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RECENT PATTERNS OF TESTATE SUCCESSION IN THE UNITED STATES AND ENGLAND

Olin L. Browder, Jr.*

THE massive and pervasive aggregate of processes by which wealth is transmitted from generation to generation remains in large part, like an iceberg, below the surface of our common knowledge. Our assumptions about this phenomenon have been based either upon generalizations from the experience of practitioners or upon the reports of appellate cases. These sources have tended to limit our knowledge disproportionately to instances involving relatively large accumulations of wealth. One would expect that more representative data would reveal that many of our assumptions about the transmission of wealth are sound. Proper investigation may also reveal a margin of error in current assumptions of fact or emphasis. Still, an enormous range of questions of fundamental, if not ultimate, significance lies beyond any pretensions of the common lore. For instance, the social and economic significance or consequences of current law and practice in this field remains largely virgin territory.

Those interested in looking below the surface to discover how testators actually behave and the reasons for their behavior have been confronted with the enormity of the investigative problems involved. For example, the problem of measuring the dimensions of the transmission of wealth otherwise than by testate or intestate succession has so far proven beyond anyone's reach. Recent investigation has been modestly designed to illuminate some corners of the whole structure.¹ The purpose of the investigation which resulted in this Article involved no greater pretensions. Considerable public and professional interest has recently been aroused about our cumbersome processes of administering decedents' and trust estates.² Although this survey is not irrelevant to those problems, the

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1. See, e.g., Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 (1964); Powell & Looker, *Decedents' Estates*, 30 COLUM. L. REV. 919 (1930); Ward & Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393.

2. The current work of the Special Committee on the Uniform Probate Code of the National Conference of Commissioners on Uniform State Laws is the most significant development in this connection. Popular interest has been aroused by N. DACEY, *HOW TO AVOID PROBATE* (1965).

basic emphasis here is upon discovering what testators really seem to want to do with their property and how they in fact do it. Some limited social and economic significance may be perceived in the results of such an inquiry. But the main emphasis is upon the utility of our great proliferation of dispositive devices to meet the current needs of those who wish to dispose of property by will and upon the skill and effectiveness with which such devices are used. The latter inquiry may enable us to evaluate the professional performance of those upon whom testators typically rely to formulate and effectuate their various objectives.

The data used herein were derived from two sources: the records of decedent estate administration in Washtenaw County, Michigan, and similar records in London, England. In Washtenaw County, the probate court records of all testate estates for the year 1963 were examined.³ These totaled 223 estates, thirty-six of which were excluded for most of the present purposes because, for want of assets, no administration followed the initial filings. The title of this Article carries no pretension that these records constitute a reliable basis for conclusions about current practices generally in the United States. The complexion of the population of Washtenaw County does suggest that in some respects it can be regarded as average, despite the presence within it of two universities. The population estimate at the time of this survey was 187,000; two cities, Ann Arbor and Ypsilanti, accounted for over half of this total. Depending on the standards used, twenty to twenty-six per cent of the population can be designated as rural. The western part of the country is distinctively rural; the eastern part, which abuts Wayne County where Detroit is situated, is to some degree industrial.

This study purports to be in part a comparison of American and English testamentary practices. The virtual absence in England of estate records as we know them imposed limitations on the attainment of this objective. For present purposes, data concerning English practices were derived almost entirely from one hundred English wills selected at random from those filed during the year 1963 in the Principal Probate Registry in London. To the extent that these wills came from all over England and Wales, they can be regarded as representative of English practices generally. But the much smaller size of the sample in relation to the population which it represents should be taken into account.

3. Some time lag seemed necessary to allow for the completion of administration.

I. SUCCESSION BY WILL IN AMERICA: A MICHIGAN SAMPLE

A. *Testamentary Dispositions to Spouses, Issue, and Others*

The primary purpose of this portion of the Article is to reveal the identity of the beneficiaries of the testate estates covered by the Washtenaw County sample. Table 1 shows the identity, by categories, of family members or other relatives who survived both testate and intestate decedents.⁴ This data lays a foundation for ascertaining the extent to which testators responded in their wills to the normal ties of blood or marriage. Currently there is considerable interest in the question whether the traditional intestacy statutes require modification to reflect existing attitudes and practices in the transmission of family wealth. The data presented in this section is relevant to that question.

1. *Disposition to Surviving Issue When No Spouse Survives*

In those cases in which a spouse did not survive the testator, the sample revealed not a single instance in which the testator totally disinherited his surviving issue. In only three wills out of a total of sixty-seven did the testator exclude any surviving child or children.⁵ Only eighteen wills included gifts of anything more than specific personal chattels to anyone other than spouses or issue. And no more than three of these created substantial interests outside the immediate family. For the rest, small bequests appeared as follows: nine wills included charitable bequests, one will included brothers and sisters, four wills included spouses of children, and four wills included bequests to nonrelatives. It is the almost universal pattern among intestate succession statutes that a decedent's issue will take his entire estate when no spouse survives. If intestate patterns are designed to reflect normal donative objectives—and if representative

4. For convenience the categories in the table reflect the determination of heirs which in Michigan is normally made in the course of administration of both testate and intestate estates. Account should be taken of the fact that the intestate sample excludes 64 estates which were administered by summary procedures, and 9 in which there were no determinations of heirship. Summary procedures could be followed with estates valued at less than \$1,500, which results, upon proof of payment of debts and expenses, in distribution to the surviving spouse or, if none, to next of kin. MICH. COMP. L. ANN. §§ 708.39-41 (1963). In most of the cases in this sample, distribution was to surviving spouses.

5. Two of these involved estates valued at less than \$10,000. The third estate, valued at nearly \$127,000, was left in trust for the testator's three daughters and their issue, but excluded a son for the stated reason that he was otherwise well provided for.

TABLE 1
Distribution of Estates by Classes of Survivors and Sex of Decedents

	Testate				Intestate		
	Male	Female	Total	% Testate	Total	Male	Female
Spouse and Issue	41 (48%)	13 (13%)	54 (29%)	54%	46 (29%)	40 (38%)	6 (11%)
Issue	23 (26%)	44 (44%)	67 (36%)	56%	53 (33%)	22 (21%)	31 (57%)
Collaterals	8 (9%)	39 (39%)	47 (25%)	57%	36 (23%)	24 (23%)	12 (22%)
Spouse and Collaterals	9 (10%)	2	11		8	5	3
Spouse	2	—	2		2	2	—
Spouse and Father or Mother	—	—	—		1	—	1
Father or Mother	—	1	1		10	9	1
No heirs	4	1	5		3	3	—
Totals	87 (100%)	100 (100%)	187 (100%)		159 (100%)	105 (100%)	54 (100%)

will patterns accurately indicate such objectives—there is little basis in the present data for challenging the traditional intestate norm.

Ours is one of the few legal systems in the world which does not impose some degree of restraint upon the power of a testator to disinherit his lineal descendants. Nevertheless, there has been virtually no sentiment in this country for changing the law in this respect. The reason usually advanced is that restraints upon disinheritance are unnecessary—that testators rarely disinherit their children in any event.⁶ Even if they do, it is usually for the same reasons which would defeat forced heirship in civil-law jurisdictions: the unworthiness or misconduct of the beneficiary. The data studied in this sample supports this argument. But this need not preclude us from considering other alternatives. Under the English Family Provision legislation, for instance, minors or children who for stated reasons are incapable of maintaining themselves may apply to the High Court for relief when the parent's will or the law of intestacy does not make "reasonable provision" for them.⁷ Of course, the adoption of such an alternative in the United States might prove to be objectionable because its administration would be vested in a multitude of local probate courts instead of in a single High Court of Justice.

2. *Disposition When Both Spouse and Issue Survive*

In those cases in which both the testator's spouse and issue survived, the most striking fact revealed by the sample was that twenty-six out of fifty-four testators⁸ left everything to their spouses.⁹ Each of the twenty-six wills contained substitutional gifts of all or a substantial portion of the estate to issue in the event the spouse predeceased the testator.¹⁰ Six testators designed their wills to gain the marital deduction for federal estate tax purposes by giving benefits to their spouses to the extent of substantially one half of the value of their respective estates. Except for the wills which gave all of the estate to the spouses, only three wills excluded any of the

6. L. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 24 (1955).

7. Inheritance (Family Provision) Act, 1 & 2 Geo. 6, c. 45 (1938), as amended, Intestates' Estates Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, pt. II (1952).

8. Female decedents accounted for only four of these cases.

9. At least one other study made similar findings, see Dunham, *supra* note 1, at 252.

10. It may be worth noting that eighteen of these estates were valued at less than \$25,000, and only three at more than \$100,000. Seven wills gave life interest in all or substantially all of the respective estates to the testator's spouse, with remainders to issue. One of these gave the spouse a general power of appointment; another gave a trustee the power to invade corpus for the benefit of the testator's wife.

testator's surviving children.¹¹ The cases in this category thus reflect little interest among testators in providing benefits outside the nuclear family. Only six wills out of a total of fifty-four bequeathed anything to anyone other than spouses or issue.¹²

The cases in this and the preceding section reflect the triumph of the so-called nuclear family in testamentary succession. Few wills affront the legal or moral claims of the primary objects of the decedent's bounty. This fact is most emphatically established in the treatment of issue. The protection of spouses is a more subtle matter, not only when there are competing claims of issue, but also in the absence of issue. There is evidence here that a majority of testators will in some manner establish a priority of spouses over issue. This finding contrasts sharply with the pattern most commonly prescribed by intestacy statutes. These statutes typically limit a spouse's share to one third or one half of the estate when issue survive, depending upon whether one or more than one child survives. The empirical evidence would seem to suggest some reason for altering this course of descent to give the entire estate to a dependent spouse when its size does not exceed a minimum which is regarded as adequate to provide for his or her needs. If the fact of dependency is regarded as too difficult for a probate court to determine (particularly in the case of a surviving husband), the same result could be justified simply on the ground that it is consistent with the normal desire of decedents. The interests of minor dependent children would usually be served as effectively by such a devolution as by some division of property under which their interests would be received by the spouse in the formal capacity of guardian. Of course, the place of a surviving spouse in family property succession looms larger still when no issue survive.

3. *Disposition When the Spouse but No Issue Survives*

In cases in which the spouse but no issue survived the testator nine of thirteen wills in the sample left everything to the spouses, and another reduced a widow's residue by only a small legacy to a sister. However, in two of the three remaining wills the testator

11. One of these excluded a son because of the large extent of his own resources; one excluded a daughter because inter vivos gifts had been made to her; and one excluded a son in favor of a brother in an estate that proved to be insolvent.

12. Three of these included bequests to brothers or sisters in relatively small amounts; one was a devise to a brother, which he redeemed from an insolvent estate by paying all debts and expenses; two included relatively small bequests to charities; and two made small bequests to non-relatives.

limited the spouse's share to one third of the total estate; these two wills suggest an intent on the part of the testator to provide only what the law requires. In fact, one of these wills left all of the balance of an estate valued at over 200,000 dollars to charitable purposes. So long as a testator is free by his will to change or disregard the statutory pattern of succession within the limit of his widow's right of election, it can be argued that there is no compelling reason for not awarding an intestate estate in its entirety to a surviving spouse when no issue survives. The existence of one or more surviving ancestors may be the only appealing occasion for an exception to this general rule.¹³

4. *Spouse's Portion and the Widow's Right of Election*

The data examined above reflects the firm, if not predominant, place of spouses in the dispositive scheme of a large majority of testators. But the empirical evidence does not show very much about the other side of the coin: the extent of any sentiment by testators to evade or minimize the moral or legal claims of their spouses. In large estates employing the marital deduction, tax considerations may operate as a special factor to limit the portions left to spouses. Moreover, several of the cases mentioned above suggest the presence of a desire to limit spouses to amounts equivalent to their elective shares under the intestacy statute. Such cases also suggest one of the most elusive of all questions on this matter: How important is a widow's forced share or right of election in securing to her an adequate portion of her husband's estate?¹⁴

Fraud upon or evasion of the forced share of widows by inter vivos transactions is not reflected in probate records. Even so, the probate records examined in this survey revealed no case in which a widow claimed access to any property not inventoried in the

13. Under the Michigan statute, it should be noted that except for the first \$3,000 provided for a surviving widow, a spouse is entitled to one-half of the estate if any parent, brother, sister, or the issue of a brother or sister survives. MICH. COMP. LAWS ANN. §§ 702.80, 702.93 (1968). Only if none of these survives and no issue survives does a spouse take the entire estate.

14. In states which prescribe a forced share for widows, the share is usually that portion of real or personal property, or both, to which she would have been entitled if her husband had died intestate. Such a share is often subject to further limitations which restrict it to one third or one half of her husband's estate. In Michigan, a widow, if she elects to take against her husband's will, may elect to take dower and homestead rights, or (1) her intestate portion of her husband's real estate, which cannot exceed one half thereof, and (2) the first \$5,000 and one half of the balance of her intestate portion of her husband's personal property. MICH. COMP. L. ANN. § 702.69 (1968).

estate. In only one case did a widow elect to take against her husband's will.¹⁵ In that case, involving an estate valued at 186,157 dollars, the testator gave his wife only a life interest in the family residence and blithely explained this by the statement that she was amply provided for by life insurance. He devised a farm to a son and the residue to his six children. Although it may have been naive for the testator to have relied upon his wife's consent to this arrangement when he made his will, he did have a point which suggests an imperfection in the law of election. Perhaps this law should be amended to take account of assets other than those included in his will which pass to a widow upon her husband's death.¹⁶

In two cases widows who were given less than the statutory share elected to abide by the terms of the wills.¹⁷ The testators in three more cases gave their widows life estates in real estate comprising all or the bulk of the probate estates, which were valued at 11,000 dollars or less. Three other wills limited widows to their statutory shares.¹⁸

In Michigan, wives, but not husbands, have the right of election against a will.¹⁹ This suggests that the force of the law of election can be tested by data concerning the provisions which female decedents make for their husbands. The trouble with using such data to infer the behavior of male testators in the absence of the law of election is that it does not take account of the relative economic status of husbands and wives. The value of the following data may be further limited by the fact that out of one hundred cases in which the decedents were female, only fifteen of them were survived by husbands. Within this sample of fifteen cases, six wills left everything to the decedent's husband, and in two other wills the husband was amply provided for. But seven wills either excluded surviving husbands altogether or left them amounts less than their intestate portions. This fact does not really prove anything, but it may cause one to

15. In another case a widow tried to elect against her husband's will, but she was held barred by the terms of an antenuptial agreement. In fact, in two cases, widows were limited to minimal testamentary benefits by the terms of antenuptial agreements, and in one case the widow was so limited by a separation agreement.

16. N.Y. DECED. EST. LAW 18-a (McKinney Supp. 1966) provides for the augmentation of the assets of a decedent's estate for election purposes by including property, not covered by the will, which was the subject matter of certain prior transactions.

17. The estate in one of these cases was valued at \$27,000, the other was valued at less than \$10,000.

18. One of these estates was barely solvent; another was valued at \$417,830, and the third was valued at \$223,972. In a fourth case in which the will limited the widow's portion, she failed to survive the testator.

19. MICH. COMP. LAWS ANN. § 702.69 (1968).

hesitate before he concludes that there is no longer any real need for forced heirship for widows.

For what it is worth, this data, together with that presented in the other sections above, is at least consistent with the assumption that a large majority of testators will amply provide for their widows even in the absence of a forced-share statute. But some evidence remains for the proposition that a small proportion of testators would, if possible, leave their widows less than the portion prescribed by law. In some of these cases there may be perfectly valid reasons for doing so. Unless some flexible type of family provision law were accepted,²⁰ an elective forced-heirship statute may be justified only as a protection against infrequent aberrational behavior. But, of course, many of the duties imposed by criminal or tort law have no other justification. The proper size of an inflexibly prescribed portion, however, is another matter. If the intestate portion allotted to spouses were increased, as suggested above, it does not follow that the forced heirship proportion should be correspondingly increased. It may be desirable to give a widow all of her intestate husband's estate when no issue or ancestors survive; it does not follow that her husband should be forced to leave everything to her in such circumstances. An elective share confined to the traditional one third of a decedent's estate still has wide support. But there is nothing magical about that percentage, nor does it have to be invariable. One half of the estate could also be justified, at least when neither issue nor ancestors survive.²¹

5. *Disposition When Neither the Spouse nor Issue Survives*

As might have been expected, when neither spouse nor issue survived, testators dispersed their estates among a great variety of beneficiaries. Under these circumstances, the claims of blood or marriage are understandably much diluted by considerations of particular personal associations. The limited data presented here may be useful in order to compare the patterns of succession revealed by these cases with the hierarchy of heirship declared in the statutes on intestate succession. It should be noted first that in all but ten of fifty-three cases in which no spouse or issue survived, the testator's

20. See note 7 *supra*.

21. See the elaborate provisions for determining the elective share in N.Y. DECED. EST. LAW § 18 (McKinney Supp. 1966). These provisions have the effect of giving greater flexibility to a decedent in framing his dispositions so as to avoid renunciation by his widow; he can make certain provisions for his wife, including a life interest in certain circumstances, against which the wife may not elect.

heirs were brothers and sisters or their issue. In five cases the testators left no heirs at all. The wills may be classified as follows: thirteen wills made dispositions limited to persons designated as heirs; twelve excluded all heirs except for nominal bequests; twenty distributed property among one or more heirs and one or more others; twenty-two made gifts to nonrelatives or persons whose identity was not indicated; and eleven included charitable bequests.

When neither spouse nor issue survives, there appears to be too little regularity in the patterns of testamentary succession to justify their use as a frame of reference for intestate succession. Consanguinity may be the only viable basis for determining such succession; indeed, this is the pattern reflected by almost all intestacy statutes. But the usual progression of these statutes through remote degrees of kinship should be brought within reasonable limits. The pursuit of blood lines to remote and unknown relatives, or "laughing heirs," can become ridiculous. The only rationale for this progression to remote kindred appears to be that anything is better than escheat. But if the state can through its taxing power reach substantial portions of the substance of a man who has dependents, it might also claim the estate of a decedent who has not chosen to identify by his will anyone who has a claim upon his bounty. A schedule of intestate succession which included ancestors as a preferred class and stopped with brothers and sisters or their issue would be adequate in most cases. A decedent who was unhappy with such a schedule would presumably be induced to make a judgment by will which would probably be more thoughtful and sensible than a mechanical pursuit of his remote kindred.

6. *A Further Note on Intestate Succession*

It has been assumed that the adequacy of intestacy statutes can be tested by considering how testators in fact dispose of their estates: To what extent do they depart by will from the patterns of intestate succession?²² The data appearing in the preceding paragraphs shows that most wills do depart to some degree from those patterns. Only when a decedent is survived by issue but no spouse does his testamentary pattern tend to approximate the pattern set by law. When a testamentary pattern which diverges from the usual patterns of intestate succession appears with some frequency, a basis exists for suggesting amendments to the intestacy statutes. I have mentioned

22. See Dunham, *supra* note 1.

some such suggestions above, particularly in relation to the treatment of spouses.

But the desires of normal or average decedents do not provide the sole basis for framing or justifying an intestacy law. Policy considerations are also relevant, particularly with respect to restraints upon testation such as the forced heirship of spouses. Nor can the adequacy of intestate statutes to meet the average donative objectives of decedents be tested merely by referring to what testators in fact do by will. Some attention must also be given to the actual extent of intestate succession. The reader should refer again to Table 1 for the purpose of comparing corresponding data on testate and intestate succession. It will be noted that the three largest categories of survivors on both the testate and intestate sides of the table are "Issue," "Spouse and Issue," and "Collaterals," in that order. The middle column shows that the percentage of testate estates in each category varies only slightly among the three categories. This data would tend to disprove any hypothesis that kinship relationships between a decedent and his survivors is a factor affecting the incidence of wills.²³ It also reveals the significant but unspectacular fact that in all three of the stated categories, slightly less than one half of all decedents leaving estates of sufficient size to be administered by other than summary procedures were content to let the intestate law take its course.²⁴ Among people who are still largely free to frame their own particular dispositive schemes by will, a willingness by almost half of any group of decedents to allow their property to pass by intestacy does not suggest serious disaffection with the intestacy laws. The basic features of the traditional statutes still seem to be relevant to average needs. Taking all of these factors into account, including appropriate but arguable value judgments on matters of social policy, one can project useful refinements but not revolutionary changes in the law of intestate succession.

23. In assessing the inducement to make a will on the basis of facts existing at the death of the testator, account should be taken of relevant changes after the will is made, such as the death of beneficiaries. Although such data usually does not appear in probate records, some account may be taken of the fact that in seventeen estates listed as showing only issue surviving, the testator made dispositions to a spouse who predeceased him. Since there is little difference between the ratio of testate and intestate states in the categories "Issue" and "Spouse and Issue," it is doubtful that this discrepancy is significant.

24. Some account should perhaps be taken of those persons who for a variety of reasons, including a negligible accumulation of assets, know little and care less about where their property goes. But this factor cannot be measured by data appearing in probate records.

B. Gifts to Charity

It may be assumed that most persons who receive income make annual charitable gifts, if only in nominal amounts. The extent of charitable gifts by will, as reflected in the present study, appears in striking contrast: only thirty wills out of a total of 187 contained such gifts. This number included four wills in which the testator made only substitutional charitable gifts in the event primary takers predeceased him, and one in which the testator made a charitable gift in default of the exercise of a general power of appointment by his widow. These facts are shown in more detail—including the size of the estates involved—in Table 2.

TABLE 2
Wills Containing Charitable Gifts by Value of Estate and
Class of Survivors LL

Value of Estate	Number	Per Cent of All Estates in Category	Number of Testators Leaving only Collateral Kin or No Heirs
Below \$10,000	8	13%	6
\$10,000-\$24,999	11	22%	8
\$25,000-\$99,999	6	13%	4
Over \$100,000	5	19%	1
Totals	30		19

It will be observed that two thirds of the wills with charitable gifts disposed of estates less than 25,000 dollars. This percentage is not significantly inconsistent with the ratio between all estates in this value category and the total number of estates in the sample. It will be surprising only to those who assume that the incidence of charitable gifts would or should rise with the increase in value of the estates.

It can be inferred that the absence of any nuclear family is a factor in the incidence of charitable gifts. In this regard, it is not surprising to find that in nineteen of the thirty wills reflected in table 2 the testators were survived only by collateral kindred or by no legal heirs at all. This is in marked contrast with the twenty-six per cent of all testators who left only collateral relatives as survivors. One can only speculate on other factors to explain what appears to be a low percentage of wills containing charitable gifts in all categories. Most persons probably do not seriously diminish their standard of living by means of charitable contributions out of current income. More penetrating studies than this would be required to show the

extent to which dependents are deprived by the death of the person upon whom they principally rely for support. It seems fair to assume, however, that death benefits, including testamentary gifts, are rarely the equivalent of the support provided by the decedent during his lifetime. An habitual giver of charitable gifts, even when moved by tax considerations, is not likely to make charitable bequests unless he is sure that his dependents will be adequately provided for. Still, this does not explain the low percentage of charitable bequests in cases of large estates or when no dependent survivors were left. Is it possible that standardized procedures for charitable fund-raising are simply not geared for generating much pressure for this kind of giving? The cost of individual appeals in relation to the lack of prospects for an immediate return may limit such appeals to a selection of the more affluent prospective donors. There must also be some reticence about approaching an ostensibly healthy person in respect to this most private of all property transactions.

The size of charitable bequests (when this fact was ascertainable) in relation to the total value of the respective estates was as follows: less than one per cent, four; one through five per cent, eight; six through ten per cent, two; and over ten per cent, ten (plus three substitutional gifts). Eight of the ten testators in the over-ten-per-cent category left the bulk of their estates to charity.²⁵ Seven of the testators either left no heirs or were survived only by collateral kindred.²⁶ This data may raise some doubt about the need for that type of mortmain statute which limits the proportion of an estate which a testator can give to charitable beneficiaries in order to protect certain preferred classes of his surviving relatives.

C. Gifts of Tangible Personal Property

Dispositions of tangible personal property sometimes present problems which are out of proportion to the value of the property

25. Most of these estates were small (from \$1,969 to \$15,875). But one estate was valued at \$63,513; another was valued at \$176,821, most of which was left to the building fund of a church; and a third was valued at \$223,972, the bulk of which was left to the employees' pension fund of a bank. In respect to the last of these, the testator limited his surviving widow to her statutory share.

26. All gifts were outright except three. One of these was by way of remainder in a portion of property left in trust; another was by way of gift in default of the exercise of a general power given to the testator's widow. In a third will, the testator established a charitable trust which directed the trustees to establish and administer a scholarship fund for needy students in a designated high school.

Twenty-two wills made charitable bequests to religious institutions or officials; twelve wills made gifts to a variety of nonreligious institutions. Only three wills contained gifts of both types. Nineteen of the thirty charitable donors were women.

involved. Children's expectations may be raised by informal, private expressions of present or future donative intention respecting family heirlooms or other chattels of sentimental value. Unless these expressions are substantiated by will, they can be given effect only if harmony prevails throughout the surviving family. Even when nothing savoring of a specific promise or completed gift has been made, discrepancies between actual and sentimental values and conflicting preferences among the survivors can produce family dissension at a time when emotions are at the surface and apprehensions are easily aroused. If the testator's spouse survives, a practical solution to any unresolved question as to the devolution of tangible personal property is the common assumption that it all goes, or should go, to the spouse. But even here the executor faces the question of what items are to be inventoried in the estate. What indeed is the state of the title to household goods which have been purchased and used during the marriage by both spouses? Lawsuits on such matters are rare, but there is some risk in any practical solution which does not have the approval of all interested parties.

An examination of the extent to which these matters have been recognized and provided for by the testators in the 223 wills in this sample (including the thirty-six wills which were not formally administered) indicates that the problem is often avoided by the simple expedient of making a residuary gift to one person. This was the pattern in sixty-nine wills or thirty per cent of the cases, including those in which another single legatee was substituted for a primary legatee who predeceased the testator. But a disposition of this type, although simple, may be open to objection if it makes all tangible personal property part of the pool of assets which is first available for the payment of the debts and expenses of the estate.

Many testators either have not been mindful of any problems with respect to the distribution of tangible personal property, or they have assumed that their beneficiaries will make a practical and amicable division of their goods after death. In forty-eight cases not involving other dispositions of tangible goods, testators made residuary bequests—which would have included tangible personal property—to more than one person. In three other cases, testators made bequests of tangible personal property to more than one person in categories that required division. In addition, testators in forty cases made gifts including all tangible personal property to primary beneficiaries with substitutional gifts to more than one person in the event the primary beneficiary predeceased the testator. This

means that in ninety-one wills, or forty-five per cent of the cases, the testators either were not aware of, or not concerned about, potential problems in the distribution of tangible personal property.

Potential problems of a different sort were inherent in several other wills. In each of two cases, the testator made residuary gifts (including any tangible personal property) to his spouse for life, with remainders to one or more others. In four joint and mutual wills, a similar problem involved gifts of all of the testator's estate to the survivor for life, with remainders. The problem here, of course, is the definition of the rights and duties of the life tenant and the enforcement of the rights of remaindermen when the ownership of chattels is divided into present and future estates. Except perhaps in the case of specific heirlooms, the creation of legal present and future interests in personal property should be avoided.

When a testator wishes to dispose of all or part of his tangible personal property otherwise than by a residuary clause, he must exercise some care to avoid ambiguous expressions. It is possible for him to identify particular items, but this is rarely done; only ten wills in this sample group contained specific bequests of single items. Thirty-nine other wills contained gifts of chattels by categories expressed with varying degrees of generality and precision.²⁷ No word of art exists to designate the totality of such property which is normally available for distribution. "Tangible personal property" may be appropriate if the testator does not desire a more specific categorization. The same term may also be used as a kind of residual designation when other more limited categories have been prescribed.

If a testator is content to leave the disposition of his tangible personal property to a post-mortem consensual solution, various devices are available to impose some regularity upon that process. The need for these devices will turn upon the testator's estimate of the family situation. In seventeen wills in this study, the testator prescribed procedures for distribution of tangible personal property which in varying degrees left room for recognition of the desires and preferences of the beneficiaries. In six of these cases, the testator gave the executor a power of sale which either expressly or impliedly

27. Such terms as the following, used singly or in a variety of combinations, have been used to describe categories of personal property: tangible personal property, personal and household articles, personal effects, household goods, household goods and furnishings, household furniture, furnishings and effects, furniture, clothing, jewelry, office furniture and equipment, and the contents of a designated place of residence.

covered tangible personal property. Although an actual forced sale would seem to be the least desirable disposition of such property, the executor's authority can be used as a means of applying pressure to bring the beneficiaries to some consensus among themselves. In the other eleven cases the following devices were noted: (1) a bequest to a single legatee directing him to divide the tangible personal property in his discretion as equally as possible among all the beneficiaries; (2) a bequest to a single legatee expressing the wish, but not the direction, that he distribute the property according to an informal memorandum; (3) a bequest to multiple legatees directing them to divide the property among themselves but specifying that if they could not agree, the executor should distribute the property; (4) a direction to multiple legatees to sign an informal statement of instruction which the testator would leave with the executor as a grant of authority to distribute property; (5) a grant of authority to a trustee to make distributions of property in his discretion; (6) a direction that if any legatee refused to accept the personal property mentioned for him in a letter of instructions to be left with the executor, such property should be distributed in the discretion of the executor; (7) a bequest to legatees authorizing the executor to supervise the selection of property and to sell all items not selected; and (8) a direction that disposition be made according to instructions in a letter from the testatrix to her daughter. It should be evident that some of these variations could prove to be troublesome. An attempt to impose a fiduciary duty upon a person to comply with informal directions should be avoided because the duty is probably not enforceable. But merely to authorize someone to distribute property in his discretion is no less objectionable. It is not clear whether this amounts to an absolute bequest, some sort of bare power of appointment, or an attempt to impose a fiduciary duty. If such a duty is discovered, it may fail for want of definite beneficiaries. An outright gift to one person of all tangible personal property, fettered only by the moral force of such informal directions as the testator chooses to provide, is an acceptable solution. But if such a legatee has a personal interest in the ultimate distribution of the property, there is some risk of actual or fancied partiality. If a disinterested executor is chosen for this purpose, he need not be given the property outright; he may simply be empowered to distribute it in his discretion among designated persons, to sell all of the property not distributed, and to add the proceeds to the residue.

Some estate lawyers specify more elaborate testamentary direc-

tions to executors on procedures to be followed in making dispositions of this sort. Under some of these procedures, all chattels in the estate would first be appraised. After an order of priority was established, the legatees would proceed to select particular desired items on a rotating basis. Each legatee's right of selection would end when the aggregate of his selections reached the value of his share of the entire pool.²⁸ Here drafting simplicity as well as administrative convenience and economy are sacrificed in the interest of a maximum practicable satisfaction of beneficiaries' desires.

D. *The Testamentary Transmission of Real Estate*

It is commonly assumed that real estate is a minor source of personal wealth or family endowment. Family dynastic wealth in land, it is said, is no longer a significant feature of our economy. The data from the Michigan sample, although it verifies the relative predominance of personal property in testamentary succession, does tend to show that decedents continue to transmit real estate in substantial amounts by will. Another common assumption is that most family real estate—in particular the family home—is jointly owned by spouses and thus seldom appears in probate. The Michigan data also supports this assumption, but again we must guard against exaggeration. Such studies as have been made on the subject support the assumption about the high incidence of jointly owned land,²⁹ but they do not indicate the ultimate disposition of this land. It

28. The following sample provision of this type appears in W. LEACH, *CASES AND TEXT ON THE LAW OF WILLS* 258 (1960):

If my wife . . . survives me, I bequeath to her all tangible personal property which I shall own at the time of my death; and I hope, but do not require, that out of this property she will give to each of my children, children-in-law and grandchildren some token of my affection for them. If my said wife does not survive me, I bequeath such tangible personal property in three equal shares as follows:

(a) . . . (b) . . . (c) . . . [with substitutional provisions to prevent any of this property from passing into the residue unless all persons designated fail to survive the testator.]

In the interest of family harmony I hereby state that I have not promised any particular thing to any person. If my wife does not survive me and the tangible personalty is, therefore, to be divided among the persons named in Clauses (a), (b), and (c), I recommend but do not require that all items of this property be appraised by a professional appraiser and that those who are to participate in the division then select in rotation items at the appraised values, the order of choice to be determined by lot. It seems to me improbable that the legatees named in this Paragraph will desire to own any large portion of the tangible personal property which I leave. I recommend, but do not require, that whatever articles are not desired by any legatee shall be sold by my executor and the proceeds thereof divided, after charging against each legatee the appraised value of items which he has elected to take in kind.

29. Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 *IOWA L. REV.* 582 (1966).

may be assumed that a considerable amount of residential property is successively transmitted on the market without ever coming to rest in a decedent owner's estate. But it is also true that when land is jointly held by spouses, it is solely owned by the survivor; unless it is put back on the market after the death of one of them, it will very likely appear in the survivor's estate. In fact, of the ninety-nine estates in this survey which included real estate, sixty-eight were estates of decedents who left no surviving spouse. Such figures seem to support both the stated assumption and the caveat about jointly held land.

The incidence of real estate in decedents' estates, classified by value, is indicated in Table 3:

TABLE 3

Distribution of Estates by Value and the Incidence of Real Estate

Value of Estate	Number and Percentage of All Estates	Estates Containing Real Estate
Below \$5,000	34 (18.2%)	8 (8%)
5,000-9,999	30 (16%)	16 (16%)
10,000-24,999	49 (26.2%)	24 (24%)
25,000-49,999	26 (13.9%)	17 (17%)
50,000-99,999	22 (11.8%)	14 (14%)
100,000 and over	26 (13.9%)	20 (20%)
Total	187 (100%)	99 (99%)

Of the sample of 187 estates studied, ninety-nine, or fifty-three per cent of the total number of estates, included real estate. But real estate accounted for only twenty-five per cent of the total value of all estates. In sixty-two of ninety-nine estates, real estate constituted fifty per cent or more of the total value of the estate. These cases, of course, were concentrated among the smaller estates, only fourteen of which were valued at 50,000 dollars or more. In ten estates each under 60,000 dollars, real estate was the only property inventoried. Of the wills covering the ninety-nine estates which included real property, only twenty-seven contained any specific reference to real estate. Twenty-three of these wills included specific devises, two mentioned real estate as part of residuary bequests, and two included directions to sell all real estate. Only six of the specific devises created life estates and remainders in land.³⁰ In all other

30. Eight of the specific devises were of the testator's residence, four were of farms, and two were of land used in connection with businesses. Of the four devised farms, one was given to the testator's daughter and only child for life, with remainder to her daughter; one was devised to one of two children, with the balance of the estate to be divided between both children; and one was devised to one child, with the

cases the testator transmitted real estate either by language disposing of all of his property or by residuary clause.

This finding would seem to indicate that the ownership of real estate by most testators has little special effect upon the formulation of their testamentary schemes. Rather, real estate is most often thought of merely as one form of transmissible wealth; little regard is given to its preservation intact or its distribution in kind. This indiscriminate treatment of real and personal property, however, produces special problems in the administration of decedents' estates, when the physical characteristics of land cannot be so easily ignored. Interests in land are the least liquid of a decedent's assets and the least susceptible of flexible administration. Unless there are sufficient liquid assets to pay debts and expenses of administration, the executor may be forced to convert real estate into liquid assets pursuant to a power to sell or to a court order. But in those instances in which a testator wishes to make a specific devise of land, this may severely distort his scheme of distribution. Thus, care should be taken to provide sufficient other assets to preclude the sale of land to pay debts and expenses.

In contrast to the prevalent English testamentary practice of placing all of one's estate within the framework of the ingenious trust for sale, the Michigan sample shows only limited use of powers in executors to sell land. The records in twenty-four estates in this survey reflected proceedings leading to orders by the probate court to sell real estate to pay debts, expenses of administration, or legacies. In one other estate, the court ordered the executor to mortgage the real estate to pay debts and expenses. In only three cases was real estate sold without court order pursuant to a power in the executor to sell in his discretion. In three of the estates in which court orders of sale were obtained, the executors had been given authority by will to sell without such an order. Although none of the proceedings which resulted in court orders was contested, the practice or necessity of resorting to judicial procedures caused unnecessary delay and expense.³¹

residue to six children. A fourth will gave one son an option to purchase a farm within ninety days after inventory, after which the farm was to pass as part of the residue to the testator's four children.

One of the two wills which devised real estate in connection with business interests gave the property to four of the testator's five sons on condition that they pay the testator's wife 400 dollars a month for her life. The other involved a half interest in a partnership which the testator shared with his son, and which he left to his three daughters.

31. Eighty-two of the intestate estates studied, or 36% of the total, included real

E. *The Problem of Lapse and Substitutional Gifts*

Every testator, even of the simplest will, must decide whether to provide a substitutional gift in the event of the death of his beneficiaries prior to his death. The historic law of lapsed legacies and devises is founded upon the canon of law and logic that property cannot be transferred to a dead person. Thus, the death of a beneficiary prior to the testator's demise renders the legacy or devise ineffective and leaves the property affected to pass either under a residuary clause or by intestacy. Either result may be avoided if the testator provides a substitutional gift to take effect in the event a beneficiary predeceases him. If he makes no such provision, substitutional gifts may still be provided by law under some circumstances. This, of course, is the import of the so-called lapse statutes, which exist in all but a few states.³² However, these statutes are not framed so as to substitute the heirs of every beneficiary who predeceases the testator. The Michigan statute, for instance, is limited in scope to the death of "any child or other relation of the testator," and substitutes only the issue, if any survive, of the deceased beneficiary unless the will directs otherwise.³³ A simple class gift, moreover, has a built-in substitutional feature: those members of the class who predecease the testator lose their interests in favor of those who survive. This result is qualified where, as in Michigan, a lapse statute is applicable to class gifts.³⁴ Under this qualification, a simple class gift requires no expression of alternative benefits to the issue of deceased class members or to the surviving takers when a class member dies without issue. It is not regarded as good drafting practice, however, to rely upon the rules of construction relating to class gifts or upon the proper application of a lapse statute.

In this study, 117 out of 187 wills contained one or more substitutional gifts. This number does not include wills in which the only provision against the lapse of specific or general legacies was in the form of a residuary clause.³⁵ About one third of the wills

estate among the assets. Of this number, the records in forty estates, or 49% of the total, revealed orders for the sale of real estate to pay debts or expenses, or to make distribution.

32. Iowa and Maryland. See Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 900, 902 (1960).

33. MICH. COMP. LAWS ANN. 702.11 (1968).

34. *Strong v. Smith*, 84 Mich. 567, 48 N.W. 183 (1891).

35. It was not at all unusual to find in the sample wills which contained substitutional specific and general legacies with no provision against lapse in the residuary clause.

which contained substitutional bequests devised simple gifts to individuals, with provision for either a single designated substitute beneficiary or a stated priority among two or more substitute beneficiaries.

The remaining two thirds of the wills in the sample illustrated the unexpected complications which can arise when—as is commonly the case—a testator wishes to make a gift to two or more persons but at the same time wishes to provide against the death of any one or more of them. At least two alternative substitutional provisions are commonly in his mind or should be brought to his attention: the first is a substitutional gift to the children or issue of a primary taker; the second is a substitutional gift to the primary takers who survive. Obviously these alternatives are not mutually exclusive; they may, and usually should, appear in combination. Moreover, other alternatives may be desired, including a gift to the spouse of a deceased taker. The possible permutations and combinations of these alternatives pose a problem to the draftsman, the dimensions of which are seldom fully perceived. The result may be either ambiguity or a disposition which does not produce the result a testator would have intended if he were properly advised. The balance of this section is devoted to a survey of the manifestations of this problem which appeared in the Michigan sample.

1. *Patterns of Substitutional Gifts to Children,
Issue, Heirs, and Survivors*

a. *Simple class gifts.* The sample revealed only five wills in which the testator made clearly identifiable class gifts without further provision for substitute takers. Three of these class gifts were themselves substitutional devises to the testators' children in the event that their spouses predeceased them. In all five cases the combination of the class-gift rule and the lapse statute would implicitly have provided both for the issue of a deceased class member and, if none, for the surviving class members. By resorting to so simple a disposition to achieve such results, however, the testators assumed the risk that a class-gift construction might not be adopted or that the lapse statute might not be applied.

b. *Gifts to individuals or survivors.* In making a gift to two or more individuals, a testator may wish to inject into his disposition one of the ingredients of a class gift. Eighteen testators in the sample made gifts to two or more persons "or the survivor." It

should be noted that this language precludes the application of a lapse statute in favor of the issue of a deceased taker, unless the word "survivor" is so narrowly construed that it can be ignored in the event none of the designated takers survives. In those circumstances in which the protection of the issue of a deceased taker is not indicated—as when the testator makes gifts in small amounts, leaves personal chattels or household goods, or gives gifts to a husband and wife, to collateral relatives, or to friends—simple provisions of this sort may be perfectly proper. In all eighteen of the wills which contained such provisions, one or more of the enumerated factors was present.

c. *Substitutional gifts to issue or heirs.* In four wills, class gifts were modified by substitutional gifts in favor of children, issue, or heirs, but not survivors. The first will contained a gift to the testator's children, with substituted gifts to the children of deceased children. Another will was similar, but embraced issue in both circumstances rather than children. The third will included a gift to the testator's children "and the issue of deceased children." This language does not make it entirely clear whether the testator meant to give property to his surviving issue per stirpes. The fourth devise to children "or their heirs." This bequest may be adequate to provide a complete disposition in a simple manner, provided the heirs of a deceased taker are ascertained, not at his death, but at the death of the testator; some courts have announced a rule of construction to this effect.³⁶ Still, one may well heed the admonition that a gift to the "heirs" of any person should be avoided unless that term is defined to resolve its inherent ambiguity. This usually implies that the testator should refer to a statute on intestate succession and specify the time when he wishes the ascertainment of heirs to occur.

A number of other wills (twenty) contained nonclass gifts to two or more persons with substitutional provisions for the issue or children of takers who predeceased the testator. As with the cases in the preceding paragraph, these provisions spell out consequences which in most cases would have been prescribed by the lapse statute in any event. But since the primary gifts were not to a class, there was no provision for the lapse of the interest of a taker who died *without* issue. This fact is especially significant in light of the further fact that in all but one of these wills, the primary gifts were residuary—there were no additional residuary provisions. Under such circum-

36. L. SIMES & A. SMITH, *FUTURE INTERESTS* § 732 (1956).

stances, the result of the death of a primary taker without issue is partial intestacy, a consequence which can be justified, if at all, only if the testator has consciously taken it into account in framing his scheme of disposition.

d. *Substitutional gifts to issue or survivors.* In order to deal with the possibility that a primary beneficiary might predecease the testator without leaving issue, fourteen testators in the sample made gifts to two or more individuals (and in one case to a class) with substitutional gifts to the issue of predeceased primary takers or to the surviving takers if any should die without issue. This more complete type of disposition might suffice for many purposes if the first intended substitution were to the issue of predeceased primary takers *per stirpes*. Even if this were the intent, however, it leaves open the possibility of an unequal distribution among families in the event that one child should die leaving issue followed by the death of another child without issue.

In one case the testator gave the property to his own heirs-at-law in the event that none of the primary or substituted takers should survive him. Some such end limitation is appropriate if the testator desires to make a complete provision against all contingencies, no matter how remote.

e. *Complete stirpital distribution.* In only two wills in the sample did the testator avoid the problem of unequal distribution among family stocks. In one the testator left the residue of his estate to his six named children, the share of any who predeceased the testator to go to the deceased child's children; if, however, that child should die without leaving issue, the residue was to go to the surviving children of the testator "*or to their issue by right of representation.*" Although the clarity of this language could have been improved, it comes close to expressing the complete stirpital distribution among a testator's issue which most testators presumably would adopt if the complexities of this apparently simple type of gift were explained to them. Thus, if a taker died without issue, his share would be divided into as many parts as there were other primary takers who either survived or who died leaving surviving issue.

f. *Comment on these practices.* It may be inferred that in many of the cases discussed above [in all categories except subsection (b)] the testator's intention could have been more simply and completely expressed by a gift to his surviving issue or lineal descendants *per stirpes*. Such a disposition implicitly covers all the substitutional possibilities except the death of all possible takers in all generations.

When issue take per stirpes, issue of living issue are excluded, and issue of deceased issue take by representation.

Many of the foregoing substitutional gifts to the issue of deceased takers were ambiguous because they omitted a stirpital designation. But even a limitation to "issue per stirpes" leaves one possible question unresolved: a testator may desire that if all takers are in the same generation, they shall take equally. If so, he can easily qualify his gift to this effect. In the case of gifts taking effect at a testator's death, this would rarely present a problem: if all of the testator's children survived, clearly they would take in equal shares. To this extent every stirpital arrangement contains a per capita ingredient. Only if none of them survived would it be necessary to prescribe a per capita distribution among grandchildren. If, as in Michigan, the statute of intestate succession includes this per capita qualification,³⁷ it might be preferable for the testator to define the term "issue" by reference to this statute.

2. *Gifts to Spouses of Deceased Takers*

If a testator wants to introduce as a substitute legatee the spouse of a primary taker who predeceases him, the substitutional patterns discussed above are further complicated.³⁸ The idea of substituting the spouse of a predeceased primary taker seems to be perfectly natural, particularly when the latter's issue are likely to be minors. It is surprising, therefore, that the sample included only five wills which contained express alternative provisions for the spouses of deceased legatees. The provisions of these wills reflected a variety of possibilities: in two of them, the testator made primary gifts to his children, with the share of any predeceased taker to go to his spouse, or if none, to his children (or issue). In another will, a stated sum out of the share of a deceased child was to go to his spouse and the balance to his children. In the fourth will, the testator reversed the priority between spouse and issue and stated a threefold set of alter-

37. The following form for a provision of this sort appears in W. LEACH, *supra* note 28, at 282:

Where in this will any gift is made to issue of a person, those children and more remote descendants of such person shall take who would have taken the personal property of such person if he had died at the time said gift becomes possessory, unmarried, intestate, domiciled in _____, under the laws _____ in force at the time such gift becomes possessory, and the shares and proportions of taking shall be determined by said laws.

38. The cases referred to under subsection (1) above in which substitutional gifts were made to the "heirs" of a deceased taker at least have the virtue of providing a widow's portion of a deceased taker's share.

natives: the children of a deceased taker were to take first, followed by his spouse, and for want of any of these, other primary takers who survived. In the final case, the testator left half of his residue to his son, but if he should predecease the testator, to his daughter-in-law (the son's wife) and the issue of the son "equally and to the survivor of them." It is not clear, if put to a test, how this final disposition would have fared.³⁹ As indicated in the other four cases, a better solution would have been to establish a priority of substitution in favor either of the spouse or of the issue.⁴⁰

F. *Common-Disaster Provisions*

Part of the problem of providing against the lapse of legacies or devises is the difficulty caused by the death of the testator and a beneficiary, usually his spouse, in a so-called "common disaster." Although the incidence of such events has increased markedly in our time, I am not aware of any appreciable increase in litigation caused by the factual problem of establishing the respective times of such deaths. Still, if the potential problem can be precluded by some standard form of testamentary clause, such a clause should take its place among the other common boilerplate provisions of a will, provided the draftsman takes account of the relative size of the estates of the testator and the beneficiary and the tax implications of those facts. Of course, in states which have adopted the Uniform Simultaneous Death Act⁴¹ (assuming one is satisfied with its terms) there is little reason to provide specifically for the common-disaster problem by will. According to that Act, a testator will be deemed to have survived a beneficiary if there is no sufficient evidence that the two died otherwise than simultaneously.

39. Would the daughter-in-law take half of this portion and the issue the balance? Does "survivor" include her? Would she take any part of the share of a child who died leaving other children surviving?

40. There is no simple form for covering all possible contingencies in dispositions which include both spouses and issue as substituted takers. But it can be done, at least if one avoids the complexities of providing for spouses beyond the first generation. One of the several possible arrangements might be as follows:

The residue of my estate shall be divided into as many shares as there are children of mine who predecease me either leaving spouses who survive me or leaving issue but no spouses who survive me. I bequeath one share to each of my children who survives me, one share to the spouse of any child of mine who predeceases me, and one share to the issue per stirpes of any child of mine who predeceases me leaving no spouse who survives me.

Of course, modifications of this language may be required to fit particular circumstances. For instance, if at the time of the making of the will any child of the testator had already died leaving a spouse or issue, a somewhat different arrangement would be needed.

41. *E.g.*, MICH. COMP. LAWS ANN. §§ 720.101-108 (1968).

This study revealed only thirty-one wills, or seventeen per cent of the total, which contained common-disaster provisions. Several testators from among this group merely specified that the provision was to become operative upon the death of the testator and a beneficiary in a common disaster. This obviously does not resolve the crucial question of the priority of death. Still less satisfactory were expressions found in two other wills which referred to deaths having occurred "simultaneously." Most of the wills, however, referred to lack of proof of survivorship as the circumstance which would give rise to the operation of the common disaster provision. Some of these wills contained such ambiguous expressions as the following: (1) if the legatee dies "under circumstances making it difficult or impossible to determine which has died first;" (2) if the legatee and the testator "die in a common disaster in which survivorship is not readily ascertained;" or (3) if the legatee and the testator die "as the result of a common disaster and there is a question as to which died first." Another more acceptable provision stated in terms of lack of proof appeared in one will which referred to the death of the testator and the beneficiary under circumstances in which "it cannot be determined by competent evidence which survived." The common-disaster provisions themselves usually provided that the testator's property was to be given to a substituted beneficiary as though the testator were in fact the survivor. In a few instances there was a presumption that the testator survived; in two cases, the presumption was reversed.⁴²

Even the most satisfactory of the clauses stated in terms of proof of death seem to leave the question of survivorship to be resolved by litigation. In light of this shortcoming, there is current sentiment that the problem should be handled simply by imposing upon a beneficiary a condition of survivorship for a stated period of time beyond the death of the testator. Only five wills in the present sample contained provisions of this type. The time periods used ranged from one week to five months. Use of a relatively long period may suggest that the testator's purpose is not merely to cover a common disaster, but to prevent property from passing through two estate administra-

42. Two wills in which the presumption of survivorship was reversed disposed of substantial estates and contained marital deduction clauses. In one of these wills a separate bequest of household goods to the testator's wife was accompanied by a substitutional gift if she were not living or had died in a common disaster with the testator. If death in a common disaster had occurred in this case, the marital deduction property might have ended in the wife's estate, while the chattels bequeathed to her outright might have passed to the substituted legatee.

tions in the event that a legatee does not live long enough to enjoy it. Perhaps the best practical solution to the simultaneous-death problem is the use of a short-term condition precedent of survivorship. It goes without saying that if the testator employs such an arrangement, he should pay particular attention to the alternative disposition of the property involved if the condition is not satisfied, especially when the requirement is imposed upon a class or a number of beneficiaries. When the testator seeks to take full advantage of the marital deduction, and perhaps in other special circumstances, a condition-of-survivorship provision will not be suitable. In this event, the draftsman may wish to fall back upon an acceptable form of a lack-of-proof type of provision, with a presumption that the beneficiary survived the testator.⁴³

G. Trusts and Future Interests

Thirty-two wills, or seventeen per cent of the sample, contained dispositions in trust.⁴⁴ The size of the estates involved is shown in table 4.⁴⁵

TABLE 4

Distribution of Trust Estates by Value of Estate & Sex of Decedent

	Male	Female	Total	
Below 50,000	5	5	10	(31%)
50,000-99,999	3	4	7	(22%)
100,000-499,999	10	4	14	(44%)
Over 500,000		1	1	(3%)
Total	18	14	32	

There is nothing particularly surprising about these figures except the seemingly large number of estates less than 50,000 dollars in which trusts appeared. It should be noted, however, that no trusts were in fact created by ten of the thirty-two wills which explicitly

43. The draftsmen of the new Uniform Probate Code have tentatively adopted a provision for legislative enactment which may resolve the problem for the draftsmen of average wills. Section 2-601 of the current draft provides:

A devisee who fails to survive the testator by five full days is deemed to have predeceased the testator, unless the will of the decedent creates a presumption that the devisee is deemed to survive the testator or requires that the devisee survive the testator for any stated period in order to take under the will.

44. In addition, one testatrix tried to impose upon her husband the duty to use property left to him to support the minor children of the testatrix by a previous marriage. It was not clear from the language that a trust was intended, and the court handled the problem by appointing guardians to receive the shares of the minor children.

45. The amounts shown in the table 4 represent the total values of the probate estates, not the value of trust estates created.

provided for trusts. Seven of these wills included substitutional trusts to take effect only if the testator's spouse predeceased him. Two wills devised property into trust in the event that certain beneficiaries were under age at the testator's death. And one created a trust which lapsed upon the death of the sole income beneficiary prior to the testator's death. Seven of these ten cases involved small estates, the largest of which was under \$2,000 dollars. Thus, in seven of the ten estates listed in the below-50,000 dollar category, no trusts were actually created. In addition, an eighth will in the lowest value category included a small gift to the state in trust for the testator's mentally incompetent son who was a patient in a state institution.⁴⁶ Therefore, although the testators of ten small estates provided for trusts, only two of these actually resulted in a private trust administration.

The separation of the management from the enjoyment of property by means of a private trust generally appears in two recurrent patterns. The first pattern, in which the beneficial title to property is divided into present and future interests, provides a family endowment for a succession of at least two generations. Under this arrangement, there is an income interest for the life of one beneficiary—usually the testator's widow—or perhaps a succession of such interests, followed by a remainder or alternative remainders consisting of the right to receive principal. The second pattern provides a trust administration for the benefit of persons who are under a designated age and who are entitled to principal upon the attainment of the age. This arrangement may include the substitution of beneficiaries for those who die under that age. The age limitations are usually confined to the beneficiary's period of minority, but instances were noted in the sample in which the testator directed distribution of principal in whole or in part at ages twenty-three, twenty-five, thirty, and thirty-five. In one case, the testator directed installments of principal to be paid to his grandchildren upon their respectively attaining twenty-five, thirty, and thirty-five years of age. Of course, the two primary trust patterns noted here may appear in combination: in the present survey, thirteen cases appeared in the first category, thirteen in the second, and three in both categories.

1. *Personal or Professional Trustee?*

Testators designated corporate trust companies as trustees in fifteen wills, personal trustees in thirteen wills, and co-trustees of

46. This gift was pursuant to a statute authorizing such gifts and specifying the procedure for their administration. MICH. COMP. LAWS ANN. §§ 330.46-52 (1968).

both types in two wills. Of the thirteen wills involving personal trustees, six named two persons as co-trustees. In all but one of the six cases, the trustees were children of the testator.⁴⁷ Estates containing trusts with personal trustees were valued below 100,000 dollars in all but four cases. Two of these involved contingent trusts which never came into existence, and one involved a charitable trust which, by arrangements approved by the probate court during the course of administration, came into the hands of professional fiduciaries.

2. *Power to Invade Corpus*

It has become almost a standard practice of testators to vest a trustee with the power to sell and expend part or all of the trust corpus for the support or education of an income beneficiary. Such a provision appeared in twenty of the thirty-two wills in this study. Unless the trust estate is large enough to assure adequate income, the omission of such a provision may produce a hardship which subverts the security sought by the creation of the trust. The only practicable way of providing this security is to vest in the trustee an almost unfettered discretion to sell corpus subject perhaps to the limitation that it be exercised for the support, maintenance, health, or education of the beneficiary. Such a clause appeared in all but one of the cases containing powers to invade corpus. Occasionally the standard of support was related to the beneficiary's "station in life" or to the life style "to which he is accustomed." In one case the trustee was authorized to use income and corpus to the extent necessary to produce a stated annual sum.

3. *Spendthrift Trusts*

Spendthrift provisions appeared in nineteen out of the thirty-two wills. Ten of these expressly restrained alienation or anticipation of the beneficiary's interests in both income and principal.⁴⁸ Nine others in the form of trusts for support could be construed to have

47. One will named the testator's wife and two sons as co-trustees.

48. In Michigan, a beneficiary of a trust for the receipt of rents and profits of land cannot transfer his interest, and his creditors can reach only the surplus of such rents and profits beyond the amount necessary for his education and support. MICH. COMP. LAWS ANN. §§ 555.13, 555.19 (1968). To the extent provided, every such trust is a spendthrift trust. But the validity of a spendthrift provision respecting a beneficiary's interest in the corpus of a trust is at least doubtful. *In re Ford's Estate*, 331 Mich. 220, 49 N.W.2d 154 (1951). In fact, this case appears to stand for the proposition that if the beneficiary has an interest in the corpus, spendthrift provisions are void, even as to his interest in the income. W. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 236 (1955).

the same effect. In the latter cases, the beneficiary's enjoyment was expressly dependent upon the trustees' judgment as to the amounts required for support.

4. *Charitable Trusts*

In only one will in this sample did the testator create a charitable trust. In that case, the testator distributed all of his estate except the portion prescribed by law for his widow to a variety of charitable organizations. Some bequests were outright to charitable institutions. One gift was to a named person in trust for the establishment and administration of a scholarship fund for needy graduates of a certain high school. Another bequest, essentially a pour-over gift into an existing trust fund, directed the executor to pay money over to the employees' pension fund of a bank.

5. *Marital Deduction Trusts*

Six wills were expressly designed to take advantage of the marital deduction for federal estate tax purposes. The estates involved were valued in two cases at slightly under 100,000 dollars, in two cases at approximately 170,000 dollars, in one case at over 440,000 dollars, and in one case at over 2,000,000 dollars. The marital deduction formula clauses utilized in each of the six wills followed the "pecuniary formula" in four cases (an amount equal to one half of the testator's adjusted gross estate) and the "fractional share formula" in the other two (that fractional share of the residue required to obtain the maximum marital deduction).⁴⁹ Three of the six wills gave the marital deduction share to the spouse outright, with the balance in trust to the spouse for life⁵⁰ and a remainder in the issue of the testators. The other three wills each created a typical "marital deduction trust" of the marital-deduction share for the spouse for

49. In one of the pecuniary formula clauses, it was specified that the executor should apply the percentage to assets distributed at their fair market value at the time of distribution. In the three others it was provided only that values should be those finally determined for federal estate tax purposes. In one of these the executor was authorized to distribute wholly or partially in cash or in kind. Each of the two fractional share clauses directed that the amount of the bequest should be determined on the basis of values existing on the date of distribution, with an express direction that the marital bequest carry its proportionate part of the income of the testator's estate from the date of his death. Three of the six wills contained tax allocation clauses charging estate and inheritance taxes to the residue, two directed that such taxes should not be charged to the marital portions, and one contained no tax allocation clause. For a comprehensive commentary on the relative merits of the several marital deduction formula clauses, see Polasky, *Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations*, 63 MICH. L. REV. 809 (1965).

50. One variant included the testator's sister as a life beneficiary.

life. In the first of these, the testator also gave the spouse a general testamentary power of appointment, with a gift in default to a "residuary trust" for the benefit of designated issue of the testator. In the second, the testator gave his spouse a general testamentary power, in default of which the trust estate was to be poured over into an existing inter vivos trust. In the third, the testator gave his wife, in addition to her life interest in the marital-deduction trust, a general power of appointment over both income and principal, exercisable either in her lifetime or by will. In default of appointment, there was a gift by way of residuary trust, in which the wife was also life beneficiary, with a remainder to the testator's daughter or her issue. Presumably the testator designed this arrangement both to give his wife the life benefit of most of the probate estate and to relieve all but the marital-deduction share from the estate tax upon her death.

6. *Some Problems of Construction*

a. *Trusts containing indefeasibly vested interests.* When a trust is established in which the primary or remainder interest is subject to postponed enjoyment for a period of years ending upon the attainment of a certain age, the settlor must decide what to do about the survivorship problem. Does he wish to provide alternative gifts in the event a beneficiary dies under the stated age? If he does not, but prefers an indefeasibly vested gift with no condition of survivorship, the draftsman must exercise care in order to avoid language which could be construed to impose such a condition. This problem is complicated by the recurrent and unpredictable disposition of some courts to imply a condition of survivorship whenever a trustee is directed to pay principal to a beneficiary upon attainment of a certain age. The kind of directions which appeared in three wills in the sample would seem to preclude any problem that a court might misconstrue the testator's intent. In those cases the testators made immediate gifts to designated issue, followed by the direction that if any beneficiary entitled to receive principal were a minor, his share was to be given to (or retained by) a designated trustee. There were further directions for the use or payment of income during the period of the trust.⁵¹

51. In one of these cases, apparently in recognition that some problem might arise if such a beneficiary died under age, it was provided that on the death of any beneficiary during minority, those persons then entitled to receive principal would also receive any accumulation of income. Since no alternative takers were named, it may be inferred, although not beyond all doubt, that the estate of the deceased child would take his share of such principal and income.

In one case not involving any age limitation, the testator provided a substitutional trust for the benefit of his daughter in the event his wife predeceased him. The instrument directed the trustee to use income and corpus in his discretion for the daughter's support, but it specified neither the duration of the trust nor alternative beneficiaries. This sort of trust would present no problem in England where—absent any rule like our *Clafin* doctrine⁵²—such a beneficiary, if and when fully competent, could call at any time for termination of the trust and a conveyance of the corpus. Under our law, a trust cannot be terminated so long as a substantial purpose of the trust remains unsatisfied. Most American draftsmen, therefore, assume that they must indicate a date of termination by a specific direction on the payment of principal. In fact, most American trusts not only divide ownership of property into managerial and beneficial interests, but also divide beneficial interests into rights to income and rights to receive principal. Often the trust directs income to be paid to a beneficiary for his lifetime; in such a case, a direction to pay principal thereafter to someone else is properly designated as a remainder. In this manner, it is appropriate and convenient to regard the doctrine of estates as having been extended to the division of beneficial interests under a trust.

Suppose, however, that a settlor wishes to give a person the full beneficial title to property while limiting his enjoyment to a right to receive income for life. The beneficiary's interest in corpus in such a case would consist of a power to direct its devolution rather than a right to receive it from the trustee. Conceptually an interest so limited has no exact analogy in the doctrine of estates, but there is nothing in the law of trusts to preclude such an arrangement. It would appear that the only real problem is how the draftsman can clearly express the testator's complete donative intention. How does one negate the implication that, by giving the beneficiary an interest for life, the intention is to give him no more than an equitable life estate? It is disconcerting, if not conducive to misinterpretation, to direct that the principal shall be paid to him at his death. A direction to pay principal to his heirs will also not produce the intended result, for it reduces his interest to a life interest with a succession of interests thereafter which is beyond his control. Some draftsmen in such a case may resort to the dubious device of directing the trustee to pay principal to the beneficiary's "estate."⁵³ A better solu-

52. *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454 (1889).

53. See Fox, *Estate: A Word To Be Used Cautiously, If at All*, 81 HARV. L. REV. 992 (1968).

tion, which appeared in several of the trusts with age limitations noted above, would be to bequeath the property to the beneficiary subject to the stipulation that for a stated period such property should be held by a trustee and administered according to certain directions. These directions would include no provisions for the payment of principal other than perhaps a discretionary power in the trustee to invade principal for the beneficiary's support.

Only two cases in this survey contained trusts in the simple form of income interests for life with directions to pay principal to one or more named persons as remaindermen. In the absence of other language, such remainders are indefeasibly vested, that is, not subject to any condition of survivorship until the time of distribution. One may be discomfited by language which directs payment to persons who may not be alive, but if our basic constructional dogma against implying conditions of survivorship has any force when future interests are limited in trust, one should be able to rely on that dogma in the case of such simple directions as these. The testator can, of course, insure this interpretation by inserting an explanatory statement that he intends such remainder interests to be indefeasibly vested and subject to no condition of survivorship.

b. *Contingent future interests.* Twenty out of the thirty-two trusts in this survey contained contingent future interests limited either after life interests or upon the failure by primary beneficiaries to survive to a stated age. All but two of these trusts either limited remainders to the issue of the respective testators, or created trusts for the benefit of children under stated ages with future interests limited over to other issue. Many of the drafting problems noted above in connection with substitutional provisions against lapse apply here as well. Principally, the problem is to identify and provide for all contingencies relating to the birth and death of beneficiaries during the trust period.

In six of the thirty-two trusts examined, the intention of the testator might have been more simply expressed by limiting a remainder to his "issue per stirpes then living," with the possible qualification that if all takers were in the same generation, they would take per capita. Instead, intricate and in some instances incomplete alternatives were specified. In one instrument, for example, the testator limited a remainder to his son and daughter or the survivor or the living children of each. Among other ambiguities, this language did not cover the event of the death of both beneficiaries without children, or the death of one leaving children followed by the death of the other without children.

In several cases, trust instruments granted future interests to two or more persons with supplanting limitations to the issue or children of any who died before such interests became possessory but without any further alternative provisions. In all but one of these cases, the language seemed to describe vested remainders subject to defeasance in favor of the remaindermen's issue. Properly construed, such language implies that if a remainderman dies before the stated time without leaving issue, his remainder is not defeated and remains in his estate. Even when this is the result intended, such cryptic expressions invite controversy.⁵⁴

Because the construction of the many possible variations of alternative or supplanting limitations is unpredictable, the safest practice is to make all future interests of this sort, including the primary gift, subject to express conditions precedent of survivorship.⁵⁵ Taken together—in conjunction perhaps with an end-limitation to the testator's heirs—these conditions would presumably exhaust all possibilities relating to the birth or death of potential beneficiaries. One testator, for instance, effectively handled this problem by providing that upon the death of his son (a life beneficiary of part of the residue), the trust estate was to be divided into "as many equal parts as there are children of (this son) and of (another deceased son) then living and deceased children of my sons leaving issue then living," with distribution accordingly. There was also an end limitation to the testator's heirs then living.⁵⁶

Substantially the same effect can be achieved, however, by using a remainder which, although vested, is subject to defeasance upon death prior to distribution. Of course, care must be taken to provide alternative interests which, singly or together, cover without ambiguity every circumstance which may arise upon the death of primary

54. L. SIMES & A. SMITH, *supra* note 36, at § 583; 5 AMERICAN LAW OF PROPERTY § 21.23 (A. Casner ed. 1952). One extremely careless piece of drafting appeared in a will which limited the remainder, after a life interest in the testator's wife, to his three children: "and if none of said children shall be then living, but has issue of hers or his surviving, the issue shall take the share of such deceased daughter or son of mine *equally*" (emphasis added).

55. Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 CALIF. L. REV. 297, 465 (1961).

56. It would have been better to provide for the ascertainment of heirs as of the end of the life interest rather than simply to refer to "my heirs at law then living." The latter is subject to a construction calling for ascertainment of the heirs at the ancestor's death subject to the further requirement that they survive the life beneficiary. Cf. *In re Love's Estate*, 362 P. 105, 66 A.2d 238 (1949). It should be noted further that this disposition effectively designated the testator's grandchildren (those living and those dead leaving issue) as the heads of the stocks of what is essentially a gift to the testator's own issue, and provided that division in that generation was to be in equal shares. A simple gift to the testator's issue per stirpes would not have been completely free of ambiguity under some possible circumstances.

remaindermen. Several wills which required that primary takers survive to a certain age were carefully drawn to this effect.

c. *Separate trusts with age limitations.* In one case in the survey, the testator left remainders in separate trusts for each of his three grandchildren to continue until each attained age thirty. In the event of death before that age, the trust provided for alternative gifts in favor of the issue of each. But if any died without issue, his share was to be divided among the remaining trusts. Not only is this disposition incomplete, but serious inequalities between the family stocks could result under certain circumstances. What would happen, for example, if one of the grandchildren were to die without issue and all the other trusts had ended or if one but not both of the other trusts had ended?

In another case the testator limited remainder interests to his children—the share of any children under twenty-five to be held in trust—with alternative gifts over of the shares of any children who died under twenty-five. Although this disposition was complete, the gift-over provisions required the payment of principal outright, even to a living child under twenty-five who was then only an income beneficiary.

A third case effectively avoided both of these difficulties by limiting remainder interests to three grandchildren and by providing alternatives upon the death of a grandchild under a stated age. These alternatives called for distribution in favor of a deceased grandchild's issue, or if none, in favor of other grandchildren or the living issue of those then deceased. There was an added direction that if at the time of any such distribution any one of the grandchildren was the beneficiary of a separate trust, his share of the gift over was to be added thereto.

d. *Distribution when the youngest beneficiary attains a stated age.* In several of the wills examined, the testator imposed an age limitation by providing for distribution of principal when the youngest member of a class attained a stated age or died under that age; income was to be payable to the class in the meantime. In this type of disposition, care must be taken to provide for the full disposition of income in the event one of the beneficiaries dies prior to the termination date. The following examples of this problem, drawn from the sample, will illustrate the point. In one case, income was payable in designated shares to each beneficiary who attained twenty-one; corpus was to be distributed to the beneficiaries "or to their children by right of representation" when the youngest attained twenty-five. It can be inferred from this disposition that if

one beneficiary, having attained twenty-one, should die before reaching twenty-five or while any of the others were still under twenty-five, his share of the income should either be paid to his children, if any, or distributed as if the income interest were property vested in him at the time of his death. Neither alternative, however, is free of doubt. In a second case, the testator limited a remainder to persons who survived a life beneficiary; income was to be paid to them and principal distributed when all attained twenty-one. Under this disposition, both the interest in income and in principal of one who died after the end of the life interest but before all attained twenty-one would be payable to his estate. A third will was carefully drawn to call for immediate distribution to alternative takers of the share in the corpus of any primary beneficiary who died before all such beneficiaries attained the age of twenty-three. In other words, the death of any primary taker would abrogate *pro tanto* the direction to postpone distribution until *all* attained the stated age. Perhaps the simplest solution to this problem would be to vest the trustee with a broad discretion to "sprinkle" income during the term of the trust among a group consisting of the primary beneficiaries and their issue.

3. *Perpetuity Problems*

We may have been led to believe by much that has been said in recent years that testators' intentions have frequently been frustrated by careless violations of the Rule Against Perpetuities. I strongly endorse the admonition that one who is not well grounded in this doctrine should not attempt to draft any but the simplest of wills. But the wills reviewed in this study support the proposition that perpetuity violations are rare. Perpetuity reform, if it is needed at all, can be justified by the value of salvaging those cases in which violations, however few, do occur; but this does not mean that the bar stands in need of rescue from a maze of incomprehensible doctrine. Indeed, I have the impression from the cases examined in this survey that the draftsmen involved knew their way around the old pitfalls. The sample also gives me the impression that normal testamentary objectives seldom lead a draftsman into confrontation with the more notorious of the old bugaboos.⁵⁷ For example, testators normally do not leave property to persons living at the time of the probate of their wills or the settlement of their estates. Nor is one likely to en-

57. The classic categorization of these pitfalls was made in Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). See also 6 AMERICAN LAW OF PROPERTY §§ 24.21-.23 (A. Casner ed. 1952); Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965).

counter those attenuated family arrangements which invoke the perils of the "fertile octogenarian" and his company. Instead, most perpetuity violations may be laid on the doorstep of eccentric testators and their counsellors who are not alert to the dangers of abnormal family arrangements.

Many wills in this study prescribed distribution of principal upon the termination of life interests. If, as is usually the case, life beneficiaries are limited to named persons in being at the death of the testator, virtually all perpetuity problems are avoided. The most obvious and likely danger occurs when the testator postpones the vesting of an interest to take account of age limitations which exceed twenty-one years. As noted above, several such examples appeared in this study. But for the most part, the draftsmen involved seemed to be alert to the problem; indeed, it can be stated almost as a general proposition that the draftsmen confined age requirements to the children of a testator or to other persons living at the time of his death. Obviously, when indefeasibly vested interests are given with age requirements clearly limited to the postponement of enjoyment, no such practice is necessary.

One problem encountered in this study, however, appears to be neither obvious nor unusual. This problem relates to the normal desire of a testator to provide for the spouse, as well as the issue, of a primary beneficiary who dies before a postponed date of distribution. Here, of course, one confronts the booby-trap of the infamous "unborn widow." If a testator wants to introduce someone's spouse as a future beneficiary for life with further contingent limitations, the difficulty lies in the remote possibility that such spouse will not have been living at the testator's death. In one case in this survey a testatrix limited remainder interests to her four children with typical supplanting limitations in favor of issue in the event that any should die before distribution. But if any child should die without leaving issue, the instrument gave a life interest to his spouse, with similar alternatives upon the spouse's death. The draftsman, however, was aware of the perpetuity problem involved, for he inserted a saving provision which directed termination of the trust in any event upon the death of the survivor of the testatrix's husband and all her children living at the time of her death. This saving clause might have been made even more secure by including among the measuring lives all issue of the testatrix living at her death.⁵⁸ In another case the will was virtually identical, but con-

58. It is noted that this will was probated in an ancillary proceeding, and apparently was drafted in California.

tained no saving clause. The trust, which is now being administered, therefore, contains interests which violate the Rule Against Perpetuities.⁵⁹

4. Powers of Appointment

Besides the general powers of appointment encountered in the marital deduction trusts mentioned above,⁶⁰ I discovered only two other powers of appointment in the sample, neither of which was typical. In one case the testator directed the executor to distribute personal property according to informal directions, but if any potential beneficiary refused to accept those directions, he left distribution in the discretion of the executor. In another case the testator left the residue of his estate to his brother in trust to distribute in his discretion among the testator's children. In choosing among the children, the brother was to be guided by his finding as to whether they had accorded the testator during his lifetime such attention as is normal between parent and child. To the extent that this small sample is representative, either the value of powers of appointment for other than tax objectives—specifically their value to provide for a flexible succession of family property—has not yet impressed the practicing bar or testators still cling to a measure of inflexibility.

H. Legal Future Interests

The division of ownership into present and future legal estates is a practice that should be avoided whenever possible, particularly when personal property is involved. The reason relates to the definition of, or the means for assuring proper protection to, the rights of future interest holders. This is essentially a modern problem, growing out of the courts' extension of the doctrine of legal estates in land to personal property. In the setting of the trust, this evolution has served to prevent the intolerable inconvenience of having to work with two distinct doctrines of estates. The lesson, of course, is that the creation of present and future interests in personal property should be confined to the setting of the trust. If the value of the property involved does not justify resort to a trust administration, the property should be bequeathed outright.

It is perfectly normal for a testator to wish to leave his home to his wife for life. A legal life estate in rental property may also make

59. No point has so far been made of this during the course of administration. In fact, if the three sons of the testatrix survive her husband, the violation will become irrelevant.

60. See text following note 50 *supra*.

sense if the life tenant is one to whom the management of the property can safely be entrusted. The difficulty is that there is no assurance that the income from the property will provide sufficient support for the life tenant. Indeed, over the period of a lifetime it may become necessary to sell the land and either reinvest the proceeds or expend them in order to assure adequate support for the intended beneficiary. In either case the sale of land produces personal property and the need for a trust to assure its proper management. If a trust is not desired initially, it is possible for a testator to empower a life tenant to sell the property and hold the proceeds in trust for himself and the remaindermen. Alternatively, he may authorize the life tenant to convey the property to a trustee who is in turn empowered to sell it and administer the proceeds. Either device requires considerable elaboration and care in the drafting, and to my knowledge is seldom, if ever, employed. The simplest disposition of real property is to devise it in fee simple—an alternative which, because it removes the dead hand's control over the ultimate descent of property, may have more than simplicity to commend itself in healthy family circumstances.

I discovered only ten wills in the sample which purported to create legal present and future interests in real property. In each of three cases the testator gave his spouse a life estate in his place of residence with a remainder to issue. In two more cases the testator gave his daughter a life estate in farm land with a remainder to his other issue. One testatrix with an estate valued at over 400,000 dollars left all her real estate to her husband for life with a remainder, together with one half of the residue of her estate, in trust for her issue. Another testatrix left all of her estate, including both real and personal property, to her husband for life with remainders to issue, but the husband died first and the remainders were accelerated.

Only two wills employed the device of bequeathing the residue, including both real and personal property, to the testator's wife for life together with a power to sell and consume for support. This dubious device became common in some regions during the last century—presumably a reflection of the traditional rural American resistance to the trust. The result was a proliferation of confusing case law in which the courts struggled with many badly drafted provisions. These provisions often left in doubt the nature of the estates in the respective spouses, the nature or scope of the attendant powers, and the consequences of their exercise. Happily, this does not seem to remain a significant problem in Michigan.

I. *Joint and Mutual Wills*

A joint and mutual will⁶¹ is fraught with such potential controversy concerning its legal effects, such uncertainty about what makes it "joint" or "mutual" or both, that one wonders what would move anyone to resort to such a device. One reason may be no more than the convenience of using one instrument when the testators' testamentary objectives are identical or reciprocal. It is more likely, however, that the parties intend to bind themselves in a manner that is inconsistent with the rules relating to the revocability of wills. If so, they may make an agreement—usually referred to as a contract not a revoke—which purports to limit their ability severally to abrogate their joint endeavor. They may, and surely should, reduce such an agreement to writing and expressly refer to it in the will. If the will does not recite the contractual arrangements, the court may nonetheless discover a contract either by implication from the execution of a joint and mutual will or from that fact plus other evidence.⁶² Obviously, if the parties actually intend to bind one another to adhere to their common objective, they can express their testamentary desires as well by two wills as by one.

The real question is: Why do the spouses wish to bind themselves in such a manner? It may be inferred that one or both of the parties is concerned about the ultimate devolution of individual or jointly held property after its enjoyment by the survivor. If the assurance of economic benefits to other members of the family is the source of concern, the use of a trust or the division of ownership into life estates and remainders by will or inter vivos disposition will probably not be desirable when the value of the estate is small. Outright inter vivos or testamentary gifts to the testators' children will also not be acceptable, particularly when, in respect to gifts by will, the spouse has an election to take against the will. We may therefore expect that some spouses with modest resources will assume the risks of a joint and mutual will supported by a contract as the least objectionable of the available dispositive devices for reaching their common objective. Despite the risks of failure, the device may have at least some in *terrorem* force against the temptation of the surviving spouse to subvert the ultimate objective.

61. For present purposes, a joint and mutual will may be defined as one which purports to pass the property of two persons, generally husband and wife; the will is usually executed by both and contains provisions which are at least in part reciprocal.

62. B. SPARKS, *CONTRACTS TO MAKE WILLS* 28-38 (1956); Partridge, *The Revocability of Mutual and Reciprocal Wills*, 77 U. PA. L. REV. 357, 360 (1929).

If the surviving testator is free to dispose of his own property in his lifetime, however, the restrictive effect of a joint and mutual will cannot be achieved merely by denying him the power to revoke his own will. The courts seem to have evolved limitations which prohibit the survivor from unreasonably consuming or disposing of his own property with the intention to subvert the arrangement.⁶³ The inherent unpredictability of the result when such matters are contested casts further doubt upon the value of the joint and mutual will. Even more uncertain is the question of the proper remedy where one has exceeded his powers.

Only four joint and mutual wills were found in this sample, and only one of these recited that it was made pursuant to a contract for the disposition of the spouses' property. All were probated in estates valued at less than 35,000 dollars. One will was completely reciprocal in the sense that no interests were given to anyone other than the testators themselves, which in effect left the survivor as absolute owner. The three other wills covered personal property of the deceased spouse. To the extent that a joint and mutual will covers personal property, it is subject to the objection noted elsewhere concerning the creation of legal future interests in personal property.⁶⁴

In addition to the four wills mentioned above, two other wills were noted which, although not joint, recited that the disposition was pursuant to an agreement between the spouses. The estate probated under each of these wills was valued at less than 7,000 dollars. One will devised the testatrix's place of residence to the husband for life with remainder to a son, and left everything else to the son outright. The real estate was not inventoried in the estate, presumably because it was jointly held. If so, the question may remain whether the language of this will, together with the contract under which it was made, serve to bind the husband so as to render him a simple life tenant, or whether he would have the power to sell and consume under certain unspecified circumstances.

All of these wills, except the one which was completely reciprocal, left for possible future adjudication the rights and duties of the surviving spouses. This justifies the admonition that the joint and mutual will is better avoided altogether. It appears to be a device resorted to by persons of small means to achieve what affluent persons can achieve by more efficient devices. This suggests a deficiency

63. B. SPARKS, *supra* note 62, ch. V.

64. See pt. I. H. *supra*.

in our law for meeting a normal family objective: assurance that jointly held property or the combined property of the spouses is kept within the family without prejudice to the needs of the surviving spouse.

J. *Conditions against Contest*

Only two wills in the entire sample imposed conditions against contest covering attempts by beneficiaries either to set aside the will or to assert claims against the estate. Each will reduced to one dollar the bequest to any beneficiary who breached the condition. Both wills were made by women, neither of whom left a surviving husband. One testatrix was survived by a daughter and her four children. The estate was to be divided among a number of relatives, including the daughter and her children. The other testatrix left no issue, and her heirs were three nephews and one niece. She left the residue of her estate to the niece and two of the three nephews; the third nephew received a small general bequest. The two cases suggest that a no-contest condition is typically used when there is a plan of unequal distribution among a testator's heirs or when one such beneficiary is given appreciably less than a normal portion.

II. SUCCESSION BY WILL IN ENGLAND: SOME COMPARISONS

The commentary below on current English testamentary practices is, for the most part, based upon an examination of one hundred wills selected at random from the Principal Probate Registry for the year 1963. This examination revealed two distinctive features of English testamentary practice: (1) the use of the trust, usually in the form of the so-called "trust for sale," throughout a broader spectrum of dispositive patterns than in American practice; and (2) the use of a common form of substitutional provision for the issue of deceased legatees which exhibits a policy of avoiding the devolution of any property to minors. An explanation of both of these features requires a brief summary of the distinctive character which English law and practice have taken since the parting of our two legal systems.

A. *Background of English Property Law*

The major purpose of the extraordinary English property law reform of 1925 was to eliminate all fetters upon the alienability of land. The Law of Property Act⁶⁵ abolished all legal estates in land other than the fee simple absolute and the term of years absolute.

65. 15 Geo. 5, c. 20, § 1.

All other interests can be created only in equity, that is, as beneficial interests in trust. Other provisions authorized two devices for creating successive beneficial interests in land: a settlement under the Settled Land Act of 1925⁶⁶ and a "trust for sale" under the Law of Property Act. A proper settlement under the former Act vests the legal title and full power of disposition over land, subject to elaborate regulations, in the so-called "tenant for life"—the person of full age who, for the time being, is beneficially entitled to possession of the land for his life. The tenant for life in effect holds the land in trust for himself and for others to whom beneficial interests have been given, so that upon the sale of settled land the capital fund produced thereby will be preserved for all interested parties. A settlement, however, must also provide for trustees who have certain residual powers and duties not conferred upon the tenant for life, including the power to receive and hold "capital money" and to give consent to certain transactions. A settlement therefore requires the execution of two instruments, a vesting deed and a trust instrument. By this device the legal title is kept unfettered by the terms of the settlement. A will may serve as a trust instrument, but upon the testator's death the trustees of the settlement must execute a vesting deed to the person who has the status of tenant for life. Because of the cumbersome machinery required for creating a settlement of land, this device has been used with diminished frequency in recent years; it is rarely used in the testamentary disposition of land.

The second device for creating limited or successive beneficial interests in land is the "trust for sale," which is authorized and elaborately regulated by the Law of Property Act. This device closely resembles a trust in the traditional sense; full legal title is vested in trustees, who are given all the powers of both the tenant for life and the trustees of a settlement under the Settled Land Act. But the trust must be a binding trust to sell—not merely a power to sell—so that the interests of beneficiaries become interests in a capital fund rather than in the land itself. The fact that this conversion must occur, however, does not prevent the testator from conferring upon trustees the power to postpone sale indefinitely in their discretion; in fact, such power of postponement is implied unless a contrary intention appears from the trust instrument. Moreover, it is perfectly consistent with such a trust for the testator to direct the trustees to permit a beneficiary to possess land and not to sell it without his consent. Thus, it is possible to impose a greater measure

66. 15 Geo. 5, c. 18.

of restraint upon the sale of land by means of a trust for sale than by a settlement under the Settled Land Act. Nevertheless, the trust for sale is particularly appropriate when the testator's objective is to establish a capital fund for the production of income for the objects of his bounty. And since testamentary dispositions of this type often do not discriminate between real and personal property, the trust for sale is peculiarly adapted to estates consisting in whole or in part of personal property.⁶⁷ When land is involved, a traditional trust cannot be used, and any attempt to create such a trust results in a settlement under the Settled Land Act. When only personal property is involved, a traditional trust may be, and sometimes is, still utilized. But in practice, the trust for sale is the predominant device for family endowments in England. Such trusts are invariably declared by the following standard form with occasional variations in language:

I give, devise and bequeath the whole of my estate both real and personal whatsoever and wheresoever situate unto my trustees upon trust to sell, call in and convert the same into money with full power to postpone such sale, calling in and conversion thereof so long as they in their absolute discretion think fit without being liable for loss and out of the moneys arising from such sale, calling in and conversion thereof or of any ready moneys to pay my debts, funeral and testamentary expenses and To Hold the net proceeds thereof In Trust for

To understand fully the distinctive features and functions of the trust in English practice, it is necessary to note certain other features of English trust law. Of greatest significance is the doctrine of *Saunders v. Vautier*,⁶⁸ which contrasts with the American *Clafin* doctrine.⁶⁹

According to the *Clafin* doctrine, no trust can be terminated so long as any significant trust objective remains unsatisfied. The supposed rationale of this rule is that a settlor has the right to dispose of his own property with such restrictions as he sees fit, to the extent that they are not contrary to law or public policy. In *Saunders*, however, the court held that a legatee who had reached twenty-one could demand payment of a vested legacy which the will did not make payable until he reached twenty-five. This and similar cases have been taken to mean that any trust is terminable by a single

67. Since the term "trust for sale" normally implies that the subject matter is land, when the form is used to include personal property it is often referred to as a trust to sell and convert.

68. 49 Eng. Rep. 282 (Ch. 1841).

69. *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454 (1889). See text accompanying note 52 *supra*.

legally competent beneficiary who has a vested interest, without regard to the directions of the settlor or the wishes of the trustee. The same is true if all legally competent concurrent or successive beneficiaries agree upon termination.

The rationale of the English rule is not entirely clear. It has been said that a trust is the equitable equivalent of a common law gift; once declared, the settlor has no further rights over the property.⁷⁰ Although such an explanation is less than satisfactory, it does seem clear that the English emphasis is upon the status of the beneficiary as the present owner of property rather than upon the power of a settlor as former owner to fetter the property in the hands of his donees. This may or may not represent a policy judgment by the English courts upon the extent to which the "dead-hand" can control the future enjoyment of property.⁷¹ It is not necessary for purposes of this Article to evaluate the basic differences between American and English philosophy on this particular aspect of trust law. It is enough to say that the adherence of the English to the traditional rule reflected in *Saunders* is probably the most significant of the doctrinal bases for their modern trust practices.

This survey of English trust law would not be complete without brief reference to two statutes—the Trustee Investments Act of 1961⁷² and the Trustee Act of 1925⁷³—which govern the administration of trusts generally. Particular attention is called to section 31 of the Trustee Act of 1925, which authorizes a trustee holding property during the infancy of any beneficiary to pay to his parent or guardian, or to apply towards his maintenance and education, such of the income as may in all the circumstances be reasonable. Moreover, if such a beneficiary upon attaining twenty-one does not have a vested interest in the property, the Act directs the trustee to pay the income to him until he either acquires a vested interest or until his interest fails. These specific provisions apply only to a gift which "carries the intermediate income": to all contingent or future specific or residuary bequests and devises, and to general bequests and devises in which the testator is *in loco parentis* to the legatee.⁷⁴ This statutory apparatus, together with the body of common law

70. A. UNDERHILL, *LAW OF TRUSTS AND TRUSTEES* 444 (11th ed. 1959).

71. It may be relevant to note in respect to the American doctrine that the *Clafin* case was decided by the same court which, at very nearly the same time, handed down the leading case announcing the doctrine of spendthrift trusts, which has only limited acceptance in England. *Broadway Natl. Bank v. Adams*, 133 Mass. 170, 43 AM. REP. 504 (1882).

72. 9 & 10 Eliz. 2, c. 62.

73. 15 Geo. 5, c. 19.

74. A. UNDERHILL, *supra* note 70, at 455.

trust doctrine and judicial construction which accompanies it, permits settlors to declare trusts in very simple terms.

The English bar seems to have escaped most of the refinements which have produced controversies in the United States about whether a trust is active or passive.⁷⁵ This may reflect in part the effect of the rule in *Saunders v. Vautier*. If the beneficiaries of a trust can terminate it whenever all the interests are vested in them, there is little need for a settlor to specify the duration of his trust in terms of express active duties of the trustee. Moreover, it appears that what we call a "dry" trust is called a "simple" trust in England. A simple trust is one in which the trustee's only duty is to convey the property to beneficiaries.⁷⁶ By implying such a duty, the English courts have escaped the problem of deciding whether the settlor has kept his trust active. Thus, while American draftsmen typically declare the substantive provisions of a trust by carefully describing the extent of the trustee's duties with respect to the several beneficiaries, English draftsmen may simply designate the beneficiary or a succession of beneficiaries.

It is also relevant that under English law, with some exceptions, trustees are not entitled to compensation for their services. Although a settlor may provide compensation for his trustee—and will normally do so when the circumstances indicate the advisability of appointing a professional trustee—the circumstances generally tend to encourage the appointment of relatives, friends, or solicitors.⁷⁷

Finally, the administration of decedents' and trust estates in England tends to be informal and unsupervised; with rare exceptions, a court will intervene for remedial, but not for supervisory, purposes.

B. *The English Sample: Common Provisions and some Implications*

Of the one hundred English wills examined in this study, thirty included dispositions of all or the residue of the testator's estate upon trusts for sale.⁷⁸ Eleven other wills contained trusts which were

75. The Law of Property Act repealed the Statute of Uses in England. But the mere inapplicability of that Statute to personal property in the United States has not prevented American courts from finding that a trust of personal property has terminated because it has become passive or "dry" G. BOGERT, TRUSTS AND TRUSTEES § 206 (2d ed. 1965).

76. A. UNDERHILL, *supra* note 70, at 12.

77. Unless provided otherwise by the will, a solicitor is not entitled to compensation for services which could be performed by someone not a solicitor. A. UNDERHILL, *supra* note 70, at 385.

78. Five of the thirty wills also included trusts not for sale. The informal nature of English estate administration does not produce public records which reveal the nature of the property covered by these trusts.

not trusts for sale, including one will which declared a charitable trust. Five more wills, which did not expressly declare trusts, nevertheless included dispositions which would require trust administration. The testators in these cases followed the common practice of appointing persons to act as both executors and trustees. Thus, the percentage of wills creating trusts in the English sample is more than two-and-one-half times that in the Michigan sample. But this data must be immediately qualified by what I think is a fair observation on the English sample: only fourteen of the forty-six English wills which used a trust device revealed testamentary objectives of the kind which would normally induce an American testator to create a trust. Such a categorical proposition requires some explanation, which is offered in the various observations on English practice that appear below.

1. *Dispositions not in Trust*

More than one half of the English wills examined either disposed outright of all of the testator's estate, or contained outright gifts in a variety of specific, general, or residuary bequests or devises. These wills are not readily distinguishable from an even larger majority of such wills in the Michigan sample. It does appear that more English testators are content to make their wills by inserting handwritten substantive language into standard printed forms; twenty-three out of the sample of one hundred wills were in this form as compared to five out of 187 American wills.

2. *Life and Remainder Interests*

In the Michigan sample, the separation of ownership from the beneficial enjoyment of property normally appeared in one of two forms: a trust administration during the lifetime of a beneficiary, usually the settlor's spouse, with remainders limited thereafter; or a trust administration during a period of years until the attainment of a stated age by one or more of the beneficiaries. The English wills studied contained only twelve arrangements of the first type, seven of which used the form of the trust for sale. As in Michigan, spouses predominated as life beneficiaries. The instruments usually directed the trustee to pay income to the life beneficiary, although in two cases the instructions were merely to hold property in trust for the beneficiary for life. Most wills limited remainder interests by the simple direction that upon the death of the life beneficiary, the trustees should hold in trust for the designated remaindermen. In four cases remainders were limited to designated classes of children

or issue living at the end of the life interests if they should attain twenty-one.⁷⁹

3. *Gifts upon Attaining the Age of Twenty-One*

Under authority conferred by section 179 of the Law of Property Act, the English Lord Chancellor in 1925 prescribed a series of statutory forms which testators could incorporate in their wills by reference. Two of these forms contain the following language:

[I]n trust, in equal shares if more than one, for all or any of my children or child who survive me and attain the age of twenty-one years or marry under that age, and for all or any of the issue living at my death who attain the age of twenty-one years or marry under that age of any child of mine who predeceases me, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share or shares which his or their parent would have taken if living at my death and so that no issues shall take whose parent is living at my death and so capable of taking.⁸⁰

The effect of such a form upon current drafting practice may be inferred from the fact that twenty-four of forty-six English trusts contained provisions of this sort. In most of these trusts the draftsman simplified the form in various respects, usually by confining the beneficiaries to the children of designated persons. Another common variation in the language limited gifts to males at twenty-one but to females at twenty-one or marriage. In four cases the gifts were by way of remainder after life interests; in the rest the gifts were immediate but by way of substitution in the event of the lapse of primary gifts. Most commonly a will simply directed trustees to hold for a person absolutely, but if he should die during the testator's life, then in trust according to the provisions of the standard form. All but three wills with age limitations contained the common introductory clause appointing persons as both executors and trustees, and all but five declared trusts for sale; only one of them made any other disposition which would require an active trust administration.⁸¹

79. These wills employed the standard form for such dispositions discussed under subsection 3 below.

80. Forms 9 & 10. Section 47 of the Administration of Estates Act of 1925, 15 Geo. 5, c. 23, and of the Intestates' Estates Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, contains similar language which is applicable when the residuary estate of an intestate is directed to be held on the statutory trusts for the issue of the intestate.

81. It should be noted in passing that only one English will imposed an age contingency other than the attainment of the age of twenty-one; in that case the age specified was twenty-five.

Some comment may be in order upon the substance of the standard English form for gifts to issue. The normal distribution per stirpes to the issue of the testator living

We have seen that most American testators who make substitutional gifts to children or issue of deceased legatees simply do not impose age limitations which require the use of a trust.⁸² If a will contains no other dispositions in trust, it is easy to understand why a testator would hesitate to declare one for so limited and contingent a purpose. The alternative is simply to make these substitutional gifts outright, without conditions relating to the age of the substituted legatees; indeed, this seems to be the prevailing American practice. In England, however, it is impossible to vest legal title to land in an infant.⁸³ When a gift of personal property is made to an infant instead of to trustees for the benefit of the infant, the testator's personal representatives are authorized by statute⁸⁴ to appoint trustees for the infant's interest.⁸⁵

Under this and the other distinctive features of English trust law noted above, English testators commonly resort to the trust to sell and convert as an over-all or residuary umbrella, and direct trustees to do things which are normally done by executors in this country. They may rely on elaborate statutory provisions which define the powers and duties of trustees, but they commonly designate relatives, friends, or solicitors to serve in this capacity without compensation. In this setting, English testators are relatively free to invoke those flexible substantive arrangements—including provisions designed to protect the interests of infant beneficiaries—which constitute the genius of the trust device. The prevailing practice is therefore to invoke a trust for all testamentary gifts to minors.

In the United States, on the other hand, the lack of any standard form for common dispositive provisions is reflected in the difficulty

at the time of his death is complicated when the testator imposes an age contingency. Taking by representation is confined to the situation existing at the testator's death. If an unmarried child dies under twenty-one after the testator's death, the number of primary shares are reduced and the quantum of the remaining shares is enhanced. No provision is made for the deceased child's issue in such an event, for unless he has taken a vested interest by marrying under twenty-one, the possibility of his having issue need not be contemplated. A number of testators, however, have abridged the standard form in a manner which may not be adequate to provide against all of the implicit contingencies. If the disposition is confined to the testator's children (rather than the issue) who attain twenty-one, no provision exists for the issue of a child who dies before the testator. If the alternative contingency of marriage under twenty-one is confined to female children, it is possible that a son of the testator may survive him, marry, and die under twenty-one leaving issue who are also not provided for.

82. See pt. I. E. *supra*.

83. Settled Land Act, 1925, 15 Geo. 5, c. 18, § 27; Law of Property Act, 1925, 15 Geo. 5, c. 20, § 19.

84. Administration of Estates Act, 15 Geo. 5, c. 23, § 33 (1925).

85. Under the same statute, the intestate share of an infant passes to his personal representative on trust to sell and convert.

which many testators encounter in attempting to provide substitutional gifts in the event of the death of primary beneficiaries.⁸⁶ In light of the English experience, the publication of some sort of official or otherwise reliable standard but adaptable forms for this and other recurring dispositive problems seems desirable. Our trust companies seem to have made some progress in this direction, at least with regard to what are called administrative trust provisions. As for substantive provisions, we should now recognize that these are not necessarily as individually tailored and diverse as we have always believed.

4. *Simple or Inactive Trusts*

Ten of the English wills examined declared trusts in some form, usually trusts to sell and convert, but directed trustees to do no more than hold property in trust for one or more persons "absolutely."⁸⁷ The use of such a "simple" trust may appear to be no more than a circumlocution for making simple outright bequests or devises to named persons. In fact, it probably reflects the indiscriminate English practice of casting residuary gifts in the standard form of the trust to sell and convert. In any case, the practical result of a simple or inactive trust will normally not be different from a gift in which no trust terminology is employed. Still, the simple trust may be advantageous under some circumstances: if upon a testator's death the exigencies of the case require it, the declared trust may be allowed to continue if and so long as the trustees and the beneficiary both desire it, without further action or order of any sort, and without otherwise disturbing or delaying the distribution of the testator's estate.

5. *Professional and Personal Trustees*

We have seen that most English testators name relatives, friends, or solicitors to serve both as trustees and executors. In thirty-eight wills in which such appointments were noted, twenty-nine named two or more such persons; two other wills named one such person. In each of seven wills the testator named a bank as executor and trustee, and two of these wills also named personal co-executors and co-trustees. Wills which appointed only executors invariably named nonprofessionals, usually one person.

86. See pt. I. E. *supra*.

87. In several of these wills, the testator included substitutional gifts of the same sort.

6. *Protective Trusts*

American indulgence of the dead hand has produced not only the *Clafin* doctrine, but also our doctrine of spendthrift trusts. Although the latter doctrine does not exist as such in England, obvious pressure for recognizing some such restrictive device has resulted in the creation of the so-called "protective trust." Under this arrangement, the testator directs that if any beneficiary for life does or suffers any act which would deprive him of the right to income, the trust shall terminate automatically. Thereafter, the income shall be held on trust to be applied for the maintenance and support of the beneficiary as the trustees in their absolute discretion think fit. In fact, section 33 of the Trustee Act of 1925 authorizes such trusts and prescribes a form for their use. A settlor may invoke the terms of the form merely by directing that income shall be held on "protective trusts" for the benefit of any person. Only one will in the present sample employed such a device for the benefit of the testator's daughter, who was life beneficiary of two thirds of the testator's residuary bequest. As indicated above, the incidence of spendthrift trusts in this country is substantially greater.⁸⁸

7. *Powers of Appointment*

Only two wills in the sample conferred a power of appointment upon a beneficiary. In one of them the testator gave his daughter a life interest in two thirds of the residue of his estate with a power to appoint a life or lesser interest to her surviving husband followed by a remainder interest limited by the usual form of trust provision for issue at twenty-one. The other example of a power of appointment appeared in connection with a complicated devise of land under the Settled Land Act.

8. *Advancements or Power to Invade Corpus*

In the case of property held on trust to sell and convert, section 32 of the Trustee Act of 1925 confers upon trustees the power in their absolute discretion to pay or apply capital money for the benefit of any person entitled to the capital of trust property. The trustee has this power whether the beneficiary is entitled to the capital absolutely or contingently upon attaining a certain age, or upon the happening of any other event. However, the trustee does not have the power to prejudice any person entitled to a prior life or

88. *Supra* p. 1331.

other interest unless the latter is of full age and consents in writing. The existence of this statutory authority explains why no such provisions appeared in any of the English wills in this survey which disposed of property in trust for minors. It may also help to explain the predominance in practice of the trust to sell and convert.

When property is limited in trust for one or more life interests with remainders thereafter, it may be desirable for trustees to have the power to invade corpus for the benefit of the life beneficiaries, especially when the estates involved are not large enough to assure their adequate maintenance out of income. It will be recalled that a large majority of Michigan testators who created trusts included such a power.⁸⁹ It is surprising, therefore, to discover that among the dozen English wills which provided life and remainder interests, only one included a power to invade corpus. The terminology used in that will was different from that normally employed by American settlors. It authorized the trustees by deed and upon consent of the life beneficiary to revoke all or any of the trusts, powers, and provisions declared in the legacy and to direct that the whole or any part thereof be held in trust for the life beneficiary absolutely.

9. *Disposition to Spouses*

The lack of public records of estate administration in England precludes any data on the identity of family members and other relatives who have survived a testator. One cannot be sure, therefore, whether a testator was survived by a spouse who was not mentioned in his will. Nor can one be sure whether a spouse mentioned in a will actually survived the testator. It can be inferred, however, that the disinheritance of spouses is rare. Although there is no English counterpart to the right of an American spouse to elect to take a statutory share against the terms of a will, an English spouse may seek some benefit from an estate under the so-called Family Provision Act⁹⁰ if, upon proper application, the Chancery Division rules that the will did not make reasonable provision for her maintenance.

The sample revealed one notable exception to the assumed practice of English testators to make adequate provision for their spouses: one testator established three elaborate trusts of both real and personal property but merely named his wife as one of several executors and trustees. It can be inferred from the surrounding

89. *Supra* p. 1331.

90. 1 & 2 Geo. 6, c. 45 (1938), *as amended*, Intestates' Estates Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, pt. II (1952).

circumstances that the wife had been amply provided for, either from her own resources or by prior inter vivos settlements. This case may indicate an advantage which the English system of flexible restraints on testation based upon the actual needs of surviving spouses has over the invariable forced share typically found in the United States, at least when the forced share statute does not take account of resources available to a surviving spouse other than those passing by will.

Data derived from the wills themselves may give some idea about the place of spouses generally in the English patterns of succession. Out of the sample of one hundred wills, thirty-nine named spouses as beneficiaries. The most significant fact—particularly in the light of similar data in this country⁹¹—is that twenty-five of the thirty-nine wills named spouses as the sole beneficiary. Seven more wills appeared to give the bulk of the estate to spouses, subject only to limited specific or general bequests. In seven other wills, spouses received less predominant portions. Of the wills not including spouses, thirty-three included children or other issue; twenty-eight mentioned a variety of relatives and nonrelatives other than spouses or issue.

10. *Settlements under the Settled Land Act: One Relic?*

In only one English case was land disposed of under the complicated provisions of the Settled Land Act. In that case, the testator devised certain family land in trust with an elaborate succession of beneficial interests for life and in tail, including successive special powers of appointment in two beneficiaries.⁹² When such an elabo-

91. *Supra* pp. 1307-08.

92. The language of the will was as follows:

I give and devise my freehold property situated and being in the County of . . . and known as . . . to my Trustees . . . upon the following trusts and so that every interest for life shall be without impeachment for waste:

- (a) Upon trust for my son . . . (A) . . . during his life with remainder
- (b) Upon trust for the first and other sons successively in order of seniority of my Son . . . [A] in tail with remainder Upon Trust for such daughter of my Son . . . [A] as he shall by Deed or Will appoint with remainder
- (c) Upon trust for the first and other Daughters successively in order of seniority of my Son . . . [A] in tail with remainder
- (d) Upon trust for my Daughter . . . [B] during her life with remainder Upon trust for such Son of my Daughter . . . [B] as she shall by Deed or Will appoint with remainder
- (e) Upon trust for the first and other Sons successively in order of seniority of my Daughter . . . [B] in tail with remainder Upon trust for such Daughter of my Daughter . . . [B] as she shall by Deed or Will appoint with remainder
- (f) Upon trust for the first and other daughters successively in order of seniority of my Daughter . . . [B] with remainder
- (g) Upon trust for such descendant of . . . [C] as the survivor of my Son . . . [A] and my Daughter . . . [B] shall by Will or Codicil appoint and in default of and subject to any such appointment In trust for the National Trust for Places of Historic Interest or Natural Beauty . . .

rate disposition emerges under an ingenious statutory scheme which—though complicated itself—facilitates a simple and straight-forward system of transmitting family wealth, one wonders if it signifies anything more than an aristocratic nostalgia for the era of the strict settlement.⁹³ But the care with which this disposition was drafted suggests a more thoughtful purpose. On its face it suggests an attempt by the testator to direct the devolution of a landed estate for a very long time indeed. By resort to entailed interests with remainders which must vest in due time, the testator has kept his disposition within the limits of the Rule Against Perpetuities. But the land itself has not been tied up at all, for each of the successive “tenants for life” can convey the land in fee simple, preserving only a capital fund in its place. The ability to break out of the strictures of the disposition has been further enlarged by the power in two of the beneficiaries to appoint the corpus absolutely. If this testator had merely wanted to preserve the corpus in one form or another for as long as possible, he could have accomplished his purpose much more simply, as some eccentric English testators have shown by their resort to the notorious “royal-lives clause.”⁹⁴ Presumably this testator really did want to keep the family land intact as long as possible. By his antiquated scheme of dispositions, he announced his purpose. Although the English law no longer allows him to enforce this purpose, he has at least established an intricate line of succession which will operate without further ado unless one or another of the participants along the way chooses to sever the bonds of successive entailments. It may be assumed that there are moral pressures here against any severance that it not made for compelling reasons. Maybe this is all that the complicated regimes still permitted by the Settled Land Act amount to: the formal marshalling of moral pressure for perpetuating landed estates subject to the overriding policy of modern English law that land shall always remain freely alienable.

C. *Summary Impressions*

For usual testamentary purposes, the English legal profession has exhibited a continued sensitivity to the initial genius of the trust. In characteristic fashion, it has achieved by a complexity of apparatus an admirable simplicity of practice. In so doing, the legal pro-

93. A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* 382 (1st. std. ed. 1950).

94. *See, e.g., In re Villar*, [1929] 1 Ch. 243.

fession has rendered the trust a normal and routine, rather than an extraordinary, dispositive device. By somehow promoting a practice of such generality that a trust is at times declared when no special reasons for a trust appear, the English have remained free of those impediments which frequently turn settlers away when good reasons for a trust are present. And they may have escaped the reproach, so often uttered among us, that the trust is a device of value only to the wealthy. At the same time, when the complexity of large estates creates the need or desire for more elaborate arrangements, all of the devices and practices familiar to us—as well as some uniquely complex arrangements of their own—may be employed.

III. CAVEAT AND CONCLUSION

This Article must end, not with a flair of trumpets, but on a quiet note. The study was begun, not to prove a thesis, but to look at a massive institution across a narrow spectrum and report the results. What I have seen does not seem to be alarming, nor unresponsive to the current needs of those who should be served by the available processes of testamentary succession. Looking back at the local sample of American experience through some of the more striking contrasts with the English scene, one cannot justify any general or ultimate comparative judgment. On the basis of what appears herein, one cannot even say whether the English system is better for them than ours is for us. The English seem to me to do their job in this field very efficiently. But we cannot expect to duplicate fully the results of their experience. Having long since departed from our common origins, we have for compelling reasons experienced a somewhat divergent legal history.

When we speak of comparative law, we rarely think of English-American comparisons; we tend to assume too much about a common heritage. This is unfortunate, for there may be special significance in the differences between kindred forces. To the extent that this study was comparative, however, I am more aware of substantial similarities than of meaningful contrasts. The simple dispositions of humble people are much the same on both sides of the Atlantic, and are carried out in much the same way, despite the widespread use in England of the "trust for sale."

I have made some comments throughout this Article about specific American and English laws and practices. At this point, a few more general observations are in order.

First, the study has revealed that a feature of relative strength

in English practice is its responsiveness to the needs of common people. In this regard, the greatest source of American disadvantage lies in our complicated system of estate administration. The monumental efforts of the current committee charged with producing a new Uniform Probate Code may substantially reduce this disadvantage. I refer mainly to the efforts of the committee to establish a system of informal, judicially unsupervised administration of decedents' estates—a system which would avoid unnecessary delays and expense. This must be the most effective answer to the clamor about "how to avoid probate." The same objective logically extends to trust administration, so that testamentary trusts can be administered with the same simplicity as inter vivos trusts. The committee is also projecting appropriate legislation in this direction.

Second, we would do well to reconsider the policy behind the *Claflin* doctrine,⁹⁵ as well as our elaborate doctrine on spendthrift trusts. I must admire the English attitude toward the dead-hand control of property. There is something appealing about their recognition that normally the continuance of a trust need not be compelled beyond the minority of a beneficiary or the duration of a life interest. English trustees are answerable in court only to those who are beneficially interested in or entitled to the trust estate. The ghost of a deceased settlor who has parted with all interest in property sits with little grace upon a trustee who is by such visitation authorized to resist the requests of those who are the beneficial owners. Abolition of the *Claflin* doctrine would not necessarily require the abolition of spendthrift trusts. But such trusts could be confined within reasonable limits, and testators need not be encouraged to use them. There are some signs of a trend in this direction. Recently the Ohio Supreme Court rejected the doctrine of spendthrift trusts altogether.⁹⁶

To achieve some of the incidental benefits which ought to follow from the removal of the *Claflin* doctrine would require a more sensible treatment of so-called dry or passive trusts. If property is simply given in trust for one or more persons in succession—without express directions to the trustee about the payment of income and principal—it is fair to assume that the trustee is expected to do what a trustee is required by law to do in the management of property for the benefit of others. This includes the payment of income to any beneficiary who is not yet entitled to call for the payment of principal. If the latter duty is not clear in our law unless expressly

95. See text accompanying notes 52 and 69 *supra*.

96. *Sherrow v. Brookover*, 174 Ohio St. 90, 189 N.E.2d 90 (1963).

directed, it can easily be made explicit by an appropriate provision in any trust code.

English as well as American testators rely upon elaborate trust provisions whenever they have elaborate dispositive objectives. As we have seen, English testators resort to the standard form of the trust for sale as a normal and common means of testamentary disposition. It is striking that in the land of the strict settlement, trusts are routinely expressed in the simplest conceivable terms. Perhaps the contrast between the two systems can be put most simply by saying that English testators commonly resort to simple trusts in circumstances in which American testators would not resort to the trust at all.

We would hardly wish to encourage American testators to employ the trust if they would prefer to leave their property outright. But if we had the English doctrinal structure, testators could more readily resort to the trust when its special benefits are indicated. I have been struck by the common English practice of making dispositions in such forms as the following: (a) "to *X* in trust for my daughter *B* absolutely," or (b) "in trust for my wife for life, and on her death in trust for my children *A* and *B* in equal shares." The American counterpart of (a) would probably take the form of an outright gift to *B*. Under (b), a testator might give property to his wife for life, with a remainder on her death to *A* and *B*; alternatively, he might give the property in trust, to pay the income to his wife for life, and on her death to pay the principal to *A* and *B*. Although the differences may seem to be insignificant, the English practice under (a) has the advantage of permitting continuance of the trust if the parties desire it under the circumstances existing when the decedent's estate is closed. There would be no need to worry about the duties of the trustee, for income would be paid to *B* until she attained her majority and called for payment of the principal. Nor would there be any concern about what should happen on *B*'s death, for since she would be the owner of the beneficial interest, she could leave it to whomever she pleased.

Consider in contrast how an American testator would proceed if he wanted to give a full beneficial title to *B* but also wished to provide the benefits of a trust administration for *B*'s benefit. The draftsman would insist that the testator prescribe the trust duration, which under the circumstances might be arbitrary and wholly unrelated to *B*'s future needs. Moreover, he would have to tell the trustee what to do after trust termination. If the duration of the trust were for *B*'s life, it would be difficult to express this in terms of a direction

to pay principal without implying that it was the testator, rather than *B*, who was controlling the devolution of title upon *B*'s death. In such circumstances a draftsman may feel driven to prescribe an elaborate skein of contingent future interests, which might not only depart from the original purpose of the disposition but might also present those pitfalls of ambiguity which lurk in the path of an unwary or inexperienced draftsman. Much the same analysis can be made for example (b), except for the interposition of the life estate which under the English rules would prevent termination of the trust in the meantime unless all parties, *sui juris*, otherwise agreed. In summary, for those testators who do not wish to leave all their property outright, there may be some sense in promoting a trust system which encourages making as many beneficial interests as possible indefeasibly vested, rather than trust practices, like ours, which commonly produce a variety of contingent future interests.

Third, the survey indicates that English practice virtually eliminates outright testamentary dispositions to minors—undoubtedly a consequence of the doctrine which prevents the legal title to land from ever vesting in a minor. Resort to the trust for sale as a normal and common means of testamentary disposition permits an efficient and flexible means of transmitting property to minors, one that includes some assurance that their interests will be properly protected. Under provisions of the English trust statutes, a trustee under a trust for sale, unless otherwise directed by the settlor, has several alternatives in disposing of income and principal for a minor's benefit, including a discretion to pay income to a parent or guardian. Within the framework of the changes suggested above, we could improve our management of the interests of infant beneficiaries.

Fourth, the prevalence in England of standard patterns of disposition reflects the absence or suppression of individual dispositive whims as well as a distillation of drafting experience. Standard substantive provisions for recurrent dispositive situations are commonly kept by American law firms, estate specialists, and trust companies, but the best of these forms are too often husbanded as part of an undisclosed stock-in-trade. Some such material should be made available to the casual draftsman—the one most likely to serve persons of modest means. Legislation could authorize standard provisions to be incorporated by reference; at least such provisions could serve as models for individual adaptation. The more general the circulation and use of such provisions, the more readily could testators be led to formulate their objectives accordingly.