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THE UNIFORM PROBATE CODE UPENDS THE LAW OF REMAINDERS

*Jesse Dukeminier**

Nothing is more settled in the law of remainders than that an indefeasibly vested remainder is transmissible to the remainderman's heirs or devisees upon the remainderman's death. Thus, where a grantor conveys property "to *A* for life, then to *B* and her heirs," *B*'s remainder passes to *B*'s heirs or devisees if *B* dies during the life of *A*. Inheritability of vested remainders was recognized in the time of Edward I, and devisability was recognized with the Statute of Wills in 1540.

Section 2-707 of the Uniform Probate Code (UPC),¹ adopted in 1990, upends this law. In a comprehensive remake of the law of remainders, section 2-707 provides that, unless the trust instrument provides otherwise, *all future interests in trust are contingent on the beneficiary's surviving the distribution date*. Additionally, if a remainderman does not survive to the distribution date, the UPC creates a substitute gift in the remainderman's then-surviving descendants. If the remainderman has no surviving descendants, the remainder fails, and on the life tenant's death the property passes to the testator's residuary devisees or to the settlor's heirs.

This sea change in the law of remainders was set in motion by the Code's revisers when they expanded the antilapse idea of the law of wills to include trust remainders.² Under the law of wills, if a devisee predeceases the testator, antilapse statutes give the devise to the devisee's descendants if the devisee bears a particular relationship to the testator — usually kindred, but sometimes close kindred. The UPC drafters decided that the antilapse statute applicable to wills³ should apply to will substitutes, such as contracts with payable-on-death (P-O-D) designations.⁴ They then fur-

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1. UNIF. PROB. CODE § 2-707 (1993).

2. See Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1131-33 (1992).

3. UNIF. PROB. CODE § 2-603 (1993).

4. UNIF. PROB. CODE § 2-706 (1993). Section 2-706 does not apply to all contracts with P-O-D designations, but only to those under which the P-O-D beneficiaries must survive the decedent in order to take. See UNIF. PROB. CODE § 2-706(a)(2) (1993). It does not impose a

ther adapted the antilapse statute to trust remainders, changing the requirement that a beneficiary survive the *testator* to a requirement that a remainderman survive to the *date of distribution* and applying it to all trust remainders and not just to remainders given to the testator's kindred.⁵ There is merit in the idea that antilapse statutes should apply to all will substitutes, including revocable trusts, thus requiring the beneficiary to survive the decedent donor, and providing a substitute gift to the issue of beneficiaries who do not.⁶ But expanding the antilapse idea to a requirement that trust remaindermen must survive to the termination of the trust raises entirely different questions. Irrevocable inter vivos trusts, testamentary trusts, and revocable trusts that continue as irrevocable trusts after the settlor's death are not will substitutes, and the substantive law of wills cannot be applied to them on the theory that they are functionally analogous transfers.

The proposal to supplant the existing law of remainders with an antilapse-like statute may have merit, not by analogy to will substitutes but as an independent claim that the antilapse idea better carries out the settlor's intent and better serves subsidiary public policies. There are two crucial questions. First, does the antilapse idea carry out the settlor's intent better than the traditional law of remainders? Second, does an antilapse law or the common law of remainders better serve public policy concerns, including reducing litigation and complexity? As for the first question, neither the Official Comment nor the drafters' law review commentary⁷ presents empirical evidence indicating that most trust settlors want a remainderman to lose the remainder if he does not survive the life tenant, substituting his descendants for him if he leaves descendants. The

survivorship requirement on all P-O-D beneficiaries, unlike § 2-707, which imposes a survivorship requirement on all remaindermen. See UNIF. PROB. CODE § 2-707(b) (1993). The Official Comment offers no explanation for this inconsistency.

5. UPC § 2-603, the antilapse statute applicable to wills, applies only to devises to a grandparent, a descendant of a grandparent, or a stepchild of the testator. See UNIF. PROB. CODE § 2-603(b) (1993). UPC § 2-706, applicable to P-O-D contracts, is similar. See UNIF. PROB. CODE § 2-706(b) (1993). If the antilapse idea is to apply to trust remainders, the statutes should be consistent. What justification is there for presuming the testator intends that only descendants of deceased close kindred take devises and P-O-D contracts but descendants of any deceased remainderman take remainders in a revocable trust?

6. RESTATEMENT (SECOND) OF PROPERTY § 27.1 cmt. e (1987) (Donative Transfers) takes the position that antilapse statutes should apply to revocable trusts.

In *Dollar Savings & Trust Co. v. Turner*, 529 N.E.2d 1261 (Ohio 1988), an Ohio court applied the antilapse statute to a revocable trust. At the urging of the Ohio bar, the legislature reversed the decisional law by enacting a statute providing that the antilapse statute does not apply to any remainders in trust, revocable or irrevocable. OHIO REV. CODE ANN. § 2107.01 (Anderson 1994).

7. See Halbach & Waggoner, *supra* note 2.

drafters appear to be proceeding purely on their own speculation. In fact, it seems just as likely that trust settlors intend to cede control of the remainder to the remainderman to permit the remainderman to deal with changes in his family circumstances during the life tenant's life. Before a fundamental change in the law of remainders is made, some empirical evidence should show that the common law has read people wrong for centuries.

Favoring property passing to the descendants of a beneficiary is, of course, an old idea in the law. Courts often construe ambiguous trust instruments so as to pass a remainder to the remainderman's descendants rather than having it pass outside the remainderman's immediate family. But protection of descendants is not the issue here. If the remainder is devisable or inheritable, as under current law, descendants will take the remainder unless the remainderman diverts it to others. The issue is whether the power of a remainderman to act in what he perceives as the best interests of the family should be taken away.

Section 2-707 is a revolutionary statute, and states should carefully consider its ramifications before enactment. It is the purpose of this article to examine those ramifications.

LOSS OF FLEXIBILITY

A law of remainders fashioned by section 2-707 of the UPC will be very different from current law. Perhaps the most important practical difference will be the loss of flexibility in the beneficiary's disposition of future interests.

In this respect, section 2-707 can be fairly described as retrogressive, slipping trusts back to the days before flexible powers of appointment came into widespread use. When a trust is created for *A* for life, remainder to *B*, *B* has the equivalent of a general power of appointment over the remainder. If *B* dies before *A*, *B* can transmit the remainder at death to anyone *B* chooses. Under UPC section 2-707, *B*'s remainder is made contingent upon surviving *A*. If *B* dies during *A*'s life leaving descendants, *B*'s descendants are substituted for *B*. *B* has no power to transmit the remainder to others.

A principal feature of sound estate planning in the twentieth century is creating flexibility in trusts, which experience has shown to be highly desirable.⁸ The transmissible vested remainder rule of

8. See Edward C. Halbach, Jr., *The Use of Powers of Appointment in Estate Planning*, 45 IOWA L. REV. 691 (1960):

Whenever one seeks to control the devolution of his property over extended periods, possibly for several generations . . . flexibility becomes a significant element in the suc-

the common law is a substitute for a power of appointment overlooked by the settlor. *B* can devise the remainder to *B*'s spouse, taking advantage of the estate tax marital deduction, and making it possible for the spouse to use her \$600,000 exemption from the federal estate tax and \$1 million exemption from the generation-skipping transfer tax in transferring the trust property to their children. Or *B* can devise the remainder to *B*'s children in such shares and on such terms as appear wise. If *B*'s children are minors, *B* can devise the remainder in trust for the children until they reach majority, avoiding conservatorship. If one of *B*'s children is disabled and supported by the state in a state institution, *B* can devise the child's share in a trust providing the child only with benefits supplementing those the state provides, thus avoiding the state's seizure of the child's full share as the child's creditor, as section 2-707 would allow.

Under section 2-707, *B* does not have these choices. In all cases *B*'s descendants are substituted for *B* if *B* dies during *A*'s life. If *B*'s descendants are minors, a court will have to appoint a conservator to manage their property — an undesirable and expensive arrangement that *B* can avoid under present law. In some states, the court must appoint guardians ad litem to represent minors in the trustee's accounting — an additional expense. Whether or not *B* has children, *B* cannot pass the property to *B*'s spouse. No statute can pick the appropriate substitute takers as well as living persons.⁹

It seems particularly odd that the UPC revisers in section 2-707 make it impossible for *B* to benefit *B*'s spouse any longer, inasmuch as the modern trend is to increase the protection of the spouse. The Retirement Equity Act of 1984,¹⁰ requiring a pension to be paid as a joint-and-survivor annuity to the employee and his or her spouse unless the spouse consents otherwise, is an illustration of this modern trend. So, too, are laws calling for equitable division of prop-

cess of the dispositive scheme. . . . [A power of appointment] enables adjustments to be made in accordance with changes in family membership or in accordance with changes in the physical, mental (especially in the event of incapacity to manage property), and financial welfare of family members. Also to be considered are subsequent legal, social, and economic developments.

Id. at 692-93.

9. In an earlier article, Professor Waggoner, one of the chief drafters of section 2-707, favored a vested construction and opposed extending antilapse provisions to future interests for the reasons given above. "[I]t seems far better for the predeceased legatee, rather than the legislature, to decide how best to provide for his own family" Lawrence W. Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts Under the New Illinois "Anti-Lapse" Provision*, 1969 U. ILL. L.F. 423, 438.

10. Pub. L. No. 98-937, 98 Stat. 1426 (codified in scattered sections of 26 U.S.C. and 29 U.S.C.).

erty upon divorce. The 1990 UPC provisions relating to intestacy¹¹ and the elective share¹² continue this trend by increasing the spouse's share significantly beyond that given in most states. Studies have shown that in many cases — especially in smaller estates and where the decedent has no descendants — the spouse is the primary object of the decedent's bounty.¹³

Where trusts have been created for a child for life, with a remainder to the child's children, overlooking the needs of the child's surviving spouse, desperate beneficiaries sometimes have adopted their spouse as a child in an attempt to continue trust support for the spouse.¹⁴ These wife-adoption cases are vivid lessons in how far beneficiaries will go to remedy inadequate trust drafting that has overlooked a beneficiary's natural desire to benefit a spouse. Section 2-707 imbeds this omission in the statutes. Why do the revisers assume that the decedent would want to be generous with his or her spouse but would want to cut out a beneficiary's spouse? Is this merely an irresistible atavism of our English inheritance, revering the blood line and effacing the son's wife?

LITIGATION ISSUES INVOLVING LAPSE INTRODUCED INTO LAW OF REMAINDERS

Section 2-707 is a rule of construction. It yields to a finding of a contrary intent. If a remainder is given "to *B* or her estate" or "to *B* whether or not *B* survives the life tenant," *B*'s remainder will be devisable and inheritable as under current law.

Establishing a contrary intent may be a fruitful source of litigation. It imports into the law of remainders issues commonly litigated in cases of lapse under the law of wills. A look at three of these issues is illustrative. First, suppose that a trust is created "for *A* for life, then to *B* and her heirs." Does the use of the phrase "and her heirs" indicate a contrary intent, an intent that *B*'s heirs take if *B* does not survive? Of course, all lawyers know that "and her heirs" is superfluous, meaning only "in fee simple," and yet in

11. UNIF. PROB. CODE § 2-102 (1993). The spouse takes all if the decedent leaves no descendant or parent or if all of the decedent's descendants are also all of the descendants of the spouse. In all other circumstances the spouse takes at least one-half.

12. UNIF. PROB. CODE §§ 2-201 to 2-214 (1993).

13. See Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 348-64 (citing earlier studies).

14. See, e.g., *In re Belgard's Trust*, 829 P.2d 457 (Colo. Ct. App. 1992), cert. denied, 1992 Colo. LEXIS 420 (May 11, 1992); *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340 (Ky. 1967). In both cases, the court did not void the adoption but held that the settlor did not intend to include adult adoptees as descendants of the beneficiary.

some lapse cases "and her heirs" has been read to mean "or her heirs," creating a substitute gift in *B*'s heirs.¹⁵ In that way lapse has been avoided. It seems odd that different consequences would turn, in the twenty-first century, on the inclusion of the phrase "and her heirs" in creating a remainder, a phrase we have long thought obsolete. Yet, if states adopt section 2-707, the lapse cases may pre-empt the revival of the importance of this phrase in the law of remainders.

A second example of lapse litigation moving into the law of remainders involves an express requirement that the beneficiary survive to the date of distribution. Does such a requirement of survival state an intention that *B*'s descendants not be substituted for *B* if *B* predeceases *A*? Contrary to what most lawyers would probably infer, section 2-707(b)(3) provides that words of survivorship attached to a future interest do *not* state an intent that descendants not be substituted for the deceased remainderman. Thus:

Case 1. *T* devises a fund in trust "for *A* for life, then to *B* if *B* survives *A*." At common law, the words "if *B* survives *A*" state a condition precedent of survival, and if *B* dies before *A*, the remainder fails. Under section 2-707, however, the words "if *B* survives *A*" do not indicate that the transferor does not want *B*'s descendants substituted for *B* if *B* predeceases *A*. If *B* predeceases *A*, leaving descendants, the descendants take, in spite of this language.

This rule of construction is taken from the 1990 UPC antilapse statute applicable to wills. In cases involving the application of an antilapse statute to lapsed gifts in wills, most courts have held that an express requirement of survivorship states an intent that the antilapse statute not apply.¹⁶ Hence, a devise "to *A* if *A* survives me" does not go to *A*'s descendants if *A* predeceases the testator. Under the 1990 revision of the Uniform Probate Code, the drafters reversed this majority rule, giving *A*'s lapsed gift to *A*'s descendants even though the will states "if *A* survives me."¹⁷ This action of the 1990 UPC drafters has come under sharp criticism:

Instead of allowing "if he survives me" to mean what almost everyone would expect it to mean, the revisers have translated it into, "if he survives me, and, if he does not survive me, to his issue who survive me." For those unfamiliar with estate planning esoterica, therefore, it

15. See, e.g., *Jackson v. Schultz*, 151 A.2d 284 (Del. Ch. 1959); cf. *Hofing v. Willis*, 201 N.E.2d 852 (Ill. 1964).

16. See 2 RESTATEMENT, *supra* note 6, § 18.6 cmt. a; Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 349 & n.88 (1988).

17. UNIF. PROB. CODE § 2-603 (1993).

has become yet more difficult to figure out what the words in a will actually mean.¹⁸

This criticism is equally applicable to section 2-707, which provides that a remainder "to *B* if *B* survives *A*" goes to *B*'s descendants if *B* dies before *A*, unless there is an express gift over to a specified person who survives the life tenant.

A third source of litigation in lapse cases is whether the devise creates a class gift. If it is a class gift, the gift does not lapse. If the devisee does not leave descendants who are substituted by the anti-lapse statute, the devisee's share goes to the surviving members of the class. Litigation over whether the gift is made to a class is extensive.¹⁹ Similar lawsuits may be expected under section 2-707. Thus:

Case 2. *T* devises a fund in trust "for *A* for life then to *A*'s children, *B* and *C*," with a residuary devise to *D*. *B* survives *T* but predeceases *A*. Under the common law of remainders, *B*'s share of the remainder goes to *B*'s heirs or devisees. Whether the remainder is to a class is irrelevant. Under section 2-707, the outcome is different. If *B* leaves descendants, *B*'s descendants take the remainder. If *B* does not leave descendants, the result turns on whether the remainder is to a class. If it is a class gift, *C* takes *B*'s share. If it is not a class gift, *D* takes *B*'s share.

As to what constitutes a class, the authorities may not be "in inextricable confusion," as one English judge claimed,²⁰ but they surely leave outcomes uncertain in many cases.²¹ The same language may be deemed a gift to a class in one case, but not in another. Extrinsic evidence of the testator's intent appears to play a crucial role. The class gift question plays no current role in the transmissibility of remainders.

It must be admitted that section 2-707, in presuming all future interests to be contingent upon surviving to distribution, will doubtless reduce litigation over whether, under a trust instrument, a re-

18. Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 651-55 (1993); see also Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 126-30 (1991) (arguing that the new antilapse provision in the 1990 UPC will increase malpractice suits against lawyers who continue to use the language they have used for years — "to *A* if *A* survives me" — expecting the words requiring survivorship to negate the operation of the antilapse statute).

19. See 5 AMERICAN LAW OF PROPERTY §§ 22.4-.11 (A. James Casner ed., 1952).

20. *In re Moss*, [1899] 2 Ch. 314, 317 (1898) (Lord Lindley, M.R.), *affd.*, 1901 App. Cas. 187.

21. For example, 3 RESTATEMENT OF PROPERTY § 284 (1940) [hereinafter FIRST RESTATEMENT] says a gift "to *A* and the children of *B*" is a gift to one class whereas 5 AMERICAN LAW OF PROPERTY, *supra* note 19, § 22.13 says it is a gift to an individual, *A*, and a class composed of the children of *B*. Cf. 3 RESTATEMENT, *supra* note 6, § 28.1 cmt. g.

mainderman is subject to a requirement of survival. But litigation of this issue has decreased greatly in the last several decades because of the increased use, in drafting trusts, of forms that expressly settle this matter and because courts have more and more standardized rules of construction, following the *Restatement of Property*,²² the *American Law of Property*,²³ and *Powell on Real Property*.²⁴ In any event, the increase in litigation of other issues imported from the law of lapse will likely more than outweigh the reduction in litigation over whether survival is required.

COMPLEX NEW RULES INTRODUCED INTO FUTURE INTERESTS

Section 2-707 applies to all "future interests" in a trust. The term "future interests" is not defined, but presumably it incorporates the standard definition of a future interest as a nonpossessory interest that may become possessory.²⁵ Future interests, in contrast to present interests or possessory interests, do not offer immediate beneficial enjoyment of the income or the property. Section 2-707 thus cuts a wide swathe, applying to all remainders, executory interests, and reversions. All of these are made contingent upon surviving to the distribution date.

Section 2-707 eliminates the presumption in favor of vesting, as well as a number of well-settled rules of construction favoring a vested construction. Since *Clobberie's Case*,²⁶ for example, it has been settled that when a testator devises all interest in property to a person but withholds possession until the person reaches a specified age, the gift of the property is vested with possession postponed. Section 2-707 does away with this rule. Thus:

Case 3. *T* bequeaths a fund in trust "to pay income to *B* until *B* reaches 25, then to pay the principal to *B*." Under common law, *B*'s gift of principal, a future interest, is vested with possession postponed, and if *B* dies under 25, *B*'s estate takes the property. Depending upon whether *B* dies testate or intestate, *B*'s estate may pass to *B*'s spouse, children, parents, brothers and sisters, or other devisees. Under section 2-707, if *B* dies under 25, *B*'s descendants take the property. If *B* leaves no descendants, the property goes to the testator's residuary devisees then surviving, or to their surviving descendants, or, if none, to the testator's surviving heirs.

22. 3 FIRST RESTATEMENT, *supra* note 21, §§ 249-59.

23. 5 AMERICAN LAW OF PROPERTY, *supra* note 19, §§ 21.10-.25.

24. 2A RICHARD R. POWELL, POWELL ON REAL PROPERTY §§ 27.01-.06 (Patrick J. Rohan ed., rev. ed. 1995).

25. See 2 FIRST RESTATEMENT, *supra* note 21, § 153, at 520.

26. 86 Eng. Rep. 476 (Ch. 1677).

To deal with successive future interests, and the enormous variety of complicated trusts, section 2-707 invents a whole new future interests vocabulary to determine which alternative future interest will be given effect under a variety of circumstances.²⁷ Its complexities and convolutions cannot be summarized here; they are explained in seven pages of closely analytical reasoning in the Official Comments. They must be worked through by the reader at length, over and over again, to be understood. Even the drafters themselves call the statute "elaborate and intricate," and admit that it will require "a few hours" of intense study.²⁸ *Case 4* is illustrative.

Case 4. *T* bequeaths a fund in trust "for *A* for life, then to *B* if *B* survives *A*, and if *B* does not survive *A*, to *C*." *T*'s residuary devisee is *D*. *B* then dies, survived by a child, *B*¹. If *C* survives *A*, *C* takes on *A*'s death; the express gift over to *C* is given effect. But if *C* dies before *A*, survived by a child, *C*¹, who takes on *A*'s death? Here the rules become complicated. Under section 2-707, because the words "if *B* survives *A*" do not state an intent that *B*'s child shall not take in *B*'s place, *B*¹ is substituted for *B*. Similarly, *C*¹ is substituted for the deceased remainderman, *C*. To choose between them, section 2-707 provides that the substitute takers of the "primary future interest"²⁹ (*B*'s remainder) take unless the alternative future interest (*C*'s remainder) is a "younger-generation future interest."³⁰ Under the facts here, if *C* is a descendant of *B*, *C*'s remainder is a "younger-generation future interest," and *C*¹ takes. If, on the other hand, *C* is not a descendant of *B*, *B*¹ takes. Hence, if *B* is *T*'s sister and *C* is *T*'s son, *B*'s child *B*¹ takes.

Apart from the rules about which alternative future interests take, section 2-707 brings other mysteries and surprises. If the settlor during life creates an irrevocable trust for *A* for life, then to *B*,

27. Section 2-207's new terms include "primary future interest," "primary substitute gift," "younger-generation future interest," "younger-generation substitute gift," and "superseded gifts." See UNIF. PROB. CODE § 2-707(a) (1993).

28. Halbach & Waggoner, *supra* note 2, at 1048.

29. "'Primary future interest' means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interest who left surviving descendants survived the distribution date." UNIF. PROB. CODE § 2-707(c)(3)(i) (1993).

30.

"Younger-generation future interest" means a future interest that (A) is to a descendant of a beneficiary of the primary future interest, (B) is an alternative future interest with respect to the primary future interest, (C) is a future interest for which a substitute gift is created, and (D) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

UNIF. PROB. CODE § 2-707(c)(3)(iii) (1993).

A note, Erich Tucker Kimbrough, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269, 310 (1994), calls UPC § 2-603(c), the subsection of the antilapse statute applicable to alternative devises, "an interpretive nightmare." The subsection is essentially the same as § 2-707(c), applicable to alternative future interests in trust.

and thereafter *B* dies without descendants, the settlor has a reversion. If the settlor then dies during *A*'s life, the settlor has no control over who takes the property. If the settlor leaves surviving descendants, they take. If the settlor does not leave surviving descendants, the settlor's heirs take.³¹ The property does not pass under the settlor's will as reversions do under current law. In most cases this will defeat the settlor's intent. Where an inter vivos trust fails for some reason, and a resulting trust or equitable reversion arises in the settlor, the settlor has a second chance to fill a gap in the disposition or to correct otherwise the flaw in the original trust. Under section 2-707, the settlor cannot say what is to be done with the property unless the settlor survives the termination of the trust. Why the 1990 UPC revisers chose to pass the property upon the termination of the trust to the settlor's heirs, who might not be the objects of the settlor's bounty, rather than in accordance with the settlor's direction in his will or through his residuary clause is inexplicable.

There is no federal estate tax advantage in making all reversions contingent upon surviving to the termination of the trust. Under current law, a transmissible reversion is included in the reversioner's federal gross estate under section 2033 of the Internal Revenue Code.³² Under section 2-707 of the UPC, which substitutes heirs for the reversioner, the reversion is included in the settlor's federal gross estate according to section 2037 of the Internal Revenue Code³³ if the reversion is worth more than five percent of the value of the property at the settlor's death. Indeed, inasmuch as section 2-707 creates a reversion in the settlor in every case of an irrevocable inter vivos trust, unless a contrary intent is shown, there is a risk that the settlor's reversion implied by law will be taxable in his estate under section 2037 of the Internal Revenue Code.

INCREASE IN ESCHEATS

The common law dislikes escheats to the state. It favors distribution to private individuals. The transmissible remainder rule serves to carry out this policy.

Because *all* future interests in trust are, under section 2-707 of the UPC, subject to a requirement that their individual owners must survive to the distribution date unless the trust instrument

31. UNIF. PROB. CODE § 2-707(d) (1993).

32. I.R.C. § 2033 (1988).

33. I.R.C. § 2037 (1988).

provides otherwise, escheats will increase if these owners die without descendants substituted for them by section 2-707. The Official Comment points this out in a rather indirect way. Under section 2-707, it says, "there will always be a set of substitute takers, even if it turns out to be the State."³⁴ This is best seen by an example.

Case 5. *T* bequeaths a fund in trust "for *A* for life, then to *B*." *T*'s residuary devisee is *C*. Then *B* dies without issue, devising his property to his spouse, *D*. *C* dies intestate without issue. Under common law, *D* takes the fund at *A*'s death. Under section 2-707, because *B*'s remainder is contingent on surviving *A*, and *B* leaves no issue to substitute for *B*, *B*'s remainder fails. Likewise, *C*'s residuary gift of the trust remainder is contingent upon surviving *A*, and because *C* dies before *A* without issue, the gift to *C* fails. At *A*'s death, the trust fund is distributed to *T*'s heirs ascertained as if *T* died when *A* died.³⁵ If *T* has no heirs alive at *A*'s death, the property will escheat to the state.

Skilled lawyers often make all future interests contingent upon surviving to the date of distribution, in order to avoid federal estate tax on a remainder if a remainderman dies before the life tenant. It is common for the lawyer to insert a charity as the ultimate taker if all the contingent future interests fail. Section 2-707 substitutes the state in this event.

MORE PERPETUITIES VIOLATIONS

By making all remainders contingent on survival, unless the trust instrument provides otherwise, section 2-707 will prevent many remainders from being treated as vested under the Rule Against Perpetuities. The Rule Against Perpetuities applies only to contingent interests, not to vested remainders. Remainders vested at common law but made contingent by section 2-707 may violate the Rule. A lawyer who follows his or her old reliable forms, unaware that a sweeping change in the law of vested remainders has been effected by section 2-707 of the UPC, may inadvertently create a contingent interest in violation of the Rule and be liable for malpractice.

Section 2-707 applies to all future interests in trust, including reversions. Under common law, all reversions are vested and not

34. UNIF. PROB. CODE § 2-707 cmt. (1993).

35. UNIF. PROB. CODE § 2-103 (1993) limits heirs to the descendants of the decedent's grandparents. This limitation on inheritance has met with considerable resistance in the legislatures, which have not favored escheat. In California, for instance, the legislature adopted large portions of the 1969 Uniform Probate Code, but, rejecting the UPC pro-escheat stance, the legislature extended intestate succession to all kindred, stepchildren, mothers-in-law, fathers-in-law, brothers-in-law, and sisters-in-law — but not to sons-in-law or to daughters-in-law! CAL. PROB. CODE § 6402(e), (g) (West 1991).

subject to the Rule Against Perpetuities. Under section 2-707, reversions are contingent and subject to the Rule Against Perpetuities. This may result in unexpected violations of the Rule. The two-generation trust involved in *Case 6* is an illustration.

Case 6. *T* bequeaths his residuary estate in trust "for *A* for life, then to *A*'s children for their lives, then to *B*." Under common law, *B*'s remainder vests upon creation and is valid. *B* can devise the remainder as *B* chooses. Under section 2-707, *B*'s remainder is contingent on *B*'s surviving *A* and *A*'s children, who may not all be in being at *T*'s death. But because *B* must survive these persons to take, the remainder in *B* will vest, if at all, within *B*'s life. It is valid. On the other hand, the substitute gift in *B*'s descendants, who may be born after *T*'s death, is void because these possibly afterborn descendants must survive *A*'s possibly afterborn children. This event will not necessarily occur, if at all, within lives in being. The reversion in *T*'s heirs, who are ascertained as if *T* died when the last child of *A* dies, is also void because the heirs cannot be ascertained until the death of *A*'s children, who may be afterborn persons. Who then takes the property upon the death of *A* and *A*'s children, if *B* is dead? Apparently, it will go to the state because no valid interests in individuals have been created. At common law, this could not happen because all reversions are vested, and the reversioner takes if all other interests are void.

Some, but not all, of the additional perpetuities violations section 2-707 causes will be cured if the jurisdiction has adopted a wait-and-see statute. If the jurisdiction has adopted the Uniform Statutory Rule Against Perpetuities,³⁶ for example, no violation of the rule can occur until ninety years pass. If at that time contingent interests still exist — if, for example, *A* has a child born after the creation of the trust who survives *B* and is living ninety years after the creation of the trust — the court must reform the trust so as to best carry out the intentions of the settlor. Such a lawsuit, with no predictable outcome, will be a godsend to lawyers.

MORE DIFFICULTY IN TERMINATING TRUSTS

Section 2-707 makes it more difficult to terminate trusts. Where a trust is created for *A* for life, remainder to *B*, the trust can be terminated if *A* and *B* agree, unless termination would be contrary to a material purpose of the settlor. Under section 2-707, it is much more difficult to terminate the trust during *A*'s lifetime because *B*'s issue who survive *A* have a potential interest in the trust. Section 2-707 thus places a substantial restraint upon alienation.

36. UNIF. STATUTORY R. AGAINST PERPETUITIES WITH 1990 AMENDMENTS § 1(a)(2) (1990).

Many unforeseen problems may arise during long-term trusts: changes in the beneficiaries, their needs, and their abilities; changes in the tax laws and in different types of investment opportunities; unsatisfactory performance by the trustee. Where long-term "dynasty" trusts have been created to avoid estate and generation-skipping taxes for several generations, and particularly in states adopting the Uniform Statutory Rule Against Perpetuities, which invites ninety-year dynasty trusts,³⁷ beneficiaries may increasingly want to modify or terminate disadvantageous trusts.

Section 2-707 applies only to future interests in trust, not to legal remainders. The drafters excluded legal remainders from the statute on the ground that giving a contingent interest to the remainderman's descendants would make it more difficult for the life tenant and the remainderman to give good title in a sale of land.³⁸ But terminating a trust that has outlived its usefulness is often just as important to family welfare as selling land.

LAW OF EQUITABLE REMAINDERS SEPARATED FROM LAW OF LEGAL REMAINDERS

Section 2-707 preserves the existing common law as it applies to legal remainders. The new rules of section 2-707 apply only to future interests in trust. This adds an additional body of complicated rules for lawyers to know, without abolishing their existing counterparts.

Having separate rules for legal and equitable future interests may lead to litigation when it is not clear whether the future interests are legal or equitable.³⁹ It may revive old learning, thought obsolescent, about whether the Statute of Uses applies to the particular instrument and converts legal interests into equitable ones.⁴⁰ Where land is conveyed in trust, the trustee takes only such legal

37. On \$1 million dynasty trusts, which avoid federal estate and GST taxes for the perpetuities period, see Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185, 205-09 (1995).

38. UNIF. PROB. CODE § 2-707 cmt. (1993).

39. See 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 24.1 (4th ed. 1987) (citing numerous cases litigating whether a devise to two or more persons in succession creates a trust or legal estates).

See also *Lux v. Lux*, 288 A.2d 701 (R.I. 1972), in which the court held that a devise of income-producing real property to the testator's grandchildren aged two to eight, to be possessed by them when the youngest living grandchild reached 21, created a trust for the grandchildren. The court's sensible construction would result, under § 2-707, in a condition of survivorship being imposed upon the grandchildren.

40. See 1A SCOTT & FRATCHER, *supra* note 39, §§ 67-73.

estate as is necessary to enable the trustee to perform the trust.⁴¹ If the trustee takes merely a life estate *pur autre vie* (for the life beneficiary's life), the remainder is legal, not equitable. Today, whether a trustee takes a legal fee simple or a more limited estate is of little practical importance. But, under section 2-707, this may become once again a lively question in our jurisprudence.

In the last hundred years the law has made admirable progress in merging the law of legal future interests and the law of equitable future interests. It applies the same rules of construction to both and, in almost all states, the same rules about devisability and inheritance. Section 2-707 pulls these rules apart, creating more complications.

AVOIDANCE OF PROBATE ADMINISTRATION

One disadvantage of transmissible remainders is that the remainder passes through probate at the remainderman's death, incurring probate costs. Indeed, the stated rationale for section 2-707 of the UPC is "to prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests, who may have died long before the distribution date."⁴² It is hard to understand, however, why, as a matter of policy, future interests in trust should be excluded from the estate inventory and other nonpossessory interests included. Other nonpossessory interests may include copyright royalties, television residuals, an option to purchase property, a landlord's reversion in rental property, a futures contract, life insurance on the life of another, or legal future interests. Future interests in trust are certainly no more "cumbersome and costly" to administer — or to value — than other nonpossessory interests.

Any remainderman who wishes to avoid subjecting the remainder to probate expenses can transfer the remainder, like other property, into a revocable *inter vivos* trust. The creation of a vested remainder does not necessarily mean the remainder will pass through probate at the remainderman's death.

The Official Comment suggests that if the remainderman's personal representative overlooked the remainder and did not include the remainder as an asset of the remainderman's probate estate, the probate estate will have to be reopened and a new administrator appointed when the life tenant dies in order to pass title to the re-

41. *See* 1A *id.* § 88; 4 *id.* § 345.

42. UNIF. PROB. CODE § 2-707 cmt. (1993).

mainderman's heirs or devisees. The Official Comment does not cite a single case for this proposition, which deserves close examination. If the order for final distribution of a probate estate contains an omnibus clause distributing "currently unknown" or "hereafter discovered" property to specified persons, no subsequent administration is necessary.⁴³ Even without an omnibus clause, no good reason appears why the trustee should not be able to distribute the trust principal upon termination of the trust directly to the residuary beneficiaries or heirs if they have been determined in the probate decree. As a Missouri court said:

Even though there are newly discovered assets of an estate the appointment of an administrator of the goods unadministered is not required unless there are unpaid allowed claims against the estate, or other good cause is shown. What may constitute other good cause is not defined and has not been fully developed by the cases. The phrase would appear to include situations where it was uncertain who, as heirs or distributees, is entitled to receive the newly discovered assets. If there are no debts and it is clear who is entitled to the newly discovered assets, and all parties interested therein can be brought before the court, it has been held proper for those distributees or heirs to maintain an action to collect or reduce to their possession the newly discovered assets of the estate without the appointment of an administrator of the goods unadministered.⁴⁴

In some jurisdictions, cases hold that a trustee may distribute the trust assets to the current owners of the remainder, without reopening probate for a deceased remainderman.⁴⁵ In a jurisdiction that requires reopening probate estates to pass title to a remainder not previously inventoried, a simple statute authorizing the trustee to distribute the trust property directly to the persons entitled on the distribution date could cure the problem. There is no need to reverse 700 years of law to accomplish this result.

FEDERAL TRANSFER TAXATION ON REMAINDERMAN'S DEATH

A second disadvantage of transmissible remainders is that a transmissible remainder is subject to federal estate taxation if the remainderman dies during the life tenant's life. Prior to 1986, a number of academic commentators opposed the common law pre-

43. See, e.g., 2 CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA PROBATE WORKFLOW MANUAL, REVISED, § 18.29, at 573 (1995) (form for petition for distribution contains omnibus clause); see also CAL. PROB. CODE § 11642 (West 1991).

44. *In re Estate of Waller*, 559 S.W.2d 312, 317 (Mo. Ct. App. 1977) (quoting 4 ALMON H. MAUS, PROBATE LAW & PRACTICE § 1523, at 644 (1960)).

45. *Security Trust Co. v. Irvine*, 93 A.2d 528 (Del. Ch. 1953); see also *Estate of Stanford*, 315 P.2d 681 (Cal. 1957) (ordering the distribution of trust principal directly to the devisee of a vested remainderman).

sumption of vesting because of the potential estate taxation of a remainder at a remainderman's death.⁴⁶ This disadvantage of transmissible remainders was neutralized, however, with the enactment of the federal generation-skipping transfer (GST) tax in 1986.⁴⁷

Although section 2-707 of the UPC prevents a federal estate tax from being imposed at the remainderman's death by eliminating the remainder's transmissibility, section 2-707 may result in imposition of a generation-skipping transfer tax in its place. Section 2-707 substitutes the descendants of the dead remainderman for the remainderman. If the remainderman is of a generation below the trust settlor, this substitution results in a transfer to persons two or more generations below the settlor — a generation-skipping transfer. Unless the generation-skipping transfer is sheltered by the \$1 million exemption⁴⁸ or an exception to the GST tax, a GST tax of fifty-five percent of the trust corpus will be levied at the life tenant's death.⁴⁹

Because numerous factors may come into play in any individual case — available exemptions from estate and GST taxes, marital deduction for estate tax, stepped-up basis for assets subject to estate tax, state death taxes — it is not possible to say whether the present transmissible remainder rule or section 2-707 will be more advantageous for taxpayers. The benefits and burdens of each rule will depend on the individual case. Because no clear general taxpayer advantage results from one rule rather than the other, the respective merits of section 2-707 and the transmissible remainder rule should be evaluated on some basis other than an assumption that one of them is generally preferable for tax reasons.

WHAT A SKILLED ESTATE PLANNER WOULD DO

In assaying the merits of a default rule such as section 2-707, it is useful to compare it with what a skilled estate planner would do in the circumstances. How close does the default rule come in giving the clients of the unskilled the advantages of skill? An experienced estate planner would want to avoid taxes, keep administrative costs

46. See WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 439 n.20 (1988) (listing commentators).

47. Tax Reform Act of 1986, Pub. L. No. 99-154, § 1431(a), 100 Stat. 2085, 2717-2729 (codified as amended at I.R.C. §§ 2601-2663 (1988 & Supp. V 1993)).

48. I.R.C. § 2631 (1988).

49. The GST tax is levied at the highest rate of the estate tax, which is currently 55%. See I.R.C. § 2001(c) (Supp. V 1993).

low, eliminate ambiguities, and give the beneficiaries power to cope with changing circumstances. The result would be a trust looking something like this:

Case 7. *T* devises a fund in trust "for *A* for life, then to *B* if *B* survives *A*, and if *B* does not survive *A*, then to such one or more of *B*'s spouse and *B*'s descendants and their spouses as *B* appoints by will. If *B* fails to exercise the power of appointment, the trust property shall be distributed on *A*'s death to *B*'s descendants then living [or over to others]."

In *Case 7*, *B* does not have a remainder transmissible at *B*'s death because *B* is required to survive *A*. The remainder will not be included in *B*'s probate estate or subject to federal estate tax if *B* predeceases *A*. Any disadvantages of transmissible remainders have been avoided. On the other hand, *B* has a special power of appointment that gives *B* the ability to deal with changing circumstances.⁵⁰ The objects of the power include spouses, making it possible to take advantage of the marital deduction as well as spousal exemptions from the estate tax and the generation-skipping transfer tax. If *B* dies during *A*'s life, resulting in a generation-skipping transfer at *A*'s death, *B* can avoid the GST tax by exercising the special power so as to throw the trust remainder into *B*'s taxable federal gross estate.⁵¹ If the remainder is included in *B*'s federal gross estate, and subjected to estate tax, no GST tax is payable at *A*'s death. A special power of appointment gives the donee the option of paying an estate tax on the value of the remainder at rates from thirty-seven to fifty-five percent rather than a generation-skipping transfer tax at the life tenant's death on the full value of the property at fifty-five percent rate.

Which default rule — the current law of transmissible remainders or section 2-707 — more closely resembles what a skilled drafter would do? The common law creates a general power rather than a preferred special power in the remainderman, which makes it more difficult — but not impossible — for the remainderman to save federal transfer taxes. The common law gives the remainderman power to deal with changing events, applying intelligence to

50. A skilled estate planner might give the life tenant rather than the remainderman a special power of appointment if the life tenant is competent and has sound judgment.

51. Under I.R.C. § 2041(a)(3), if the donee exercises a special power by creating a general inter vivos power in another, the property subject to the special power will be subject to estate tax at the donee's death. This is known as the "Delaware Tax Trap," because the provision was inserted in the Code to deal with some peculiar Delaware perpetuities law. If the donee chooses to fall into the Delaware Tax Trap, and subject the remainder to estate tax, no GST tax is payable. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 711, 873-74, 1084-85 (5th ed. 1995).

the circumstances as they exist at the remainderman's death. In contrast, section 2-707 of the UPC offers no tax advantage and, most important, leaves the family stuck with an unchangeable course of inheritance preordained from the creation of the trust.

In the most comprehensive examination of whether an antilapse statute is preferable to the common law of remainders, Professor French compared these two sets of rules to what skilled estate planners do in creating trusts.⁵² She concluded that an antilapse statute is not better than the common law if descendants are unalterably substituted for the remainderman who predeceases the life tenant. This would impede sound and flexible estate planning by the remainderman. French concluded that imposing a requirement of survival on remaindermen was justified only if they were given, by statute, a broad special power of appointment permitting the remainderman maximum flexibility to adapt to changes after the creation of the trust — in other words, providing by statute what a skilled estate planner would provide.⁵³ The UPC revisers did not narrow the remainderman's current general power to a special power as French recommended. They eliminated the power to deal with changing circumstances altogether. It seems unlikely that any skilled estate planner would draft a trust that resembles what the client of an unskilled lawyer would get under section 2-707.

CONCLUSION

Very likely any legislature adopting section 2-707 would make it prospective only, inasmuch as retroactive application might be held to be an unconstitutional taking of property from the current owners of transmissible remainders.⁵⁴ If the legislature were to make section 2-707 prospective only, for some years to come lawyers would be responsible for knowing pre-enactment future interests law about transmissible remainders as well as the complicated new law of section 2-707, broadening their exposure to malpractice. Section 2-707 likely will not commend itself to practitioners, who will be required to learn new rules and revise their trust forms — all for changes that arguably do not benefit the public welfare.

52. Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801 (1985).

53. *Id.* at 835-36.

54. See *Lake of the Woods Assn. v. McHugh*, 380 S.E.2d 872 (Va. 1989) (holding retroactive application of wait-and-see perpetuities statute to previously vested interests unconstitutional).

It is not possible to say whether the common law or section 2-707 of the UPC most likely carries out the intent of the average trust settlor. There is no empirical evidence one way or the other. Judged by other criteria, the common law looks much more attractive than section 2-707. It gives flexibility to family members to deal with changes occurring during the life tenant's life, flexibility that section 2-707 eliminates. Section 2-707 will make more difficult modification or termination of trusts that, with the passage of time, become disadvantageous to the family. Section 2-707 will likely increase litigation, complexity in the law, and malpractice exposure. The only advantage of section 2-707 is that it eliminates remainders from remaindermen's probate estates, possibly saving probate costs. If there are probate administration costs associated with remainders, which have never been documented, they are a small price to pay for the flexibility of the common law.

Uniform Probate Code section 2-707 creates a new estate in remainder: an estate that passes only to the descendants of the remainderman. The English Parliament in 1285 by the Statute De Donis authorized a rather similar estate, either in possession or in remainder. It was called a fee tail. After centuries of experience, the fee tail was found to deprive the head of family of power to make wise and flexible dispositions of family land, to interfere greatly with marketability of land, and to have numerous other disadvantages. It was abolished in almost all American jurisdictions by the end of the nineteenth century, and finally, in 1925, in England. It is not too far off the mark to say that section 2-707 of the UPC is a piece of feudalism redivivus.