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THE ACCELERATION OF REMAINDERS: MANIPULATING THE IDENTITY OF THE REMAINDERMEN

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I. INTRODUCTION

When successive interests are created in property, the transferor expects that the property will be enjoyed by one or more persons for a period of time and then, at the expiration of that time, enjoyed by one or more other persons. For example, when *O* conveys Blackacre "to *A* for life, then to *B*," *O*'s intent is for *B* to get possession of Blackacre at *A*'s death. Contrary to *O*'s expectations, however, it is possible for *B*'s

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remainder to be accelerated, giving *B* possession prior to *A*'s death.[1] This could happen if *A* conveyed his life estate to *B*, or if *A* disclaimed or released his life estate.[2]

Because most future interests today are equitable interests in financial assets, many acceleration cases involve the issue of trust termination.[3] For example, if *O* conveys $100,000 "to *T* in trust to invest for the benefit of *A* for life, then to corpus *B*" and then *A* disclaims, releases, or conveys his interest to *B*, *B* may ask that the trust be terminated by accelerating the remainder and distributing the trust property to him.[4] *B*'s claim is supported by the generally prevailing rule that a trust may be terminated if all the beneficiaries consent, unless termination would defeat a material purpose of the trust.[5]

This Article focuses on the potential for abuse by the life tenant who may be able to alter the identity of the remaindermen by a disclaimer, release, or conveyance.[6] This is unfair to the remaindermen who lose their chance of taking. It also defeats the intent of the donor. The traditional judicial approach in acceleration cases does not recognize these manipulative situations, and the problem has been exacerbated both by the widespread adoption of disclaimer statutes[7] and by the position taken in the recently promulgated *Restatement (Second) of Property*.[8] This Article discusses the case law on acceleration and

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1. *See* RESTATEMENT (SECOND) OF PROPERTY §§ 26.1, 26.2 (1988); RESTATEMENT OF PROPERTY §§ 231-233 (1936); 5 AMERICAN LAW OF PROPERTY § 21.43 (1952); W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 47.45 (1962); 5 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 412.1 (4th ed. 1989); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 791-804 (2d ed. 1956); Annotation, *Relinquishment of Interest by Life Beneficiary in Possession as Accelerating Remainder of Which There is Substitutional Gift in Case Primary Remainderman Does Not Survive Life Beneficiary*, 7 A.L.R.4TH 1084 (1981).

2. Although contrary to *O*'s expectations, *B*'s earlier possession of Blackacre does not necessarily defeat *O*'s overall intent under the circumstances.

3. *See infra* text accompanying notes 78-93.

4. If *A* has not disclaimed, released, or conveyed his interest to *B*, then *A* and *B* could request termination. For a discussion of trust termination cases, *see infra* text accompanying notes 78-93.

5. This is known as the Claflin Doctrine, from Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889). *See* P. HASKELL, PREFACE TO WILLS, TRUSTS, AND ADMINISTRATION 222-32 (1987).

6. The issue of the acceleration of remainders may arise in the context of conveyances and devises of both real and personal property. It also may arise with respect to both legal interests and interests created in trusts. The remainder may be vested or contingent and may be to a class or to one or more individuals.

7. The disclaimer statutes typically provide that the property passes as if the disclaimant either predeceased the testator (in the case of a will) or died before the time of the conveyance (in the case of an inter vivos transfer). *See infra* note 16.

8. Comments and illustrations to § 26.1 and § 26.2 of the RESTATEMENT (SECOND) OF PROPERTY (1988) indicate that it treats a release like a disclaimer because the property passes as if the releasor predeceased the testator. *See infra* text accompanying note

offers a suggestion for reform that will reduce the potential for abuse by the life tenant.

The potential for manipulation exists when the identity of the remaindermen can change during the course of the prior estate. This is the case, for example, when *O* conveys "to *A* for life, then to *A*'s children, the issue of any deceased child to take the parent's share."[9] *A*'s children are sometimes called the primary remaindermen and *A*'s grandchildren the alternative or substitutional remaindermen. If *A* disclaims and if the remainder is accelerated, giving *A*'s then-living children indefeasible interests, the identity of the remaindermen becomes fixed. Had there been no renunciation, one or more children of *A* might have predeceased *A*, resulting in the substitution of their issue as remaindermen. In trust termination cases, courts have been inconsistent about whether the potential for the change in identity of the remaindermen constitutes a material purpose that would be defeated by termination.[10]

At times acceleration and indefeasibility may even be contrary to the disclaimant's intent. For example, suppose *T* devises property "to *A* for life, then to *A*'s children." *A* may have one young child and *A* may be planning to have more children. *A* may also have tax reasons for wanting to disclaim the life estate. But if *A* disclaims, and the disclaimer statute provides that the property passes as if the disclaimant predeceased *T*, this will have the effect of accelerating the remainder and closing the class of *A*'s children. This could be contrary not only to *T*'s intent but to *A*'s as well.

The traditional judicial approach presumes acceleration absent contrary intent.[11] Of course, the difficult issue is what constitutes contrary intent, and it is not easy to reconcile the cases. Courts sometimes find contrary intent in language that is included in the instrument for reasons that have nothing to do with acceleration. Most courts do not find contrary intent, however, and they frequently state that no independent purpose exists for postponing the estate other than to provide for the life tenant, and therefore, the remainder should be accelerated when the life tenant renounces.[12]

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9. For the sake of brevity, "to *T* in trust to invest for the benefit of *A*" occasionally will be omitted from the hypotheticals in this Article. The issues of acceleration and the identity of the remaindermen exist for both legal and equitable interests.

10. *See infra* text accompanying notes 81-88.

11. *See* O. BROWDER & L. WAGGONER, FAMILY PROPERTY TRANSACTIONS: FUTURE INTERESTS 72 (3d ed. 1980).

12. *E.g.*, Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940); Simpkins v. Simpkins, 131 N.J. Eq. 227, 24 A.2d 821 (1942); Wachovia Bank & Trust Co. v. McEwen, 241 N.C. 166, 84 S.E.2d 642 (1954); Union Nat'l Bank v. Easterby, 236 N.C. 599, 73 S.E.2d 541

Supported by both the first *Restatement of Property* and the *Restatement (Second) of Property*, the traditional approach also presumes indefeasibility as a consequence of acceleration. However, indefeasibility is not an inevitable result of acceleration. A remainder can accelerate and remain defeasible or partially defeasible.[13] Furthermore, indefeasibility, rather than acceleration itself, is what allows the life tenant to manipulate the remainder. The cases that purport to object to acceleration, upon closer examination, really object to indefeasibility. In fact, some of the cases that expressly deny acceleration are in fact accelerating by giving the income to the remaindermen while retaining defeasibility so that the identity of the remaindermen can change until the death of the life tenant.[14] These courts are under the misapprehension that they are denying acceleration, mistakenly equating acceleration with an outright distribution of corpus.

Disclaimer statutes[15] may be determinative on the issue of acceleration because they often provide that the property passes as if the disclaimant predeceased the testator or transferor.[16] Such a provision

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(1952); Clark v. Board of Trustees, 596 S.W.2d 804 (Tenn. 1980); Auerbach v. Samuels, 9 Utah 2d 261, 342 P.2d 879 (1959); *In re* Estate of Reynolds, 39 Wis. 2d 155, 158 N.W.2d 328 (1968).

13. *See, e.g.*, Hasemeier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923); Askey v. Askey, 111 Neb. 406, 196 N.W. 891 (1923).

14. *See, e.g.*, Pate v. Ford, 293 S.C. 268, 360 S.E.2d 145 (Ct. App. 1987), *rev'd*, 297 S.C. 294, 376 S.E.2d 775 (1989).

15. Most states have disclaimer statutes. *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 123 (4th ed. 1990).

16. Section 2-801(d) of the Uniform Probate Code provides:

> (d) The effects of a disclaimer are:
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> (1) If property or an interest therein devolves to a disclaimant under a testamentary instrument, under a power of appointment exercised by a testamentary instrument, or under the laws of intestacy, and the decedent has not provided for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the decedent, but if by law or under the testamentary instrument the descendants of the disclaimant would take the disclaimant's share by representation were the disclaimant to predecease the decedent, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the decedent. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had predeceased the decedent. A disclaimer relates back for all purposes to the date of death of the decedent.
>
> (2) If property or an interest therein devolves to a disclaimant under a nontestamentary instrument or contract and the instrument or contract does not provide for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the ef-

mandates acceleration and indefeasibility, which in turn, creates the potential for manipulation.[17] The drafters of the disclaimer statutes probably did not anticipate this problem, but rather were concerned with providing for an unambiguous distribution of the disclaimed property.

Release, on the other hand, is not governed by the disclaimer statute, and this creates the potential for different results under similar circumstances. Similarly, a conveyance by the life tenant to the remaindermen does not invoke the disclaimer statute. It is easier for courts to prevent manipulation, and hence easier to effectuate intent, when there is a release or a conveyance rather than a disclaimer because the inflexible disclaimer statute does not govern. However, the *Restatement (Second) of Property* deviates from the majority view by treating release cases like disclaimer cases, thus increasing the oppor-

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> fective date of the instrument or contract, but if by law or under the nontestamentary instrument or contract the descendants of the disclaimant would take the disclaimant's share by representation were the disclaimant to predecease the effective date of the instrument, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the effective date of the instrument. A disclaimer relates back for all purposes to that date. A future interest that takes effect in possession or enjoyment at or after the termination of the disclaimed interest takes effect as if the disclaimant had died before the effective date of the instrument or contract that transferred the disclaimed interest.

UNIF. PROBATE CODE § 2-801(d), 8 U.L.A. 167 (1983 & 1990 Supp.).

17. Acceleration can be avoided in the context of a disclaimer when the disposition provision of the disclaimer statute is never invoked. For example, in Stewart v. Johnson, 88 N.C. App. 277, 362 S.E.2d 849 (1987), *cert. denied*, 323 N.C. 179, 373 S.E.2d 124 (1988), *T* devised property to his son Charles for life, then to Charles's children, and if Charles died without children, to Charles's brothers and sisters. Charles renounced. He had no children. The court denied acceleration because the remaindermen could not be identified. *Id.* at 279, 362 S.E.2d at 851. The court ignored N.C. GEN. STAT. § 31B-3(a) which provides that the property devolves as if the renouncer predeceased the decedent. N.C. GEN. STAT. § 31B-3(a)(1989).

The court suggested that § 31B-1(b), which prohibits someone from taking more than the disclaimant's share, also prevented acceleration. It is doubtful that the legislature intended the section cited by the court to prevent acceleration. Its purpose is probably to prevent the following: *T* dies intestate survived by a child, *A*, and a grandchild, *G*, who is the child of a deceased child of *T*. *A* has four children, *B*, *C*, *D*, and *E*. *A* disclaims. Without N.C. GEN. STAT. § 31B-1(b) the property arguably would be distributed as follows: 1/5 each to *B*, *C*, *D*, *E*, and *G*, giving *A* the power to funnel 4/5 of the estate into his branch of the family because of North Carolina's per-capita-at-each-generation system. Because of N.C. GEN. STAT. § 31B-1(b), if *A* disclaims, the property should be distributed: 1/8 each to *B*, *C*, *D*, and *E* and 1/2 to *G*. Another way to read the statute results in the following distribution: 1/10 each to *B*, *C*, *D*, and *E*, and 6/10 to *G*. (The property renounced passes from the decedent as if the renouncer predeceased.) *See* Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195 (1985) (Exum, J., dissenting).

tunities for manipulation.[18]

This Article first discusses a recent case which illustrates the potential for manipulation. Then it discusses some preliminary matters, such as the case law's position on the relevance of the classification of the future interest to the issue of acceleration, and the difference between disclaimer and release. The spousal dissent cases, a sub-category of disclaimer cases, are treated separately. This is followed by an explanation of why the objection should be to indefeasibility rather than acceleration. The article then explores the relationship of the acceleration issue to the old destructibility rule. Finally, the Article examines trust termination cases, which involve trust law doctrine not found in other acceleration cases. The summary and conclusion offer some suggestions for reform that will reduce the potential for abuse.

II. AN ILLUSTRATION

A recent South Carolina case dramatically illustrates the potential for abuse. In *Pate v. Ford*,[19] *T* devised one-third of her estate to her son Billy for life, then to her grandchildren; one-third to her son Wallace for life, then to her grandchildren; and one-third outright to her grandchildren. At *T*'s death, Wallace had five children and Billy had none. Wallace disclaimed his life estate. If disclaimer triggered acceleration, Wallace would in effect guarantee for his five children a possessory and indefeasible interest in the one-third.[20] Their interest in this portion of *T*'s estate would not be diminished by any afterborn children of Wallace or Billy.

The South Carolina Court of Appeals held that the remainder would not be accelerated because that would destroy the rights of unborn grandchildren.[21] Wallace argued that the disclaimer statute mandated acceleration because it provided that the disclaimant is deemed to predecease *T*. However, the Court of Appeals said that *T* had pro-

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18. *See infra* text accompanying note 91.

19. 293 S.C. 268, 360 S.E.2d 145 (Ct. App. 1987), *rev'd*, 297 S.C. 294, 376 S.E.2d 775 (1989).

20. Of course, they already have a possessory and indefeasible interest in the one-third interest that they were devised outright.

21. Although the court of appeals expressly denied acceleration, its real objection was to indefeasibility. The court decided that the income from the trust created by Wallace's disclaimer should go to whomever happened to be the remaindermen at the time income is distributed. This arguably is acceleration because the remaindermen, who originally owned a future interest, are given the income interest during the life of the disclaimant, which is a present interest. The court assumed that acceleration also meant indefeasibility and thus expressly denied acceleration. But giving the income to the remaindermen, while letting their identity change from time to time, is acceleration with the retention of defeasibility. *See infra* text accompanying note 56.

vided for distribution at Wallace's death, which constituted an "otherwise provided" clause that the disclaimer statute excepted. Although the result prevented the life tenant from manipulating the identity of the remaindermen in a way that could be contrary to *T*'s intent, the court's interpretation nullified that provision of the statute because there will always be a provision for distribution that differs from distribution upon acceleration.

On appeal, the South Carolina Supreme Court reversed[22] and held that the disclaimer statute's distribution provision resulted in acceleration. The supreme court rejected the lower court's holding that "on Wallace's death" constituted "another disposition" within the meaning of the disclaimer statute's exception to its distribution provision.[23] The court relied on the first *Restatement of Property*, which provides: "A construction that the 'terms and circumstances of the limitation, manifest a contrary intent' is not justified solely by the fact that after limiting a life interest (the renounced interest) it is provided that the gift over shall take effect 'at the death' of the life tenant . . . ."[24]

This decision by the South Carolina Supreme Court represents a trend to accelerate remainders under the authority of the disclaimer statute in a situation in which the life tenant may be manipulating the identity of the remaindermen contrary to the testator's intent.[25]

III. SOME PRELIMINARY MATTERS

A. The Relevance of Classification

The acceleration issue can arise with any kind of future interest.[26] The classification of the future interest should not determine the acceleration issue, however, because the classification depends upon the often fortuitous choice of words that usually does not reflect the transferor's intent about acceleration.

Nonetheless, courts occasionally find the classification determinative. For example, in *Blackwood v. Blackwood*,[27] *T* devised all of his

22. Pate v. Ford, 297 S.C. 294, 376 S.E.2d 775 (1989).

23. *Id.* at 298, 376 S.E.2d at 777.

24. RESTATEMENT OF PROPERTY § 231 comment j (1936).

25. The disposition in *Pate* was unusual. The potential for Wallace's manipulation arose because the remainder interest in Wallace's one-third went to *T*'s grandchildren instead of to Wallace's descendants by representation. Most trusts still alter the identity of the remaindermen, but only within their own descending line.

26. Future interests subject to acceleration include indefeasibly vested remainders, vested remainders subject to open, vested remainders subject to complete divestment, contingent remainders, and executory interests.

27. 237 N.C. 726, 76 S.E.2d 122 (1953).

property to his wife in fee simple so long as she remained his widow, and if she remarried, to his living children or heirs of those children who died leaving children.[28] *T*'s wife renounced her interest. The court treated acceleration as dependent solely on whether the successive interests were a life estate and remainder or a defeasible fee and an executory interest. The court construed the language as a grant of a life estate. Thus, the remainder accelerated and became indefeasible. The court did not explain, however, why an executory interest following a defeasible fee would not accelerate. The court also did not express concern that the identity of the remaindermen might have changed if there had been no acceleration.[29]

Usually the classification issue involves the age-old contingent-versus-vested debate. Traditionally, a number of legal consequences have turned on whether a remainder is contingent or vested subject to divestment. The deciding factor is the verbal formula used: If the condition is stated in precedent form, the remainder is contingent; if it is stated in subsequent form, it is vested subject to divestment. These two classifications of future interests are illustrated as follows: "To *A* for life, then to *A*'s surviving descendants" and "to *A* for life, then to *A*'s children, if any child of *A* predeceases *A*, to his or her surviving descendants." Substantively, these two conveyances say the same thing but because of the way they are worded, the first example is a contingent remainder and the second example is a vested remainder subject to divestment.

Several cases seem to allow determination of the acceleration issue to turn on this artificial distinction. In *Keen v. Brooks*,[30] *T* devised the remainder to (his) grandchildren *A* and *B*, and if either *A* or *B* died without issue, to the survivor, and if either died with issue, the issue would take the parent's share per stirpes. The life tenant renounced and the court held that the remainder accelerated and became indefeasible in *A* and *B*. The court stated that the alternative gifts were "substitutional, and could hardly be construed as conditions precedent."[31] In *In re Fischer*[32] the court held that remainders contingent upon survival could not be accelerated because they were contingent.[33]

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28. *Id.* at 727, 76 S.E.2d at 122-23.

29. This would happen if one of *T*'s children predeceased his wife.

30. 186 Md. 543, 47 A.2d 67 (1946).

31. *Id.* at 548, 47 A.2d at 70.

32. 307 N.Y. 149, 120 N.E.2d 688 (1954).

33. *See also* Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940) (renunciation of life estate by widow accelerated remainders, which were deemed to be vested remainders subject to divestment rather than contingent remainders); Simpkins v. Simpkins, 131 N.J. Eq. 227, 24 A.2d 821 (1942) (acceleration allowed upon relinquishment of precedent life estate; legacy presumed vested rather than contingent); Central Nat'l Bank v. Eells,

The above cases illustrate the condition most frequently attached to remainders, namely, that the remaindermen survive the life tenant, whether it is stated in condition precedent or condition subsequent form. The form used should not determine the acceleration issue, but the cited cases hold that acceleration results if survival is stated in condition subsequent form. If stated in condition precedent form, acceleration *may*, but probably will not result.

The *Restatement of Property* is not entirely clear in its treatment of the acceleration of contingent remainders. It provides that "a succeeding interest is not accelerated so long as a condition precedent to such succeeding interest continues unfulfilled."[34] But a comment further explains:

> Thus a description of the persons to take after the attempted prior interest as the "then surviving descendants" of a named person or as "such children of (a named person) as are then living" is not necessarily sufficient to create the condition precedent which is required for the operation of the rule stated in this section. In resolving this preliminary problem of construction, the criterion is whether the terms and circumstances of the limitation manifest an intent to benefit persons living at the termination of the preceding interest or at the death of the person to whom such preceding interest was limited.[35]

The *Restatement*'s criterion is not very helpful because the "terms and circumstances"[36] of the limitation do not manifest an intent one way or the other when there is no information other than a remainder to the life tenant's surviving children.

Courts have come out both ways on whether a remainder can be accelerated if it is contingent upon surviving the life tenant. This is probably based in part on the Restatement's unclear rule. Some courts have rationalized acceleration by construing the language to require survival of the life tenancy rather than the person to whom the life estate was given.[37] Thus, the remaindermen who are living when the life estate is renounced would be entitled to an indefeasibly vested interest because they survived the life tenancy. Other courts have viewed the renunciation by the life tenant as equivalent to his or her death.[38] These rationales are appropriate for both the vested-subject-to-divest-

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5 Ohio Misc. 187, 215 N.E.2d 77 (1965) (renunciation of a prior interest by a beneficiary accelerates succeeding vested remainders subject to divestment, unless terms and circumstances of the limitation manifest a contrary intent on the part of the testator).

34. RESTATEMENT OF PROPERTY § 233 (1936).

35. *Id.* § 233 comment c.

36. *Id.*

37. *See, e.g.*, Thomsen v. Thomsen, 196 Okla. 539, 543, 166 P.2d 417, 421 (1946).

38. Wachovia Bank and Trust Co. v. McEwen, 241 N.C. 166, 169, 84 S.E.2d 642, 644 (1954); *In re* Estate of Reynolds, 39 Wis. 2d 155, 159, 158 N.W.2d 328, 329 (1968).

ment form of remainder and for the contingent form.

If the condition precedent is independent of the life estate, the remainder generally will not be accelerated when the life estate is renounced if the condition has not been fulfilled.[39] For example, if *T* devises property "to *A* for life, then to *B* if *B* graduates from college," and *A* disclaims, the remainder will not be accelerated if *B* has not yet graduated from college.

B. Disclaimer versus Release

Most acceleration cases arise because a life tenant has released or disclaimed her interest.[40] A disclaimer (or renunciation)[41] is a refusal to accept the benefit of an interest with the result that, by operation of law, the property passes to someone else rather than passing to someone chosen by the disclaimant.[42] The transfer runs from the original transferor or testator, rather than from the disclaimant, to the one who takes as a result of the disclaimer.

A release, in contrast, is a beneficiary's refusal to continue accepting the benefits of the interest after having already accepted some benefits. It constitutes a transfer from the releasor to the beneficiary of the release. For example, *T* devises a life estate to his wife, remainder to his children; his wife releases her life estate two years after his death. This is not a disclaimer because *T*'s wife has accepted the benefits for two years. Nonetheless, courts often use the terms loosely, and the most common misuse seems to be calling a release a disclaimer.[43]

With respect to the issue of acceleration, the distinction between a disclaimer and a release should not necessarily exist.[44] However, in

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39. RESTATEMENT OF PROPERTY § 233 (1936).

40. Acceleration issues may also arise if the life tenant conveys his interest to the remaindermen. *E.g.*, Cunningham v. Cunningham, 230 Ga. 493, 197 S.E.2d 731 (1973); Schmucker v. Walker, 226 Va. 582, 311 S.E.2d 108 (1984). *See, e.g.*, *In re* LeFranc's Estate, 38 Cal. 2d 289, 239 P.2d 617 (1952) (the life tenant forfeits his interest by challenging the will when it includes a no-contest clause which is enforced against him); Walter v. Thielke, 127 N.J. Eq. 402, 13 A.2d 649 (1940) (if the remainderman conveys his interest to the life tenant).

41. By traditional usage, an heir renounces; a will beneficiary disclaims. Today the two words are used interchangeably; they are considered synonymous. The term disclaimer is the one more commonly used to describe the formal refusal to take by either as heir or as a beneficiary. J. DUKEMINIER & S. JOHANSON, *supra* note 15, at 123 n.16.

42. *Id.* at 122-27.

43. *E.g.*, Smith v. Bank of Delaware, 43 Del. Ch. 124, 219 A.2d 576 (1966); Weinstein v. Mackey, 408 So. 2d 849 (Fla. Dist. Ct. App. 1982); Lefler v. Hoffman, 112 Ind. App. 387, 44 N.E.2d 1022 (1942); Ohio Nat'l Bank v. Adair, 54 Ohio St. 2d 26, 374 N.E.2d 415 (1978); Estate of Weeks, 485 Pa. 329, 402 A.2d 657 (1979); Goldstein v. Goldstein, 104 R.I. 284, 243 A.2d 914 (1968).

44. For some purposes, it makes a difference whether the transaction is a release or

most of the cases in which the life tenant has released the interest, the courts have refused to accelerate,[45] but in most of the cases in which the life tenant has disclaimed the interest, the courts have accelerated the interests.[46] At least two possible explanations exist for this distinction. One is that in the case of disclaimer, the courts rely on the disclaimer statute's provision that property passes as if the disclaimant predeceased the testator.[47] However, many disclaimer cases have accelerated the remainder without relying on such a provision.[48] Another

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a disclaimer. For example, the beneficiaries of a spendthrift trust may disclaim but cannot release their interest. *See* RESTATEMENT (SECOND) OF TRUSTS § 337 comment l (1957).

45. Hills v. Travelers Bank & Trust Co., 125 Conn. 640, 7 A.2d 652 (1939); Lefler v. Hoffman, 112 Ind. App. 387, 44 N.E.2d 1022 (1942); Ajax Electrothermic Corp. v. First Nat'l Bank, 7 N.J. 82, 80 A.2d 559 (1951); Walsh v. Hulse, 23 N.J. Super. 573, 93 A.2d 230 (1952); Trenton Banking Co. v. Hawley, 7 N.J. Super. 301, 70 A.2d 896 (1950); Lawrence v. Westfield Trust Co., 1 N.J. Super 423, 61 A.2d 899 (1948); Keesler v. North Carolina Nat'l Bank, 256 N.C. 12, 122 S.E.2d 807 (1961); Ohio Nat'l Bank v. Adair, 54 Ohio St. 2d 26, 374 N.E.2d 415 (1978); Goldstein v. Goldstein, 104 R.I. 284, 243 A.2d 914 (1968); Compton v. Rixey's Ex'rs, 124 Va. 548, 98 S.E. 651 (1919).

"[I]t is generally held that the acceleration of the class gift by merger or forfeiture of the life interest will not affect the size of the class. The class will increase in size until the time when the life interest would have ended naturally." 5 AMERICAN LAW OF PROPERTY § 22.43, at 368 (J. Casner ed. 1952).

46. *See, e.g.*, Equitable Trust Co. v. Proctor, 27 Del. Ch. 151, 32 A.2d 422 (1943); Danz v. Danz, 373 Ill. 482, 488-89, 26 N.E.2d 872, 875 (1940); Hasemeier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923); Tomb v. Bardo, 153 Kan. 766, 114 P.2d 320 (1941); Keen v. Brooks, 186 Md. 543, 546, 47 A.2d 67, 68 (1946); Commerce Trust Co. v. Fast, 396 S.W.2d 683, 687 (Mo. 1965); *In re* Trust of Criss, 213 Neb. 379, 399, 329 N.W.2d 842, 854 (1983); Estate of Paine, 103 Misc. 2d 393, 425 N.Y.S.2d 1018 (1980); *In re* Will of Delavan, 95 Misc. 2d 540, 542, 408 N.Y.S.2d 212, 213-14 (1978); *In re* Estate of Jacobs, 92 Misc. 2d 617, 618, 401 N.Y.S.2d 146, 147 (1977); *In re* Estate of Chadbourne, 92 Misc. 2d 648, 651, 401 N.Y.S.2d 139, 140 (1977); *In re* Will of Carson, 58 Misc. 2d 819, 821, 296 N.Y.S.2d 726, 728 (1968); Wachovia Bank & Trust Co. v. McEwen, 241 N.C. 166, 169, 84 S.E.2d 642, 644 (1954); Blackwood v. Blackwood, 237 N.C. 726, 76 S.E.2d 122 (1953); Union Nat'l Bank v. Easterby, 236 N.C. 599, 602, 73 S.E.2d 541, 542 (1952); Central Nat'l Bank v. Eells, 5 Ohio Misc. 187, 215 N.E.2d 77 (1965); Funkhouser v. Dorfmeier, 31 Ohio Op. 2d 42, 47, 202 N.E.2d 226, 230 (1963); Thomsen v. Thomsen, 196 Okla. 539, 542, 166 P.2d 417, 418 (1946); Palmer v. White, 100 Or. App. 36, 40, 784 P.2d 449, 451 (1989); Pate v. Ford, 297 S.C. 294, 297-98, 376 S.E.2d 775, 777 (1989); Clark v. Board of Trustees, 596 S.W.2d 804, 806 (Tenn. 1980); Albright v. Albright, 192 Tenn. 326, 332, 241 S.W.2d 415, 417 (1951); *In re* Estate of Reynolds, 39 Wis. 2d 155, 158, 158 N.W.2d 328, 329 (1968); *In re* Muskat's Will, 224 Wis. 245, 271 N.W. 837, 838 (1937).

47. *See, e.g., In re* Will of Delavan, 95 Misc. 2d 540, 541, 408 N.Y.S.2d 212, 213 (1978); *In re* Estate of Chadbourne, 91 Misc. 2d 648, 651, 401 N.Y.S.2d 139, 140 (1977); *In re* Estate of Jacobs, 92 Misc. 2d 617, 618, 401 N.Y.S.2d 146, 147 (1977); Funkhouser v. Dorfmeier, 31 Ohio Op. 2d 42, 202 N.E.2d 226 (1963); Pate v. Ford, 297 S.C. 294, 297, 376 S.E.2d 775, 777 (1989).

48. *See* Equitable Trust Co. v. Proctor, 27 Del. Ch. 151, 32 A.2d 422 (1943); Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940); Hasemeier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923); Keen v. Brooks, 186 Md. 543, 47 A.2d 67 (1946); Commerce Trust Co. v. Fast,

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possible explanation is that in the case of a release the court may be more likely to suspect that the person granting the release is manipulating the identity of the remaindermen. This is because there are usually other reasons for a disclaimer, such as considerations other than its effect on the remainder.

C. *Spousal Dissents from the Will*

In many acceleration cases, the life tenant who renounces is the spouse of the testator, who is dissenting from the will.[49] In nearly all of these cases the courts have accelerated the remainders.[50] Occasionally courts simply rely on the dissent statute's provision that property passes as if the spouse predeceased the testator.[51] The courts often

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396 S.W.2d 683 (Mo. 1965); *In re* Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983); Estate of Paine, 103 Misc. 2d 393, 425 N.Y.S.2d 1018 (1980) (N.Y. EST. POWERS & TRUSTS LAW § 3-3.10 (McKinney 1967) did not apply retroactively to the case but the court accelerated the remainder because acceleration would be consistent with testator's intent); *In re* Will of Carson, 58 Misc. 2d 819, 296 N.Y.S.2d 726 (1968); Blackwood v. Blackwood, 237 N.C. 726, 76 S.E.2d 122 (1953); Central Nat'l Bank v. Eells, 5 Ohio Misc. 187, 215 N.E.2d 77 (1965); Thomsen v. Thomsen, 196 Okla. 539, 166 P.2d 417 (1946); Palmer v. White, 100 Or. App. 36, 784 P.2d 449 (1989); Clark v. Board of Trustees, 596 S.W.2d 804 (Tenn. 1980); Albright v. Albright, 192 Tenn. 326, 241 S.W.2d 415 (1951); *In re* Estate of Reynolds, 39 Wis. 2d 155, 158 N.W.2d 328 (1968).

49. In states that have adopted the "augmented estate" approach of the Uniform Probate Code, the value of anything the spouse renounces is applied first to satisfy the spouse's entitlement. UNIF. PROBATE CODE § 2-207, 8 U.L.A. 86-87 (1983 & Supp. 1991). This provision deters the spouse from renouncing. As a result, this aspect of the Uniform Probate Code has been criticized because the spouse might prefer, but is effectively precluded from taking, an absolute interest rather than a life estate. *See* Volkmer, *Spousal Property Rights at Death: Re-evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 141-48 (1983-84).

50. *See* Equitable Trust Co. v. Proctor, 77 Del. Ch. 151, 32 A.2d 422 (1943); Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940); Hasemeier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923); Tomb v. Bardo, 153 Kan. 766, 114 P.2d 320 (1941); Ward v. Ward, 153 Kan. 222, 109 P.2d 68 (1941); *In re* Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983); Askey v. Askey, 111 Neb. 406, 196 N.W. 891 (1923); Estate of Paine, 103 Misc. 2d 393, 425 N.Y.S.2d 1018 (1980); Wachovia Bank & Trust Co. v. McEwen, 241 N.C. 166, 84 S.E.2d 642 (1954); Blackwood v. Blackwood, 237 N.C. 726, 76 S.E.2d 122 (1953); Union Nat'l Bank v. Easterby, 236 N.C. 599, 73 S.E.2d 541 (1952); Funkhouser v. Dorfmeier, 31 Ohio Op. 2d 42, 202 N.E.2d 226 (1963); Thomsen v. Thomsen, 196 Okla. 539, 166 P.2d 417 (1946); Albright v. Albright, 192 Tenn. 326, 241 S.W.2d 415 (1951); Hamilton Nat'l Bank v. Allred, 496 S.W.2d 497 (Tenn. Ct. App. 1972); *In re* Muskat's Will, 224 Wis. 245, 271 N.W. 837 (1937).

51. *See* Funkhouser v. Dorfmeier, 31 Ohio Op. 2d 42, 202 N.E.2d 226 (1963). States with right-to-dissent statutes which provide that the property passes as if the spouse predeceased the testator include: DEL. CODE ANN. tit. 12, § 907(a) (1987); FLA. STAT. ANN. § 732.211 (West 1983); ILL. ANN. STAT. ch. 110 ½ para. 2-8(c) (Smith-Hurd 1978); IND. CODE ANN. § 29-1-3-1(d) (Burns 1989); MD. EST. & TRUSTS CODE ANN. § 3-208(a) (1974);

hold, however, that the renunciation is equivalent to the spouse's death even without the benefit of such a provision in the dissent statute.[52] In spousal dissent cases courts frequently state that acceleration gives effect to intent because the testator is presumed to know that the law provides the surviving spouse with the right to dissent.[53] Another possible explanation is that the life expectancy of a spouse is shorter than that of the typical nonspouse disclaimant, who is usually a child of the testator. Courts recognize, without expressly stating it, that when the remaindermen are children their identity probably will not change.

In one of the few dissent cases in which the court refused to accelerate the remainder,[54] the testator (*T*) devised property to his wife (*W*) and daughter (*D*) for the life of his wife, then certain legacies to named individuals and the rest to *D*, if living, otherwise to her children. *W* renounced. The court refused to accelerate because the postponement was for the benefit of *W* as well as *D*. The court reasoned that if the legacies were paid prior to *W*'s death, *D* would be deprived of the value of her life estate. Therefore, acceleration would distort the gifts and be contrary to *T*'s intent. It would seem that if the legacies were discounted to present value, *D* would not be deprived of anything by acceleration because she was given the remainder after the legacies were taken out. *D*'s children suffered by acceleration because they would have lost their remainder, which was contingent on *D* predeceasing *W*.[55]

MO. ANN. STAT. § 474.160(3) (Vernon Supp. 1991); NEB. REV. STAT. § 30-2318(a) (1989); OHIO REV. CODE ANN. § 2107.39(D) (Anderson 1990); VT. STAT. ANN. tit. 14, § 551(2) (1989); VA. CODE ANN. § 64.1-190(a) (Supp. 1990).

52. *See, e.g.*, Tomb v. Bardo, 153 Kan. 766, 114 P.2d 320 (1941); Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940); Hasemeier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923); *In re* Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983); Blackwood v. Blackwood, 237 N.C. 726, 76 S.E.2d 122 (1953); Clark v. Board of Trustees, 596 S.W.2d 804, 806 (Tenn. 1980); Albright v. Albright, 192 Tenn. 326, 241 S.W.2d 415 (1951); *In re* Muskat's Will, 224 Wis. 245, 271 N.W. 837 (1937).

53. *See, e.g.*, *In re* Trust of Criss, 213 Neb. 379, 400, 329 N.W.2d 842, 854 (1983); Thomsen v. Thomsen, 196 Okla. 539, 543, 166 P.2d 417, 420 (1946); Clark v. Board of Trustees, 596 S.W.2d 804, 806 (Tenn. 1980); Albright v. Albright, 192 Tenn. 326, 333, 241 S.W.2d 415, 418 (1951); Hamilton Nat'l Bank v. Allred, 496 S.W.2d 497, 500 (Tenn. Ct. App. 1972).

54. St. Louis Union Trust Co. v. Kern, 346 Mo. 643, 142 S.W.2d 493 (1940).

55. This assumes that if the remainder had been accelerated, it would have become indefeasible, which is the result in the overwhelming majority of cases in which remainders have been accelerated.

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IV. ACCELERATING AND BECOMING INDEFEASIBLE VERSUS ACCELERATING AND REMAINING DEFEASIBLE

One of the most significant shortcomings of the case law on acceleration has been the failure to separate the issue of defeasibility from the issue of acceleration. It is possible for a remainder that is vested subject to total or partial divestment to accelerate but remain defeasible. For example, if *T* devises property "to *A* for life, then to *B*, but if *B* predeceases *A*, then to *B*'s issue" and *A* disclaims, *B*'s remainder could be accelerated but remain subject to divestment. In the case of real property, *B* would get possession and would have a defeasible fee, which would be divested in favor of his issue if he predeceased *A*. Similarly, a remainder that is vested subject to open could be accelerated but remain subject to open. For example, if *T* devised property "to *A* for life, then to *A*'s children" and *A* disclaimed, the remainder could be accelerated but remain subject to open or to partial divestment.

The overwhelming majority of cases that accelerate the remainders, however, also hold that they become indefeasible,[56] and courts rarely even discuss the possibility that the remainder can remain defeasible or partially defeasible. In some cases, it seems that the possibility was never suggested to or considered by the court.[57] When defeasibility has been considered, it has not been fully understood. In *Weinstein v. Mackey*[58] the court discussed the practical problem of a

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56. Exceptions exist. In Hasemeier v. Welke, 309 Ill. 460, 141 N.E. 176 (1923), *T* devised all of his real and personal property to his wife "so long as she lives and at her death to . . . my children, or in case of their death, then to the heirs of their body." *Id.* at 461, 141 N.E. at 177. *T*'s wife renounced and the court held that the remainder would accelerate but remain defeasible. In Neill v. Bach, 231 N.C. 391, 57 S.E.2d 385 (1950), *T* devised real property to her daughter, *D*, for life "with the remainder in fee to her children." *Id.* at 394, 57 S.E.2d at 387. At *T*'s death *D* had two daughters, a five-year-old and an eleven-year-old. *D* renounced. Five years later *D*'s husband, as guardian of the children, contracted to sell the property. The buyer refused to accept the deed claiming that it did not convey the deed in fee simple. *D*'s husband sued for specific performance. The court held that *D*'s renunciation had the effect of accelerating the remainder but that it would remain subject to open "until the possibility of afterborn children is extinct by the death of [*D*]." *Id.*, 57 S.E.2d at 388. The court found that *T*'s devise of the property to *D* for the express purpose of providing a home for *D* was evidence of *T*'s intent to keep the class open. *Id.* at 394, 57 S.E.2d at 387. In Askey v. Askey, 111 Neb. 406, 196 N.W. 891 (1923), *T* devised enough proceeds from his property to support his wife (*W*) for her life, but if she remarried her interest was to cease; at her death the property was to be sold and divided among *T*'s grandchildren. *W* dissented from the will. The court held that the class remained subject to open. *Id.* at 410, 196 N.W. at 893. The court noted that although *T* realized that *W*'s interest could terminate by remarriage, *T* nevertheless provided in his will that the grandchildren would not take until her death. *Id.*

57. *See, e.g.*, Albright v. Albright, 192 Tenn. 326, 241 S.W.2d 415 (1951).

58. 408 So. 2d 849 (Fla. Dist. Ct. App. 1982).

remainder remaining defeasible if it is an interest in personal property:

> If . . . [the rights of the contingent remaindermen] are protected by sequestering or continuing the trust as to all or part of the assets (the required proportion of which would be entirely speculative, since there is no way of knowing how many more children Dr. Mackey may have), there would be no real acceleration of the right to the principal at all. In any event, this approach would engender a welter of uncertainty which, as far as possible, the law of property should discourage.[59]

The *Weinstein* court and others have cited section 231 of the *Restatement of Property* as authority for holding that remainders are indefeasible.[60] The *Restatement (Second) of Property* also indicates that accelerated remainders are indefeasible.[61]

The *Weinstein* reasoning is wrong. Contrary to the point made by the court, an interest that remains in trust to protect future remaindermen can be accelerated in a real sense even though it may not mean an outright distribution of the corpus. The remainder, a future interest, can be accelerated into a present interest by becoming an interest in income until all the remaindermen have been identified. In the meantime, the interests of those receiving income can remain defeasible or partially defeasible. This is acceleration in the real sense because the interest becomes a present interest rather than remaining a future interest. A life interest is a present interest even though it is simply a right to periodic payments if it is an interest in intangible personal property held in trust.[62]

In the case of an immediate gift of income to a class, the prevailing view is that the class does not close immediately, but can remain open to afterborn members because it is not administratively inconvenient to keep the class open.[63] Thus, if *T* transfers "$100,000 in trust to pay income to the children of *A* for ten years, then corpus to *B*," the class of *A*'s children may, if *A* is alive, increase for ten years. The interests of *A*'s children are vested subject to partial divestment. Each time income is paid out, it is divided into as many shares as there are children

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59. *Id.* at 852 n.4.

60. *See, e.g.*, Keen v. Brooks, 186 Md. 543, 546-47, 47 A.2d 67, 69 (1946); Commerce Trust Co. v. Fast, 396 S.W.2d 683, 688-89 (Mo. 1965); Cavers v. St. Louis Union Trust Co., 531 S.W.2d 526 (Mo. Ct. App. 1975); *In re* Trust of Criss, 213 Neb. 379, 399, 329 N.W.2d 842, 853 (1983); Pate v. Ford, 297 S.C. 294, 298, 376 S.E.2d 775, 777 (1989).

61. RESTATEMENT (SECOND) OF PROPERTY § 26.1 comment j, illustration 13, § 26.2 comment i, illustration 6 (1988).

62. The remaindermen would hold, in effect, a life estate *pur autre vie*; that is, a life estate is measured by the life of another.

63. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 144 (2d ed. 1984).

of *A* at that time.

When a life tenant disclaims, the remainder can accelerate and become a present interest in income during the life of the disclaimant. But it can remain defeasible or subject to open just as if it had initially been a present interest as in the example above. The assumption that acceleration necessarily results in indefeasibility contradicts the prevailing view that in the case of a present gift of income, the class can remain open. An erroneous assumption exists that acceleration means an outright distribution of corpus. Once it is recognized that there can be acceleration without an outright distribution of corpus, it should follow that the accelerated interest can remain defeasible or partially defeasible.

Cases that purport to deny acceleration because the remainder is contingent sometimes reach the same result that would have been reached had the language expressed a condition subsequent; the remainder would have been accelerated but remained defeasible or partially defeasible. For example, assume that *T* devises property in trust "to *A* for life, then to *A*'s surviving issue." *A* is to receive the income during his life and at his death the corpus is to be distributed to *A*'s surviving issue. If *A* disclaims, a court might hold that the remainder cannot be accelerated because it is contingent and the identity of the remaindermen cannot be ascertained.[64] But if the property remains in trust and the income is paid to those who are entitled to the next successive interest, the same practical result is reached as if the remainder had been accelerated but remained defeasible.[65] Each time income is paid out, it is paid to those who are *A*'s issue at the time. When *A* dies the corpus is paid to the issue of *A* who survive.

If the devise is worded as a condition subsequent, but in substance has the same effect as a condition precedent, the remainder could be accelerated yet remain defeasible. This would reach the same practical effect as the illustration stated above. Thus, if *T* devised property "to *A* for life, then to *A*'s children, the issue of any deceased child to take the parent's share,"[66] and *A* disclaimed, the remainder could accelerate but remain defeasible. This could be achieved by putting the property in trust (or keeping it there) and paying the income to whomever happens to be *A*'s issue at the time. At *A*'s death, the corpus would be

64. *See, e.g.*, Aberg v. First Nat'l Bank, 450 S.W.2d 403 (Tex. Civ. App. 1970).

65. Paying the income to those who are presumptively entitled to the next eventual estate is not the only possibility. The income could revert or accumulate. For a discussion of these choices, see *infra* note 103 and accompanying text.

66. This language is different substantively from the language in the hypothetical in the previous paragraph in one way. If children of *A* predeceases *A* without issue, they will not be divested of their interest. *In re* Houston's Estate, 414 Pa. 579, 201 A.2d 592 (1964).

distributed to *A*'s children and the issue of any deceased children. Allowing the accelerated interest to remain defeasible prevents the life tenant from being able to manipulate the identity of the remaindermen. This preserves *T*'s plan for distribution.

In short, indefeasibility is neither a necessary, nor desirable, consequence of acceleration. A simple example illustrates the efficacy of acceleration without indefeasibility. Assume *T* devises Blackacre "to *A* for life, then to *A*'s children." If *A* disclaims, *A*'s children could get possession, but their interest would be subject to open; they could be partially divested by the birth of other children of *A*. They would have, in effect, a life estate *pur autre vie* measured by the life of *A*, in addition to a vested remainder.

Now assume that the property is intangible personal property, rather than real property, and *A* disclaims. The income could be distributed to *A*'s children who are alive at the time; the corpus would be distributed to them at *A*'s death. Giving them an interest in the income during *A*'s life is equivalent to a possessory interest in real property. In other words, either way their interest is present, not future. In the case of real property, it is present possession; in the case of intangible personal property, it is the right to periodic payments of income.

A court may purport to deny acceleration because of the concern for the identity of the remaindermen, but give the income in the meantime to the remaindermen. This is not refusal to accelerate. If the remaindermen are given the income, their future interest has been accelerated into a present interest. In short, acceleration does not necessarily require an outright distribution of corpus.

V. THE RELATIONSHIP OF ACCELERATION TO THE DESTRUCTIBILITY RULE

A. Statutes That Abolish the Destructibility Rule and Their Effect on Acceleration Cases

The archaic and nearly extinct destructibility rule provides that if a life tenancy ends before the contingency is resolved, the contingent remainder is destroyed.[67] For example if *T* devises property "to *A* for life, then to *B* if *B* attains 21," and if *A* died when *B* was 18, *B*'s contingent remainder would be destroyed and the property would become possessory in the reversioner. If the life tenant disclaims, *B* has an executory interest because the disclaimer relates back. This means that the life estate never existed; therefore the remainder never existed. *B*'s executory interest is preserved because the destructibility rule does not

67. T. BERGIN & P. HASKELL, *supra* note 63, at 78.

apply to executory interests.[68]

The destructibility rule has been abolished in most jurisdictions.[69] In some jurisdictions in which it has been abolished legislatively, courts have prevented acceleration by applying the statute literally, even though this was not the intent of the statute. For example, in *In re Lefranc's Estate*,[70] *T* devised the residue of her estate in trust "to *A* for life, then to the issue of *A* and if *A* dies without issue to *B* if living, and if not, to the issue of *B*." After *A* challenged the will, the court enforced a no-contest clause against her, which resulted in the forfeiture of her life estate. *A* was forty-eight years old and childless. The court said that the contingent interests of *B*'s children could not be defeated by *A*'s forfeiture of her interest.[71] The court relied on a California statute and refused to distribute the corpus to *B*. The statute stated:

> No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.[72]

It is doubtful that the purpose of the statute was to prevent acceleration even though a literal reading seems to warrant that result. If the statute had been worded less broadly by referring to "remainder" rather than "future interest," the no-acceleration result could have been avoided more easily. The statute would not have applied because the future interests could have been called executory interests.

Although *Lefranc* involved an unintended application of the statute, the result it reached is not objectionable. It provides another illustration of a case in which the real objection is not to acceleration, but rather to early indefeasibility. This is because the court applied another statute that required the income be paid to *B*.[73] Thus, *B*'s inter-

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68. Pells v. Brown, 79 Eng. Rep. 504 (1620), established the inapplicability of the destructibility rule to executory interests. *See* O. BROWDER & L. WAGGONER, *supra* note 11, at 49.

69. O. BROWDER & L. WAGGONER, *supra* note 11, at 126.

70. 38 Cal. 2d 289, 239 P.2d 617 (1952). *See also* Estate of Hoiby, 150 Cal. App. 3d 233, 197 Cal. Rptr. 682 (1983) (future interests of remaindermen who are to take trust property on the death of a life beneficiary cannot be accelerated by an event other than death of the life tenant).

71. *In re* Lefranc's Estate, 38 Cal. 2d at 297, 239 P.2d at 622.

72. CAL. CIV. CODE § 742 (West 1990).

73. California Civil Code § 733 states that the income "belongs to the persons presumptively entitled to the next eventual interest." *Id.* § 733.

A similar New York statute states that, "When income is not disposed of and no

est became a present interest instead of a future interest. This ruling also allowed for the future identification of the remaindermen as *T* had intended.

B. A Return to the Destructibility Rule?

One of the reasons the destructibility rule has been denounced is because it enables the life tenant and the reversioner to collude and destroy the contingent remainders. For example, if *O* conveyed Blackacre "to *A* for life, then to the children of *A* who survive *A*," later *O* and *A* could agree that one would convey his or her interest to the other. This would merge the life estate with the reversion and destroy the contingent remainder.[74]

Ironically, the accelerate-and-become-indefeasible result that the disclaimer statutes seem to mandate brings us back to a kind of destructibility rule. For example, assume *T* devises property "to *A* for life, then to *A*'s children, the issue of any deceased children to take the parent's share." Assume also that *A* has two children, *B* and *C*, and several grandchildren who are children of *B* and *C*. *A* might strike a deal with *B* and *C* to disclaim his interest. *B*'s and *C*'s remainders would accelerate and become indefeasible, thus "destroying" the interest of the grandchildren. Although technically different from traditional destructibility, because executory interests rather than contingent remainders are destroyed here, the result is still that the life tenant and the holder of the successive interest can eliminate contingent future interests owned by others.

Of course, a court might reach this result in a context other than disclaimer when the destructibility cannot be blamed on the disclaimer statute. In *Walter v. Thielke*,[75] *T* devised the residue of his estate in trust for the benefit of his wife (*W*) and son (*S*) for their lives, then to four named individuals. If any of the four died before *W* or *S*, that share would go to his or her children. Four years after *T*'s death the four remaindermen conveyed their interests to *W* and *S* in exchange for two thousand dollars each. *W* and *S* then released their life estates. The court held that the remainders accelerated and became indefeasible in *W* and *S*, defeating any interest in the children of the four beneficiaries.[76] Although the court did not use the term "merger," the court

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valid direction is given for its accumulation it passes to the persons presumptively entitled to the next eventual estate." N.Y. EST. POWERS & TRUSTS LAW § 9-2.3 (McKinney 1967).

74. T. BERGIN & P. HASKELL, *supra* note 63, at 85.

75. 127 N.J. Eq. 402, 13 A.2d 649 (1940).

76. The court referred to the children of the four beneficiaries as "contingent substitutionary remaindermen." *Id.* at 405, 13 A.2d at 651.

reached the same result that the merger branch of the destructibility rule would reach. That branch of the rule destroyed contingent remainders whenever the life estate and the reversion came into the hands of the same person.[77]

VI. THE TRUST TERMINATION CASES

Trust termination cases are often acceleration cases even though the doctrine of acceleration is not mentioned by, or argued to, the court. These cases are hard to reconcile with other acceleration cases. This may be due, in part, to a lack of recognition of a distinct body of law on acceleration. Because of this lack of recognition, many acceleration cases are not recognized, or treated, as such. Acceleration may not be recognized because often no disclaimer, conveyance, or release by the life tenant is present. The owners of the successive interests simply seek termination. But if a trust is terminated and the corpus is distributed to the owners of the (previously) successive interests according to their respective values, then the owner of what originally was a future interest gets possession of a share of the corpus, a present rather than a future interest. This is acceleration.

In trust termination cases, courts usually follow the general trust principle that a trust may be terminated if all the beneficiaries consent, unless to do so would defeat a material purpose of the trust.[78] Instead of an accelerate-and-become-indefeasible issue, the question in trust termination cases is whether an early ascertainment of the identity of the remaindermen would defeat a material purpose of the trust.

Of course, in the case of an indefeasibly vested remainder, the identity of the remaindermen is established at the time the interest is created.[79] Although any successive ownership is defeated by termination, generally this alone has not been considered a material purpose that should prevent termination.[80] Thus, if *T* devises property in trust "for the benefit of *A* for life, then to *B*," *A* and *B* can compel termina-

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77. O. BROWDER & L. WAGGONER, *supra* note 11, at 47.

78. This is known as the Claflin Doctrine, which is derived from Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889). *See* P. HASKELL, *supra* note 5, at 222-32.

79. If *T* devises property "to *A* for life, then to *B*," *B* has an indefeasibly vested remainder. This means that if *B* predeceases *A* without having sold his remainder, it passes to his successors in interest. Thus, the identity of the remaindermen is certain in the sense that at *A*'s death it will become possessory in *B* or *B*'s successor in interest.

The identity of the remaindermen might be certain ("to *A* for life then to *B* and *C*"), or even if not certain, the potential remaindermen might be certain ("to *A* for life, then to *B*, but if *B* predeceases *A*, then to *C*"), or the potential remaindermen might not be certain, because potential remaindermen might exist who are not born yet ("to *A* for life, then to *A*'s surviving descendants").

80. *See* P. HASKELL, *supra* note 5, at 226.

tion. If terminated, *A* would receive a share of the corpus equal to the value of his life estate determined actuarially, and *B* would receive the rest.

If *T* devises property in trust "to *A* for life, then to *B* but if *B* predeceases *A*, then to *C*," then *A*, *B*, and *C* could compel termination. The value of *B*'s remainder and *C*'s executory interest, again, would be determined actuarially. But *A* and *B* could not compel termination against *C*'s objection, even if *A* is ninety and *B* is twenty and in good health. *C* is entitled to the chance that things will turn out differently than the actuarial charts predict.

Furthermore, if *A* disclaims his life estate and the disclaimer statute provides that the property passes as if the disclaimant predeceased the testator, *C* will argue that to deprive his remainder of the chance to vest will defeat a material purpose of the trust. But here the material purpose principle of trust law competes with the less flexible provision in the disclaimer statute. If the latter prevails, *C*'s interest is defeated because *B* is deemed to have survived *A*. Although the cases go both ways on this issue, if framed as a trust termination issue, the alternative beneficiaries have a better chance of prevailing.[81]

If a disclaimer is not involved, the alternative or substitute beneficiaries are more likely to retain their interests. Assume *T* devises property in trust "for the benefit of *A* for life, then to *A*'s children, the

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81. *See* Schwarzkopf v. American Heart Ass'n, 541 So. 2d 1348 (Fla. Dist. Ct. App. 1989); *In re* Estate of Ikuta, 64 Haw. 236, 639 P.2d 400 (1981); *In re* Estate of Morgan, 74 Ill. App. 3d 853, 393 N.E.2d 692 (1979), *aff'd*, 82 Ill. 2d 26, 411 N.E.2d 213 (1980); Blacque v. Kalman, 225 Minn. 258, 30 N.W.2d 599 (1948); Ajax Electrothermic Corp. v. First Nat'l Bank, 7 N.J. 82, 80 A.2d 559 (1951); Ohio Nat'l Bank v. Adair, 54 Ohio St. 2d 26, 374 N.E.2d 415 (1978); National City Bank v. Ford, 36 Ohio Misc. 60, 299 N.E.2d 310 (1973); Frost Nat'l Bank v. Newton, 554 S.W.2d 149 (Tex. 1977); Clayton v. Behle, 565 P.2d 1132 (Utah 1977); *In re* Estate of Brown, 148 Vt. 94, 528 A.2d 752 (1987); Schmucker v. Walker, 226 Va. 582, 311 S.E.2d 108 (1984); Blackwell v. Virginia Trust Co., 177 Va. 299, 14 S.E.2d 301 (1941). *But see* Cavers v. St. Louis Union Trust Co., 531 S.W.2d 526 (Mo. Ct. App. 1975) (*T* devised property in trust for the benefit of several annuitants with the corpus to go to eight persons or their descendants upon the death of the life annuitants. Paul, the last surviving annuitant, released his interest after accepting the benefits for fifty years. The court held that the trust could be terminated, and it rejected the argument of the substituted takers that they should not lose their chance of taking). *See also* Testamentary Trust of a Child, 153 Mont. 349, 457 P.2d 447 (1969) (trust's purpose was to pay income to *S*'s wife, mother, sister, and son during their lifetimes, but mother, sister, and wife were deceased. Son, whose life was last measuring life for trust, had forfeited his right to receive income, and trust would be terminated, although some beneficiaries did not consent); Estate of Weeks, 485 Pa. 329, 402 A.2d 657 (1979) (trust's purpose was to support testator's (*T*) widow and children and to preserve the corpus for *T*'s grandchildren. The trust was to terminate on the death of *T*'s last child. *T*'s surviving daughters, each over 60, had renounced their interest in the trust income. The court held that the facts were sufficient to permit unconditional termination of the trust because the chance of the birth of additional beneficiaries was negligible).

issue of any deceased child to take the parent's share." Assume also that *A* has two children, *B* and *C*, and two grandchildren, *X* and *Y*, who are children of *B*. If *A* conveys his interest to *B* and *C*, they may argue that their remainder accelerates, becomes indefeasible, and thus defeats the substitutionary gift to *B*'s children. But in this case, the disclaimer statute does not directly apply, and the guardian for the born and unborn grandchildren can argue that termination would defeat a material purpose of the trust because the testator wanted the ascertainment of the remaindermen to be deferred until the death of *A*.

Thus, the court in *Schmucker v. Walker*[82] refused to terminate a trust because it affected the rights of unidentified remaindermen. The testatrix, *T*, devised real property in trust for the benefit of her son, *S*, for life, then for the benefit of her son's widow, *W*, for life or until her remarriage, then to "their children or the issue of any deceased children, per stirpes." Four years after *S* died, *W* conveyed her interest to the remaindermen who then sought to terminate the trust. The court refused and said:

> [U]ntil the event occurs which will terminate the trust ([W's] death or remarriage), it is not possible to ascertain precisely who will be in the class of remaindermen contemplated by the testatrix. For example, should one of [*W*'s] children die leaving issue before [*W*] either died or remarried, the class of beneficiaries would open for such issue. Consequently, a premature termination of the trust by the beneficiaries could abridge the rights of undetermined parties.[83]

Stated differently, if potential unborn remaindermen exist, their consent to terminate the trust cannot be obtained. Thus, in *Clayton v. Behle*[84] the corpus was to be distributed to the issue of the life tenant. The court held that the trust could not be terminated prior to the life tenant's death because the ultimate beneficiaries could not be determined until then.[85]

Similarly, in *National Bank v. Ford*,[86] decided before the enactment of Ohio's disclaimer statute, the court held that if the life tenant disclaimed, the remainder to his heirs could not be accelerated because the heirs could not be determined until his death.[87] Ohio's subsequently enacted disclaimer statute would change this result because it provides that unless expressly provided otherwise, the property passes

82. 226 Va. 582, 311 S.E.2d 108 (1984).
83. *Id.* at 586, 311 S.E.2d at 110.
84. 565 P.2d 1132 (Utah 1977).
85. *Id.* at 1133.
86. 36 Ohio Misc. 60, 299 N.E.2d 310 (1973).
87. *Id.* at 65, 299 N.E.2d at 314.

as if the disclaimant died before the effective date of the instrument.[88] This again illustrates the disclaimer statute's departure from the traditional protection of contingent remaindermen.

The life tenant can circumvent the resistance encountered in trust termination cases, however, by fashioning the transaction as a disclaimer rather than a trust termination. Therefore, if the life tenant desires to terminate the trust prior to the deadline for disclaimer, he could disclaim, and the disclaimer statute would mandate termination. This would effectively preclude the "material purpose" argument of the alternative remaindermen.

The desire to terminate could originate with the primary remaindermen who want to prevent their remainders from failing. For example, assume *T* devises property in trust "for the benefit of *A* for life, then to *A*'s children, the issue of any deceased child to take the parent's share." Assume also that at *T*'s death *A* has two children, *B* and *C*, and two grandchildren, *E* and *F*, who are children of *B* and *C*. Shortly after *T*'s death, *B* and *C* might politely suggest to *A* that he disclaim his life estate, perhaps in exchange for some small gift.[89]

If the beneficiaries do not anticipate the benefits of this arrangement in time to meet the deadline of the disclaimer statute, then *A* might try to achieve the same result by conveying his interest to *B* and *C* or by releasing his interest. Alternatively, *A*, *B*, and *C* might simply seek termination, but as explained above, they have less chance of prevailing because of the unascertained remaindermen and because the disclaimer statute does not apply. Furthermore, as *Schmucker* illustrates, there is no guarantee that the conveyance technique will work either.

A might not achieve his goal by releasing. There is a split of authority, but most courts refuse to accelerate when the life tenant releases.[90] However, the *Restatement (Second) of Property* indicates that the class should close when the interests merge, contrary to the majority view.[91] Illustration seven of section 26.2 provides:

> O transfers Blackacre by deed "to O's daughter D for life, then to D's children in fee simple." Ten years after the transfer of Blackacre, D transfers her interest to her two children, C1 and C2. Prior to such transfer, under the controlling local law, C1 and C2 have a vested remainder subject only to partial divestiture by the birth of more child-

88. OHIO REV. CODE ANN. § 1339.60(G)(3) (Anderson Supp. 1989).

89. This arrangement is similar to what occurred under the merger branch of the old destructibility rule discussed in the text accompanying note 74.

90. *See supra* note 45 and accompanying text.

91. *See* RESTATEMENT (SECOND) OF PROPERTY § 26.1 reporter's note 10, § 26.2 comment i (1988).

ren to D. The transfer of D's life estate to C1 and C2 causes it to terminate if there is a merger. Any child of D that is conceived or adopted after the merger is excluded from the class gift under the rule of Subsection (1) of this section, in the absence of additional language or circumstances that indicate otherwise.[92]

Although this rule achieves the desired result of treating release and disclaimer similarly, like the disclaimer statutes, it creates the possibility for early indefeasibility. This creates even more opportunities for manipulation of the identity of the remaindermen. In other words, on the issue of acceleration and indefeasibility, the *Restatement (Second)* has chosen to treat release cases like disclaimer cases. It would have been fairer to the remaindermen to retain the flexibility found in traditional release cases, which did not automatically result in acceleration and indefeasibility.[93]

VII. CONCLUSION

Many deeds, wills, and trusts create successive interests in property, with a class of remaindermen that often fluctuates. The class might only increase (to *A* for life, then to *A*'s children) or only decrease (to *A* for life, then to my children who survive *A*) or even both increase and decrease (to *A* for life, then to *A*'s surviving issue). During the course of the life estate, the identity of the remaindermen is determined by the births and deaths of the beneficiaries whose interests are contingent on being born and sometimes on surviving the life tenant. These contingencies often have the purpose and effect of keeping the property in the family, and courts sometimes say that giving effect to this intent is the preferred result.[94]

If the life tenant renounces, the question of accelerating the remainder arises. When remainders are accelerated and made indefeasible because of disclaimer or release, this acceleration almost always affects the identity of the remaindermen. Only infrequently do courts even note that the identity of the remaindermen becomes fixed, whereas had there been no disclaimer, the remaindermen's identity would have fluctuated, becoming fixed at a later time.

Perhaps courts are tacitly taking into consideration the ages of the beneficiaries of the successive interests. If it is very likely that the identity of the remaindermen will not change anyway because of their respective life expectancies, a court would likely accelerate the remain-

92. *Id.* § 26.2 illustration 7.

93. *See supra* note 45 and text accompanying note 47.

94. *See, e.g.*, Ohio Nat'l Bank v. Adair, 54 Ohio St. 2d 26, 31, 374 N.E.2d 415, 419 (1978).

der and make it indefeasible. Courts are not explicit about this, however, and consequently, the acceleration cases are hard to reconcile.

Some patterns have emerged despite the inconsistencies. For example, in most disclaimer cases courts have accelerated the remainders and made them indefeasible.[95] An even higher percentage of spousal dissent cases have resulted in acceleration and indefeasibility.[96] Courts are more likely to accelerate in disclaimer cases than in release cases.[97] Courts are more likely to accelerate when the remainder is vested subject to divestment than when it is contingent, although the modern and better view is to reject the technical classification because it is not decisive.[98]

When remainders are accelerated they almost always become indefeasible. Courts rarely even discuss the possibility that they could accelerate but remain defeasible or partially defeasible. The indefeasibility aspect of acceleration seems to have been self-perpetuating. The first *Restatement of Property* made the accelerated remainder indefeasible; the case law followed the *Restatement*. The *Restatement (Second)* has followed the case law rather than taking a fresh and more enlightened approach based upon developed trust doctrine. Furthermore, and unfortunately, the *Restatement (Second)* seems to have extended the automatic accelerate-and-become-indefeasible result to release cases.[99]

The law of future interests, of which the doctrine of acceleration is a part, evolved at a time when wealth was largely tied up in land. Some of the concepts that are relevant to the acceleration issue, such as the class-closing rules, are tailored to address the concerns of real property. For example, if a class closes so that the interest becomes indefeasibly vested, the land is more marketable.[100] However, it is often preferable for a future interest to accelerate, but remain in or be put in trust without becoming indefeasible. Less need generally exists today to close a class because of the prevalence of trusts when it is not administratively inconvenient to keep the class open. In fact, automatic indefeasibility upon acceleration is inconsistent with the prevailing view that in the case of a present gift of income, the class does not close immediately.[101] The disclaimer statutes applied literally, however, have had the effect of early indefeasibility and this, in turn, creates the po-

95. *See supra* note 46 and accompanying text.
96. *See supra* note 53 and accompanying text.
97. *See supra* note 47 and accompanying text.
98. *See, e.g.*, Estate of Paine, 103 Misc. 2d 393, 425 N.Y.S.2d 1018 (1980); Clark v. Board of Trustees, 596 S.W.2d 804 (Tenn. 1980).
99. *See supra* text accompanying notes 90-91.
100. *See* 5 AMERICAN LAW OF PROPERTY § 22.42 (J. Casner ed. 1952).
101. T. BERGIN & P. HASKELL, *supra* note 63, at 144.

tential for manipulation of the identity of the remaindermen by the life tenant in a way that would be contrary to the testator's intent.

Courts that purport to object to acceleration are often, upon closer examination, really objecting to early indefeasibility. Refusing to accelerate, but at the same time paying the income interest to the remaindermen although their identity fluctuates, is arguably not a refusal to accelerate. If the income is paid to the remaindermen, then a future interest has become a present interest simply because of the periodic payments. In the meantime, the composition of the class of remaindermen can fluctuate until the death of the life tenant who has disclaimed. At that point the class identity becomes fixed, which was intended by the testator, and their interests become indefeasible. In the case of personal property, the corpus would be distributed to them. In the case of real property, they would own a fee simple absolute as tenants in common.

Acceleration in the sense just described depends on paying the income to the remaindermen. But it is not clear whether the income will always be paid to the remaindermen. It will in jurisdictions with a statute like New York's, which provides that the income goes to those "presumptively entitled to the next eventual estate."[102] However, other possibilities exist.[103] Without a statute like New York's, the income belongs to the residuary devisees, if any exist who are different from the remaindermen. It could also be argued that the income belongs to the testator's heirs because they own the reversion, which passed to them by intestacy. If the interests are created by an inter vivos transfer, the income arguably reverts to the transferor until the death of the life tenant.[104] Finally, it would be possible for the income simply to

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102. N.Y. EST. POWERS & TRUSTS LAW § 9-2.3 (McKinney 1967). *See also* ARIZ. REV. STAT. ANN. § 33-240 (1990); CAL. CIV. CODE § 733 (West 1982); MINN. STAT. ANN. § 500.17(5) (West 1990); S.D. CODIFIED LAWS ANN. § 43-6-3 (1983); WASH. REV. CODE ANN. § 11.104.040 (West 1987).

103. In some cases in which the courts refuse to accelerate, the opinion does not indicate the disposition of the income in the meantime. *See* Hills v. Travelers Bank & Trust Co., 125 Conn. 640, 7 A.2d 652 (1939); Estate of Ikuta, 64 Haw. 236, 639 P.2d 400 (1981); Lefler v. Hoffman, 112 Ind. App. 387, 44 N.E.2d 1022 (1942); Ajax Electrothermic Corp. v. First Nat'l Bank, 7 N.J. 82, 80 A.2d 559 (1951); Walsh v. Hulse, 23 N.J. Super. 573, 93 A.2d 230 (1952); Trenton Banking Co. v. Hawley, 7 N.J. Super. 301, 70 A.2d 896 (1950); Ohio Nat'l Bank v. Adair, 54 Ohio St. 2d 26, 374 N.E.2d 415 (1978); National City Bank v. Ford, 36 Ohio Misc. 60, 299 N.E.2d 310 (1973); Goldstein v. Goldstein, 104 R.I. 284, 243 A.2d 914 (1968); Blackwell v. Virginia Trust Co., 177 Va. 299, 14 S.E.2d 301 (1941); Compton v. Rixey's Ex'rs, 124 Va. 548, 98 S.E. 651 (1919).

104. The *Restatement (Second) of Trusts* § 412 comment c provides:

> If the owner of property transfers it in trust for two or more persons in succession, and the prior interest fails, no resulting trust arises if the future interest is accelerated. Thus, if a testator bequeaths property in trust to pay the income to a designated person for life and on his death to pay the principal to a

accumulate.[105]

A sensible result that would in all likelihood effectuate the testator's intent, would be to give the income to the remaindermen.[106] They are the ones the testator wanted to benefit after the life tenant. Thus, when the life tenant renounces, it seems logical that the remaindermen would be the testator's next choice. This is generally the rationale behind the presumption in favor of acceleration. Distributing the income to the current remaindermen is a compromise between an outright distribution of the corpus and giving it to the reversioner. Letting the remainder remain defeasible or partially defeasible effectuates the testator's other purpose, to defer the ultimate identification of the remaindermen until the death of the life tenant or until the end of the prior estate.

This approach would have the effect of preventing early termination of trusts which, at times, may frustrate the desires of the beneficiaries. Trusts should not be prolonged unreasonably, however. If clear and convincing evidence exists that the identity of the beneficiaries would not change, a court should terminate the trust. Beneficiaries who seek termination are aided because the trust termination cases reject the conclusive presumption of lifetime fertility.[107]

Several statutory steps also can be taken to remedy some of the existing deficiencies. Legislatures can enact statutes providing that in

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designated person, and if the life beneficiary disclaims, the principal ordinarily becomes payable to the beneficiary in remainder. But if the identity of the beneficiary in remainder cannot be ascertained until the death of the life beneficiary, the principal is not payable until the death of the life beneficiary, and during his lifetime a resulting trust exists for the estate of the testator. It is the duty of the trustee to pay the income to the estate of the testator until the death of the designated life beneficiary unless the testator has manifested a different intention as to the disposition of the income.

RESTATEMENT (SECOND) OF TRUSTS § 412 comment c (1959).

105. *See* 5 A. SCOTT, THE LAW OF TRUSTS § 412.1, at 54 (Fratcher 4th ed. 1989).

106. Scott agrees:

Even though the accumulation would not be invalid, it may come nearer to the probable intention of the testator to make current distributions of the income. If so, the income will ordinarily be paid to those persons who are presumptively entitled as remaindermen, even though they might not take the remainder on the death of the life beneficiary.

Id. § 412.1, at 55.

For example, in the devise "to *A* for life, then to *A*'s children," if *A* disclaims, the income could be paid out periodically to *A*'s children at the time of the payment. If *A* has another child, the income will be divided into another share the next time it is paid out. In the case of a devise "to *A* for life, then to *A*'s heirs," the income would be paid out to *A*'s heirs as if *A* had died immediately before the payment of income, that is to *A*'s heirs apparent.

107. *See* Estate of Weeks, 485 Pa. 329, 402 A.2d 657 (1979). *See also* 4 A. SCOTT, THE LAW OF TRUSTS § 340.1 (W. Fratcher 4th ed. 1989).

the case of a disclaimer, release, conveyance, or other event that has the effect of ending the life estate while the life tenant is alive, when the identity of the remaindermen is to be ascertained at the death of the life tenant, the property should be held in trust for the benefit of the remaindermen. The statute also should specify that the income is to be paid out from time to time to those who fit the identity of the remaindermen at the time. This would apply to a remainder that is contingent (to *A* for life, then to *A*'s surviving children), vested subject to open (to *A* for life, then to *A*'s children), or vested subject to divestment (to *A* for life, then to *A*'s children, the issue of any deceased child to take the parent's share). Additionally, disclaimer statutes should be amended to make it clear that acceleration will not occur without indefeasibility.

Short of a statutory remedy, courts should recognize that acceleration does not necessarily mean an outright distribution of corpus that requires indefeasibility. The better result is to give the income to the current remaindermen and retain defeasibility until the death of the disclaimant. This would both effectuate the donor's intent and prevent the disclaimant from being able to manipulate the identity of the remaindermen.