law,<sup>11</sup> provided that the beneficiaries must survive the time of possession or enjoyment, i.e., A's death.<sup>12</sup> The new Property Restatement follows that position,<sup>13</sup> because that construction is the more natural meaning of the dispositive language and hence represents the probable intent of the transferor.<sup>14</sup> Nevertheless, it is far better to avoid the problem: "to A's children who survive A."

Another recurring ambiguity occurs in what I call the "or" cases: "to A for life, remainder to B or B's children."<sup>15</sup> The Property Restatement comes down squarely on the side of requiring survival of the income beneficiary. The rationale is that that construction gives effect to the natural meaning of the language and probably expresses the transferor's actual intent. Nevertheless, using "or" language to express that intent is hardly recommended, because it raises an ambiguity that must be resolved by a rule of construction. That's always a bad idea. Language that easily avoids the ambiguity takes the following form: "to A for life, remainder to B if B survives A; if not, to B's children who survive A."

What if the transferor wants the property to go to the descendants of any beneficiary who predeceases the income beneficiary's death? Unfortunately, that intention is sometimes expressed ambiguously. The case law shows that scribes are too often tempted to express the condition of survival on the primary beneficiary in condition-subsequent

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your client really means that all of A's children must survive A in order for any of them to take.

<sup>10</sup> For a case construing ambiguous words of survival as relating to the testator's death rather than to the income beneficiary's death, see *In re Nass's Estate*, 182 A. 401, 403 (Pa. 1936) (the rationale was that this construction avoided an inequality among the testator's descending lines).

<sup>11</sup> Cases construing ambiguous words of survival as relating to the distribution date (the death of the life tenant) include *Ford v. Jones*, 3 S.W.2d 781, 782 (Ky. 1927) (not resulting in an inequality among the descending lines, because court construed remainder to "my surviving children, if any, or their natural heirs" as creating a substitute gift to the heirs (apparently construed as meaning issue) of any child who predeceases the distribution date); See also *In re Marine Midland Bank, N.A.*, 547 N.E.2d 1152, 1157 (N.Y. 1989) (resulting in an inequality among the descending lines).

<sup>12</sup> RESTATEMENT (FIRST) OF PROP. § 251 (1940).

<sup>13</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, § 26.4 ("Unless the language or circumstances establish that the transferor had a different intention, an express condition of survival that is ambiguous regarding the time to which survival is required is construed to require the beneficiary or beneficiaries to survive the distribution date.")

<sup>14</sup> *Id.* § 26.4 cmt. b.

<sup>15</sup> *Id.* § 26.5.

form. Conditions expressed in condition-subsequent form can be ambiguous and can lead to unintended results.<sup>16</sup> Any condition can be expressed in precedent or subsequent form.<sup>17</sup> Here is an example of imprecision produced by the condition-subsequent form: “to A for life, remainder to B, but if B fails to survive A, to B’s descendants who survive A.” If B survives A, B takes. If B predeceases A and leaves descendants who survive A, B’s descendants take. If both B and B’s descendants predecease A, however, the right to the property passes through B’s estate to B’s successors in interest. Yet, the transferor (and the scrivener) might not have anticipated that the right to trust principal would pass through B’s estate if B predeceases A without leaving descendants who survive A. The condition-subsequent form produces much litigation, whereas the precedent form tends to avoid ambiguity, and hence avoids the need to litigate the meaning of the disposition. The precedent form pressures the scrivener to identify with more care the various events that might transpire in the future, especially those that are improbable but not impossible. In turn, the precedent form allows the scrivener to bring each eventuality to the transferor’s attention and to implement the transferor’s intention regarding each potential event in unambiguous language.<sup>18</sup> Assuming that the transferor would not have wanted the property to pass through B’s estate no matter what happened, the precedent form would be: “to A for life, remainder to B if B survives A; if B fails to survive A, to B’s descendants who survive A.”<sup>19</sup>

### III. SIMPLIFICATION OF THE LAW: SIMPLIFIED CLASSIFICATION OF PRESENT AND FUTURE INTERESTS

One of the goals of Restatements in general is to simplify the law when possible. The Property Restatement does that. One of the long-outdated areas in need of simplification is the complicated system of classification of present and future interests, a system that was developed over the centuries in English land law to serve a variety of feudal purposes.

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<sup>16</sup> *Id.* § 26.2 cmt. e.

<sup>17</sup> A condition precedent provides that the beneficiary is entitled to take in possession or enjoyment “if” a specified event happens, as in “to A for life, then to B if B survives A; if not, to C.” A condition subsequent provides that the beneficiary is entitled to take in possession or enjoyment, “but not if” a specified event happens, as in “to A for life, then to B, but if B fails to survive A, to C.” *Id.* § 25.3 cmt. b.

<sup>18</sup> See *id.* § 26.5 cmt. c (discussing the perils of using the condition-subsequent form).

<sup>19</sup> This form also forces a decision regarding who should take if B predeceases A without leaving descendants who survive A.

English land law divided present estates into two broad categories—freehold and nonfreehold. The freehold estates were the fee simple absolute, the fee simple determinable, the fee simple subject to a condition subsequent, the fee simple subject to an executory limitation, and the life estate. The nonfreehold estate relevant to donative transfers was the term of years.

English land law divided future interests into two broad categories—reversionary and nonreversionary. The reversionary future interests were the reversion, the possibility of reverter, and the right of entry. The nonreversionary future interests were the remainder and the executory interest. Future interests were also classified in terms of vesting. The categories were indefeasibly vested, vested subject to defeasance, and contingent. The distinction between a future interest that was vested subject to defeasance and one that was contingent rested on the mere verbal difference between a condition that was stated in the form of a condition precedent (remainder to B *if* B survives the life tenant) and a condition subsequent (remainder to B, *but not if* B predeceases the life tenant).

Today, present and future interests are predominantly created as equitable interests in trust, not as legal interests in land. For modern purposes, the system of classification based on English land law is unnecessarily complex. As noted in a prominent treatise on the English law of real property, “English real property law has tended to have an unenviable reputation for its complexity.”<sup>20</sup> The complexity serves no purpose in modern circumstances, and England simplified its land law by legislation in 1925.<sup>21</sup> When, in the 1930s, the Restatement (First) of Property embraced the complex system of English land law, the President of the American Law Institute, George W. Wickersham, said that one of its accomplishments was “to state what is a recognized principle of law in such clear and distinct form that its bad nature may become apparent.”<sup>22</sup>

Recognizing that the principal function of classification today is descriptive, the Property Restatement simplifies the doctrine of estates for

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<sup>20</sup> CHARLES HARPUM ET AL., MEGARRY & WADE: THE LAW OF REAL PROPERTY § 1-001 (7th ed. 2008).

<sup>21</sup> *Id.* §§ 1-016 to -017.

<sup>22</sup> 11 ALI PROCEEDINGS 146 (1932-1934). The first Restatement was heavily criticized for perpetuating the old categories. See Myres S. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077 (1942). A comprehensive proposal for simplifying the system was first advanced in Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729 (1972).



American law.<sup>23</sup> Under the Property Restatement, the distinction between freehold and nonfreehold estates is no longer recognized. The present interests are the fee simple absolute, the fee simple defeasible, the life estate, and the term of years. The future interests are the reversion and the remainder. In terms of vesting, a future interest is either vested or contingent. The following table lists the categories of present and future interests recognized in the Restatement:

<i>Present Interest</i>	<i>Future Interest</i>
Fee simple absolute (land) Absolute ownership (personal property)	None None
Fee simple defeasible	Reversion (Contingent or Vested) Remainder (Contingent or Vested)
Life estate	Reversion (Contingent or Vested) Remainder (Contingent or Vested)
Term of years	Reversion (Contingent or Vested) Remainder (Contingent or Vested)

The Restatement's definitions of present interests are mostly unremarkable. The definitions of the fee simple absolute (land) or absolute ownership (personal property), the life estate, and the term of years are quite conventional. Unremarkable also are the Property Restatement's acknowledgment that the fee tail estate, the Rule in Shelley's Case, and the rule of destructibility of contingent remainders are not recognized in American law.<sup>24</sup>

The principal innovation on the present interest side is that the Property Restatement absorbs under one title—the fee simple defeasible—the estates currently classified as a fee simple determinable, a fee simple subject to a condition subsequent, or a fee simple subject to an executory limitation. On the future interests side, the Property Restatement absorbs under one title—the remainder—the future interests currently classified as a remainder or an executory interest, and absorbs under one title—the reversion—the future interests currently classified as a reversion, a possibility of reverter, or a right of entry. Also on the future interests side, the Property Restatement redefines the terms vested and contingent. A future interest that is currently classified as indefeasibly vested is classified as vested. A future interest that is cur-

<sup>23</sup> For a more complete discussion of the Property Restatement's simplification of the doctrine of estates, see Lawrence W. Waggoner, *The American Law Institute Proposes Simplifying the Doctrine of Estates* (Univ. Mich. Public Law, Working Paper No. 198, 2010), available at <http://ssrn.com/abstract=1612878>.

<sup>24</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, §§ 16.2, 24.4, 25.5.

rently classified as vested subject to defeasance or as contingent is classified as contingent.

Once upon a time, classification was important, because it produced legal consequences, but now far less so and under the Property Restatement no longer. Formerly, a contingent remainder could be destroyed under the destructibility rule but an executory interest was not subject to that rule; a legal remainder to the life tenant's heirs was subject to the Rule in Shelley's Case but an executory interest was not subject to that rule. Because the destructibility rule and the Rule in Shelley's Case are no longer part of American law, the distinction has lost its significance. At one time, the distinction between a contingent remainder and a vested remainder or a vested reversion subject to divestment had several legal consequences: alienability, acceleration, and perpetuities. A contingent remainder was inalienable, could not accelerate when the holder of the preceding estate disclaimed, and was subject to the Rule Against Perpetuities, whereas a vested remainder and a vested reversion subject to divestment were alienable, would accelerate, and were exempt from the Rule Against Perpetuities. Under the Restatement, however, all future interests are alienable, and under widespread disclaimer legislation, all future interests accelerate. As for perpetuities, the Restatement shifts from a time-of-vesting to a time-of-termination rule. Under the Restatement's time-of-termination rule, whether a future interest is vested or contingent is irrelevant. As explained later, the Restatement's perpetuity rule provides that any trust or other donative disposition that does not terminate on or before the expiration of the perpetuity period is subject to being judicially modified in a manner that forces the trust or other disposition to terminate within the perpetuity period.<sup>25</sup>

If, under the Property Restatement, classification no longer produces legal consequences, why does classification matter? What is its remaining significance? Under the Restatement, classification is merely descriptive—a short-hand way of labeling an interest that has specific characteristics. The time has come to unclutter the system and put a stop to the antiquated preference for form over substance, and that is what the Restatement seeks to do.

#### A. Remainders and Reversions

Under the Property Restatement, a future interest is either a remainder or a reversion.<sup>26</sup> Gone are executory interests, possibilities of reverter, and rights of entry. What is now labeled an executory interest

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<sup>25</sup> See *infra* Part VI.

<sup>26</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, § 25.2.

becomes a remainder. What is now labeled a possibility of reverter or a right of entry becomes a reversion. The distinction between a remainder and a reversion is that a reversion is a future interest that was retained by the transferor and a remainder is a future interest that was created in a transferee.

Why continue to distinguish between a remainder and a reversion? Why not just label all future interests under one title? There are a couple of reasons. One is that the distinction can be important for various tax-law purposes.<sup>27</sup> Another is that the distinction is recognized in various uniform laws<sup>28</sup> and other Restatements<sup>29</sup> and accords with the usage of the profession.

#### B. Vested Versus Contingent

The Property Restatement provides that a future interest is either vested or contingent.<sup>30</sup> A future interest, whether a remainder or a reversion, is vested if it is certain to take effect in possession or enjoyment. A future interest is contingent if it might not take effect in possession or enjoyment. Gone is the artificial distinction between a condition precedent and a condition subsequent. Under the Restatement, a disposition “to A for life, then to B if B survives A, and if not, to C” and one “to A for life, then to B, but if B fails to survive A, to C” are treated the same. In both cases, B and C have a contingent remainder. Under the current but out-of-date system of classification, B and C would have contingent remainders in the first case, but B would have a vested remainder subject to divestment and C would have an executory interest in the second case.

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<sup>27</sup> See, e.g., I.R.C. § 673 (trust in which the grantor has a “reversionary interest” in either the corpus or the income); I.R.C. § 2037 (inter vivos transfer in which the decedent has retained a “reversionary interest”); I.R.C. § 2042 (life insurance in which the insured possessed at his death a “reversionary interest,” a term that includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him); I.R.C. § 2702 (“retained interest” and “noncontingent remainder interest”); I.R.C. § 6163(a) (granting an extension of time for the payment of the estate tax on the value of a “reversionary or remainder interest in property” that is taxable in the decedent’s estate); I.R.C. § 7520 (any “remainder or reversionary interest”). See also Treas. Reg. § 25.2702-3(f)(2) (“[A] remainder interest includes a reversion”).

<sup>28</sup> See, e.g., UNIF. TRUST CODE (2005); UNIF. PRINCIPAL & INCOME ACT (2000).

<sup>29</sup> See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 7 (2003) (referring to a resulting trust as a “reversionary, equitable interest”). Both the RESTATEMENT (THIRD) OF TRUSTS and the RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (2011) variously refer to property as “reverting” or “reverting back” to the transferor or the transferor’s estate or successors in interest in certain cases.

<sup>30</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, § 25.3.

C. Postponed Class Gifts

If a future interest is in favor of a class, the Property Restatement labels it as a “postponed class gift.” In the case of a postponed class gift that is open to new entrants, the Restatement classifies the future interest of each existing class member as a remainder that is subject to open.<sup>31</sup> Under the Restatement, a remainder that is subject to open can be either vested or contingent, depending on whether it is certain to take effect in possession or enjoyment; and the future interest of a potential class member is always classified as a contingent remainder.

IV. ADDRESSING NEW ISSUES: CLASS-GIFT RIGHTS OF CHILDREN OF ASSISTED REPRODUCTION

A goal of Restatements is to address new issues. The issue that stands out here is the class-gift rights of children of assisted reproduction.<sup>32</sup> Class-gift rights of children of assisted reproduction pose relatively new and complex questions in the law, questions that are destined to become increasingly important as the use of assisted reproduction technologies increases. So far, there has been relatively little legislation on the subject. In the absence of legislation, the Property Restatement is likely to be cited and could influence the case law, as it already has in at least one case.<sup>33</sup>

The Restatement is quite comprehensive, covering different parental relationships, sperm sources, egg sources, and birth mothers:

<i>Parental Relationship</i>	<i>Sperm Source</i>	<i>Egg Source</i>	<i>Birth Mother</i>
Husband & wife	The husband or a 3d party donor	The wife or a 3d party donor	The wife or a surrogate
Unmarried opposite sex partners	The male partner or a 3d party donor	The female partner or a 3d party donor	The female partner or a surrogate
Unmarried female partners or married female partners in a state recognizing same-sex marriages	3d party donor	One of the female partners or a 3d party donor	One of the female partners or a surrogate

<sup>31</sup> *Id.* § 25.4.

<sup>32</sup> For a more complete discussion of the class-gift rights of children of assisted reproduction, see Waggoner, *supra* note 4, at 11-19, 21-22.

<sup>33</sup> *In re Martin B.*, 841 N.Y.S.2d 207, 211 (Sur. Ct. 2007).

<i>Parental Relationship</i>	<i>Sperm Source</i>	<i>Egg Source</i>	<i>Birth Mother</i>
Unpartnered female	3d party donor	The unpartnered female or a 3d party donor	The unpartnered female or a surrogate
Unmarried male partners or married male partners in a state recognizing same-sex marriages	One of the male partners or a 3d party donor	3d party donor	Surrogate
Unpartnered male	The unpartnered male or a 3d party donor	3d party donor	Surrogate

The Restatement has two sections dealing with children of assisted reproduction, one covering the case in which the birth mother is not acting as a surrogate<sup>34</sup> and the other covering the case in which the birth mother is acting as a surrogate.<sup>35</sup>

#### A. Non-surrogate Birth Mother

If the birth mother is not acting as a surrogate, the Restatement's position is that a child of assisted reproduction is presumptively treated for class-gift purposes as the birth mother's child.<sup>36</sup> Because the birth mother is a woman who voluntarily became pregnant by means of assisted reproduction, the Property Restatement presumes that her purpose was to have *her* child. Regardless of whether she is the child's genetic mother (i.e., whether or not the egg that was fertilized was her egg or the egg of a third-party donor), her action in undergoing the procedure presumptively establishes a parent-child relationship between her and the child.<sup>37</sup> It does not matter whether she is married, partnered with another in a domestic partnership,<sup>38</sup> or unpartnered. Consequently, if the birth mother or someone else creates a will, trust, or other arrangement that contains a class gift in favor of the birth

<sup>34</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8.

<sup>35</sup> See *id.* § 14.9.

<sup>36</sup> The position set forth in the Restatement is consistent with the Uniform Probate Code and the Uniform Parentage Act. See UNIF. PROBATE CODE §§ 2-705(b), 2-120(c) (2010); UNIF. PARENTAGE ACT § 201(a) (2002).

<sup>37</sup> This position is consistent with the Uniform Probate Code and the Uniform Parentage Act. See UNIF. PROBATE CODE § 2-120(c); UNIF. PARENTAGE ACT § 201(a).

<sup>38</sup> The Restatement uses the term "domestic partner" in the sense that it is defined in the ALI's Principles of the Law of Family Dissolution. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (2000).

mother's "children" or "descendants," the child is presumptively a class member.

The harder question in the non-surrogacy cases is whether the child has another parent.<sup>39</sup> It is important to keep in mind that the question is not whether the birth mother wants to have another person's child but whether that other person wants the child be treated as his or her child. Thus, under the Restatement, the birth mother's child is also a child of another person *if that other person* consented to assisted reproduction by the birth mother with intent to be treated as the child's other parent.<sup>40</sup> As depicted in the above table, a birth mother who is not acting as a surrogate is a female who is either married to a male, unmarried but partnered with a male, unmarried but partnered with a female or married to a female in a state recognizing same-sex marriages, or an unpartnered female. If the birth mother is married or partnered with a male or female, and if no divorce, separation, or similar proceedings are pending, the Restatement establishes a presumption that her married spouse or her partner did consent to assisted reproduction with intent to be treated as the child's other parent.<sup>41</sup> If the birth mother is unmarried and unpartnered, the child is not the child of a "third-party sperm donor."<sup>42</sup>

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<sup>39</sup> Under the Restatement and the Uniform Probate Code, a third-party donor never has such a relationship. See 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8 cmt. n; UNIF. PROBATE CODE § 2-120(b) (2010).

<sup>40</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8(2) cmts. e-g, k.

<sup>41</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8 cmt. h.

<sup>42</sup> See *id.* § 14.8 cmt. j. For the definition of a "third-party sperm donor," see *id.* § 14.8 Reporter's Note 3 (quoting UNIF. PROBATE CODE § 2-120(a)(3) (2010)). If the unmarried and unpartnered birth mother subsequently marries or enters into an unmarried partnership with another, the presumption that her married spouse or her partner consented to assisted reproduction with intent to be treated as the child's other parent child does not apply. 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8 cmt. j. A subsequent spouse or partner functions more as a stepparent of the child, not as a parent of the child. *Id.* Under § 14.5, however, the child would be treated as the adopted child of the new spouse or partner if that spouse or partner adopts the child.

A third-party sperm donor does not include "an individual who has been determined . . . to have a parent-child relationship with a child of assisted reproduction." *Id.* § 14.8 Reporter's Note 3 (quoting UNIF. PROBATE CODE § 2-120(a)(3)(C)). Thus, if the sperm donor was a friend or acquaintance of the birth mother, as distinguished from a sperm donor who anonymously deposited sperm in a sperm bank, he could be treated for class-gift purposes as the other parent of the child (i.e., he would not be classified as a third-party donor), but only if the evidence establishes that he consented to assisted reproduction by the birth mother with intent to be treated as the child's other parent. If the sperm donor who was a friend or acquaintance subsequently married the birth mother or became her domestic partner, his consent would still have to be established by proof; the presumption that he consented would not apply.

Much of the discussion in the literature has focused on posthumous conception. Although that is an important question, it is only one part of the overall picture. A typical case is that of a married couple who are having difficulty producing a pregnancy. Adoption is always a possibility, but they may first try one or more of the range of solutions offered by fertility clinics, including artificial insemination or in vitro fertilization. If the husband's sperm is used for either procedure, and if the wife's eggs are used for in vitro fertilization, there is no problem—the child is the genetic child of both parents. If the sperm of someone other than the husband is used, or the eggs of someone other than the wife are used for in vitro fertilization, the child is not the genetic child of both parents. If the procedure proves successful, and the wife carries the child to birth, and if the married couple do what is expected and function as parents of the child, the child will be presumptively treated as their child for class-gift purposes.

#### B. Posthumous Conception<sup>43</sup>

Regarding posthumous conception, a case that comes readily to mind is that of a member of our armed forces who is deployed to a war zone. He is recently married, perhaps has a young baby or his wife is pregnant with their first child. Before departing for the war zone, he leaves sperm in a sperm bank for use by his widow in case he does not make it back alive. Tragically, he is killed in action. After a reasonable period of grieving, his widow decides to use the frozen sperm to get pregnant and bear his child. Suppose that the soldier's mother had died several years earlier, creating a trust that paid the income to him for life, remainder in principal to his "children" (or "issue"). Is the posthumous child to be treated as a member of the class or not? Under the Restatement's position, the child would presumptively be treated as a member

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<sup>43</sup> Technically, and unfortunately, a posthumously conceived child born to a decedent's surviving widow could be considered a nonmarital child. *E.g.*, *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 266-67 (Mass. 2002) ("Because death ends a marriage . . . posthumously conceived children are always nonmarital children"). Nevertheless, a provision in a will, trust, or other governing instrument that relates to the inclusion or exclusion of a nonmarital child, or to the inclusion or exclusion of a nonmarital child under specific circumstances, would not have been inserted with a child of assisted reproduction in mind. Consequently, such a provision ought to be treated as inapplicable to a child of assisted reproduction, and the Restatement so provides. *See* 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8 cmt. m. *Accord*, UNIF. PROBATE CODE § 2-705(b) (2010).

of the class,<sup>44</sup> assuming that the child was born within a reasonable time after the soldier's death.<sup>45</sup>

### C. Post-mortem Sperm Retrieval

A different case is presented, however, if the decedent did not deposit sperm before his death but his sperm was retrieved after his death. Post-mortem sperm retrieval makes it possible for a widow or surviving female partner, unilaterally and without any previous discussion with her deceased husband or male partner, to have his sperm harvested so that she could become pregnant with "his" child without his prior approval in order to gain unjustified control of class-gift rights for the child from him and possibly from one or more of his relatives. In such a case, therefore, the burden of proof that the deceased husband or male partner consented to be treated as the child's father remains on his widow or surviving female partner, even if at his death no divorce proceeding was

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<sup>44</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.8 cmt. k. There have been a few litigated cases dealing with the status of children conceived posthumously by assisted reproduction. See *e.g.*, *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), *rev'g* 231 F. Supp. 2d 961 (D. Ariz. 2002); *Woodward*, 760 N.E.2d 257; *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). These cases involved Social Security survivor benefits for the children as dependents of the deceased father, not whether the child was presumptively a member of a class created in a donative document. In *Astrue v. Capato*, 132 S. Ct. 2021 (2012), the Supreme Court held that the entitlement of posthumously conceived children to Social Security survivor benefits depends on state intestacy law.

None of the litigated cases so far has involved the case of a soldier killed in action. They have all involved a husband who is diagnosed with cancer or some other disease requiring chemotherapy. Before undergoing chemotherapy, which could render him infertile, he deposits sperm in a sperm bank for use by his wife or, should he succumb to the illness, by his widow. He does succumb to the illness, and after his death, his widow becomes pregnant with his child. Just as in the case of the soldier's child, the Restatement's rule would presumptively treat the child as a child of the deceased husband for class-gift purposes, assuming that the child was born within a reasonable time after the husband's death (as the children were in these three cases).

<sup>45</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, § 15.1 cmt. j, which provides, "In cases in which the distribution date is the deceased parent's death, a child [conceived] posthumously by assisted reproduction is treated as in being at the decedent's death for purposes of the class-closing rules, if the child was born or in utero within a reasonable time after the decedent's death . . . . Determining whether birth or [in utero] occurred within a reasonable time after the decedent's death requires a balancing of the interest in final settlement of trusts and estates and allowing the surviving spouse or domestic partner time to grieve before making a decision whether to go forward with an assisted-reproduction procedure, and how soon after death an attempt was made to produce a pregnancy through assisted reproduction, whether successful or not. In cases in which the distribution date arises after the deceased parent's death, a child [conceived] posthumously by assisted reproduction is in being on the date when the child is in utero for purposes of the class-closing rules, just as is any other child . . . ."



pending or the partnership was not dissolved or in the process of being dissolved.<sup>46</sup> That burden would be satisfied if the deceased husband or partner signed a writing or other record expressly consenting to be treated as the child's father in case of post-death retrieval. In the absence of such a writing or other record, the widow or surviving partner has the burden of proof to establish by clear and convincing evidence that the decedent consented to post-death retrieval with intent to be treated as the child's father.

#### D. Surrogate Birth Mother

In surrogacy situations, which can arise in all of the situations depicted in the above table, the birth mother of the child of assisted reproduction did not get pregnant to have *her* child. She got pregnant to carry the child to term for an intended parent or for intended parents. The Restatement's position is that, with limited exceptions, the child is not a child of the surrogate.<sup>47</sup> The child is presumptively treated for class-gift purposes as a child of an intended parent, but only if the intended parent functioned as a parent of the child within a reasonable time after the child's birth.<sup>48</sup>

In some states, surrogacy agreements are unenforceable or illegal.<sup>49</sup> For class-gift purposes, however, the enforceability or legality of the surrogacy agreement or arrangement is irrelevant.<sup>50</sup> Performance of an illegal or unenforceable agreement still produces a child who is entitled to be treated as someone's child. Because the Restatement only deals with class gifts, the question cannot arise unless a child is actually born. The only question is who has a parent-child relationship with the child. Disregarding the enforceability or legality of the surrogacy agreement has the added advantage of avoiding conflict of laws questions that might otherwise arise because of the mobility of society. For example, a child might be born as a result of a surrogacy agreement that was valid under the law applicable when the contract was entered into but the intended

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<sup>46</sup> *Id.* § 14.8 cmt. k(1).

<sup>47</sup> The only situation in which the surrogate birth mother is the child's mother for class-gift purposes is when a court order designates her as the child's mother or she is the child's genetic mother and no intended parent functioned as a parent of the child within a reasonable time after the child's birth. *See id.* § 14.9 cmt. j.

<sup>48</sup> *Id.* § 14.9 cmt. e. If there were two intended parents, the child is a child of both if both functioned as parents of the child within a reasonable time after the child's birth. If only one of the two did so, the child is a child of the parent-functioning parent but not of the other intended parent.

<sup>49</sup> For a state-by-state survey of the legality of surrogacy agreements, see CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE* § 5.4 (2d ed. 2011).

<sup>50</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, § 14.9 cmt. d.

parents or parent moved and later died in a state in which surrogacy contracts are illegal (or vice versa). It would be unacceptable for the law to hold that a child who grew up in the household of the intended parents or parent is not a child of the intended parents or parent simply because the surrogacy agreement was illegal.

The Restatement recognizes a limited set of circumstances in which a parent-child relationship can be established between a surrogacy child and a decedent whose sperm or eggs were used after the decedent's death to conceive a child under a surrogacy agreement entered into after the decedent's death.<sup>51</sup> The requirement is that the decedent must have intended to be treated as the parent of the child. Unless there is clear and convincing evidence of a contrary intent, a decedent is deemed to have intended to be treated as the parent of a surrogacy child if the decedent, before death, deposited the sperm or eggs that were used to conceive the child, when the decedent deposited the sperm or eggs, the decedent was married and no divorce proceeding was pending, and the decedent's spouse or surviving spouse functioned as a parent of the child within a reasonable time after the child's birth.<sup>52</sup> Under the Restatement, the same presumption is extended to partners in a domestic partnership, where the partners are not separated and the partnership has not been terminated and is not in the process of being terminated.

#### E. Class Closing

In cases in which the distribution date is the deceased parent's death, a child produced posthumously by assisted reproduction is treated as in being at the decedent's death for purposes of the class-closing rules, if the child was born or in utero within a reasonable time after the decedent's death.<sup>53</sup> Determining whether birth or pregnancy occurred within a reasonable time after the decedent's death requires a balancing of the interest in final settlement of trusts and estates and allowing the surviving spouse or domestic partner time to grieve before making a decision whether to go forward with an assisted-reproduction procedure, and how soon after death an attempt was made to produce a pregnancy through assisted reproduction, whether successful or not.<sup>54</sup>

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<sup>51</sup> *See id.* § 14.9 cmt. g.

<sup>52</sup> *See id.* § 14.9 cmt. h.

<sup>53</sup> *See id.* § 15.1 cmt. j, illus. 7, 8, & 9.

<sup>54</sup> The Uniform Probate Code provides that a child who is conceived after the decedent's death is treated as in being at the decedent's death if the child is in utero not later than 36 months after the decedent's death or born not later than 45 months after the decedent's death (*see* UNIF. PROBATE CODE §§ 2-120(k), 2-121(h) (2010)), which seem appropriate periods for a court to adopt as reasonable times.

In cases in which the distribution date arises after the deceased parent's death, a child produced posthumously by assisted reproduction is in being on the date when the child is in utero for purposes of the class-closing rules, just as is any other child:

*Illustration.*<sup>55</sup> Grantor created a revocable inter vivos trust shortly before her death. The trustee was directed to pay the income to Grantor for life, then "to pay the income to the children of my son S commencing upon each child's twenty-first birthday, and at the death of S's last surviving child, to pay the principal of the trust to X charity." When Grantor died, S had an infant daughter with his wife W. Shortly after being diagnosed with leukemia, S feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. S consented to be the parent of the child within the meaning of § 14.8, Comment *k*. After Grantor's death, S died, and S's widow W decided to become artificially inseminated with his frozen sperm so that she could have a second child by him. Upon reaching 21, S's second child is entitled to receive half of the income.

## V. POWERS OF APPOINTMENT

The law of powers of appointment was not in great need of reform. For the most part, the Restatement tracks the substance of the Restatement (Second) of Property: Donative Transfers,<sup>56</sup> although the material is organized differently.

### A. Decanting Powers

A topic that is much-discussed in the literature is the estate-planning uses of so-called decanting powers. A decanting power is nothing more than a power of appointment. The Property Restatement recognizes the authority of the donee of a power of appointment to exercise the power by creating another trust out of all or a portion of the property or property interest subject to the power.<sup>57</sup> The Restatement also recognizes the authority of the donee to create one or more powers of

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<sup>55</sup> 3 PROPERTY RESTATEMENT, *supra* note 1, §15.1 cmt. j, illus. 10.

<sup>56</sup> See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 11.1 - 24.4 (1986).

<sup>57</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, § 19.13 cmt. d (dealing with the exercise of a general power); *Id.* § 19.14 cmts. e, f (dealing with the exercise of a nongeneral power).

appointment over the income or principal or both of the new trust.<sup>58</sup> Under the Restatement, a decanting power only exists if the power is expressly created in the trust document; the Restatement does not provide that such a power intrinsically exists in all trusts.

Different rules apply, however, depending on whether the donee's power is a general power or a nongeneral power and depending on whether the donee holds the power in a fiduciary capacity. The holder of a power of appointment cannot exercise the power beyond its scope<sup>59</sup> and a trustee's or other fiduciary's exercise of a power of appointment is subject to fiduciary obligations.<sup>60</sup>

## B. Creditors' Rights

The common-law rule was that the donee's creditors could not reach appointive assets covered by an unexercised general power of appointment if the power was created by someone other than the donee. The rationale was that until the donee exercised the power, the donee had not accepted sufficient control over the appointive assets to give the donee the equivalent of ownership of them.<sup>61</sup>

The Restatement (Third) of Trusts diverged from the common-law rule in 2003.<sup>62</sup> That Restatement represents the current position of the American Law Institute, and is the rule adopted in the Property Restatement.<sup>63</sup> The rule adopted by both Restatements is that property subject to a presently exercisable general power of appointment that was created by someone other than the donee is subject to claims of the donee's creditors to the same extent that it would be subject to those claims if the property were owned by the donee, but only to the extent that property owned by the donee or the donee's estate is insufficient to satisfy those claims. The rationale is that a presently exercisable general power is an ownership-equivalent power, whether the donee exercised the power or not.

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<sup>58</sup> See *id.* § 19.13 cmt. f (dealing with the exercise of a general power); *Id.* § 19.14 cmts. g-g(5) (dealing with the exercise of a nongeneral power).

<sup>59</sup> See *id.* § 19.13 cmt. g(2).

<sup>60</sup> *Id.* § 17.1 cmt. g; See *id.* § 19.14 cmt. f; RESTATEMENT (THIRD) OF TRUSTS § 86 (2003); See also *id.* § 50 cmt. a.

<sup>61</sup> RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 13.2 cmt. a (1986) (adhering to the common-law rule but recognizing that statutory law in a number of states had departed from the common-law rule.)

<sup>62</sup> RESTATEMENT (THIRD) OF TRUSTS § 56 cmts. b, c (2003).

<sup>63</sup> See *id.* § 22.3.

### C. Spousal Elective-Share Rights

The Restatement Second provided that property subject to a general power of appointment is treated as assets owned by the donee at death for purposes of the elective-share rights of the donee's surviving spouse, but only if the appointive property was originally owned by the donee and the donee transferred that property retaining a general power over it.<sup>64</sup> The new Property Restatement retains this restriction for property subject to a general testamentary power, but lifts the restriction for property subject to a general power that was presently exercisable immediately before the donee's death.<sup>65</sup> Because a presently exercisable general power is an ownership-equivalent power, the Restatement adopts the rule that property subject to a general power that was exercisable immediately before the donee's death is treated as owned at death even if the power was conferred on the donee by another person. This rule is based on an analogy to the elective-share treatment of property that is owned by the decedent at death. Property owned at death is subject to the spouse's elective-share rights, without distinction between property that the decedent acquired by gift from another person or by other means.

### D. Miscellaneous Features

Other features of the Restatement's treatment of powers of appointment are less central to the practice of estate planners, but could become important in cases of botched practice. The Restatement gives more prominence to the gift-in-default clause in cases of ineffective appointments of general powers,<sup>66</sup> reduces the consequence of exercising a power by a blending clause,<sup>67</sup> provides that a donee's residuary clause indicates an intent to exercise a general power, but only in the absence of takers-in-default and in the absence of a specific-reference requirement,<sup>68</sup> and adopts a substantial compliance doctrine with respect to donor imposed formalities.<sup>69</sup>

## VI. PERPETUITIES AND THE DEAD HAND

Perpetuity law is now statutory, so the Property Restatement's position on perpetuities is aspirational. Perpetuity law is no longer made in judicial opinions. If the Restatement is to be successful in shaping the

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<sup>64</sup> See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 13.7 (1986).

<sup>65</sup> See *id.* § 23.1.

<sup>66</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, § 19.21.

<sup>67</sup> See *id.* §§ 19.19, 19.21.

<sup>68</sup> See *id.* § 19.4.

<sup>69</sup> See *id.* § 19.10.

law, it will have to be through legislation, possibly by forming the basis of a new uniform act on perpetuities. Nothing in that direction will happen unless and until Congress places a durational limit on the GST exemption (I.R.C. § 2631).<sup>70</sup> Nevertheless, the American Law Institute took the occasion to express its position that the recent perpetual-trust movement is ill advised.<sup>71</sup>

The perpetual-trust movement has not been based on the merits of removing any serious curb on excessive dead-hand control. The policy issues associated with allowing perpetual trusts have not been seriously discussed in the state legislatures. There is no evidence that it was understood that a perpetual trust can have as many as 450 living beneficiaries 150 years after creation, more than 7000 living beneficiaries after 250 years, and over 114,000 living beneficiaries after 350 years.<sup>72</sup> Nor does it seem to have been understood that after 175 years, the settlor's genetic relationship to all of his or her then-living beneficiaries will drop below one percent and, as the trust presses on into the more-distant future, the settlor's genetic relationship to the beneficiaries will decline further, as the trust benefits ever-more remote relatives.<sup>73</sup> The state legislatures have been more influenced by an effort to retain trust business within the enacting state and to compete for trust business from other states.<sup>74</sup>

The driving force underlying the perpetual-trust movement is the failure of Congress to impose a durational limit on the GST exemption. The American Law Institute concluded: "An unintended consequence

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<sup>70</sup> See Lawrence W. Waggoner, *Effectively Curbing the GST Exemption for Perpetual Trusts*, 135 TAX NOTES 1267-72 (June 4, 2012), available at <http://ssrn.com/abstract=2083804>; Lawrence W. Waggoner, *Congress Should Effectively Curb the GST Exemption for Perpetual Trusts*, 136 TAX NOTES 1216-17 (Sept. 3, 2012), available at <http://ssrn.com/abstract=2147989>.

<sup>71</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, Introductory Note to ch. 27 (Rule Against Perpetuities), at p. 564; Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* 1-13 (Univ. Mich. Public Law, Working Paper No. 199, 2010), available at <http://ssrn.com/abstract=1614934>.

<sup>72</sup> See 3 PROPERTY RESTATEMENT, *supra* note 1, Introductory Note to ch. 27 (Rule Against Perpetuities), at pp. 554-56; Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 1-16 (Univ. Mich. Public Law, Working Paper No. 259, 2013), available at <http://ssrn.com/abstract=1975117>.

<sup>73</sup> See Waggoner, *supra* note 72, at 1-14.

<sup>74</sup> See RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 80-81 (2010) (noting that the ability to offer perpetual trusts "created a marketing bonanza for banks and trust companies. . ."); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2466-68 (2006); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410 (2005).

of tax law should not determine policy on so fundamental a matter as state perpetuity law, especially since history suggests that tax loopholes do not last indefinitely.”<sup>75</sup>

The American Law Institute not only deemed the perpetual-trust movement ill advised. It proposed a new approach to perpetuities. With certain qualifications and exceptions,<sup>76</sup> the new approach limits the duration of trusts to two younger generations.<sup>77</sup>

#### A. Shift From Lives In Being to Generations

A previously unexamined assumption of the common-law Rule Against Perpetuities and the wait-and-see movement is that the perpetuity period—the maximum limit—must be measured by lives in being at the creation of the interest. Requiring the lives to be in being at the creation of the interest prevents the perpetuity period from adjusting to the trust and family circumstances, because that requirement often divides members of the same generation into measuring and non-measuring lives. Although trusts commonly confer lifetime benefits on members of one generation before passing benefits to the next generation, the life-in-being requirement means that only those members of a generation who are in being at the creation of the interest can be used to measure the perpetuity period. Members of the same generation who come into being later cannot be used. The Restatement replaces the “in being” requirement with a rule that measures the perpetuity period by generations. With certain qualifications and exceptions, the Rule—as promulgated in the Restatement—limits dead-hand control to granting benefits through but not beyond two generations younger than the transferor. The result is that the perpetuity period is tailored to the individual trust and family circumstances.

#### B. Shift from Time of Vesting to Time of Termination

Historically, the Rule has focused on contingent future interests and the time of vesting. The Rule has been formulated to prevent a contingent future interest from continuing to exist beyond the allowable perpetuity period. That mechanism has some merit but is not well al-

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<sup>75</sup> PROPERTY RESTATEMENT, *supra* note 1, Introductory Note to ch. 27 (Rule Against Perpetuities), at p. 568.

<sup>76</sup> *See id.* § 27.1. The Restatement has special rules for cases in which the share of a beneficiary is distributable upon reaching a specified age of 30 or younger and for trusts whose sole current beneficiary is a named great-grandchild.

<sup>77</sup> *See id.*; Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. Mich. Public Law, Working Paper No. 200, 2010), available at <http://ssrn.com/abstract=1614936>.

igned with the purpose of the Rule, which is to limit dead-hand control. The rule of the Restatement focuses on the time when the trust or other disposition of property terminates. The time of termination as opposed to the time of vesting coordinates more purposively with the Rule's objective of limiting dead-hand-control, because the time of termination is when the property comes under the control of the ultimate beneficiaries. Another benefit of shifting from the time of vesting to the time of termination is that the distinction between a contingent and a vested future interest becomes irrelevant.

### C. Judicial Modification

Judicial modification of an otherwise noncomplying trust or other donative disposition of property is an integral part of the Rule Against Perpetuities adopted in the Restatement. A trust or other donative disposition of property that does not terminate on or before the expiration of the perpetuity period is not invalid. The property does not return to and then through the estate of the long-deceased transferor. Instead, the trust or other donative disposition is subject to judicial modification. In most cases, the form of modification will accelerate the right to possession of the beneficiaries of the trust or other disposition.

## VII. CONCLUSION

The new Property Restatement, in association with the new Trusts Restatement, has now systematically proceeded through the whole field of wills, will substitutes, trusts, and estates. Both of the new Restatements should prove to be handy resources for trust and estate lawyers, not only in preparing to argue cases at both trial and appellate levels, but also in the everyday work of drafting and construing dispositive provisions in wills, trusts, and other types of donative documents. Each Restatement section is followed by a set of Comments explaining and illustrating the black letter and by Reporter's Notes collecting relevant cases, statutes, and secondary sources.



**APPENDIX:  
Table of Contents for Volume 3**

**DIVISION V. CLASS GIFTS**

**Chapter 13. General Characteristics of a Class Gift**

- § 13.1 Class Gift Defined; How Created
- § 13.2 Class Gift Distinguished from Disposition to Beneficiaries Whose Identities and Shares Are Fixed; How Created

**Chapter 14. Presumptive Meaning of Class-gift  
Terms of Relationship**

*Part A. Single-Generation Class Gifts*

- § 14.1 Class Gift to Children and Other Single-Generation Classes
- § 14.2 Single-Generation Class Gifts; How Property Divided

*Part B. Multiple-Generation Class Gifts (Other Than Class  
Gifts to Heirs or Next of Kin)*

- § 14.3 Class Gift to Issue or Descendants
- § 14.4 Multiple-Generation Class Gifts; How Property Divided

*Part C. Questions of Status*

- § 14.5 Adopted Child as Child of Adopting Parent
- § 14.6 Adopted Child as Child of Genetic Parent
- § 14.7 Child of Parents Not Married to Each Other
- § 14.8 Child of Assisted Reproduction: Non-Surrogacy
- § 14.9 Child of Assisted Reproduction: Surrogacy
- § 14.10 Relative by Marriage

**Chapter 15. Increase and Decrease in Class Membership**

*Part A. Increase in Class Membership*

- § 15.1 When Class Closes; Rule of Convenience

*Part B. Decrease in Class Membership*

- § 15.2 Class Member Who Is Deceased When Donative Document Takes Effect; Deeds
- § 15.3 Postponed Class Gift; Beneficiary of Multiple-Generation Class Gift Fails to Survive Distribution Date
- § 15.4 Postponed Class Gift; Beneficiary of Single-Generation Class Gift Fails to Survive Distribution Date