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# JARRETT V. MCREYNOLDS, A NEW ERA OF WILLS CONSTRUCTION IN VIRGINIA?

JOSEPH E. ULRICH\*

## I

When J. T. Jarrètt, Sr.'s will was executed in 1927, his family consisted of a wife and three children.<sup>1</sup> The general plan for his estate was certainly not unique: he wished to provide for his wife during her lifetime and his children after her death. To this end he left his entire estate in trust, directing the trustee to pay the income to his wife "for the maintenance and support of herself and our children. . . ."<sup>2</sup> After the widow's death the trustee was to pay the trust income to the testator's children in equal shares until they reached 25, but if a child died under 25 without children surviving him, such deceased child's share of the income was to be paid to the "survivor or survivors."<sup>3</sup> The ultimate distribution of the trust estate was controlled by the three cryptic sentences quoted below. Following the example of the Virginia court, I shall identify them with the letters A, B, & C.

Sentence A describes the testator's children who shall take shares and prescribes the time when their shares shall be distributed:

As each of my children arrives at the age of twenty-five years after my said wife's death, or to such thereof as may be twenty-five years of age upon her death, or should my said wife predecease

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<sup>1</sup>Jarrett v. McReynolds, 212 Va. 241, 183 S.E.2d 343 (1971).

<sup>2</sup>The pertinent part of the will provided:

ITEM C. I direct that my said Trustee shall pay and deliver to my wife, Anna A. Jarrett, at least quarterly, the entire net income from my said trust estate, so long as she may live, for the maintenance and support of herself and our children.

183 S.E.2d at 344.

<sup>3</sup>The pertinent part of the will provided:

ITEM D. Upon the death of my said wife, should she survive me, or in the event she shall predecease me, then upon my death, I direct my said Trustee to continue to hold and manage the said trust estate as hereinabove provided and pay the net income therefrom equally to each of my children until each of them shall become twenty-five years of age, or to the survivor or survivors thereof, *per capita*, should any of them die without children surviving before reaching the age of twenty-five years.

183 S.E.2d at 344.

me, then to such thereof as may be twenty-five years of age upon my death, I direct my said Trustee to transfer, pay over and deliver to each of them their share of the principal of my said trust estate, and thereupon such child shall cease to participate in the income from the remainder of said trust estate, and as to each part of the principal so paid and delivered this trust shall terminate.<sup>4</sup>

Sentence B, said the court, "causes the difficulty in this case, probably because of faulty drafting":<sup>5</sup>

Should any of my said children die before attaining the age of twenty-five years leaving no children surviving, then such deceased child's part of the principal of said trust estate shall belong to and be by said Trustee paid over and delivered to the survivor or survivors thereof equally, or to the surviving children *per stirpes* of any of my children who may be then dead, as and when their right thereto has become fixed and they are qualified as herein provided to receive the same.<sup>6</sup>

Sentence C disposes of the share of a deceased child, but only if that child leaves surviving children:

Should any of my said children die before receiving or before being entitled to receive his or her portion of said trust estate as hereinabove provided, leaving children surviving, my said Trustee shall continue to hold and manage the decedent's share of said trust estate and pay the net income therefrom equally at least quarterly to decedent's surviving children (the testator's grandchildren) or their guardian or guardians until the youngest thereof reaches the age of twenty-one years, at which time said Trustee shall pay over and deliver equally to the survivors their parent's share of said trust estate.<sup>7</sup>

Testator was survived by his wife and three children. One of his children, James T. Jarrett, Jr., predeceased his mother, the life tenant under the trust, at age 34. He left no surviving children. He left his entire estate to his wife, Elizabeth, now Elizabeth McReynolds. Upon the death of the life tenant, Mrs. McReynolds, claiming through her husband, demanded one-third of the corpus of the trust. The testator's surviving children disputed her claim. The lower court's judgment<sup>8</sup> for Mrs. McRey-

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<sup>4</sup>*Id.* at 345.

<sup>5</sup>*Id.* at 346.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 345-46.

<sup>8</sup>The trial court held that Elizabeth H. McReynolds, as the sole devisee under the will of James T. Jarrett, Jr., was entitled to one-third of the trust principal on the ground that the will of James T. Jarrett created a defeasible vested remainder in his son, James T. Jarrett, Jr., deceased, and that the remainder could be divested only upon the latter's death without issue and before arriving at the age of twenty-five years. *Id.* at 345.

nolds was appealed. The supreme court reversed, concluding that a child of the testator could share in the trust corpus only if he fulfilled two conditions, reaching 25 and surviving the life tenant.

How did the court rationalize this result? The court first stated the old shibboleth that its function "is to discern the testator's intent from the language used in the will, giving effect to and reconciling, if possible, all provisions of the will."<sup>9</sup> It then looked to each of the three sentences quoted above to see if James Jr. (and through him, Mrs. McReynolds) was granted anything by the express language. He had no claim under Sentence A, because James Jr. was not alive at the life tenant's death. He had no claim under Sentence C, because it only controls distribution where a child dies with children surviving him. And, he had no claim under B, although this clause caused the court more trouble. The negative inference from B is that a child who dies over 25 without surviving issue prior to the life tenant's death was entitled to a share, i.e., a child by fulfilling the age requirement took a vested interest in one-third of the trust principal, but this interest could subsequently be divested to the extent the trustee found it necessary to encroach on the corpus to carry out his duties under various sections in the will.<sup>10</sup> The court refused to accept this inference because "Sentence B purports not to vest shares in the testator's children when they attain 25, but rather purports to vest shares of the testator's deceased children in his living children and grandchildren."<sup>11</sup> Instead, the court interpreted "Sentence B as intending, but inadvertently omitting by its express language. . ."<sup>12</sup> to say that a child who died over 25 without children prior to the life tenant's death failed to take a share. This latter interpretation was required, said the court, in order to make the provisions of Sentences A, B, & C conform with Clauses V<sup>13</sup> and VI<sup>14</sup> of the will which authorized the trustee to invade

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<sup>9</sup>*Id.* at 345.

<sup>10</sup>This is precisely the line of reasoning put forth by the appellee to support the judgment of the trial court. *Id.* at 345.

<sup>11</sup>*Id.* at 346.

<sup>12</sup>*Id.*

<sup>13</sup>Clause V of the will provided:

In the event that any of my aforesaid children shall not have completed their education before my death, I direct and hereby so empower and authorize my said Trustee to use such portion of the principal of my estate, if the net income therefrom is in its opinion insufficient, as it may deem expedient for the proper education of my said children to the end that each of them shall have the best education of which they will take advantage.

*Id.* at 343.

<sup>14</sup>Clause VI of the will provided:

In the event that my wife, or any of my children, shall suffer any illness or bodily injury, I direct and hereby so empower and authorize my said Trustee to use such portion of the principal of my estate, if the net

the trust corpus "for the benefit of the testator's wife and children."<sup>15</sup>

To provide that a child's share should vest irrevocably in right when he attained age 25, even though the testator's wife was living, would conflict with a provision authorizing the Trustee to invade the principal of the estate as a whole for the benefit of the testator's wife or any child.<sup>16</sup>

The court also based its conclusion on the fact that if a child took a vested interest before the time of distribution, he could by his will pass a share of the trust estate to persons other than the testator's lineal descendants. To keep his property in the hands of his immediate family was his primary goal.<sup>17</sup>

## II

Forgetting the court's reasoning for the moment, the result reached is excellent. The decision holds that James Jr. did not die owning a future interest.<sup>18</sup> From this flow three beneficial consequences. First, an unnecessary tax is avoided. Had the court held that James Jr. took a vested interest subject to divestment, the value of this interest would have been includible in his estate for federal estate tax purposes.<sup>19</sup> The very real difficulties of valuation of the future interest which often cause extended litigation would also be present.<sup>20</sup> Finally, James Jr.'s executor would have the problem of raising the money to pay the tax, since future inter-

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income therefrom is, in its opinion insufficient, as it may deem expedient, to the end that they shall have proper medical attention.

*Id.* at 343.

<sup>15</sup>*Id.* at 346.

<sup>16</sup>*Id.*

<sup>17</sup>The exact language used by the court in Jarrett was as follows:

. . . the will as a whole, and particularly sentences A, B and C, evidences an intention to pass the estate at the time fixed for distribution, to the testator's descendants.

*Id.* at 346.

<sup>18</sup>A person owns a future interest if, on his death, this interest does not terminate. In other words, he has a future interest which is descendible, which will pass through his estate. Any type of future interest—reversion, right of entry, possibility of reverter, remainder or executory interest—may have this characteristic. For example, suppose T leaves \$100,000 to A for life, and then to B if B survives A, but if B does not survive A, to C. B has a contingent remainder which terminates automatically if he fails to survive A. Thus, B's contingent remainder is not descendible. C also has a contingent remainder, but his interest does not necessarily terminate on his death. Thus, if C should predecease both A and B, his contingent remainder would descend to his successor in interest. If B should subsequently predecease A, this contingent remainder would vest in C's successor. C, therefore, died owning a future interest.

<sup>19</sup>INT. REV. CODE OF 1954, § 2033.

<sup>20</sup>See W. LEACH & J. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 23 (Supp. 1962).

ests of this character are ordinarily unmarketable.<sup>21</sup> The fact that James Jr. did not have possession of this property during his lifetime does not prevent the tax. By deciding that James Jr. had to survive the life tenant in order to get a share of the trust corpus, the court's holding had the effect of relieving James Jr.'s estate of a needless tax.<sup>22</sup>

A second related benefit follows from this ruling. If the court had held that James Jr. took a vested interest subject to divestment, it probably would have been necessary to reopen James Jr.'s estate.<sup>23</sup> At the date of this decision James Jr. had been dead approximately twenty-seven years. To reopen this estate at this late date would have been costly, time consuming, and would serve no good purpose.<sup>24</sup> The court's decision that James Jr. took a contingent interest avoids all this.

Third, the decision keeps the property in the hands of the testator's lineal descendants. The court indicated this was one reason for its holding. Since this point will be discussed more fully later in this article, it will only be mentioned here. Most testators prefer to favor their blood kin to strangers. Where nothing is clearly indicated to the contrary, a decision which transmits the testator's property to his lineal descendants as opposed to third parties is most likely to be in accord with his actual intent. The decision in *Jarrett* does exactly this.

### III

While the result in *Jarrett* is good, the reasoning supporting this result is not. I am sure that this opinion will confuse rather than clarify the law, and that is unfortunate. One can readily sympathize with the court's dilemma in *Jarrett*. Distinguishing between vested and contingent inter-

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<sup>21</sup>The consideration of marketability is tied closely to that of valuation. Would you buy one of these interests? Consider that the value of the interest will depend not only upon the life expectancy of the life tenant, but also upon (1) the number of remaindermen in being; (2) the likelihood or unlikelihood of others being born; and (3) if the time of substitution for the substitutionary gift to take effect is held referable to the life tenant's death, the possibilities as to whether any other remaindermen who may die before the life tenant will leave descendants surviving them or not. Schuyler, *Drafting, Tax, and Other Consequences of the Rule of Early Vesting*, 46 ILL. L. REV. 407, 434 (1951).

<sup>22</sup>Of course the desirability of this result depends on one's social philosophy regarding taxation of estates.

<sup>23</sup>*Knight v. Pottgieser*, 176 Ill. 368, 52 N.E. 934 (1898); cf. *Security Trust Co. v. Irvine*, 33 Del. Ch. 375, 93 A.2d 528 (Ch. 1953) in which the court does not require decedent's estates long closed to be reopened, but directs distribution directly to the beneficiaries subject to tax obligations. There is no statutory procedure in Virginia for reopening an estate, which has led at least one authority in this field to suggest that statutory enactments are necessary to cure the indefiniteness in estate administration.

<sup>24</sup>One of the primary functions of estate administration is to insure the payment of creditors' claims. Obviously reopening the estate after twenty-seven years would not serve this purpose.

ests continues to be one of the most perplexing of all judicial tasks.<sup>25</sup> Precedent is of questionable value in interpreting wills. Jarrett's will, moreover, gives few clues to the proper resolution of the issue before the court. In fact there are so many inconsistencies within the instrument that the court's decision could be based on little more than an intelligent guess. Conceding these difficulties, the court could have given a more plausible explanation for the choice it made.

Jarrett Sr.'s lawyer made two common drafting errors: first, he failed to make individual provisions for those future changes in family circumstances which could have been foreseen at the time the will was drafted;<sup>26</sup> and second, he tried to cover multiple results in general clauses.<sup>27</sup> Viewing the gifts to the testator's children in the principal of the trust estate from the time the will was executed, there were eight eventualities which should have been foreseen and covered expressly in the instrument. These four eventualities are expressly covered by the will:

- A. Children Survives Parent (life tenant) and
  1. dies under 25 with issue;
  2. dies under 25 without issue;
  3. survives to 25 with issue;
  4. survives to 25 without issue.<sup>28</sup>

None of the following possibilities are covered by this instrument:

- B. Child Predeceases Parent (life tenant)
  1. under 25 with issue;
  2. under 25 without issue;
  3. over 25 with issue;
  4. over 25 without issue.

For example, assume that James Jr. had died before the life tenant, at age 23, with children surviving him (B(1)). At first glance Sentence C seems to cover this situation, but in fact it does not. At James Jr.'s death Sentence C commands the trustee to pay the income from the decedent's share to his surviving children or their guardians. Such provision is inconsistent with Clause IV, c, which directs the trustee to pay the entire income from the trust to the wife during her lifetime and with Clauses V

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<sup>25</sup>See Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467 (1965); Schuyler, *Drafting, Tax, and Other Consequences of the Rule of Early Vesting*, 46 ILL. L. REV. 407 (1951).

<sup>26</sup>In the words of Professor Powell, the drafter "should spell out, ad nauseam, if necessary, the details of the desired disposition." 2 POWELL ON REAL PROPERTY § 325 (rev. ed. 1971).

<sup>27</sup>W. LEACH & J. LOGAN, *MANUAL FOR TEACHERS*, accompanying cases and text on FUTURE INTERESTS AND ESTATE PLANNING, 8-12 (1962).

<sup>28</sup>A(1) is covered by Sentence C; A(2) is covered by Sentence B; A(3) is covered by Sentence A; A(4) is covered by Sentence A.

and VI, emphasized by the court in construing Sentence B, which permit the trustee to invade the corpus of the trust in certain situations only if the life tenant is dead. It only covers by its express terms situations in which a child outlives the life tenant. Yet, can there be any doubt that the draftsman of Jarrett Sr.'s will intended, if he considered the matter at all, to cover this situation and A(1), B(3) and possibly A(3)<sup>29</sup> by this Clause.

The court unfortunately refused to notice these gaps in the disposition. By ignoring these gaps the court could say, by implication at least, that unless James Jr. was expressly entitled to take under Sentence A, B, or C, Mrs. McReynolds' claim must fail. B and C are not applicable; the crucial sentence is A. Sentence A only covers two situations, A(3) and (4). The court's use of blinders, however, permits it to say that a child can take a share only if he fulfills the requirements set out in this sentence. What are those requirements? One is clearly stated—a child must reach 25. The court implies a second requirement—that the child survive the life tenant.

How does the court arrive at the conclusion that Sentence A imposes a condition of survivorship on the testator's children? The argument implicit in the court's position will be set out in detail. Sentence A states in pertinent part, that "to such [of my children] as may be twenty-five years of age upon her death . . . I direct my said Trustee to transfer, *pay over and deliver* to each of them their share of the principal. . . ."<sup>30</sup> (emphasis added) When the word "upon" is read in connection with the words "pay over and deliver", it is evident that futurity is annexed to the gift.<sup>31</sup> The trustee is directed to deliver the share of the corpus at a future time (the death of the widow) to the proper party. Obviously, the trustee cannot *pay over and deliver* this share to a dead man; rather, the person must be alive to receive it. Therefore, the inference is inescapable that a child, in order to take a share, must survive to the time of distribution. In more formal terms, futurity is annexed to the substance of the gift. Apparently, this is the basis for the supreme court's conclusion that James Jr. "died before receiving or being entitled to receive a share of the trust estate under Sentence A."<sup>32</sup> I do not find this argument persuasive. It is based on the same rationale used to support the now discredited "divide and pay over rule." The best known statement of the divide and pay over rule is found in *Matter of Crane*:<sup>33</sup>

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<sup>29</sup>For further discussion see text accompanying notes 44-45 *infra*.

<sup>30</sup>183 S.E.2d at 345.

<sup>31</sup>2 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 586-90 (2d ed. 1956); 5 AMERICAN LAW OF PROPERTY §§ 21.17-20 (A. Casner ed. 1952).

<sup>32</sup>183 S.E.2d at 345.

<sup>33</sup>*Matter of Crane*, 164 N.Y. 71, 58 N.E. 47 (1900).

Where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate; contingent, and not vested.<sup>34</sup>

Most modern authorities<sup>35</sup> have refused to follow this rule. The Restatement of Property<sup>36</sup> declares that divide and pay over language has no significance in determining whether an interest is vested. The modern view seems preferable, for the rule as stated by the court in *Matter of Crane*, and its underlying rationale, make no sense. A simple example illustrates this point. Suppose real property is left to A for life, and upon A's death to B if he reaches twenty-five. This gift creates a life estate in A, and a contingent remainder in B, the only contingency being that B reach twenty-five. Once B reaches twenty-five, his remainder vests absolutely in interest, but he is entitled to possession of the property only on the death of A. If B predeceases A, B's remainder passes through his estate to his successors in interest. To reach this conclusion (that B's interest vests absolutely once he attains twenty-five) one must treat the words "upon A's death" as surplusage and not words of condition. The only difference between the example given and the disputed gift made in Jarrett's will is that the latter gift was in trust. Any well drawn trust instrument makes gifts by directing that the trustee do something. Speaking loosely, I might say, "all my property is to be left in trust for A for life, and upon A's death to B." This is poor technique. If the gift is made in this form, the trustee must make a determination of what interests are created under the instrument. This, however, is not the trustee's function: his task is limited to faithfully carrying out the settlor's directions as stated in the trust instrument. The correct technique is to direct the trustee what he is to do with the income and principal during A's lifetime, and then direct how he shall pay the principal upon A's death to the remaindermen. Consequently, if there is a rule that gifts made by way of a direction to pay principal to a certain individual are to be considered contingent upon survival of the named taker to the time of vesting in possession, that becomes a rule that proper technique always creates a contingent gift. This is precisely what finding a double contingency in this case seemingly requires.

It would be improper in a discussion of this case not to note the court's other rationale for implying a condition of survivorship. The court reasoned that to hold that a child took a vested interest on reaching 25 while the life tenant was still alive would conflict with the provision "authorizing the trustee to invade the principal of the estate for the benefit of the

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<sup>34</sup>*Id.* at 76, 58 N.E. at 48.

<sup>35</sup>W. LEACH & J. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 324 (1961); RESTATEMENT OF PROPERTY § 260 (1940).

<sup>36</sup>RESTATEMENT OF PROPERTY § 260 (1940).

testator's wife or children."<sup>37</sup> For if a child received an irrevocably vested interest in attaining age 25, his "share would [have to] be set aside and held inviolate, pending distribution at a later time."<sup>38</sup> The court is apparently saying that once a remainderman attains a vested interest in a share of the trust corpus, the trustee's express authorization to invade the corpus somehow from that time forth becomes null and void as to that remainderman's share. Now that is indeed a novel proposition!

#### IV

How, then, should the court have gone about the task of rationalizing the result it wanted? Two approaches seem possible. An extensive examination of the instrument could have led the court to the conclusion that the testator intended to leave the principal of his estate to those of his lineal descendants who were living at the time of distribution. There is nothing new in this. Or, the court could have taken a more radical tack. It might have asserted that since the language was clearly ambiguous, rules of construction would be employed to ascertain the testator's intent, but that the court had decided to abandon the use of the early vesting rule and in its place adopt a rule of construction which favored the lineal descendants of the testator over parties not related to the testator by blood. There are indications in the opinion that the court considered both these approaches. Whether or not the court reached its decision along one of these paths, I think it worthwhile to explore both.

Let us take the traditional approach first. No one would dispute that the starting point for construction should be the words used in the instrument itself,<sup>39</sup> but, as I attempted to point out in the preceding section, where there are gaps in the dispositive provision of the will and no provision expressly covers the situation before the court, a mechanical reading of the words will not suffice.<sup>40</sup> Once the extent of the drafting error is recognized, it becomes evident that a different approach must be applied.

Conceding there are many gaps in the instrument, does the will, when read as a whole and in light of the family situation of the testator existing at the time of its execution, indicate what Jarrett Sr. was trying to do? In more formal terms, can the court deduce the testator's estate-plan?<sup>41</sup> At the very least the will allows us to determine the testator's priorities. His first priority was to care for his wife during her lifetime and, to a more limited degree, his children. His second priority was to transmit his

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<sup>37</sup>183 S.E.2d at 346.

<sup>38</sup>*Id.*

<sup>39</sup>Griffin v. Central Nat'l Bank, 194 Va. 485, 74 S.E.2d 188 (1953).

<sup>40</sup>See generally J. GRAY, THE NATURE AND SOURCES OF THE LAW §§ 700-05 (1909).

<sup>41</sup>See 2 POWELL ON REAL PROPERTY § 325 (rev. ed. 1971).

property in equal shares to his children at some point in time. Were it not for the supplanting limitation<sup>42</sup> in Sentence C, the conclusion would be inescapable that a child upon attaining the age of 25 became the absolute owner of a one-third interest in the trust corpus to be distributed on the wife's death. (In traditional terms, such child would take a vested remainder in the trust principal at 25, but his interest in the corpus would be subject to divestment to the extent that the trustee encroached on the trust corpus as authorized by the will.) The repeated use of age 25 suggests that the testator thought his children capable of controlling their affairs upon attaining that degree of maturity.<sup>43</sup> The supplanting limitation in Sentence C, however, gives rise to a conflicting inference: in at least one situation, i.e., where the child reaches 25 and then predeceases the widow with children surviving him (B(3) *supra*), the testator intended to control the disposition of his property in favor of his grandchildren, even though their parent had attained the magic age. These inferences cancel each other.

Sentence C's supplanting limitation suggests two other points which as yet have not been taken into account. First, when it is read in conjunction with the gifts over in Sentence B, it is evident that the testator had a third priority—his grandchildren. The testator must have wanted his grandchildren to take the share intended for their parent directly from him upon the occurrence of some contingency or contingencies. Second, and more importantly, Sentence C strongly suggests that the testator intended only his living issue to take under this instrument. Sentence C begins: "[s]hould any of my said children die *before receiving or before being entitled to receive* his or her portion . . . ."<sup>44</sup> I think that the

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<sup>42</sup>Supplanting limitations are substantially different both in form and in effect from . . . alternative limitations. . . . Alternative limitations are so phrased as to require a future choice between alternative takers. The postponement of the choice causes the imposed requirement of survival to be commonly found to be a condition precedent. When, however, the conveyance contains successive phrases embodying, respectively, an intended original gift and an intended secondary gift, separated by such words as "but if", and "and if", or "in case", any imposed requirement of survival operates to defeat the first gift and is, therefore, a defeasibility or non-survival rather than a condition precedent of survival.

2 POWELL ON REAL PROPERTY § 330 (1967). It seems to me that Sentence C, when read with Sentences A and B, is a supplanting limitation, but it might be construed as an alternative contingent remainder. As far as this case is concerned, nothing turns on the distinction.

<sup>43</sup>Another argument might be made to support this inference. Presumably, a gift is unconditional. If the donor does not place conditions on the gift, none are implied. The condition of reaching twenty-five is clearly stated. Therefore, where a testator clearly indicates by the express language of the gift that he wants one contingency, it is only reasonable to presume that if he wanted a second contingency to apply to this gift, he would also have stated this in equally unmistakable terms.

<sup>44</sup>183 S.E.2d at 345 (emphasis added).

meaning which these words were intended to convey is simply this: If a child of the testator dies at any time before the trustee actually distributes his share to him and such child is survived by issue, the trustee must continue to hold the property in trust under the provisions of Sentence C. "Before receiving" must be read literally—before the trustee actually pays the child his share; "before being entitled to receive" is intended to cover those situations in which a child still had a condition precedent to satisfy, for example, reaching twenty-five. Of course my reading of Sentence C makes the phrase "before being entitled to receive" superfluous, but I think it is fair to say that this draftsman did not realize this and wished to include all possibilities. This point may be illustrated by the following situation. Suppose that James Jr. had outlived his mother, but that he died at age 40 before the trustee actually paid over to him the share to which he was entitled. Assuming he left surviving children, Sentence C applies and the trustee would commit a breach of trust by paying a share of the trust corpus to James' estate. Thus, to those situations to which Sentence C applies—A(1), A(3), B(1), and B(3), half of the possible eventualities—the testator went to great lengths to insure that only living persons should receive a share of his estate.

Once this interpretation is given to Sentence C, it becomes manifest that the testator attempted by every dispositive provision in his will to pass his estate to his living issue. In the situation covered by sentence A, the testator assumed that a child would survive the life tenant. Necessarily, if a child took under this clause, he had to be alive. In Sentence B, the testator tried to insure that the trust principal would pass to his living descendants by providing for alternative gifts if one of his children died under 25. Sentence C, as explained above, goes to great lengths to place the testator's estate into the hands of his living issue.<sup>45</sup>

From these conclusions the testator's overall estate plan may be deduced. As to the issue here, he seems to have had three goals in mind. First, he wanted to transmit the corpus of the trust he created to his lineal descendants, his children and grandchildren only. Second, he intended that those who received a share be alive, and that no shares pass to decedents' estates. Third, the testator did not want a child under the age of twenty-five to have control of a substantial sum: once a child reached twenty-five, the testator thought him to be sufficiently mature to handle his own affairs. Thus, to reconcile this goal with the other two, it must be inferred that the testator intended twenty-five to be the earliest age at which a child could receive his share, but not that by reaching that age the child acquired some kind of vested interest in one-third of the estate

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<sup>45</sup>In most instruments involving successive beneficiaries where a condition of survivorship is imposed on the remainderman, the crucial date is the death of the life tenant. Compare Sentence A of Jarrett, Sr.'s, will, note 4 and accompanying text *supra*.

to be distributed. Assuming this to be the testator's estate plan, the only way to carry out the testator's essential goals was to imply a condition of survivorship to the date of distribution upon each of the testator's children.

I do not claim that the argument presented is overpowering; a good argument could be made for the opposite result.<sup>46</sup> What is asserted, however, is that the rationalization of the result in *Jarrett* set out above is more plausible and subject to less confusion than the reasoning stated in the court's opinion. In all fairness I should point out that the court may have arrived at its conclusion along the lines just indicated, for the court says:

[T]he will as a whole, and particularly Sentences A, B and C, evidences an intention to pass the estate, at the time fixed for distribution, to the testator's descendants.<sup>47</sup>

If so, it certainly could have been more explicit.

## V

Where the testamentary instrument before the court is ambiguous, the established approach in Virginia<sup>48</sup> and elsewhere<sup>49</sup> requires the court to employ the rules of construction as aids in discovering the testator's intent. *Jarrett's* will certainly qualifies as ambiguous.<sup>50</sup> The court might have reached the desired result by announcing a new rule of construction which favors the testator's lineal descendants over strangers and by overruling those cases holding that the early vesting rule applies to situations of this kind. Instead it found, by rather questionable means, the testator's intent to be sufficiently clear that the rules of construction were unnecessary. Stated a little differently, the court cannot employ its standard operating procedure to reach the desired result; the court apparently feels locked in by its own rules.

What are rules of construction?<sup>51</sup> They are simply guides used to aid courts in interpreting ambiguous instruments, a set of skeleton keys to the dead man's intent.<sup>52</sup> These keys are alloys of varying amounts of three

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<sup>46</sup>In fact, I submitted a memo to the court indicating why Mrs. McReynolds should win. As a matter of "law", I still think my position was proper, but the court's decision reflects greater wisdom.

<sup>47</sup>183 S.E.2d at 346.

<sup>48</sup>*Griffin v. Central Nat'l. Bank*, 194 Va. 485, 74 S.E.2d 188 (1953).

<sup>49</sup>*Eg., In re Imperatu's Will*, 44 Misc.2d 639, 254 N.Y.S.2d 581 (Sur. Ct. 1964), *rev'd on other grounds*, 24 App. Div.2d 598, 262 N.Y.S.2d 343 (1965).

<sup>50</sup>*See White v. National Bank & Trust Co.*, 212 Ga. 568, 572, 186 S.E.2d 21, 25 (1972).

<sup>51</sup>*See generally* 2 POWELL ON REAL PROPERTY §§ 316-17 (rev. ed. 1971); Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 309, 397 (1939).

<sup>52</sup>*E.g., Trice v. Powell*, 168 Va. 397, 191 S.E. 758 (1937).

legal ingredients: first, and with good reason, these rules tend to represent a crystallization of judicial views of the attitudes and motivations common to normal testators similarly situated.<sup>53</sup> This factor, for example, leads to a constructional preference for equality of distribution, since a normal testator, other things being equal, will treat those with equal claims on his bounty equally.<sup>54</sup> Second, and also with some merit, these rules lead to a construction which tends to promote certain policies favored by the law and are quite unconnected with the desires of the testator.<sup>55</sup> This ingredient is the dominant element in the rule of convenience employed in interpreting class gifts, the purpose of this set of construction preferences being to facilitate the administration of decedent's estates.<sup>56</sup> Third, and with no justification whatsoever, the rules tend to carry over to the United States the long outworn notions of medieval England.<sup>57</sup> The clearest examples of this carry-over (and there are too many) are the indefinite construction of the phrase "die without issue",<sup>58</sup> the doctrine of worthier title [the conveyer heir rule],<sup>59</sup> and the rules of construction surrounding *Shelley's Case*.<sup>60</sup>

The most prominent construction preference in Virginia law is the time honored early vesting rule.<sup>61</sup> It has been accepted in numerous Vir-

<sup>53</sup>RESTATEMENT OF PROPERTY § 243(a) (1940).

<sup>54</sup>RESTATEMENT OF PROPERTY § 243 comment f (1940).

<sup>55</sup>RESTATEMENT OF PROPERTY § 243 (1940).

<sup>56</sup>For a discussion of the so called "rule of convenience" and a refusal to apply it see *In re Earle's Estate*, 369 Pa. 52, 85 A.2d 90 (1951).

<sup>57</sup>*Accord*, 4 PAGE ON WILLS § 30.3 (1961).

<sup>58</sup>*Tinsley v. Jones*, 13 Gratt. 289 (Va. 1856); *Harrison v. Brown*, 416 S.W.2d 613 (Tex. Civ. App. 1967).

<sup>59</sup>The doctrine of worthier title provides that a conveyance by a grantor with a limitation over to the grantor's heirs creates a reversion in the grantor, not a remainder interest in the heirs. To take by descent, rather than by purchase, is said to create a "worthier title". See *Hatch v. Riggs Nat'l. Bank*, 284 F. Supp. 396 (D.D.C. 1968), citing *C. MOYNIHAN, REAL PROPERTY* 150 (1962). This doctrine is applied as a matter of law in the District of Columbia. See 284 F. Supp. at 397. However, most jurisdictions, following Judge Cardozo's opinion in *Doctor v. Hughes*, 225 N.Y. 305, 102 N.E. 221 (1919), apply the doctrine as a rule of construction. See also *Verall, The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 U.C.L.A. L. REV. 371 (1959). For illustration of the application of the rule in Virginia see *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954).

<sup>60</sup>1 Co. 93a (1581).

<sup>61</sup>While there is by no means a great degree of accord as to the proper breakdown and analysis of the "early vesting rule", the following posited by Professor Rabin is suggested as helpful:

In reality, the rule favoring the vesting of estate is a compressed statement of several separate but closely related sub-rules or corollaries. Unless contrary to the manifested intent of the testator,

(1) future interests are construed to become indefeasibly vested at the earliest possible time;

(2) conditions are not readily implied, and are construed as narrowly as possible;

ginia cases.<sup>62</sup> The rule is easy to state: where the question to be decided is whether an interest is vested or contingent, the court will seek a construction which will make the interest vest at the earliest point in time. In *Jarrett*, this point in time would have been when James Jr. reached 25.

Since the early vesting rule has been accepted by England<sup>63</sup> and most American jurisdictions,<sup>64</sup> one would expect to find many judicial declarations as to why this preference exists. Surprisingly, one does not. The original basis for the rule can be traced to the efforts of the English judiciary of the seventeenth century to ameliorate the harsh consequences of the common law rule of destructibility.<sup>65</sup> Under the doctrine of destructibility, contingent remainders could be destroyed in certain situations. Since the rule applied only to contingent remainders and not vested ones, a court, by finding a remainder vested and not contingent, could avoid the consequences of the destructibility doctrine. Since remainders could be destroyed by the volitional act of the parties and thereby defeat the intent of the conveyor, the judges developed the rule of construction that interests would be construed as having vested at the earliest point in time. An excellent account of the entire development of the early vesting rule and its relation to the destructibility doctrine is available elsewhere<sup>66</sup> and has not been set out here. For my purposes it is sufficient here to point out that Virginia,<sup>67</sup> like most states, by either statute or court decision, has overruled<sup>68</sup> the destructibility doctrine, and it is therefore no longer a problem. Thus, the original basis for the early vesting rule is gone.

Those who have attempted to rationalize its continued existence have done so on the basis of the second ingredient noted above—that the rule promotes the public interest. The Restatement of Property cites two ways in which the rule serves ends favored by the law.<sup>69</sup> Its principal claim is that early vesting facilitates alienation of real property to a considerable degree. Thus, if Blackacre is conveyed to “A for life, and upon A’s death to B”, A and B could jointly transfer a fee simple only if B’s interest is

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(3) future interests are characterized as defeasibly vested rather than contingent.

Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 469 (1965).

<sup>62</sup>*Davis v. Lynchburg Nat'l Bank*, 198 Va. 14, 92 S.E.2d 277 (1956); *Griffin v. Central Nat'l Bank*, 194 Va. 485, 74 S.E.2d 188 (1953); *Aldridge v. First & Merchants Nat'l Bank*, 191 Va. 323, 60 S.E.2d 905 (1950).

<sup>63</sup>*Re Blackwell*, [1926] Ch. (C.A.) 223-34.

<sup>64</sup>See PAGE ON WILLS § 43.3 n.15 (1962).

<sup>65</sup>See *Purefoy v. Rogers*, 2 Wms. Saund 380 (1670).

<sup>66</sup>Schuyler, *Drafting, Tax, and Other Consequences of the Rule of Early Vesting*, 46 ILL. L. REV. 407, 408-15 (1951).

<sup>67</sup>VA. CODE ANN. § 55.16 (Repl. Vol. 1969).

<sup>68</sup>1 AMERICAN LAW OF PROPERTY § 463 n.7 (1952 ed.).

<sup>69</sup>§ 243(b) comment i (1940).

construed as indefeasibly vested. That is true, but not especially important.<sup>70</sup> The vast majority of instruments creating remainders, or other kinds of future interests, involve trusts of personal property, not land. Furthermore, even if the trust corpus is composed all or in part of real estate, the effect of the early vesting rule in this situation is negligible. A well drawn trust instrument will authorize the trustee to sell the real estate included in the trust, and even if the instrument lacks a power of sale, the courts are quick to imply one.<sup>71</sup> Thus the trustee can convey marketable title despite the fact that the remainder interests in the trust corpus are subject to conditions precedent which cannot be determined until the trust terminates. Finally, many states, either by legislation or court decision, have developed techniques by which fee simple title may, in certain instances, be conveyed despite the presence of contingent interests. Professor Rabin sums up the point well:

[T]he rule facilitates alienation only in cases involving legal estates in land where the interest is an indefeasibly vested estate not subject to open and where ameliorative legislation has not been enacted. Since very few applications of the rule favoring early vesting come within this category, the rule cannot be justified on the ground that it promotes alienability.<sup>72</sup>

The Restatement also asserts that the rule lessens the destructive effect of the Rule Against Perpetuities.<sup>73</sup> This justification applies only in a limited number of situations. Suppose a testator leaves "\$100,000 payable to the first child of A (a living person) at 25, but if no child of A reaches 25, to B." The gift to B is clearly remote. Thus, the whole gift will fail unless the limitation in favor of the first child of A is construed as vested subject to divestment rather than contingent. The early vesting rule pulls toward this construction. Of course, by holding that the gift to the first child of A is vested, the court has in fact held that gift is absolutely vested, for the gift over fails under the rule against perpetuities. In this sense the early vesting rule has saved as much of the gift as possible. This assumes that the testator would have preferred to make an absolute gift rather than none, which may not be true in all situations;<sup>74</sup> but more importantly, there are other constructional preferences which more effec-

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<sup>70</sup>This paragraph draws heavily on Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 480-82 (1965).

<sup>71</sup>See 2 SCOTT ON TRUSTS § 190 at 1422 (2d ed. 1956). Statutes in some states provide procedures to alleviate the problem of a trustee who is not given a power of sale. *E.g.*, N.Y. REAL PROP. LAW §§ 105-07 (McKinney 1968).

<sup>72</sup>Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 482 (1965).

<sup>73</sup>§ 243 comment f (1940).

<sup>74</sup>As to the validity of this assumption in general, see Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329 (1938).

tively limit the destructive effect of the rule against perpetuities than the preference for early vesting.<sup>75</sup>

Others have sought to defend the early vesting rule on the ground that it promotes certainty thereby preventing litigation.<sup>76</sup> It is doubtful that the case law bears this out. Although the rule has been with us for four centuries, the task of distinguishing between vested and contingent continues to be "one of the most perplexing of all judicial tasks."<sup>77</sup> "Down the centuries property lawyers have successfully expended a huge amount of energy in seeking to obtain rulings that interests are vested despite language in the instrument which at first sight appears to be very contingent indeed."<sup>78</sup>

Finally, Professor Rabin argues that the only advantage of the early vesting rule is that it "tends to prevent unintended disinheritance of the issue of a deceased remainderman."<sup>79</sup> Suppose the testator leaves a wife and two children A and B. By his will he leaves his estate to "my wife for her life, remainder to my surviving children." Assume further that child A outlives his father but predeceases his mother and is survived by children of his own. Unless the word surviving is interpreted as referring to the testator's death rather than that of the life tenant, A's issue will be cut off and child B will take all of his father's estate. Since the early vesting rule pulls toward a construction vesting the remainder interest at the testator's death, it gives a good result. But, if it be assumed that A dies without surviving children and leaves his share in his father's estate to a third party, does the early vesting rule again lead to a good result? It is suggested that it does not. Most courts on these latter facts would ignore the early vesting rule and interpret the word "surviving" to refer to the death of the life tenant.<sup>80</sup> This is precisely what the Virginia court did in *Jarrett*.

From this rather extended discussion it should be evident that the early vesting rule is a poor key for unlocking ambiguous instruments. Since today it does not pull toward constructions which promote policies favored by the law, and since there has never been any connection between it and the desires of a normal testator (in fact, it is on occasion intent defeating), its sole ingredient must be made up of relics from an

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<sup>75</sup>RESTATEMENT OF PROPERTY § 375 (1944).

<sup>76</sup>Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 CALIF. L. REV. 431, 472 (1961).

<sup>77</sup>Rabin, *The Law Favors the Vesting of Estates. Why?* 65 COLUM. L. REV. 467, 483 (1965). *Accord*, *In re O'Brien's Will*, 33 Misc.2d 484, 487, 229 N.Y.S.2d 242, 246 (Sur. Ct. 1962).

<sup>78</sup>J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES* 40 (2d ed. 1962).

<sup>79</sup>Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 483 (1965).

<sup>80</sup>*Id.* at 471.

age long dead. It is suggested that this key be allowed to rust from disuse. Or, better yet, let's give it an official burial—with honors, of course.

What should be put in its place? The court in *Jarrett* hinted at the possible substitute. In defending its decision the court pointed out that unless it imposed a condition of survivorship,

a share of the trust estate could, and in the case of James Jr. would, vest in a child before the time fixed for distribution, permitting that child if he died before the date fixed for distribution to pass a share of the trust estate to persons other than the testator's descendants.<sup>81</sup>

I offer this suggestion: Why not make explicit what is implicit in *Jarrett*? Why not say that in cases in which the testator's intent is unclear, the court will adopt the construction which favors the lineal descendants of the testator over strangers to the blood and gives equal distribution among lines of the testator?<sup>82</sup>

Presumably, this rule of construction would be consonant with the desires of most testators. Admittedly, the testator's intent is the polar star of construction. In construing wills the court's sole goal in interpreting his words is to do with the property what the testator wanted done. Thus, it seems to make sense that where the testator's desires as expressed in his will are unclear due to inept drafting, the court should at least choose a construction which most probably carries out his desires. This is especially true where no reasons of policy require a different result.

In addition, the rule suggested would be easier for the court in administer. In construing a will a court will often peek ahead to determine the consequences of adopting a particular construction.<sup>83</sup> If the court finds that such a result is not to its liking, it is very likely to return to the task of construction to see what alternatives are available. Since the early vesting rule is purely arbitrary in the sense that there is no reason for its continued existence, the courts will be increasingly loath to follow where it leads. *Jarrett* is an illustration of this tendency. On the other hand, since the rule suggested is based on sound policy<sup>84</sup> and gives an acceptable result, it is one that the courts should be able to live with and use without regrets.

## VI

The *Jarrett* decision might be criticized for failing to provide a standard for lower courts in future cases. There is some merit to this conten-

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<sup>81</sup>183 S.E.2d at 346.

<sup>82</sup>Whether such a rule should apply in favor of collateral relatives is a different matter. Certainly, the more distant the relationship, the less justification for extending the rule to cover them.

<sup>83</sup>2 POWELL ON REAL PROPERTY §§ 316, 317 (rev. ed. 1971).

<sup>84</sup>RESTATEMENT OF PROPERTY § 243 (1940).

tion. It is preferable that there be a rule clearly stated so that persons in similar circumstances be treated similarly by the law. For this reason it would have been better had the court articulated the rationale for its decision more clearly.

The probability, however, is that the court was not ready to announce a new rule in this area. It needed more time to consider the alternatives open to it. For the *Jarrett* decision seems to be a harbinger of a new approach to the field of wills construction. The court is telling us that no longer will they be inclined to follow precedent just because it is, well, precedent. Rather, the court is saying, we want to know about the practical implications of our decision, such as the tax consequences, the effect on creditors,<sup>85</sup> and whether the estates of people long dead will have to be reopened. Furthermore, the court will also be more interested than ever before in the relationship of the parties to the testator and the purposes of the testator. Finally, the court appears to be telling us that if the rationale employed in decisions during this transition period does not work well, we will not be bound by it.

These impressions seem to be borne out by the court's recent decision in *White v. National Bank & Trust Co.*,<sup>86</sup> an opinion handed down since *Jarrett*. The appellees in *White* were parties named as beneficiaries in the will of Anne White Bailey; the appellants were the testatrix's next of kin. The will directed that Mrs. Bailey's estate be held in trust, such trust to terminate on the twenty-fifth anniversary of the date of her death. During the duration of the trust the trustee was authorized to use income and, in its discretion, principal for John Henry White's school and education.<sup>87</sup> Upon the termination of the trust, the trustee was directed to pay over a share of the trust principal to "John Henry White, should he then be living, otherwise to his heirs and distributees, per stirpes."<sup>88</sup> Since John Henry's interest would be determined in his lifetime, i.e., must vest, if at all, within a life in being, the court had little difficulty in validating his

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<sup>85</sup>In Virginia one may sell a vested interest before it vests in possession. *Prince v. Barham*, 127 Va. 462, 103 S.E. 626 (1920). As to creditors specifically see *Mayone v. Municipal Court of Boston*, 335 Mass. 717, 142 N.E.2d 383 (1957).

<sup>86</sup>*White v. National Bank & Trust Co.*, 212 Va. 568, 186 S.E.2d 21 (1972).

<sup>87</sup>The following language was used by the draftsman in *White*:

The Trustee shall have wide discretionary powers in providing income for the foregoing purposes . . . [I]nsofar as the education of my said grand-nephews and grand-niece [John Henry White and the other grand-nephews and the grand-niece provided for in the will] are concerned, supplemental educational funds from the trust shall be provided to or for them respectively only so long as such person is making normal progress in completing the educational program approved by the parent and the Trustee for such person, or by the Trustee alone if the parent may not be living when educational decisions must be made.

186 S.E.2d at 22.

<sup>88</sup>*Id.*

interest as to both income and principal. Whether the alternative gift to the heirs and distributees of John Henry was valid was a more difficult question. The appellants argued that the alternative takers could not be determined until the date of distribution, but had to survive twenty-five years from the date the will became operative. Since John Henry, the only life connected with the gift, might not necessarily live to within twenty-one years and ten months<sup>89</sup> of the date of distribution, the date when such interests would vest, the gift was void. To give a concrete example of the way the gift might have violated the rule under appellant's interpretation, suppose John Henry died exactly one year after the testatrix. The interests in the trust corpus would not be determined, would not vest, for another twenty-four years. Now further suppose that John's sole heir on the date the trust terminates is his one year old son. This child's interest would not vest in him within twenty-one years and ten months of the death of a life in being, John Henry. Moreover, the one year old child cannot qualify as a life in being since he obviously was not in existence on the date the testatrix died. Therefore, since the possibility that the gift might vest too remotely in alternative takers exists at all, the gift fails. The key to appellants' argument is the imposition of a condition of survivorship on the alternative takers. In support of this proposition, the appellants cited *Jarrett*.<sup>90</sup> The case seems to be very close to point. As in *Jarrett* the trustee is directed to pay over a share to the remainderman and the trustee is given authority to encroach on trust corpus for the income beneficiaries. The supreme court, however, refused to impose a condition of survivorship on the alternative takers. After noting that a decedent's heirs and distributees are the class of persons described in the Virginia statutes of descents and distribution who are living at the decedent's death,<sup>91</sup> the court noted that the gift to John Henry was expressly made upon his being alive at the date of distribution, the gift to the alternative takers was not.

So rather than implying that the class comprising John Henry White's heirs and distributees should be determined as of the twenty-fifth anniversary, the language of the will implies just the opposite.<sup>92</sup>

The court then concluded that the "express language" in the will required them to find that the alternative takers interests vested, if at all, at John Henry's death and therefore the gift did not violate the rule against perpetuities. The court distinguished *Jarrett* in the following manner:

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<sup>89</sup>*Id.* The ten month part of the Virginia rule applies only to periods of gestation. See 1 MINOR ON REAL PROPERTY § 806 (2d ed. 1928).

<sup>90</sup>The court indicates that the appellees cited *White*. This must be a misprint.

<sup>91</sup>186 S.E.2d at 23.

<sup>92</sup>*Id.* at 24.

The gift . . . to "his [John Henry White's] heirs and distributees" is not *ambiguous*. Conversely, the alternative gift under the Jarrett will was couched in *ambiguous* language. The Jarrett will did not expressly provide whether upon the death of the testator's son before the death of the life tenant, the son's share should pass to his estate or should be added to the other shares under the will. Unlike this case, we were called upon in *Jarrett* to infer an intent where express language evidencing intent was lacking.<sup>93</sup>

The court's attempt to distinguish *Jarrett* is not too convincing. The thought the court is trying to convey in two sentences by the use of the word *ambiguous* is not that clearly expressed.<sup>94</sup> The points at issue, moreover, are quite similar. In *White* the testatrix meant to benefit John Henry's heirs and distributees on the happening of a contingency. In *Jarrett*, the testator meant to give his son a share on the happening of a contingency. In both cases the issue was whether an additional condition of survivorship to the date of distribution ought to be implied. In both cases the intent of the testator on the point in issue was *ambiguous*. Furthermore, why is the conflict between the trustee's right to encroach on corpus for the income beneficiaries and vested rights of these alternative takers which is so important in *Jarrett* not even worthy of mention here?<sup>95</sup>

Despite the possible inconsistencies of reasoning, the result here as in *Jarrett* is certainly a good one. The testatrix clearly wanted to bestow her bounty on the appellees; just as surely she intended to cut off the appellants. The court, faced with a construction which would save the entire gift and one which would void the gift over, chose the former. This is clearly what Mrs. Bailey would have preferred and that, implies the court, is more important here than consistent precedents.

I might add that once again the court failed to mention the early vesting rule in reaching its decision. That is a good indication of the direction the court is taking.

## VII

What are the implications of the court's new approach to wills construction cases for Virginia attorneys? For the draftsman, none. No competent lawyer would ever rely on a rule of construction in drafting a will

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<sup>93</sup>*Id.* (emphasis added).

<sup>94</sup>I think all the court meant was that on the occurrence of John Henry's death prior to the termination of the trust, the testatrix intended to make a gift to the alternative takers; while in *Jarrett*, the conditions attached to the gift to James Jr. are uncertain.

<sup>95</sup>Hopefully, the court realized that the statement was in error, and so obviously so, that the court need not recant formally.

(or any other document). If he wished to create a vested remainder, he would use words which expressly stated this intention. He certainly would not rely on the early vesting rule or other constructional preferences to do this. In addition, every lawyer knows that a rule of law which is followed on the day he writes his client's will may be changed by statute or court decision at some future time. No one has a vested interest in a rule of law. If *Jarrett* or *White* says anything to Virginia attorneys, it says draw your wills carefully. But all wills cases should remind us of that.

To lawyers who try wills cases, the decisions in *Jarrett* and in *White* are important ones. The court is informing the bar that it is becoming result oriented. Advocates are advised to emphasize why a decision for them will be in accord with the testator's intent. The practical consequences of the decision will be about as important. The advocate has nothing to fear from the early vesting rule; on the contrary, he can now point to the advantages of implying conditions of survivorship since they prevent unnecessary administration expenses and often additional taxes.<sup>96</sup> Yes, the days of merely citing old cases are gone. This change is to be applauded.

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<sup>96</sup>Probably the happiest solution to the whole problem would be for all draftsmen to listen to the words of Professors Leach and Logan:

*Beware of creating any descendible future interest.*

W. LEACH & J. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING (Supp. 1962).



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