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## FUTURE INTERESTS-CONSTRUCTION-WHEN CLASS CLOSES IN CASE OF PER CAPITA CLASS GIFT

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FUTURE INTERESTS—CONSTRUCTION—WHEN CLASS CLOSES IN CASE OF PER CAPITA CLASS GIFT—Testator died in 1928 leaving an estate of \$10,000,000. His will provided that each of his grandsons, two of whom were alive at his death, was to receive the income of a \$100,000 trust for life. The residue of his estate was left in another trust and was to remain intact until the expiration of 21 years after the death of testator's last surviving grandchild living at the time of his death.<sup>1</sup> Meanwhile the income from this trust was to go to various other legatees. When another grandson was born in 1949, the question arose whether a \$100,000 trust should be created for him out of the residuary trust. The Orphans' Court refused to create one on the ground that the class had closed at testator's death. On appeal, *held*, reversed. The class remains open until distribution of principal at the termination of the residuary trust. *In re Earle's Estate*, 369 Pa. 52, 85 A. (2d) 90 (1951).

When a gift is made to a class of persons not named specifically but given some group designation such as "grandsons," a court faces the difficult task, in the absence of explicit language, of determining whether the testator intended to close the class at his death or keep it open to include after-born persons in the benefited group.<sup>2</sup> The common law resolves this ambiguity of intent by applying certain rules of construction, based on considerations of convenience and the desires of testators in general. These rules are presumptions, rebuttable only by a clear indication of contrary intent. In the case of a per capita class gift to take effect immediately, whether or not there are any members of the class living at testator's death, the class presumptively closes at once, assuming that the distribution of the residue is not

<sup>1</sup> The court deferred consideration of the question whether the gift over on termination of the trusts for grandsons violated the rule against perpetuities, but indicated that it would probably avoid violation of the rule by construing the trusts for after-born grandsons as being for life or until the termination of the residuary trust.

<sup>2</sup> A class gift may be broadly defined as a gift to persons as a group rather than as individuals. This emphasis on the group over its component members, by way of illustration, avoids a lapse where one member dies before the testator's death, and may permit the benefited group to increase after the will takes effect. In a per capita gift, a certain amount is given to each member of the class, as distinguished from a lump sum to be shared by the class as a whole. See 2 SIMES, FUTURE INTERESTS §§364, 386 (1936).

postponed.<sup>3</sup> Courts recognize that testators generally want to benefit all those bearing the class designation whenever born, but presume that testators would not intend to keep the class open at the expense of an indefinite delay in the distribution of the residue. When, however, distribution of the entire estate will not take place until sometime in the future in any event, the courts find no inconvenience in presuming that the testator intended to let the class increase until that time.<sup>4</sup> The court in the principal case, in holding that a trust should be set up for the first after-born grandson, bases its decision on two alternative grounds. First, it argues that there is no need to apply any presumption since the language is unambiguous in indicating an intent to benefit all grandsons regardless of when they should be born. The court bases this branch of its opinion mainly on the fact that the will used language of futurity in giving trust funds to "each and every" grandson who "shall by birth inherit . . . the name of Earle."<sup>5</sup> It is submitted, however, that the absence of any language making specific provision for after-born grandsons leaves some doubt whether the testator really would have intended to keep the class open at all costs;<sup>6</sup> hence application of the appropriate rule of construction was necessary. The court assumes, alternatively, that the language is ambiguous, but proceeds to the same result by applying the rule of construction which presumes testator intended to keep the class open, even though a fixed sum is given to each member, where distribution of the entire estate is postponed. The crux of the supreme court's disagreement with the lower court is the meaning of the word "distribution" as used in the rule of construction which both agree is applicable. As the lower court interprets the facts, "distribution" took place at the time the trusts were established. The supreme court, on the other hand, is of the opinion that

<sup>3</sup> 2 SIMES, FUTURE INTERESTS §386 (1936); *Ringrose v. Braham*, 2 Cox 384, 30 Eng. Rep. 177 (1794); *Storrs v. Benbow*, 2 M. & K. 384, 39 Eng. Rep. 862 (1833); *Howland v. Howland*, 77 Mass. 469 (1858). In Kentucky the class is apparently kept open even where a delay in distribution results, if the class is closely related to the testator. 2 SIMES, FUTURE INTERESTS §377 (1936); *Azarch v. Smith*, 222 Ky. 566, 1 S.W. (2d) 968 (1928).

<sup>4</sup> 2 SIMES, FUTURE INTERESTS §386 (1936); *McLain v. Howald*, 120 Mich. 274, 79 N. W. 182 (1899); *Heisse v. Markland*, 2 Rawle 274 (1830); *Austin's Estate*, 315 Pa. 449, 173 A. 278 (1934); 3 PROPERTY RESTATEMENT §294(q) (1940). See also A. James Casner, "Class Gifts to Others than to 'Heirs' or 'Next of Kin'—Increase in the Class Membership," 51 HARV. L. REV. 254 (1937). It is noteworthy that distribution in the principal case was delayed, not because of any intervening life estate, as is often the case, but because the very large residue was put in trust.

<sup>5</sup> Principal case at 56.

<sup>6</sup> If the residue had not been in trust, a finding that this language showed a clear intent to keep the class open would have forced the court to delay final distribution until the death of both of the testator's sons. Even where a testator attempted to include in the class children "born or hereafter to be born," the class was closed at his death; *Howland v. Howland*, supra note 3. But where a will went so far as to direct that a fund be set aside to provide for after-born members of the class, the court kept the class open; *Deffis v. Goldschmidt*, 1 Mer. 417, 35 Eng. Rep. 727 (1816). See 3 JARMAN, WILLS, 7th ed., 1640 (1930).

while the establishment of the various trusts was distribution of a sort, it was not the kind of distribution which warrants closing the class, since no inconvenience would be suffered by keeping the class open until distribution of the corpus of the residuary trust. It is submitted that in giving the word "distribution" such a technical definition the lower court overlooks the fact that the terms used in the rule are subordinate to the policy of convenience behind it. It is not an inconvenience, furthermore, as the dissenting opinion in the supreme court argues, merely because permitting the class to increase after testator's death will diminish the future shares of income going to residuary beneficiaries, inasmuch as testator intended them to have only what was left after his specific bequests had been satisfied.<sup>7</sup>

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<sup>7</sup> There seems to be no objection in the authorities to depriving other beneficiaries of trust income in order to admit a new member to the class; it is only where divestiture of principal sums not in trust is required that the courts refuse to involve themselves in the difficulties of increasing the class. In the case of income from a lump sum to a class, for example, after-born members are let in even though this diminishes the shares of income going to older members. 2 SIMES, FUTURE INTERESTS §387 (1936); *In re Wenmoth's Estate*, 37 Ch. Div. 266 (1887).