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Application of New York Estates, Powers & Trusts Law Section 3-3.2 to Dispositions to Attesting Witnesses

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Application of New York Estates, Powers & Trusts Law Section 3-3.2 To Dispositions To Attesting Witnesses

The interested witness statute, section 3-3.2 of the New York Estates, Powers and Trusts Law (EPTL), provides that a disposition to an attesting witness to a will is void if at the time of execution and attestation there are not at least two other attesting witnesses who receive no disposition under the will.[1] The disposition is also void, even though at the time of execution and attestation there were at least two other attesting witnesses receiving no disposition, if the will cannot be proved without the testimony of the witness to whom the disposition is made.[2]

The statute's direction that the disposition is void can be

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1. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(1) (McKinney 1967). The text of section 3-3.2 is as follows:

> (a) An attesting witness to a will to whom a beneficial disposition or appointment of property is made is a competent witness and compellable to testify respecting the execution of such will as if no such disposition or appointment had been made, subject to the following:
>
> (1) Any such disposition or appointment made to an attesting witness is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition or appointment thereunder.
>
> (2) Subject to subparagraph (1), any such disposition or appointment to an attesting witness is effective unless the will cannot be proved without the testimony of such witness, in which case the disposition or appointment is void.
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> (3) Any attesting witness whose disposition is void hereunder, who would be a distributee if the will were not established, is entitled to receive so much of his intestate share as does not exceed the value of the disposition made to him in the will, such share to be recovered as follows:
>
> (A) In case the void disposition becomes part of the residuary disposition, from the residuary disposition only.
>
> (B) In case the void disposition passes in intestacy, ratibly [sic] from the distributees who succeed to such interest. For this purpose, the void disposition shall be distributed under 4-1.1 as though the attesting witness were not a distributee.
>
> (b) The provisions of this section apply to witnesses to a nuncupative will authorized by 3-2.2.

2. *Id.* § 3-3.2(a)(2).

given effect in two ways: by striking the disposition from the will, or by treating the witness as having immediately predeceased the testator. In most cases, either method of applying the statute produces the same result. In two situations, however, the different methods produce different results: if substitutionary provisions have been made, either by statute or in the will, for "lapsed" but not "void" dispositions; and if the statute applies only to one beneficiary of a disposition in the form of a cotenancy.

This comment explores the background of the interested witness statute and finds that its legislative purpose was to preserve the wishes of the testator as far as possible, while maintaining safeguards against direct inducement to give fraudulent testimony. Analyzing the statute's application, first, in conjunction with a substitutionary provision for lapsed dispositions and, second, to a disposition in the form of a cotenancy, the comment concludes that treating the witness as having immediately predeceased the testator will best fulfill the legislative intent. Finally, the comment recommends that the legislature amend the statute to specify this treatment and makes a drafting suggestion to obviate confusion that could arise from a substitutionary provision.

I. Background

A. *Historical Evolution*

Under the common law of England, a beneficiary[3] under a will[4] was disqualified from testifying as a witness[5] to that will.

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3. The New York Estates, Powers and Trusts Law (hereinafter referred to as EPTL) defines "testamentary beneficiary" as "a person in whose favor a disposition of property is made by will." *Id.* § 1-2.17. This new term combines the separate common-law categories "devisee" and "legatee." A "devisee" is a person to whom land or other real property is given by will; such a gift is called a "devise." BLACK'S LAW DICTIONARY 407-08 (5th ed. 1979). A "legatee" is one who receives a gift of personal property by will; such a gift is called a "legacy" or a "bequest." BLACK'S LAW DICTIONARY 145, 802, 808 (5th ed. 1979). The separate common-law categories of gifts by will are consolidated in EPTL under the term "disposition." N.Y. EST., POWERS & TRUSTS LAW § 1-2.4 (McKinney 1967). To avoid confusion, the EPTL terms are used throughout this comment.

4. EPTL gives "will" a comprehensive definition, which includes properly made oral declarations and written instruments revocable during the lifetime of the testator which dispose of property, direct how property shall not be disposed of, dispose of the testator's body or part thereof, exercise a power, appoint a fiduciary, or make any other provi-

Since the witness would benefit by probate of the will, it was feared that his interest would be an inducement to give fraudulent testimony in favor of the will.[6] Barring such an interested witness's testimony eliminated the possibility of fraud. If the will could not be probated without his testimony, the will was void.[7] In those cases in which fraud was absent, voiding the will caused frustration of the testator's wishes and "cases frequently arose where great hardship was worked."[8]

The earliest statutory attempts to solve this problem, both in England and America, restored the witness's competency to testify by depriving him of his interest under the will if the will

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sion for the administration of the testator's estate. N.Y. EST., POWERS & TRUSTS LAW § 1-2.18 (McKinney 1967). Unless the context requires otherwise, the term "will" includes a "codicil." *Id.* "A codicil is a supplement to a will, either adding to, taking from or altering its provisions or confirming it in whole or in part by republication, but not totally revoking such will." *Id.* § 1-2.1.

The common-law definition of "will" is "an instrument by which a person makes a disposition of his property, to take effect after his decease." BALLENTINE'S LAW DICTIONARY 1371 (3d ed. 1969). The differences between the two definitions are irrelevant to this comment, since EPTL 3-3.2 applies only to wills which make "a beneficial disposition or appointment of property" to a witness. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(McKinney 1967).

5. To be valid, a will must be made as prescribed in EPTL 3-2.1 or EPTL 3-2.2. EPTL 3-2.2 prescribes rules for nuncupative (unwritten) and holographic (written entirely in the handwriting of the testator) wills. Holographic wills do not require attestation by witnesses and are therefore not affected by provisions regarding interested witnesses. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2, revisers' note 3, at 314 (McKinney 1967). The making of a nuncupative will and its provisions must be clearly established by at least two witnesses. *Id.* § 3-2.2(a)(1). EPTL 3-2.1, which prescribes the rules for all other wills, requires that at least two witnesses attest that the testator's signature was affixed or acknowledged in their presence and sign at the end of the will. *Id.* § 3-2.1(a)(4). Such witnesses are traditionally called "subscribing witnesses," from the act of signing at the end of the instrument (Latin: *sub*, under; *scribere*, to write), BLACK'S LAW DICTIONARY 1596 (4th ed. 1968); or "attesting witnesses," from the act of attesting that the signer has witnessed the execution of the instrument, BLACK'S LAW DICTIONARY 117 (5th ed. 1979). EPTL uses the term "attesting witness." *See, e.g.*, N.Y. EST., POWERS & TRUSTS LAW § 3-2.1 (McKinney 1967).

6. *In re* Walters, 285 N.Y. 158, 162, 33 N.E.2d 72, 74, *remittitur amended*, 285 N.Y. 412, 35 N.E.2d 19 (1941).

7. *In re* Dwyer, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920); *In re* Smith, 165 Misc. 36, 38, 300 N.Y.S. 1057, 1059 (Sur. Ct. Westchester County), *aff'd*, 253 A.D. 731, 300 N.Y.S. 919 (2d Dep't 1937). At common law, proof of a will required the testimony of two witnesses. If at least two witnesses who were not beneficiaries were available to testify, the will could still be probated despite the disqualification of the interested witness; if, however, the interested witness was one of only two available witnesses, his disqualification would cause the will to fail.

8. *In re* Dwyer, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920).

could not be proved without his testimony.[9] These statutes preserved the wishes of the testator by allowing proof of the will and implementation of the testamentary dispositions contained therein, except the disposition to the witness. The statutes also eliminated the inducement for the witness to testify fraudulently in favor of the will by denying him any direct benefit under the will.

These statutes, however, created a new inducement to testify fraudulently *against* the will if the interested witness was also a distributee[10] of the testator: if the will was proved, the witness was deprived of his interest and would get nothing; but if the will failed and the decedent died intestate,[11] the witness received his intestate share.[12] Moreover, the statutes left the interested witness/distributee in a worse position than he had

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9. *Id.* There is some ambiguity as to the required "necessity" of the testimony of the interested witness. In *In re* Walters, 285 N.Y. 158, 33 N.E.2d 72, *remittitur amended*, 285 N.Y. 412, 35 N.E.2d 19 (1941), both witnesses were to share in a bequest of the testator's business. One witness had left the state at the time of probate in order to avoid testifying. *Id.* at 161, 33 N.E.2d at 73. The Surrogate's Court had dispensed with the testimony of the absent witness under the authority of § 142 of the Surrogate's Court Act, now Surrogate's Court Procedure Act (hereinafter referred to as SCPA) § 1405, and proved the will on the testimony of the remaining witness. *Id.* at 161-62, 33 N.E.2d at 73-74. The court held that "[s]ince the will was in fact probated without the testimony" of the absent witness, her testimony was not required and the disposition to her therefore not void. *Id.* at 162, 33 N.E.2d at 74. This case would be decided differently now, since EPTL 3-3.2(a)(1) makes clear that any disposition to a witness is void unless there were at least two other disinterested witnesses at the time of execution. If there were two such disinterested witnesses at the time of execution, but both are not available to testify at probate, the Surrogate's Court could still invoke SCPA § 1405 to dispense with the testimony of an absent interested witness. For the purposes of this comment, it will be assumed that the testimony of the interested witness is "necessary" to prove the will.

10. EPTL defines "distributee" as "a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution." N.Y. EST., POWERS & TRUSTS LAW § 1-2.5 (McKinney 1967). At common law such persons were also called "heirs," "heirs at law," or "next of kin." BALLENTINE'S LAW DICTIONARY 361 (3d ed. 1969). These terms are now replaced by "distributee." N.Y. EST., POWERS & TRUSTS LAW § 2-1.1 (McKinney 1967).

11. If the invalid will had contained the testator's sole attempt to revoke an earlier valid will, the earlier will may now be probated. If all earlier wills also fail, or if none exist, the decedent is said to die intestate, and the estate passes under the statutes governing descent and distribution.

12. The part of an intestate estate which each distributee receives is called his "distributive share" at common law. BLACK'S LAW DICTIONARY 427 (5th ed. 1979). EPTL replaces this term with "intestate share." *See, e.g.*, N.Y. EST., POWERS & TRUSTS LAW §§ 3-3.2(a)(3), 5-1.1(c)(2)(B) (McKinney 1967).

been under the common-law rule: under the statute, the will would be probated, and the interested witness/distributee would receive nothing; under the common law, either the will would be probated without his testimony, and he would receive his disposition under the will, or if the will could not be probated without his testimony, he would receive his intestate share.[13] The New York legislature acted to eliminate both this new inducement to testify against the will and the perceived inequity to the interested witness/distributee. A statute,[14] effective January 1, 1830, preserved for the witness the amount of the lesser of the disposition to him or his intestate share.[15]

This statutory pattern, that an interested witness is competent to testify but that the disposition to him is limited by the amount of his intestate share or destroyed if he is not a distributee, was embodied in section 27 of the Decedent Estate Law[16] and now forms section 3-3.2 of EPTL.[17] The statute directs that

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13. *In re* Dwyer, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920).

14. N.Y.R.S. pt. 2, chap. 6, tit. 1, art. 3, § 51.

15. *In re* Dwyer, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920).

16. N.Y. DEC. EST. LAW, 1909 N.Y. LAWS, ch. 18, § 27 (current version at N.Y. EST., POWERS & TRUSTS LAW § 3-3.2 (McKinney 1967)).

17. For the text of EPTL 3-3.2, *see* note 1 *supra*. Subparagraph (a)(3) of EPTL 3-3.2, which provides that an interested witness/distributee "is entitled to receive so much of his intestate share as does not exceed the value of the disposition made to him in the will," also specifies that "such share" be recovered from the residuary disposition if the void disposition becomes part of the residue, or ratably from the distributees if the void disposition passes in intestacy. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(3) (McKinney 1967.) Thus, although what the witness receives is technically his intestate share rather than the void disposition, this "share" is taken from the ultimate recipients of the void disposition. For convenience, this process is often telescoped and described as saving the disposition.

No provision is made in EPTL 3-3.2(a)(3) for a void disposition which passes by a nonresiduary substitutionary disposition; in such cases, the legislative intent of the section clearly requires recovery from any applicable substitutionary disposition.

A more difficult problem may arise if the void disposition is in the form of a cotenancy between the interested witness/distributee and a nonwitness. For a discussion of cotenancies, *see* notes 67-91 and accompanying text *infra*. If the value of the witness's intestate share is equal to or greater than the value of his void interest in the cotenancy, EPTL 3-3.2(a)(3) preserves the entire interest, and no difficulty arises. If the value of the intestate share is less than that of the interest in the cotenancy, however, EPTL 3-3.2(a)(3) requires that the value of the witness's interest be reduced to the value of the intestate share. This reduction in value is possible in a tenancy in common, in which the interests of the cotenants may be unequal, but is impossible in a joint tenancy or a tenancy by the entirety, in which the cotenants own the one interest together and must, therefore, be equal. In these latter situations, EPTL 3-3.2(a)(3) may require that the

"[a]ny such disposition or appointment made to an attesting witness is void."[18] The former statutes, including the Decedent Estate Law, had declared that the "devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him."[19] The reports of the Bennett Commission,[20] which drafted the present statute after six years of the most thorough analysis and consideration, did not discuss this change of wording. Neither is it mentioned in the official Revisers' Notes.[21] Hence, one can assume that the change merely reflects a drafting economy and was not intended to change the meaning of the earlier form.[22]

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cotenancy be converted to a tenancy in common in order to permit reduction of the witness's interest. Because of the complexity of applying EPTL 3-3.2(a)(3) to joint tenancies and tenancies by the entirety, the sections of this comment dealing with such tenancies assume that the interested witness is not a distributee.

18. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(1) (McKinney 1967).

19. N.Y. DEC. EST. LAW, 1909 N.Y. LAWS, ch. 18, § 27 (current version at N.Y. EST., POWERS & TRUSTS LAW § 3-3.2 (McKinney 1967)).

20. FIRST THROUGH SIXTH AND FINAL REPORTS OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, N.Y. LEGISLATIVE DOC. 1962, no. 19; 1963, no. 19; 1964, no. 19; 1965, no. 19; 1966, no. 19; 1967, no. 19.

21. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2, revisers' notes at 314 (McKinney 1967).

22. The change of wording could be relevant in two contexts in this comment: (1) application of the anti-lapse statute to dispositions made to a witness who is an issue or sibling of the testator, *see* notes 51-57 and accompanying text *infra;* and (2) dispositions in the form of cotenancies, *see* notes 67-139 and accompanying text *infra.*

In the first instance, if the current version of the interested witness statute preserves the meaning of the earlier form, one could argue that the proposed application of the anti-lapse statute to dispositions made to a witness who is an issue or sibling of the testator is prohibited. The anti-lapse statute would pass such dispositions to the issue of such witness by virtue of their relation to the witness, making them, under this argument, persons "claiming under" the witness. Since section 27 of the Decedent Estate Law (hereinafter referred to as DEL) declared the disposition void "as concerns such witness, or any claiming under him," the attempted application of the anti-lapse statute would be void as well. The answer to this argument is that the issue of such witness are not claiming under him; their claim is based on independent rights arising by statutory grant. Note in particular that the anti-lapse statute vests the disposition in the *issue* of the witness without regard to their status as distributees, beneficiaries, or assigns of the witness; only these latter classes would be "claiming under" the witness. Thus, even if, as argued, the current statute retains the meaning of the former version, it does not prevent application of the anti-lapse statute by the method proposed in this comment. *See* notes 51-57 and accompanying text *infra.* If the current statute is read without reference to the former version, this conclusion is even more obvious, since only a disposition "to an attesting witness" is rendered void by EPTL 3-3.2.

In the second instance, the argument would assume that the legislature intended the

B. *Legislative Purpose*

The succession of statutes modifying the common-law rule[23] attempted to maintain the safeguards against fraud while preserving the wishes of the testator. The common-law rule, by disqualifying the testimony of the interested witness, had eliminated the possibility that a witness's personal interest in the will would induce him to testify fraudulently for or against the will; but the common-law rule also frustrated the wishes of the testator if the will could not be probated without the testimony of that witness.[24] The current statutory provisions preserve the primary intent of the testator by allowing all witnesses to testify, while at the same time guarding against fraud by voiding or modifying those provisions of the will which create the witness's personal interest.[25]

The effect of the interested witness statute has been to enhance protection of the testator's wishes, while weakening the safeguards against fraud. The instrument will not be denied probate because of an interested witness, who is now competent and "compellable to testify";[26] thus, the basic testamentary scheme will be preserved. The testator's wishes are only frustrated with respect to the disposition to the witness, which is destroyed because this disposition might induce fraudulent testimony in favor of the will. In this respect the statute provides as full a

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change of wording to change the meaning of the statute as regards dispositions in the form of cotenancies. The earlier version in DEL § 27 clearly protected the co-beneficiary who was not a witness, since it voided the disposition "so far only as concerns such witness, or any claiming under him." Since EPTL 3-3.2 omits this phrase, one could argue that the direction that "[a]ny such disposition or appointment made to an attesting witness is void" applies to the entire legacy and voids the interest of the nonwitness co-beneficiary as well as that of the witness. Nothing in the legislative history of the current statute, however, especially in the detailed and comprehensive reports of the Bennett Commission, *see* note 20 *supra*, suggests that so major a change was intended. More likely, the legislature intended that the new phrase "disposition . . . made to an attesting witness" encompass only that part of the disposition which "concerns such witness." Neither *In re* Flynn, 68 Misc. 2d 1087, 329 N.Y.S.2d 249 (Sur. Ct. Westchester County 1972), the only case to consider application of EPTL 3-3.2 to cotenancies, nor the criticism of that case, raised this point or suggested that the interest of the nonwitness co-beneficiary should be void. *See* note 131 *infra*.

23. *See* notes 9-17 and accompanying text *supra*.

24. *In re* Dwyer, 191 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920).

25. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2 (McKinney 1967).

26. *Id.* § 3-3.2(a).

protection against fraud as did the common-law rule. The protection against the possibility that an interested witness/distributee will testify fraudulently *against* the will, however, is not as strong under the statute as it was under the common-law rule.[27]

The common-law rule had eliminated the danger that an interested witness/distributee would testify fraudulently against the will by disqualifying the witness's testimony. The statute attempts to prevent such fraudulent testimony against the will by allowing an interested witness/distributee to receive the lesser of the disposition or his intestate share. If the disposition is greater than the intestate share, the witness will receive the same amount whether the will is proved or not and thus has no motive to testify fraudulently for or against the will. But if the disposition is smaller than the intestate share, the witness will receive less if the will is proved than if it fails, and the possibility of fraud against the will remains. Thus, under the statute, an interested witness may be induced to testify fraudulently against the will in certain circumstances which would not have been possible under the common-law rule.

The statute also makes no attempt to go beyond the common-law rule to guard against fraud which may be motivated by interests not personal to the witness. A gift to the witness's spouse or issue may provide as strong an inducement to testify fraudulently in favor of the will as a gift to the witness himself. Similarly, a witness whose spouse or issue is a distributee of the testator may have almost the same motive to testify fraudulently against the will as a witness who is himself a distributee. The legislature may have concluded that protecting against such indirect interests would complicate the statute unduly.[28] In many

27. In practice, it is rare that one who acts as an attesting witness will testify against the will. Interview with Professor Philip B. Blank, Pace University School of Law, formerly Law Assistant/Referee in the Surrogate's Court, Westchester County, N.Y., in White Plains, N.Y. (Feb. 15, 1980). Nevertheless such testimony is possible. Moreover, the witness may be induced to testify in favor of the will in such an unconvincing way that the effect is to discredit the will.

28. Additional examples in which indirect interests might serve as inducements to fraudulent testimony against the will include a witness who would have received a disposition under a prior will; a witness whose spouse or issue would have received such a disposition; and a witness to a codicil which reduces the value of dispositions to the witness or his spouse or issue under the will. Examples in which indirect interests might serve as inducements to fraudulent testimony in favor of the will include a witness to a

cases, protection against such indirect interests would expand the reach of the statute to most of the persons best qualified and most likely to serve as attesting witnesses of home-drawn wills. In any event, the legislature did not choose to protect against all possible motives for fraudulent testimony.

Although some commentators focus on the protection against fraudulent testimony,[29] the preceding analysis of the statutory modifications of the common-law rule shows that the primary legislative purpose was to "remedy the evils and hardships"[30] of frustrating the testator's wishes. The protection against fraud has not been expanded[31] and, indeed, has been sacrificed in part[32] to preserve as much of the testamentary scheme as possible.

This underlying legislative purpose should be the guide in situations in which the appropriate method of application is not clearly indicated by the statutory scheme. In particular, the statute is not punitive but remedial, and therefore its words may be given a liberal construction to further the legislative purpose.[33]

II. Uncertainties in Applying the Statute

A. *The Relationship Between the Statute and Substitutionary*

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codicil which increases the value of dispositions to the witness's spouse or issue. In addition, the ties of friendship are often as close as those of blood and could also create indirect inducements for a witness to testify fraudulently. The complications which would result from attempting to protect against these indirect interests could easily overwhelm the legislative process.

29. *See, e.g., In re* Fracht, 94 Misc. 2d 664, 667, 405 N.Y.S.2d 222, 224 (Sur. Ct. Bronx County 1978).

30. *In re* Dwyer, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920).

31. *See* note 28 and accompanying text *supra*.

32. *See* note 27 and accompanying text *supra*.

33. *See, e.g.*, American Historical Soc'y v. Glenn, 248 N.Y. 445, 451, 162 N.E. 481, 482-83 (1928); Archer v. Equitable Life Assur. Soc'y of the United States, 218 N.Y. 18, 25, 112 N.E. 433, 436 (1916); Hudler v. Golden, 36 N.Y. 446, 447 (1867); Gavin v. Motor Vehicle Accident Indemnification Corp., 57 Misc. 2d 335, 336, 292 N.Y.S.2d 745, 747 (Sup. Ct. Kings County 1968).

The remedial purpose of EPTL 3-3.2 was to lessen the frustration of testators' wishes which resulted under the common-law rule and early statutes. A liberal construction of EPTL 3-3.2, therefore, would seek to preserve dispositions to interested witnesses if this could be done without sacrificing the safeguards against fraud. If the disposition could not be saved, a liberal construction would seek to pass it to those alternate beneficiaries the testator would likely have chosen, had he contemplated the contingency.

Provisions for Lapsed Dispositions

1. *The meaning of "Void" and "Lapsed"*

EPTL 3-3.2 states that under certain specified circumstances a disposition to an attesting witness is "void."[34] EPTL 3-3.3,[35] and many substitutionary clauses in wills, refer to dispositions which have "lapsed." Applicability of provisions for lapsed dispositions to the interested witness situation depends on the relationship between the terms "void" and "lapsed."

Strictly speaking, a lapsed disposition is one "which is good at the date [of execution] of the will, but afterward fails by reason of the occurrence of some event."[36] A disposition would lapse, for example, when a beneficiary, who was alive when the will was made, dies before the testator.[37] A void disposition, on the other hand, is one "which was ineffective from the date [of execution] of the will,"[38] for example, when a beneficiary was dead at the time the will was made.[39] If these narrow definitions are used in interpreting EPTL, a disposition to an interested witness which is void under EPTL 3-3.2 is a nullity[40] and must be struck from the will as if it had never existed. The gift would then pass by an applicable substitutionary disposition or fall into the estate to pass by residuary gift or in intestacy.[41] A substitutionary provision triggered by a "lapse" could not be applied to a "void" disposition because of the clear distinction between the two.

These technical definitions are not widely followed, how-

34. For the text of EPTL 3-3.2, *see* note 1 *supra*.

35. EPTL 3-3.3, the anti-lapse statute, provides that a testamentary disposition to an issue or sibling of the testator who dies during the lifetime of the testator does not lapse but passes to the surviving issue of such predeceasing beneficiary, unless the will provides otherwise. N.Y. EST., POWERS & TRUSTS LAW § 3-3.3 (McKinney 1967). For the text of EPTL 3-3.3, *see* note 48 *infra*.

36. 80 AM. JUR. 2d *Wills* § 1661 (1975).

37. *See, e.g., In re* King, 200 N.Y. 189, 193, 93 N.E. 484, 485 (1910); *In re* Estate of Sorensen, 28 A.D.2d 534, 535, 279 N.Y.S.2d 645, 647 (2d Dep't 1967); *In re* Estate of Anderson, 26 Misc. 2d 468, 470, 209 N.Y.S.2d 188, 190 (Sur. Ct. N.Y. County 1960).

38. 80 AM. JUR. 2d *Wills* § 1661 (1975).

39. *Id.*

40. BALLENTINE'S LAW DICTIONARY 1348 (3d ed. 1969).

41. *See* 65 N.Y. JUR. *Wills* § 817 (1969); 6 WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Wills* § 13.03 (1978). *See also* note 43 and accompanying text *infra*.

ever, and the two terms are often used interchangeably.[42] If the distinction between "void" and "lapsed" is blurred, the statutory provisions could be effectuated by treating the interested witness as if he had immediately predeceased the testator, thereby causing the disposition to lapse. In most situations, treating the witness as having immediately predeceased the testator would produce the same effect as striking out the disposition: a lapsed gift, like a void gift, passes by an applicable substitutionary disposition or falls into the estate to pass by residuary gift or in intestacy.[43] The result would be different only when a substitutionary provision had been made in the will or by statute for "lapsed" dispositions. Eliminating the distinction between "void" and "lapsed" would make such substitutionary provisions applicable to the disposition to the interested witness.

Resolution of this conflict between the mutually exclusive and the interchangeable definitions of "void" and "lapsed" must come from the usage of the terms in EPTL. Neither term is de-

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42. *See, e.g., In re* Wells, 113 N.Y. 396, 400, 21 N.E. 137, 138 (1889). The term "lapse" is frequently used when the beneficiary has died before the date of execution. 80 AM. JUR. 2d *Wills* § 1661 (1975). *See, e.g., In re* Tamargo, 220 N.Y. 225, 232, 115 N.E. 462, 464 (1917). In general, "[t]he courts show little inclination to distinguish" between the two categories. 65 N.Y. JUR. *Wills* § 817 (1969). Most legal dictionaries are more concerned with the contrast between "void" and "voidable" than with that between "void" and "lapsed." *See, e.g.*, BALLENTINE'S LAW DICTIONARY 709, 1348 (3d ed. 1969); BLACK'S LAW DICTIONARY 1022-23, 1745 (4th ed. 1968); BLACK'S LAW DICTIONARY 792, 1411 (5th ed. 1979); BOUVIER'S LAW DICTIONARY 1861-62, 3406-07 (3d ed. 1914); JOWITT'S DICTIONARY OF ENGLISH LAW 1065, 1869 (2d ed. 1977); STROUD'S JUDICIAL DICTIONARY 1489-91, 2951-56 (4th ed. 1971-74). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) actually lists "void" as a definition of "lapsed." *Id.* at 1272.

43. *See, e.g., In re* Estate of Bonnet, 113 N.Y. 522, 524, 21 N.E. 139, 140 (1889) ("lapsed or void legacy will be carried by a general gift of the residuum"); Cruikshank v. Home for the Friendless, 113 N.Y. 337, 355, 21 N.E. 64, 66 (1889) ("lapsed devise fell into the residue"); *In re* Estate of Simons, 16 Misc. 2d 352, 353-54, 182 N.Y.S.2d 1005, 1007 (Sur. Ct. N.Y. County 1958) (gift of one half of the remainder to the testator's son and grandson "and to their lawful issue, if any," was designed "to provide for a substitutional gift to the issue of the named legatees to take effect in the event of the death of either of them leaving such issue him surviving"; since the son died without issue, his share of the gift "fails and becomes part of the residuary estate"); *In re* Estate of Parker, 15 Misc. 2d 162, 164, 181 N.Y.S.2d 711, 713-14 (Sur. Ct. N.Y. County 1958) ("legacy lapsed . . . the share . . . passes as intestate property"); *In re* Estate of Epstein, 14 Misc. 2d 946, 947, 179 N.Y.S.2d 146, 148 (Sur. Ct. N.Y. County 1958) ("legacy lapsed and must be distributed as in intestacy"). *See also* 64 N.Y. JUR. *Wills* § 717 (1969); 6 WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Wills* § 13.03 (1978).

fined, but analysis of both EPTL 3-3.2 and EPTL 3-3.3 raises a strong implication that the legislature did not intend to draw a distinction between "void" and "lapsed."

EPTL 3-3.2(a)(1) applies when there are not two disinterested witnesses at the time of execution;[44] such dispositions are ineffective from the date of execution and come within the narrow definition of "void."[45] EPTL 3-3.2(a)(2) applies when there were two disinterested witnesses in addition to the interested witness, but they are unavailable at the time of probate, and the will cannot be proved without the testimony of the interested witness;[46] such dispositions are good initially but fail afterward and therefore come within the narrow definition of "lapsed."[47] Since EPTL 3-3.2 terms "void" those dispositions which can be characterized as "lapsed" and also those which are clearly void, the legislature cannot have intended a rigid distinction between the two terms.

EPTL 3-3.3, the anti-lapse statute, provides that a disposition to an issue, brother or sister of the testator who dies during the lifetime of the testator "does not lapse."[48] The statute does not expressly affect void dispositions. Subsection (a)(2) extends the application of this anti-lapse rule to dispositions made to a

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44. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(1) (McKinney 1967). For the text of EPTL 3-3.2, *see* note 1 *supra*.

45. *See* note 38 and accompanying text *supra*.

46. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(2) (McKinney 1967). For the text of EPTL 3-3.2, *see* note 1 *supra*.

47. *See* note 36 and accompanying text *supra*.

48. N.Y. EST., POWERS & TRUSTS LAW § 3-3.3 (McKinney 1967). The text of EPTL 3-3.3 is as follows:

> (a) Unless the will provides otherwise:
>
> (1) Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, per stirpes.
>
> (2) The provisions of subparagraph (1) apply to a disposition made to issue, brothers or sisters as a class as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred hereunder upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.
>
> (b) As used in this section, the terms "issue," "surviving issue" and "issue surviving" include adopted children and illegitimate children; for this purpose, an illegitimate is the child of his mother and is the child of his father if he is entitled to inherit from his father under 4-1.2.

testator's issue or siblings as a class, but specifically excludes the issue of class beneficiaries who died before the execution of the will from the benefit of this class anti-lapse rule.[49] This exclusion would not have been necessary had the legislature intended to draw a distinction between "void" and "lapsed," since dispositions to named or class beneficiaries who had died before execution of the will are "void" under the narrow definition.[50] Therefore, the exclusion from the anti-lapse rule of class beneficiaries who had died before execution of the will is excess verbiage unless the terms "void" and "lapsed" are interchangeable. The fact that the legislature felt the exclusion to be necessary in EPTL 3-3.3 again implies that the terms were seen as interchangeable and not mutually exclusive.

The conclusion that the legislature did not intend a rigid distinction between "void" and "lapsed" permits, but does not require, application of EPTL 3-3.2 by treating the interested witness as if he had immediately predeceased the testator instead of by striking the disposition from the will. That method of application should be used which best fulfills the legislative purpose. The subsections immediately following analyze two areas in which the two methods of application produce different results: statutory provisions for certain lapsed dispositions; and testamentary provisions relating to lapsed dispositions.

2. *The Anti-Lapse Statute*

EPTL 3-3.3, the anti-lapse statute, provides that a disposition to an issue, brother or sister of the testator who dies during the lifetime of the testator does not lapse but passes to the surviving issue of such predeceasing beneficiary, unless the will provides otherwise.[51] On its face, this statute does not apply to a

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49. Since this exclusion is not stated in connection with dispositions to named issue, brothers or sisters of the testator, the statute apparently applies to such dispositions even if the named beneficiary had died before execution of the will, as long as the named beneficiary's death occurred "during the lifetime of the testator." N.Y. EST., POWERS & TRUSTS LAW § 3-3.3, commentary at 79 (McKinney Supp. 1980). That these dispositions, which are technically "void," are made effective by a statute which prevents their "lapse" again shows that the legislature used the two terms interchangeably.

50. *See* text accompanying note 38 *supra*.

51. N.Y. EST., POWERS & TRUSTS LAW § 3-3.3 (McKinney 1967). For the text of EPTL 3-3.3, *see* note 48 *supra*.

disposition to an attesting witness who is also an issue or sibling of the testator which is declared "void" by EPTL 3-3.2; the beneficiary is not dead, and the disposition has not lapsed. If EPTL 3-3.2 is applied by striking the disposition from the will, the anti-lapse statute clearly does not apply. But if EPTL 3-3.2 is applied by treating the witness as having immediately predeceased the testator, then the situation falls within the scope of the anti-lapse statute, and application of the anti-lapse statute will cause the disposition to pass to the witness's issue.[52] The choice of the better method of applying EPTL 3-3.2 in this situation thus depends on whether application of the anti-lapse statute to such witnesses' dispositions furthers the legislative purpose of the interested witness statute.

Treating the witness as having immediately predeceased the testator, and thereby applying the anti-lapse statute to pass the void disposition to the issue of the witness, would provide less protection against fraud than would striking out the disposition; the witness would still have an indirect inducement, the interest of his issue, to testify fraudulently. Neither the common law nor the interested witness statutes, however, have ever attempted to protect against interests not personal to the witness.[53] The numerous existing qualifications on the interested witness statute's protection against fraud weaken the argument that application of the anti-lapse statute to an interested witness would violate the legislative purpose of EPTL 3-3.2. If the disposition had been made directly to the issue of the witness, EPTL 3-3.2 clearly would not apply; the disposition would be good. When a disposition is made to the witness, application of the anti-lapse statute to pass the disposition to his issue produces the same practical result as if the disposition had been made to the issue directly. Therefore, application of EPTL 3-3.3 seems compatible with the minimum protection against fraud required by EPTL 3-3.2.

Moreover, application of the anti-lapse statute to pass the

52. One could argue that this is not a literal reading of EPTL 3-3.3 since the witness has not actually died. If it is determined that EPTL 3-3.2 shall be applied by treating the witness as having immediately predeceased the testator, there is a legal fiction, for the purpose of the disposition to the witness, that he has died during the lifetime of the testator.

53. *See* note 28 and accompanying text *supra*.

disposition to the witness's issue would further the primary legislative purpose of preserving the testator's wishes as far as possible.[54] The anti-lapse statute is based on a legislative determination that when a disposition to an issue, brother or sister of the testator fails, and there is no substitutionary disposition, the testator would prefer that the disposition pass to such beneficiary's issue rather than fall into the estate and pass in the residue or in intestacy.[55] The same family ties that support this implied testamentary intent when the beneficiary predeceases the testator also provide support when the disposition fails because the beneficiary was an attesting witness.[56] Finally, if the void disposition is the residue of the estate, application of the anti-lapse statute would satisfy the rule of testamentary construction to avoid intestacy whenever possible.[57]

3. *Substitutionary Testamentary Provisions*

When the testator has made a substitutionary disposition in the event that the beneficiary predeceases him, there is a strong implication that the testator would have wished this to apply when the primary disposition is declared void by EPTL 3-3.2.[58]

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54. *See* text accompanying notes 29-30 *supra*.

55. *See, e.g., In re* Neydorff, 193 A.D. 531, 533, 184 N.Y.S. 551, 553 (3d Dep't 1920); *In re* Estate of Howes, 35 Misc. 2d 109, 110, 229 N.Y.S.2d 469, 470 (Sur. Ct. N.Y. County 1962).

56. In the case of a home-drawn will, that the testator himself chose the beneficiary as an attesting witness usually implies a close personal tie between them.

57. *See, e.g., In re* Estate of Nurse, 35 N.Y.2d 381, 388, 362 N.Y.S.2d 441, 445, 321 N.E.2d 537, 540 (1974); Lamb v. Lamb, 131 N.Y. 227, 234, 30 N.E.2d 133, 134 (1892); *In re* Will of Birdsell, 271 A.D. 90, 95, 63 N.Y.S.2d 146, 151 (3d Dep't 1946), *aff'd*, 296 N.Y. 840, 72 N.E.2d 26 (1947).

58. *In re* Baumann's Will, 97 N.Y.S.2d 478, 485 (Sur. Ct. Broome County 1950). Although the court accepted this implied testamentary intent, it held that applying a substitutionary disposition worded in terms of the beneficiary's death to a witness's void disposition would be, in effect, rewriting the will. This the court refused to do, noting that "there is no stronger principle in the law of wills than that courts cannot make or remake decedents' wills." *Id.* The disposition in question was part of the residue; the result may have been influenced by the strong common-law rule of "no residue of a residue," which has since been changed by EPTL 3-3.4. In any case, this comment's argument does not involve rewriting the will in order to include a void disposition within a provision for lapsed dispositions. This comment suggests that EPTL 3-3.2 be applied by treating the witness as having immediately predeceased the testator. If one decides to apply the statute in this way, the disposition to the witness comes within the natural meaning of a substitutionary disposition for beneficiaries who have died. The *Baumann*

The substitutionary disposition shows an actual intent to prefer the substitutionary beneficiary to the residuary beneficiaries or the distributees upon the only contingency the testator contemplated. One may fairly imply this same intent when the disposition fails for another reason not involving wrongdoing by the beneficiary.[59] Application of the interested witness statute by treating the witness as having immediately predeceased the testator would bring the disposition within the scope of the substitutionary disposition. Striking the disposition as void would cause the gift to fall back into the estate, since the condition of the substitutionary disposition that the beneficiary predecease the testator would not have been met. Thus the primary purpose of the statute, to preserve the testator's wishes as far as possible,[60] is better fulfilled by treating the witness as having immediately predeceased the testator.

The arguments concerning the protection against fraud discussed in the context of the anti-lapse statute are also applicable to such substitutionary dispositions if the substitutionary beneficiary is the spouse or an issue of the witness.[61] The practical effect of treating the witness as having immediately predeceased the testator is to pass the gift to the spouse or issue by the substitutionary disposition; this destroys the witness's personal interest and is compatible with the minimum protection against fraud required by EPTL 3-3.2. If the substitutionary beneficiary is not the spouse or an issue of the primary beneficiary, the secondary purpose of protection against an indirect inducement to fraud is irrelevant, and the justification for treating the witness as having immediately predeceased the testator is even stronger.

4. *Conclusion Regarding "Void" and "Lapsed"*

Analysis of the usage of "void" and "lapsed" in EPTL indicates that the legislature did not intend to draw a distinction

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court did not consider this approach.

59. The implied testamentary intent that the beneficiary *not* receive the disposition in situations which involve wrongdoing by the beneficiary will be protected by the public policy which prevents such beneficiaries from profiting by their wrongdoing. *See, e.g.*, Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (murderer of testator deprived of any interest in the estate, either as beneficiary or heir).

60. *See* text accompanying notes 29-30 *supra*.

61. *See* text accompanying note 53 *supra*.

but rather used the terms interchangeably.[62] The directive of EPTL 3-3.2 that a disposition to a witness is void can therefore be given effect either by striking the disposition from the will or by treating the witness as having immediately predeceased the testator. In most situations, both methods of application produce the same result; in two situations, however, the results of each method are different: if the witness is an issue or sibling of the testator, the anti-lapse statute would pass the disposition to the issue of the witness if he is treated as predeceased but would be inapplicable if the disposition is struck out;[63] and if the will contains a substitutionary disposition in case the beneficiary predeceases the testator, the substitutionary disposition applies if the witness is treated as having predeceased but does not apply if the disposition is struck out.[64] In both situations, the result obtained by treating the witness as having immediately predeceased the testator better fulfills the primary legislative purpose of the statute, to preserve the intent of the testator as far as possible.[65] This method of application also maintains the minimum safeguards against inducement of fraud by destroying the witness's personal interest under the will.[66]

B. *Applying the Statute in Conjunction with a Disposition of a Cotenancy*

1. *Types of Cotenancy*

Three types of cotenancy are recognized in New York: tenancy in common, joint tenancy, and tenancy by the entirety.[67]

Tenancy in Common

In a tenancy in common, each cotenant has a distinct and

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62. *See* notes 42-50 and accompanying text *supra*.

63. *See* notes 51-52 and accompanying text *supra*.

64. *See* notes 58-59 and accompanying text *supra*.

65. *See* notes 54-55 and accompanying text *supra* and text accompanying note 60 *supra*.

66. *See* text accompanying notes 53 & 61 *supra*.

67. N.Y. EST., POWERS & TRUSTS LAW § 6-2.1 (McKinney 1967). A fourth type, the tenancy in coparcenary, existed at common law as a corollary to the English rule of primogeniture. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 235-36 (1962). *See* 2 AMERICAN LAW OF PROPERTY § 6.7 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *187-91; 4 J. KENT, COMMENTARIES *366-67. Since primogeniture was never in

separate interest in the property.[68] The only unity is that of possession.[69] Each cotenant's interest is alienable and descendible.[70] There is no right of survivorship;[71] if one cotenant in common dies after the estate is vested, the decedent's share passes to his estate.[72] A tenancy in common, however, creates no rights before it is vested. Thus, if one co-beneficiary of a tenancy in common created by will dies before the testator, the share of the deceased co-beneficiary does not pass to his estate or to the surviving co-

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force in the United States, estates in coparcenary were not generally recognized. C. MOYNIHAN, *supra*, at 236. This tenancy has now been absorbed by the tenancy in common. 2 AMERICAN LAW OF PROPERTY § 6.7 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *367; C. MOYNIHAN, *supra*, at 236.

Although tenancies in common and joint tenancies may include two *or more* cotenants, for simplicity the discussion herein will be limited to tenancies with *two* cotenants, one of whom is an attesting witness. Additional cotenants would not change the result.

68. *See, e.g.*, Chittenden v. Gates, 18 A.D. 169, 172, 45 N.Y.S. 768, 770 (2d Dep't 1897); Berlin v. Herbert, 48 Misc. 2d 393, 395, 265 N.Y.S.2d 25, 28 (Dist. Ct. Nassau County 1965); Kristel v. Steinberg, 188 Misc. 500, 514, 69 N.Y.S.2d 476, 491 (N.Y.C. Mun. Ct. N.Y. County 1947); 2 AMERICAN LAW OF PROPERTY § 6.5 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *191; 4 J. KENT, COMMENTARIES *368; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy in Common* §§ 1.02, 7.03 (1979).

In contrast to joint tenants, *see* note 77 and accompanying text *infra*, and tenants by the entirety, *see* note 85 and accompanying text *infra*, tenants in common are said to be seised *per my* but not *per tout*, by the half, or moiety, but not by all. 4 J. KENT, COMMENTARIES *368. The interests of tenants in common may therefore be unequal. C. MOYNIHAN, *supra* note 67, at 224.

69. *See, e.g.*, Jemzura v. Jemzura, 36 N.Y.2d 496, 503, 369 N.Y.S.2d 400, 407-08, 330 N.E.2d 414, 419 (1975); *In re* Estate of Moore, 16 A.D.2d 697, 698, 227 N.Y.S.2d 820, 823 (2d Dep't 1962); Chittenden v. Gates, 18 A.D. 169, 172, 45 N.Y.S. 768, 770 (2d Dep't 1897); 2 AMERICAN LAW OF PROPERTY § 6.5 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *191-92; 4 J. KENT, COMMENTARIES *367; C. MOYNIHAN, *supra* note 67, at 224; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy in Common* §§ 1.02, 2.02 (1979).

70. *See, e.g.*, Barson v. Mulligan, 191 N.Y. 306, 323-25, 84 N.E. 75, 81-82 (1908); 2 AMERICAN LAW OF PROPERTY § 6.5 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *368; C. MOYNIHAN, *supra* note 67, at 224; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy in Common* § 7.03 (1979).

71. 2 AMERICAN LAW OF PROPERTY § 6.5 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *194; 4 J. KENT, COMMENTARIES *368; C. MOYNIHAN, *supra* note 67, at 224; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy in Common* § 1.02 (1979).

72. 2 AMERICAN LAW OF PROPERTY § 6.5 (A.J. Casner ed. 1952); C. MOYNIHAN, *supra* note 67, at 224.

beneficiary but lapses.[73]

Joint Tenancy

In a joint tenancy, the cotenants own the one interest together under a legal fiction of unity of the persons as co-owners.[74] Joint tenants must hold under a four-fold unity: interest, title, time and possession.[75] There is a right of survivorship; each cotenant has an interest in the whole, and, on the death of one, the decedent's interest disappears, and the whole estate continues in the survivor.[76] The fictional unity of the parties is ignored for some purposes, and the cotenants are recognized as having individual rights,[77] but the right of survivorship, based on the

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73. Downing v. Marshall, 23 N.Y. 366, 373 (1861).

74. *See, e.g.*, Moore Lumber Co. v. Behrman, 144 Misc. 291, 292, 259 N.Y.S. 248, 249-50 (N.Y.C. Mun. Ct. N.Y. County 1932); 2 AMERICAN LAW OF PROPERTY § 6.1 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *182; 4 J. KENT, COMMENTARIES *359; C. MOYNIHAN, *supra* note 67, at 216-17; 2A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Joint Tenants* § 1.04 (1980).

75. *See, e.g., In re* Estate of Horler, 180 A.D. 608, 612, 168 N.Y.S. 221, 223 (1st Dep't 1917); Moore Lumber Co. v. Behrman, 144 Misc. 291, 292, 259 N.Y.S. 248, 249-50 (N.Y.C. Mun. Ct. N.Y. County 1932); 2 AMERICAN LAW OF PROPERTY § 6.1 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *180; C. MOYNIHAN, *supra* note 67, at 217; 2A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Joint Tenants* § 1.05 (1980).

76. *See, e.g., In re* Estate of McKelway, 221 N.Y. 15, 19, 116 N.E. 348, 349 (1917); *In re* Estate of Rushak, 28 A.D.2d 807, 807-08, 281 N.Y.S.2d 940, 941 (4th Dep't 1967); *In re* Estate of Costello, 147 Misc. 629, 634, 265 N.Y.S. 905, 910 (Sur. Ct. Broome County 1933); 2 AMERICAN LAW OF PROPERTY § 6.1 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *183-84; 4 J. KENT, COMMENTARIES *360; C. MOYNIHAN, *supra* note 67, at 220; 2A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Joint Tenants* § 1.03 (1980). The right of survivorship may be destroyed by severance of the joint tenancy. *See* note 77 *infra; cf.* note 88 and accompanying text *infra* (right of survivorship in tenancy by the entirety is indestructible).

77. *See, e.g., In re* Lorch's Estate, 33 N.Y.S.2d 157, 165-66 (Sur. Ct. Queens County 1941); 2 AMERICAN LAW OF PROPERTY § 6.2 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *359-60; C. MOYNIHAN, *supra* note 67, at 217.

The combination of individual rights and fictional unity is the basis of the maxim that, in contrast to tenants in common, *see* note 68 and accompanying text *supra*, and tenants by the entirety, *see* note 85 and accompanying text *infra*, joint tenants are seised *per my et per tout*, by the half, or moiety, and by all. *See, e.g., In re* Estate of McKelway, 221 N.Y. 15, 19, 116 N.E. 348, 349 (1917); 2 AMERICAN LAW OF PROPERTY § 6.1 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *182; 4 J. KENT, COMMENTARIES *359; C. MOYNIHAN, *supra* note 67, at 217.

An example of the individual rights of joint tenants is the ability of one cotenant to alienate his separate interest. *See, e.g., In re* Estate of McKelway, 221 N.Y. 15, 19, 116 N.E. 348, 349 (1917); *In re* Estate of Cotter, 159 Misc. 324, 327, 287 N.Y.S. 670, 674 (Sur. Ct. Kings County 1936); 2 AMERICAN LAW OF PROPERTY § 6.2 (A.J. Casner ed. 1952); 2 W.

unity of the parties, is the dominant element of the tenancy.[78] As early as 1752, it was well settled that when one co-beneficiary of a joint tenancy created by will dies before the testator, the surviving co-beneficiary takes the whole estate.[79] The right of survivorship is so applied in New York, even if the gift fails as to one co-beneficiary for a cause other than death.[80]

Tenancy by the Entirety

Tenancy by the entirety is a special form of cotenancy available only to a husband and wife.[81] In New York, it is also limited to estates in real property.[82] Tenants by the entirety own the one interest together under a legal fiction of unity as husband and wife.[83] As in the joint tenancy, there is a right of survivorship; each cotenant has an interest in the whole, and on the death of one, the decedent's interest disappears, and the whole estate continues in the survivor.[84]

BLACKSTONE, COMMENTARIES *185; 4 J. KENT, COMMENTARIES *363; C. MOYNIHAN, *supra* note 67, at 221; 2A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Joint Tenants* § 1.04 (1980). Such alienation severs the joint tenancy and creates a tenancy in common between the transferee and the nontransferring cotenant. *See, e.g., In re* Estate of McKelway, 221 N.Y. 15, 19, 116 N.E. 348, 349 (1917); 2 AMERICAN LAW OF PROPERTY § 6.2 (A.J. Casner ed. 1952); 2 W. BLACKSTONE, COMMENTARIES *185; 4 J. KENT, COMMENTARIES *363; C. MOYNIHAN, *supra* note 67, at 221; 2A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Joint Tenants* § 1.03 (1980). The severance thus destroys the right of survivorship of both original tenants. *See, e.g., In re* Estate of McKelway, 221 N.Y. 15, 19, 116 N.E. 348, 349 (1917).

78. *See, e.g., In re* Lorch's Estate, 33 N.Y.S.2d 157, 166 (Sur. Ct. Queens County 1941); 2 AMERICAN LAW OF PROPERTY § 6.1 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *360; C. MOYNIHAN, *supra* note 67, at 220; 2A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Joint Tenants* § 1.03 (1980).

79. Humphrey v. Tayleur, 27 Eng. Rep. 89, 90 (Ch. 1752).

80. Downing v. Marshall, 23 N.Y. 366, 373 (1861). *See* note 130 and accompanying text *infra*.

81. *See, e.g.,* Ninth Fed. Sav. & Loan Ass'n v. Thuna, 36 Misc. 2d 742, 744, 233 N.Y.S.2d 753, 755 (Sup. Ct. Queens County 1962); 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952); C. MOYNIHAN, *supra* note 67, at 229; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* §§ 1.01, 1.08 (1979).

82. N.Y. EST., POWERS & TRUSTS LAW § 6-2.1(4) (McKinney 1967).

83. *See, e.g.,* Stelz v. Shreck, 128 N.Y. 263, 266, 28 N.E. 510, 511 (1891); *In re* Estate of Price, 56 Misc. 2d 774, 775, 290 N.Y.S.2d 210, 212 (Sur. Ct. Suffolk County 1968); 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *362; C. MOYNIHAN, *supra* note 67, at 229; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* § 1.01 (1979).

84. *See, e.g.,* Stelz v. Shreck, 128 N.Y. 263, 266, 28 N.E. 510, 511 (1891); *In re* Maguire, 251 A.D. 337, 339, 296 N.Y.S. 528, 531 (2d Dep't 1937), *aff'd*, 277 N.Y. 527, 13

Although at common law tenants by the entirety were not recognized as possessing any individual interests,[85] New York treats the modern tenancy by the entirety as a tenancy in common with an indefeasible right of survivorship.[86] Thus, either spouse may transfer his right to possession together with his contingent right of survivorship.[87] But in New York, as under the common law, a tenancy by the entirety can be severed against the will of one cotenant only by dissolution of the marriage; the right of the surviving spouse to the entire estate cannot be defeated by any transfer, voluntary or involuntary, by the other spouse.[88]

As noted above,[89] when one co-beneficiary of a joint tenancy created by will dies before the testator, the surviving co-beneficiary takes the whole estate. Since this rule is applied to joint tenancies despite the destructibility of the joint tenants' rights of survivorship,[90] the rule should also extend to tenancies by the

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N.E.2d 458 (1938); *In re* Estate of Price, 56 Misc. 2d 774, 775, 290 N.Y.S.2d 210, 212 (Sur. Ct. Suffolk Country 1968); 2 AMERICAN LAW OF PROPERTY § 6.6. (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *362; C. MOYNIHAN, *supra* note 67, at 230; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* § 1.07 (1979). In contrast to the joint tenancy right of survivorship, *see* note 76 *supra*, the right of survivorship in a tenancy by the entirety is indestructible. *See* note 88 and accompanying text *infra*.

85. *See, e.g.*, Hiles v. Fisher, 144 N.Y. 306, 312, 39 N.E. 337, 338 (1895); 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *362-63; C. MOYNIHAN, *supra* note 67, at 229. In contrast to joint tenants, *see* note 77 and accompanying text *supra*, and tenants in common, *see* note 68 and accompanying text *supra*, tenants by the entirety are said to be seised *per tout* but not *per my*, by all but not by the half, or moiety. *See, e.g.*, 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952); 4 J. KENT, COMMENTARIES *362; C. MOYNIHAN, *supra* note 67, at 229; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* § 1.07 (1979).

86. *See, e.g.*, Goodrich v. Village of Otego, 216 N.Y. 112, 117, 110 N.E. 162, 164 (1915); Henner v. State, 32 Misc. 2d 333, 335, 224 N.Y.S.2d 420, 422 (Ct. Cl. 1962); C. MOYNIHAN, *supra* note 67, at 234; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* § 1.06 (1979).

87. *See, e.g.*, Goodrich v. Village of Otego, 216 N.Y. 112, 116, 110 N.E. 162, 164 (1915); First Fed. Savings & Loan Ass'n v. Lewis, 14 A.D.2d 150, 154, 218 N.Y.S.2d 857, 861 (2d Dep't 1961); Lawriw v. City of Rochester, 14 A.D.2d 13, 15, 217 N.Y.S.2d 113, 114 (4th Dep't 1961), *aff'd*, 11 N.Y.2d 759, 226 N.Y.S.2d 695, 181 N.E.2d 631 (1962); C. MOYNIHAN, *supra* note 67, at 234; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* § 3.02 (1979).

88. *See, e.g.*, DeGolyer v. Schutt, 40 A.D.2d 943, 943-44, 339 N.Y.S.2d 240, 241 (4th Dep't 1972); C. MOYNIHAN, *supra* note 67, at 229-30, 234; 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* §§ 1.07, 3.02, 3.05 (1979).

89. *See* notes 79-80 and accompanying text *supra*.

90. *See* note 77 *supra*.

entirety, in which the rights of survivorship are indestructible.[91]

2. *Voiding the Interest of a Cotenant*

In a tenancy in common, the manner in which EPTL 3-3.2 voids the interest of the witness, either by treating the witness as having predeceased the testator or by striking the disposition to the witness from the will, is largely immaterial. The interest passes by an applicable substitutionary provision or falls into the estate. Since the interest of the witness is separate and alienable,[92] the interest of the unblemished primary co-beneficiary[93] is not affected; the substitutionary beneficiary becomes the cotenant of the unblemished primary co-beneficiary.

The proper method of application of the statute is not clear, however, when one co-beneficiary of a disposition in the form of a joint tenancy or a tenancy by the entirety is a witness to the will. The disposition to the witness is void,[94] but the legislative intent to preserve the testator's wishes requires that the disposition to the unblemished co-beneficiary remain unaffected.[95] Since the cotenants own the one interest together under a legal fiction of unity of the persons,[96] it is impossible to void the interest of one co-beneficiary without affecting the other co-beneficiary.

Because of the complications introduced by the cotenant's interest in the whole and contingent right of survivorship, there are four possible methods of applying the statute to joint tenancies and tenancies by the entirety.[97] The Unitary Approach would void the entire disposition, destroying the interest of both primary co-beneficiaries; this approach is the equivalent of striking the entire disposition from the will. The Substitutionary Approach would allow the substitutionary beneficiary[98] to step into

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91. The effect of the death, before the testator, of one co-beneficiary of a tenancy by the entirety created by will has not been judicially determined in New York.

92. *See* notes 68 & 70 and accompanying text *supra*.

93. The "unblemished" primary co-beneficiary is the co-beneficiary who is not an attesting witness to the will.

94. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2 (McKinney 1967).

95. Du Bois v. Brown, 1 Dem. Sur. 317, 329 (Sur. Ct. Westchester County 1882), *aff'd sub nom. In re* Brown, 31 Hun 166 (N.Y. Sup. Ct. Gen. Term 2d Dep't 1883).

96. *See* notes 74 & 83 and accompanying text *supra*.

97. The terminology for these four approaches is the author's.

98. For convenience, the term "substitutionary beneficiary" is used to denote the

the shoes of the witness as cotenant of the intended tenancy with the unblemished primary co-beneficiary; this approach is one way of striking the disposition from the will only as it relates to the witness. The Severance Approach would treat the witness as having alienated his interest, thus severing the tenancy, and would pass the disposition to the substitutionary beneficary and the unblemished primary co-beneficiary as tenants in common; this approach is another way of striking the disposition from the will only as it relates to the witness. The Survivorship Approach would treat the witness as having predeceased the testator and thereby pass the entire property to the unblemished primary co-beneficiary.

Each of these approaches will be examined in terms of protection against fraud, preservation of the testator's intent, and compatibility with the property law concepts of the different types of cotenancy to determine which best fulfills the legislative purpose of EPTL 3-3.2.

All four approaches provide complete protection against direct inducement to testify fraudulently which might result from the witness's interest. The Unitary Approach provides a further protection against the indirect inducement which might result from the interest of the co-beneficiary, particularly if the co-beneficiary is closely tied to the witness.[99] The statute has never attempted to reach any indirect interests; a disposition made directly to the unblemished co-beneficiary would clearly be good, even if that co-beneficiary were the spouse or issue of the witness.[100] Thus, while the Unitary Approach provides the maximum protection, all the approaches provide at least the level of protection required by the statute.

The Unitary Approach

The Unitary Approach, which voids the entire disposition and thereby destroys the interest of both primary co-benefi-

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alternate taker, whether under a substitutionary disposition, under a residuary disposition, or in intestacy.

99. Protection against such indirect inducement to fraud could be particularly relevant in a tenancy by the entirety, in which the co-beneficiary must be the witness's spouse. This additional protection of the Unitary Approach sweeps too broadly, however, as it would also void the interest of a totally unrelated co-beneficiary in a joint tenancy.

100. *See* note 28 and accompanying text *supra*.

ciaries, views the disposition as intended by the testator to create a single interest in the cotenants together. Since the testator intended to create a unitary interest, no part of the testamentary scheme can be preserved. But one can also view a disposition of a joint tenancy or a tenancy by the entirety as intended to give an interest in the whole, coupled with a contingent right of survivorship, to each cotenant.[101] Voiding the interest of the witness defeats part of the testamentary intent but does not require defeating the entire scheme by voiding the interest of the unblemished co-beneficiary as well.[102] The testator, after all, made no attempt to condition the gift to one co-beneficiary on the ability of the other to share; for example, if one co-beneficiary actually predeceased the testator, the other would receive the entire disposition.[103] As the primary legislative purpose of the interested witness statute is to preserve the testator's intent as far as possible,[104] another method of application which preserves at least part of the unblemished co-beneficiary's interest would be preferable.

The Unitary Approach seems to conform to the property law concepts underlying both the joint tenancy, in which the cotenants hold under a legal fiction of unity as co-owners,[105] and the tenancy by the entirety, in which the cotenants hold under a legal fiction of unity as husband and wife.[106] Each joint tenant, however, has individual, as well as joint, rights;[107] the Unitary Approach ignores and destroys these individual rights of the unblemished co-beneficiary. Furthermore, the primary effect of the fictional unity of the cotenants in both tenancies is to create a

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101. This view of the testamentary intent conforms to the property law concepts of the joint tenancy and the tenancy by the entirety. *See* notes 76 & 84 and accompanying text *supra*.

102. It is a canon of testamentary construction that if an invalid part can be expunged without destroying the general testamentary scheme, the valid parts of the will should be upheld. *See, e.g., In re* Will of Eveland, 284 N.Y. 64, 74, 29 N.E.2d 471, 474 (1940); Kalish v. Kalish, 166 N.Y. 368, 375, 59 N.E. 917, 919 (1901); *In re* Estate of Pace, 93 Misc. 2d 969, 976, 400 N.Y.S.2d 488, 493 (Sur. Ct. Cayuga County 1970); 6 WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Wills* § 10.08 (1978).

103. *See* notes 79-80 & 91 and accompanying text *supra*.

104. *See* note 30 and accompanying text *supra*.

105. *See* note 74 and accompanying text *supra*.

106. *See* note 83 and accompanying text *supra*.

107. *See* note 77 and accompanying text *supra*.

right of survivorship in each cotenant;[108] the Unitary Approach destroys this right in the unblemished co-beneficiary. Finally, the modern concept of the tenancy by the entirety in New York ignores the fictional unity of the parties and treats the interest as a tenancy in common with an indefeasible right of survivorship.[109] The Unitary Approach is clearly inapplicable to the tenancy in common, in which each cotenant has only a separate interest,[110] and is therefore also inapplicable to the modern tenancy by the entirety.[111] Since the Unitary Approach is only applicable to joint tenancies, and then only by ignoring the joint tenant's individual rights and right of survivorship, adoption of this approach would not permit a uniform rule for all types of cotenancy.

The Substitutionary Approach

The Substitutionary Approach would allow the substitutionary beneficiary to step into the shoes of the witness as cotenant, without altering the nature of the tenancy. This approach may seem to preserve the testator's intent as to the unblemished primary co-beneficiary, since the nature of the cotenancy would be maintained. The co-beneficiary's interests would, nevertheless, be affected to some extent; the disposition was made in the form of a cotenancy with the original co-beneficiaries in mind. Substituting a stranger for one of the co-beneficiaries alters this basic relationship and, in many cases, would produce a result vastly different from that intended by the testator.[112] For example, the resulting cotenants might be incompatible in terms of their personalities or intended use of the gift; or the life expectancy of the substituted cotenant might be very different from

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108. *See* notes 78 & 84 and accompanying text *supra*.

109. *See* note 86 and accompanying text *supra*.

110. *See* note 68 and accompanying text *supra*.

111. The inapplicability of the Unitary Approach to tenancies by the entirety is particularly important in evaluating this approach, since it is primarily in the context of a tenancy by the entirety that voiding the interest of both co-beneficiaries would remove indirect inducements to testify fraudulently. *See* note 99 and accompanying text *supra*. Applied only to joint tenancies, the approach sweeps away far too much of the testator's intent for a minimal increase in protection against fraud.

112. The relationship between the original cotenants is particularly close in a tenancy by the entirety; the cotenants must be husband and wife. *See* note 81 and accompanying text *supra*.

that of the witness, thus altering the value of the unblemished primary co-beneficiary's right of survivorship in a joint tenancy. The Substitutionary Approach therefore fails to preserve fully the testator's intent as to the unblemished primary co-beneficiary.

The Substitutionary Approach is consistent with the property law concepts of the tenancy in common. The interest of a tenant in common is alienable;[113] the result of such alienation can be viewed as substitution of the transferee as tenant in common with the original cotenant.[114] This approach does not conform to the property law concepts of the joint tenancy; substitution of parties within a joint tenancy is impossible.[115] The Substitutionary Approach is also incompatible with the property law concepts of the modern tenancy by the entirety.[116] Although one tenant by the entirety may transfer his right to possession and his contingent right of survivorship, the measuring lives for survivorship remain those of the original cotenants.[117] Substitution would require that the measuring lives for survivorship be those of the resulting cotenants.[118]

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113. *See* note 70 and accompanying text *supra*.

114. C. MOYNIHAN, *supra* note 67, at 224. *But see* 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy in Common* § 7.03 (1979), which characterizes the result of alienating the interest of one tenant in common as termination of the tenancy and creation of a new tenancy in common between the resulting cotenants. Both explanations are valid. The only unity required for a tenancy in common is that of possession. *See* note 69 and accompanying text *supra*. Therefore, the current possession by the resulting cotenants may be viewed as the basis of a new tenancy in common, or the transfer of possession to the transferee cotenant may be viewed as a continuation of the original tenancy.

115. If one party in a joint tenancy transfers his interest while living, the result is severance of the joint tenancy and creation of a tenancy in common between the resulting cotenants. *See* note 77 *supra*. An attempted transfer at death fails; the right of survivorship means that the surviving cotenant owns the sole interest from the moment of death. *See* note 76 and accompanying text *supra*.

116. *See* note 86 and accompanying text *supra*.

117. *See, e.g.*, Lawriw v. City of Rochester, 14 A.D.2d 13, 15, 217 N.Y.S.2d 113, 114 (4th Dep't 1961), *aff'd*, 11 N.Y.2d 759, 226 N.Y.S.2d 695, 181 N.E.2d 631 (1962); 5A WARREN'S WEED NEW YORK LAW OF REAL PROPERTY *Tenancy by Entirety* § 3.02 (1979).

118. Alternatively, the Substitutionary Approach could be viewed as acting on the disposition before it becomes effective. Thus viewed, the approach would conform to the property law concepts of the joint tenancy; the substitutionary beneficiary and the unblemished primary co-beneficiary would be the original cotenants. Nevertheless, this approach fails to recognize the essential characteristic of the tenancy by the entirety: that it is available only to cotenants who are husband and wife. *See* note 81 and accompany-

The Substitutionary Approach is inapplicable to joint tenancies and tenancies by the entirety; therefore, adoption of this approach would not permit a uniform rule for all types of cotenancy.

The Severance Approach

The Severance Approach, by treating the witness as having severed the tenancy, would pass the disposition to the unblemished primary co-beneficiary and the substitutionary beneficiary as tenants in common. This approach, like the Substitutionary Approach,[119] would substitute a stranger for one of the co-beneficiaries selected by the testator, and would thereby frustrate the testamentary intent as to the relationship between the unblemished primary co-beneficiary and his cotenant. The frustration produced by the Severance Approach would be far more significant in a joint tenancy or a tenancy by the entirety than that of the Substitutionary Approach. The Severance Approach would destroy the right of survivorship which the testator intended to give to the unblemished primary co-beneficiary.

The Severance Approach is compatible with the property law concepts of the tenancy in common. The interest of a tenant in common is alienable;[120] the result of such alienation can be viewed as severance or dissolution of the tenancy and creation of a new tenancy in common between the resulting cotenants.[121] This approach also conforms to the property law concepts of the joint tenancy. A joint tenant may sever the tenancy by transferring his interest; the transferee becomes a tenant in common with the nontransferring cotenant.[122] Application of the Severance Approach to joint tenancies, however, would conflict with the rule stated in *Downing v. Marshall*,[123] that when a joint tenancy created by will fails as to one of the beneficiaries, because he died before the testator, or "from any other cause than death," the whole interest passes to the survivor.[124] The Sever-

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ing text *supra*.

119. *See* note 112 and accompanying text *supra*.

120. *See* note 70 and accompanying text *supra*.

121. *See* note 114 *supra*.

122. *See* note 77 *supra*.

123. Downing v. Marshall, 23 N.Y. 366 (1861).

124. *Id.* at 373. For discussion of this rule, *see* note 130 and accompanying text

ance Approach does not conform to the property law concepts of the tenancy by the entirety, which cannot be severed against the will of one cotenant except by dissolution of the marriage.[125]

Since the Severance Approach is inapplicable to tenancies by the entirety, and conflicts with the rule of *Downing v. Marshall* as to joint tenancies, adoption of this approach would not permit a uniform rule for all types of cotenancy.

The Survivorship Approach

The Survivorship Approach, by treating the witness as having immediately predeceased the testator, would pass the entire property to the unblemished primary co-beneficiary of a joint tenancy or a tenancy by the entirety;[126] treating a witness who is a co-beneficiary of a tenancy in common as having predeceased the testator would cause the witness's one-half interest to lapse.[127]

The Survivorship Approach is the only approach which does not adversely affect the interest of the unblemished primary co-beneficiary of a joint tenancy or a tenancy by the entirety. This approach, by passing the property to the co-beneficiary, may seem to give him a windfall, but cotenants of such tenancies each have an interest in the whole coupled with a contingent right of survivorship; treating the witness as having immediately predeceased the testator gives no additional interest to the co-beneficiary, but merely removes the cloud of the other's interest. The interest of the unblemished co-beneficiary is increased in value, but this quantitative change is minor compared to the real windfall which the residuary beneficiaries or distributees would receive if the witness's interest were passed to them. Furthermore, this approach operates through the right of survivor-

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infra.

125. Although in New York a tenant by the entirety can transfer his right of possession and contingent right of survivorship, this does not sever the tenancy or destroy the right of survivorship of the cotenant. *See* note 88 and accompanying text *supra*.

126. *See* notes 79-80 & 90-91 and accompanying text *supra*. The Survivorship Approach is so called because, in treating the witness as having immediately predeceased the testator, it treats the unblemished primary co-beneficiary as the surviving beneficiary.

127. *See* note 73 and accompanying text *supra*. The lapsed interest would pass to an applicable substitutionary beneficiary or fall into the estate to pass by residuary gift or in intestacy.

ship, the distinguishing feature of the joint tenancy and the tenancy by the entirety, which can fairly be implied as the primary reason the disposition was made in this form. The Survivorship Approach is therefore the most consistent with the testator's intent as to joint tenancies and tenancies by the entirety.

The Survivorship Approach is applied to a tenancy in common by causing the witness's one-half interest to lapse and pass to the residuary beneficiaries or distributees. This result correctly reflects the testator's intent, in choosing a nonsurvivorship tenancy, that the co-beneficiary should not receive the entire property even on the death of the witness. The Survivorship Approach may adversely affect the interest of the unblemished primary co-beneficiary by replacing the cotenant selected by the testator. The effect of such replacement is relatively minor in a tenancy in common, however, since there is no right of survivorship,[128] and each cotenant has the power to transfer his interest to a stranger.[129] Furthermore, no other approach better preserves the testator's intent in the tenancy in common.

The Survivorship Approach conforms to the property law concepts of all three types of cotenancy. The distinguishing feature of both the joint tenancy and the tenancy by the entirety is the right of survivorship; the tenancy in common lacks this right. The Survivorship Approach is applied to the former tenancies through the right of survivorship; when applied to the latter tenancy, the absence of survivorship produces a different result. The Survivorship Approach is thus the only approach which follows property law distinctions between the types of cotenancy.

The Survivorship Approach is applicable to tenancies in common, joint tenancies, and tenancies by the entirety; adoption of this approach would therefore permit a uniform rule for all types of cotenancy. Furthermore, the Survivorship Approach may be required in joint tenancies. In 1861, the New York Court of Appeals stated in dicta:

> Where a devise or bequest to two or more persons by name is in such form as to create a joint tenancy, and one of them dies before the testator, it is well settled, that the whole interest vests

128. *See* note 71 and accompanying text *supra*.
129. *See* note 70 and accompanying text *supra*.

> in the survivors; and this result will take place if the gift fails, as to one of the persons *from any other cause than death.*[130]

This rule was also applied to a tenancy by the entirety in the only New York case to consider directly the effect of EPTL 3-3.2 on a tenancy with a right of survivorship, *In re Flynn.*[131]

Finally, the Survivorship Approach is consistent with the approach to substitutionary provisions for lapsed dispositions developed in subsection A of this comment. Therefore, the Survivorship Approach allows creation of a uniform rule treating the witness as having immediately predeceased the testator in

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130. Downing v. Marshall, 23 N.Y. 366, 373 (1861) (citations omitted) (emphasis added).

131. *In re* Flynn, 68 Misc. 2d 1087, 329 N.Y.S.2d 249 (Sur. Ct. Westchester County 1972). The testator in *Flynn* had devised her home to one of the attesting witnesses and the witness's husband. *Id.* at 1088, 329 N.Y.S.2d at 250. The parties agreed that the devise to the witness was rendered void by EPTL 3-3.2, but differed as to the effect of voiding this disposition on the gift to the co-beneficiary. The objectant argued that a disposition of real property to husband and wife creates a tenancy in the entirety under EPTL 6-2.2(b); that such a disposition involves "an entirety of interest," and that severing the witness's interest rendered void the entire disposition. *Id.* The objectant's position corresponds to the Unitary Approach, discussed at notes 100-111 and accompanying text *supra.* The court rejected this approach on the ground that no tenancy by the entirety ever came into existence. *Id.*

The *Flynn* court claimed that because the devise to the witness was void, "the language of the devise must now be read as if her name were omitted entirely therefrom." *Id.* at 1088, 329 N.Y.S.2d at 251. The quoted language seems to require application of EPTL 3-3.2 by one of the approaches which involve striking out the disposition to the witness, *i.e.* the Unitary Approach rejected by the court, the Substitutionary Approach, or the Severance Approach. Yet the *Flynn* court did not use any of these approaches; it applied the rule of *Downing v. Marshall* by analogy and held that the entire fee interest vested solely in the co-beneficiary. *Id.* at 1089, 329 N.Y.S.2d at 251. This result corresponds to the Survivorship Approach, the only approach which does *not* involve striking out the disposition to the witness.

Flynn has been criticized by Patrick J. Rohan as defeating the policy behind EPTL 3-3.2. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2, commentary at 78 (McKinney Supp. 1980). In light of the discussion of the legislative policy of EPTL 3-3.2 above, *see* notes 23-33 and accompanying text *supra*, this criticism is unfounded. Passing the entire property to the unblemished co-beneficiary maintains the statutory protection against direct inducement to fraud by destroying the witness's personal interest. This approach does not protect against the indirect inducement which may result from the interest of the co-beneficiary, but the statute does not attempt to reach any indirect inducement. *See* note 28 and accompanying text *supra.*

all applications of EPTL 3-3.2.

3. *Conclusion Regarding Cotenancies*

When EPTL 3-3.2 voids the interest of a witness in a disposition in the form of a cotenancy, the legislative purpose of the statute requires that the interest of the unblemished co-beneficiary be preserved as far as possible.[132] This presents no problem in a tenancy in common, since the interests of the cotenants are separate and alienable.[133] In a joint tenancy or a tenancy by the entirety, however, the cotenants own the one interest together under a legal fiction of unity of the persons,[134] and it is impossible to void the interest of one cotenant without affecting the other cotenant.

This comment has examined four possible methods of applying the statute to cotenancies. All four approaches provide the full statutory protection against direct interests.[135] The Unitary Approach,[136] which would void the interests of both beneficiaries, interferes far too broadly with the testator's intent and cannot be applied to tenancies in common or tenancies by the entirety. The Substitutionary Approach,[137] which allows the substitutionary beneficiary to step into the shoes of the witness, interferes with the testator's intent by changing the identity of the unblemished primary co-beneficiary's cotenant, thereby affecting the unblemished primary co-beneficiary's enjoyment of the gift and the value of any contingent right of survivorship. This approach is also inapplicable to joint tenancies, in which substitution of a party severs the tenancy and destroys the right of survivorship, and to tenancies by the entirety, in which the indefeasible right of survivorship prevents any change in the measuring lives. The Severance Approach,[138] which treats the witness as having severed the tenancy and passes the disposition to the substitutionary beneficiary and the unblemished primary co-beneficiary as tenants in common, results in the same inter-

132. *See* note 30 and accompanying text *supra*.
133. *See* notes 68-70 and accompanying text *supra*.
134. *See* notes 74 & 83 and accompanying text *supra*.
135. *See* notes 99-100 and accompanying text *supra*.
136. *See* notes 101-111 and accompanying text *supra*.
137. *See* notes 112-118 and accompanying text *supra*.
138. *See* notes 119-125 and accompanying text *supra*.

ference with the testator's intent as does the Substitutionary Approach. Moreover, the Severance Approach is not applicable to tenancies by the entirety, which cannot be severed except by dissolution of the marriage. The Survivorship Approach,[139] which treats the witness as having immediately predeceased the testator, is the only approach which both satisfies the legislative purpose of EPTL 3-3.2 and is applicable to all types of cotenancy.

The Survivorship Approach produces the least alteration in the testamentary scheme when applied to a joint tenancy or a tenancy by the entirety, since it merely removes the cloud of the witness's interest from the interest in the whole already given to the co-beneficiary. This approach also fulfills the testator's intent by operating through the right of survivorship, the distinctive feature of the joint tenancy and the tenancy by the entirety. The Survivorship Approach may alter the relationship between the cotenants of a tenancy in common, but no other approach better preserves this testamentary scheme. This approach, therefore, best fulfills the legislative purpose of EPTL 3-3.2 to preserve the testator's wishes as far as possible while maintaining the safeguards against direct inducement to fraud.

The Survivorship Approach is applicable to all types of cotenancy; it is the only approach which follows property law distinctions. Finally, the Survivorship Approach to cotenancies is consistent with the approach to substitutionary provisions for lapsed dispositions suggested in subsection A of this comment. Therefore, the Survivorship Approach is suggested as the preferable approach to the application of EPTL 3-3.2 to cotenancies.

III. Suggestions

The foregoing analysis of the situations in which the intended effect of EPTL 3-3.2 is not clear leads to the conclusion that the legislative purpose is best served by treating the witness as having immediately predeceased the testator. Courts should interpret the word "void" in EPTL 3-3.2 as interchangeable with "lapsed" and give effect to the statute by treating the witness as having immediately predeceased the testator, rather than by

139. *See* notes 126-131 and accompanying text *supra*.

striking out the disposition. In most cases, either method will produce the same result; when the results are different, the purpose of the statute is better served by treating the witness as predeceased.

The legislature should consider removing the uncertainty in the application of EPTL 3-3.2 by amending the statute to specify that any disposition, or part thereof, to an attesting witness, which is rendered void by this section, shall be given effect as though the witness had immediately predeceased the testator.[140]

Finally, draftsmen should avoid possible confusion as to the applicability of a substitutionary disposition. Limitation of the substitutionary disposition to situations in which the beneficiary predeceases the testator raises the question whether the testator intended the substitution to be made when the disposition is rendered void by EPTL 3-3.2.[141] Instead of relying on the courts to adopt the interpretation of the statute suggested above, a draftsman can ensure applicability of the substitutionary disposition by using the phrase, "if he predecease me or if the disposition, or any part thereof, fails for any reason." Use of this wording will produce a result in keeping with the testator's intent in the situations discussed above and in any others not contemplated by the testator.[142]

IV. Conclusion

This comment's comparison of EPTL 3-3.2 with its statutory and common-law antecedents shows that the legislature's primary purpose in enacting the statute was to preserve the wishes of the testator as far as possible while still protecting against the inducement to give fraudulent testimony, for or

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140. This method of application is already specified in several other sections of EPTL. *See, e.g.*, N.Y. EST., POWERS AND TRUSTS LAW §§ 2-1.11(b) (renunciation), 4-1.4(b) (disqualification of parent), 5-1.4(a) (revocatory effect of divorce) (McKinney Supp. 1980).

141. The standard substitutionary clause is phrased in terms of the beneficiary's predeceasing, or not surviving, the testator. *See, e.g.*, 2 E. FINGAR, D. BOOKSTAVER & J. MCQUAID, NEW YORK WILLS AND TRUSTS §§ 14:04:F03-04 (1980); 2 J. MURPHY, MURPHY'S WILL CLAUSES, forms 12:35, 12:36A (1980).

142. The testator is already protected against application of the substitutionary provision in situations which involve wrongdoing by the beneficiary. *See* note 59 and accompanying text *supra*.

against the will, which might result from a witness's personal interest in the will. Neither the statute nor the common-law rule has ever attempted to extend its protection to prevent inducement resulting from interests of the witness's spouse or issue.

The statute declares that such dispositions are "void," but does not specify whether this is to be effected by striking the disposition from the will or by treating the witness as having immediately predeceased the testator. In most cases, the effect is the same under either method, but only the latter approach allows application of EPTL 3-3.3 to prevent the lapse of a disposition to a witness who is an issue or sibling of the testator and to pass the disposition to the surviving issue of such witness. Application of this anti-lapse mechanism preserves the implied intent of the testator to prefer the witness's issue to the residuary beneficiaries or distributees. This approach maintains the primary safeguard againt fraud by destroying the witness's personal interest in the will; thus, the legislative purpose of EPTL 3-3.2 is best served by treating the witness as predeceased.

Similarly, a substitutionary disposition in the event that the beneficiary predeceases the testator carries the implication that the testator would have intended the same result if the primary disposition were voided by EPTL 3-3.2. Activation of the substitutionary disposition does not affect the statutory safeguards against fraud, since the witness's personal interest in the will relates only to the primary disposition. Application of EPTL 3-3.2 by treating the witness as predeceased best serves the legislative purpose in this situation as well.

Finally, a disposition in the form of a joint tenancy or a tenancy by the entirety reflects a testamentary intent to give each co-beneficiary an interest in the whole gift and a contingent right of survivorship. Voiding the interest of the witness by treating him as having immediately predeceased the testator fulfills this testamentary intent by preserving the interest of the unblemished co-beneficiary through the mechanism of the right of survivorship. This method, here called the Survivorship Approach, preserves the testamentary intent more fully than any other method, without sacrificing any protection against direct inducement to give fraudulent testimony. Thus, this method of applying EPTL 3-3.2 to cotenancies best achieves the legislative purpose of the statute.

Application of EPTL 3-3.2 by treating the witness as predeceased achieves the legislative purpose in all situations examined. In most cases, this method produces the same result as the alternative methods; when the results differ, this application best serves the legislative purpose.

Three recommendations are made on the basis of these conclusions:

1. The courts should apply EPTL 3-3.2 by treating the witness as having immediately predeceased the testator. At the very least, this approach ought to be followed in the above-considered situations as necessary to the fulfillment of the legislative purpose.
2. The legislature should amend the statute to make clear that this is the proper method of application.
3. Draftsmen should avoid confusion which may arise in the application of substitutionary dispositions. Applicability of the substitutionary disposition to the situations discussed above can be ensured by changing the standard activating phrase to read "if he predecease me or if the disposition, or any part thereof, fails for any other reason."

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