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Trusts and the Doctrine of Estates

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TRUSTS AND THE DOCTRINE OF ESTATES

Olin L. Browder, Jr.

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TRUSTS AND THE DOCTRINE OF ESTATES

*Olin L. Browder, Jr.**

THE "doctrine of estates" is the common law system for the classification of divided ownership. Its primary purpose is to differentiate the legal consequences of the variety of concurrent, present, and future estates, but it also serves to differentiate the dispositive language required to create or transfer such estates. The doctrine of estates, therefore, embraces a sizable part of the law of conveyancing, including the large body of doctrine known as rules of construction.

In modern practice the classification and construction of present and future interests usually occurs with respect to beneficial interests in trust.¹ It has not been sufficiently recognized, however, that dispositions in trust present special problems of classification and construction that do not arise in nontrust dispositions. It is my purpose to discuss a number of such problems that have not received adequate systematic attention. These problems have their source in the complexities of dispositive language typically found in trust instruments.

Interests in trusts may involve admixtures of concurrent and successive interests in income and both concurrent and alternative or supplanting interests in corpus. Interests in trust income may be given in shares, percentages, stated sums, or a combination of these. There may be directions to pay corpus in a variety of forms, or to

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1. The rise of the trust and the ultimate completion of the panoply of future interests were related consequences of the Statute of Uses. The absorption of the trust wrenched the doctrine of estates out of its limited role as a regulator of land tenure. Under the trust concept, the divisions of ownership of personal property assume the same forms as the estates in land. It was the English chancellor's wisdom that, while breaking trust enforcement away from the strictures of the common law, cast the new rights into common law form. We were thus spared two doctrines of estates (or perhaps four, if we would otherwise have separate interests in land and chattels, as well as in trust and nontrust). But of course such simplification could not ignore the role and status of that indispensable intruder, the trustee. It has long been argued that we need not explain the interests of trust beneficiaries in property terms, because the trustee is the owner of trust property, whose duty to the trust beneficiaries can be explained in in personam terms. See G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 183 (2d ed. 1965); 1 A. SCOTT, *THE LAW OF TRUSTS* § 1 (3d ed. 1967). Tradition, however, has always cast the concurrent or successive relations between one beneficiary and another in property terms. How else can one explain the application to trusts of almost the whole scheme of estates and its attendant rules of construction, as well as the vulnerability of trust interests to the Rule Against Perpetuities?

pay parts of corpus at various times or to several persons at different times. All of this may be further complicated by grants of discretion to trustees to determine the amounts paid or the persons entitled to receive income, or to invade corpus at various times or in various ways for various purposes.

Most substantive trust language takes the form of directions to trustees to pay income or corpus. Most such directions can be followed by trustees without guidance. It should be obvious, however, that dispositions of trust income create special construction problems. It may not be obvious that the conceptual apparatus of ownership, when applied to beneficial interests in trust, also seems to have produced special problems of construction and drafting that do not arise out of dispositions not in trust.

I. EQUITABLE FEE ESTATES

Most private trusts are created for either or both of two purposes: to establish an effective succession of present and future interests in property in circumstances in which a succession of legal interests would be impracticable or insecure, and by separating management from enjoyment and prescribing professional or regulated management, to protect and enhance the enjoyment of property. Many settlors seek both objectives; where they seek only the first, they incidentally gain the second.

Following a succession of beneficial interests the ultimate interests will, of course, be in fee simple: a gift of or a direction to pay the corpus of the trust estate. Under traditional estate concepts, fee simple interests may be indefeasibly vested, defeasible, or contingent. The most common condition upon a remainder in fee simple is a condition of survivorship. In fact, it has been urged that such interests always be made subject to a condition of survivorship, so as not to allow the beneficiary to die owning property that he has never enjoyed but upon which his estate might be taxed.² Such advice is now commonly followed, which usually implies a provision for one or more alternative contingent remaindermen. The alternative interests should all be subject to express conditions precedent, because of the complexities and drafting pitfalls inherent in giving primary remainders that are vested subject to restricted or unrestricted conditions of defeasance.

Not all trusts, however, are or should be variations of this pattern. Some settlors seek only the second objective mentioned above,

2. See Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 CALIF. L. REV. 431, 465 (1961).

and do not wish to create any future interests in the trust estate. Thus a settlor may not wish to give property to a donee outright, preferring that for some period the property be managed for the donee's benefit. In fact, a settlor may wish to establish such a trust for his own benefit, creating a beneficial interest only in himself. The most obvious way to attain such an objective is the total or partial separation of legal and equitable titles, without any division of the equitable title. The beneficiary is then entitled to the fruits of a trust administration—usually the right to receive income, either as it accrues or after a period of accumulation—and the corpus upon the termination of the trust. He has interests in both income and corpus. But since every interest in trust income is an interest in trust corpus—perhaps the only interest in corpus consistent with the purposes of the trust—it is not proper conceptually (and may produce confusion and unintended consequences) to say that the beneficiary has two interests, if by this we mean a division into present and future estates. He has only one estate, the complete beneficial estate, which can be called an equitable fee simple or its equivalent.³ For convenience this term may be applied to interests that are in fact partly legal—where, after a time in trust, the property is given to the beneficiary free of trust.

This may seem to be the simplest kind of trust and the easiest to declare without ambiguity. Such a trust is not uncommon in cases in which income is to be paid to one or more beneficiaries for a period of years in gross or until the attainment of a certain age, with a direction to pay the corpus thereafter to the beneficiary or beneficiaries. Each beneficiary in effect takes an equitable fee.⁴ A variation of this arrangement, however, may produce a classificatory snare for the unwary. Suppose the direction is to pay the income to a beneficiary and to pay him the corpus if or when he attains a certain age. If there is no gift over upon his death, it is permissible to say that he takes an indefeasible fee interest.⁵ But if it is appropriate to find a condition of survivorship, as where there is a gift over to others, it still seems proper, despite language that in form

3. It is common, for tax and other purposes, to distinguish an income interest from an interest in the corpus, and for such purposes a beneficiary with an equitable fee simple would be treated as having two interests.

4. It is generally accepted as a constructional preference that a gift of corpus at a certain age is not subject to a condition of survivorship if the beneficiary is entitled to the intermediate income. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 588 (2d ed. 1956). Under the Uniform Gifts to Minors Act substantially the same benefit can be gained without a trust; the minor takes the full legal title. *UNIFORM GIFTS TO MINORS ACT* § 3.

5. *RESTATEMENT OF PROPERTY* § 258, comment *a* (1940).

imposes a condition precedent, to construe the language as creating a fee interest defeasible on death before the end of the income period,⁶ rather than a term of years plus a contingent remainder or executory interest. The difference in characterization might be crucial in certain circumstances.

Suppose a settlor wishes to give property to *A* subject to a trust for *A*'s lifetime, without creating any other beneficial interest. Assume further that the settlor wishes to give the property over to someone else only if *A* leaves (or does not leave) issue. Efforts apparently intended to accomplish such objectives are sometimes couched in ambiguous language, and the resulting construction problems have led to decisions that may have frustrated the settlor's intent.

The source of such drafting deficiencies is evident. Most trust instruments direct the payment of income followed by a gift of or a direction to pay corpus. It is one thing to direct that income be paid to *A* for ten years, and that the corpus shall then be paid to *A*. But, although it would not be improper, most draftsmen recoil from a direction to pay income to *A* for life, and then to pay the corpus to *A* upon *A*'s death. As a result, language actually employed to produce what is in effect an equitable fee may leave doubt whether that was in fact intended. Or the language may so differ from traditional forms that construction becomes ensnared in conceptual confusion. Traditional drafting practice and terminology foster the fallacious assumption that a gift of income and a gift of corpus necessarily create two separate estates, or that a trust measured by a person's lifetime necessarily creates a life estate.

A. *More on Doctor v. Hughes*

*Doctor v. Hughes*⁷ involved the creation of an inter vivos trust in land with an income interest to the settlor for life and an express remainder in the settlor's heirs. When Judge Cardozo breathed new life into the moribund worthier-title doctrine by treating it as a rule of construction, he tersely explained why the remainder in the set-

6. In *Rust v. Rust*, 211 S.W.2d 262 (Tex. Civ. App.), *affd.*, 147 Tex. 181, 214 S.W.2d 462 (1948), trust income was to be paid to a testator's daughter until her thirty-fifth birthday, at which time the corpus was to vest in fee simple in the daughter. Two alternative classes of beneficiaries were substituted in case the daughter died before the end of the stated period. These dispositions were sustained under the Rule Against Perpetuities, the last two on the ground that vesting was postponed only until the daughter's death. The daughter's interest would have been valid even if construed as contingent, but the court said that the fee title to the trust estate vested in her at the testator's death, defeasible upon her death prior to the stated time. In other words, she took a defeasible equitable fee estate. *Cf. Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950).

7. 225 N.Y. 305, 122 N.E. 221 (1919).

tlor's heirs was without effect: "No one is heir to the living; and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs."⁸ The opinion follows the terminology of worthier title by declaring that since the limitation to the settlor's heirs was without effect, a reversion in the settlor was created by operation of law. But since no one other than the settlor had any interest in the land, the result is more properly described as an equitable fee simple in him.

Perhaps this is the result intended by the settlor. The draftsman may have been groping for a way to say that the property, on the settlor's death, should still be regarded as belonging to the settlor. It is at least plausible that in such circumstances a draftsman will insert a provision for the settlor's heirs merely because they are the normal substitute for one who would take if he were alive. It is not my purpose, however, to offer a further defense of the doctrine of *Doctor v. Hughes*. Its unfortunate history in New York is well known, and demands for its abolition are still in order.⁹ The irony of *Doctor v. Hughes* is that the effort to cast the worthier-title doctrine into a more palatable form may have had a contrary effect. While a limitation to a person's heirs may be stated ambiguously, it is too straightforward an expression of intent to justify a construction that, when the heirs mentioned are the settlor's heirs, the words are to be treated as if they were not used at all. The drafting lesson of the American doctrine of worthier title, even where it is still in effect, is that a limitation of a remainder to one's own heirs is not a secure method to perfect an inter vivos trust for one's sole benefit or to retain a reversion after creating income interests in others.

B. "Heirs, Devisees and Legatees"

Suppose that the remainder interest in *Doctor v. Hughes* had been limited not to the settlor's heirs but to his "heirs, devisees and legatees." Such language appeared in *Estate of Rosecrans*,¹⁰ in reference to successors of two named beneficiaries. An inter vivos trust instrument directed the payment of principal and accumulated income, in sums and at times left to the trustee's discretion, to a named son and daughter in equal amounts, or, if either was deceased, "to the heirs, devisees and legatees of such deceased person, subject

8. 225 N.Y. at 313, 122 N.E. at 223.

9. See *Hatch v. Riggs Natl. Bank*, 361 F.2d 559 (D.C. Cir. 1966); Browder, *Future Interest Reform*, 35 N.Y.U. L. REV. 1255, 1260 (1960); Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 UCLA L. REV. 371 (1959).

10. 4 Cal. 3d 34, 480 P.2d 296, 92 Cal. Rptr. 680 (1971).

to the administration of his or her estate."¹¹ On the termination of the trust, at a time not mentioned but presumably upon or after the death of both named beneficiaries, the trust estate was to be divided and given in the same manner, that is, "to the heirs, devisees, and legatees" of the son and daughter. Upon the death of the son the court in a state inheritance tax proceeding held that the son took no more than a power of appointment, and that the exercise of the power, under the then applicable statute, did not permit the inclusion of the appointive property as part of the decedent's separate property for the purpose of the marital exemption.

A limitation in favor of a person's "heirs, devisees and legatees" is so tersely ambiguous and so alien to normal dispositive terminology that it may suggest a completely inexperienced or confused draftsman. Perhaps, however, the terseness—and the fact that the language is a substitute for a gift to the named person himself—suggests instead a simple notion that is lost if one seeks the meaning in each word separately. The phrase "devisees and legatees," standing alone, is indefinite if the named person is living, and makes the gift depend on his will, formally expressed. The result, in effect, is a testamentary power of appointment, and this could have been what was intended, except for the word "heirs." That word, standing beside the others, can hardly be intended to mean that a person's heirs are to share the property with his legatees and devisees. The more plausible inference is that his legatees and devisees are to take if he dies leaving a will, and his heirs are to take if he dies intestate. The result, in other words, is a gift in default of appointment to the heirs of the donee of the power. Full classification of all of the beneficial interests under the *Rosecrans* trust in these terms would produce a special power of appointment in the trustees in favor of the son and daughter, with a general testamentary power in each of the latter, upon his or her death during the term of the trust, to designate the objects of the special power, and also to appoint the remainder or executory interests upon the termination of the trust, with gifts in default of appointment in either event to their respective heirs.

This elaborate analysis may come rather close to casting in estate terms the meaning of the words "heirs, devisees and legatees." Note, however, the further language in *Rosecrans* that the property was to be "subject to the administration of his or her estate." If the testator's son or daughter had only a power of appointment, the

11. 4 Cal. 3d at 36, 480 P.2d at 297, 92 Cal. Rptr. at 681.

property would not be treated as part of the estate of each for purposes of administration. The power analysis thus ignores part of the language of the will.

A simpler notion emerges from the language of the *Rosecrans* trust taken as a whole. Did it not provide for full beneficial ownership, subject to discretion in the trustee about the times and amounts of payment—that is, an equitable fee estate? One ingredient of ownership—the power of inter vivos appointment—might have been lacking, for the three dispositive words all indicated succession at death. Perhaps it would therefore have affronted the settlor's desire to permit the legatees to designate their successors inter vivos. On the other hand, it might well have furthered the settlor's intent to give a full equitable fee, permitting his children to deal with the property as their own for tax purposes.

The California tax law has since been changed on the point involved in *Rosecrans*,¹² so that the power analysis accommodates the marital exemption as well as the estate analysis. For most purposes, either analysis will serve, but there are circumstances in which the minor differences between them are important. The estate analysis means that the property belongs to the legatee and goes through his estate upon his death. It also permits disposition inter vivos, unless the trust is expressly or impliedly spendthrift. The power analysis is more complicated and thus more conducive to litigation about the exercise or release of the power. It keeps the property out of the probate estate of the donee and usually subjects the property to the donee's creditors only if he exercises the power.¹³ Although inter vivos control by the donee is not altogether eliminated, because even a general testamentary power is releasable,¹⁴ in many jurisdictions the dispositive power of the donee is restricted by virtue of the rule measuring the perpetuity period from the time the power is created.¹⁵

Where settlors have obviously sought to confer substantially complete ownership upon one or more trust beneficiaries, but have expressed their intention in terse, ambiguous language, courts are free to choose from among our proliferated dispositive devices the analysis that comes closest to the settlor's inferred intent. Considerable sophistication is required for such construction, however. General powers of appointment are essentially proprietary interests so

12. See CAL. REV. & TAX. CODE § 13696 (West 1963).

13. L. SIMES & A. SMITH, *supra* note 4, §§ 944-45.

14. *Id.* § 1054.

15. *Id.* § 1275.

close to ownership that a question exists about their status as a separate dispositive device, at least for some purposes. Where dispositive language creates a power only by implication, courts should not overlook the larger alternative. Not every power of disposition is a power of appointment. An owner in fee simple has the largest power of disposition, but he does not have a power of appointment. The same may be said for a trust beneficiary who is given both enjoyment and the power to name his successors.

These analytical alternatives should also be borne in mind where a settlor creates an inter vivos trust for his own benefit for life, with a remainder to his heirs, devisees, and legatees. An issue may arise as to the effect of the worthier title doctrine—or a statute abolishing it—on this disposition. In *Stewart v. Merchants National Bank*¹⁶ the settlor adopted the unusual expedient of having the trust declared by his attorney as settlor; but, because only the client's funds were used, the court declared the client the settlor in fact. The trust was for the settlor's sole benefit for his life. On his death, any remaining principal and accumulated income was to be distributed, after payment of expenses and claims against the estate, "as the Last Will and Testament of the beneficiary may provide, or to the beneficiary's heirs-at-law in equal shares if beneficiary leaves no valid will."¹⁷ Although the settlor had reserved no power to revoke, he petitioned for revocation. The trial court's denial of the petition—on the ground that interests of minors and unborn heirs were involved—was reversed on appeal.

While acknowledging that the worthier-title doctrine had been abolished by statute,¹⁸ the appellate court stated that the statute did not "require a trust to be construed in such a way as to override the expressed intent of the maker of such an instrument."¹⁹ Yet if an express gift to the settlor's heirs is construed to create a remainder in such heirs, it is difficult to see how the statute could override the settlor's "expressed intent." Although the court did not mention it, the effort by the testator to cast his attorney in the role of settlor might be seen as an effort to avoid the statute. Even if the statute

16. 3 Ill. App. 3d 337, 278 N.E.2d 10 (1972).

17. 3 Ill. App. 3d at 339, 278 N.E.2d at 12.

18. ILL. REV. STAT. ch. 30, § 188 (1969):

Where a deed, will or other instrument purports to create any present or future interest in real or personal property in the heirs of the maker of the instrument, the heirs shall take, by purchase and not by descent, the interest that the instrument purports to create. The doctrine of worthier title and the rule of the common law that a grantor cannot create a limitation in favor of his own heirs are abolished.

19. 3 Ill. App. 3d at 340, 278 N.E.2d at 13.

declares a rule of law, which seems doubtful, the settlor's language expresses an intention similar to that in *Rosecrans*—that is, to create an equitable fee in himself. On this view, the limitation to the settlor's heirs is considered only in relation to other directions for disposition of the property on his death. Since the conclusion that the settlor intended to create an equitable fee simple in himself does not require resort to the worthier-title doctrine, it is not precluded by a statute abolishing that doctrine.

C. Gift to a Person's "Executors or Administrators"
or to His "Estate"²⁰

Suppose that in *Rosecrans* or *Stewart*, instead of language about heirs, devisees, and legatees, the trustees had been directed to give the property to a beneficiary's "executors or administrators" or to his "estate."²¹ Both unlearned and experienced draftsmen have resorted to simple dispositive language of this sort. These expressions have appeared in a variety of circumstances, with consequent differences in dispositive intent. Although only one of the variants involves an equitable fee interest in trust, all reflect aspects of a common construction problem. The significance of this problem requires a brief survey of the several variations, culminating in the one that involves the equitable fee interest.

It should be noted generally that "estate" as a dispositive term suffers a special vulnerability in the hands of the courts. Some have held that property cannot be conveyed to an estate because an estate is not a person or an entity.²² Where the term is not used to label a property interest under the doctrine of estates, it is a general reference to one or more things, an aggregate of things, or a fund, the scope and attributes of which are indicated by the context. Obviously an effective conveyance requires a grantee. But there is little excuse for terminating construction at this point if the donor's intention can be discerned. Fortunately most courts have avoided the semantic hurdle, but some have not, and others have stumbled unnecessarily in the pursuit of the donor's meaning.

The Internal Revenue Code repeatedly refers to dispositions to a deceased person's "estate" under Federal Estate and Gift Tax

20. See generally Fox, *Estate: A Word To Be Used Cautiously, If at All*, 81 HARV. L. REV. 992 (1968); Annot., 10 A.L.R.3d 484 (1966).

21. The terms "executors and administrators" and "estate" are treated here as synonymous, provided no intention appears to give to a person's executor or administrator beneficially.

22. *Gardner v. Anderson*, 114 Kan. 778, 227 P. 743 (1923), *affd. on rehearing*, 116 Kan. 431, 227 P. 747 (1924).

provisions;²³ the *Restatement of Property* makes a similar reference in the definition of a general power of appointment;²⁴ and a similar reference appears in the Uniform Gifts to Minors Act.²⁵ The framers of these provisions surely assumed that the term "estate" has a valid and clear meaning. The cases discussed below, however, cast grave doubt upon this assumption.²⁶

1. *Gift to the Estate of a Living Person*

In *Cannon v. Ballenger*,²⁷ property was "to go back to Emma Cannon's estate" on a contingency after a life estate. Emma was alive when the contingency occurred, and the court gave her the property. While one might argue that Emma was given only a power of appointment, the court's judgment seems more likely to effectuate the donor's intent.

2. *The Testator's Estate*

In a number of cases homemade wills have directed that property, after the end of prior interests or upon a contingency, return or revert "to my estate," or the equivalent. Absent such language the undisposed-of interest would usually pass as a reversion to the testator's heirs. Should the language, therefore, be treated as surplusage, or does it prescribe a different result? Several courts have held that the property goes to the testator's heirs.²⁸ In one case that result was reached because an estate was held not to be a person capable of taking property,²⁹ and in the others the language was construed as equivalent to a limitation to the testator's heirs. A possible difference between a remainder in a testator's heirs and a reversion passing by intestacy, however, is that the former may be construed so as to as-

23. E.g., INT. REV. CODE OF 1954, §§ 674(b)(6), 2041(b)(1), 2056(b)(1)(A), 2503(c)(2), 2514(c), 2523(b)(1); Treas. Reg. §§ 20.2037-1(e), examples (1), (2); 20.2056(e)-2(b)(2) (1958).

24. RESTATEMENT OF PROPERTY § 320(1)(b) (1940).

25. UNIFORM GIFTS TO MINORS ACT § 4(d). See also 17 U.S.C. § 24 (1970) (copyright).

26. See Harris, *Tax Traps in Administrative Powers*, 8 REAL PROPERTY, PROBATE & TRUST J. 562, 562 (1973) ("In drafting wills and trusts we are drafting primarily for revenue agents, not for equity court judges.").

27. 222 S.C. 39, 71 S.E.2d 513 (1952).

28. *Shockley v. Storey*, 185 Ga. 790, 196 S.E. 702 (1938); *Gardner v. Anderson*, 114 Kan. 778, 227 P. 743 (1923), *affd. on rehearing*, 116 Kan. 431, 227 P. 747 (1924); *Clark v. Payne*, 288 Ky. 819, 157 S.W.2d 63 (1941); *Reid v. Neal*, 182 N.C. 192, 108 S.E. 769 (1921).

29. *Gardner v. Anderson*, 114 Kan. 778, 227 P. 743 (1923), *affd. on rehearing*, 116 Kan. 431, 227 P. 747 (1924).

certain the heirs at a time later than the testator's death.³⁰ Where a remainder to one's heirs is followed by a residuary clause, for instance, it has been held that the remainder interest is disposed of by that clause,³¹ although in one case that result was precluded by the restrictive terms of the residuary clause.³² In another case a residuary trust estate for the benefit of the testator's children and the children of a deceased child provided that upon the death of either of the grandchildren without issue, his share should "revert to my estate." The court held that the testator meant to refer to the residuary trust estate, and that the share should go to the then living trust beneficiaries.³³

Testators have also made outright gifts of all their property, or residuary dispositions, to their own estates or the equivalent. The result is the same, whether it is said to be by intestacy³⁴ or by a gift to the testator's heirs.³⁵

The problem is different where a donor attempts by inter vivos disposition to create a future interest in his own estate or in his executors or administrators. In *In re Estate of Bentley*³⁶ a life insurance policy was converted by the insured into what the court called an "annuity trust." Interest on the insurance proceeds was to be paid to the insured's daughter for life. On her death the proceeds were to be paid to her children then living, and, if none, "to the executors, administrators and assigns of Leon A. Bentley" (the insured). Upon the death of the daughter without issue the court held the proceeds payable to the successors-in-interest of the residuary legatees under the insured's will. The result seems sound, although the court's analysis of the interests created is open to question. The court said that alternative contingent remainders were created, plus a defeasible reversion in the insured. Upon the death of the daughter, the alternative remainder in the "testator's representatives" vested, divesting the reversion. This remainder was said to be an asset of the insured's estate and subject to the provisions of his will. Signifi-

30. *Clark v. Payne*, 288 Ky. 819, 157 S.W.2d 63 (1941).

31. *Downing v. Grigsby*, 251 Ill. 568, 96 N.E. 513 (1911); *Martin v. Hale*, 167 Tenn. 438, 71 S.W.2d 211 (1934).

32. *Clark v. Payne*, 288 Ky. 819, 157 S.W.2d 63 (1941).

33. *Lyman v. Sohler*, 266 Mass. 4, 164 N.E. 460 (1929).

34. *In re Estate of Davis*, 59 P.2d 547 (Cal. App.), *rev'd. on other grounds*, 8 Cal. 2d 11, 63 P.2d 827 (1936).

35. *In re Estate of Weissmann*, 137 Misc. 113, 243 N.Y.S. 127 (Sur. Ct. 1930), *aff'd.*, 232 App. Div. 698, 247 N.Y.S. 901 (1931). *Cf. In re Estate of Billman*, 175 Misc. 334, 24 N.Y.S.2d 43 (Sur. Ct. 1940), *aff'd.*, 261 App. Div. 957, 27 N.Y.S.2d 448 (1941).

36. 14 Ill. App. 3d 630, 303 N.E.2d 166 (1973).

cantly, this analysis assumes that the limitation in favor of the insured's personal representatives was in effect a reservation of an interest in himself. This interpretation seems sound; however, the interest was properly not a remainder, but a reversion, which, as the court held, was subject to disposition by his will. The case presented a recurring drafting problem: It was difficult to express the intention that any interest not given to his daughter and her children was to be retained by the insured under circumstances in which that interest could not be enjoyed until after his death.

3. *Immediate Gifts to a Deceased Person's Estate or to "A or His Estate"*

Although an immediate gift to the estate of a named person implies that the named person died before the testator, the gift does not purport to be a gift to a deceased person. It has been held that such a gift fails, either because no legatee is named³⁷ or because the testator's intent was not evident.³⁸ One court refused to pass upon the validity of the disposition, holding merely that the property did not go to the heirs of the named decedent.³⁹

In other cases courts have given the property to the executor of the named decedent to be disposed of according to the terms of his will.⁴⁰ This may mean that the gift is to the legatees designated in the named decedent's will, in which case the property is not to be treated as part of the decedent's estate for other purposes.⁴¹ Such an analysis can be justified under the statute of wills, if not by the doctrine of incorporation by reference then by the notion that the deceased person's will constituted an act of independent significance, or by compliance with the statute of wills by both instruments.⁴²

A simpler analysis, however, is possible. In order to carry out the inferred intention of the testator a court can treat the property as though it were part of the named decedent's estate at the time of his death.⁴³ This has the simplicity of a layman's assumption, and

37. *In re Estate of Glass*, 164 Cal. 765, 130 P. 868 (1913).

38. *In re Doyle's Estate*, 107 Mont. 64, 80 P.2d 374 (1938).

39. *Cookman v. Lindsay*, 215 Iowa 564, 246 N.W. 268 (1933).

40. *Cumming v. Cumming*, 219 Ga. 655, 135 S.E.2d 402 (1964); *Bottomley v. Bottomley*, 134 N.J. Eq. 279, 35 A.2d 475 (Ch. 1944); *Arnett v. Fairmont Trust Co.*, 70 W. Va. 296, 73 S.E. 930 (1912).

41. *Cumming v. Cumming*, 219 Ga. 655, 135 S.W.2d 402 (1964). *Cf.* *Bottomley v. Bottomley*, 134 N.J. Eq. 279, 35 A.2d 475 (Ch. 1944).

42. 1 A. SCOTT, *supra* note 1, §§ 54.2, 4.

43. In *Arnett v. Fairmont Trust Co.*, 70 W. Va. 296, 73 S.E. 930 (1912), language of both the opinion of the court and a dissenting justice seems to assume that the property would be administered in the estate of the named decedent and subject to the claims of his creditors. *See* note 44 *infra*.

by the use of a fiction escapes other conceptual difficulties, assuming that a court is not put off by treating a gift to a person's estate as a figure of speech to serve in place of a named legatee. This analysis would, however, subject the property to administration as part of the named decedent's estate.

Either interpretation is consistent with a holding in favor of the decedent's heirs where he dies intestate. In other words, a gift to a deceased person's estate may be treated as a gift to his legatees and devisees if he leaves a will or to his heirs if he dies intestate. Where he leaves a will, the gift would presumably pass under the residuary clause.

Similar problems arise where a testator makes an immediate gift "to A or his estate," "to A if living, or, if not, to his estate," or the like. If a named legatee dies before the testator, his gift will lapse unless a substitute taker is provided in the instrument or by law. If an alternative gift to A's estate is construed as a gift to his legatees and devisees (or heirs), substitute takers do exist, precluding the application of a lapse statute. But if the property is treated as if it were part of the decedent legatee's estate at the time of his death, does the gift violate the law on lapsed legacies and devises, or the applicable lapse statute?⁴⁴ If a gift cannot be made by will to a deceased person, can the testator make a disposition that treats the deceased person as if he had not died? I see no reason in policy to prevent this result, however it is explained.

In *Estate of Brunet*⁴⁵ the testator devised land "to Otto Speckter or his Estate." Otto died before the testator, and the California court held that the devise was "to the persons entitled to succeed to Speckter's estate, namely his heirs or devisees."⁴⁶ This of course meant that his devisees would take if he left a will and his heirs would take if he died intestate. The court recognized the need to give meaning to dispositive words and to avoid intestacy, declaring that to a layman, such as this testator, the construction given was "reasonable and natural."⁴⁷ Nothing in the opinion suggests that the property was to become part of Otto's estate for general purposes of administration.⁴⁸

44. See, e.g., MD. ANN. CODE art. 93, § 4-403 (1957). This anti-lapse statute directs that property given a deceased legatee shall go to "those persons, who would have taken if said legatee had died, testate or intestate, owning the property."

45. 34 Cal. 2d 105, 207 P.2d 567 (1949).

46. 34 Cal. 2d at 109, 207 P.2d at 569.

47. 34 Cal. 2d at 109, 207 P.2d at 569.

48. The same result was reached in *Leary v. Trust Co.*, 272 Mass. 1, 171 N.E. 828 (1930), in which a testamentary trust estate was to be paid on the death of the life

This simple and straightforward assessment of dispositive intent contrasts with the more recent analysis of the Pennsylvania court in *Braman Estate*.⁴⁹ The court seemed incredibly confused, and in seeking the testator's intent, seemed to thwart it. Ruth and Mary were sisters. Ruth's will gave her residue to Mary for life and then to certain charities. Mary's will gave her residue to Ruth "or her estate." Ruth died first. Helen, the court said, was the sole heir of both (although Mary must also have been an heir of Ruth). In giving Mary's property to Helen rather than to the charities named in Ruth's will, it is not clear whether the court ruled that Helen took as Mary's heir, meaning that the gift to Ruth's estate was void, or that Helen took as heir of Ruth, on the ground that the gift to Ruth's estate was a gift to Ruth's heirs. The court was concerned primarily with whether Ruth's will could cover after-acquired property, that is, the residue of Mary's estate. The court held that it could not, since that would be an effort by Ruth to dispose of an expectancy. But the real issue was the effect of the gift in Mary's will to Ruth's estate. If this were construed, as in *Brunet*, to be a gift to Ruth's residuary legatee, it would not constitute a disposition by Ruth. The court failed to discover any intention that Mary's assets be disposed of according to the terms of Ruth's will, about which Mary may have had no knowledge. But it was just such an intention that the court in *Brunet* said was only "reasonable and natural." Is this indeed not an obvious inference of intent—especially the intent of a lay draftsman—when property is given to a deceased person's estate rather than to his heirs?

4. *Remainder or Executory Interest to "A or His Estate"*

The use of the term "estate" in this context may be designed to avoid federal estate tax liability with respect to an irrevocable inter vivos transfer.⁵⁰ Provided that *A* is living when the instrument takes effect, an analysis can be made similar to that in the *Rosecrans* case.⁵¹

beneficiary to the testator's brother "James if he be then living and in event of his death to his, said James' estate." James died in the testator's lifetime. The property was held to pass by the residuary provisions of James's will. The court said the result was not explained by incorporation by reference, since James's will was not in existence when the testator's will was made. Rather, the testator had made "the remainder a part of James' estate, James having the right to dispose of the remainder as a part of his estate as he wished." 272 Mass. at 7, 171 N.E. at 830. It is clear from the decree that the property was not to be subject to any further administration of James's estate, but was to be paid directly to James's successors in accordance with the terms of his will.

49. 435 Pa. 573, 258 A.2d 492 (1969).

50. See Treas. Reg. § 20.2037-1(e) (1958).

51. See text accompanying notes 10-11 *supra*.

If the language means the same as a limitation "to *A* if living, if not, to his estate," it can be construed as giving *A* a contingent remainder plus a general testamentary power to appoint an alternative remainder, with a further alternative remainder in default of appointment to *A*'s heirs.

Again, however, such a complicated analysis is not necessary. This dispositive language may simply be a layman's way of making clear that a legatee is to have an indefeasibly vested remainder. *A* is to take the property if living; if not, it is to pass through his estate. The traditional dogma against implying conditions of survivorship may not be well understood by inexperienced draftsmen, and they may be reluctant to direct a trustee to pay corpus to a person who may not be living when the direction applies. The proposed construction, however, may startle a court steeped in traditional dispositive terminology, for it amounts to saying that language purporting to impose a condition of survivorship was really intended to have the opposite effect.

Preposterous results can be reached with language of this sort when construction is hidebound by traditional dispositive forms and concepts. In *Ryan v. Beshk*⁵² the testator devised land to his wife, provided she did not remarry. Upon her death or remarriage he gave the land to four named collateral relatives, with the provision that "if they be living at the death or remarriage of my wife, or in the event of the death of all or any of said persons . . . I give or bequeath his or her part or share intended for him or her who has died before the death or remarriage of my said wife . . . to his or her executor or administrator to be applied by such as if the same had formed part of the estate of such person . . . at his or her decease."⁵³ Two of the named persons died in the wife's lifetime, and the court held that their shares passed by the residuary clause of the will to the testator's widow. The court declared that the language of the will clearly imposed conditions precedent of survivorship. The alternative remainders to the remaindermen's executors or administrators were found subject to the condition precedent that such officers be duly appointed, which might occur beyond the perpetuity period. The remainders to the officers were therefore held void.

Apparently no one argued the possible construction of a power of appointment in the named legatees, exercisable upon death before the end of the wife's life estate. Counsel did argue, however, that the remaindermen's interests were vested, and that allowance should

52. 339 Ill. 45, 170 N.E. 699 (1930).

53. 339 Ill. at 46, 170 N.E. at 700.

be made for the ignorance or carelessness of the testator in not correctly expressing his intentions. This was too much for the court to swallow, immersed as it was in the technicalities of vesting. Although the court said it must seek intention from the language of the will, and not from inferences about what was in the testator's mind, this hardly justified ignoring the language directing payment to a legatee's executor or administrator.

All draftsmen should understand that a remainder is vested except as language makes it contingent, and that the best way to limit a vested remainder is not by language that appears to make it contingent. Judicial construction, however, requires more than a mechanical application of the technicalities of vesting. Courts should be aware that not all words of apparent condition are intended to impose conditions, especially where the validity as well as the meaning of a testator's dispositions is at stake.

5. *Gift of Trust Corpus to the "Estate"*
of an Income Beneficiary

This final context for a gift to a person's estate or to his executor or administrator presents essentially the same problem as that discussed in *Rosecrans*.⁵⁴ The use of the term "estate" in this setting may be designed to avoid federal gift tax liability with respect to gifts to minors⁵⁵ or, by use of the so-called "estate trust,"⁵⁶ to gain the benefit of the marital deduction under the federal estate or gift tax laws. Putting the disposition most simply, suppose property is given in trust to pay the income to *A* for life, and on *A*'s death, the corpus is given to *A*'s estate (or *A*'s executor or administrator). As discussed in connection with *Rosecrans*,⁵⁷ either of two constructions may substantially preserve the settlor's purpose. It can be said on the one hand that *A* takes a life interest plus a general testamentary power of appointment, with a gift in default of appointment to his heirs. It can be said more simply that *A* takes an equitable fee simple. The risk most to be feared in the use of such language is not that a court will fail to recognize one or the other of the two alternatives, but rather that a court will become enmeshed in conceptual confusion over such unfamiliar language and subvert the whole scheme. The following cases represent the range of possibilities.

54. See text accompanying notes 10-11 *supra*.

55. See INT. REV. CODE OF 1954, § 2503(c).

56. See INT. REV. CODE OF 1954, §§ 2056(b)(1), 2523(b). See also Fox, *supra* note 20, at 1003.

57. See text accompanying notes 10-15 *supra*.

In *Rogers v. Walton*⁵⁸ the residue of the testatrix's estate was given to her children in trust to operate the testatrix's business and to pay the net income equally among the children. Upon the death of any child the estate was to be managed by the survivors in the same manner, until the death of all but the last survivor, who was directed to distribute the "proceeds of this trust to the devisees under this Will, . . . to their estates, and to himself equally." In a suit for construction by the executrix of a deceased son of the testatrix, the court properly held that during the trust the personal representative of the deceased son was entitled to the son's share of the income, and at the termination of the trust was entitled to his share of the corpus. After rejecting the argument that a bequest to a person's estate is necessarily void, the court said: "We think that the intent of the testatrix is clear to give to each son a one-third interest in the trust fund, which could pass as his property under his will or as intestate property if he should leave no will."⁵⁹

In *Second National Bank v. Dallman*⁶⁰ the insured under a life insurance policy had elected an optional settlement under which his daughter was to receive a life annuity of three per cent upon the principal, together with the right to designate a contingent beneficiary of the principal; if no contingent beneficiary were living at her death, the sum held by the insurer was to be paid to the beneficiary's executors, administrators, or assigns. The beneficiary died without designating a contingent beneficiary, but leaving a will that gave all of her residue in trust. Her executor paid the insurance proceeds to her designated trustee. A federal estate tax was paid on this sum under protest, and a judgment denying recovery was reversed.

This contractual arrangement is obviously analogous to a disposition in trust. The beneficiary's contract right against the insurer was a chose in action that, if transferable, was a property interest. The real question was what property, if any, she owned at her death. The government offered the two alternative analyses of the effect of directions to pay to a person's executor or administrator discussed above: an equitable fee in the "insurance proceeds" or a general power to appoint them.

The court held that she had neither,⁶¹ stating that the contract gave the beneficiary only the right to name a contingent beneficiary,

58. 141 Me. 91, 39 A.2d 409 (1944).

59. 141 Me. at 99, 39 A.2d at 412.

60. 209 F.2d 321 (7th Cir. 1954).

61. Was not the power to name a contingent beneficiary a general power of appointment? If so, it would have been a pre-1942 power that was not exercised. *See* INT. REV. CODE OF 1954, § 2041(a)(1).

a right that expired on her death. The disposition of the insurance proceeds was thus governed by the terms of the contract, which gave them to the decedent's executor. The court expressed no thought as to whether the executor was under any obligation in disposing of them. Yet any such obligation, if it existed, could be explained only in property terms. While the express provision permitting the beneficiary to name a contingent beneficiary is admittedly somewhat inconsistent with an intention to confer a larger power, the direction to pay to the beneficiary's executors, administrators, or assigns must mean that the proceeds, at the beneficiary's death, were to be treated as if they belonged to her or were subject to disposition by her will.

The result and rationale of *Dallman* were criticized and rejected in *Keeter v. United States*.⁶² There an insurance settlement option provided that the beneficiary was to receive interest on her principal share for life and that on her death the principal was to be paid to her executors and administrators. The court held that the beneficiary had a general testamentary power of appointment over the insurance proceeds, which made them subject to tax in her estate, stating: "We know of no state in which the executor is empowered to do whatever he chooses with a decedent's estate."⁶³ The court did not, however, consider the possibility that the beneficiary had more than a power of appointment.

Language directing the payment of trust corpus to a deceased person's estate or to his executor or administrator may give rise to an additional complication. *In re Clark*⁶⁴ concerned a will that gave one half of a decedent's residue to trustees

to collect the income thereof and pay over semi-annually to Emory Wendell Clark, during his life, and upon his death to pay over the principal to his executors and administrators, provided he leave a child or children, not adopted, living at the time of his death, but in case he should die without leaving any child or children of his own, not adopted, to pay over the principal of said part, share and share alike, to Vassar College . . . to Williams College . . . and to Teachers College⁶⁵

In a suit for construction by Emory, the surrogate held that, upon Emory's death leaving children, the principal was payable to his executor if he left a will or to his administrator if he left no will,

62. 461 F.2d 714 (5th Cir. 1972).

63. 461 F.2d at 719.

64. 274 App. Div. 49, 80 N.Y.S.2d 1 (1948).

65. 274 App. Div. at 50, 80 N.Y.S.2d at 3.

to be administered in either case as if the principal had been owned by him at the time of his death. On appeal this decree was modified to provide that on Emory's death leaving a child not adopted the trustees should pay the principal to such person or persons as he might by will appoint and, in default of appointment, to such persons as would be entitled to take his estate in the event of intestacy.

While the surrogate's decree could be interpreted to mean that Emory took an equitable fee, defeasible on his death without leaving children, the appellate division interpreted the decree to give Emory a vested remainder in the principal from which he was to receive income for life. The court was troubled by the irregularity of the latter analysis and quoted the following language from an early case in the court of appeals:

Undoubtedly a testator, without violating any rule of law, could give an estate to trustees, with directions to collect the income and pay it over to a beneficiary, and, upon the death of the latter, the trust estate to sink into, and become part of, the estate of the beneficiary, but so far as we know, no will, which, in express terms, has so disposed the property, has been brought to the attention of the courts; and the fact that such a provision is very unusual does not aid us in coming to the conclusion that such a disposition was intended by the testator.⁶⁶

The court also said that "[a] future estate is rarely created in one in whom it can vest in possession only during the future life."⁶⁷ "Since it was not the intention of the testatrix to give to her nephew the principal of this trust after he shall have died,"⁶⁸ the directions of the will conferred upon him a power to appoint by will the persons who would take as beneficiaries of the testatrix. The court's key assumption was that a direction to pay income necessarily creates a life estate. The resultant confusion disappears if the language, taken altogether, is seen as giving an estate not limited to Emory's life but defeasible on his death without children surviving.

The court also said that "it was not the purpose of decedent herein thus to impose upon her nephew the burdens without the advantages of ownership of the principal of this large fund."⁶⁹ The burdens were those to which any decedent's estate is subject, but what benefits would Emory lack except those powers given to the trustees to be exercised for his sole benefit? The court rejected the

66. 274 App. Div. at 51, 80 N.Y.S.2d at 4, quoting *Howland v. Clendenin*, 134 N.Y. 305, 310, 31 N.E. 977, 979 (1892).

67. 274 App. Div. at 51, 80 N.Y.S.2d at 4.

68. 274 App. Div. at 52, 80 N.Y.S.2d at 4.

69. 274 App. Div. at 51, 80 N.Y.S.2d at 4.

argument that, since Emory was to have his power only if he died leaving children, the power was to appoint only among his children—a special power. Such a construction, it stated, improperly makes “a condition of the existence of the power” serve “as a limitation upon its scope.”⁷⁰

Fortunately, the court's judgment was not subverted by its analytical misconceptions; the objectives of this testatrix were substantially vindicated.⁷¹ General testamentary powers of appointment, however, are essentially spendthrift devices, conferring substantial ownership upon a trust beneficiary to whom a life interest is also given while denying him the power to alienate or encumber his interest during his lifetime. It might be wise not to make the power analysis of dispositive language of this sort a constructional preference, since in effect it creates a spendthrift device by implication.

D. *Filling Gaps That Do Not Exist*

The error of construction that the court avoided in *Clark*—construing a condition that the beneficiary leave issue as an expression of intent to benefit the issue—was made with such a vengeance in *Bredin v. Wilmington Trust Co.*⁷² that the beneficiary was left without any power of disposition. A trust agreement entered into by Irénée du Pont provided for the payment of the trust income to the settlor's eight named children. Each child was to receive one eighth of the net income upon attaining the age of twenty-one. Further:

In the event of the death of any one of the said children leaving issue, her proportionate part of the corpus or principal of the said trust estate shall be paid to the executor or administrator of the child so dying, free and discharged from any trusts. If, however, any one of the said children shall die leaving no issue her surviving, her share of the corpus or principal shall be held by the said Fidelity Trust Company for the survivors and held and disposed of as herein provided.⁷³

There were alternative gifts over on the death of all eight children without leaving issue.

It can be assumed that this dispositive instrument was neither homemade nor prepared by inexperienced counsel. The language

70. 274 App. Div. at 54, 80 N.Y.S.2d at 7.

71. Emory did receive a bonus, whether intended or not, in that this property was not subject to his debts except to the limited extent brought about by his exercise of the power.

72. 42 Del. Ch. 563, 216 A.2d 685 (1965).

73. 42 Del. Ch. at 565, 216 A.2d at 686.

quoted above was carefully designed to make a complete disposition of all beneficial interests. Nevertheless, the court held that upon the death of a daughter leaving issue there was an implied future interest in favor of such issue.

While the implication of future interests to fill dispositive gaps has become a well-recognized principle of construction, great care is required in its application. Before a future interest can be implied, a dispositive gap must be found. When courts begin to fill dispositive gaps in the guise of construction, they may fill gaps that do not exist.⁷⁴

Here the court relied upon an old rule that a gift to *A* for life, with a remainder to *B* if *A* dies without issue, justifies the implication of a remainder in *A*'s issue. The error in using that rule here was the same as that made in *Clark*⁷⁵—the assumption that the income interests in the settlor's children were life interests. The court said that to give a life interest plus a vested remainder to the same person would be "an oddity in the field of wills and trusts,"⁷⁶ so that such an intent could not be imputed to the settlor. However, the settlor might have intended, and probably did intend, simply to give interests that were greater than life interests but defeasible on death without issue.

Having found an intention to benefit the issue of a deceased beneficiary, no room was left to construe the language referring to the executor or administrator of a deceased child as conferring a power of appointment upon such child. But the court came tantalizingly close to the mark when it conceded that it might hold differently if, in addition to the language used, the settlor had added that the property should "become part of the Estate of the one so dying."⁷⁷

74. See *Warner v. Warner*, 237 F.2d 561 (D.C. Cir. 1956). The court found no dispositive gap, despite arguments of counsel seeking the implication of future interests. For recent cases in which courts filled gaps that arguably did not exist see *In re Thall*, 18 N.Y.2d 186, 273 N.Y.S.2d 33, 219 N.E.2d 397 (1966), discussed at text accompanying notes 189-93 *infra*; *In re Englis*, 2 N.Y.2d 395, 161 N.Y.S.2d 39, 141 N.E.2d 556 (1957).

75. See text accompanying notes 64-69 *supra*.

76. 42 Del. Ch. at 566, 216 A.2d at 687.

77. 42 Del. Ch. at 566, 216 A.2d at 687. Cf. *Colonial Bank & Trust Co. v. Stevens*, 164 Conn. 31, 316 A.2d 768 (1972), in which a testator gave 400 dollars per year until the corpus and accumulations were exhausted. The interest of any legatee who died during the trust was given to his children, or, if none, it was to remain part of the trust and be distributed to the testator's surviving children. Upon proof that for a period of years the income was more than sufficient to pay the annuities, the court held that upon the death of the last surviving child of the testator, the trust estate not then distributed should be held as the intestate property of the testator. The result means that the interests of the children were only life interests.

E. *Drafting Equitable Fee Estates*

One who works his way through the discouraging record of litigation sketched above may be convinced that many American courts cannot conceive of separating legal and equitable interests by means of a trust without also dividing the equitable interests into present and future interests. One might suppose that, like a gift to "A and his heirs," a gift in trust for "A absolutely" would be the simplest and most obvious provision for the professional management of property. If one were to try this, however, he would probably learn that the trust was "dry" and no trust at all. Or, even if a direction to manage the property and pay income were implied, a question would arise about the duration of the trust and whether (or when) the beneficiary could terminate it. If express directions to pay income for the beneficiary's lifetime were included, they would need to be explicit that the beneficiary's life was the measure of the duration of the trust, and not the measure of the beneficiary's interest.

It could be argued that if a settlor indeed wants to give interests in trust that are defeasible on death with (or without) issue but are otherwise unlimited, he should begin by giving the property to one or more beneficiaries, and then add that for the period of each beneficiary's lifetime his share of the corpus shall be held in trust for him, with a gift over on his death with (or without) issue. This will usually work,⁷⁸ but it requires careful drafting.⁷⁹

If a settlor wishes to create a trust solely for A's benefit, with income to be paid to A for his lifetime, perhaps the only safe advice is not to do it at all, but rather to use a similar arrangement with which the courts are familiar: Give A an interest for life plus a general testamentary power of appointment, with a gift in default to A's heirs. The power device, however, produces its own risks and special consequences, not all of which may be acceptable. It also does not serve well a settlor who wishes to use the so-called "estate trust" as a method of qualifying for the marital deduction under the federal estate or gift tax.⁸⁰

78. See cases cited note 85 *infra*.

79. In *Howland v. Clendenin*, 134 N.Y. 305, 31 N.E. 977 (1892), a residuary gift was made to the testator's named children "and to their respective heirs, executors, administrators and assigns forever," subject to trusts thereafter declared. These trusts constituted the executors as trustees of shares given in trust for the daughters, to pay them the income, "and upon their death, as each shall happen to die, to pay over and distribute the principal of the share or portion of the one so dying, to her issue living at the time of her decease." The testator's purposes on the death of his daughters might have been expressed more clearly; but the court held that the daughters took life estates only, and on the death of a daughter without issue her share of the corpus passed as the intestate property of the testator.

80. See INT. REV. CODE OF 1954, §§ 2056(b)(1), 2523(b). See also Fox, *supra* note 20, at 1003-04.

Despite the constructional risks involved, experienced draftsmen have resorted to the simple expedient of directing that income be paid to *A* for life, with a direction to pay the corpus to *A*'s estate on his death. This sort of disposition remains attractive apart from tax consequences, not only because of its simplicity, but because of the difficulty of expressing such an intention in other words. Some draftsmen will no doubt continue to assume the risks of such language, perhaps in part because they are not aware of them. Others may elaborate the language so as to leave no doubt about the consequences intended.⁸¹

I believe that the time has come to convert this technically inartful expression—gift to an “estate”—into a term of art, meaning what many draftsmen assume it already means. A gift to a deceased person's estate would constitute a direction that the property be treated as if it were owned by the decedent at the time of his death. It would serve as a simple expression of intention that would otherwise require an elaborate paragraph to express without ambiguity. While this can best be accomplished by enlightened judicial construction, it can be accomplished by legislation if necessary.

II. CONSTRUCTION PROBLEMS INVOLVING GIFTS OF INCOME

Most of the familiar problems involved in trust administration require for their solution the use of the income-principal correlatives. The problems may require definition of both income and principal, determination of when a right to income accrues, apportionment of income between successive interests, classification as income or principal of corporate distributions and certain other special forms of property, and assessment of the respective charges against income and principal that must be satisfied during a trust administration. It is significant that, unlike the new Louisiana Trust Code,⁸² which differentiates between “income” and “principal” beneficiaries, the Uniform Principal and Income Act uses the terms “income beneficiary” and “remainderman.”⁸³ This suggests the continued relevance of traditional estate terminology, which suffices for the purposes of the Act, despite the fact that not every beneficiary of principal is a remainderman.

The problems considered under this section are of a different sort. They involve ambiguity respecting either the identification of

81. See Fox, *supra* note 20, at 1013-14. Life insurance contracts commonly contain a standard provision that if the insured does not name a beneficiary, the proceeds shall be paid to his estate. As we have seen, such language may also appear in optional settlement provisions.

82. LA. REV. STAT. ANN. §§ 9:1721-2252 (1964).

83. UNIFORM PRINCIPAL AND INCOME ACT § 1.

the beneficiaries of income or the duration of their interests. The ambiguity may result in gaps in the scheme for distribution of income, and the resultant problems can be characterized in terms of doubt on the part of a trustee about what he is to do with income from a trust fund. In general the problems are of two kinds. The first is analogous to the difficulty created by gaps in the disposition of corpus under a scheme of concurrent, successive, or alternative interests, and includes the prior question whether a limitation in fact creates a dispositive gap. The second is peculiar to income gifts and usually arises from a surplus, or occasionally from a deficiency, in the income available for distribution.

A source of error in courts' treatment of the equitable fee problem discussed above was the difficulty in applying the present-future estate correlatives to successive interests in trust income and principal. The same difficulty is encountered in the income problems discussed below.

A. *Gift of Income as Gift of Equitable Fee*

A survey of the problems involved in the creation of equitable fee interests in trust must include cases in which a trustee is directed to pay income to one or more persons without an express limitation in time, and with no direction for the payment of corpus. Such a disposition seldom occurs in so simple a form. A direction to pay income is frequently accompanied by a power to invade corpus for stated purposes or to make up a sum that is given in the form of an annuity, but without further gift of corpus. Corpus may in fact be given upon some but not all possible contingencies, and circumstances occur for which no disposition of corpus is provided. Such cases pose squarely the possible confusion between the life estate-remainder correlatives of the doctrine of estates and the income-principal correlatives of prevailing trust practice.

The first notion that must be avoided is that the two sets of correlatives are coterminous. A gift of trust income is not necessarily a life interest. While this proposition is axiomatic, it leaves unresolved the troublesome question whether, under the construction of particular language in the light of relevant circumstances, a gift of income is intended to be limited for life.⁸⁴

84. Contrast the effort to establish in Louisiana a trust code that would gain the benefits of the common law trust in a civil law jurisdiction in which the doctrine of estates had never been accepted. See text accompanying note 82 *supra*. A central feature of the system is the simple classification of trust beneficiaries as "income" or "principal" beneficiaries, which of course does not prevent any person from being a beneficiary of both. LA. REV. STAT. ANN. §§ 9:1805-07 (1964). The Code provides that

Within the common law scheme of fragmented ownership a gift of any beneficial interest in trust is a gift of a benefit to be derived from, and is therefore an interest in, the corpus of the trust. It is the purpose of every private trust to withhold from the beneficiaries the control of the corpus for a time, while conferring all other benefits of the corpus throughout the life of the trust. The quantum or duration of any beneficial interest in trust is governed, not by the kind of enjoyment conferred, but by the usual tenets of conveyancing and construction applicable to nontrust conveyances.

Dispositive provisions that merely direct the payment of trust income should be distinguished from those that purport to give property to a beneficiary but are accompanied by language sufficient to create a trust of such property and by directions to pay income to the beneficiary.⁸⁵ Although the latter may fail to indicate the duration of the trust, there should be no doubt that the intention is to give the full beneficial title, either by way of an equitable fee or a limited equitable interest accompanied by a successive legal fee. As already suggested,⁸⁶ such a provision, when properly drafted, may be an effective way of giving an equitable fee subject to a trust for the beneficiary's lifetime, because it avoids the drafting obstacle encountered in telling the trustee to pay the corpus to the beneficiary on his death. But the distinction between the two kinds of dispositions is sometimes not easy to draw, as in the case of a disposition to a trustee "for the benefit of A" followed by directions as to income only.⁸⁷

Where income is given with no express gift of corpus, prevailing dispositive practices may create pressures to find an intention to give only a life interest, even though it is conceded that an income interest is not conceptually or by definition a life interest. A court may be tempted to infer that if no limit to an income interest is stated, the omission was inadvertent. The result may be partial intestacy;

the interest of a principal beneficiary vests on his death in his heirs or legatees. LA. REV. STAT. ANN. § 9:1972 (1964). While there may be successive income beneficiaries, LA. REV. STAT. ANN. § 9:1807 (1964), the interest of an income beneficiary ends at his death. LA. REV. STAT. ANN. § 9:1964 (1964). See Oppenheim, *A New Trust Code for Louisiana—Some Steps Toward Its Achievement*, 37 TUL. L. REV. 169, 182 (1963). An income interest is apparently regarded as in the nature of a usufruct, like a life estate in land, which constitutes a burden upon, but does not divide, ownership.

85. *E.g.*, *In re Ternansky's Estate*, 4 Ohio Op. 2d 329, 141 N.E.2d 189 (Ct. App. 1957); *Williams v. Thompson*, 375 S.W.2d 489 (Tex. Civ. App. 1964); *In re Suhling's Will*, 258 Wis. 215, 45 N.W.2d 608 (1951).

86. See text preceding note 78 *supra*.

87. *E.g.*, *Gourley v. Greene*, 102 N.H. 501, 161 A.2d 172 (1960). Cf. *In re Work Family Trust*, 260 Iowa 898, 151 N.W.2d 490 (1967).

or, to avoid intestacy, a court may imply a future interest in persons other than the income beneficiary.

In the absence of language or circumstances justifying the inference that only a life interest was granted, however, the court may properly invoke the precept of conveyancing that an interest is absolute or in fee simple unless an intent to limit is expressed. Where there is no express gift of corpus, the presumption against intestacy may in many instances fortify a construction that an equitable fee has been given.⁸⁸ Since all draftsmen understand how to create life interests and gifts of corpus, the failure to do either is presumably intentional. It may reflect the difficulties in drafting a disposition intended to vest property in a beneficiary while withholding control during his lifetime or for some other period. The only inadvertent omission may be an express limitation on the duration of the trust. In fact there is substantial authority for a rule of construction that an unlimited gift of income with no gift of corpus is a gift of the full equitable ownership, or an equitable fee.⁸⁹ Such a result is often reached, however, only after a court has considered relevant circumstances and discovered no contrary intent. It is clear that this rule does not distinguish between an immediate gift of income and one limited as a remainder after a prior limited gift of income.⁹⁰ The existence of a prior, expressly limited income interest reinforces the inference that the succeeding interest is absolute.

The rule has been applied to gifts of income with a power in the trustee to invade corpus in his complete discretion or when necessary to provide support.⁹¹ Where corpus is mentioned for the purpose of permitting its invasion, one might infer that no further interest in it was intended. Another inference is possible, however:

88. See, e.g., *Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142, 144 (Ky. 1951).

89. See, e.g., *Wilmington Trust Co. v. Houlehan*, 15 Del. Ch. 84, 131 A. 529 (1925); *Stephens v. First Natl. Bank*, 222 Ga. 423, 150 S.E.2d 865 (1966); *In re Work Family Trust*, 260 Iowa 898, 151 N.W.2d 490 (1967); *Goetz v. Goetz*, 174 Kan. 30, 254 P.2d 822 (1953); *Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142 (Ky. 1951); *Dixon v. Dixon*, 123 Me. 470, 124 A. 198 (1924); *In re Trust of Tufford*, 275 Minn. 66, 145 N.W.2d 59 (1966); *Gourley v. Greene*, 102 N.H. 501, 161 A.2d 172 (1960); *Kale v. Forrest*, 278 N.C. 1, 178 S.E.2d 622 (1971); *Lowitz Estate*, 360 Pa. 91, 61 A.2d 342 (1948); *Simmons v. Morgan*, 25 R.I. 212, 55 A. 522 (1903); *Trammell v. Trammell*, 162 Tenn. 1, 32 S.W.2d 1025 (1930).

90. *Arnold v. Barber*, 472 S.W.2d 466 (Ky. 1971); *Gourley v. Greene*, 102 N.H. 501, 161 A.2d 172 (1960); *In re deVarona's Trust*, 274 App. Div. 303, 84 N.Y.S.2d 50 (1948), *affd.*, 299 N.Y. 726, 87 N.E.2d 450 (1949); *Simmons v. Morgan*, 25 R.I. 212, 55 A. 522 (1903); *Ross v. Stiff*, 47 Tenn. App. 355, 338 S.W.2d (1960).

91. *In re Work Family Trust*, 260 Iowa 898, 151 N.W.2d 490 (1967); *Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142 (Ky. 1951); *In re Will of Cuff*, 277 App. Div. 829, 97 N.Y.S.2d 182 (1950); *In re Will of Edwards*, 199 Misc. 58, 97 N.Y.S.2d 3 (Sur. Ct. 1950).

The testator may merely have wanted to keep the corpus out of the beneficiary's hands. The corpus has been held to pass by the beneficiary's will or as her intestate property where in addition to a gift of income and a power to invade corpus for support the trustee was authorized to deliver the entire corpus to the beneficiary in its uncontrolled discretion.⁹²

The rule has similarly been applied to gifts of periodic payments of a stated sum out of income and corpus, or out of income with resort to corpus if the income is insufficient.⁹³ In one such case the will prohibited the trustee from paying amounts greater than a stated sum to two named beneficiaries, but he was authorized to terminate the trust when in his discretion continuance of the trust was neither justifiable nor practicable under the circumstances. The beneficiaries unsuccessfully sought termination. Unless terminated by the trustee, the court stated, the trust would end on the death of the survivor of the beneficiaries, when "the remainder would go in equal shares to the estate of each beneficiary."⁹⁴

The Massachusetts court has often refused to accept the rule declaring an equitable fee, absent dispositive language indicating an intention to give such an interest to the income beneficiary. The result in such cases is a life interest in the beneficiary,⁹⁵ and in most instances an intestacy of the corpus. In the most recent expression of the court, however, an intention to give the entire beneficial interest was inferred from a consideration of the dispositive scheme, despite the absence of specific language to that effect.⁹⁶

It has been held by lower courts in New York that the equitable fee rule does not apply where a will creating a trust and giving only income also contains a residuary clause.⁹⁷ This holding incorrectly assumes that the only basis for the rule is the presumption against intestacy, and, perhaps for this reason, it has not been universally followed in New York.⁹⁸

The nature and source of the rule under discussion are often stated with terse ambiguity. Some courts have relied upon an old rule that a conveyance of the rents and profits of land is a conveyance

92. *Stephens v. First Natl. Bank*, 222 Ga. 423, 150 S.E.2d 865 (1966).

93. *In re Trust of Tufford*, 275 Minn. 66, 145 N.W.2d 59 (1966); *In re Estate of Klarsfeld*, 13 Misc. 2d 353, 175 N.Y.S.2d 686 (Sur. Ct. 1958).

94. *In re Trust of Tufford*, 275 Minn. 66, 74, 145 N.W.2d 59, 65-66 (1966).

95. *Compare* *Hull v. Adams*, 286 Mass. 329, 190 N.E. 510 (1934), and *Keating v. Smith*, 59 Mass. (5 Cush.) 232 (1849), with *Chauncey v. Salisbury*, 181 Mass. 516, 63 N.E. 914 (1902), and *Holden v. Blaney*, 119 Mass. 421 (1876).

96. *Goodwin v. New England Trust Co.*, 321 Mass. 502, 73 N.E.2d 890 (1947).

97. *In re Estate of Tubbs*, 196 Misc. 914, 9 N.Y.S.2d 222 (Sur. Ct. 1939).

98. *See In re Will of Edwards*, 199 Misc. 58, 97 N.Y.S.2d 3 (Sur. Ct. 1950).

of the land itself.⁹⁹ That precept says nothing about the duration of the estate conveyed, and courts applying it to nontrust dispositions have readily discovered an intent to create only a life estate.¹⁰⁰ It seems obviously designed for nontrust dispositions, and it may be misleading to apply it to trusts. An unlimited right to trust income may properly create an equitable fee, but not an immediate right to trust corpus, nor a right to receive income in perpetuity. The result, in other words, should be the same as if the trust corpus had been given to the beneficiary subject to its being held in trust to pay him the income. The beneficiary is entitled to receive the corpus only upon a proper termination of the trust. Nevertheless, some courts have declared that an unlimited gift of income is a gift of corpus, with the result that the beneficiary takes outright and free of trust,¹⁰¹ or that he has an immediate right to have the corpus from the trustee.¹⁰² Upon finding that an active trust was created, other courts have rejected the rule by concluding that the beneficiary took only a life interest.¹⁰³ The only alternatives were assumed to be either a legal fee or an equitable life estate. Further distortion appears where, on the same assumption, courts have declared a legal interest on the ground that where the only duty expressly given to a trustee is to pay income, the trust is "dry."¹⁰⁴

The difference between a legal and an equitable fee is of small importance in cases in which the only question is whether a beneficiary has the legal title in fee (or is presently entitled to have it conveyed to him). While the procedural situation in some cases does not require an answer,¹⁰⁵ this is a normal question of trust duration or of the right of a beneficiary to have a trust terminated. Since there is no express language relating to the duration of the trust

99. COKE ON LITTLETON, L. 1, c. 1, § 1, ¶ 4b (19th ed. C. Butler 1932).

100. *E.g.*, *Morrison v. Schorr*, 197 Ill. 554, 64 N.E. 545 (1902); *Reed v. Reed*, 9 Mass. 372 (1812).

101. *Wilmington Trust Co. v. Houlehan*, 15 Del. Ch. 84, 131 A. 529 (1925); *Arnold v. Barber*, 472 S.W.2d 466 (Ky. 1971); *Passman v. Guarantee Trust & Safe Deposit Co.*, 57 N.J. Eq. 273, 41 A. 953 (Ch. 1898); *Ross v. Stiff*, 47 Tenn. App. 355, 338 S.W.2d 244 (1960). *In re Estate of Klarsfeld*, 13 Misc. 2d 353, 176 N.Y.S.2d 686 (Sur. Ct. 1958), is the most recent of a series of New York lower court rulings that seem to have decreed legal estates. The court relied on *Hatch v. Bassett*, 52 N.Y. 359 (1873). *Cf.* *Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142 (Ky. 1951).

102. *Gourley v. Greene*, 102 N.H. 501, 161 A.2d 172 (1960).

103. *Skovborg v. Smith*, 8 N.J. Super. 424, 72 A.2d 911 (Ch. 1950); *Bell v. Harrison*, 498 P.2d 397 (Ore. App. 1972). *See also* cases cited note 95 *supra*.

104. *Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142 (Ky. 1951); *Wilkins v. Miltimore*, 95 N.H. 17, 56 A.2d 535 (1948); *Carmany Estate*, 357 Pa. 296, 53 A.2d 731 (1947).

105. *Stephens v. First Natl. Bank*, 222 Ga. 423, 150 S.E.2d 865 (1966); *Goetz v. Goetz*, 174 Kan. 30, 254 P.2d 822 (1953).

in many cases, the duration must be inferred from other language, if any, and from relevant circumstances.

Most of these difficulties, or at least most of the judicial confusion, are not encountered in England, where the Statute of Uses has been repealed and there is no doctrine of dry trusts. A trust without stated duties in the trustee is a "simple trust,"¹⁰⁶ but it continues until the trustee conveys to the beneficiary. The absence of any problem of trust duration in England derives from the ability of a single trust beneficiary who is *sui juris* and who has a vested interest to compel payment to him of the principal, free of the trust. The American *Claffin* doctrine¹⁰⁷ prevents termination of a trust upon the motion of a single beneficiary, or the concurrence of all multiple beneficiaries, so long as any stated or inferred objective of the trust remains unfulfilled.

Under the *Claffin* doctrine the duration of a trust should not be decided simply on the ground that a gift of income without limit in time is a gift of corpus, or by straining the doctrine of dry or passive trusts. It is equally objectionable to say, as some courts have at least implied,¹⁰⁸ that an unlimited gift of trust income gives a legal fee because otherwise the trust would be perpetual and therefore void. Unless otherwise provided by statute, a private trust is not void merely because its duration is unlimited.¹⁰⁹ A trust that may last beyond the limits of the Rule Against Perpetuities stands beyond the protection of the *Claffin* doctrine, which simply means that the English rule is applicable and the trust may be terminated by the beneficiary or beneficiaries.¹¹⁰ Thus a trust to pay the income "to A and his heirs forever" should not be void, but should continue so long as A or his successors in interest wish to enjoy its benefits or protection.

American settlors, of course, usually do not create such trusts intentionally; nor is it likely that a settlor who directs merely the payment of income to a beneficiary intends a trust that is immediately terminable. There is an alternative to holding that the beneficiary takes either an equitable life estate or the legal fee, for particular dispositive language and circumstances can surely imply that although such a beneficiary takes the equitable fee, the trust lasts

106. LEWIN ON TRUSTS 6 (16th ed. W. Mowbray 1964).

107. See *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889).

108. *Wilmington Trust Co. v. Houlehan*, 15 Del. Ch. 84, 131 A. 529 (1925); *Dixon v. Dixon*, 123 Me. 470, 124 A. 198 (1924).

109. G. BOGERT & G. BOGERT, *supra* note 1, § 218.

110. L. SIMES & A. SMITH, *supra* note 4, § 1393.

only for his life,¹¹¹ or during his minority,¹¹² or otherwise as the circumstances suggest.¹¹³

Such a result could properly be based on a finding that the purpose of the trust has been accomplished at the beneficiary's death or upon his majority. If the question arises upon the death of the income beneficiary, it is easy to infer that no purpose of the trust would be served by continuing the trust after his death. None of these considerations, of course, is inconsistent with a finding, on particular language or circumstances, that the beneficiary was intended to take no more than an equitable life estate.¹¹⁴

No court has had more difficulty with this problem than the Pennsylvania court. That court's struggles¹¹⁵ follow from a failure to distinguish between two issues: whether the income beneficiary takes a life interest or a fee, and whether his interest is legal or equitable. The Pennsylvania court apparently assumes that the applicable rule of construction produces a legal estate in fee; but when an active trust is created, the notion that an unlimited gift of income creates a fee estate must be wholly rejected. As a relief against the strictures of its position, the court has strained to find that a trust is dry where the trustee has been directed merely to pay income. The nature of the court's dilemma is best expressed in its own words. In a case in which the residue of a testator's estate was given in trust, and part of the income was to be paid to the testator's daughter, "her heirs and assigns," the court denied the relief sought by those who claimed the daughter was given only a life estate, stating: "[H]ad the testator intended to create an active trust to be measured by the life of the daughter, he would have evidenced such intentions by the use of the words 'for life,' rather than by words of inheritance."¹¹⁶

111. *In re Trust of Tufford*, 275 Minn. 66, 145 N.W.2d 59 (1966). Income was given to two beneficiaries and the trust was held to last until the death of the survivor of them.

112. *In re Will of Hedden*, 8 Misc. 2d 1012, 169 N.Y.S.2d 64 (Sur. Ct. 1957), *revd. mem.*, 7 App. Div. 2d 764, 179 N.Y.S.2d 931 (1958). The court found no provision in the will for the payment of income in excess of that given to the beneficiary, and so found that it was to be accumulated. Under the old New York accumulations rule, accumulation of income beyond the minority of the beneficiary was illegal. The court thus declared that the trust terminated when the beneficiary attained her majority, but that she was then entitled to receive the fund in question.

113. *In re Work Family Trust*, 260 Iowa 898, 151 N.W.2d 490 (1967); *Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142 (Ky. 1951); *In re Trust of Tufford*, 275 Minn. 66, 145 N.W.2d 59 (1966). In *Citizens Fidelity Bank & Trust Co.* the court also declared the trust dry. It is easy to confuse the doctrine of dry trusts with the *Clafin* doctrine.

114. *E.g.*, *Burton v. King*, 459 S.W.2d 663 (Tex. Civ. App. 1970).

115. *See Annot.*, 174 A.L.R. 319, 363 (1948).

116. *Carmany Estate*, 357 Pa. 296, 299, 53 A.2d 731, 733 (1947). This case was later

The problem of unlimited gifts of income assumes a somewhat different aspect where the disposition includes a gift of corpus only under specific circumstances, and either different circumstances have occurred, or the gift of corpus is invalid. This means, of course, that the gift of income, although not without express limitation, is unlimited in the circumstances in which the case has arisen. In such cases other precepts fortify the construction that the income beneficiary is left with an equitable fee.

The first of these situations has most often arisen where income is given to the testator's widow with a gift over of corpus in the event of her remarriage. This has been held to create an equitable fee that is defeasible upon marriage, but that passes as the widow's property on her death unmarried.¹¹⁷ The fact that the settlor has chosen to divest her interest on one event implies that her interest is not terminable on any other event. A more extreme example appeared in a recent case in which income was given to the testator's wife and the children of his stepson in equal shares, but with the provision that in case of the death of the widow or any of the children the income should be divided "between" the survivors. The last survivor of the widow and children sought payment of the corpus, which was granted.¹¹⁸ The court inferred that the testator could not have intended to benefit his next of kin upon the death of all the beneficiaries, since the persons who qualified as next of kin were all much older than his stepson's children. The trust was terminated without discussion, apparently on the assumption that termination was implicit in the ruling about the estates created. Further consideration of the duration of the trust might well have produced the same result, for on these facts it may be inferred that the continuance of the trust would serve no purpose of the testator.

*Industrial National Bank v. Votaw*¹¹⁹ presents a situation analogous to the disposition of income to a widow with a gift of corpus

relied on to give a trust fund outright to a testator's sisters, although the will directed that the fund be administered by a trustee and that the earnings be divided equally among the sisters. *Lowitz Estate*, 360 Pa. 91, 61 A.2d 342 (1948). The decision in *Carmany* seems justified, although three justices dissented on the basis that the sisters should have received only life interests. It is also arguable that the decision in *Lowitz* was justified. But if the ground for terminating the trust was the want of any indication of a purpose for its continuance, one might take exception to the ease with which the court jumped to that conclusion.

117. *Jennings v. Reed*, 75 N.J. Eq. 530, 72 A. 939 (Prerog. 1909), *relying on* *Traphagen v. Levy*, 45 N.J. Eq. 448, 18 A. 222 (Ch. 1889). In *Jennings* the gift was to the widow of the testator's brother; a prior income interest was given to the brother for life.

118. *Gourley v. Greene*, 102 N.H. 501, 161 A.2d 172 (1960).

119. 104 R.I. 404, 244 A.2d 575 (1968).

on her remarriage. The will contained elaborate dispositive arrangements, obviously drafted professionally, but nonetheless imperfectly. Upon the death of the testator's widow the income of a trust was directed to be paid to two daughters in equal shares, "and in case of the decease of either of them leaving issue living at the time of such decease then such issue shall take his, her, or their parents' share of such income."¹²⁰ Other provisions for income and corpus were made in case of the death of either or both of the daughters without issue, but there was no language directing the payment of corpus on the event that actually occurred: the death of both daughters, each leaving one daughter. Each of these granddaughters was paid half the income until, on the death of one, the trustee sought construction. The court held that each of the grandchildren acquired a vested equitable fee, and that each of them could have demanded payment of her share upon the death of her mother.

The court followed a tortuous route to this result, however. Ignoring the language that limited income to the issue of the daughters, the court said that the testator failed to provide for the disposition of the trust estate upon the death of the daughters leaving issue. Accepting the principle of the implication of future interests from a dispositive scheme, the court *implied* vested remainders in the issue of the two daughters, and then labored to the conclusion that such remainders were in fee simple. The dispositive language limiting remainders *in the income* to the issue of the daughters, however, did not specify the duration of such interests. If the language had been construed to create equitable remainders in fee there would have been no dispositive gaps to be filled by implication.

The court summarily disposed of the question of the trust's duration. The court said that the fee interest in the granddaughters was equitable. The decision must mean that upon the death of each of the testator's daughters the purpose of the trust of her share was fulfilled, and that the gifts to issue were limited to issue living at each daughter's death. If the gifts of income to issue were given the broadest meaning, a perpetuity violation would have resulted.

The court in *Votaw* cited as authority *Ross v. Stiff*,¹²¹ which presented the income rule—unlimited gifts of income carry the fee—in a perpetuity setting. With some simplification, trust income in *Ross* was to be paid to the testator's widow, two daughters, and a granddaughter, with the widow's share apportioned among the others on her death. The testator directed that his estate be kept

120. 104 R.I. at 410, 244 A.2d at 580.

121. 47 Tenn. App. 355, 338 S.W.2d 244 (1960).

intact so long as his wife, children, and grandchildren should live. If none of his issue were living at the death of his wife and his last living grandchild, the corpus was given to two persons, or, if they were not then living, to their children. In a suit by the executors for construction, the court held that the remainders created at the end of the trust violated the Rule Against Perpetuities. This left the income interests unlimited in duration. Applying a traditional rule of construction, the court said that the prior interests became what they would have been if the future interests had been omitted.¹²² Since the prior income interests were without limitation, they carried the fee. The court ruled that upon the widow's death the trust estate would vest in possession and enjoyment in the other income beneficiaries, that is, the trust would end on her death.

The court refused to speculate about the complex possibility of implied limitations of income if the stated income interests were treated as life interests. It simply assumed that the stated income interests were, in effect interests in fee entitling the legatees to the corpus. However, it was not necessary that the trust be terminated at the death of the testator's widow. Although the testator's intention respecting the duration of the trust was necessarily frustrated, under the *Clafin* doctrine that intention might have been preserved at least to the extent of continuing the trust as to each legatee's share until her death. That is, the fact that the legatees' interests were not life interests did not mean that the trust should not continue for their respective lives.

In sum, an intentional unlimited gift of income has proven to be the most successful device for creating an absolute or defeasible equitable interest in corpus. It is, however, not a satisfactory method. The draftsman should at least accompany such a direction with dispositive language expressing an intention to give more than a life interest, but an interest subject to the trust provisions regarding the payment of income.¹²³

If a failure to make a gift of corpus is inadvertent, the equitable fee rule may frustrate the testator's intent. It hardly needs to be emphasized, however, that if one wants to limit an interest for life, even an income interest, he should say so in the usual manner. When such simple and familiar words are absent, it is hardly justifiable, except in the most compelling factual circumstances, for a court to write them in. Where a gift of corpus is included, but not in the cir-

122. The court cited J. GRAY, *THE RULE AGAINST PERPETUITIES* § 247 (4th ed. R. Gray 1942).

123. See text accompanying notes 78, 86 *supra*.

cumstances that have occurred, it seems even less permissible for a court to infer that the income interest was meant to be only for life. Such an inference will produce a dispositive gap if there is no applicable residuary clause, and this may in turn lead a court to believe that it must imply a future interest in the corpus.

B. *The Implication of Cross-Remainders for Life*

The oldest rule of construction for implying future interests to fill dispositive gaps applies where property is given to persons as tenants in common for life (or in tail), with a remainder in fee to take effect only upon the death of the last surviving life tenant. The rule prescribes the implication of cross-remainders for life in the life tenants, so that on the death of one life tenant, a remainder for life takes effect in possession or enjoyment in the survivors or survivor.¹²⁴ While this rule was not particularly so designed, it is most commonly applied to trust dispositions in which a trustee is directed to pay income. There are cases, however, in which the rule has not been mentioned, with the result that the income is not disposed of and so passes by a residuary clause or by intestacy.¹²⁵

The reasons for the rule are seldom mentioned. Presumably, since the gap arising in such cases is unlikely to have been intended by the donor, the result reached is a natural inference of donative intent, which also avoids partial intestacy.

The main difficulty in applying the cross-remainder rule is the observance of its proper limits. It is obvious that there is no need for such a rule if the life interests are given in joint tenancy, which produces the same result without special construction. The modern presumption against joint tenancies furnishes the principal impetus for the implication rule.

No dispositive gap is created if the remainder in fee is not limited over on the death of the last living tenant but takes effect in shares upon the death of each of them. However, the intention to limit the remainder upon the death of all of the life beneficiaries is seldom expressed so clearly as to leave no doubt. In *Kiesling v. White*,¹²⁶ after the limitation of income interests so as "to give my said brothers and sisters a life estate only in my said property," the will gave to the testator's nephews and nieces "share and share alike, the rest and

124. RESTATEMENT OF PROPERTY § 115 (1936); L. SIMES & A. SMITH, *supra* note 4, § 843; Annot., 140 A.L.R. 841 (1942).

125. L. SIMES & A. SMITH, *supra* note 4, § 843. See *Union & New Haven Trust Co. v. Sellick*, 128 Conn. 566, 24 A.2d 485 (1942).

126. 411 Ill. 493, 104 N.E.2d 291 (1952).

residue of all of my property after the life estates hereinabove provided . . . have come to an end."¹²⁷ The court rejected the argument that the words meant "after the respective life estates are ended" and implied cross-remainders. In support of this conclusion the court relied on the words "share and share alike," which might be violated if the remainder accrued in segments since the remainder was limited to a class subject to increase.¹²⁸

The cross-remainder rule is particularly well illustrated by *New Jersey Title Guarantee & Trust Co. v. Ellsworth*,¹²⁹ which involved two sets of similar dispositions in the same will. One gave the interest upon 5,000 dollars of a trust estate to two nephews and two nieces "for and during the term of each of their natural life [*sic*], and upon the decease of the last one of my nephews or nieces," the sum was to become part of the residue. Upon the death of one of the nephews, his share of the income was held to pass to the surviving nephew and nieces. This result was not spoken of as the implication of cross-remainders, but in terms of joint tenancy. The residue was also to be held in trust, the income from which was given to three other nephews in equal shares "for and during the term of their

127. 411 Ill. at 495, 104 N.E.2d at 292.

128. *But see In re Browne's Will Trusts*, [1915] 1 Ch. 690, in which trust income was to be paid to such of six nieces as were living at the end of two life interests, for their respective lives. A further direction ordered the trustee "after the decease of my said six nieces, to stand possessed of my said trust estate and the income thereof, upon trust for and to such child or children of my said son as shall be living at his decease . . ." [1915] 1 Ch. at 691. Three of the six nieces survived the life interests, and construction was sought as to the effect of the death of one of them. Conceding that several constructions were possible, the court held "that on the death of each niece the ultimate gift to the remainderman takes effect in respect to her share." [1915] 1 Ch. at 693. The court regarded the language limiting the remainder as ambiguous, and believed that to construe the language to read "after the decease of my six nieces, respectively" was "the more probable construction." [1915] 1 Ch. at 695. This construction was thought to be suggested by the language giving the income to the nieces for their respective lives. For a case to similar effect see *Michigan Trust Co. v. Young*, 347 Mich. 78, 78 N.W.2d 581 (1956). Cf. *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Riley*, 89 N.J. Eq. 252, 104 A. 225 (Ch. 1918).

Hunt v. Mitchell, 409 Ill. 321, 99 N.E.2d 347 (1951), did not involve a trust, but a devise of a described portion of land to a daughter for life, with the remaining portion to a son for life. On the death of the two children or either of them, both parcels were given to the testator's grandchildren living at the death of the survivor of the two children. The son died leaving two children, survived by his sister. The court spoke of the cross-remainder doctrine and seemed undeterred by the fact that the life tenants took separate parcels rather than as tenants in common. But the court did not believe that the implication of a remainder for life in the daughter was consistent with the testator's intention. The court believed that the illogical condition of survivorship, which seemed to direct that the remainders take effect separately, but on a condition that would be appropriate only if they took effect simultaneously, did not express the true intention. The language about grandchildren living at the death of the "survivor" of the two children was construed so as to substitute "either" for "survivor." With this construction there was no gap.

129. 108 N.J. Eq. 229, 154 A. 602 (Ch. 1931).

natural life [*sic*], and upon the decease of my said nephews to pay over [the balance of the estate] to such child or children of my said nephews . . . as shall be living at that time, in equal shares." Emphasizing the contrast between the two clauses, the court held that upon the death of one of these nephews one third of the corpus vested in his children then living.

A serious error in the application of the cross-remainder doctrine results from ignoring the requirement that the initial interests be life interests (or interests in fee tail, which of course are rarely encountered today). If they are not life interests, no gap is created by the death of one of the takers. If the interests are all limited for a term of years, or for the life of a named person (that is, *pur autre vie*, rather than for the respective lives of each of the takers), with remainders at the end of such periods, a taker's interest does not by its terms end upon his death before the end of the stated period. Some courts, however, have failed to heed this analysis and have implied cross-remainders in such situations.¹³⁰ Such a result means either that the court is implying a limitation of life interests, which in particular circumstances may have some support as a matter of construction, or is applying the cross-remainder doctrine in ignorance of its proper dimensions, which is more objectionable. This constructional obfuscation is given black-letter status by section 143(2) of the *Restatement (Second) of Trusts*: If trust "income is payable to two or more beneficiaries and the principal is payable to another on the death of the survivor of the income beneficiaries, and one of them dies, the survivor or survivors are entitled to the income until the death of the last survivor, unless the testator manifested a different intent."¹³¹ While this language does not reach the case in which the corpus is given at the end of a term of years or upon the death of any person other than the survivor of the income beneficiaries, it erroneously includes the case in which the income beneficiaries' interests are limited not to their respective lives but *pur autre vie* for the life of the survivor. In the latter case there is no

130. This problem is discussed further in the text following note 172 *infra*.

131. This provision contrasts with RESTATEMENT OF PROPERTY § 115 (1936), which provides:

When an otherwise effective conveyance creates concurrent estates for life held as a tenancy in common, and also creates a future estate limited to take effect on the death of the survivor of the expressly designated life tenants, then, in the absence of a manifestation of an inconsistent intent, such conveyance also creates in favor of each such life tenant a remainder estate for life in the share of each other such life tenant, which remainder takes effect in possession only if the first life tenant outlives the life tenant as to whose share such remainder estate is created.

gap to be filled; to this extent the stated rule is an extension of the cross-remainder doctrine and rests on dubious and limited case authority. The result may be defensible in particular circumstances, but not as a constructional preference.

Dispositions in trust present a number of dispositive patterns that raise questions regarding the applicability of the cross-remainder doctrine. Dispositions usually direct the payment of income to persons in equal shares. This is hardly a disposition to persons as tenants in common (unless one means merely that the takers have no inherent right of survivorship), but if the doctrine were held inapplicable in such cases, it would scarcely ever apply to dispositions in trust. Suppose, however, that income is given for life in shares of one quarter to *A*, one quarter to *B*, and one half to *C*, with a gift of corpus on the death of all three to the issue of *C*. Does the doctrine apply if *A* dies first? Does it apply if *C* dies first? If so, how is the share of the decedent to be apportioned?

In *Rhode Island Hospital Trust Co. v. Swan Point Cemetery*¹³² income was to be divided equally among four named beneficiaries. On the death of each his part was to "be reversed back to the estate," and on the death of the survivor the "full amount" was given to a college. The court held that this language gave life interests and required that on the death of each beneficiary, one fourth of the income be accumulated for the benefit of the college. This answered the claim that remainders for life be implied, but as a further ground for decision the court distinguished a prior case¹³³ in which two beneficiaries had been given income for life with a gift of corpus to a library "at their deaths." The court there did not speak of the implication of remainders, holding instead that the beneficiaries took as joint tenants, which of course produced the same result.¹³⁴ The ground for distinction was that "undivided income" had been given in the earlier case, while in the later case the income was divided into four shares, indicating that each beneficiary was to receive no more than a quarter of the income.¹³⁵

132. 62 R.I. 83, 3 A.2d 236 (1938), *affd. on rehearing*, 63 R.I. 79, 7 A.2d 205 (1939).

133. *In re Monroe*, 42 R.I. 412, 108 A. 497 (1920).

134. *But see In re Browne's Will Trust*, [1915] 1 Ch. 690, discussed in note 128 *supra*.

135. Suppose that quarter interests in income are given to *A* and *B* for their respective lives, and the "balance" of the income is given to the children of *C*. *A* dies first. In *Stanley v. Stanley*, 108 Conn. 100, 142 A. 851 (1928), the court seemed to believe that the obvious result was to give *A*'s income to the children of *C*. If that is what is meant by giving the "balance" to them, it amounts to an express gift of a remainder in the income, leaving no gap to be filled.

*C. Other Gaps in Income Interests*¹³⁶

In *Butler v. Butler*¹³⁷ the residue of an estate was left in trust to pay three fifths of the income to the testator's wife for life and two fifths to his daughter for life. On the wife's death, and when a son of the testator reached the age of twenty-eight, the corpus was to go to the daughter and the testator's three sons, with alternative gifts over of the daughter's share if she were not then living. When the testator's wife died before the son reached twenty-eight the income previously paid to the wife was held payable to the primary remaindermen (the daughter and sons). Obviously these dispositive provisions, stated in terms of explicit fractions, differ from those in the traditional statement of the cross-remainder doctrine.¹³⁸ The court discussed only the nature of the remainder, on the assumption that if it were vested, even defeasibly, it would include income not otherwise given. The court refused to order the accumulation of income for the benefit of the remaindermen, on the usual ground that nothing in the will indicated such an intention.

The same result was reached in *Aldrich v. Aldrich*¹³⁹ on similar facts, except that the corpus was given at the end of the income period to such of the testator's children as were then living, the lawful issue then living of a deceased child to take the child's share. The court subverted the normal import of this language by finding that the remainder was not contingent, but vested subject to defeasance. It awarded the undisposed-of income to the remaindermen.

In *Glaser v. Chicago Title & Trust Co.*¹⁴⁰ half of certain income was given to a daughter for life and half to a son for life. On the death of either leaving issue, half of the corpus was to go to his or her surviving issue per stirpes. On the death of the survivor the corpus of the survivor's share was to go to his or her surviving issue, with a provision giving all of the corpus to the issue of one if the other died without issue. When the son died without issue in the lifetime of

136. Several of the cases discussed under this head might have been included under the discussion of the cross-remainder doctrine in section IIB *supra*. They are considered separately, however, partly because they present variations in dispositive language that raise a question about the scope of that doctrine, and partly because only one of the courts even mentioned the doctrine as providing a possible construction.

137. 40 R.I. 425, 101 A. 115 (1917).

138. Because the income interests were given in fractions, the court's analysis in a later case, *Rhode Island Hosp. Trust Co. v. Swan Point Cemetery*, 62 R.I. 83, 3 A.2d 236 (1938), would have prevented application of the cross-remainder doctrine. See text accompanying notes 132-35 *supra*.

139. 43 R.I. 179, 110 A. 626 (1920).

140. 393 Ill. 447, 66 N.E.2d 410 (1946).

the daughter, the court held that the income previously paid to him should be distributed as intestate property of the testator. The next of kin were determined as of the testator's death, so that half went to the daughter and half through the son's estate. This dispositive pattern is still further removed from that normally reached by the cross-remainder doctrine. The court did not mention the doctrine, stating only that the income was not given to the life beneficiaries as joint tenants. The alternative of accumulating the income was dismissed for want of any direction to accumulate.

Conceding that the force of the cross-remainder doctrine as a constructional preference does not reach either of the above cases, it nevertheless seems that an inference of intention to grant remainders in the income was not precluded. Perhaps, however, the normal resistance to inserting what is in effect an unexpressed dispositive provision requires a firmer ground for inference than appeared in these cases.

In *Hartford-Connecticut Trust Co. v. Hartford Hospital*¹⁴¹ the residue of a testator's estate was to be divided into two parts. The income from one part was to be paid to a sister for life and that from the second part to another sister for life, with successive life interests in each part in a number of named persons. Upon the death of the last survivor of these persons the principal was to be paid to the defendant hospital. When all of the interests in one part had ended, one person survived as beneficiary of the other part. In a suit for construction the court held that the income from the part in which all life interests had expired was to be distributed as intestate property of the testator. The court refused to imply a cross-remainder in the survivor of the other part on the ground that such a result would be inconsistent with the dispositive scheme, and refused to order the accumulation of income for the benefit of the hospital on the ground that the testator did not anticipate any dispositive gap in the distribution of income.¹⁴²

141. 141 Conn. 163, 104 A.2d 356 (1954).

142. An obvious dispositive gap appeared in *National Shawmut Bank v. Morey*, 320 Mass. 492, 70 N.E.2d 316 (1946), in which trust income was payable to several life beneficiaries in stated amounts and 90 per cent of the balance was payable to other beneficiaries until the death of all the beneficiaries. The court held that the remaining 10 per cent of the income was to be added to the corpus for the benefit of the remaindermen. This judgment was based on several factors: the language giving "all the rest, residue and remainder" of the testator's estate in trust, the direction that the trustee was to keep all the property held in trust invested in good, safe securities, and the direction upon termination of the trust to pay over "the then remaining sum." See also *Brown v. Wright*, 168 Mass. 506, 47 N.E. 413 (1897). Cf. *Abbott v. Williams*, 268 Mass. 275, 167 N.E. 357 (1929).

In two other cases gaps in income interests were left by dispositions giving annu-

Assuming that the implication of cross-remainders was not a proper result in any of these cases, the intestacy decreed in *Glaser* and *Hartford* seems the least defensible result. On the other hand, the view of the Rhode Island court in *Butler* that otherwise undisposed-of income is an inherent incident of a gift of corpus deserves further attention. Consider the reduction of construction problems that might follow if that proposition were accepted as a general rule.

There are good reasons why we do not speak of a devise of land to *A* for life, remainder to *B*, simply in terms of a prescribed succession of interests. We say rather that ownership is divided into two estates, each of which has present incidents and value. Even under civil law systems, which do not recognize the division of ownership into segments dependent on the passage of time, it is possible to make the same sort of arrangement. One can give an interest similar to a life estate—called a usufruct—that is an encumbrance upon ownership given to someone else.

Where property is given in trust our common law conceptions are complicated by a different division of ownership, that between trustee and beneficiaries. During the continuance of the trust we may speak of the beneficial interests that are given for life as equitable life estates. They usually do not imply the right of possession, for that usually goes to the trustee as a necessary incident of his management function. Enjoyment of the beneficial interests thus constitutes a special sort of ownership, with the right to receive income its usual main ingredient. While the customary practice of speaking of beneficial interests in trust as either income interests or interests in corpus does serve useful purposes, we have already seen how it may be misleading when we also apply the traditional estate dichotomy of life interests and remainders.¹⁴³ A further consequence of this practice may be the erroneous notion that income interests and interests in

ities for the duration of a trust and the balance of the income in certain circumstances—but not in the circumstances that occurred. In *Foss v. State Bank & Trust Co.*, 343 Ill. 94, 175 N.E. 12 (1931), the corpus was given to charities, but the court held that the undisposed-of income was intestate property. The court justified this result on the ground that the testator had tried to make a complete distribution of income and had given only the corpus to the charities. In contrast, in *Cotton v. Bank of California*, 145 Wash. 503, 261 P. 104 (1927), the corpus was given to the testator's granddaughter, and the court held that the undisposed-of income should be given to her. This result was reached, however, not upon any general notion that undisposed-of income accrues to corpus, but on a finding that the granddaughter was the primary object of the testator's bounty and that the income was needed for her support during her minority. This seems, in other words, to amount to the implication of an income interest, based on an inferred testamentary objective.

143. See text following note 99 *supra*.

corpus are distinct and segregated entities requiring express language to bring them together in the same person.

It may be more useful both in drafting and construction to say that a remainderman who is entitled to trust corpus has been given all of the ingredients of ownership not given to someone else. The very nature of the trust seems to imply that, so long as there is a complete disposition of the corpus, there can be neither gaps in income nor intestacy. This notion is commonly expressed by a settlor who directs the ultimate distribution of corpus and all undistributed income. I suggest that such a purpose is implied by any gift of corpus.¹⁴⁴ This implication, if raised to a constructional preference, would of course yield to a different construction of specific dispositive language, including language that implies cross-remainders. In the absence of such language, speculation leading to the possible implication of interests in income would be avoided, for by hypothesis no gap would remain to be filled.

This at least is the assumption made by the Rhode Island court in *Butler and Aldrich*.¹⁴⁵ Another obvious problem remains, however, to which I suggest the Rhode Island court gave short shrift. If the undisposed-of income belongs to the remaindermen, when are they entitled to receive it? In the absence of a provision for accumulation, the court concluded that it was payable immediately. Here the court encountered the difficulty with respect to accumulation of income that arises when remainder interests are contingent on survivorship. The court responded by torturing language to find a vested remainder that was conceded still to be subject to a requirement of survival.

This problem requires a reexamination of traditional notions about the accumulation of income. Most learned discourse contains little more than an analysis of policy requirements respecting the duration of an accumulation period. The ghost of *Thellusson v. Woodford*¹⁴⁶ still haunts all other thoughts about the accumulation of income: If accumulation is a peculiarly objectionable fetter on property, and is to be permitted only for very limited periods, it is understandable why courts are reluctant to imply directions to ac-

144. This is not a new idea. In *Thellusson v. Woodford*, 11 Ves. 112, 146, 32 Eng. Rep. 1030, 1044 (1805), the Lord Chancellor said: "[W]herever a residue of personal estate is given, the interest goes with the bulk; and there is no more objection to giving that person, that, which is only forming another capital, than to giving the capital itself."

145. See text accompanying notes 137-39 *supra*.

146. 11 Ves. 112, 32 Eng. Rep. 1030 (1805).

cumulate. However, since almost all states have eliminated special statutory restrictions on accumulations of income,¹⁴⁷ and so presumably are left only with the common law perpetuity period,¹⁴⁸ it now seems permissible to follow a more liberal constructional preference respecting accumulation.¹⁴⁹

Accumulation could be ordered even though income not expressly provided for would otherwise go to residuary legatees; that is, undisposed-of income could still go to the takers of the corpus rather than to residuary legatees where the corpus of the property that produces the income is expressly given at the end of the income interests. The issue in such a case is how strong the proposed rule of construction should be in relation to normal assumptions about the role of a residuary clause, particularly as a device for closing dispositive gaps.

For both conceptual and practical reasons, the notion I am proposing should be treated as a "residual" rule of construction. I do not mean, however, that it is a weak rule. If an owner of property is to be entitled to the income earned by the corpus except as income is specifically given to someone else, the proposed rule should be applied only when an instrument, by its express terms or in the absence of any otherwise applicable rule of construction, leaves a gap in the income interests.

Recent statutory amendments in Wisconsin of the Rule Against Perpetuities¹⁵⁰ include a new rule on accumulations.¹⁵¹ Consistently

147. L. SIMES & A. SMITH, *supra* note 4, § 1466 (Supp. 1973).

148. A number of the recent statutes repealing earlier, more restrictive limitations on the accumulation of income have provided that an accumulation is void only to the extent that it exceeds the common law perpetuity period. CAL. CIV. CODE § 725 (West 1971); ILL. REV. STAT. ch. 30, § 153 (1973); IND. ANN. STAT. § 32-1-4-4 (1973); MONT. REV. CODES ANN. § 67-413 (1970); N.Y. ESTATES, POWERS & TRUSTS LAW § 9-2.1 (McKinney 1967); PA. STAT. ANN. tit. 20, § 6106 (Supp. 1974). Cf. ALA. CODE tit. 47, § 146 (1958). Since the common law accumulations restriction invalidates any direction to accumulate income that may exceed the perpetuity period, the more liberal statutory rule has a bearing on the willingness of a court to imply a direction to accumulate. Such a statute may not always be easy to apply, for it seems to embrace a wait-and-see ingredient, but this problem is outweighed by its less severe frustration of dispositive intention.

149. The Connecticut court held on one occasion that if there is no express or implied "direction" to accumulate, but income is accumulated because the testator provided funds for his stated purposes that turned out to be so ample that the income to be used for such purposes did not exhaust the supply of income, there was not such a direction to accumulate as would invoke the common law restriction upon accumulations. *Hoadley v. Beardsley*, 89 Conn. 270, 93 A. 535 (1915). Cf. RESTATEMENT OF PROPERTY § 439(a)(ii) (1944).

150. WIS. STAT. ANN. § 700.16 (Supp. 1973).

151. WIS. STAT. ANN. § 701.21 (Supp. 1973).

with the exemption from the Rule Against Perpetuities of dispositions in trust where the trustee has a power to sell, it is provided that no direction for accumulation of income shall be invalid. Although I am not willing to defend either of these provisions,¹⁵² special attention should be given to this further provision of the accumulations statute:

Income not required to be distributed by the creating instrument, in the absence of a governing provision in the instrument, may in the trustee's discretion be held in reserve for future distribution as income or be added to principal subject to retransfer to income of the dollar amount originally transferred to principal; but at the termination of the income interest, any undistributed income shall be distributed as principal.¹⁵³

It may be that the main purpose of this section was to provide for a reserve against deficits in distributable income, a problem discussed below.¹⁵⁴ But it does so in terms of a surplus of distributable income, which can arise not only from unexpected increases in income but from dispositive gaps in income interests. The statute declares that such income, if not held in reserve, accrues to corpus, subject to being recovered if needed. If not expended the income is payable only with the corpus; in other words, it is to be accumulated. These results may all be subject to the terms of the "creating instrument."¹⁵⁵

Subject to the need for clarification, I commend the Wisconsin provision for adoption elsewhere. In fact, if my preceding analysis of trust dispositions in estate terms is sound, courts may be free to reach the same results without legislation. Such a statute, however, cannot be adopted without further amendment in any state that adheres to a policy restriction on the accumulation of income. Although there is little common law authority on the existence of any rule restricting

152. See ABA Committee on Rules Against Perpetuities, *Further Trends in Perpetuities*, 5 REAL PROPERTY, PROBATE & TRUST J. 333 (1970).

153. WIS. STAT. ANN. § 701.21(4) (Supp. 1973).

154. See section IIF *infra*.

155. This qualification will require interpretation. Does the statute supersede the cross-remainder doctrine where the dispositive language would otherwise invoke that doctrine? Would it override the precept, discussed in section IID *infra*, that when income is given for a term or *pur autre vie* the income interest is not limited to the life of the income beneficiary? The statute should not be construed to fill gaps that by proper construction do not exist. It was designed as a substitute for a prior statutory provision that gave undisposed-of income to those "presumptively entitled to the next eventual estate." Law of Aug. 8, 1957, ch. 561, § 1, [1957] Wis. Laws 758 (repealed 1969). As indicated in sections IID4 and IIF2c *infra*, the same interpretative problem exists in states with statutes such as the latter.

the duration of a dispositive direction for the accumulation of income, it has been declared, and is generally assumed, that such a rule does exist. Unless otherwise provided by statute, it invalidates any direction to accumulate income for a period that can exceed the perpetuity period.¹⁵⁶ In any state with an accumulations rule the provision of the Wisconsin statute quoted above must be modified to prevent the accrual of income to corpus where such an accrual would violate the law on the accumulation of income. The directive of the statute concerning the maintenance of a reserve need not be so qualified, but may be treated as authorizing a kind of accumulation that does not invoke the restriction.¹⁵⁷

In any state not otherwise committed by statute or precedent, the rule of the *Thellusson* case¹⁵⁸ could be adopted, under which no accumulation of income is unlawful if all interests are valid under the Rule Against Perpetuities. In a case (unlike *Thellusson*) in which income is to be accumulated beyond the time when the interest in the corpus vests, the problem could be treated as one of trust duration only. This would presumably mean that if the period of accumulation may exceed the perpetuity period, the *Clafin* doctrine¹⁵⁹ would be rejected, and the trust would become terminable by the beneficiaries when they become *sui juris* and attain indefeasibly vested interests.¹⁶⁰ Such a rule could be given an even more liberal interpretation, making the trust terminable only if the beneficiaries have indefeasibly vested interests and the perpetuity period has expired.

The fact remains that most express or implied directions to accumulate income do not exceed the perpetuity period. In such cases the Wisconsin statute, which provides for accumulation of any surplus of distributable income, makes sense. Although there is no reason to encourage incomplete dispositions of trust income, there is something to be said for giving draftsmen the security that all income not specifically disposed of will follow the principal.

156. See RESTATEMENT OF PROPERTY § 441 (1944).

157. See *id.* § 439(a)(ii).

158. *Thellusson v. Woodford*, 11 Ves. 112, 32 Eng. Rep. 1030 (1805). See note 144 *supra*.

159. See text following note 107 *supra*.

160. L. SIMES & A. SMITH, *supra* note 4, § 1393. Cf. RESTATEMENT OF PROPERTY § 381 (1944). There is authority that, in the absence of an applicable statute, a trust is not void on the ground that it may last beyond the perpetuity period. There is less authority to the effect that the *Clafin* doctrine is rejected in cases of excessive trust duration. *Id.*

D. *Income Interest for a Term of Years
or Pur Autre Vie*¹⁶¹

It is not uncommon to give income interests to two or more persons, not for their respective lives, but for a term of years, or for the life of a named person (who may or may not be one of the legatees). Such an express limitation is normally inconsistent with the implication of additional limitations. Thus, if an income interest is not inherently a life interest, an implication of a limitation for life would be inconsistent with any express limitation. The implication would also leave unexplained the omission of a further gift of income upon the income beneficiary's death. If an unlimited gift of income is not impliedly limited for life, there is even less reason for such an implication where a gift of income is limited for a period other than the beneficiary's life.

1. *Income Interests Held Transmissible*

In cases involving gifts by will of annuities for a stated period, the English courts have from an early date held in favor of the executor or administrator of an annuitant who died before the end of the annuity period.¹⁶² Income interests have also been held transmissible

161. Long ago a special problem existed with respect to legal estates in land limited *pur autre vie*. If the life tenant died before the end of the measuring life, the estate could not devolve as personal property because it was a freehold and not a chattel real; but since it was not an estate of inheritance, it could not descend or be devised. This led to the peculiar rules about general and special occupants. The English Statute of Frauds and certain American statutes have eliminated or reduced the problem, as have those intestacy statutes that do not distinguish between real and personal property. The problem does not arise where the limitations are of personal property. In general the result is that such interests can descend or be devised. See 1 AMERICAN LAW OF PROPERTY § 2.26 (A. Casner ed. 1952); RESTATEMENT OF PROPERTY § 151 (1936).

162. *Bryan v. Twigg*, L.R. 3 Ch. 183 (1867); *In re Ord*, 12 Ch. D. 22 (1879); *Jones v. Randall*, 37 Eng. Rep. 313 (Ch. 1819); *Savery v. Dyer*, 27 Eng. Rep. 91 (Ch. 1752). *Jones v. Randall* involved language that might have been regarded by some American courts as ambiguous: An annuity was to be divided among the children of the initial annuitant who should survive her, to be paid "during the lives of such children and the life of the survivor." The opinion of the Master of the Rolls is instructive upon the role of a court in such circumstances:

We cannot tell what the testator intended except so far as he has expressed it. The safest way is to adhere to the words, and they are perfectly clear in describing to whom the annuity was to go after the death of M. A. Randall. It was there given to all the children who should survive her, in equal shares and proportions; this would make them tenants in common. . . .

The words that follow only describe how long this annuity is to last; they determine the subject-matter of the bequest, regulating the duration, but not the persons who are to participate in it.

It is only a conjecture, that because the annuity is for the lives of the survivors, therefore the survivors are to enjoy it. That would be raising an inference against the express words. . . .

37 Eng. Rep. at 314.

by American courts where the interest is limited for a term of years, for the life of a named person, or for the life of the survivor of the legatees, and where the income is given in equal shares, as annuities, in percentages, or for the support of the legatees.¹⁶³ In *Stoffels v. Stoffels*,¹⁶⁴ for example, half of the income was given to *A* and half to *B*, with a provision for *B* if *A* should predecease him but with no provision for the death of *B* before *A*. *B* died first, and the court held in favor of *B*'s executor.¹⁶⁵

A variant on the typical dispositive pattern appeared in *Dyslin v. Wolf*,¹⁶⁶ in which income was given to the testator's children in equal shares, with the provision that if any child died leaving a child or children surviving, the parent's share of the income was to be paid to such child or children. The corpus was given on the death of the survivor of the testator's children. One of the children died leaving two sons, one of whom subsequently died leaving a wife and three children. The court held that the deceased son's share of the income passed by his will to his widow. Rejecting the application of the cross-remainder doctrine to these facts, the court said that the son's interest was vested and not subject to a requirement of survival, by which it meant that the son's interest was not limited to his lifetime. The same result was reached in *Gasque v. Sitterding*¹⁶⁷ on similar facts, except that on the death of a child leaving issue the deceased child's share of the income was to go to his or her issue. One child died leaving three children, and one of these, a daughter,

163. *Bobys v. Bobys*, 284 F. Supp. 321 (D.D.C. 1968); *New Britain Trust Co. v. Stanley*, 128 Conn. 386, 23 A.2d 142 (1941); *Davis v. Goodman*, 17 Del. Ch. 231, 152 A. 115 (1930); *Dyslin v. Wolf*, 407 Ill. 532, 96 N.E.2d 485 (1950); *Anderson v. Simpson*, 214 Ky. 375, 283 S.W. 941 (1926); *Crouch v. Mercantile-Safe Deposit & Trust Co.*, 220 Md. 140, 151 A.2d 757 (1959); *Hussey v. Hussey*, 323 Mass. 533, 83 N.E.2d 159 (1948); *Harrison v. Marden*, 298 Mass. 148, 10 N.E.2d 109 (1937); *Lich v. Lich*, 158 Mo. App. 400, 138 S.W. 558 (1911); *Stoffels v. Stoffels*, 18 N.J. Super. 300, 86 A.2d 806 (Ch. 1952); *City Bank Farmers Trust Co. v. Housman*, 296 N.Y. 512, 68 N.E.2d 453 (1946), *affg. mem.* 269 App. Div. 1059, 59 N.Y.S.2d 626 (1945), *affg. mem.* 59 N.Y.S.2d 880 (Sup. Ct. 1945); *In re Will of Sacchi*, 36 App. Div. 597, 318 N.Y.S.2d 555 (1971); *In re Edelmuth's Estate*, 62 N.Y.S.2d 708 (Sur. Ct. 1946); *McGlinn's Estate*, 77 Pa. Super. 582 (1921); *Gasque v. Sitterding*, 208 Va. 206, 156 S.E.2d 576 (1967). *Cf.* *Rogers v. Walton*, 141 Me. 91, 39 A.2d 409 (1944). *See* Annot., 112 A.L.R. 581 (1938).

164. 18 N.J. Super. 300, 86 A.2d 806 (Ch. 1952).

165. *But see* *Wheeler v. Kennard*, 344 Mass. 466, 182 N.E.2d 823 (1962). There was a supplanting gift of income to the issue of either of two beneficiaries, but no such gift if either died without issue. The Massachusetts court distinguished prior cases that left the income in a deceased legatee's estate, on the questionable ground that the one supplanting gift indicated that the initial income interests were intended to be only for the lives of the respective legatees.

166. 407 Ill. 532, 96 N.E.2d 485 (1950).

167. 208 Va. 206, 156 S.E.2d 576 (1967).

later died without issue. The interest of the deceased granddaughter of the testator was held to remain in her estate. The court emphasized the supplanting provision on the death of a child of the testator and the absence of such a provision respecting the interest in the issue of a deceased child.¹⁶⁸

A different result was reached in *Casey v. Gallagher*,¹⁶⁹ in which, after initial life interests in income in the testator's three children, remainders in the income were given respectively to their children, or, if any of them should have no children, "to the other children, or their issue if dead." One of the testator's children died leaving two sons, one of whom died without issue before the end of the income period. The court held that the latter's income interest passed to his brother. Conceding the applicability of the traditional rule about gifts of income *pur autre vie*, the court said that it must yield to inferences from the whole will. The court inferred from the dispositive pattern that the testator's failure to provide for the death of a grandchild who succeeded to the interest of his parent was inadvertent, and thus concluded that the testator intended to make all of the interests life interests, with an appropriate cross-remainder in the circumstances that occurred.

The court's language indicates that it was willing to accept the full implications of its judicial will-making. That is, if the deceased grandchild had left issue, they presumably would have succeeded to his income interest. In other words, the will was construed so as to give the income to the testator's issue per stirpes from time to time living. While this seems like a sensible way to give income, it was not what the testator said.

In *Gasque* the supplanting limitation on the death of a child of the testator was in favor of his issue, not his children. Suppose after the death of one child the child's daughter had died leaving issue. If "issue" meant issue per stirpes, is it implicit in such a limitation that the representation principle continues to apply until the end of the income period? On facts similar to *Casey*, except that one remainder in the income was given to the issue of a deceased child with an alternative in the living children of the testator, a California court reached the result that the court in *Casey* only sug-

168. This result was also reached in *Crouch v. Mercantile-Safe Deposit & Trust Co.*, 230 Md. 140, 151 A.2d 757 (1959), in which the initial interests in the testator's children were limited to their respective lives.

169. 11 Ohio St. 2d 42, 227 N.E.2d 801 (1967). Cf. *Wilkes v. Wilkes*, 488 S.W.2d 398 (Tex. 1972).

gested: Upon the death of a child of the testator, leaving a daughter who later died leaving two children, the children took, not by descent from their mother, but by the inferred terms of the will.¹⁷⁰

The contrast between *Gasque* and *Casey* is instructive on the proper role of courts in the construction of wills. It exemplifies the pervasive tension between the constructional precept that the intention of the testator is the predominant guide and the precept that a court will not make a will for the testator. More simply, when does construction become reformation? The *Casey* court said that the otherwise applicable rule of construction yields to the intention inferred from the whole will. The *Gasque* court said that the construction reached in *Casey* would amount to the insertion into the will of a set of alternative limitations upon the death of any of the testator's grandchildren, and that it had no right to insert such a provision. Whatever the proper limits of construction, the implication of future interests to fill dispositive gaps should be confined to cases in which the existence of a gap is clearly evident. While a settlor's dispositive scheme may be the basis for construction that by implication fills a dispositive gap, construction may be unduly strained where the inferences from a dispositive scheme are the only basis for the discovery of a dispositive gap.

Another wrinkle would be added if the trust in any of the circumstances discussed above were spendthrift. That would, of course, prevent any inter vivos alienation of an income interest, including any transfer of an interest that otherwise would continue beyond the legatee's death. Is it the purpose of a spendthrift provision to restrain alienation of an income interest by will? However that question is decided, can spendthrift language prevent the intestate succession of the interest of a deceased beneficiary? It can if spendthrift language is held to imply that the restricted interests are life interests. I have encountered only two cases involving the problem in question in which the trust was identified as spendthrift. This fact was regarded as contributing to the conclusion that the income interests were not *pur autre vie* but were limited to the lifetime of the respective beneficiaries.¹⁷¹

2. Cross-Remainders Implied

In a number of cases of the kind discussed above the courts applied the cross-remainder doctrine, so that upon the death of one

170. *In re Hartson's Trust*, 200 Cal. App. 2d 757, 19 Cal. Rptr. 694 (1st Dist. 1962). Cf. *In re Nixon*, 306 Pa. 261, 159 A. 442 (1932).

171. *Estate of Robinson*, 262 Cal. App. 2d 32, 68 Cal. Rptr. 420 (5th Dist. 1968); *In re Nixon*, 306 Pa. 261, 159 A. 422 (1932).

income beneficiary his share of the income was given to one or more surviving beneficiaries.¹⁷² It has already been observed that this doctrine is properly applicable only where the several income interests are limited for the respective lives of the beneficiaries.¹⁷³ In cases in which there were no such express limitations, some courts have nevertheless declared or assumed that the respective income interests were intended to be life interests.¹⁷⁴ Unless one assumes that income interests are necessarily life interests, at least in these circumstances, there was in most of these cases no dispositive language justifying the result. In several cases the courts simply applied the cross-remainder doctrine as though it were not limited to cases in which concurrent life interests are given in income.¹⁷⁵ It has been observed that this assumption is objectionable because it precludes specific inquiry into the result that is assumed, but that section 143(2) of the *Restatement (Second) of Trusts* supports such an implication.¹⁷⁶ The New Jersey court recently relied on that section to justify its implication of cross-remainders.¹⁷⁷

172. *E.g.*, *Hartford Natl. Bank & Trust Co. v. Harvey*, 143 Conn. 233, 121 A.2d 276 (1956); *Kramer v. Sangamon Loan & Trust Co.*, 293 Ill. 553, 127 N.E. 877 (1920); *In re Young's Will*, 248 Iowa 309, 79 N.W.2d 376 (1956); *In re Estate of Conway*, 59 N.J. 221, 280 A.2d 189 (1971). *Cf.* *Casey v. Gallagher*, 11 Ohio St. 2d 42, 227 N.E.2d 801 (1967), discussed in text accompanying note 169 *supra*. In *Bates v. Barry*, 125 Mass. 83 (1878), the court held merely that a 500 dollar annuity for ten years was not payable to the administrator of the annuitant, who died during the period, because no words of inheritance were used. Presumably this would no longer be a ground for finding that only a life interest was given. *See* the Massachusetts cases cited note 163 *supra*.

173. *See* text preceding note 130 *supra*.

174. *Hartford Natl. Bank & Trust Co. v. Harvey*, 143 Conn. 233, 121 A.2d 276 (1956); *Norman v. Prince*, 40 R.I. 402, 101 A. 126 (1917).

175. *Kramer v. Sangamon Loan & Trust Co.*, 293 Ill. 553, 127 N.E. 877 (1920); *In re Young's Will*, 248 Iowa 309, 79 N.W.2d 376 (1956); *In re Estate of Conway*, 59 N.J. 221, 280 A.2d 189 (1971).

176. *See* text accompanying note 131 *supra*.

177. *In re Estate of Conway*, 59 N.J. 221, 280 A.2d 189 (1971).

In *First Natl. Bank & Trust Co. v. Palmer*, 261 N.Y. 13, 184 N.E. 477 (1933), the testatrix undertook to distribute income to her husband, a sister, and her son. The will included language giving income to her husband during the life of her son. She undertook to prescribe a variety of redistributions on the death of one or the other of these persons, but failed to prescribe the result in the event of the death of both the sister and husband in the lifetime of the son. Without referring to any cross-remainder doctrine, the court said that the will was "instinct" with the intention that except as otherwise provided, the son was to benefit. This means that the gift to the husband during the life of the son was assumed to be also limited to his own life. Under such a disposition, that inference may seem justified.

In *Norman v. Prince*, 40 R.I. 402, 101 A. 126 (1917), 2,000 dollars of annual trust income was given to the testator's widow, the "residue" to be divided among his children, with a gift of corpus upon the death of the widow and the children. On the death of the widow, it was held that all the income was payable to the children. This result turned on two inferences: that income was given to the widow for her

A problem inherent in implying cross-remainders where income interests are given for periods other than the lives of the beneficiaries is the possibility that all of the income beneficiaries will die before the end of the stated income period. It could be argued that the implication of cross-remainders does not necessarily mean that each income interest is a life interest, but rather that each such interest is subject to a gift over on death leaving one or more surviving takers. This would mean that the last survivor takes an interest that terminates only at the end of the income period, so that on his death the income interest would pass through his estate. I know of no case, however, that has so held, and two courts have held otherwise. The Massachusetts court has held that the undisposed-of income passed to the residuary legatees,¹⁷⁸ while a federal court has held that the income should be accumulated.¹⁷⁹ In the latter case the same persons were apparently entitled to the income whether they took the income by intestacy or whether the income passed to the ultimate takers of the corpus. But it is significant that the court said "[the income] is part of the trust estate and not subject to distribution until 'the trust shall cease and determine.'"¹⁸⁰

3. Class Gifts of Income

Several courts have treated the gift of income to a class as though it avoids the problem raised by an income gift not expressly limited to the respective lives of the beneficiaries. Upon the death of any member of the class, the surviving class members take his share of the income unless it is otherwise provided.¹⁸¹ In all but one of these cases¹⁸² the wills also contained provisions for paying income to the issue of deceased legatees, but no provisions for the death of

support and personal benefit, and therefore it was intended to continue only for her life. The court also relied on *Bates v. Barry*, 125 Mass. 83 (1878), for the proposition that the lack of words of inheritance indicates a life interest. The income previously paid to the widow was thus distributable as part of the "residue" given to the children. *Cf. Stanley v. Stanley*, 108 Conn. 100, 142 A. 851 (1928).

178. *Wheeler v. Kennard*, 344 Mass. 466, 182 N.E.2d 823 (1962).

179. *American Security & Trust Co. v. Blair*, 70 F.2d 774 (D.C. Cir. 1934).

180. 70 F.2d at 776. These two cases are relevant to the problem of treating gifts of corpus impliedly to include income not disposed of otherwise. *See* section IIC *supra*.

181. *E.g.*, *Bank of Delaware v. Kane*, 285 A.2d 440 (Del. Ch. 1971); *Maxwell's Estate*, 261 Pa. 140, 104 A. 501 (1918); *In re Boyer's Estate*, 115 Pa. Super. 501, 175 A. 728 (1934); *Rhode Island Hosp. Trust Co. v. Thomas*, 73 R.I. 277, 54 A.2d 432 (1947). The Pennsylvania cases cited above relied on *Rowland's Estate*, 151 Pa. 25, 24 A. 1091 (1892), in which the class involved was issue per stirpes. Such language, together with other language, led the court to believe that the intention was in fact to give to issue from time to time living.

182. *Old Colony Trust Co. v. Treadwell*, 312 Mass. 214, 43 N.E.2d 777 (1942).

legatees without issue. In only one of the last mentioned cases, however, did the presence of the supplanting limitation have a bearing on the outcome. The Pennsylvania court made it clear that if the gift were not to a class, it would hold that a deceased legatee's interest would pass through his estate.¹⁸³ The Rhode Island court implied the same in a case in which a class gift was found even though all the members of the class had been named.¹⁸⁴ The principle announced by these courts amounts to the implication of two provisions: the interest of each class member is limited to his lifetime, and cross-remainders are given to the survivors.

The Massachusetts court reached the same result where the income beneficiaries were named, on the ground that the rule preventing a class designation where the class members are named must yield to the testator's intention.¹⁸⁵ Where, as in that case, the corpus is given on the death of all of the income beneficiaries, the interest of the survivor of them is in effect a life interest. This may have been the basis of the inference that all the interests were so limited.

It does not require resort to a class doctrine to imply cross-remainders where life interests are given with a remainder upon the end of all of the life interests. Perhaps the presence of a class gift of income does tend to fortify the implication, but the rub comes in implying that a class gift of income is a gift for the respective lives of the class members. No constructional doctrine justifies such a limitation. In fact, it seems at least analogous to the error made by a few courts in holding that a remainder to a class implies a condition of survivorship.¹⁸⁶ This analysis erroneously assumes that if a class is subject to increase it is also subject to decrease.

If income is given to a person's issue per stirpes, however, the stirpital distribution may imply that a qualifying taker's issue should supplant him if he should die during the income period leaving issue. This result was reached in *Rowland's Estate*,¹⁸⁷ improperly relied upon by the Pennsylvania court in later cases as authority for assuming income interests to be life interests in any case in which such interests are given to a class.¹⁸⁸

183. *Maxwell's Estate*, 261 Pa. 140, 104 A. 501 (1918).

184. *Rhode Island Hosp. Trust Co. v. Thomas*, 73 R.I. 277, 54 A.2d 432 (1947).

185. *Old Colony Trust Co. v. Treadwell*, 312 Mass. 214, 43 N.E.2d 777 (1942).

186. E.g., *Jones v. Holland*, 223 S.C. 500, 77 S.E.2d 202 (1953). See L. SIMES & A. SMITH, *supra* note 4, § 146 n.64 (the Tennessee "class doctrine").

187. 151 Pa. 25, 24 A. 1091 (1892).

188. See note 181 *supra* and accompanying text.

4. "Next Eventual Estate"

In *In re Thall*¹⁸⁹ trust income was to be paid to the testator's widow, his sister, and the sister's two sons in equal shares, and the corpus was given on the death of the widow to the other three. Other alternative gifts of corpus were provided: on the death of the sister before the widow, her share to her two sons; on the death of either of these nephews before the widow, his share to his surviving children, if any, or, if not, to the surviving nephew. The widow was predeceased first by one nephew who left a daughter, and then by the sister and the other nephew, both without issue. No explicit provision had been made for these circumstances. The court held that the daughter of the one nephew was entitled to the corpus.¹⁹⁰ The court assumed that the income was also undisposed of, and held that it, too, should be given to the testator's surviving grandniece under section 63 of the New York Real Property Law,¹⁹¹ since she was the person "presumptively entitled to the next eventual estate."

The statute cited was part of early legislation restricting accumulation of income. It was designed primarily to govern the disposition of income released by a ruling that an unlawful accumulation had been directed. *Thall* and earlier cases held the statute applicable whenever income is not disposed of, even though there is no unlawful accumulation or suspension of the power of alienation. The section has recently been amended expressly so to provide.¹⁹²

The application of the statute in *Thall* depended on a finding that the income was not disposed of by the trust instrument. Since the income interests were without express limitation other than by the direction to pay corpus on the death of the widow, they were really given *pur autre vie* and so were disposable property in the estates of the deceased beneficiaries. The court's finding of a gap in the income interests must therefore have rested on the assumption

189. 18 N.Y.2d 186, 273 N.Y.S.2d 33, 219 N.E.2d 397 (1966).

190. This construction is at least questionable. Without here outlining all of the relevant provisions of the will, it is arguable that one half of the corpus should have passed through the estate of the last surviving beneficiary, who died without issue.

191. "When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." Law of May 1, 1916, ch. 364, § 63, [1916] N.Y. Laws 974 (repealed 1966).

192. N.Y. ESTATES, POWERS & TRUSTS LAW § 9-2.3 (McKinney 1967): "When income is not disposed of and no valid direction is given for its accumulation it passes to the persons presumptively entitled to the next eventual estate."

that the interests were for the life of each of the beneficiaries. The assumption was left unstated and thus unsupported.¹⁹³

A California court¹⁹⁴ reached the same result as in *Thall* by applying an identical statute.¹⁹⁵ The court expressly refused either to construe the gift as *pur autre vie* or to imply cross-remainders, on the ground that neither was consistent with the testator's intention. Several factors were cited, including the facts that the trust was spendthrift and that the income was given to provide for the needs of the income beneficiaries. In other words, the income interests were only life interests in the amounts initially given to each.¹⁹⁶

E. Gifts upon a Stated Event

Where property is given upon the attainment of a certain age, or upon marriage, or at the end of a stated period of time, the problem most often encountered is whether such a gift is conditional upon survival to the stated future time.¹⁹⁷ It is not my purpose to re-examine that problem. Under any construction, however, a subordinate problem may arise from the failure of the instrument, where the limitations are in trust, to provide for the disposition of income between the death of the donee and the occurrence of the stated event.

Where the gift is found to be indefeasibly vested, it is not surprising to find cases holding that the income belongs to the donee.¹⁹⁸

193. No mention was made in *Thall* of *City Bank Farmers Trust Co. v. Housman*, 296 N.Y. 512, 68 N.E.2d 453 (1946), *affg. mem.* 269 App. Div. 1059, 59 N.Y.S.2d 626 (1945), *affg. mem.* 59 N.Y.S.2d 880 (Sup. Ct. 1945), in which it was held that income payable to a substituted beneficiary passed on her death before the end of the income period to her executor. The statutory provision about undisposed-of income was rejected, presumably on the ground that there was no such income.

194. *In re Estate of Robinson*, 262 Cal. App. 2d 32, 68 Cal. Rptr. 420 (5th Dist. 1968).

195. CAL. CIV. CODE § 733 (West 1954).

196. Interpretation of the statutory language referring to the "next eventual estate" has produced considerable litigation in New York, AMERICAN LAW OF PROPERTY, *supra* note 161, § 25.111, which need not be pursued here. The statute almost eliminates the possibility that trust income can be intestate or passed to residuary legatees, unless the heirs or legatees happen to be the takers of the next eventual estate. In other words, the statute expresses the principle that income belongs to the presumptive takers of the corpus, unless it is otherwise disposed of, or unless the next eventual estate is itself an income interest. Such a statute prevents an implied accumulation of income where the only basis for such implication is that the instrument does not expressly, or upon proper construction, dispose of the income. The main difficulty with these statutes is that, where one or more contingent or defeasible remainders are given, the income may go to persons who do not eventually enjoy the remainder. In fact, some difficulty may be encountered in deciding who are the persons presumptively entitled to the next eventual estate.

197. See L. SIMES & A. SMITH, *supra* note 4, §§ 586-87, 592.

198. *Stinson v. Palmer*, 146 Conn. 335, 150 A.2d 600 (1959) (age); *Feinberg v.*

In view of the nature of the gift, it also may not be surprising when accumulation is directed and payment made with the principal at the stated time.¹⁹⁹ How does one describe the interests given in such circumstances? Where the income is expressly or impliedly payable to the legatees as it accrues, the interest is an equitable fee estate. If, however, the interest is to be accumulated for the legatees, it is a future interest.²⁰⁰ But how under the doctrine of estates may an interest be called a future interest where there is no present beneficial interest in anyone else? We seem to have come this far without the need for a label for this unique property interest.

Where survival to the designated time or event is held a condition precedent to the gift, the question of title to intermediate income is not likely to arise, because in the usual case the donee has died before the stated time. In such a case it is likely that both income and principal will go to residuary legatees or by intestacy. The problem is further narrowed by the implication of a gift of income if the donor stands *in loco parentis* to the donee,²⁰¹ which may in turn eliminate any condition of survivorship. In *Allen v. Burkhisser*,²⁰² however, the residue of an estate was given to named grandnieces and grandnephews "when they reach the age of 21 years." In a suit for construction after one grandnephew had reached 21, but when all of the others were under that age, the court held that attainment of the age was a condition precedent to enjoyment. The court also held that the testator died intestate as to each share until the contingency was satisfied. Accordingly, the entire residue was vested in the testator's brother, his sole heir, subject to divestment upon the happening of the contingency. The court directed that a trustee be appointed to conserve the estate in the interim. Nothing was said about what the trustee was to do with the interim income. Did it belong to the brother? Or is it implicit that in conserving the estate the trustee was to accumulate the income for the benefit of those who were ultimately entitled to the principal? Where a testator expressly gives such income as it accrues to the legatees, it is usually

Feinberg, 36 Del. Ch. 438, 131 A.2d 658 (1957) (marriage); Alden v. Meling, 185 Iowa 394, 170 N.W. 757 (1919) (five years); Hickman v. Hickman, 190 S.2d 853 (Miss. 1966) (begin college); *In re Balsamo*, 136 Misc. 113, 240 N.Y.S. 528 (Sur. Ct. 1930) (age); New England Trust Co. v. Brown, 44 R.I. 87, 115 A. 641 (1922) (age); see *Clafin v. Clafin*, 149 Mass. 19, 23, 20 N.E. 454, 456 (1889) (age).

199. The cases cited note 198 *supra* uniformly so held.

200. See RESTATEMENT OF PROPERTY § 153 (1936).

201. L. SIMES & A. SMITH, *supra* note 4, § 589.

202. 125 N.J. Eq. 524, 6 A.2d 656 (Ch. 1939).

held that this negates a condition of survivorship.²⁰³ This construction, however, should not determine who is ultimately entitled to income about which the testator said nothing. It is one thing to say that an heir may ultimately be entitled to the income together with the principal of any share that fails to vest, but it is another to say that the heir is entitled to the income as it accrues upon a share that ultimately vests in someone else. Only a notion that an estate in income is a separate entity from an estate in corpus requires the latter result. I have suggested a better construction, implicit in the doctrine of estates: When property is given expressly or impliedly in trust, the taker of a future interest is entitled to all interim beneficial enjoyment not given to someone else.²⁰⁴ Where the interest in the principal is indefeasibly vested, the legatee is entitled to income not given to someone else. The question may remain whether he is so entitled as it accrues or only when the principal is payable. When the interest in the principal is a contingent future interest, or defeasible on death, the same line of reasoning would entitle the legatee to income not given to someone else, but he would not be entitled to it if his interest in the principal fails to vest or is divested. This must mean that it is to be accumulated in the interim.²⁰⁵ Where gifts upon a future event are to be paid out of residue or a fund, the balance of which is otherwise disposed of, the language and circumstances may indicate that intermediate income is to go to persons other than those to whom the future legacies are given.

It is obvious that terse language making gifts at a certain age, or the like, is inadequate. Where personal property is involved a trust should be used. It should be made clear whether the gifts are merely payable on the future event or whether survival is required; if survival is required, one or more alternative gifts should be made; and in any event, explicit directions should be given about the disposition of intermediate income. Dispositions of this sort are common, but the challenge to the draftsman is much greater than normally supposed.²⁰⁶

F. *Surplus Income and Deficits in Income*

In the situations considered above an ostensible gap in income interests arose from a failure to provide for all the circumstances

203. L. SIMES & A. SMITH, *supra* note 4, § 588.

204. See text accompanying notes 142-44 *supra*.

205. Cf. *Industrial Trust Co. v. Hall*, 66 R.I. 201, 18 A.2d 629 (1941).

206. See Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1333 (1969).

affecting a pattern of income distribution. One such circumstance is often the death of an income beneficiary. We have seen that one of the main questions in such a case is whether in fact there is a gap in the income interests, an issue that often can be put in terms of whether an income interest is only a life interest. Similar questions are involved in the cases considered in this section. Usually, however, there is no doubt that a gap exists under the express terms of the instrument; the gap arises because income is given for a stated purpose or in stated amounts, and more or less income is produced than is required for such purpose or amounts.

1. *Trusts for Support*

Where income, together with corpus or a power to invade corpus, is to be used for the support of one or more beneficiaries, the gift over at the end of the trust period should expressly include both corpus and any income not expended. Where the instrument is not explicit in this respect, the same result is usually decreed; that is, income not paid for the stated purpose is ordered accumulated.²⁰⁷

Such a ruling has two ingredients. It should go without saying that *all* of the income of the trust is to be available for the stated purpose. Simply because it is in the nature of income gifts that distribution is made periodically it does not follow that, if at any particular distribution of income there is a surplus, that surplus is freed from the stated purpose of the trust²⁰⁸ (unless the dispositive language and circumstances indicate such a result²⁰⁹). This should be reflected in the administrative and accounting practices of the trustee, although it makes little difference how the surplus income is designated if a power to invade the corpus is given.²¹⁰

The other ingredient of the rule decreeing accumulation is that at the end of the income period income not expended for the stated purpose belongs to the takers of the corpus.²¹¹ Although judicial

207. *Brown v. Mead*, 121 Conn. 1, 183 A. 27 (1936); *Bridgeport-City Trust Co. v. Beach*, 119 Conn. 131, 174 A. 308 (1934); *Jarecki v. Strong*, 98 Conn. 357, 119 A. 353 (1923); *In re Estate of Hartt*, 88 Ill. App. 2d 146, 232 N.E.2d 231 (1967); *Demeritt v. Young*, 72 N.H. 202, 55 A. 1047 (1903); *New York Trust Co. v. Murray*, 120 N.J. Eq. 494, 186 A. 531 (Ch. 1936); *Thurber v. Thurber*, 43 R.I. 504, 112 A. 209 (1921). Cf. *Eldred v. Shaw*, 112 Mich. 237, 70 N.W. 545 (1897).

208. *Robinson v. Bonaparte*, 102 Md. 63, 61 A. 212 (1905); *Perry v. Brown*, 34 R.I. 203, 83 A. 8 (1912). The cases cited note 207 *supra* declare or imply this limitation. See also *Stempel v. Middletown Trust Co.*, 127 Conn. 206, 219, 15 A.2d 305, 310 (1940).

209. *In re Estate of Baker*, 61 N.J. Eq. 592, 47 A. 1046 (Prerog. 1901).

210. See Wis. STAT. ANN. § 701.21(4) (Supp. 1973), cited note 153 *supra*. Cf. *New York Trust Co. v. Murray*, 110 N.J. Eq. 494, 186 A. 531 (Ch. 1936).

211. See cases cited note 207 *supra*. In *Rhodes' Estate*, 147 Pa. 227, 23 A. 553 (1892),

opinions are not generally cast in these terms, the result exemplifies and supports the proposition I have previously advanced—that income accrues to corpus unless it is otherwise disposed of. However, vague language in limitations of this sort may lead a court to find that all of the income is given to a beneficiary, and that language regarding support is a direction about its use, and not a limitation on the amount given.²¹²

Although there is usually little excuse for a holding that surplus income passes by a residuary clause or by intestacy, *Stempel v. Middletown Trust Co.*²¹³ was a special case. Income, and principal as necessary, were to be used to provide support for a daughter of the testatrix, and, under more restricted circumstances, for the support of a sister. There was a gift on the death of the survivor of all of the income then remaining to another daughter, Olive, for life. Alternative gifts of principal were made to Olive's issue living at her death or to the heirs at law of the testatrix. The productivity of the trust estate increased greatly over the years, leaving a large amount not needed for the benefit of the two initial beneficiaries. Olive and her children, however, were in dire financial need. After years of controversy over the will, including the making and contesting of two agreements between Olive and the trustees, the court held that the surplus income was intestate property of the testatrix, so that Olive was entitled to a part of it.

The court addressed the question of the accumulation of income and restated its previous declarations that there should be no accumulation contrary to the testator's scheme, or even where the will disclosed no intention in that regard. Here, the court said, the testatrix anticipated no surplus—a fact indicated by the power to invade corpus—and therefore had no intention about accumulation. The validity of that inference aside, the anterior question as to who was entitled to the surplus income was addressed by the court only by way of its assumption that if the testatrix had contemplated a surplus, she undoubtedly would have given it to Olive. It could in fact be argued that under the will as written Olive was entitled to all of the surplus income, at least after the death of the initial beneficiaries.

however, in which excess income was to be used to pay liens on real property and the expenses of maintenance, the excess after such purposes were satisfied was held to pass by intestacy. The accumulation of such income was said to be contrary to the applicable accumulations statute.

212. Reference is made to the cases in which income and sometimes principal is given for support, but with no limitation on the duration of the income interests. See text accompanying note 91 *supra*.

213. 127 Conn. 206, 15 A.2d 305 (1940).

But that would have been little comfort to Olive, whose need was immediate.²¹⁴

2. Gifts of Income in Stated Amounts

The flexibility inherent in gifts of trust income permits periodic payments of stated sums of money. These can be called annuities, subject to a caveat respecting the ambiguities of this term explored below.²¹⁵ A dispositive gap may be created where such interests are given for stated periods of time and followed by gifts of corpus, if the trust estate produces more than the total of such gifts. Courts have disposed of a surplus of this sort in a variety of ways.

a. *Accumulation.*²¹⁶ A number of courts have held that the surplus income remains in the trust to be accumulated.²¹⁷ The ultimate beneficiaries are the persons to whom the corpus is given.

Most of the courts that have so held did not face the question—analogueous to that mentioned above in the discussion of gifts of income for support—whether a reserve of surplus income should be established to make up a possible deficit in future income. The cases are divided on this question,²¹⁸ which has been made to turn on inferences from particular dispositive patterns.²¹⁹ Factors indi-

214. The *Stempel* court qualified its ruling by saying that in determining the amount required for the support of the surviving initial income beneficiary, the trustee "may properly include a reasonable reserve" to provide a substantial safeguard for her future use. 127 Conn. at 219, 15 A.2d at 310. A more liberal attitude about the accumulation of income would have made the surplus income a part of the fund that would ultimately benefit Olive and her children. That would not have helped Olive immediately, but it might have been more consistent with the testator's scheme.

215. See section IIG *infra*.

216. In connection with the problems discussed in this subsection and in subsection IIF1 *supra* see the treatment of surplus income and income deficits in the Wisconsin statute discussed in text accompanying notes 150-55 *supra*.

217. Hartford Natl. Bank & Trust Co. v. Yearly Meeting of Friends, 137 Conn. 648, 81 A.2d 104 (1951); Springfield Safe Deposit & Trust Co. v. Friele, 304 Mass. 224, 23 N.E.2d 138 (1939); St. Louis Union Trust Co. v. Bethesda Gen. Hosp., 446 S.W.2d 823 (Mo. 1969); Tobler v. Montcrief, 72 N.J. Super. 48, 178 A.2d 105 (Ch. 1962); Wachovia Bank & Trust Co. v. Dodson, 260 N.C. 22, 131 S.E.2d 875 (1963). Cf. Colonial Bank & Trust Co. v. Stevens, 164 Conn. 31, 316 A.2d 768 (1972), cited note 77 *supra*.

218. For a reserve: Weeks v. Pierce, 279 Mass. 108, 181 N.E. 231 (1932); Smith Trust, 385 Pa. 416, 123 A.2d 623 (1956); Rhode Island Hosp. Trust Co. v. Peck, 40 R.I. 519, 1101 A. 430 (1917). *Contra*, Willson v. Tyson, 61 Md. 575 (1884); *In re Ebbett's Will*, 46 N.Y.S.2d 828 (Sur. Ct. 1944). See also cases cited note 223 *infra*, denying that surplus income at any time of distribution is available to make up past deficits. Accumulation of a reserve has also been denied where it would violate an old statute restricting the period of accumulation. Spencer v. Spencer, 38 App. Div. 403, 56 N.Y.S. 460 (1899). However, the court in Smith Trust, 385 Pa. 416, 123 A.2d 623 (1956), held that such a statute is not violated by an accumulation in aid of the judicious management of the trust.

219. The Pennsylvania court, however, has declared a constructional preference

cating that no reserve was intended include a direction to trustees to set aside sufficient funds to produce a certain annual sum²²⁰ and a disposition of the balance after the initial income interest is satisfied. Any reserve for future deficits in the latter case would invade the sum otherwise payable to the subsidiary legatee.²²¹

A related question is whether surplus income may be used to make up past deficits in the income available for distribution. A number of cases have held that it should be so used, in the absence of language or circumstances indicating otherwise;²²² but there are an imposing number of decisions to the contrary.²²³ It is clear from the cases that this issue turns on the particular dispositive scheme and extrinsic circumstances. No constructional preference for or against making up past deficits is evident. Among the relevant factors are the size of the trust estate, the amount of the accumulated deficit, whether the claim is made by a personal representative after the death of the beneficiary, and the existence of or degree of kinship between the beneficiary and the testator. Where income is given in stated amounts, followed by similar gifts purporting to exhaust the available income, use of the income to make up past deficits has been denied on the ground that there can be no surplus income at any particular distribution.²²⁴

A decision to accumulate for the benefit of remaindermen may also turn on the breadth of the language directing the payment of corpus.²²⁵ It is easy to hold that the distribution includes accumu-

for accumulation of a reserve. *See* *Smith Trust*, 385 Pa. 416, 419, 123 A.2d 623, 625 (1956).

220. *In re Ebbett's Will*, 46 N.Y.S.2d 828 (Sur. Ct. 1944).

221. *Willson v. Tyson*, 61 Md. 575 (1884). *But cf.* *Smith Trust*, 385 Pa. 416, 123 A.2d 623 (1956).

222. *E.g.*, *Willson v. Tyson*, 61 Md. 575 (1884); *Forbush v. Home for Aged Women*, 241 Mass. 433, 135 N.E. 474 (1922); *In re Lowrie's Estate*, 294 Mich. 298, 293 N.W. 656 (1940); *In re Estate of Carter*, 34 Misc. 2d 106, 226 N.Y.S.2d 879 (Sur. Ct. 1962). *See* 2 A. SCOTT, *supra* note 1, § 128.7 n.20; Annot., 93 A.L.R.2d 203 (1964). *Cf.* *In re Ebbett's Will*, 46 N.Y.S.2d 828 (Sur. Ct. 1944), in which the court held both for and against making up past deficits with respect to two different provisions of the will.

223. *Estate of Markham v. Palmer*, 28 Cal. 2d 69, 168 P.2d 669 (1946); *Bridgeport-City Trust Co. v. Leeds*, 134 Conn. 133, 55 A.2d 869 (1947); *First Natl. Bank v. Cleveland Trust Co.*, 308 Ill. App. 639, 32 N.E.2d 964 (1941); *Dwight Estate*, 389 Pa. 520, 134 A.2d 45 (1957); *Elmore Estate*, 379 Pa. 155, 108 A.2d 803 (1954). *Cf.* *In re Ebbett's Will*, 46 N.Y.S.2d 828 (Sur. Ct. 1944).

224. *Bridgeport-City Trust Co. v. Leeds*, 134 Conn. 133, 55 A.2d 869 (1947); *Ginns v. Topkis*, 32 Del. Ch. 99, 80 A.2d 500 (1951).

225. *In St. Louis Union Trust Co. v. Bethesda Gen. Hosp.*, 446 S.W.2d 823, 825 (Mo. 1969), "all of the assets then constituting the trust estate" were given to the defendant hospital; in *Tobler v. Moncrief*, 72 N.J. Super. 48, 51, 178 A.2d 105, 107 (Ch. 1962), the ultimate gift was of "the principal as it shall then exist."

lated income when the will directs payment of the "residue" after the termination of the income interests.²²⁶ Draftsmen may avoid a problem on this point either by making an express disposition of surplus income or by using language giving corpus and any income not required for the stated purposes.

In one case²²⁷ a court recognized that while there is, according to the *Restatement*,²²⁸ a constructional preference against the accumulation of income, an intent to accumulate may nonetheless be inferred.²²⁹ The court stated that a more liberal interpretation was justified where the principal was given to a charity. Another court has stated that accumulation should be permitted where a will discloses an intent to accumulate income, or where distribution as it accrues is contrary to the scheme of the will.²³⁰

b. *Income legatee entitled.* In several cases in which periodic payments of specified sums were directed, income in excess of the amount necessary to make such payments has been held payable to the designated legatee.²³¹ The simplest ground for such a decision is that the sum was stated as a minimum only.²³² In several of these cases there was also a power to invade corpus, or the gift was made in terms that did not exclude corpus as a source of payment, but it was not clear that these were controlling factors. The courts were evidently motivated by a resistance to accumulation,²³³ although that does not explain why the surplus income should go to the beneficiary rather than to someone else. Nor does the attempt to avoid intestacy, also evident, explain why the beneficiary should take rather than those to whom the corpus is given. Where trustees are directed to set aside funds sufficient to produce a certain annual income and "such income" is to be paid to the legatee, however,

226. *Springfield Safe Deposit & Trust Co. v. Friele*, 304 Mass. 224, 23 N.E.2d 138 (1939); *Weeks v. Pierce*, 279 Mass. 108, 181 N.E. 231 (1932).

227. *St. Louis Union Trust Co. v. Bethesda Gen. Hosp.*, 446 S.W.2d 823 (Mo. 1969).

228. *RESTATEMENT OF PROPERTY* § 440 (1944).

229. The court relied on *RESTATEMENT OF PROPERTY* § 439 (1944).

230. *Hartford Natl. Bank & Trust Co. v. Yearly Meeting of Friends*, 137 Conn. 648, 81 A.2d 104, 107 (1951).

231. *Fidelity & Columbia Trust Co. v. Lucas*, 66 F.2d 116 (6th Cir. 1933); *Hunsinger v. Rouse*, 344 S.W.2d 812 (Ky. 1961); *First Natl. Bank v. Stevenson*, 293 S.W.2d 362 (Mo. 1956); *Estate of Lindsay*, 260 Wis. 19, 49 N.W.2d 736 (1951). See also cases cited note 234 *infra*.

232. *Hunsinger v. Rouse*, 344 S.W.2d 812 (Ky. 1961); *First Natl. Bank v. Stevenson*, 293 S.W.2d 362 (Mo. 1956).

233. Cf. *Fidelity & Columbia Trust Co. v. Lucas*, 66 F.2d 116 (6th Cir. 1933), in which the obvious resistance to accumulation related to whether the income was taxable to the trust at a high surtax rate rather than to each of three income legatees.

the language may support the construction that the income given is not limited to the sum stated.²³⁴

c. *Next eventual estate.* In several New York and California cases income in excess of that required to pay an annuity was held to go by statute to those persons who were presumptively entitled to the next eventual estate.²³⁵ In one such case the corpus was given to the issue of the annuitant,²³⁶ and in another to the two annuitants themselves, subject to a supplanting gift to the issue of a deceased annuitant.²³⁷ Under the then applicable accumulations statute an implied direction to accumulate the excess income could not have been sustained, but under the statutory direction for undisposed-of income the excess could be paid to persons who would take the corpus if they survived the termination of the trust. This was the result in both cases: In one case, the one living child of the annuitant was held entitled to all the income until other issue were born; in the other case the annuitants themselves were held entitled to the excess income. In a third case²³⁸ the corpus was to go to the beneficiary's issue in default of his appointment. The beneficiary had no issue, and the surplus income was held payable to him. As the sole heir of the testator he was the person who for the time being was presumptively entitled to the next eventual estate.²³⁹

d. *To residue or intestate.* In a number of cases surplus income has been held payable as it accrues to residuary legatees or to the takers of the intestate property of the settlor. It may seem obvious

234. *In re Will of Sabin*, 28 Misc. 2d 941, 216 N.Y.S.2d 835 (Sur. Ct. 1961); *In re Doerschuck's Will*, 79 N.Y.S.2d 68 (Sur. Ct. 1948). See 2 A. SCOTT, *supra* note 1, § 128.7 n.27. Several other New York surrogate court cases have favored the income legatee. See *In re Estate of Hirschhorn*, 22 Misc. 2d 898, 196 N.Y.S.2d 436 (Sur. Ct. 1959), *affd.*, 12 App. Div. 2d 604, 210 N.Y.S.2d 485 (1960), and cases cited therein; *In re Krasner's Will*, 158 N.Y.S.2d 86 (Sur. Ct. 1956), and cases cited therein; *In re Estate of Harde*, 149 N.Y.S.2d 895 (Sur. Ct. 1956). These cryptic opinions reflect an effort to avoid unlawful accumulation and a feeling by the courts that the testator would have preferred the income legatee to take rather than the takers of the next eventual estate. In *In re Estate of Harde*, 149 N.Y.S.2d 895 (Sur. Ct. 1956), there is language indicating that the result is a simple sort of compensation for possible future deficits.

235. *Estate of Charters v. Yeakel*, 46 Cal. 2d 227, 293 P.2d 778 (1956); *In re Estate of Hagyma*, 46 Misc. 2d 492, 259 N.Y.S.2d 942 (Sur. Ct. 1965); *In re Will of Krebs*, 10 Misc. 2d 867, 173 N.Y.S.2d 480 (Sur. Ct. 1958). For the applicable accumulations statutes see notes 191-92, 195 *supra*.

236. *Estate of Charters v. Yeakel*, 46 Cal. 2d 227, 293 P.2d 778 (1956).

237. *In re Will of Krebs*, 10 Misc. 2d 867, 173 N.Y.S. 480 (Sur. Ct. 1958).

238. *In re Estate of Hagyma*, 46 Misc. 2d 492, 259 N.Y.S.2d 942 (Sur. Ct. 1965).

239. See also *Swetland v. Swetland*, 100 N.J. Eq. 196, 134 A. 822 (Ch. 1926), *affd. on other grounds*, 102 N.J. Eq. 294, 140 A. 279 (Ct. Err. & App. 1928), in which the court, applying New York law to part of the property disposed of, held that the surplus income was intestate property and passed to the testator's children, who, as next of kin, were entitled to the next eventual estate.

that the residuary legatees should take the surplus income where the only provision other than the income gift is a residuary gift. But when are they entitled to receive it?

The nature of the residuary gifts created a special problem in this regard in two Connecticut cases. In *Shephard v. Union & New Haven Trust Co.*²⁴⁰ the testator gave several annuities for limited periods. The residue was given to the testator's grandchildren, half at age thirty and half at age fifty, with gifts over to the children of any grandchild who died before attaining the stated ages. The court held that the supplanting gifts to the children of any grandchild who was born after the testator's death were void under the Rule Against Perpetuities. It was also argued that the trust was void as resulting in an unlawful accumulation of income, but the court avoided that issue by construing the will as not providing for the accumulation of income in excess of that needed for the annuities. It was aided in this construction by a failure to discover any intention by the testator to accumulate income for his grandchildren. Since it was also assumed that the grandchildren were not entitled to any benefits before attaining the stated ages, the only remaining alternative was to direct the disposition of the surplus income by intestacy.²⁴¹

A similar result was reached by the same court in *Belcher v. Phelps*,²⁴² in which the testator gave life annuities to three relatives and half of the residue to the surviving children of a grandson. The court was troubled by a possible unlawful accumulation of surplus income; in fact no such violation existed, because the surplus income could not be accumulated beyond the life of the testator's grandson. Again the court found no intent to deprive interested parties of the benefit of the income, even during the lifetime of the grandson, and the resulting intestacy permitted the grandson to enjoy the released income as the testator's sole heir at law. It is interesting that the other half of the residue was given to the children of a niece, without any condition of survivorship. Without disclosing whether the niece was still living, and after finding that her children's interests were vested, the court ordered half of the then accumulated surplus income and half of the corpus of the residue

240. 106 Conn. 627, 138 A. 809 (1927).

241. Cf. *Kenworthy's Estate*, 230 Pa. 606, 79 A. 803 (1911), in which a similar result was reached respecting income that could not have been accumulated until the distribution of corpus because of the then applicable statute on accumulations. Cf. also *Rhodes Estate*, 147 Pa. 227, 23 A. 553 (1892), which involved a direction to pay surplus income to satisfy liens on real estate and in which a surplus remained after the satisfaction of this purpose.

242. 109 Conn. 7, 144 A. 659 (1929).

paid to her children immediately, excluding a reserve fund sufficient to provide for the payment of the continuing annuities.

The Connecticut court dealt with this problem again in *New Haven Bank v. Hubinger*.²⁴³ There was no residuary gift, and upon the death of the last surviving life annuitant the trust corpus was given to the then living issue of the testator's son and daughter. Again the surplus income was held to go by intestacy. The court here followed a constructional preference against an inferred intention to accumulate income, aided by an inference that the failure to dispose of all of the income was inadvertent. It said that surplus income would go to residuary legatees, if any, unless their gifts were contingent, in which event such surplus would go by intestacy. The gifts here being contingent, the remaindermen were not entitled to the surplus income; moreover, the court stated, the will gave them only "the principal."

The problem in these cases is the same as that discussed above in connection with gaps in income interests.²⁴⁴ If a court resists the accumulation of income, either because of concern about its duration or for more general reasons, trouble is encountered in the immediate distribution of accruing surplus income where no disposition appears other than contingent or defeasible gifts of corpus or residue. In the last two of the three cases discussed above, if the court had accepted the notion that income not otherwise disposed of accrues to corpus (especially when the corpus is given by a residuary clause), and had also escaped the traditional prejudice against the accumulation of income, the surplus income could simply have been held for the benefit of those who ultimately became entitled to the corpus. In *Shephard*, where such an accumulation might have exceeded the permissible period, the court could have used the alternative and perhaps preferable solutions suggested earlier.²⁴⁵

In similar circumstances, where the corpus was given upon the death of two living persons, a New Jersey court assumed without discussion that the surplus income was intestate property, but held that it should be accumulated and distributed with the corpus.²⁴⁶ The argument made in *Shephard* that surplus income cannot be given to the takers of corpus when the instrument gives them only the "principal" was applied in two cases to give such income to

243. 117 Conn. 417, 167 A. 914 (1933).

244. See section IIC *supra*.

245. See text accompanying note 158 *supra*.

246. *Swetland v. Swetland*, 100 N.J. Eq. 196, 134 A. 822 (Ch. 1926) *affd. on other grounds*, 102 N.J. Eq. 294, 140 A. 279 (Ct. Err. & App. 1928).

residuary legatees.²⁴⁷ Where there is no residuary gift, however, and the gifts of corpus are neither contingent nor defeasible, there is little excuse for producing an intestacy by such a construction.

G. Annuities

There are several problems in the construction of language that courts have classified by reference to the term "annuity." It is evident from the courts' use of the label that it does not have the same meaning for all purposes and that all courts do not use the same meaning. The usual danger of the misuse of labels in deciding cases is especially evident here.

At a minimum, an annuity is a right "to receive fixed, periodical payments, either for life or a number of years."²⁴⁸ One might even eliminate from the definition any time limitation, for a perpetual annuity is at least a theoretical possibility. At any rate, an annuity is not necessarily a life interest, although on occasion it is so treated.²⁴⁹ While an annuity is commonly thought of as a contract with an insurance company, there is no reason to limit the term to that method of creation, for it can usefully be applied to interests created by will or by other donative transactions. Moreover, the commercial annuity can result from wills directing a fiduciary to purchase an annuity for a designated beneficiary.

Such a disposition may raise the question whether the beneficiary may elect to take the sum designated for the purchase of the annuity rather than the annuity itself. It is necessary to distinguish this type of disposition from one in which a trustee is directed to make periodic payments of trust income or principal or to set aside a sum sufficient to produce periodically a designated sum. It is clear that in the latter instances a beneficiary has no right to elect to take the commuted value of his annuity,²⁵⁰ although there may be circumstances in which a court will order such commutation in the interest of all the beneficiaries.²⁵¹

Where the dispositive direction is to purchase an annuity the English courts have sustained the annuitant's right of election, even against the express intention of the donor, on the ground that as soon

247. *Welch v. Hill*, 218 Mass. 327, 105 N.E. 1067 (1914); *In re Estate of Vanderbilt*, 229 App. Div. 574, 243 N.Y.S. 165 (1930). Cf. *In re Kohler*, 231 N.Y. 353, 132 N.E. 114 (1921).

248. *Dwight Estate*, 389 Pa. 520, 525, 134 A.2d 45, 48 (1957).

249. *Estate of Hoyt*, 275 Wis. 484, 82 N.W.2d 177 (1957).

250. *In re Will of Maybaum*, 296 N.Y. 201, 71 N.E.2d 865 (1947); *In re Harris' Will*, 143 N.Y.S.2d 746 (Sur. Ct. 1955).

251. *In re Ferris*, 3 N.Y.2d 70, 143 N.E.2d 505 (1957).

as the annuity is acquired it may be sold by the annuitant.²⁵² The same rule was accepted in Massachusetts²⁵³ and, until changed by statute,²⁵⁴ in New York.²⁵⁵ While such a rule is consistent with the English law on trust termination, in this country its application would violate the *Clafin* doctrine if a settlor intended to prevent the annuitant from having immediate management and enjoyment of the capital fund. More recently, courts in other states have cited the *Clafin* doctrine in denying the right of election.²⁵⁶ The right has also been denied where trustees were given a discretion to sell property, using the proceeds for the purchase of annuities,²⁵⁷ and where the testator intended to benefit the institution from which the annuity was to be purchased.²⁵⁸

A New York statute making inalienable the "right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person"²⁵⁹ has been held inapplicable to annuities,²⁶⁰ where "annuity" refers to rights to payments out of principal as well as income. The assignment of remainder interests to such a beneficiary has been held to permit termination of a trust and payment to him of the balance of the trust fund.²⁶¹ Such termination has been denied, however, upon the authority of the statute, where a trustee was directed to pay a beneficiary sixty dollars a month out of income, with power in the trustee's discretion to use principal for this purpose and to increase the payments if he believed either was necessary for the beneficiary's support.²⁶² An annuity for such a purpose does not, for New York perpetuity purposes, suspend the power of alienation,²⁶³ because the annuity is not made inalienable by the statute.

252. 4 A. SCOTT, *supra* note 1, § 346.

253. *Parker v. Cobe*, 208 Mass. 260, 94 N.E. 476 (1911).

254. N.Y. ESTATES, POWERS & TRUSTS LAW § 3-3.9 (McKinney 1967).

255. *In re Estate of Cole*, 219 N.Y. 435, 114 N.E. 785 (1916).

256. *In re Estate of Johnson*, 238 Iowa 1221, 30 N.W.2d 164 (1947); *Bedell v. Colby*, 94 N.Y. 384, 54 A.2d 161 (1947). Cf. *Feiler v. Feiler*, 149 Ohio St. 17, 77 N.E.2d 237 (1948), in which the court disapproved of the English rule, but decided the case on the ground that such a rule was not applicable on the facts of the case.

257. *Feiler v. Feiler*, 149 Ohio St. 17, 77 N.E.2d 237 (1948).

258. *American Bible Soc. v. Chase*, 340 Ill. App. 548, 92 N.E.2d 332 (1950).

259. N.Y. ESTATES, POWERS & TRUSTS LAW § 7-1.5(a)(1) (McKinney 1967).

260. *Wells v. Squires*, 117 App. Div. 502, 102 N.Y.S. 597 (1907), *affd. mem.*, 191 N.Y. 529, 84 N.E. 1122 (1908); *In re Estate of Fowler*, 263 App. Div. 255, 32 N.Y.S.2d 700, *affd. mem.*, 288 N.Y. 697, 43 N.E.2d 87 (1942).

261. *In re Schirmer's Will*, 113 N.Y.S.2d 697 (Sur. Ct. 1952).

262. *In re Higgins' Will*, 205 Misc. 385, 127 N.Y.S.2d 664 (Sur. Ct. 1954).

263. *In re Trumble*, 199 N.Y. 454, 92 N.E. 1073 (1910); *Wells v. Squires*, 117 App. Div. 502, 102 N.Y.S. 597 (1907), *affd. mem.*, 191 N.Y. 529, 84 N.E. 1122 (1908); *In re Kerb's Estate*, 130 N.Y.S.2d 259 (Sur. Ct. 1954).

A restricted meaning of "annuity," similar to that used in the New York cases noted above, appears in cases involving the question whether an annuity is payable only out of trust income. While this Article does not undertake a general consideration of the language necessary to confer a power to invade trust corpus, that issue is implicit in testamentary gifts of annuities where the source of payment is not expressed. The absence of language limiting the payments to trust income seems to justify an inference that any part of the trust estate not otherwise restricted is available to meet the directed payments. It is usually held in such cases that corpus may be taken where the available income is insufficient.²⁶⁴ In reaching this result courts often apply the term "annuity" to distinguish the disposition from a bequest of trust income. This restricted meaning of "annuity" can be misleading, for in a larger sense both types of gifts are annuities.²⁶⁵

Where the case concerns the power to use corpus for the payment of an annuity, the decision may turn on a variety of factors other than the specific language of the gift, including the relation between the settlor and the annuitant and the relative size of the annuity and the trust estate. This issue has in fact been raised in cases in which the language expressly directed the payment out of income. Although the courts in such cases have usually denied access to corpus,²⁶⁶ the language of some courts implies that even this specific limitation does not necessarily preclude a resort to corpus.²⁶⁷

Confusion concerning the meaning of "annuity" is further generated by statutes such as section 161(3) of the California Probate Code. While purporting to classify legacies in the usual manner, that provision defines "annuity" as "a bequest of certain specified sums periodically; if the fund or property out of which a demonstra-

264. *Estate of Luckel*, 151 Cal. App. 2d 481, 312 P.2d 24 (2d Dist. 1957); *Schoesser v. Schoesser*, 329 Ill. App. 604, 70 N.E.2d 346 (1946); *D'Evereaux Hall Orphan Asylum v. Green*, 226 S.2d 725 (Miss. 1969); 2 A. SCOTT, *supra* note 1, § 128.7 n.18. *But see id.* § 128.7 n.17; Annot., 109 A.L.R. 717 (1937).

265. This distinction should not be confused with the distinction between a direction to an executor or a trustee to purchase an annuity and a direction to a trustee to make periodic payments to a trust beneficiary. In the larger sense both of these are also annuities, and both may also be annuities in the sense that trust corpus is committed.

266. *Estate of Markham v. Palmer*, 28 Cal. 2d 69, 168 P.2d 669 (1946); *Dwight Estate*, 389 Pa. 520, 134 A.2d 45 (1957); *Elmore Estate*, 379 Pa. 155, 108 A.2d 803 (1954).

267. *See especially* *Dwight Estate*, 389 Pa. 520, 134 A.2d 45 (1957). In such circumstances special care is required to avoid confusion over the meaning of "annuity." In one case, in which the will directed the payment of annuities out of income and the testator referred to such gifts as "annuities," the court relied on the reference to hold that corpus could be reached to make up past failures to meet the annuity payments. *MacMackin Estate*, 356 Pa. 189, 51 A.2d 689 (1947).

tive legacy or an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in the case of a general legacy."²⁶⁸

The provision, if read literally, permits resort to corpus even if an annuity is expressly payable only out of trust income. It appears, however, that the California courts have escaped such a result by distinguishing between an annuity and a gift of trust income.²⁶⁹ In other words, if an annuity is payable out of trust income it is not an annuity within the meaning of the Code provision.

When an executor or a trustee is directed to set aside a sum sufficient to produce an annuity in a stated amount, it is obvious that a given sum may at times fail to produce that amount. While different results have been reached as to whether the annuitant is entitled to have the fund increased from the residue of the settlor's estate,²⁷⁰ there is authority that the annuitant is at least entitled to have the deficiency made up from the principal of the fund set aside to produce the annuity.²⁷¹

III. CONCLUSION

Dispositive gaps in income interests usually result from a failure to perceive all of the circumstances that may arise rather than from inept efforts to provide for them. The construction problems discussed above emphasize the magnitude of the problem of avoiding such gaps. Of equal concern is the inclination of some courts to discover and fill dispositive gaps that by proper construction do not exist. A dispositive gap may be discovered by a court in assuming either that an income interest can be only a life interest or that it was so intended in a particular case, even where the interest is not expressly so limited. This assumption is pervasive; some might even suggest a statutory provision that all income interests are life interests, as provided in the Louisiana Trust Code,²⁷² or that they should be presumed to be so limited. The first suggestion is an indefensible stricture upon dispositive freedom, and the second would in some degree produce the same sort of confusion that would follow an effort to reestablish the old precept that any estate is for life

268. CAL. PROB. CODE § 161(3) (West 1956). Similar statutes can be found in Montana, North Dakota, Oklahoma, and South Dakota. See 2 A. SCOTT, *supra* note 1, § 128.7 n.22.

269. See *Estate of Markham v. Palmer*, 28 Cal. 2d 69, 168 P.2d 669 (1946); *Estate of Luckel*, 151 Cal. App. 2d 481, 312 P.2d 24 (2d Dist. 1957).

270. See *In re Doerschuck's Will*, 79 N.Y.S.2d 68 (Sur. Ct. 1948) (holding against the annuitant's claim); 2 A. SCOTT, *supra* note 1, § 128.7 n.22.

271. *In re Von Miklos*, 11 Misc. 2d 939, 170 N.Y.S.2d 405 (Sur. Ct. 1957); 2 A. SCOTT, *supra* note 1, § 128.7 n.23. But cf. *In re Doerschuck's Will*, 79 N.Y.S.2d 68 (Sur. Ct. 1948).

272. See note 84 *supra*.

unless it is conveyed with words of inheritance. It would, moreover, increase the number of real dispositive gaps, thus increasing judicial implication of interests to fill them.

I have presumed to advance a proposal for dealing with real dispositive gaps in income interests: Trust income belongs to those who are entitled to trust corpus, unless such income is specifically given to others. Although this idea is not novel, it has seldom been advanced as a general constructional precept. Its acceptance would require a considerable shift in courts' attitudes about the accumulation of income.

I believe that property owners should be encouraged to give their property outright. The creation of present and future interests in trust are permitted, within policy limits, in order to serve worthy purposes. While our law is not designed to discourage elaborate trust arrangements—indeed, the federal tax laws encourage them—it is sound social and economic policy to leave as much control of property as possible in the hands of the living. If one does not wish to leave property outright, he should be encouraged to give it with as few restrictions as possible. Thus if one wants merely to gain the advantages of trust administration, he should not have to create an elaborate scheme of present and future interests or powers of appointment. Because of prevailing drafting terminology, it has become very difficult to establish such a scheme with security, simplicity, and clarity. The problem, like the income problems, is aggravated by conceptual confusion over the nature of equitable interests in trust as they operate within the doctrine of estates. I know of no simple solution. Too many draftsmen have addressed it with only a dim perception of what they were trying to do. The problem must be carefully identified and analyzed; it will then yield to careful drafting.