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Ghosts from the Grave-Inheriting through the Predeceased under Ohio Law

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GHOSTS FROM THE GRAVE–INHERITING THROUGH THE PREDECEASED UNDER OHIO LAW

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I. INTRODUCTION

This Article seeks to advise the estate-planning attorney that Ohio's laws concerning inheriting through predeceased persons is a labyrinth of arbitrary rules, the majority of which serve no apparent public policy. Specifically, very different sets of rules apply to inheriting through a predeceased person via intestacy, a will, a living trust, or a "beneficiary designation" type account, such as a "payable on death" account (hereinafter P.O.D.).

Additionally, Ohio law contains surprisingly high doses of ambiguity in some of the most basic principles of law relating to inheriting through predeceased next of kin or predeceased named-beneficiaries in a dispositive-planning instrument.

Rather than an exercise in academia, this Article will argue that understanding and then planning around the problems contained in these rules is extremely important to the Ohio estate-planning attorney.

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Evidence exists that named beneficiaries predeceasing their donors is common.[2] Failure to counsel clients about the operation of these rules in the event that a client's intended beneficiary predeceases him or her runs a high risk of arguably the worst of all estate planning consequences—inheritance of a client's assets by unintended heirs.

In sections II through V, I will summarize Ohio's laws regarding inheritance through predeceased persons in the four previously-referenced contexts: intestacy, testacy, revocable living trusts, and P.O.D.-type designations. In sections VI and VII, I will explore strategies to deal with these various sets of rules in real-life planning contexts.

II. Inheritance through a Predeceased Person Via Intestacy

Section 2105.06 of the Ohio Revised Code (hereinafter "O.R.C.") is the primary statute concerning intestate succession. (It is often the only Probate statute memorized by law students by its number.) Having gone through several metamorphoses during the years, its current version, effective March 22, 2001, provides in its entirety:

> When a person dies intestate having title or right to any personal property, or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:
>
> (A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;
>
> (B) If there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;
>
> (C) If there is a spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first twenty thousand dollars plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or child's lineal descendant, per stirpes.
>
> (D) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the

[2] In an informal study of 150 families referred to a law firm by financial planners during a 12 month period in the mid-1990's, one Ohio attorney tracked the average age of the clients' wills. The average was 19.6 years. (Study by Scott Williams, attorney at law Berea, Ohio). Interview with Scott Williams, Attorney in Berea, Ohio (2001-2002).

> spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;
>
> (E) If there are no children or their lineal descendants, then the whole to the surviving spouse;
>
> (F) If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;
>
> (G) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;
>
> (H) If there are no brothers or sisters or their lineal descendants, one-half to the paternal grandparents of the intestate equally, or to the survivor of them, and one-half to the maternal grandparents of the intestate equally, or to the survivor of them;
>
> (I) If there is no paternal grandparent or no maternal grandparent, one-half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;
>
> (J) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;
>
> (K) If there are no stepchildren or their lineal descendants, escheat to the state.[3]

Section (A) of the statute uses that popular Latin phrase "per stirpes," which simply means "by the roots."[4] Inheritance in this manner is often referred to as taking by "representation"[5] and means not taking in one's own right, "but as representatives of a person who, if that person had survived, would have shared equally with the others."[6] An applicable part of Section 2105.13 of the code actually gives a de facto example of the term's application:

> If some of the children of an intestate are living and others are dead, the estate shall descend to the children who are living and to the lineal descendants of such children as are dead, so that each child who is living will inherit the share to which he would have been entitled if all the children of the intestate were living, and the lineal descendants of the

[3] OHIO REV. CODE ANN. § 2105.06 (West 2002).

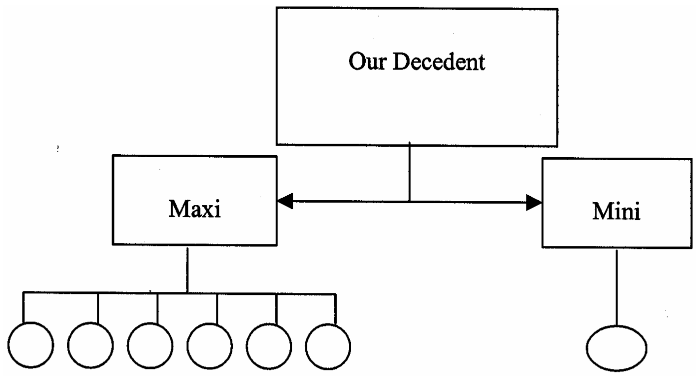
[4] *See* ANGELA G. CARLIN, MERRICK-RIPNER PROBATE LAW § 15.21, at 331 (2002).

[5] *See* 31 OHIO JUR. 3D *Decendents' Estates* § 95 (2002).

[6] *Id.*

> deceased child will inherit *equal parts of that portion of the estate* to which such deceased child would be entitled if he were living.[7]

Intestate per stirpes inheritance, however, is subject to exceptions. There are two major exceptions to intestate per stirpes inheritance. The first exception is best illustrated by the following example: Someone dies; she is the parent of two predeceased daughters, Maxi and Mini. Maxi died leaving six children surviving. Mini died leaving one child surviving. The family tree is illustrated as follows:



What percentages does each of the six grandchildren take? Section 2105.06(A) seems to say that the six sibling grandchildren of Maxi would each inherit 1/12th and the "only child" grandchild of Mini would inherit a full 1/2.[8] Section 2105.12, however, must also be taken into account. That statute provides:

> When all the descendants of an intestate, in a direct line of descent, are on an equal degree on consanguinity to the intestate, the estate shall pass to such persons in equal parts, however remote from the intestate such equal and common degree of consanguinity may be.[9]

The type of taking set forth in Section 2105.12 is referred to as "per capita."[10] It imports a taking "...in equal shares among a class of persons ... One who takes per capita takes directly in his own right, not because he represents anyone else. Taking per capita precludes representation."[11]

A literal reading of these two statutes would suggest they are in conflict. The seminal treatise *Merrick-Ripner Probate Law*, however, suggests that a *pari materi* reading of the statutes invites a conclusion that "[t]hose heirs in the nearest class of [living] next of kin take per capita. Lineal descendants of deceased members of the one class take per stirpes ..."[12] Specifically citing and adopting *Merrick Ripner*'s

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[7]OHIO REV. CODE ANN. § 2105.13 (West 2002) (emphasis added).

[8]*See* OHIO REV. CODE ANN. § 2105.06 (West 2002).

[9]OHIO REV. CODE ANN. § 2105.12 (West 2002).

[10]*See* 31 OHIO JUR. 3d *Decedents' Estates* § 97 (2002).

[11]31 OHIO JUR. 3d *Decendents' Estates* § 94 (2002).

[12]*See* CARLIN, *supra* note 4, § 15.45 (citations omitted).

interpretation, the Court in *Washburn v. Scurlock*,[13] in construing the General Code version of O.R.C. § 2105.12 stated: "This section ... disturbs the general rule that property descends *per stirpes* and not *per capita*. Under this statute, when all the descendants [of the nearest degree of kinship] are of an equal degree of consanguinity they should share equal." [sic][14] Previously, in *Kincaid v. Cronin*[15] the Appellate Court, without much elaboration, effectively reached a similar conclusion. It affirmed the lower court ruling, which held where nieces and nephews stand in the closest degree of kinship to the intestate decedent, each niece and nephew takes on a per capita basis, and the grandnieces and grandnephews of predeceased nieces and nephews take on a per stirpes basis.[16]

In our example, therefore, since grandchildren are the nearest class of living next of kin, each grandchild would receive a 1/7th share of the decedent, regardless of parentage. Such a construction would appear to agree with what Ohio's statutory scheme is saying.

The second exception to intestate per stirpes inheritance is built right into the statute. It should be noted that the express language of O.R.C. § 2105.06(I) cuts off the application of per stirpes inheritance at the lineal descendants of grandparents. Specifically, § 2105.06(I) states "[t]here shall be no representation among such [i.e. heirs more distant than lineal descendants of grandparents] next of kin".[17]

We can start to realize the arbitrary nature of the statutory scheme when we change our first example around a bit: As indicated by the following illustration, let us assume the decedent's closest next of kin is Carlos, a second cousin (i.e. the great grandson of his great grandparents) and, say, two second cousins once removed (i.e. the children of his same great grandparents' other great grandson, Conan, who happens to be deceased), David and Dianne.[18] Since there is no taking by representation, each of these three people would take a third.

To further illustrate the arbitrary nature of the statutory scheme, suppose these next of kin were instead a cousin and children of a deceased cousin (i.e. lineal descendants of grandparents of the deceased) respectively.[19] The cousin, Carlos, would take one half, and David and Dianne, the first cousins once removed would take by representation (i.e. one fourth each.)[20]

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[13]449 N.E.2d 797 (Ohio. Ct. App. 1982).

[14]*Id*. at 801.

[15]22 N.E.2d 576 (Ohio. Ct. App. 1939).

[16]*Id*. at 578.

[17]OHIO REV. CODE ANN. § 2105.06(I) (West 2002).

[18]*See infra* Appendix A, Example 1. In studying these examples, please keep in mind that cousins are, by definition, relatives whose closest common ancestor is a grandparent. Second cousins are, by definition, relatives whose closest common ancestor is a great-grandparent. (Second cousins are not to be confused with the children of cousins, who are, by definition, first cousins once removed, descending.)

[19]*See infra* Appendix A, Example 2.

[20]To leave no room for doubt as to this conclusion, OHIO REV. CODE ANN. § 2105.13, cited *supra*, as an example of the application of the per stirpes principle, goes on to say that its scope is limited to "...all cases...not more remote than lineal descendants of grandparents..." *Id.*

It is difficult if not impossible to envision what public policy is served by such arbitrary rules that treat, for example, cousins differently than second cousins viz. a vis inheriting through them.

The careful reader may have noticed one other very arbitrary rule imbedded in Ohio's intestate law. Section I of 2105.06 contains a kind of "super-rule" that in the case where the closest living next of kin are lineal descendants of grandparents, one must first divide the intestate's estate into halves, one half to the side of his paternal grandparents and one half to the side of the maternal grandparent.[21] Examples may help illustrate these rules.

To give an obvious example, let us suppose an intestate decedent's closest next of kin are six cousins, five on his mother's side of the family and one on his father's side of the family. Under this "super-rule," the five maternal cousins would each get 1/10th of his net estate, and the paternal cousin would get 1/2 of his net estate.[22]

If, however, the decedent's closest next of kin were *second* cousins (that is, lineal descendants not of his grandparents but of his great-grandparents), this preliminary division of the decedent's estate into two halves would apparently not take place because it is not mandated by the statute.[23] In the parallel case of a decedent dying with his closest next of kin being five maternal second cousins and one paternal second cousin, each second cousin would presumably take a 1/6th interest in the decedent's net estate.

The answer as to "why" these results are what they are should become clear: Because that is what the statute states.

We are now in the position to sum up what I call the "Rules Governing Intestate Succession in Ohio from the Predeceased."[24]

> Rule One: Identify the class of next of kin closest to the decedent that has at least one person living (treating half siblings, if siblings happens to be the class, as full siblings). If that class member is a sole parent, distribute all assets to that parent.
>
> Rule Two: If, and only if, the class identified in Rule One is a grandparent or a lineal descendant thereof (excepting a parent or sibling), just divide the decedent's assets in half and allocate one half to the maternal grandparents, their survivor, or lineal descendants and one half to the paternal grandparents, their survivor, or lineal descendants and apply the remaining rule separately as to each half: Distribute the assets to the living class members identified in Rule One on a per capita basis and

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[21] *See* OHIO REV. CODE ANN. § 2105.06(I) (West 2002).

[22] *See* OHIO REV. CODE ANN. § 2105.06(I). *See infra*, Appendix A, Example 3.

[23] *See* OHIO REV. CODE ANN. § 2105.06(I). *See infra*, Appendix A, Example 4.

[24] Note that these Rules of mine ignore the portion, if any, of decedent's property that goes to a surviving spouse. The reason is that a surviving spouse presents no "inheriting through" problems. If the spouse survives, simply follow the statute as to what monetary sums and fractional shares the spouse receives. The Rules then govern the remaining intestate property. If the spouse is predeceased, the spouse is simply ignored as if the decedent had never married.

> distribute the assets of any lineal descendants of any deceased member of that class on a per stirpes basis.
>
> Rule Three: If and only if the class identified in Rule One is a class of lineal descendants whose closest common ancestors to the decedent are more remote than grandparents, distribute the assets to the living class members identified in Rule One ALONG WITH lineal descendants of any deceased members of that class on a per capita basis.

The last two rules are simply the last two sections of the statute:

> Rule Four: "If there are no next of kin, to stepchildren or their lineal descendants, per stirpes."[25]
>
> Rule Five: If there are no stepchildren or their lineal descendants, give the assets to the State of Ohio.[26]

III. Inheritance through a Predeceased Person via a Will

Ohio's so-called "anti-lapse" statute governs inheritance through someone named in a will who has predeceased the testator. Amended in 1992, the current version of O.R.C. § 2107.52 states:

> (A) As used in this section, "relative" means an individual who is related to a testator by consanguinity...
>
> (B) Unless a contrary intention is manifested in the will, if a devise of real property or a bequest of personal property is made to a relative of a testator and the relative was dead at the time the will was made or dies after that time, leaving issue surviving the testator, those issue shall take by representation the devised or bequeathed property as the devisee or legatee would have done if he had survived the testator. If the testator devised or bequeathed a residuary estate or the entire estate after debts, other general or specific devises and bequests, or an interest less than a fee or absolute ownership to that devisee or legatee and relatives of the testator and if that devisee or legatee leaves no issue, the estate devised or bequeathed shall vest in the other devisees or legatees surviving the testator in such proportions as the testamentary share of each devisee or legatee in the devised or bequeathed property bears to the total of the shares of all of the surviving devisees or legatees, unless a different disposition is made or required by the will.[27]

This statute is in derogation of the common law rule that a bequest in a will to an individual who predeceases the testator lapses. Instead, the statute "saves" the bequest, so long as the beneficiary is a relative and has issue surviving him or her, in which case such issue take the bequest on a per stirpes basis.

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[25] OHIO REV. CODE ANN. § 2105.06(J) (West 2002).

[26] OHIO REV. CODE ANN. § 2105.06(K) (West 2002).

[27] OHIO REV. CODE ANN. § 2107.52 (West 2002).

It should be noted that Section 2107.52(A) is worded to preclude a spouse from being a relative,[28] and the Courts have consistently so held.[29]

Section 2107.52 also allows an attorney to avoid undesirable statutory provisions. The statute makes use of the phrases "[u]nless a contrary intention is manifested in the will..."[30] and "...unless a different disposition is made or required by the will."[31] Further, the courts have consistently enforced a testator's right to avoid provisions in the statute deemed undesirable.[32] Clearly, the legislature contemplated that a draftsperson can draft around statutory provisions deemed inappropriate to the client's situation, which is a huge consideration for estate planners and a point that will be emphasized later in this Article.

It is obvious from a mere reading of the anti-lapse statute that it contains no per capita provisions, and there is no "per capita statute" requiring an *in pari materi* treatment to be considered regarding testacy (as we saw was the case with intestacy.) The anti-lapse statute, moreover, treats heirs of predeceased beneficiaries of kinship more remote than grandparents' lineal descendants no differently than other heirs.[33]

To press the point, let us consider a will that contains a clause leaving the remainder of the single testatrix's estate to her six cousins (who at the time happened to be her closest next of kin.). Let us further assume that at the time of the execution of the will, five of the cousins are maternal cousins and one of the cousins is paternal. All of them, however, subsequently predeceased our testatrix, five of them leaving one child (i.e. leaving four first-cousins-once-removed, descending) and the remaining paternal cousin leaving three children (i.e. leaving three first-cousins-once- removed, descending).[34]

Under the anti-lapse statute, none of the bequests to the cousins would lapse. Instead, each of the lineal descendants of the predeceased first cousins would take by representation. Hence, the five lineal descendants that were each an "only child" would all get a one-fifth interest, and the other three first-cousins- once-removed from the common parent would each take a one fifteenth interest. This result is mandated by the statute notwithstanding all of the living beneficiaries are of equal consanguinity.[35]

The result is very different from the result had the testatrix died without a will. In that case, applying the "Rules Governing Testate Inheritance in Ohio from the Predeceased," the child of the maternal cousin would take 1/2 of the entire estate. The other half of the estate would be divided *equally* among the seven children of the paternal cousins (regardless of the common parentage of three of those children).[36]

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[28] *See id.*

[29] *See*, *e.g.*, Oliver v. Bank One, 573 N.W.2d 55 (Ohio 1991).

[30] *See* OHIO REV. CODE ANN.§ 2107.52 (West 2002).

[31] *Id.*

[32] *See*, *e.g.*, Tootle v. Tootle, 490 N.E.2d 878 (Ohio 1986); Richland Trust Co. v. Becvar, 339 N.E.2d 830 (Ohio 1975).

[33] OHIO REV. CODE ANN.§ 2107.52 (West 2002)

[34] *See infra* Appendex A, Example 5.

[35] OHIO REV. CODE ANN.§ 2107.52 (West 2002)

[36] *See infra* Appendix A, Example 6.

The testate scheme, then, can be seen as a pure "per stirpes" scheme unfettered by the fairly complex rules embedded in the text of Ohio Rev. Cod. § 2105.06 governing intestate dispositions.

A comparison of the treatment of testate and intestate decedent's estates in Ohio demonstrates vastly different results when beneficiaries inherit through predeceased individuals. Which set of rules is fairer? Which set of rules is more equitable? As will be argued, that depends entirely on what the client wants. When the client comes into a law office for a will or trust, it is our duty to ask.

Even a bequest to a predeceased beneficiary who is either not a relative of the testator or not someone dying with issue will atypically result in the rules of intestacy governing the disposition of the assets in question. As the language of Ohio Rev. Cod. § 2107.52(B) makes clear, absent a contrary testamentary intent, a residuary bequest to someone who predeceased the testator but is not a relative of the testator who left any issue will instead pass to the other residuary beneficiaries " … surviving the testator in such proportions as the testamentary share of each devisee or legatee in the devised or bequeathed property bears to the total of the shares of all of the surviving devisees or legatees …"[37]

There is, however, a situation wherein the rules of intestacy set forth in Section II of this Article *will* apply to a testator's estate. That situation arises when a decedent's will either does not name a residuary beneficiary or, in the more likely alternative, names residuary beneficiaries who have all have predeceased the testator, and none of those beneficiaries are a relative of the testator who died leaving a lineal descendant. For example, in *Foreman v. Medina Cy. Nat. Bank*,[38] the only named residuary legatee predeceased the testator and was not a relative. In such case, the Supreme Court of Ohio ruled "…the testator dies intestate as to such property…"[39]

There is another foreseeable situation wherein the rules of intestacy could operate to dispose of a testator's property. It has long been established that a specific bequest to a predeceased beneficiary who is not a relative of the testator survived by a lineal descendant passes to the residuary legatee of a will.[40] When there is no named residuary beneficiary, however, or the residuary beneficiary has predeceased the testator and was not a relative leaving a lineal descendant, the lapsed specific bequest passes as intestate property.[41]

A summary of what we call the "Rules Governing Testate Inheritance in Ohio from the Predeceased" might be expressed as follows:

> Rule One: Read the will. As will be discussed, *infra*, a well-drafted document should explain precisely what happens when a bequest is made

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[37]OHIO REV. CODE ANN. § 2107.52(B) (West 2002).

[38]162 N.E. 42 (Ohio 1928).

[39]*Id.* at 43.

[40]*See*, *e.g.*, Robbins v. Pigg, 29 Ohio Ct. App. 153 (Licking County 1918); Kellogg v. Campbell, 209 N.E.2d 645 (Ohio Prob. Ct. 1965).

[41]*See*, *e.g.*, Leopold v. Weaver, 9 Ohio App 379 (Mahoning County 1918) (construing will to lack residuary devise and ruling that a specific bequest be distributed per intestate succession.)

to a beneficiary who predeceases the testator making the rest of the analysis moot.

Rule Two: If the document does not set forth the testator's instructions, determine if the bequest to the named predeceased beneficiary is a specific bequest or a bequest to one or more residuary beneficiaries in the will.

Rule Three: If the bequest is a specific bequest, go to Rule Four. If the bequest is a bequest to one or more residuary beneficiaries in the will, skip to Rule Five.

Rule Four: If the named predeceased beneficiary is both a relative of the testator and someone who has at least one living lineal descendant, distribute the assets in question to the named predeceased beneficiary's lineal descendants, per stirpes. If the named predeceased beneficiary is not *both* a relative of the testator and someone who has at least one living lineal descendant, determine if the will contains one or more residuary beneficiaries all of whom survived the testator.

Rule Five: If the will contains one or more residuary beneficiaries all of whom survived the testator, distribute the assets to those beneficiaries per their proportionate shares as directed by the will. If the will contains one or more residuary beneficiaries that have predeceased the testator, distribute the assets to those living named beneficiaries, if any, per their proportionate shares as directed by the will, and, for any predeceased beneficiary, determine if such beneficiary is both a relative of the testator who left at least one living lineal descendant.

Rule Six: If a predeceased beneficiary is both a relative of the testator who left at least one living lineal descendant, distribute the proportionate share to those lineal descendants, per stirpes.

Rule Seven: If a predeceased beneficiary is not both a relative of the testator and someone who left at least one living lineal descendant, take that predeceased beneficiary's share and distribute it to the other residuary beneficiaries who did survive the testator in such proportions as the share of each such beneficiary bears to the total of the shares of all the surviving residuary beneficiaries.

Rule Eight: If there are no other surviving residuary beneficiaries, then follow the Rules Governing Intestate Succession in Ohio to distribute the proportionate share of the named predeceased beneficiary.[42]

Perhaps the most important of these rules is Rule One: A well drafted will should prevent a fiduciary and his or her counsel from ever having to engage the succeeding

[42] *See supra* Section II, note 24, and accompanying text.

rules. Most importantly, through proper counseling, the will's terms should set forth what was the donative intent of the testator all the way down through the various levels of contingencies.

IV. INHERITANCE THROUGH A PREDECEASED PERSON VIA A REVOCABLE LIVING TRUST

Three important, albeit confounding, Ohio Supreme Court cases deal with inheritance rights viz. a vis a beneficiary named in a living trust who predeceases the settlor.

The first case to look at is *First Nat'l Bank of Cincinnati v. Tenney*.[43] In that case, a living trust established by the settlor, Mary Monfort, on February 7, 1947, named an Adelaide Iredell as the remainder beneficiary of the entire trust corpus.[44] The Court specifically notes that Mary Monfort, during her life, "...entered into a trust agreement … whereby she transferred and delivered to [the bank Trustee] certain property, the title to which it accepted and agreed to hold in accordance with the terms of the agreement."[45] Adelaide Iredell died prior to Mary Montfort.[46] Although the Court does not tell us, a careful reading of the case forces a conclusion that Adelaide Iredell must have died without leaving issue. This conclusion is deduced from the fact that Adelaide Iredell was also the beneficiary of Mary Monfort's will, which we are told was made "...a few months after executing [the] trust ..."[47] The Probate Court ruled that the bequest in Mary Monfort's *will* to Adelaide Iredell "...had lapsed and the [probate] estate therein should be distributed to the heirs-at-law of Mary E. Montfort."[48]

At the time of the execution of the trust and will and the time of Mary Montfort's death, Ohio had a similar version of its modern-day anti-lapse statute, to wit: G.C. 10504-73.[49] Both versions of the anti-lapse statute are identical in one important respect: A bequest lapses unless the predeceased person to whom the bequest is made is a relative who died leaving at least one lineal descendant. Since the Court ruled the bequest to Adelaide Iredell in Mary Monfort's *will* had lapsed, it is logical that Adelaide Iredell must have died without leaving issue.

As to the revocable living trust, however, the Court ruled the bequest did not lapse.[50] Instead, the Court treated Adelaide Iredell *as latter-deceased as to the bequest to her in Mary Montfort's trust.* The Court reasoned that bequests in wills vest upon the death of the testator, but bequests in a trust, even a revocable trust, vest

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[43] 138 N.E.2d 15 (Ohio 1956).

[44] *Id*. at 16.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Tenney*, 138 N.E.2d at 16.

[49] G.C. 10504-73 was recodified in 1953 as § 2107.52 of the Ohio Revised Code. *See* Polen v. Baker, 752 N.E.2d 258, 261 n.1 (Ohio 2001). Section 2107.52 was amended in 1992, and the current version went into effect on October 8, 1992. *See Polen*, 752 N.E.2d at 261, n.1. *See also* OHIO REVISED CODE ANN. § 2107.52 (West 2002).

[50] *Tenney*, 138 N.E.2d at 20.

upon the creation of the trust.[51] Since Adelaide Iredell died after the creation of the trust, her interest in the trust corpus was vested "subject to defeasance by the exercise of the power to revoke."[52] Since the power to revoke, in this case, was never exercised, her inheritance remained vested and is simply payable to Adelaide Iredell's *estate*. In other words, the Court treated her death as to her rights in the trust corpus analogously to the treatment of the rights in the share of a probate estate of an estate's beneficiary who survives the testator but dies before the distribution of that probate estate's share to him or her. In such case, the probate estate share simply gets paid to the estate of the beneficiary."[53]

It is important to note that the conclusion that assets in a revocable living trust are payable to the *estate* of the trust's beneficiary as a vested right is *not* invoking the anti-lapse statute. The anti-lapse statute is invoked only to save an interest in a beneficiary that has not vested and therefore, would lapse but for the application of the statute.

Unfortunately for those to whom the above analysis seems to make good sense, the analysis has become extremely obscured through a strange twist of subsequent judicial and legislative actions. In an aggressive exercise of judicial activism, the Ohio Supreme Court, in *Dollar Savings & Trust Co. of Youngstown v. Turner*,[54] without mentioning the *Tenney* decision, overruled it by implication.

Turner involved a revocable living trust established by a Gus Dettman who, in the trust, left a bequest "... to my sister, MINNIE APPLEGATE, or if she predeceases me ... to her son, HARRY APPLEGATE."[55] Both Minnie and Harry predeceased Gus Dettman. The case notes, "[t]he trust agreement did not provide for disposition of the Applegate share of the residuum under such circumstances."[56]

Had the Court followed the ruling in *Tenney*, it could have easily ruled that the bequest simply be paid to the estate of Harry Applegate. The court does not inform us who the heirs of his estate are. The court also does not tell us if one or more lineal descendants survived him. Given the Court's ruling, however, we must conclude he was so survived. The reason for this conclusion is that the Court held Ohio's anti-lapse statute applied to the bequest in the trust.[57]

The problems the Court had in reaching this conclusion were formidable. First, if the logic in *Tenney* was correct, the bequest had already vested (subject only to divestment by a revoking act of the settlor prior to his death.) As we have noted, the anti-lapse statute can only apply to lapsed bequests. For this reason, the *Turner* decision appears effectively to overrule the *Tenney* holding that a bequest in a living trust vests upon the trust's creation; for if the bequest in *Turner* was vested prior to Mr. Applegate's death, there was no lapse, and the bequest obviously should have gone to his estate. One huge implication of *Turner*, therefore, contrary to the holding

[51] *Id*. at 15.

[52] *Id*. at 16.

[53] *See*, *e.g*., Central Trust Co. v. Bedinghaus, 219 N.E.2d 243 (Ohio Ct. App. 1965).

[54] 529 N.E.2d 1261 (Ohio 1988).

[55] *Id.* at 1262.

[56] *Id.*

[57] *Id.* at 1264.

in *Tenney*, is that in Ohio, a bequest in a revocable living trust is effectively deemed to vest at the death of the settlor.[58]

Second, there is the clear language of the anti-lapse statute, which would appear to preclude its applicability to revocable living trusts. The precursor to the modern-day anti-lapse statute, O.R.C. § 2107.52, enacted in 1992, was a more recent version of the statute considered in *Turner*. That statutory version stated in relevant part:

> When a devise of real or personal estate is made to a relative of the *testator*, and if such relative was dead at the time the *will* was made, or dies thereafter, leaving issue surviving the *testator*, such issue shall take the estate devised as the devisee would have done if he had survived the *testator*.... unless a different disposition is made or required by the *will*.[59]

Somehow, the Court had to reach the conclusion that executing a revocable living trust confers "testator" status on the signer. One might argue that apparently, the living trust must somehow, at the death of its grantor, magically turn into a "will" as the anti-lapse statute, even in this ancestral version of it, clearly applies only to wills.

The Court found another route to its desired conclusion. While acknowledging that "[the anti-lapse statute] by its terms, applies only to wills, the intent of the legislature is furthered by its application to trust agreements."[60] The Court thus held:

> R.C. 2107.52 is applicable to trust agreements and will operate upon the death of the settlor to prevent the lapse of a gift contained therein so as to vest that portion of the trust res intended for a beneficiary who predeceases the settlor in the issue of the beneficiary.[61]

If the ambitious holding in *Turner* may be too much for the reader, it was also too much for the Ohio legislature. As mentioned previously, O.R.C. § 2107.52 was amended in 1992.[62] In uncodified law, the General Assembly commented:

> In amending section...2107.52 of the Revised Code, the General Assembly hereby declares its intent to supersede the effect of the holding

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[58]This author found a paucity of case law from other jurisdictions on the issue as to when a bequest in a revocable living trust vests. Hopefully, one reason for this lack of significant case authority is that trust drafters, unlike in *Turner*, are setting forth in their documents articulated "inheritance schemes" to deal with the deaths of cascading levels of beneficiaries. Despite the lack of a clear national trend on this issue, the *Turner* case, despite its problems, is at least consistent with the underlying logic in the Internal Revenue Code with which estate planning practitioners are familiar as to when a bequest is deemed completed for gift and estate tax purposes. A taxable event is deemed not to have taken place so long as the settlor retains a right to revoke the bequest (See IRS Code § 2038).

[59]OHIO REV. CODE ANN. § 2107.52 (West 1988) (emphasis added).

[60]*Turner*, 529 N.E.2d at 1264.

[61]*Id.* It is assumed that the Court, in referring globally to "trust agreements" is *not* referring to irrevocable trusts in which the settlor has made a completed transfer of his or her interest with no power to amend or revoke. To apply the Court's already adventurous decision to such trust agreements would seem to violate the concept of the intervivos vesting of a completed gift inherent in American law.

[62]*See supra* note 49, and accompanying text.

> of the Ohio Supreme Court on October 26, 1988, in *Dollar Savings & Trust Co. of Youngstown v. Turner* (1988), 39 Ohio St.3d 182, 529 N.E.2d 1261.[63]

Given the clear legislative mandate, there can be no doubt that Ohio's anti-lapse statute clearly does *not* apply to living trusts in this state.

Where, however, does this rather bizarre turn of events leave us? While the specific holding in *Turner* regarding the application of the anti-lapse statute has been "superseded" by legislative mandate,[64] it is important to note that the *Turner* decision itself has not been *overruled*. *Turner* worked on the implicit assumption, as we have seen, that a bequest in a living trust vests at the death of the settlor. Is that holding still valid? There is apparently nothing in the legislative uncodified law that states that it is not. The legislature was only concerned with *Turner*'s application of the anti-lapse statute to living trusts.[65] We thus have an Ohio Supreme Court case in *Tenney* which expressly states that a bequest in a living trust vests at the signing of the instrument[66] and a later-in-time case in *Turner*, which impliedly rules that a bequest vests at death.[67]

To further muddy already clouded waters, an earlier Supreme Court decision in *Cleveland Trust Co. v. White*[68] held that a valid trust *inter vivos* is created when under a trust agreement, the settlor *transfers and delivers property to a trustee* with the intention of passing title, and designated beneficiaries take immediate vested interest, in such property.[69] *White*, which has neither been expressly overruled or reversed adds a further requirement that the vesting of an interest in the living trust requires both the execution of a valid trust instrument *and the funding of it* with the asset in question.[70]

The question is far from academic. *Tenney* held that an interest in a living trust vests upon the signing of the document, but in that case, as noted above, title to the assets were transferred during the life of the settlor.[71] It is well settled that in the absence of express testamentary provisions postponing vesting, a beneficiary's interest in an asset bequeathed in a will vests at the death of the testator.[72] What if the assets get funded into a living trust with what is commonly known as a "pour over will" (i.e., a will which runs assets through probate and "pours them over" to the trustee of a revocable living trust after the death of the testator-grantor?)

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[63] *See Polen*, 752 N.E.2d at 261 n.1 (*quoting* Section 3, Sub. H.B. No. 427, 144 Ohio Laws, Part IV, 5483).

[64] *See id*.

[65] *See id*. (stating "The legislative intent behind the amendments was not to alter this court's construction of survivorship in regard to wills…") *Id.*

[66] *See Tenney*, 138 N.E.2d at 15, 18-19.

[67] *See Turner*, 529 N.E.2d at 1262, 1264.

[68] 15 N.E.2d 627 (Ohio 1938).

[69] *Id*. Syllabus, first paragraph (emphasis added).

[70] *Id.* at 629.

[71] *Tenney*, 138 N.E.2d at 16.

[72] *Id*. at 18; *see also* 32 OHIO JUR. 3D *Decedents' Estates* § 616.

We now have three competing theories with no legal guidance. I will name these three theories with the names of the cases that suggest them: The *Tenney* theory: An interest in a living trust vests upon the creation of the trust (subject only to divestment by a subsequent act by the grantor) in all cases.[73] The *Turner* theory: An interest in a living trust vests upon the death of the grantor in all cases.[74] The *White* theory: An interest in a living trust vests upon the creation of the trust *and* the transfer of title of the relevant asset into the trust (subject again to divestment by a subsequent act by the grantor).[75] An implication of this *White* theory is that an interest in a living trust funded by a pour over will vests at death. A further implication of the *White* theory is an accounting challenge that each asset in the trust must be analyzed as to when the trustee took title to it to determine the vesting rights of the beneficiaries involved.

Ohio's law concerning the vesting of an interest in a living trust, to be less than tactful, is a mess. Until the Ohio courts or legislature specifically untangle the legal ball of yarn around which this issue is raveled, Ohio practitioners engaged in post mortem distribution of an asset when the first-named beneficiary has predeceased the grantor should proceed with the greatest of caution, particularly when the governing instrument does not clearly set forth contingent distribution instructions.

V. INHERITANCE THROUGH PAYABLE ON DEATH ACCOUNTS

It should be apparent that Ohio's laws of inheritance are primarily statutory rather than based on the common law. One example where the statutory scheme is clearly intended to facilitate the ease of transferability of assets to heirs is Ohio's "Payable on Death" (hereinafter "P.O.D.") statute, which is set forth in O.R.C. § 2131.10.

It must again be borne in mind that in the absence of these statutory devices, designating, say, a bank account "payable on death" to a third party would have been completely ineffectual at common law. *In re Estate of Tonsic*,[76] provides a good statement of the law:

> Prior to the enactment of *Section 2131.10*, *Revised Code*, we would have had no difficulty in determining that this attempt [of designating a P.O.D beneficiary] to transfer title to the money in the bank was completely ineffective, either on the basis of an attempted testamentary transfer, or as a gift *inter vivos* or *causa mortis*, that was incomplete. A gift *inter vivos* or *causa mortis* requires that the donor, during his lifetime divest himself of all dominion of the gift and invest the donee therewith...[77]

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[73]*See Tenney*, 138 N.E.2d at 19.

[74]*See Turner*, 529 N.E.2d at 1264.

[75]*See White*, 15 N.E.2d at 628.

[76]235 N.E.2d 239 (Ohio Ct. App. 1968).

[77]*Id.* at 240. From the announcement *Turner* in 1998 until its supercedance by legislative act in 1992, P.O.D. accounts stood on a very slippery slope: If a revocable living trust was a "testamentary" instrument, thus subject to the anti-lapse statute, by what logic were P.O.D. accounts not also ripe for "testamentary" designation and thus subject to the same statute? The 1992 Uncodified Law limiting the statute expressly to wills articulated by the Ohio Legislature, now obviously makes the grounds on which P.O.D. accounts stand neither

In ruling that the payable on death designation was effective to transfer title upon death of the account holder to the beneficiaries designated on the form, the Court concluded that Ohio's enactment of the "P.O.D. statute" effectively authorized such a means of transfer of title.[78] Ohioans generally take this form of transfer for granted. The P.O.D. statute, recently amended to allow non-natural entities such as trusts to be beneficiaries of such designations, as amended, states:

> A natural person ... may enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings ... whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit may be made payable on the death of the owner to another person or to any entity or organization, referred to in such sections as the beneficiary, notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code. In creating such accounts, "payable on death" or "payable on the death of" may be abbreviated to "P.O.D."
>
> Every contract of an investment share certificate, share account, deposit, or stock deposit authorized by this section shall be deemed to contain a right on the part of the owner during the owner's lifetime both to withdraw the proceeds of such investment share certificate, share account, deposit, or stock deposit, in whole or in part, as though no beneficiary has been named, and to designate a change in beneficiary. The interest of the beneficiary shall be deemed not to vest until the death of the owner.
>
> No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the bank, building and loan or savings and loan association, credit union, or society for savings.[79]

That all seems simple enough. The statute is careful to spell out that vesting of a beneficiary's interest does not take place until the death of the account owner.[80] This puts to rest any ambiguity as to when the rights in the account vest as to beneficiaries who predecease the account holder. The answer is there is no such vesting of rights. Moreover, in light of the legislative intent embodied in the uncodified law annotating the 1992 statutory amendment of Ohio's anti-lapse statute,[81] we can state with confidence that the anti-lapse statute does not come to the rescue of such a lapsed interest in P.O.D. accounts because the legislature took pains to limit the scope of the anti-lapse statute to wills.[82]

The importance of the P.O.D. statute specifically stating that vesting in a P.O.D. account takes place at the death of the account holder also helps with the efficient

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slippery nor sloping. Neither these types of accounts nor living trusts are subject to the anti-lapse statute. *See supra* note 64, and accompanying text.

[78] *Tonsic*, 235 N.E.2d at 240.

[79] OHIO REV. CODE ANN. § 2131.10 (West 2002).

[80] *Id.*

[81] *See supra* note 49, 65, and accompanying text.

[82] *Id.*

administration of these accounts. Say, for example, a decedent, as in *Tonsic*,[83] leaves a bank account payable on death to his three children. Now assume further that one of the children predeceases the account holder. This situation creates no legal problems. Since that child's interest has not yet vested, the remaining two children would then take the proceeds of the account. Only their interests "vest."[84] This understanding of "how a P.O.D. account works" is in my experience the manner in which Ohio banks routinely treat this situation.

The P.O.D. statute, however, is not without its own set of issues. Note that § 2131.10 confers authority to designate *a* "beneficiary" *in the singular* to a P.O.D. account.[85] Are P.O.D. designations of multiple beneficiaries thus unauthorized by the statute? No. In *Wingate v. Hordge*,[86] the Ohio Supreme Court specifically rejected the argument that the statute limits an account holder's right to name a sole beneficiary.[87] What is compelling in the *Wingate* case is the logic the court used in reaching its decision.

There is a long line of authority that holds that statutes in derogation of the common law must be strictly construed.[88] *Wingate*, in apparent deference to this principle, navigated around it by reading O.R.C. § 2131.10 *in pari materi* with O.R.C. § 1.43 which states that the "singular included the plural and the plural included the singular."[89] This well reasoned case, therefore, found that Ohio account holders can name multiple beneficiaries to P.O.D. accounts.[90]

Does the logic in the *Wingate* case, however, contain within it a severe limitation in the use and flexibility of P.O.D. accounts? I submit that it does. The P.O.D. statute authorizes the naming of "a beneficiary." *Wingate* was able to avoid the strict construction problem with which statutes in derogation of common law are saddled by citing *another* statute with which O.R.C. § 2131.10 can be read *in pari materi* to construe the statute's usage for multiple beneficiaries.[91]

Importantly, the Court did not rely on an argument that the O.R.C. § 2131.10 is a remedial statute. This argument could have provided a framework for the Court to circumvent the strict construction problem in that remedial statutes, even if in derogation of common law, are entitled to *liberal* construction.[92]

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[83] *See Tonsic*, 235 N.E.2d at 239.

[84] *See*, *e.g.*, *Morton v. McComb*, 662 S.W.2d 471 (Ark. 1983) (applying a statutory scheme analogous to the Ohio statute)

[85] *See* OHIO REV. CODE ANN. § 2131.10 (West 2002) (providing that a person may create an account payable on death to "another *person*" referred to as "*the beneficiary*").

[86] 396 N.E.2d 770 (Ohio 1979).

[87] *Id*. at 772.

[88] *See*, *e.g.*, Sabol v. Pekoc, 76 N.E.2d 84 (Ohio 1947); Loyer v. Bucholz, 526 N.E.2d 300 (Ohio 1988); Shover v. Cordis Corp., 574 N.E.2d 457 (Ohio 1991); Weir v. Consolidated Rail Corp., 465 N.E.2d 1341 (Ohio Ct. App. 1983).

[89] OHIO REV. CODE ANN. § 1.43 (West 2002).

[90] *Wingate*, 396 N.E.2d at 772.

[91] *Id*. at 771.

[92] *See* OHIO REV. CODE ANN. § 1.11 (West 2002). *See also* Schwartz v. McAtee, 488 N.E.2d 479 (Ohio 1986); Ohio Civil Rights Comm'n v. Lysyj, 313 N.E.2d 3 (Ohio 1974).

Is Ohio's P.O.D. statute per its terms remedial or substantive? Unfortunately, the case law on this issue does not provide reliable guidance. In *State Ex Rel Holdrige v. Indus. Comm.*,[93] the nebulous status of the "distinction" is explained as follows:

> It is doubtful if a perfect definition of "substantive law" or "procedural or remedial law" could be devised. However, the authorities agree that, in general terms, substantive law is that which create duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.[94]

Courts have been predictably unpredictable in applying this amorphous "test." Is the P.O.D. statute a procedural device to remedy less effective ways to achieve a right Ohioans already enjoyed, i.e., the transfer of assets to beneficiaries? If so, the P.O.D. statute is procedural and thus, should be liberally construed. Or is the statute as suggested by *Tonsic*, a newly-created right of conveyance previously unavailable to Ohioans?[95] If so, the P.O.D. statute is a substantive derogation of common law mandating strict construction.

Here is why the statutory construction of the P.O.D. statute is critical: The statute does not authorize the naming of an *alternate* P.O.D. beneficiary or beneficiaries.[96] The P.O.D. statute, standing in clear derogation of common law, makes for no such provision for contingent beneficiaries. I am also not aware of any other statute with which the P.O.D. statute can be read *in pari materi* so as to rescue this limitation of the P.O.D. statute as *Wingate* as rescued the "single-beneficiary-only" problem.[97]

I therefore conclude that absent legislative or judicial clarification, there is a serious issue as to whether the use of alternate beneficiaries on P.O.D. accounts are legally valid in Ohio.

This uncertainty is a serious limitation on the usefulness of P.O.D. accounts. It goes to the heart of our ability as planners to draft beneficiary designations to meet our client's goals. For example, suppose that an account holder, as in *Tonsic*,[98] wants her three children as the primary beneficiaries of a P.O.D. account. Upon counseling the client, you learn she wants her grandchildren of the predeceased child to inherit the one-third interest of that child in the event that child does indeed predecease the client.[99] In this case, then, the beneficiary designation form would have to provide for alternate beneficiaries in the event that one or more of the primary beneficiaries predeceases the client account holder.

Not only is there doubt that the statutory scheme authorizes the naming of alternate beneficiaries, my experience is that banks and similar financial institutions have little tolerance for complex legal contingencies printed on their brief "official

[93]228 N.E.2d 621 (Ohio 1967).

[94]*Id*. at 623.

[95]*See Tonsic*, 235 N.E.2d at 240-41.

[96]*See* OHIO REV. CODE ANN. § 2131.10 (West 2002).

[97]*See Wingate*, 396 N.E.2d at 771.

[98]*See Tonsic*, 235 N.E.2d at 239.

[99]Indeed, my experience is that such a desire is very common among clients as to their grandchildren's interests.

forms."[100] In contrast, the use of living trusts and wills allow the client to establish elaborate alternative beneficiary designations up to the point of assuring that no lapse will ever occur. Such documents also allow for *in terrorem* clauses to further insulate the wishes of the client from an attack by disgruntled family members. I have yet to attempt the use of an *in terrorem* clause in a P.O.D. designation and can only speculate as to the number of conferences with the bank's legal department its use would generate, to say nothing of the doubtful enforceability of such a provision in a P.O.D. context.

It is likely that the use of alternate beneficiaries and other clauses in P.O.D. accounts, in the absence of express legislative action, will only be clarified through the process of future litigation. Further arguing against the use of alternate beneficiaries and other clause provisions is the philosophy of most practitioners, including this author, that his or her client's estate does not become one of the litigants.

VI. THE LESSON FOR THE PRACTITIONER--THE NEED TO COUNSEL

As stated earlier, my purpose in analyzing the diverse and often arbitrary way Ohio law treats inheritance through predeceased persons in different contexts (intestacy, testacy, living trusts, and P.O.D. accounts) is not academic. There are two strong ethical imperatives, I believe, that this analysis suggests to attorneys working in the area of wills and trusts to incorporate into their practices. The first ethical imperative is to counsel clients regarding client desires in the event that a named beneficiary predeceases the client. The second is to further reduce the risk of the "unintended beneficiary" by incorporating a regular updating program into the lawyer's practice.

To illustrate, let me review the four contexts in which the issue of inheriting through predeceased heirs has been analyzed.

A. Intestacy

By implication, intestacy is the situation over which lawyers as individual practitioners have the least control. A person whose estate passes through Probate via intestate succession presumably has not bothered to meet with an attorney to

[100]The legal ground on which T.O.D. real estate deeds ("Transfer on Death" Deeds) and life insurance policy beneficiary designations stand appears much firmer than P.O.D accounts: Ohio's recently enacted "Transfer on Death" statute, as to real estate interests, takes care to spell out the results of a named beneficiary predeceasing the titleholder. It specifically provides for contingent beneficiaries. One such provision in the statute, O.R.C. § 5302.23 states "...[i]f none of the designated transfer on death beneficiaries survives the deceased owner ... and no contingent transfer on death beneficiaries have been designated or have survived the deceased owner, the interest of the deceased owner shall be distributed as part of the probate estate of the deceased owner ..." OHIO REV. CODE ANN. § 5302.23 (West 2002). Likewise, consider beneficiary designations on life insurance policies. O.R.C. § 3911.14 states a rather logical scheme that makes the disposition of life insurance proceeds paid to a predeceased designated beneficiary first a matter of the policy's contractual language. OHIO REV. CODE ANN. § 3911.14 (West 2002). Then, in the absence of such language, the statute sets forth a cascading set of beneficiaries, the last of which is the insured himself or herself, which, in practical terms, means his or her estate. *Id. See also*, *e.g.*, *In re Gilger's Estate*, 109 N.E.2d 333, 337 (Portage Cy. 1956) (construing the reversionary ownership back to the insured as a directive that the death proceeds be paid to the insured's probate estate).

develop any kind of estate plan. I am assuming few practitioners would typically *advise* an intestate probate even in the simplest of cases if, for no other reason, than to deal with the ancillary issues of choice of fiduciary, waiver of bond costs, creating a power to sell real estate in the fiduciary, and, perhaps, choice of guardian of minor children. More importantly, we have seen intestacy involves an admission ticket into a statutory scheme that is so replete with arbitrary rules apparently void of any apparent public policy that few clients, with proper counsel, would ever choose the scheme to satisfy their dispositive intents in the event of inheritance through contingent beneficiaries.

Collectively, however, perhaps it is time for our profession to review the statutory scheme as a whole. The 2001 amendment to the statute mandating inheritance entirely by the surviving spouse when all of the children of the decedent are common to the decedent and the surviving spouse was a step in the right direction.[101] Some of the other provisions should likewise be eschewed as arcane and contrary to the dispositive intent of most Ohioans.

B. Testacy

For attorneys practicing in a Probate-based model, no other context more strongly illustrates the need for counseling and drafting to deal with the issue of the contingency that a named beneficiary will predecease the client. This problem is particularly acute in the will context since so much planning is often disregarded in will-based plans to begin with (e.g. catastrophic illness planning, trusts for creditor protection of beneficiaries, issues concerning inheritance issues in the event of a surviving spouse's remarriage, etc.).

Let me give a hypothetical example. Mary comes into a lawyer's office. She is a widow in her mid-60's and in good health. She has two daughters, Alice and Nancy. Both are married. Alice has three children, and Nancy has one. Mary has her will drawn up with the ten-minute interview going something like this:

> Attorney: "So you want your daughters to inherit if something happens to you, right?"
>
> Mary: "Right."
>
> Attorney: "And let's say something happens to one of your daughters before you were to pass away, what then?"
>
> Mary: "Well, I suppose I would want her share to go to her children, I guess."
>
> Attorney: "Okay, and their kids are all adults?"
>
> Mary: "Oh yes, my grandchildren are all grown up. In fact, Rachael, she lives at home due to the fact that she's a little slow, but..."

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[101] 148 Laws of Ohio, S.B. 152 (effective March 22, 2001). The previous version of O.R.C. § 2105.06 mandated, in such a case, fractional shares be divided up among the surviving spouse and the children of the marriage, which is a choice, I have experienced in twenty years of practice, few clients would want.

> Attorney [interrupting]: "Okay, and who would you like to be the executor of your estate, you know, the person who would be handling everything."
>
> Mary: "Well, that's a good question, you know. Alice is really good with money and handling finances. She's got a good head on her shoulders. Nancy is a little more scatterbrained, but then again, she lives in Cleveland, just about 15 minutes from me and Alice is in southern Ohio. I think maybe Nancy since she's closer and more involved, and maybe Alice could help her out somehow."
>
> Attorney: "All right, why don't we make Nancy the Executrix, and we'll make Alice the alternate Executrix in case Nancy can't serve for some reason."
>
> Mary: "Okay."
>
> Attorney: "And do you want to waive bond? That means, do you trust your daughters that they wouldn't steal or do something improper resulting in a loss to the estate. If you waive bond, then they won't have to pay to be bonded, and that is a savings to the estate."
>
> Mary: "Sure."

What the lawyer is obviously doing is what we may call "word processing" estate planning. He or she is merely asking questions to fill in the blanks in a computer form. Hopefully, most readers of this fictitious dialogue noticed a huge "special needs trust" planning issue that the lawyer, who is locked into this "word processing" paradigm missed.

Here is what happens: The lawyer "draws up" the will. The will contains the following boilerplate provision, the implications of which, of course, are never discussed with the client:

> I give and devise, my entire estate, of every kind, nature and description whatsoever, and wheresoever situated, which I may now own or hereinafter acquire, or have the right to dispose of at the time of my decease, in equal shares to my children who shall survive me, absolutely and in fee simple; however, should any of my children fail to survive me leaving issue surviving, said issue shall take the share of the deceased child, on a per stirpes basis…[102]

Mary comes back a few weeks later and has the will executed. The lawyer and Mary never meet again. Mary lives another fifteen years, dying at the age of eighty-eight. Prior to her death, however, both Alice and Nancy die. The inheritance result: Alice's three children each inherit 1/6th of Mary's net estate and Nancy's child inherits 1/2 of the estate.

Now to make our point, let us add a bit of *counseling* to the meeting. Had the attorney taken the time to explain in layperson's terms the difference between

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[102]How many wills have you seen that do *not* contain this type of boilerplate language?

inheriting per stirpes and per capita, Mary, as my experience tells me is usually, though not always the case, would likely have stated: "Oh, dear, if my kids died before me, I definitely want all my grandchildren to be treated equally. I love them all the same."

The point: *As to her dispositive intents, Mary would have been better off dying intestate*. She would have had her desires, as to the equal treatment of her grandchildren, fulfilled had she never seen the lawyer. Instead, by paying money to have a will drawn up, serious violence was done to her dispositive intent.

An alternate provision should have instead been inserted in the will. It might have said:

> I give and devise, my entire estate, of every kind, nature and description whatsoever, and wheresoever situated, which I may now own or hereinafter acquire, or have the right to dispose of at the time of my decease, in equal shares to my children who shall survive me, absolutely and in fee simple; however, should any of my children fail to survive me leaving issue surviving, said issue shall take the share of the deceased child, on a per stirpes basis; provided further, however, that the heirs of the nearest class of next of kin who survive me shall take on a per capita basis…

Note that in providing this language, we have effectively opted the client out of the rigorous per stirpes scheme of the anti-lapse statute. Opting out of it, of course, is exactly what the client wanted. That fact, of course, can only be learned through counseling, not word processing.

Consequently, when counseling clients in a will-based context, the difference between inheriting per stirpes vs. inheriting per capita must be explained to the clients and their wishes explored in almost every interview.

C. Living Trust

To be blunt, any well-drafted living trust should *never* result in a lapse that is not dealt with in the four corners of the document.

The history of the use of living trusts in the United States is checkered. The origin of its explosion on the scene as a dispositive planning tool, it must be acknowledged, came, in part, from outside of the legal profession. While such sources made the public aware of this valuable planning tool, they also created much opportunity for abuse, hucksterism, and just plain bad legal advice.[103] In the hands of a trained estate-planning attorney, however, a living trust is a very valuable tool: A trust is a highly effective legal concept for dealing with many of the planning issues referenced in the preceding section (beneficiary-creditor protection, remarriage planning, etc.). Since a living trust can contain trusts within trusts, the use of a revocable living trust can provide the framework for much of the architecture of a comprehensive estate plan.

When drafting a living trust, therefore, every estate-planning attorney should inquire into the contingencies as to alternate beneficiaries in case a primary

[103]For an interesting discussion of the history of living trusts in the United States, *see* ROBERT A. ESPERTI & RENNO PETERSON, THE LIVING TRUST REVOLUTION: WHY AMERICAN IS ABANDONING WILLS AND PROBATE (Viking, 1992).

beneficiary predeceases the creator of the trust. This mandate should apply to specific bequests as well as to bequests to remainderpersons. It is often appropriate that this contingency planning take place down to two levels, and, on rare occasions, even more. Finally, a well-drafted living trust should also have a kind of "safety net" clause that specifically sets forth what happens should all the named beneficiaries predecease the client.[104]

A good office practice might be not to waste the client's time discussing the "safety net" clause at the initial meeting, but to explain it fully when the document is being signed. On the rare occasion that the client has different dispositive ideas about the very remote contingencies in the "safety net" clause, office staff should be available to quickly re-draft that provision to the client's satisfaction before the document is signed.

To conclude, a properly drafted and implemented living trust should itself set forth the client's dispositive intents through all contingencies, and the issue of a lapse of a bequest should always be moot.

D. Payable on Death Accounts

Some clients come into a law office with what some practitioners might observe as a "Payable on Death Planning" mind set. That is, the client will be thinking in terms of "which account goes to which heir." I typically explore with the client alternative paradigms to think about his or her estate plan. In the first place, different accounts often will have changing values with the inherent risk that one heir gets enriched over another merely because of the value in the particular P.O.D. asset inherited at the time of the client's death.

These accounts also present disability-planning problems. Some practitioners may be surprised to learn too late that financial institutions, which tend to be very conservative, are unwilling to honor durable powers of attorney, either because the power is, in their eyes, "stale," i.e., "too old" per their internal rules, or not on their "official form" (which typically goes to the greatest legal lengths to insulate the institution from liability for its reliance on it.) While, say, a bank may have every right not to deal with a client's chosen agent, it would have a far more difficult time, for example, to refuse to recognize the directives of a Successor Disability trustee of a revocable living trust who, after all, has *legal title* to the asset.

There are occasions, however, when P.O.D. designations make perfect sense. One such example is retirement plans, since their title cannot be transferred into a revocable living trust during the life of the plan participant. Such an asset must have a designated beneficiary to avoid it being payable to the estate of the participant, which result also carries with it adverse income tax consequences.[105]

It is incumbent upon attorneys designing estate plans for clients who have such assets to counsel them about their dispositive intents in the event that a primary-named beneficiary dies. Just as importantly, it is critical that attorneys *design P.O.D. designations that deal with these alternate contingencies.*

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[104]Clients, I have found, since the tragedy of September 11, 2001, are now reading this "safety net" clause with a renewed seriousness.

[105]*See* I.R.C. § 401(a)(9) (West); *See also* NATALIE CHOATE, LIFE AND DEATH PLANNING FOR RETIREMENT BENEFITS (Ataxplan Publications 5th ed. 2003, p. 62).

I have, however, argued that leaving a banking-type of account payable on death to alternate beneficiaries may just as easily open the door to the courthouse as to the bank vault. In planning mode, certainly if the financial institution is willing to accept the P.O.D. designation, complete with its nice list of cascading alternate beneficiaries, the institution would be unlikely to dishonor the P.O.D. account or designation upon the death of the account holder (and perhaps legally foreclosed from doing so.) This fact, however, provides no assurance that the alternate designation would be safe from the collateral attack of a disgruntled individual entitled to inherit if the alternate designation is ruled invalid.

In contrast to P.O.D. accounts, life insurance designations, Retirement Plan designations, and T.O.D. real estate deeds, however, stand on much firmer ground.[106] Life insurance policies and retirement plans are typically governed by the terms of the policy or adoption agreement, respectively. The T.O.D. statute specifically provides for contingent beneficiaries.[107] In the case of life insurance or, say, a 401(k) agreement, a review of the relevant document, therefore, should set forth whether such alternate beneficiary designations are acceptable, and they usually are.

In her defining work on the subject, Natalie Choate sets forth several beneficiary designation forms that run on for several pages, many of which can be adopted wholesale or modified to suit the client's individual situation.[108]

To conclude, P.O.D. and other similar designations should always be viewed by the attorney as important legal documents. What happens should the named beneficiary predecease the client should always be explored with the client and addressed with a custom-designed designation form. Attorneys should expect that financial institutions may be slow to accept esoterically designed forms. Attorneys should thus forewarn their clients and be sure to charge for the time it may take to have these previously viewed "simple" designations ultimately accepted by the institution.

Regarding accounts governed by O.R.C. § 2131.10, the attorney will need to weigh the legal uncertainties and decide whether the financial institution's acceptance of the designation with alternate beneficiaries satisfies his or her "comfort level," or if an alternate disposition of the asset, such as through a revocable living trust, may be preferable.

E. Updating of the Client's Plan

Another way to further reduce the risk that an unintended heir inherits a client's assets is to have some sort of updating program as to clients for whom estate planning has been done. Since a client's dispositive intentions can change over time due to changes in their feelings for certain loved ones, an updating program may encompass more than addressing the mere problem of the predeceasing of a named beneficiary in clients' planning documents.

An updating program can be formal or it can be voluntary. Both as individual practitioners and as a profession, it would appear that education of our clients and the

[106] *See supra* note 101, and accompanying text.

[107] *See id*. *See also* OHIO REV. CODE ANN. § 5302.23 (West 2002).

[108] *See* CHOATE, *supra* note 105, at Appendix B of Forms pp. 475-521 (5th ed.).

public as to the importance of regular updating of estate planning documents should rise to the status of a moral imperative.

VII. CONCLUSION

Lack of counseling on the issue of what are the client's alternate dispositive intents in the event that the client's primary beneficiary predeceases the client creates a serious disservice to the client.

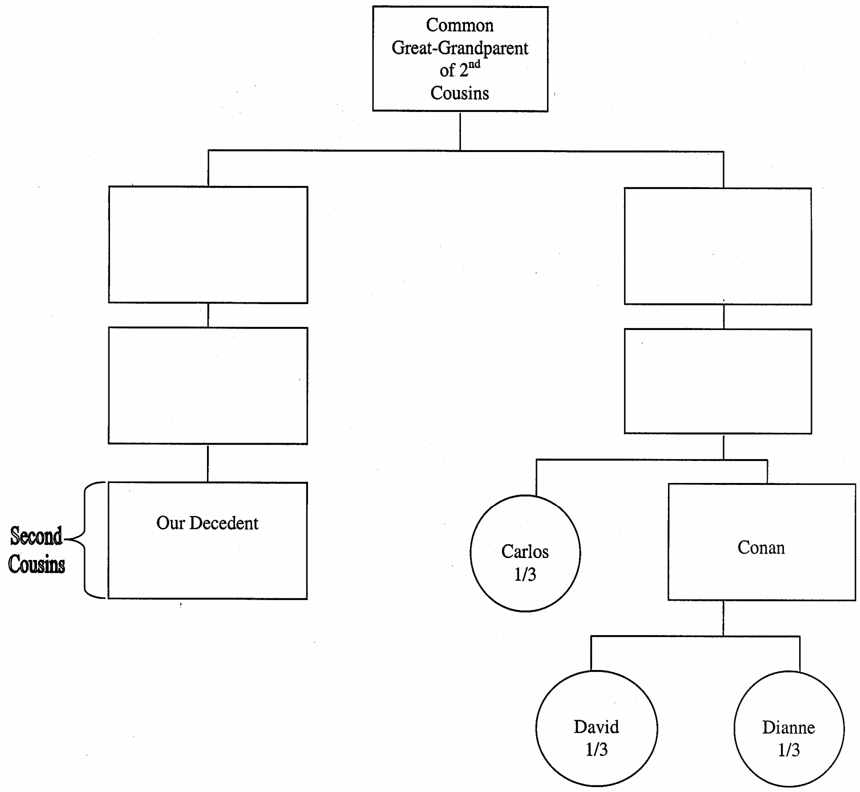
We have seen that competently addressing this issue involves taking the time to explain, in non-legalese, to the client the difference between per stripes and per capita inheritance as it relates to the client's personal family situation. It involves creating and keeping an inventory of customized drafting clauses for wills to satisfy the client's desires regarding his or her dispositive intents. It involves detailed counseling and drafting in a trust context to plan for all inheritance contingencies. It involves acquiring and examining the fine print of life insurance policies and adoption agreements for retirement assets. Often, it mandates the drafting of sophisticated beneficiary designations for these assets with the incumbent investment of time in working with the various institutions to accept them.

The issue discussed herein is but one of the reasons for detailed up-front counseling in the estate planning process. Working against this counseling model, unfortunately, is the trend in some legal quarters to provide clients the cheapest, most inexpensive word processing-generated "will package." Such a "dumming down" approach to the product, while perhaps providing sheer volume to a firm's file cabinet to ripen into future probate estates, virtually guarantees an enormous disservice to the client.

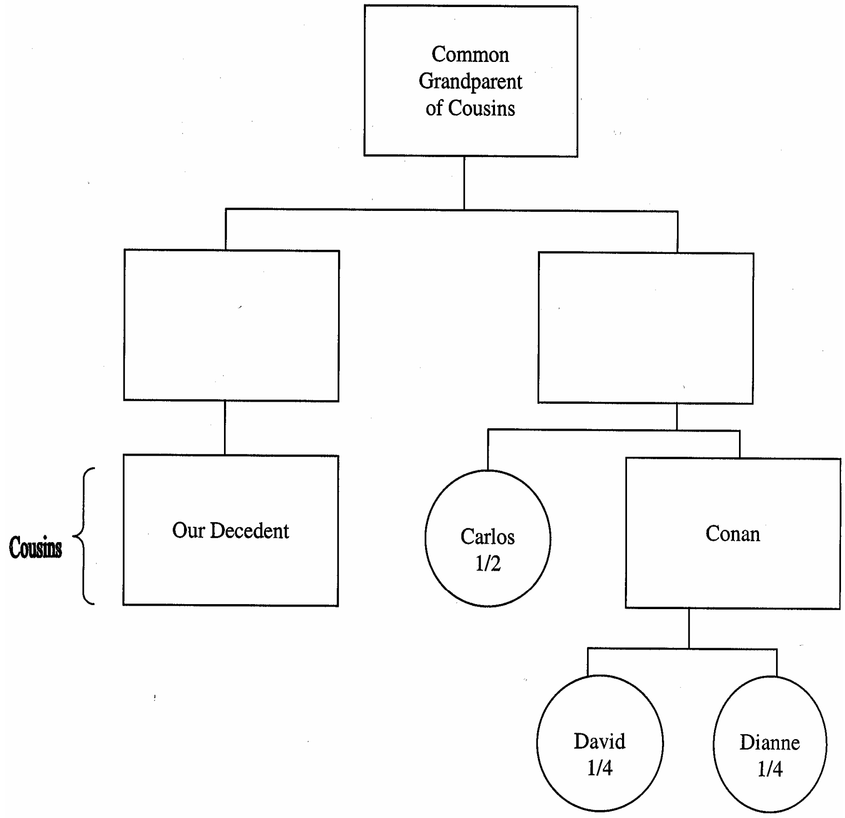
While the cost of estate planning services will and should always be a market-driven phenomenon, we practitioners might all do well to review our costs and interview approaches for even the so-called "simple" estates. We are counselors, not word processors. Good counselors work primarily in planning mode, not "clean up" mode. Planning *means* doing work up front.

Remembering these principles is the best way we can service our clients in dealing with the often-times complex and personal decisions involved in an estate plan. The issue of inheriting through a predeceased beneficiary raised in this Article is but one of them.

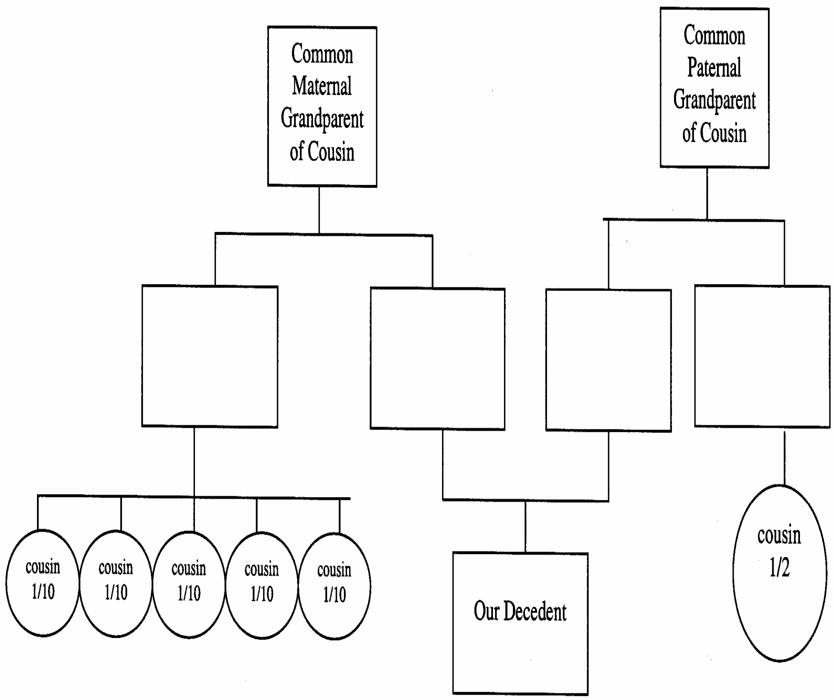
Appendix A – Example 1
Per Capita Treatment of
Second Cousins (Intestate)



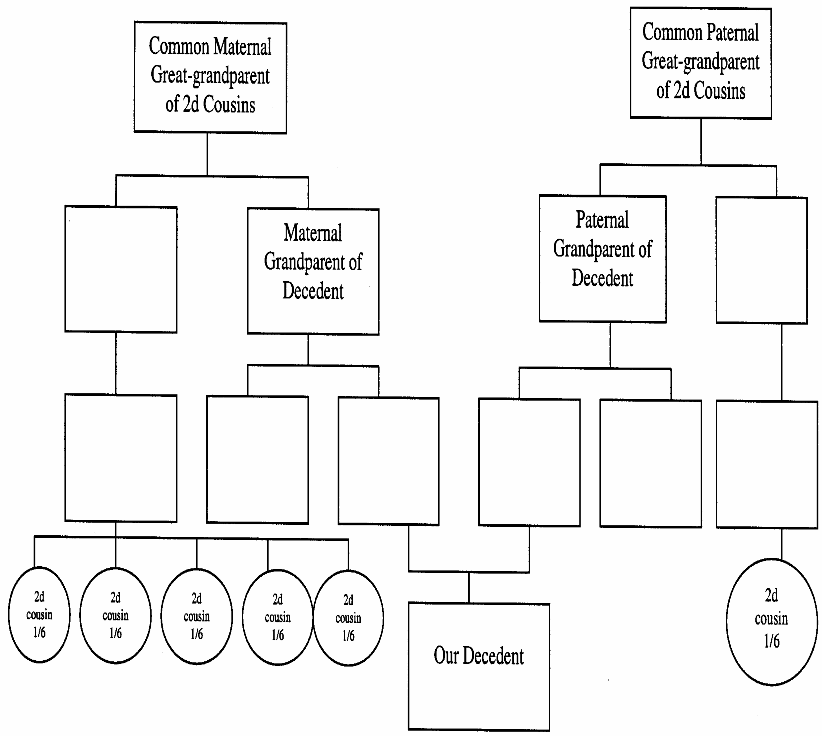
Appendix A – Example 2
Per Stirpes Treatment of
Cousins (Intestate)



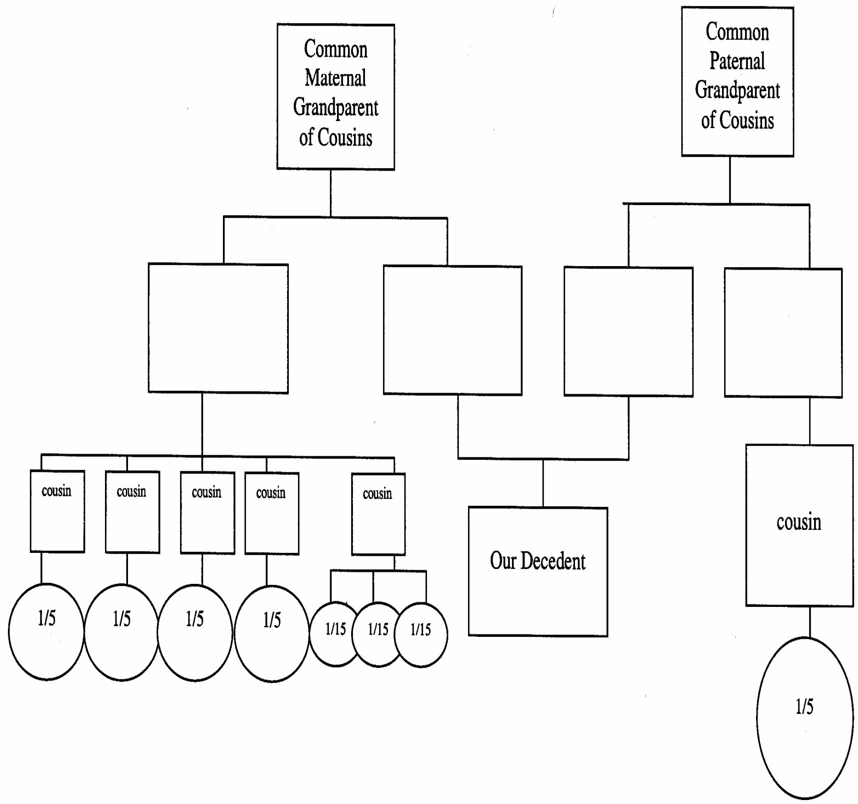
Appendix A –Example 3 (Taking Intestate Through Predeceased Cousins)



Appendix A –Example 4 (Taking Intestate through Predeceased 2d Cousins)



Appendix A –Example 5 (Taking Testate Through Predeceased Cousins)



Appendix A –Example 6 (Taking Intestate Through Predeceased Cousins)