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"I'm Not Quite Dead Yet!": Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary's Gift

Eloisa C. Rodriguez-Dod
Florida International University College of Law

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“I’M NOT QUITE DEAD YET!”:¹ RETHINKING THE ANTI-LAPSE REDISTRIBUTION OF A DEAD BENEFICIARY’S GIFT

ELOISA C. RODRIGUEZ-DOD*

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“How else . . . do the dead appear, and in particular, speak to us after death beyond the grave? [T]he dead in fact speak up every day, namely in and through their wills, their last wills and testaments, in their ‘remains’ and legacies that we inherit.”²

I. INTRODUCTION

A persistent challenge in law is how to achieve the necessary balance between individual decision-making and societal goals. This struggle of autonomy versus societal goals manifests itself in the context of anti-lapse law for wills and trusts.³

¹ MONTY PYTHON & THE HOLY GRAIL (Michael White Productions 1975).

* Professor of Law, Florida International University College of Law, Miami, Florida. My deepest gratitude to my friend and colleague, Professor Elena Marty-Nelson, for her insight and incredibly thoughtful comments. I am also thankful to Professor Angela Gilmore, who patiently listened to me read a draft of a portion of this article written in preparation for a presentation. Lastly, my thanks goes to my research assistant, Latoya Brown, for her superb work in helping me convert my presentation piece into an early draft of this article.

² John H. Smith, *Of Spirit(s) and Will(s)*, in HEGEL AFTER DERRIDA 64, 64 (Stuart Barnett ed., 1998); cf. *In re Lee’s Estate*, 80 F. Supp. 293, 294 (D.D.C. 1948).

³ “Antilapse statutes establish a strong rule of construction, designed to carry out presumed intention.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. f (1999). “Rules of construction are rules that supply presumptive meaning to dispositive and similar provisions of governing instruments.” UNIF. PROBATE CODE prefatory note (amended 2010) (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003)).

This article highlights how the current rules of construction regarding anti-lapse statutes fail both the goal of implementing intent and ensuring societal goals. An examination of the current statutes demonstrates that they are flawed, controversial, and, at times, result in inconsistent application.⁴ The current statutory scheme leads to unanswered questions: Should statutes presuppose distributions when an instrument does not explicitly address the specific scenario? If so, in setting forth this presumption, should lawmakers favor certain persons over others? One way of examining these broad questions of implementing intent is by delving into the issues when they are presented in the context of lapse and anti-lapse.

When a devise in a will is made to an individual, that person has to outlive the testator in order to take the devise.⁵ If that person predeceases the testator, that person's devise lapses.⁶ An anti-lapse statute redirects the devise to substitute takers identified by law.⁷ Scholars have discussed several problems inherent in the lapse doctrine and anti-lapse statutes.⁸ Many of the early critiques called for reform.⁹ Unfortunately, the reforms that followed often exacerbated the issues. For example, in an attempt to reconcile the laws of wills and trusts, the promulgation of § 2-707 of the Uniform Probate Code (UPC) simply extended the anti-lapse statute from wills

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary. . . . Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution.

UNIF. TRUST CODE § 112 cmt. (2010).

⁴ The latter may occur, in part, because related rules are oftentimes inconsistent, such as in the disparity between the anti-lapse statute applicable to wills as opposed to trusts. *See infra* Part III. These inconsistencies also occur in other areas of the law. For example, landlord and tenant laws may conflict with civil and criminal nuisance laws. The author recommends that, when drafters are considering adding or amending uniform laws or statutes, the drafters should simultaneously review and revise, as needed, any related rules.

⁵ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.2 cmt. a (1999).

⁶ UNIF. PROBATE CODE § 2-603 cmt. Theory of Lapse (amended 2010).

⁷ *See id.*

⁸ *See, e.g.,* Susan F. French, *Antilapse Statutes are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335 (1985). Much of the recent literature regarding anti-lapse statutes has focused on critiquing UPC § 2-707. The Restatements, on the other hand, seemed to have escaped criticism—the Restatements (Third) of Trusts punted as to anti-lapse for future interests by stating that "a trust is ordinarily subject to . . . rules of construction . . . applicable to [wills]." RESTATEMENTS (THIRD) OF TRUSTS § 25 (2003). The Restatement, however, limited this section to revocable trusts. *Id.* In a comment, it noted that rules of construction normally apply to all trusts—revocable, irrevocable, and testamentary. *Id.* at cmt.

⁹ *See, e.g.,* French, *supra* note 8, at 342.

into the realm of trusts.¹⁰ The UPC passed § 2-707 without any empirical evidence that existing anti-lapse statutes were, in fact, justified as written.¹¹

This current system is now so convoluted that, in the recent attempt to codify the multitude of trusts laws from the various states into a coherent statutory system, the drafters of the Uniform Trust Code (UTC) basically punted on the critical issue of whether anti-lapse statutes should be codified for inter vivos trusts back to the individual states without giving a proposed solution.¹²

This Article advocates reassessing the continuing lapse and anti-lapse issues in wills and trusts that have confounded scholars for decades. It delves into an analysis of whether anti-lapse statutes as default rules are effective. Parts II and III, respectively, discuss and clarify the concept of lapse and anti-lapse as applied to wills and trusts. Part IV critiques the vexing issues of the jurisdictional inconsistencies that may occur in the interplay when applying anti-lapse statutes in wills and trusts. Part V analyzes how anti-lapse jurisprudence is plagued with the tension of autonomy in disposing one's property versus the societal goals of maintaining economic health of descendants, ease of administration, and reducing litigation. It provides recommendations to remedy the effect of anti-lapse statutes in order to propound the testator's or settlor's intent. This Article ultimately concludes that the freedom to dispose of property according to one's actual intent is the tenet that should inform these issues. It also should serve as a reminder to legislators that they should be careful to not enact statutes that superimpose a presupposed intent of

¹⁰ See UNIF. PROBATE CODE § 2-707 (amended 2010).

¹¹ See, e.g., Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148, 166 (1995); French, *supra* note 8, at 348. See generally Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031 (2004) [hereinafter Hirsch, *Default Rules in Inheritance Law*].

¹² UNIF. TRUST CODE § 112 cmt. (2010).

Because of the wide variation among the States on the rules of construction applicable to wills, [the UTC] does not attempt to prescribe exact rules to be applied to trusts but instead adopts the philosophy of the Restatement [(Third) of Trusts] that the rules applicable to trusts ought to be the same, whatever those rules might be.

Id.

When the Uniform Real Property Transfer on Death Act (URPTODA) was recently enacted, a Legislative Note stated: "One of the significant trends in the law of property in the twentieth century has been the growing harmonization of the constructional and substantive rules governing deathtime transfers, whether the transfers occur in or outside of the probate process." UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13 Legislative Note (2009). Thus, the drafters suggested that states considering enactment of the URPTODA should extend the reach of probate rules, such as anti-lapse, to transfers on death deeds. *Id.* The drafters stated that the anti-lapse provisions under the Uniform Probate Code treat "wills and will substitutes alike," and that the anti-lapse provisions for will substitutes (e.g., UPC § 707 regarding future interests in trusts) were modeled after UPC § 2-603—the rule for wills. *Id.*

In light of these declarations and the consequent reaffirmation of the anti-lapse rules' stranglehold, it is time to reanalyze the lapse doctrine and the concomitant anti-lapse statutes. Can there truly be harmony between the anti-lapse statutes for wills and trusts? Should we continue to adopt these doctrines and allow them to take further stranglehold into others areas of property transfer?

the testator¹³ or that fail to capture current (and ever changing) societal views of “family.”¹⁴

II. ANTI-LAPSE JURISPRUDENCE IN THE CONTEXT OF WILLS

A. Devise to an Individual

Lapse deals with an intended beneficiary of a will who dies before the will becomes effective to transfer property.¹⁵ It occurs when a testator’s will provides for a devise to a beneficiary but that beneficiary is dead at the time the assets are to be distributed—that is, at the testator’s death.¹⁶ For example, Ted Testator drafts a will devising his antique car collection to his brother, Bob. Unfortunately, Bob died a year before Ted without Ted having revised his will. Ted’s personal representative is prepared to distribute the car collection to Bob pursuant to the language in Ted’s will, but he cannot because Bob is dead. Under the common law, the devise of the antique car collection fails because the intended beneficiary predeceased the testator—the law refers to this failure of the devise as lapse.¹⁷ Lapse occurs because a will does not take effect to transfer property until the testator’s death—a will

¹³ See Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 274-75 (2010).

Although scholars and legislatures tend to pay lip service to succession law’s historical core goal of effectuating a decedent’s testamentary intent, this once-central value has been cast to the periphery of legal relevance. Accordingly, the policy goals of succession laws are largely amorphous, with no consensus built around any particular theory.

.....

It is time for the policy goal of default rules to match the overall goal of succession laws. Creating default rules whose primary, indeed only, purpose is to effectuate testator’s intent will create a succession law system that is unified behind the same overarching concern.

Id. at 274-75, 296, 336 (citing Hirsch, *Default Rules in Inheritance Law*, *supra* note 11, at 1033-34).

¹⁴ See generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) (criticizing American inheritance law for its inability to adapt to changes in the family paradigm).

¹⁵ The UPC explains that:

[T]he common-law rule of lapse is predicated on the principle that a will transfers property at the testator’s death, not when the will was executed, and on the principle that property cannot be transferred to a deceased individual. Under the rule of lapse, all devises are automatically and by law conditioned on survivorship of the testator. A devise to a devisee who predeceases the testator fails (lapses); the devised property does not pass to the devisee’s estate, to be distributed according to the devisee’s will or pass by intestate succession from the devisee.

UNIF. PROBATE CODE § 2-603 cmt. Theory of Lapse (amended 2010).

¹⁶ *See id.*

¹⁷ *See id.*

speaks at death of a testator.¹⁸ A beneficiary receives no property interest in a testator's estate when the will is written and executed.¹⁹ Rather, the property interest only arises for the named beneficiaries in the will living at the testator's death.²⁰ The beneficiary (e.g., Bob) must be alive at the testator's death to obtain his interest.²¹ Thus, the issue arises as to who gets the car collection, as Bob cannot get it because he is dead.

Under the common law, because Bob died before the will took effect, the devise to Bob is deemed to have failed and the car collection would instead be distributed to those beneficiaries entitled to the testator's remaining assets.²² Thus, the car collection would go to a residuary devisee in the testator's will or through intestacy. For example, if Ted had devised the antique car collection to Bob and the rest and residue to ABC Museum, the latter would get the collection. The common law position only applied, however, when the will had no clear language indicating how the testator intended a devise to be distributed if the beneficiary predeceased him.²³ In this example, the only known fact is that Ted intended a devise for Bob; Ted's will did not anticipate Bob's early death. Thus, the common law may or may not have respected Ted's actual intent.

States have enacted anti-lapse statutes to address the issue of when certain devisees predecease the testator.²⁴ These statutes are designed to step in when a devisee died before the testator and the testator did not anticipate that possibility when he drafted the will or did not change his will to take the death into account.²⁵ The statutes generally substitute the deceased devisee's descendants (for example,

¹⁸ See Frederic S. Schwartz, *Misconception of the Will as Linguistic Behavior and Misperception of the Testator's Intention: The Class Gift Doctrine*, 86 U. DET. MERCY L. REV. 443, 444 (2009) [hereinafter Schwartz, *Misconception*] (citing 4 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON THE LAW OF WILLS* § 30.26 (rev. treatise 2004)).

¹⁹ See UNIF. PROBATE CODE § 2-603 cmt Theory of Lapse (amended 2010).

²⁰ *Id.*

²¹ *Id.*

²² RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.2 cmt. g (1999).

²³ In explaining the preference among the Reporters of the RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS to adopt the common law rather than anti-lapse rules for class gifts, distinguished trusts and estates scholar Professor Lawrence W. Waggoner noted:

[Adopting the anti-lapse rules] would require the court to insert a substitute gift based on likely preferences lacking any foundation in the language of the instrument of transfer. The traditional technique of the common law is construction, not insertion of a gift that does not appear in the language of the document or that cannot be implied from the language of the document.

Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 993, 1008 (2007).

²⁴ See *infra* footnotes 25-35 and accompanying text; see also Appendix, *infra*.

²⁵ See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 627 (2009) [hereinafter Hirsch, *Text and Time*].

the devisee's children or grandchildren) as the takers of the devise that would have gone to the deceased devisee.²⁶

States vary as to which deceased devisees are relevant for this substitution to apply.²⁷ In other words, there are certain favored devisees whose descendants benefit from this substitution. So who are those favored deceased devisees whom the anti-lapse statutes protect?

Most of the anti-lapse statutes, including the UPC, apply to a deceased devisee if the devisee was a grandparent or a descendant of a grandparent of the testator.²⁸ Thus, for example, a testator's parents, children, siblings, aunts, and uncles are given this favored status.²⁹ In those states, a close friend of the testator or the testator's spouse would not be covered.³⁰ Other states are more, or less, generous.

²⁶ See, e.g., IND. CODE ANN. § 30-4-2.1-7(b) (West 2012).

²⁷ Compare 20 PA. CONS. STAT. ANN. § 2514(9) (West 2012) ("A devise or bequest to a child or other issue of the testator or to his brother or sister or to a child of his brother or sister whether designated by name or as one of a class shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator but shall pass to such surviving issue who shall take per stirpes the share which their deceased ancestor would have taken had he survived the testator."), with MD. CODE ANN., EST. & TRUSTS § 4-403 (West 2012) ("(a) Unless a contrary intent is expressly indicated in the will, a legacy may not lapse or fail because of the death of a legatee after the execution of the will but prior to the death of the testator if the legatee is: (1) Actually and specifically named as legatee; (2) Described or in any manner referred to, designated, or identified as legatee in the will; or (3) A member of a class in whose favor a legacy is made. (b) A legacy described in subsection (a) of this section shall have the same effect and operation in law to direct the distribution of the property directly from the estate of the person who owned the property to those persons who would have taken the property if the legatee had died, testate or intestate, owning the property."), and CAL. PROBATE CODE § 21110(a) (West 2012) ("[I]f a transferee is dead when the instrument is executed, or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place.").

²⁸ See, e.g., ALA. CODE § 43-8-224 (2013); ALASKA STAT. ANN. § 13.12.603(a) (West 2013) (rules of construction applicable only to wills); ARIZ. REV. STAT. ANN. § 14-2603(A) (2013); COLO. REV. STAT. ANN. § 15-11-603 (West 2013); DEL. CODE ANN. tit. 12, § 2313 (West 2013); FLA. STAT. ANN. § 732.603 (West 2013); IDAHO CODE ANN. § 15-2-605 (West 2013); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (2013); MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West 2012); MINN. STAT. ANN. § 524.2-603 (West 2013); N.C. GEN. STAT. ANN. § 31-42 (West 2013); N.D. CENT. CODE ANN. § 30.1-09-05 (West 2011); S.C. CODE ANN. § 62-2-603 (2012); VA. CODE ANN. § 64.1-64.1 (West 2012); WYO. STAT. ANN. § 2-6-106 (West 2012).

²⁹ See, e.g., ARIZ. REV. STAT. § 14-2603(A) (2013); ALA. CODE § 43-8-224 (2013); MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West 2013); FLA. STAT. ANN. § 732.603 (West 2013); DEL. CODE ANN. tit. 12, § 2313 (West 2013); IDAHO CODE ANN. § 15-2-605 (West 2013); S.C. CODE ANN. § 62-2-603 (2012); N.D. CENT. CODE ANN. § 30.1-09-05 (West 2011); N.C. GEN. STAT. ANN. § 31-42 (West 2013); VA. CODE ANN. § 64.1-64.1 (West 2012); MINN. STAT. ANN. § 524.2-603 (West 2013); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (2013); WYO. STAT. ANN. § 2-6-106 (West 2012); COLO. REV. STAT. ANN. § 15-11-603 (West 2013).

³⁰ See, e.g., ARIZ. REV. STAT. § 14-2603(A) (2013); ALA. CODE § 43-8-224 (2013); MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West 2013); FLA. STAT. ANN. § 732.603 (West 2013); DEL. CODE ANN. tit. 12, § 2313 (West 2013); IDAHO CODE ANN. § 15-2-605 (West 2013); S.C. CODE ANN. § 62-2-603 (2012); N.D. CENT. CODE ANN. § 30.1-09-05 (West 2011); N.C. GEN. STAT. ANN. § 31-42 (West 2013); VA. CODE ANN. § 64.1-64.1 (West 2012); MINN. STAT. ANN.

The least generous states limit the favored status to deceased devisees who were the testator's descendants, basically children and grandchildren.³¹ For example, if the deceased devisee was the testator's child, he would be covered by the anti-lapse statute, but not if the devisee was the testator's brother—the deceased brother would not be covered. On the other hand, some states have broadened the category of favored deceased devisees, and include the spouse,³² stepchildren,³³ and, in a few jurisdictions, any beneficiary under the will.³⁴

B. Devise to a Class

What if a devise is not to a named individual but rather to a class of persons and that class includes a person who dies before the testator? Under the common law, a devise to a single-generation class³⁵ is divided equally among the members of the class living at the testator's death.³⁶ Single-generation classes may consist of relatives, such as "my children," "my grandchildren," and "my siblings," or nonrelatives, such as "my household employees" and "the members of my church choir."³⁷ Those members of the class who fail to survive the testator are excluded from sharing in the class gift.³⁸ Thus, when a class member predeceases the testator, the share to the surviving members of the class is enlarged.³⁹

For example, Tom Testator died leaving a will that devises \$1,500,000 to "my children." Tom had three children, Alan, Betty, and Carl, each of whom had children of his own. At Tom's death, his children, Alan, Betty, and Carl, each receive

§ 524.2-603 (West 2013); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (2013); WYO. STAT. ANN. § 2-6-106 (West 2012); COLO. REV. STAT. ANN. § 15-11-603 (West 2013).

³¹ See, e.g., MISS. CODE ANN. § 91-5-7 (West 2012).

³² See, e.g., KAN. STAT. ANN. § 59-615 (West 2013).

³³ See, e.g., ALASKA STAT. ANN. § 13.12.707(a) (West 2013); ARIZ. REV. STAT. ANN. § 14-2603(A) (2013); CONN. GEN. STAT. ANN. § 45a-441 (West 2013); HAW. REV. STAT. § 560:2-603 (West 2012); MICH. COMP. LAWS ANN. § 700.2603 (West 2012); MONT. CODE ANN. § 72-2-613 (2013); N.M. STAT. ANN. § 45-2-603(B) (West 2012); OHIO REV. CODE ANN. § 2107.52 (West 2012).

³⁴ See, e.g., D.C. CODE § 18-308 (2012); GA. CODE ANN. § 53-4-64 (West 2012); KY. REV. STAT. ANN. § 394.400 (West 2012); TENN. CODE ANN. § 32-3-105 (West 2012); W. VA. CODE ANN. § 41-3-3 (West 2012).

³⁵ Although gifts may be made to multi-generational classes, the author limits the discussion to single-generation class gifts because multi-generational gifts already provide for substitute takers; thus, anti-lapse statutes are not applicable to multi-generational class gifts. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 13.1 cmt. m, 15.2 cmt. c (2011).

³⁶ *Id.* § 14.2. This rule is based on the presumptive intent of the testator/settlor. *Id.* § 14.2 cmt. a; see also *id.* § 15.2.

³⁷ *Id.* §§ 13.1 cmt. c, 14.2 cmts. b, j. Note: gifts to multi-generational classes, such as "my heirs," "my issue," "my descendants," and the like, are not subject to anti-lapse rules as these classes are already subject to representational descendency by their very nature. *Id.* § 13.1 cmt. m.

³⁸ *Id.* § 15.2.

³⁹ *Id.* § 15.2 cmt. b.

\$500,000. However, if Alan predeceased Tom, the share Alan would have received is distributed to the surviving members of the class, Betty and Carl, each of whom would receive \$750,000. Alan's descendants would not receive his share.

The same would hold true if the devise were to a class of nonrelatives. For example, Tina Testator devised \$600,000 to "my friend Fanny's children." Fanny had four children, Ann, Bob, Cathy, and Dan. At Tina's death, Fanny's four children will each receive \$150,000. However, if Ann had predeceased Tina, Fanny's surviving children, Bob, Cathy, and Dan, would each receive \$200,000.

It is evident that, under the common law, the relationship of the class members to the testator is irrelevant. Those who predecease the testator are excluded from receiving a devise, and those who survive receive a greater share.⁴⁰

Anti-lapse statutes typically apply to class gifts.⁴¹ Accordingly, although anti-lapse statutes applicable to wills recognize the common law of equal division among class members,⁴² they may affect distributions of a devise to a class. Rather than automatically enlarging the shares for all surviving class members, the anti-lapse statute retains the share of certain predeceased members who are favored under the statute and distributes that share to those predeceased members' descendants.⁴³ This represents a radical change from the common law.

Thus, in the first example above, although Alan predeceased Tom Testator, Alan's share would go to Alan's descendants rather than to Betty and Carl (the surviving members of the class) because Alan is a favored devisee (the testator's child). In a majority of jurisdictions, however, the anti-lapse statute would not change the result in the second example above because Fanny's children are not relatives of Tina and, thus, are not favored devisees. In those jurisdictions that limit the favored status to certain family members, class gifts to nonrelatives will lapse if all the members predecease the testator, even if they have surviving descendants.⁴⁴ In sum, under most of the wills anti-lapse statutes, familial relationship matters notwithstanding that the testator has made a devise to a class.

The examples above are fairly straightforward—all the members of the class are either related by consanguinity ("my children") or by affinity⁴⁵ ("my friend Fanny's children"). What result would obtain, however, if the class were a "mixed" class—one that consists of persons related both by consanguinity and affinity? Disparities may occur with this added layer of class gifts.⁴⁶

⁴⁰ See *supra* notes 33-37 and accompanying text.

⁴¹ See UNIF. PROBATE CODE § 2-603 cmt. (amended 2010).

⁴² See *id.* § 2-603(b)(4).

⁴³ See *id.* § 2-603(b)(2).

⁴⁴ See *id.* § 2-603(b)(1).

⁴⁵ Although Black's Law Dictionary defines affinity as "the relation that one spouse has to the blood relatives of the other spouse; relationship by marriage," BLACK'S LAW DICTIONARY 67 (9th ed. 2009), for purposes of this article, the term affinity is defined broadly to include relationships other than those by consanguinity. For example, the Oxford English Dictionary defines affinity as including a "[v]oluntary social relationship; companionship, alliance, association." THE OXFORD ENGLISH DICTIONARY 217-18 (2d ed. 1989)

⁴⁶ A gift is deemed to be "a class gift if the terms of the disposition identify the beneficiaries only by a term of relationship or other group label." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 13.1 (2011).

For example, Tammy Testator included a devise in her will to "my employees." At the time she executed her will, Tammy had five employees, one of which was her nephew Ned.⁴⁷ Her other employees, Adam, Bill, Carol, and Delia, had no familial relationship with Tammy. If Adam predeceased Tammy, in most jurisdictions, Adam would be excluded from the class and his share would be divided among the four surviving members, i.e., Ned, Bill, Carol, and Delia; thus, each of the surviving members' shares would be enlarged. However, if the nephew, Ned, rather than Adam, had predeceased Tammy, the surviving members' shares would not be enlarged. Rather, because Ned is a descendant of Tammy's grandparent, Ned's share would go to his descendants (if any) rather than to Adam, Bill, Carol, and Delia—the remaining members of the class.

When the UPC was first promulgated, its anti-lapse statute expressly applied to class gifts.⁴⁸ The drafters noted that they did so to "eliminat[e] a frequent source of litigation" without any comment or analysis on the issue.⁴⁹ Later iterations likewise provided no further guidance.⁵⁰

Recognizing that an anti-lapse statute generally functions under the premise that a testator would prefer succession within certain family lines,⁵¹ this disparity between members of a class who are relatives versus those who are nonrelatives would seem logical. However, if a testator makes a mixed-class devise (i.e., a devise to a class that includes both relatives and nonrelatives), why should the relatives be favored over other nonrelative members of the class under the anti-lapse default rule? Does a testator who includes a relative as a member of a mixed class necessarily have a predilection for that family member? If the testator truly wanted to favor a relative, e.g. nephew Ned, the testator could have included a devise to that person as a named individual rather than as a member of the class. Thus, in using a class designation, did the testator intend to treat all the class members equally, whether or not related by blood? If the testator designated a class gift, is application of the anti-lapse statute contrary to the testator's intent? Did the testator intend for the surviving members' share to increase upon the death of any class member?⁵²

C. Devises to a Testamentary Trust

Initially, the anti-lapse rules applied only to devises in wills.⁵³ By extension, they also applied to testamentary trusts, as those trusts are created in a will.⁵⁴

⁴⁷ The class is determined from the time of execution of the will and may increase or decrease until the testator's death. *Id.* § 13.1 cmt. h.

⁴⁸ UNIF. PROBATE CODE § 2-605 cmt. (amended 2010).

⁴⁹ *Id.*

⁵⁰ *Id.* § 2-603 cmt. Class Gifts. ("In line with modern policy, subsection (b)(2) continues the pre-1990 Code's approach of expressly extending the anti-lapse protection to class gifts.").

⁵¹ *Id.*

⁵² For a critique of the RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS rules regarding distributions of shares corresponding to predeceased members of a class, see Frederic S. Schwartz, *The New Restatement of Property and Class Gifts: Losing Sight of the Testator's Intention*, 22 QUINNIAC PROB. L.J. 221 (2009) [hereinafter Schwartz, *The New Restatement*]; Schwartz, *Misconception*, *supra* note 18.

⁵³ See, e.g., UNIF. PROBATE CODE § 2-603 cmt. Restricted to Wills (amended 2010). The common law of wills applied to testamentary trusts as these trusts are created in a will. See

Under the common law, because a testamentary trust is created in a will, a beneficiary of a testamentary trust has to survive the testator/settlor to obtain his interest.⁵⁵ The beneficiary's failure to survive the testator's death causes his devise to lapse.⁵⁶ Hence, the lapsed devise is redistributed to the remaindermen of the testamentary trust, to the residuary devisees of the will, or to the testator's heirs, whatever the case may be.

However, the lapsed devise to the testamentary trust may be subject to the particular state's anti-lapse statute, if any. Presumably, because the testamentary trust is a creature born of a will, the anti-lapse statute applicable to a will, as discussed above, would apply to the trust as well. At first glance, this would seem to be the case.

However, with the passage of UPC § 2-707, questions may arise as to whether, for these purposes, a devise to a testamentary trust is treated as a devise in a will or only as an interest in a trust. UPC § 2-707 adds an anti-lapse feature to a future interest in a trust.⁵⁷ Rather than following the vesting rule for inter vivos trusts, it adopts a contingent remainder rule, requiring a beneficiary of a future interest in a trust to survive not the testator's death but rather to the date of distribution of her interest.⁵⁸ If the beneficiary predeceases that date, her interest lapses and her descendants receive her interest as substitute takers.⁵⁹ UPC § 2-707 applies to a trust created by transfer.⁶⁰ Therefore, would UPC § 2-707 govern devises to a testamentary trust? Must a beneficiary of a testamentary trust survive not only the testator/settlor's death (as required under the common law and UPC § 2-603), but also to a subsequent date for the time of possession of the beneficiary's interest (as required under UPC § 2-707)?

D. Blocking Anti-Lapse in a Will?

Whether a devise is subject to an anti-lapse statute depends not only on the familial relationship of the beneficiary to the testator, but also on whether the will contains language that blocks application of the statute.⁶¹ In some jurisdictions, words of survivorship block application of the anti-lapse statutes.⁶² For example, a

RESTATEMENT (SECOND) OF TRUSTS § 112, cmt. f (1959). "[I]f a testator devises property in a trust for a person who predeceases him, the devise of the beneficial interest lapses, and the person named as trustee ordinarily holds the property upon a resulting trust for the estate of the testator." *Id.*

⁵⁴ See UNIF. PROBATE CODE § 3-913 cmt. (amended 2010).

⁵⁵ See *supra* notes 19-22 and accompanying text.

⁵⁶ See *supra* notes 16-18 and accompanying text.

⁵⁷ UNIF. PROBATE CODE § 2-707 (amended 2010).

⁵⁸ *Id.* § 2-707(b).

⁵⁹ *Id.*

⁶⁰ *Id.* § 2-707(a)(7).

⁶¹ An anti-lapse statute is also inapplicable if the testator has named an alternate beneficiary as a substitute taker for a predeceased beneficiary. See *id.* § 2-707(c).

⁶² Under the common law, words of survivorship are irrelevant for distribution of devises in a will, whether to an individual or to a class, outright or in a testamentary trust. An

devise to "my sister if she survives me" or to "my surviving children" would sufficiently indicate the testator's intent that the anti-lapse statute not govern the disposition of the devise should the devisee predecease him.⁶³ If such words are attached to a devise, and the devisee indeed predeceases the testator, then the devise would lapse and go to the residuary devisees or to the testator's heirs.⁶⁴

Yet, in a few jurisdictions, such words are meaningless, notwithstanding an express provision in the will. Those states have adopted the position of UPC § 2-603 that "words of survivorship, . . . are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section."⁶⁵ Thus, a predeceased protected person's share of the testator's estate, whether to an individual or to a member of a class, is distributed to that person's descendants, notwithstanding survivorship language, unless further evidence of the testator's intent may be adduced.⁶⁶ Even if a testator has clearly included a condition of survivorship in his will, that express condition of survivorship is essentially ignored by fiat.⁶⁷ Is that what a testator would have preferred? Should a testator's express provisions concerning survivorship be so cavalierly disregarded? Should an anti-lapse statute frustrate a testator's written expression of her intent?

In his sharply worded criticism of the 1990 revisions to the UPC, which reversed the rule that survivorship language would defeat the anti-lapse statute, Professor Mark Ascher stated:

Apparently, the revisers [of the UPC] believe their own antilapse provisions are likely to reflect any particular testator's intent more faithfully than *the testator's own will*. This conclusion is not only pretentious, it disputes what should be obvious—that most testators expect *their wills* to dispose of their property *completely*—without interference from a statute of which they have never even heard. Instead of allowing "if he survives me" to mean what almost everyone would expect it to mean, the revisers have translated it into, "if he survives me, and, if he does not survive me, to his issue who survive me." For those unfamiliar with estate planning esoterica, therefore, it has become yet

individual must survive the testator to take his devise; if he predeceases the testator, his devise lapses. When a member of a class predeceases the testator, that member's share is distributed to the surviving members of the class. Thus, survivorship is an inherent element under the common law for a beneficiary to receive a devise under a will. *See supra* notes 33-38 and accompanying text.

⁶³ *See, e.g.*, FLA. STAT. ANN. § 732.603(a) (West 2013).

⁶⁴ *See, e.g., id.*

⁶⁵ UNIF. PROBATE CODE § 2-603(b)(3) (amended 2010).

⁶⁶ Naming an alternate devisee supersedes the effect of an anti-lapse statute. *See id.* §2-603(a)(4)(A)-(B).

⁶⁷ The comment to UPC § 2-603 suggests that a "foolproof means of expressing a contrary intention is to add to a devise the phrase 'and not to [the devisee's] descendants.'" UNIF. PROBATE CODE § 2-603 cmt. (amended 2010). *Contrary Intention—the Rationale of Subsection (b)(3)* (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. i. (2011)). However, only those that are learned on the law of anti-lapse would understand the need to add these words to negate an anti-lapse statute.

more difficult to figure out what the words in a will actually mean. The uninitiated apparently have three options: hire a competent estate planner, go to law school, or curl up with *Alice in Wonderland*.⁶⁸

III. ANTI-LAPSE JURISPRUDENCE IN THE CONTEXT OF TRUSTS

In its 1990 revisions, the Uniform Probate Code promulgated § 2-707 with the objective of “project[ing] the antilapse idea into the area of future interests (trusts)”⁶⁹ The introduction of UPC § 2-707 ignited a firestorm that has yet to be quelled.⁷⁰ So what started the firestorm? UPC § 2-707 included a provision that has a major impact on the common law governing trusts—it effectively turned a vested remainder into a contingent remainder.⁷¹

Prior to UPC § 2-707, future interests created in an inter vivos trust were deemed vested at the time of creation of the trust, unless some contingency was attached for possession of the interest.⁷² Thus, a beneficiary was not required to survive the settlor nor any prior beneficiary (unless the trust instrument stated otherwise)—the beneficiary’s interest was vested from the outset.⁷³ If the beneficiary with the vested interest did not survive to the time of possession, his interest would be distributed to his successors in interest.⁷⁴ However, UPC § 2-707 changed this result for future interests by requiring survivorship of the beneficiary to the date of distribution of the future interest even though the trust itself did not.⁷⁵ Therefore, rather than a beneficiary’s interest vesting at the trust’s inception, in order to take, a beneficiary governed under the UPC system must now survive to the time of possession and enjoyment of his interest.⁷⁶ If a beneficiary of a future interest were to predecease that date, then that beneficiary’s interest would instead be distributed to that beneficiary’s descendants.⁷⁷ Pursuant to UPC § 2-707, this substitution of descendants rule applies unless there is evidence of contrary intent.⁷⁸

⁶⁸ Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 654-55 (1993) (citations omitted). “This change was heavily criticized, and the debate over the precise issue involved in *Ruotolo* and the UPC anti-lapse statute continues unabated.” *Courts Determine if Anti-Lapse Statute Applies*, 33 EST. PLAN. 55, 56 (July 2006).

⁶⁹ UNIF. PROBATE CODE § 2-707 cmt. Rationale (amended 2010).

⁷⁰ *See, e.g.*, Dukeminier, *supra* note 11.

⁷¹ *See id.* at 159.

⁷² *Id.* at 148.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ UNIF. PROBATE CODE § 2-707(b) (amended 2010). “In effect, [UPC § 2-707] applies the anti-lapse statute applicable to wills . . . as if the transferor were a testator who died on the distribution date.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 15.4 cmt. i (2011).

⁷⁶ UNIF. PROBATE CODE § 2-707(b) (amended 2010).

⁷⁷ *Id.* § 2-707(b)(1).

⁷⁸ *See id.* § 2-707.

Under the common law, words of survivorship would be deemed to reflect such a contrary intent.⁷⁹ For example, if a settlor were to create an inter vivos trust, which states "to Ann for life, then to Betty," because no express words of survivorship are attached to Betty's interest, Betty would have a vested remainder from the time the trust was created. If, on the other hand, the trust were to state "to Ann for life, then, if Betty survives Ann, to Betty," Betty would receive a contingent remainder—her interest would be contingent on surviving the date of distribution, i.e., Ann's death. Thus, if Betty did not survive to that date, then her gift would fail and it would revert to the settlor's estate. However, UPC § 2-707 states that such words of survivorship would not make the gift lapse and revert to the settlor's estate; rather, UPC § 2-707 would substitute Betty's descendants as takers.⁸⁰ This too has caused great controversy because, although the settlor himself added an express requirement of survivorship for Betty, UPC § 2-707 would superimpose a presupposed intent that the settlor would have wanted Betty's descendants to take in Betty's place, if she does not meet the condition for possession of her gift.⁸¹

The drafters of UPC § 2-707 noted that it "substantially parallels the structure of the [wills] anti-lapse statute, [§] 2-603"⁸² However, the statutes diverge in two major respects. First, UPC § 2-603 requires a beneficiary of a present or future interest to survive a testator's death.⁸³ By comparison, UPC § 2-707 applies only to a beneficiary of a future interest who must survive to the date of distribution, rather than the settlor's death.⁸⁴ Second, they differ as to those persons favored under the rules. Where UPC § 2-603 favors only grandparents, descendants of grandparents, and stepchildren,⁸⁵ UPC § 2-707 applies to all predeceased beneficiaries of future interests, no matter the familial relationship.⁸⁶

Although all states have enacted some type of anti-lapse statute for wills, it is not the same for trusts.⁸⁷ Nineteen states, including the District of Columbia, have not addressed the lapse/anti-lapse issue for trusts by statute.⁸⁸ In those states, inter vivos trusts are presumably not affected by lapse or anti-lapse, as such trusts create a property interest in a beneficiary at the time the trust is created.⁸⁹ Therefore, the death of the beneficiary is irrelevant because he either lived to enjoy his interest in the trust or died, whereupon his vested property interest goes to his successors pursuant to his own estate plan. By contrast, in a testamentary trust, a beneficiary

⁷⁹ See *id.* cmt.

⁸⁰ UNIF. PROBATE CODE § 2-707(b)(3) (amended 2010).

⁸¹ See Dukeminier, *supra* note 11, at 153.

⁸² UNIF. PROBATE CODE § 2-707 cmt. Structure (amended 2010).

⁸³ *Id.* § 2-603(b).

⁸⁴ *Id.* § 2-707(b).

⁸⁵ *Id.* § 2-603(b).

⁸⁶ *Id.* § 2-707(a)(2).

⁸⁷ See Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's Anti-Lapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 204 (2007).

⁸⁸ See Appendix, *infra*.

⁸⁹ See *supra* notes 67-69 and accompanying text.

would have to survive the testator/settlor to obtain his interest.⁹⁰ Because the testamentary trust was created as part of the testator/settlor's will and only comes into existence as part of a will, the beneficiary only had an expectancy of receiving an interest from the testator/settlor's estate.⁹¹

Other states have addressed the issue of predeceased beneficiaries in trusts only tangentially by including not very helpful statutes to the effect that, generally, the rules of construction regarding the interpretation of a will and the disposition of property by will also apply to trusts ("trust interpretation statutes").⁹² Those nine states follow the Restatement's philosophy that wills and trusts should be construed the same way.⁹³ The uniform comment to these statutes generally states that "[r]ules of construction . . . address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary."⁹⁴ This gives very little guidance to the courts but does suggest that anti-lapse may apply to certain trusts.⁹⁵

Thus far, only three of those states (Alabama, Arkansas, and Maine) have been confronted with the issue of whether, under their trust interpretation statute, the state's respective anti-lapse statute for wills should apply to trusts.⁹⁶ The Alabama Supreme Court was able to evade deciding the issue in *Ex parte Byrom*.⁹⁷ In that case, the Court noted that the Alabama trust interpretation statute became effective several months after the trial court judgment that was on appeal;⁹⁸ thus, the trust interpretation statute could not affect the outcome of the case.⁹⁹ In another case, *First National Bank of Bar Harbor v. Anthony*, the Supreme Court of Maine seemed to sidestep the issue.¹⁰⁰ The court stated that, because the predeceased beneficiary's

⁹⁰ See *supra* notes 50-51 and accompanying text.

⁹¹ *Id.*

⁹² See, e.g., ALA. CODE § 19-3B-112 (2013); ARIZ. REV. STAT. ANN. § 14-10112 (2013); ARK. CODE ANN. § 28-73-112 (West 2012); ME. REV. STAT. ANN. tit. 18-B, § 112 (2013); N.H. REV. STAT. ANN. § 564-B:1-112 (2013); N.C. GEN. STAT. ANN. § 36C-1-112 (West 2013); S.C. CODE ANN. § 62-7-112 (2012); TENN. CODE ANN. § 35-15-112 (West 2012); VT. STAT. ANN. tit. 14A, § 112 (West 2012); W. VA. CODE ANN. § 44D-1-112 (West 2012).

⁹³ See *infra* Appendix.

⁹⁴ *Id.*

⁹⁵ The UTC also takes the approach that the rules of construction that apply in the interpretation of wills should be appropriate for trusts. See *supra* text accompanying note 3. The following states have adopted the UTC: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming. See *Legislative Fact Sheet—Trust Code*, UNIF. LAW COMM'N, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust Code](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code) (last visited Apr. 4, 2013) [hereinafter *Legislative Fact Sheet*].

⁹⁶ See *supra* notes 92-102 and accompanying text.

⁹⁷ *Ex parte Byrom*, 47 So. 3d 791 (Ala. 2010).

⁹⁸ *Id.* at 795-96.

⁹⁹ *Id.* at 796 n.8.

¹⁰⁰ *First Nat'l Bank of Bar Harbor v. Anthony*, 557 A.2d 957, 960 (Me. 1989).

"interest vested at the time of creation of the trust, we do not consider whether Maine's [wills] anti-lapse . . . could apply to an *inter vivos* trust."¹⁰¹ Because the court failed to analyze the effect of Maine's trust interpretation statute, it seemed to pave the way for future consideration of the issue of whether its wills anti-lapse statute would apply to trusts. By contrast, in the most recent of the three cases, the Supreme Court of Arkansas tackled the issue head on in a 2012 case of first impression.¹⁰² In *Tait v. Community First Trust Company*, after noting that Arkansas had no anti-lapse statute for trusts, the court analyzed the interplay among the State's wills anti-lapse statute, its trust interpretation statute, and a third statute that states "[t]he common law of trusts . . . supplement this chapter, except to the extent modified by this chapter or another statute . . ."¹⁰³ The court consequently held that a beneficiary's interest in "an inter vivos trust vests at the time the trust is created, and thus the beneficial interest does not lapse when the beneficiary predeceases the settlor."¹⁰⁴ The court, therefore, noted that it need not address whether the anti-lapse statute applied.¹⁰⁵ Thus, in spite of the Arkansas trust interpretation statute, the court applied the descendible remainder analysis to the inter vivos trust rather than the law applicable to wills.¹⁰⁶ By contrast, the court noted that, under the common law, a beneficiary's interest in a testamentary trust, unlike an inter vivos trust, would lapse if the beneficiary predeceases the testator/settlor because "a testamentary trust only becomes operative at the death of the testator."¹⁰⁷

Lastly, the remaining states have statutes specifically dealing with lapse and anti-lapse for trusts.¹⁰⁸ Of those states, the statutes differ in very important respects, including whether the beneficiary has to survive the death of the settlor and which deceased beneficiary the anti-lapse statute covers.¹⁰⁹ However, unlike the wills anti-

¹⁰¹ *Id.* at 960.

¹⁰² *See Tait v. Cmty. First Trust Co.*, No. 12-406, 2012 Ark. 455 (Dec. 6, 2012).

¹⁰³ *Id.* at *5.

¹⁰⁴ *Id.* at *9-10.

¹⁰⁵ *Id.* at *10.

¹⁰⁶ *See id.* at *9-10.

¹⁰⁷ *Id.* at *7-8.

¹⁰⁸ *See, e.g.*, ALASKA STAT. ANN. § 13.12.707(a) (West 2013); ARK. CODE ANN. § 28-26-104(2) (West 2012); CAL. PROB. CODE § 21110(a); COLO. REV. STAT. ANN. § 15-11-707 (West 2013) (survivorship with respect to future interests under terms of trust-substitute takers); 755 ILL. COMP. STAT. ANN. 5/4-11 (West 2013); IOWA CODE ANN. § 633.273 (West 2013); IOWA CODE ANN. § 633A.4701(3) (West 2013); LA. CIV. CODE ANN. art. 1589 (2012); LA. REV. STAT. ANN. § 9:1809 (2012); MONT. CODE ANN. § 72-2-613 (2013); NEB. REV. STAT. ANN. § 30-2343 (West 2012); N.M. STAT. ANN. § 45-2-707(B) (West 2012); OHIO REV. CODE ANN. § 5808.19(B)(2) (West 2012); R.I. GEN. LAWS ANN. § 33-6-20 (West 2012); S.C. CODE ANN. § 62-7-606(A) (2012); S.D. CODIFIED LAWS § 29A-2-707(b) (2012); UTAH CODE ANN. § 75-2-707 (West 2012); WIS. STAT. ANN. § 854.06 (West 2013).

¹⁰⁹ *Compare* 760 ILL. COMP. STAT. ANN. 5/5.5 (West 2013) (stating that unless the settlor provides otherwise in the trust, for gifts to a deceased beneficiary under an inter vivos trust, "if a gift of a present or future interest is to a descendant of the settlor who dies before or after the settlor, the descendants of the deceased beneficiary living when the gift is to take effect in possession or enjoyment take per stirpes the gift so bequeathed . . . if the gift is not to a descendant of the settlor or is not to a class as provided [for in the statute] and if the

lapse statutes, most of those trust anti-lapse statutes cover any beneficiary, not just relatives.¹¹⁰ In addition, in the majority of these states, the trust anti-lapse statutes apply to all trusts—whether testamentary or inter vivos.¹¹¹

IV. CONFLICTS IN WILLS AND TRUSTS ANTI-LAPSE STATUTES

Illogical inconsistencies in property distribution may arise where a wills anti-lapse statute has a different reach than the trust anti-lapse statute within the same jurisdiction and often within the same document.¹¹² For example, Alaska, Colorado, Florida, Hawaii, and Massachusetts, among other states, have this conflict in their statutes.¹¹³ What happens under the respective anti-lapse statutes in these states? The wills anti-lapse statutes in these states give favored status to the testator's grandparents and their descendants; but the trusts statutes give favored status to all beneficiaries.¹¹⁴

The discrepancy that results in this scenario is best illustrated in an example. Assume Teresa Testator's will has a devise of \$5,000,000 each to cousin Vinny and friend Fred, another devise of \$5,000,000 into a testamentary trust with income to Mother for life and upon her death to friend Gina, and a residuary clause devising the rest and residue to ABC Charity. Also assume that cousin Vinny and friend Fred

beneficiary dies either before or after the settlor and before the gift is to take effect in possession or enjoyment, then the gift shall lapse . . . and pass as part of the residue of the trust under the trust."), with OKLA. STAT. ANN. tit. 60, § 175.56 (West 2012) ("When the declaration or agreement of an express trust provides for any of the property held in trust to be distributed to a beneficiary related by blood to the grantor or to a grantor of the trust, and the beneficiary is living at the time the trust is created but dies before the time for distribution of the trust leaving one or more lineal descendants who are living at the time for distribution of the trust, and no provision is made in the trust declaration or agreement for disposition of the property in the event that the beneficiary is not living at the time for distribution of the trust, the beneficiary's lineal descendants take the share of the trust property so given to the beneficiary in the trust declaration or agreement, by right of representation, in the same manner as the beneficiary would have done had he been living at the time for distribution of the trust."), and OR. REV. STAT. ANN. § 130.550 (West 2013) ("Unless otherwise provided by the terms of the trust instrument, when property is to be distributed under the trust to any beneficiary who is related by blood or adoption to the settlor, and the beneficiary dies leaving lineal descendants either before the settlor dies or before the time set in the trust instrument for distribution, the descendants take by right of representation the property the beneficiary would have taken if the beneficiary had not died. Unless otherwise provided by the terms of the trust instrument, this section applies to a beneficiary who is entitled to receive property under a class gift if the beneficiary dies after the trust instrument is executed.").

¹¹⁰ See, e.g., TENN. CODE ANN. § 32-3-105(b) (West 2012); see also David M. Becker, *Eroding the Common Law Paradigm for Creation of Property Interests and the Hidden Costs of Law Reform*, 83 WASH. U. L.Q. 773, 799 (2005) ("Unlike most anti-lapse statutes, however, application of § 2-707 [(the UPC's survivorship provision for future interest in trusts)] is not limited to certain groups of relatives, but instead it applies to all beneficiaries—even those who are unrelated to the estate owner.").

¹¹¹ Those states have generally adopted UPC § 2-707.

¹¹² See *infra* Appendix.

¹¹³ See *id.*

¹¹⁴ See *id.*

and Gina died last year in an accident, and Teresa (the testator) died several months later. How will Teresa's estate be distributed?

Because cousin Vinny is a will beneficiary, one has to look at the wills anti-lapse statute and ask whether he is a favored devisee. Because cousin Vinny is related to Teresa in the requisite way (a descendant of Teresa's grandparents) and because he predeceased Teresa, his children, if any, get the \$5,000,000 that would have gone to him. Fred is also a will beneficiary. Under the wills anti-lapse statute, because Fred is not related to Teresa, his devise will lapse—his children get nothing and the \$5,000,000 Fred would have received goes to ABC Charity through the residuary devise in the will.

Mother survived the testator and obtained her full gift—income until her death—so anti-lapse is irrelevant as to her distributive share. Lastly there is Gina. Gina is a beneficiary of the testamentary trust; therefore one has to look at the trust anti-lapse statute and ask whether she is a favored devisee. Recall, unlike the wills anti-lapse statute, any beneficiary is favored in the trusts anti-lapse statute. Therefore, although Gina predeceased the testator/settlor, her children, if any, will take the \$5,000,000 she would have received under the trust.

The foregoing example highlights the unsettling fact that, although Fred was in a similar position as Gina (a friend/beneficiary who predeceased Teresa), he ended up in a worse position. Fred, who was to receive an outright devise under the will, receives nothing nor do his children. Gina's children, however, receive the \$5,000,000 she would have received under the testamentary trust.

Taking note of this discrepant result, it is hard to argue that it is anything other than random. This result begs the following questions. Are these statutes creating interests where they should not exist? Who is to say that Teresa prefers cousin Vinny's children to ABC Charity? Who is to say Teresa prefers cousin Vinny's children but not Fred's children? Would Teresa really prefer ABC Charity over Fred's descendants? Why is Gina placed in a better position than Fred if they are both Teresa's friends?

Choice of law rules also may create inconsistent results with a distribution of a devise in a will and an interest in a trust. Uniform Trust Code (UTC) § 107 permits a settlor to designate the law that governs the meaning and effect of the terms of a trust.¹¹⁵ The comment to UTC § 107 notes that "[t]he settlor is free to select the governing law regardless of where the trust property may be . . . located . . ."¹¹⁶ Thus, a settlor may decide that the law of another jurisdiction should govern the trust he created.¹¹⁷ Under UTC § 107, the law of the chosen jurisdiction will apply unless it is "contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue . . ."¹¹⁸ Because an anti-lapse statute is a rule of construction promulgated to further the presumed intent of a settlor rather than to promote public policy,¹¹⁹ any such designation of governing law by a settlor should

¹¹⁵ UNIF. TRUST CODE § 107 cmt. (2000).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 362 n.33 (9th ed. 2013) ("Is th[e] 'public policy' characterization of the antilapse statutes consistent

not be invalid for purposes of anti-lapse issues in the trust. Thus, a settlor's choice of law will determine which anti-lapse statute will apply, if any at all, to his trust. The choice of law rule found in UTC § 107 allows a settlor to select foreign law for both a testamentary trust and an inter vivos trust.¹²⁰ One-half of the states and the District of Columbia have adopted the UTC.¹²¹

The Uniform Probate Code also permits a testator to pick and choose the law that will govern the terms of his will.¹²² The language of UPC § 2-703 is similar to UTC § 107, permitting a testator's choice of law that is not contrary to public policy.¹²³ Only a few states have adopted choice of law rules for wills,¹²⁴ in some cases limited to devises of personal property.¹²⁵ Most states, however, have no such choice of law statutes for wills. In those states, the law governing wills is the law of the testator's domicile.

Therefore, as part of her estate plan, a property owner may execute a will that is governed by the law of her jurisdiction and create an inter vivos trust that is governed by the law of a foreign jurisdiction. By illustration, a testator's will may include a devise to "my daughter if she survives me." The testator may also create a trust, which includes a future interest to this same daughter with the exact same survivorship language. The daughter thereafter predeceases the testator/settlor. Depending on the law chosen by the testator/settlor to govern the trust, and on the anti-lapse statute applicable to the will and trust, either of three scenarios may occur: (1) the daughter's shares in both the will and trust are distributed to her descendants even though she predeceased her testator/settlor mother; (2) the daughter's shares in both the will and trust are distributed to the residuary devisees under the will and to the remaindermen of the trust because the survivorship language blocks the anti-lapse statute in each state; or (3) the survivorship language blocks the application of the anti-lapse statute for the will (so the daughter's share is distributed to the residuary devisee) but her share in the trust is distributed to her descendants (or vice versa). In the latter scenario, in choosing the law of another jurisdiction to govern the trust, did the testator/settlor really intend for differing distributive schemes regarding gifts to her daughter? This creates an anomaly of sorts.

with the principle of freedom of disposition? Is the basis for the antilapse statute a public policy preference for a substitute gift in the descendants of a predeceased devisee or a judgment about the probable intent of the typical testator in such circumstances?"); *see also* Becker, *supra* note 110, at 828-29 (noting that UNIF. PROBATE CODE § 2-707 "does not serve the kinds of public policies that frequently explain many decisions, rules, and statutes affecting the law of property"). If indeed legislatures had public policy concerns, then an anti-lapse statute that, for example, redistributed a predeceased beneficiary's interest to minor children, if any, rather than the beneficiary's descendants in general would better serve such a goal.

¹²⁰ UNIF. TRUST CODE § 107 (2000).

¹²¹ Legislative Fact Sheet, *supra* note 95.

¹²² UNIF. PROBATE CODE § 2-703 cmt. (amended 2010).

¹²³ It refers to a governing instrument, which includes a trust in its definition. *Id.*

¹²⁴ *See, e.g.*, ARIZ. REV. STAT. ANN. §14-2703 (2013); HAW. REV. STAT. § 560:2-703 (West 2013).

¹²⁵ *See, e.g.*, ALASKA STAT. § 13.06.068 (West 2012).

Further yet, the testator conceivably may execute a will governed by the law of his domiciliary state, which includes a provision for a testamentary trust governed by the laws of another state. For example, Indiana's anti-lapse statute applicable to wills protects predeceased devisees who are the testator's descendants.¹²⁶ The Indiana Trust Code contains a similar anti-lapse provision for trusts.¹²⁷ Indiana's Trust Code also includes a choice of law provision.¹²⁸ That provision states that "[t]he meaning and legal effect of a distribution under trust law shall be determined by the law of the state selected by the settlor in the trust"¹²⁹ Therefore, an Indiana domiciliary, who is dissatisfied with the limited protections offered by the Indiana trust anti-lapse statute, which limits protections to predeceased descendants,¹³⁰ may circumvent that law and include a provision in her trust that it be governed by the laws of Arizona,¹³¹ a state whose anti-lapse statute covers any beneficiary.¹³² However, the domiciliary does not have that option regarding her will. Thus, the testator/settlor's trust may be governed by foreign law, but her will is governed by Indiana law. This creates a paradox of its own. May a testator/settlor make such a choice of law for a testamentary trust? Or must a testamentary trust be governed by the anti-lapse statute applicable to wills? Should devisees to a testamentary trust be accorded greater preference than other devisees in a will? If so, why? Once again, the statutes offer little guidance.

For example, the Indiana Trust Code defines a trust as "a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held."¹³³ Certain fiduciary relationships are excluded, none of which are testamentary trusts.¹³⁴ The Indiana Trust Code further recognizes that a trust may be created in a will, i.e., a testamentary trust.¹³⁵ Therefore, presumably, testamentary trusts would be subject to all the rules applicable to inter vivos trusts.¹³⁶ To create a testamentary trust, a testator/settlor must include a devise in his will to be held in trust for a beneficiary.¹³⁷ The anti-lapse statute for wills governs devisees to descendants.¹³⁸ Consequently, this begs the

¹²⁶ IND. CODE ANN. § 29-2-6-1 (West 2013).

¹²⁷ *Id.* § 30-4-2.1-7(b).

¹²⁸ *Id.* § 30-4-1-11.

¹²⁹ *Id.* The settlor is permitted to make a choice of law unless application of the selected law is contrary to the public policy of Indiana. *Id.*

¹³⁰ *Id.* § 30-4-2.1-7(b).

¹³¹ *See id.* § 30-4-1-11.

¹³² ARIZ. REV. STAT. ANN. § 14-2707 (2013).

¹³³ IND. CODE ANN. § 30-4-1-1(a) (West 2013).

¹³⁴ *Id.* cmt. c.

¹³⁵ *See id.* § 30-4-2-1.5.

¹³⁶ The comments to Indiana Code § 30-4-1-1 note that the rules of law in the Indiana Trust Code apply to personal trusts, without any exclusion for testamentary trusts. *Id.* cmt. c.

¹³⁷ RESTATEMENT (SECOND) OF TRUSTS § 17(c), cmt. to clause (c).

¹³⁸ *Id.* § 29-1-6-1.

question of whether a testamentary trust is governed by the Indiana Trust Code, which allows for choice of law,¹³⁹ or by the Indiana Probate Code, which does not.¹⁴⁰

The same analysis can be made regarding those states that have adopted UPC §§ 2-603 and 2-707. UPC § 2-707 applies to future interests “created by a transfer creating a trust.”¹⁴¹ UPC § 2-707 is included in Part 7 of the UPC titled “Rules of Construction Applicable to Wills and Other Governing Instruments.”¹⁴² The comment to UPC § 2-701, regarding the scope of Part 7, notes that UPC § 2-707 applies to “governing instruments creating a future interest under the terms of a trust.”¹⁴³ The term “governing instruments” includes wills.¹⁴⁴ Therefore, a will that creates a future interest under the terms of a testamentary trust would seemingly be governed by UPC § 2-707. On the other hand, the comments to UPC § 2-603, which applies only to wills, expressly notes that this section does not apply to inter vivos trusts, without any reference to testamentary trusts.¹⁴⁵ Therein lies the quandary. Which anti-lapse statute applies to testamentary trusts? Is it UPC § 2-603, which favors only the testator/settlor’s grandparents, descendants of grandparents, and stepchildren? Or is it UPC § 2-707, which applies to any predeceased beneficiary of a future interest in a trust?¹⁴⁶ Does the latter trump the former?

For example, suppose Tony Testator devises \$1,000,000 in his will to be held in trust, with income payable to his sister Sara for life and, upon Sara’s death, principal to be distributed one-half to his brother Bill and one-half to his friend Fiona. If Bill predeceases Tony, without Tony having revised his will, it is of no consequence which anti-lapse provision applies. Under both UPC § 2-603 and § 2-707, Bill’s descendants, if any, would take Bill’s share. However, the end result is different if Fiona had predeceased Tony. If UPC § 2-603 applies to the testamentary trust created in Tony’s will, the devise to Fiona lapses and will be distributed to Tony’s residuary devisees. By contrast, if UPC § 2-707 applies, then Fiona’s interest in the testamentary trust will be distributed to her descendants, if any.

In the end, there is simply no coherent analytical structure for these outcomes.¹⁴⁷ The anti-lapse statutes are based, in part, on historical principles of property law where heirs have a favored status.¹⁴⁸ The statutes were premised on the idea that most testators would prefer to maintain a line of descent through the deceased

¹³⁹ *Id.* § 30-4-1-11.

¹⁴⁰ *Id.* § 29-2-6-1.

¹⁴¹ UNIF. PROBATE CODE § 2-707 (amended 2010).

¹⁴² *Id.*

¹⁴³ *Id.* § 2-701 cmt.

¹⁴⁴ *Id.* § 1-201(18).

¹⁴⁵ *See id.* § 2-603 cmt. Section 2-603 Restricted to Wills.

¹⁴⁶ Florida is the only UPC state whose version of UPC § 2-707 expressly states that it applies to testamentary trusts. FLA. STAT. ANN. § 736.1106 (West 2013).

¹⁴⁷ Professor Jesse Dukeminier inquired: “What justification is there for presuming the testator intends that only descendants of deceased close kindred take devises . . . but descendants of any deceased remainderman take remainders in a . . . trust?” Dukeminier, *supra* note 11, at 149 n.5.

¹⁴⁸ *See French, supra* note 8, at 338-39.

familial devisee, rather than passing to residuary devisees or through intestacy.¹⁴⁹ The statutes developed piecemeal—with the wills statutes coming in earlier and the trust statutes being a more recent phenomenon.¹⁵⁰ When many of these trusts statutes were enacted, there seemed to be a move toward parallelism between wills and trusts.¹⁵¹ There was also a purported move toward intent-serving policies.¹⁵² But the statutes were not effective in this regard. For example, why not apply anti-lapse statutes consistently to all beneficiaries—both in wills and trusts? Why are descendants favored? Is this really what the testator/settlor would have intended?

V. ANALYSIS AND RECOMMENDATIONS

Anti-lapse rules were fashioned under presumed notions of who is one's family and to maintain the economic health of that family unit.¹⁵³ These statutes operate under the theory that the testator/settlor would have preferred distribution to the descendants of a predeceased beneficiary over complete lapse.¹⁵⁴ These statutes are a legislature's best guess as to how typical decedents would want their property to be distributed at death—to certain members of the family—and thus ostensibly reflect societal norms.¹⁵⁵ Societal notions of family have changed, however, and the definition of that unit has become more elusive.¹⁵⁶ Is a family related by consanguinity? Does marriage create a family? Are families, instead, created by emotional ties? Or is it solely genetics?¹⁵⁷ The law is still grappling with defining family.¹⁵⁸

¹⁴⁹ *See id.*

¹⁵⁰ *See supra* notes 11-12 and accompanying text.

¹⁵¹ *See supra* notes 11-12 and accompanying text.

¹⁵² *See supra* notes 11-12 and accompanying text.

¹⁵³ Philosophers have contemplated this paradigm: "[B]ecause a family as an *ethical* . . . unit contains, indeed is organized around, its resources, by means of which it hopes to care for and maintain itself, there needs to be some *ethical* . . . way of passing these resources on over generations." Smith, *supra* note 2, at 78 (citations omitted).

¹⁵⁴ *Cf.* Becker, *supra* note 110, at 799 ("Section 2-707 [of the UPC] invents conditions and substitute gifts not found in clearly expressed trusts, and in specific instances it yields distributions to people who were never intended to benefit.").

¹⁵⁵ *See* Foster, *supra* note 14, at 199-207 (criticizing American inheritance law for its inability to adapt to the paradigm of family law).

¹⁵⁶ In a certain limited respect, the Uniform Probate Code has acknowledged extended families. For example, the UPC anti-lapse statute originally included only a testator's grandparents and descendants of a testator's grandparents as those persons whose devisees would be protected under the wills anti-lapse statutes. UNIF. PROBATE CODE § 2-605 (1969). Stepchildren, as devisees, were later added to this group. UNIF. PROBATE CODE § 2-603 (1990).

¹⁵⁷

There is no better example of this identity crisis [in succession laws] than the simmering debate over the past few decades among scholars and state legislatures concerning how the laws of succession should change to encapsulate more fully the evolving notions of American families. Changing family structures and emerging reproductive technologies influence the definition of "parentage" in law and society.

These influences may undermine the traditional definition of a parent-child relationship—the presence or presumption of a genetic link between two individuals. Recognition of child status is of particular concern for succession law in determining distributions to “children” for intestacy purposes and for the law of wills.

Tritt, *supra* note 13, at 275.

It is appropriate to draw from popular culture here, and use the series “Modern Family”—arguably one of the most popular television shows—to reflect changes in societal view of what the unit dubbed “family” really is. *Modern Family* (ABC television broadcast); see also Laura M. Holson, *Who’s on the Family Tree? Now It’s Complicated*, N.Y. TIMES (July 4, 2011), http://www.nytimes.com/2011/07/05/us/05tree.html?pagewanted=all&_r=0.

Although many scholars have discussed the reach of anti-lapse statutes to particular relatives, literature regarding familial relationships has been more extensive in the discussion of intestacy distributions. Much has been written about how intestate statutes continue to be limited to traditional family relationships and do not do enough to recognize and include persons whom a decedent may regard as family. See, e.g., Foster, *supra* note 14, at 199-207; Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223 (2008); Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the “Adoption” (and the Inequity) Out of the Doctrine of “Equitable Adoption”*, 54 ST. LOUIS U. L.J. 271 (2009). Given that intestacy and lapse/anti-lapse are kissing cousins, this issue is appropriately analogous in the lapse/anti-lapse scenario.

The scholarship in this area has criticized the failure to reflect the changes in societal norms regarding how a person defines her family. See generally Higdon, *supra* (discussing how the doctrine of equitable adoption, although meant to be more inclusive (and no matter how well-intentioned), fails to provide for the unrelated extended family when a decedent dies intestate). By way of illustration, Professor Higdon relates the story of Hattie O’Neal:

Hattie O’Neal is African American and was born in 1949 to Bessie Broughton, an unwed mother. When her mother died in 1957, Hattie was sent to live with a relative in New York City. In fact, Hattie would spend the next four years living in several different households, which were sometimes headed by relatives and other times by non-relatives who were simply in want of a “daughter.” Hattie was eventually sent to Georgia to live with Estelle Page, her paternal aunt. Soon thereafter, Page learned of a married couple, Mr. and Mrs. Roswell Cook, who were looking to adopt a little girl. After Page told the Cooks about Hattie, the couple came and met Hattie, who at this time was around twelve years of age, and ultimately took her home with them. From the time she went home with the Cooks until she married in 1975, Hattie was in all meaningful ways their “daughter.” Although she was never formally adopted and retained her own last name, the Cooks raised her as their own. Even when the Cooks divorced in the 1970s, Mr. Cook kept Hattie with him, continuing to raise her and providing for her education. Furthermore, after Hattie’s marriage, when she had children of her own, Mr. Cook referred to them as his “grandchildren.” Nonetheless, in 1991, Mr. Cook died without a will, which raises the following question: Does Hattie have the right to inherit as the child of Mr. Cook?

Id. at 224 (citing *O’Neal v. Wilkes*, 439 S.E.2d 490, 491 (Ga. 1994); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 114 (8th ed. 2005) (pointing out that O’Neal is African American)). Borrowing Professor Higdon’s illustration, one can ask: Had Mr. Cook died testate, devising his estate to Hattie, would Hattie’s children be entitled to take Hattie’s devise had she predeceased Mr. Cook? The answer is generally no.

As herein discussed, the majority of anti-lapse statutes applicable to wills would save the devise only for descendants of certain persons related by consanguinity. See *supra* Part II.A.

As such, anti-lapse statutes are default rules that superimpose a presupposed intent.¹⁵⁹ However, default rules, by their very nature, may defeat a person's intent and thus preclude freedom of disposition to whomever the testator/settlor wished—they negate autonomy in favor of societal goals.¹⁶⁰ Anti-lapse statutes often end up distributing a person's property in ways that may not be consistent with the decedent's actual intent. For example, by relying on a traditional family paradigm, anti-lapse statutes, while perhaps efficient and allowing for ease of administration, often operate in ways that are wholly inconsistent with a testator's/settlor's expectations.¹⁶¹

Thus, no matter how close the affinity between the testator and the devisee, those persons, such as Hattie, are basically deemed inconsequential, unless the testator had the wherewithal to include a provision for that person's descendants. Yet, as Professor Higdon points out in the context of informal adoptions, extended unrelated families are quite extensive and on the rise particularly in certain minority communities. Higdon, *supra*, at 226. The issue of defining family also arises in the context of unmarried partnerships. The 2010, the U.S. Census Bureau categorized unmarried partners as those "with a close and personal relationship to the householder that goes beyond sharing household expenses." Daphne Lofquist et al., *Households and Families: 2010*, U.S. CENSUS BUREAU 15 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>. Opposite sex partnerships rose about 1.5% from 2000 to 2010. *Id.* Yet, the number of same-sex unmarried partnership households doubled during that same time period. *Id.* To date, only about seventeen states recognize marriage or civil unions among couples of the same sex. See NAT'L CONFERENCE OF STATE LEGISLATURES, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last visited June 29, 2013); see also Cooper, *supra* note 87, at 204 ("Probate law provides many examples of the conflict between established legal principles and modern public policy. Sometimes these conflicts make for dramatic headlines, such as the challenges of defining 'spouses' in a society that increasingly recognizes same-sex couples and 'children' in an era of evolving reproductive technology.").

¹⁵⁸ Considerations of the dynamic nature of the concept of family have long played a role in efforts to draft rules of construction. For example, in discussing the addition of section 2-707 in the 1993 amendments to the Uniform Probate Code, Professor Lawrence W. Waggoner, then Director of Research and Chief Reporter for the Joint Editorial Board for the Uniform Probate Code, wrote: "UPC section 2-207 seeks to implement the settlor's intent. In today's divorce-prone and blended-family world, the evidence indicates that settlors incline towards substituting the descendants, not the spouse, of a remainder beneficiary who predeceases the distribution date." Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Statutes*, 94 MICH. L. REV. 2309, 2336 (1996) [hereinafter Waggoner, *The UPC Extends*].

¹⁵⁹ See *supra* notes 25-27 and accompanying text.

¹⁶⁰ For an in-depth analysis of the framework, or lack thereof, of the default rules in inheritance law, see generally Hirsch, *Default Rules in Inheritance Law*, *supra* note 11.

¹⁶¹ The German idealist, G.W.F. Hegel, postulated that upon the death of the patriarch the family disintegrates into civil society such that there exists no more need to care for the family. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 179, at 215 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991). As such, the patriarch should have the free will to dispose of property as he wishes. *Id.*

The disintegration [of the family] leaves the arbitrary will of the individual free either to expend his entire resources in accordance with his caprices, opinions, and individual ends . . . or to regard a circle of friends, acquaintances, etc. so to speak as

Granted, there are times when societal goals should outweigh a chosen disposition in a will or trust—such as a beneficiary’s forfeiture of an interest under the slayer statutes if the beneficiary murders the decedent.¹⁶² A person, however, should otherwise have the right to affirmatively determine who will receive his assets.

This is particularly important in the law of wills and trusts, where there is an established principle that the transferor’s intent governs.¹⁶³ The UPC echoes this sentiment by pointing out that, although its anti-lapse provision is a rule of construction, “the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether the testator has formed a contrary intent.”¹⁶⁴

In addition, the modern trend has been to reject formalism and embrace means of bringing about the testator’s true intent.¹⁶⁵ As the renowned trusts and estates scholar Professor John H. Langbein, notes: “[I]nvalidating a genuinely intended transfer on account of an innocuous formal defect works unjust enrichment. The person who was meant to take does not, and a person who was not meant to take gets the

taking the place of a family and to make a pronouncement to that effect in a *testament* whereby they become his rightful heirs.

Id.

If, however, decedent’s intent is the most important goal in shaping default rules, then increases in administrative costs and complexity will simply have to be accepted as the inevitable bedfellows of a succession system in which decedent’s intent takes its rightful place on top of the pile of competing policy goals. In addition, effectuating testator’s intent leads to the correct result. Intent effectuating default will provide flexibility to encapsulate the changing nature of the American family and further various economical and societal values.

See Tritt, *supra* note 13, at 288.

¹⁶² See, e.g., UNIF. PROBATE CODE § 2-803 (2010).

¹⁶³ See Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1037 (1994) (“The first principle of the law of wills is freedom of testation.”); Schwartz, *The New Restatement*, *supra* note 52, at 221 (criticizing the then independent Division V of the Restatement (Third) of Property: Wills and Other Donative Transfers for its failure to write rules that more clearly accomplish testators’ intent, which the article argues, “violates the most fundamental principle in the law of wills: that the testator’s intention is paramount”); Waggoner, *The UPC Extends*, *supra* note 158, at 2339 (“The settlor’s intent controls the construction of trusts.”).

¹⁶⁴ UNIF. PROBATE CODE § 2-603 cmt. “Antilapse” Statutes—Rationale of Section 2-603 (2010); see also LA. REV. STAT. ANN. § 9:1724 (2012) (“The provisions of this Code shall be accorded a liberal construction in favor of freedom of disposition.”); WIS. STAT. ANN. § 854.06 (West 2013) (permitting extrinsic evidence of the transferor’s contrary intent which may be introduced to make the anti-lapse provision inapplicable).

¹⁶⁵ See Cooper, *supra* note 87, at 221 (stating that Connecticut’s Supreme decision in *Erickson v. Erickson* “furthered a modern trend long urged by prominent scholars, including the draftsmen of the 1990 revisions to the UPC, rejecting needless formalism and embracing creative means of effectuating a testator’s true intent”); Mann, *supra* note 163, at 1033 (“‘Down with formalism’ has been the rallying cry of probate reform since 1975, when John H. Langbein published his landmark critique of formalism in wills adjudication.”).

resulting windfall."¹⁶⁶ Hence, any rule regarding redistribution of a gift to a beneficiary who has died prematurely should avoid any such unjust enrichment of substituted takers.

Unfortunately, there are no easy solutions to the challenges posed by the effect of the operation of anti-lapse statutes both in the context of wills and trusts. Nonetheless, this Article identifies and outlines several viable solutions.

One solution attempts to harmonize lapse in wills with trusts. This solution advocates applying the common law of wills to trusts. Under the common law, if a beneficiary of a will predeceases the testator, the devise altogether lapses.¹⁶⁷ In a parallel system, if a beneficiary of a trust predeceased the date of distribution of his interest, his gift would likewise lapse. In either event, rather than substituting individuals based on some presumed intent of the testator or settlor, the lapsed devise or gift would go through the testator or settlor's residuary provisions or to her heirs through intestacy. Critics would balk at abrogating the common law trust principle of interests arising at the creation of a trust—a solution more draconian than anti-lapse statutes that convert a descendible vested remainder into a contingent remainder.

A second solution attempts to integrate the law of wills with the law of trusts. It creates a dual-tiered system, which would eliminate lapsed gifts from passing to the residuary devisees or to the testator's heirs through intestacy. This solution follows through on the concept that most testators would want their family members to be favored devisees. Under this scenario, anti-lapse statutes would be retained only for wills. Thus, if a devisee were to predecease a testator, that person's devise would be distributed to the devisee's descendants as substitute takers. However, if the devisee has no descendants, then the devise would be treated much like an interest in a trust is treated under the common law, i.e., the gift to the predeceased beneficiary would be distributed to the predeceased beneficiary's successors in interest.

Yet another solution is to interpret a testator/settlor's will and trust *in pari passu*, rather than reading each document in isolation. When anti-lapse statutes were first enacted, trusts were not as prevalent.¹⁶⁸ However, trusts are now ubiquitous and are often a property owner's main estate planning tool.¹⁶⁹ Property owners create estate plans as a whole, and consequently their estate planning documents should be read as a whole, rather than each in isolation. Applying one anti-lapse statute for a will and a different anti-lapse statute for a trust may be entirely inconsistent with the

¹⁶⁶ John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 9 (2012) (citing scholarship written by himself and Professor Lawrence W. Waggoner regarding the reformation doctrine and the harmless error rule).

¹⁶⁷ Waggoner, *The UPC Extends*, *supra* note 158, at 2313.

¹⁶⁸ See *supra* note 161 and accompanying text.

¹⁶⁹ Langbein, *supra* note 166, at 12. Professor Langbein notes, however, that certain forms of wealth transfer, particularly those that transfer wealth on death, such as life insurance policies, retirement plans, pay on death bank accounts, and transfer on death securities accounts, are also on the rise. *Id.* at 10-14.

testator/settlor's distributive intent and lead to internal conflicts within an estate plan.¹⁷⁰

Having propounded a few options, it still behooves us to query whether there remains any role for anti-lapse statutes for wills and trusts. One could advocate altogether doing away with anti-lapse statutes. Allow the will or trust to speak for itself. In other words, read instruments and interpret them as written—nothing more and nothing less. Under this system, attorneys would need to ask the right questions—they would be forced to pay attention to their client's wishes and carefully draft estate planning documents.¹⁷¹ Just as each person is unique, each person's sense of family is unique and each estate distribution is unique. Boilerplate form language would need to be avoided.¹⁷² However, with self-help estate planning,¹⁷³ testators and settlors who draft their own documents may not comprehend the consequences under the common law of providing for a beneficiary who may predecease them. The comment to UPC § 2-603 recognizes that property owners may not, on their own, consider the possibility that a beneficiary may

¹⁷⁰ “Dealing with [a] multiplicity of [instruments of] transfers—coordinating them into a sensible plan, and keeping the beneficiary designations up to date in accord with changing circumstances—has become a central problem of modern estate planning.” *Id.* at 12.

¹⁷¹ See Becker, *supra* note 110, at 776, 808-10 (underscoring the importance of good estate planning in avoiding problems associated with survivorship). In his erudite article critiquing the impact of UPC § 2-707 on trusts law, Professor David M. Becker notes:

As a result of its condition of survivorship and substitute gift, § 2-707 should save estate owners from the negligence of lawyers who fail to ask the right questions and create the right provisions. Indeed, once one assumes that the implied condition of survivorship and the substitute gift imposed by § 2-707 would be preferred by essentially all estate owners and that an estate plan that provides otherwise could only arise because of neglect, lack of forethought, mistake, or inadvertence, surely one could then characterize the lawyer responsible for such an estate plan as negligent. Consequently, § 2-707 protects the public against bad trusts and bad lawyering.

Id. at 776 n.11. The author suggests that an anti-lapse statute cannot protect the public from “bad trusts and bad lawyering” when attorneys fail to ask the right questions, understand their clients goals, and draft estate planning documents carefully. *Id.*

¹⁷² Cf. Cooper, *supra* note 87, at 217-18 (“The drafters’ [of the UPC] concern thus is not with the use of boilerplate in and of itself, but rather with the quality of that boilerplate. Specifically, the drafters believe that boilerplate use of words of survivorship to negate an anti-lapse statute might not alert the client to the legal effect of what the lawyer has done and thus might not prompt the client to initiate further discussion on the subject. Envisioning this to be the common scenario, the drafters of the UPC proffer a solution: better boilerplate, their boilerplate. . . . These suggestions seem futile. . . . This approach merely would ensure that the lawyer’s formbook contains the boilerplate written by the drafters of the UPC. It simply does not seem worthwhile to disrupt established patterns of will drafting in pursuit of that end result. In sum, if many lawyers in Connecticut understood for nearly two centuries that the words ‘if she survives me’ would be sufficient to negate the anti-lapse statute, as even the drafters of the UPC concede they might have, then the draftsman’s use of such language in Swanson’s Will should be assumed to reflect a conscious choice and be given its intended effect.”).

¹⁷³ See, e.g., French, *supra* note 8, at 337; Hirsch, *Text and Time*, *supra* note 25, at 624.

predecease them.¹⁷⁴ Ergo, it would behoove a testator or settlor to prepare her estate plan with an attorney. Yet, as preeminent trusts and estates scholar Professor Adam J. Hirsch astutely notes, "A sensible rule of thumb to adopt is that an inheritance default—or any component thereof—should never become so complex that it appears to require specific consultation with an attorney to fathom."¹⁷⁵ Even if a property owner were to employ an estate planning attorney, language drafted by the attorney and included in estate planning documents regarding any such event "does not guarantee that the lawyer's intention represents the client's intention."¹⁷⁶ "Professionally drafted [estate planning documents purportedly] reflect the benefactors' *informed* intent. Is that the intent [distribution] defaults should strive to mimic?"¹⁷⁷

A corollary to this proposition is to treat a testamentary disposition as an outright completed gift from the outset, *i.e.*, treat it as if the beneficiary had a property interest from the time the will or the trust was executed.¹⁷⁸ Under such a system, if the beneficiary predeceased the testator or settlor, the gift would be distributed to the deceased beneficiary's successors in interest, whoever they may be. If the predeceased beneficiary died without a will, the property would go to his heirs under the jurisdiction's intestacy statutes; if the beneficiary died with a will, it would go to the devisees of his will. This may be referred to as the "Maryland model," as Maryland's wills anti-lapse statute follows a similar scheme.¹⁷⁹ Under this proposal, a gift is a gift and nothing else. A gift in a will or trust would be treated just like any other gift given during life—a concept a testator or settlor would easily understand.

A better solution that tackles the issue head on and preserves a testator's or settlor's intent is to use reformation to address the issue of a predeceased beneficiary. The doctrine of reformation permits the terms of a will or trust to be

¹⁷⁴ "[I]t cannot be assumed that all clients, on their own, [will anticipate] the possibility that [a] devisee will predecease the client and will have thought through who should take the devised property in case the never-anticipated event happens." UNIF. PROBATE CODE § 2-603 cmt. General Rule of Section 2-603—Subsection (b).

¹⁷⁵ Hirsch, *Default Rules in Inheritance Law*, *supra* note 11, at 1064.

¹⁷⁶ UNIF. PROBATE CODE § 2-603 cmt. General Rule of Section 2-603—Subsection (b).

¹⁷⁷ Hirsch, *Default Rules in Inheritance Law*, *supra* note 11, at 1074 (emphasis added). In analyzing the meaning of intent regarding inheritance defaults, Professor Hirsch notes that "informed-intent defaults tend to produce inefficiency" as they "encourage consultation with estate planners (at a more substantial transaction cost)" as opposed to laws based on unformed consent. *Id.*

¹⁷⁸ Of course, a testator may revoke a gift during her lifetime by executing a new will or codicil. *See* UNIF. PROBATE CODE § 2-507. Likewise, a settlor of a revocable trust could potentially amend her trust to remove an individual as a beneficiary of that trust. *See* UNIF. TRUST CODE § 602 (2000). Thus, a purported gift under this scheme would be subject to any such revocation.

¹⁷⁹ *See* MD. CODE ANN., Est. & Trusts § 4-403 (West 2013); *see also* Segal v. Himelfarb, 766 A.2d 233, 236 (Md. Ct. Spec. App. 2001) (applying the anti-lapse statute, the court stated, "although Mr. Segal predeceased his wife, the bequest from her passes to him, as if he had died owning the property").

corrected if any such terms are affected by a mistake of law or fact.¹⁸⁰ Under the reformation doctrine, a court may reform either instrument based on clear and convincing evidence of the transferor's intent.¹⁸¹ "The rationale for reformation starts with the fundamental policy value of the law of donative transfers: implementing transferor's intent."¹⁸²

For example, in *In re Trust of O'Donnell*, the Nebraska appellate court was faced with the issue of who was to receive monies remaining in a testamentary trust upon the death of the beneficiaries.¹⁸³ In that case, the testator's will provided for two testamentary trusts—one for her cousin, Ruby Morrissey, and another for Ruby's son, John Morrissey.¹⁸⁴ Both Ruby and John died after the testator but before exhausting the principal placed in each trust, which was to be distributed in monthly installments.¹⁸⁵ The will did not address who would receive the remaining corpus.¹⁸⁶ The lower court examined extrinsic evidence and proceeded to reform the trust to conform to the settlor's intent.¹⁸⁷ The court found that the testator intended for any remaining principal to be distributed to the beneficiaries' daughter and sister, Deborah Sanwick, rather than to the residuary devisee.¹⁸⁸ After de novo review, the appellate court affirmed, noting that the testator's failure to address how to distribute the funds upon the early death of a beneficiary was "a mistake of fact or law."¹⁸⁹

Nebraska only has an anti-lapse statute for wills,¹⁹⁰ which was not applicable in this case because the beneficiaries survived the testator's death.¹⁹¹ If, however, *In re Trust of O'Donnell* had been decided in a jurisdiction that adopted UPC § 2-707, the result may have been different. Because the beneficiaries died before the date of distribution of future monthly payments of principal, and because the testator's will was silent regarding distribution of any remaining funds, presumably, the anti-lapse would kick in. As such, the principal remaining in Ruby's testamentary trust would still go to Sanwick because she was Ruby's descendant. On the other hand, the funds

¹⁸⁰ UNIF. PROBATE CODE § 2-805 (2010); UNIF. TRUST CODE § 602, § 415 (2000); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003).

¹⁸¹ UNIF. PROBATE CODE § 2-805 (2010); UNIF. TRUST CODE § 602, § 415 (2000); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003).

¹⁸² Langbein, *supra* note 166, at 8; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. b ("Equity rests the rationale for reformation on two related grounds: giving effect to the donor's intention and preventing unjust enrichment. The claim of an unintended taker is an unjust claim.").

¹⁸³ *In re Trust of O'Donnell*, 815 N.W.2d 640, 644 (Neb. Ct. App. 2012).

¹⁸⁴ *Id.* at 698.

¹⁸⁵ *Id.* at 641-42.

¹⁸⁶ *Id.* at 644.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 647. The court took particular notice that the testator, "who had no legal training or expertise, drafted the will herself." *Id.*

¹⁹⁰ NEB. REV. STAT. § 30-2343 (2012).

¹⁹¹ *See O'Donnell*, 815 N.W.2d at 642.

remaining in John's trust would be distributed to his descendants, if any, or to the residuary devisee, rather than to Sanwick. Hence, the anti-lapse statute would subvert what was found to be the testator's intent.

In effect, this reformation solution would work similar to the *cy pres* doctrine. *Cy pres* applies when, among other circumstances, a future interest in a trust is created to benefit a charity, but that charity is no longer in existence.¹⁹² Rather than allowing the gift to fail, the court will direct the gift to another charity that reasonably approximates the settlor's purpose.¹⁹³ Because the settlor's original intent could not be carried out, his intent will be given effect as nearly as possible.¹⁹⁴ Similarly, rather than distributing a decedent's property upon presumed intent as to his wishes should a beneficiary predecease him, a court may redirect the property to effectuate the testator/settlor's actual intent as nearly as possible. The court may consider extrinsic evidence to determine the decedent's intent as to whether he would have preferred the gift to lapse or would have preferred that the property be distributed to the beneficiary's spouse, descendants, heirs, or other successors in interest. Admissible evidence may include testimony regarding the testator's or settlor's relationship to the beneficiary, his relationship to the beneficiary's spouse or children, and his relationship to his family.¹⁹⁵ New Jersey has adopted a similar scheme in its probable intent doctrine.¹⁹⁶ The New Jersey statute provides as follows:

- a. The intention of a testator as expressed in his will controls the legal effect of his dispositions, and the rules of construction . . . [including the anti-lapse statute] shall apply *unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary.*
- b. The intention of a settlor as expressed in a trust, . . . controls the legal effect of the dispositions therein and the rules of construction . . . shall apply unless the probable intent of such settlor or of such individual, *as indicated by the trust . . . and relevant circumstances, is contrary . . .*¹⁹⁷

¹⁹² UNIF. TRUST CODE § 413 (2000); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.

Id.

¹⁹³ RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); *see also* UNIF. TRUST CODE § 413(a)(3) (“[T]he court may apply *cy pres* to modify . . . the trust by directing that the trust property be . . . distributed . . . in a manner consistent with the settlor's charitable purposes.”).

¹⁹⁴ *Id.*

¹⁹⁵ UPC § 2-601 allows for introduction of extrinsic evidence to determine a testator's intent. UNIF. PROBATE CODE § 2-601 cmt. Purpose and Scope of 1990 Revisions (amended 2010).

¹⁹⁶ N.J. STAT. ANN. § 3B:3-33.1 (West 2005).

¹⁹⁷ *Id.* (emphasis added).

This statute permits introduction of extrinsic evidence.¹⁹⁸

Although the reformation doctrine is well established for trusts, only recently has it begun to be applied to wills.¹⁹⁹ In an earlier article advocating adopting the reformation doctrine for wills, Professors John H. Langbein and Lawrence W. Waggoner noted:

The question is whether these statutory gap-filling rules [such as anti-lapse] take precedence over reformation in a well-proven case of mistake. The answer is no, and the reason is straight-forward, even though the language of such a statute often gives seeming plausibility to the opposite view. Since the statute typically requires contra-indication “in the will,” it is mechanically correct to observe that a mistakenly omitted term is not “in the will.” But the reason why such statutes should not bar application of the reformation doctrine is clear: The theory of a well-proven reformation case is that language mistakenly omitted from the will is being restored to the place in the will where it was intended to be. Because reformation puts the language back in the will, there is no gap for the gap-filling statutes to fill. Reformation is based upon the testator’s actual intent and his actual language, whereas a statutory rule of construction is a device of subsidiary rank, tailored in one size for all silent testators.²⁰⁰

If implementing a testator’s or settlor’s intent is of utmost importance, should we rely on these one-size fits all anti-lapse statutes? Or would applying the reformation doctrine better serve this goal?

VI. CONCLUSION

When the UPC was revised in 1990, it was done so in response to what its drafters deemed developments that required revisions:

(1) the decline of formalism in favor of intent-serving policies; (2) the recognition that . . . inter vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; [and] (3) the advent of the multiple-marriage society, resulting in a

¹⁹⁸ See *In re Estate of Payne*, 895 A.2d 428, 434 (N.J. 2006) (“Extrinsic evidence may ‘furnish information regarding the circumstances surrounding the testator and should be admitted to aid in ascertaining the testator’s probable intent under the will.’” (citing *Wilson v. Flowers*, 277 A.2d 199 (N.J. 1971))). However, in a 1985 article calling for reform of anti-lapse statutes, Professor Susan F. French notes that the New Jersey “approach [was] met with resistance because it opens the possibility that every case involving any substantial sum will be subject to litigation.” French, *supra* note 8, at 373 (citations omitted).

¹⁹⁹ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. c (2003).

²⁰⁰ John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 580 (1982) (citations omitted).

significant fraction of the population being married more than once and having stepchildren and children by previous marriages²⁰¹

Did the revisers of the UPC respond accordingly? Is a testator's or settlor's intent truly respected under the anti-lapse rules? Should trusts, as a major source of wealth transfer, be subject to such complicated default rules? Did the UPC allow for changes in the family paradigm?

Anti-lapse statutes are somewhat rigid and restrictive. They do little in the way of intent-serving policies—ignoring a testator's actual intent, in favor of a presumed intent. They were designed to keep estates within certain lines of succession and to avoid unnecessary death costs. Should those societal goals outweigh an individual's right to dispose of his property as he intends?

There is no easy answer as one thinks through these complex theoretical issues and analyzes the varying proposals. Arguments can be made for and against each of the proposals discussed above. Ultimately, in light of all the flaws with the inconsistent anti-lapse statutes, it appears that the best solution when the issue of a predeceased beneficiary arises is reformation. This would result in a distribution as close as possible to the testator's or settlor's intent when the drafting of the will or trust is less than perfect.

²⁰¹ UNIF. PROBATE CODE art. II, references and annot., prefatory note (amended 2010). The prefatory note includes a fourth reason: "the acceptance of a partnership or marital-sharing theory of marriage." *Id.*

APPENDIX: WILLS AND TRUSTS ANTI-LAPSE STATUTES COMPARISON CHART

Protected Takers	Wills	Trusts
Grandparent (GP) or GP's descendant/goes to issue	Alabama, Arizona, Delaware, Florida, Idaho, Maine, Massachusetts, Minnesota, North Carolina, North Dakota, South Carolina ⁱ , Virginia, Washington ⁱⁱ , Wyoming	South Carolina ⁱⁱⁱ , Washington ^{iv}
GP or GP's descendant/goes to issue/words of survivorship not contrary intent	Colorado	
GP or GP's descendant or stepchild/ goes to issue	New Jersey, South Dakota ^v , Utah, Wisconsin	South Dakota ^{vi} , Wisconsin ^{vii}
GP or GP's descendant or stepchild/ goes to issue/words of survivorship not contrary intent	Alaska, Hawaii, Michigan, Montana, New Mexico, Ohio	Ohio
Descendants/goes to issue	Arkansas, Illinois, Indiana ^{viii} , Mississippi ^{ix} , Nevada ^x	Illinois ^{xi} , Indiana ^{xii}
Descendants, siblings/goes to issue	Connecticut ^{xiii} , Louisiana ^{xiv} , New York, Pennsylvania ^{xv} , Texas ^{xvi}	Louisiana ^{xvii}
Kindred/goes to issue	California ^{xviii} , Kansas ^{xix} , Missouri, Nebraska, Oklahoma ^{xx} , Oregon, Vermont ^{xxi}	California ^{xxii} , Oklahoma ^{xxiii} , Oregon
Any beneficiary survive to distribution/goes to issue	District of Columbia ^{xxiv} , Georgia, Iowa ^{xxv} , Kentucky ^{xxvi} , New Hampshire ^{xxvii} , Rhode Island ^{xxviii} , Tennessee ^{xxix} , West Virginia ^{xxx}	Arizona, Florida ^{xxxi} , Iowa ^{xxxii} , Massachusetts, Utah
Any beneficiary survive to distribution/goes to issue/words of survivorship not contrary intent		Alaska, Colorado, Hawaii, Michigan, Montana, New Mexico, North Dakota
Any beneficiary vests	Maryland	Delaware
No statute/Common law		Alabama ^{xxxiii} , Arkansas ^{xxxiv} , Connecticut, Delaware, District of Columbia, Georgia, Idaho, Kansas, Kentucky,

		Maine ^{xxxv} , Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire ^{xxxvi} , New Jersey, New York, North Carolina ^{xxxvii} , Pennsylvania ^{xxxviii} , Rhode Island, Tennessee ^{xxxix} , Texas, Vermont ^{xl} , Virginia, West Virginia ^{xli} , Wyoming
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- ⁱ Refers to great-grandparent or descendant of great-grandparent.
- ⁱⁱ Limited to GP's descendants. No mention of class gifts.
- ⁱⁱⁱ Refers to great-grandparent or descendant of great-grandparent. Applies only to revocable trusts.
- ^{iv} Limited to GP's descendants.
- ^v Includes descendants of stepchild.
- ^{vi} Includes descendants of stepchild.
- ^{vii} Applies only to revocable trusts.
- ^{viii} No mention of class gifts.
- ^{ix} No mention of class gifts.
- ^x No mention of class gifts.
- ^{xi} Expressly applies only to inter vivos trusts.
- ^{xii} No mention of class gifts.
- ^{xiii} Includes stepchild. No mention of class gifts.
- ^{xiv} Includes siblings' descendants. Statute refers to joint legatees rather than class gifts.
- ^{xv} Includes siblings' children.
- ^{xvi} Includes siblings' descendants.
- ^{xvii} Limited to testamentary trusts. Includes siblings' descendants. Exception regarding class gifts, which may only be made to certain kindred (children, grandchildren, great grandchildren, nieces, nephews, grandnieces, grandnephews, great grandnieces, and great grandnephews)—interest vests unless trust provides otherwise.
- ^{xviii} Includes "kindred of a surviving, deceased, or former spouse."
- ^{xix} Includes spouse and relative within sixth degree; no mention of class gifts.
- ^{xx} No mention of class gifts.
- ^{xxi} No mention of class gifts.
- ^{xxii} Includes "kindred of a surviving, deceased, or former spouse."

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- xxiii No mention of class gifts.
 - xxiv No mention of class gifts.
 - xxv Excludes spouse.
 - xxvi No mention of class gifts.
 - xxvii No mention of class gifts.
 - xxviii No mention of class gifts.
 - xxix Applies only to revocable trusts that become irrevocable upon settlor's death.
 - xxx No mention of class gifts.
 - xxxi Expressly applies both to inter vivos and testamentary trusts.
 - xxxii Does not apply to class gifts.
 - xxxiii Adopts Restatement that rules of construction for wills apply to trusts.
 - xxxiv Rules of construction for wills apply to trusts.
 - xxxv Adopts Restatement that rules of construction for wills apply to trusts.
 - xxxvi Rules of construction for wills apply to trusts.
 - xxxvii Adopts Restatement that rules of construction for wills apply to trusts.
 - xxxviii Adopts Restatement that rules of construction for wills (statute refers to testamentary trusts) apply to trusts.
 - xxxix Adopts Restatement that rules of construction for wills apply to trusts.
 - xl Rules of construction for wills apply to trusts.
 - xli Rules of construction for wills apply to trusts.