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When Beneficiaries Predecease: An Empirical Analysis

Adam J. Hirsch

WHEN BENEFICIARIES PREDECEASE: AN EMPIRICAL ANALYSIS

Adam J. Hirsch[*]

ABSTRACT

Under current law, bequests to beneficiaries who predecease the testator "lapse" to the beneficiary of the residuary, unless they are preserved for the descendants of predeceased beneficiaries under an "antilapse" statute. The beneficiaries covered by antilapse statutes vary from state to state, but in most states today the statutes apply only to blood relatives of the testator as distant as first cousins. This Article examines the public policy of antilapse statutes, assessing them by undertaking the first-ever survey of popular preferences concerning the matter. Harvesting evidence for five types of beneficiaries, the study finds that the prevailing structure of antilapse statutes is both over- and under-inclusive. On one hand, among beneficiaries who comprise blood relatives, most respondents prefer to create substitute bequests only for descendants of predeceased children. Lawmakers should strike other relatives from the statutes' coverage. On the other hand, most respondents would create substitute bequests for their descendants if their spouse predeceased them. Lawmakers should extend the range of the statutes accordingly. Finally, this Article advocates enhancing courts' power to deviate from mechanical rules of lapse in situations where testamentary intent is less predictable.

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[*] Napoleon Jones Professor of Law, University of San Diego. M.A. 1979, J.D. 1982, Ph.D. 1987 Yale University. My thanks to David Horton, Krista Jenkins, Mary Radford, and Reid Weisbord for helpful comments.

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INTRODUCTION

"The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a certain extent, made subservient."

Chancellor Kent[1]

In the nature of things, testators execute their wills at times distinct from when they mature. Historically, the hiatus separating those two events was rarely prolonged. From the medieval age until the late nineteenth century, most testators dictated their wills on the deathbed.[2] However hastily conceived, estate

[1] 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *534.

[2] For an early judicial observation, see Throckmerton v. Tracy (1555) 75 Eng. Rep. 222, 251; 1 Plow. 145, 163 ("[W]ills are most commonly made on a sudden, and in the testator's last moments . . . ."). For a historical study of the timing of will execution in the United States, see Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 *passim* (1964).

plans rarely grew out of date. Nowadays, testators more commonly formulate their estate plans in the prime of life.[3] Unless testators update their wills periodically, changing circumstances can render estate plans anachronistic—or can thwart them altogether.[4]

Consider the case of a will naming a beneficiary who, as matters unfold, predeceases the testator—a common occurrence today.[5] The estate plan can no longer take effect literally. A decedent cannot accept a bequest because doing so is "impossible."[6] Testators might, of course, foresee the possibility of impossibility. Contingency clauses can specify who is to receive a bequest in lieu of a deceased beneficiary. Many wills include such provisions. Many others do not. Homemade wills, making up around a third of the total, are notoriously inattentive to the risk that beneficiaries "of tender age" will fail to survive the testator.[7] Faced with failures of anticipation, lawmakers must step in to reformulate foiled estate plans.

Lawmakers have done so by enacting paired doctrines of *lapse* and *antilapse*. The first establishes general rules, and the second carves out exceptions from those rules. Among American states, statutes of this sort feature notable diversity. Although lawmakers generally agree—as Chancellor Kent maintained[8]—that testamentary intent should guide them in crafting rules that

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[3] *See* Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 248–61 (2018–2019) (presenting data from a new empirical study, and summarizing prior studies, of the time separating dates when wills were executed and death).

[4] For a theoretical overview of the problem, see Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 *passim* (2009).

[5] An empirical study in California found that beneficiaries predeceased testators under 21% of wills admitted to probate. *See* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1152–53, 1553 n.359 (2015).

[6] Glenn v. Belt, 7 G. & J. 362, 367 (Md. 1835); *see also In re* Estate of Thompson, 518 P.2d 393, 395 (Kan. 1974) (observing that predeceased beneficiaries lose their bequests because of "necessity"); Henderson v. Porter (*In re* Ladd) [1932] 2 Ch 219, 224–26 (Eng.) (holding void a provision stating that the will was to take effect even if a beneficiary predeceased the testator, in the absence of affirmative language indicating who was to take the bequest in that event).

[7] Owen v. Owen (1738) 26 Eng. Rep. 313, 313; 1 Atk. 494, 494 (quoting will); *see, e.g.*, Willett v. Estate of Vessells, 629 S.W.3d 20, 22 (Ky. Ct. App. 2021) (concerning a form will). A British study found that whereas 71% of professionally drafted wills contained contingency clauses, only 25% of homemade wills included such clauses. *See* JANET FINCH, LYNN HAYES, JENNIFER MASON, JUDITH MASSON & LORRAINE WALLIS, WILLS, INHERITANCE, AND FAMILIES 130–31 (1996) (studying 800 probated wills between 1959 and 1989). For recent empirical evidence on the frequency of homemade wills in the United States, see Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (finding that 36% of wills were homemade, 37 out of 103 wills studied); David Horton & Reid K. Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149, 1175–76 (finding that 31% of wills were homemade, including software and form wills, 139 out of 443 wills studied).

[8] *See supra* note 1.

fill gaps in wills, lawmakers in different states appear hopelessly at odds over how to accomplish this end. Kent himself hedged in his assessment of the "extent" of lawmakers' subservience to intent.[9] He may have been alluding to other policies setting limits on freedom of testation.[10] The main impediment to consensus, though, is uncertainty. If lawmakers have only an inkling of what the throng intends, they can scarcely respect intent substantively. The scattershot quality of rules of lapse reflects lawmakers' ignorance of testators' preferences.

To take better aim, lawmakers need data. No prior study has undertaken surveys of testamentary intent regarding the treatment of bequests to predeceasing beneficiaries. This Article presents hard evidence on the question for the first time.

The analysis will unfold in stages. Part I examines the problem of lapse through the lens of history. Part II leaps to the present, surveying the current state of the law in this area. Part III reviews the public policies applicable to the problem, underscoring the importance of empirical analysis of testators' intent regarding lapsed bequests. Part IV presents the first-ever empirical study of intent, laying out evidence from five surveys of popular attitudes to the problem. These surveys (graphed in the Appendix) indicate that testators prefer to substitute their children for predeceased spouses, and grandchildren for predeceased children, but otherwise wish to redirect lapsed bequests to the residuary taker of the estate. Part V proposes legislative reforms grounded in the data, together with other reforms based on inferences drawn from the data. Part V also identifies areas where data cannot clarify intent and suggests that lawmakers grant discretion to courts to deviate from mechanical rules in those areas. Finally, the Conclusion weighs in on the larger significance of empirical evidence for inheritance law.

I. HISTORY

The problem of predeceasing beneficiaries generated legal doctrine in England from a remote period.[11] Historically under English law, different courts shared jurisdiction over wills. Whereas inheritance of real property came within the province of the common-law courts, inheritance of personal property—of relatively small value prior to the industrial revolution—lay in the hands of the

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[9] *See supra* note 1 and accompanying text.

[10] For a discussion of those limits, see Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180 *passim* (2011).

[11] For a sixteenth-century discussion, see HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS pt. 7, § 23, at 560–65 (photo. reprt. n.d.) (Dublin, Elizabeth Lynch Law Book-Seller, 7th ed. 1793) (1590).

ecclesiastical courts, whose judges drew on Roman civil law.[12] Inevitably, this dual system led to duels over doctrine. In a myriad of ways, English courts disagreed over rules of inheritance—and because they held sway over separate subject matters, different courts could resolve litigation over a "mixed will," disposing of both real and personal property, inconsistently.[13] Eventually, English reformers simplified this system. Subject-matter unification of the English law of inheritance occurred in increments over the course of the eighteenth, nineteenth, and early twentieth centuries.[14]

So it was with the law of lapse. Testators could anticipate lapse by naming contingent beneficiaries in the event a primary beneficiary predeceased. Clauses providing for this contingency appeared in wills as early as the fourteenth century.[15] In the absence of such a clause, however, English courts needed a rule

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[12] *See* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 135–42, 411–12 (5th ed. 2019). Ecclesiastical courts' jurisdiction over inheritance of personal property began in the thirteenth century. *See id.* at 411.

[13] The division of authority caused friction between the courts, with some judges fearing that one court's ruling on a mixed will would prejudice its treatment by the other court. *See* R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 81–82 (1990) (citing to cases).

[14] The concurrent jurisdiction of Chancery to intervene in inheritance disputes involving both real and personal property added a further complication. *See* ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 145–50 (1928). Under the Statute of Wills of 1540, testators had freedom to devise land, but the act failed to grant freedom to bequeath personal property. *See* Statute of Wills 1540, 32 Hen. 8 c. 1, §§ 1–5 (Eng.). Freedom to bequeath personal property remained a matter of local custom and expanded gradually, becoming universal in England only in 1725, when it was extended to the city of London. *See* City Election Act 1724, 11 Geo. c. 18, §§ 17–18 (Eng.) (effective in 1725). A further step toward unification occurred in 1837, when Parliament harmonized the formalizing rules for wills disposing of real and personal property. *See* Wills Act 1837, 1 Vict. c. 26, §§ 3, 9 (Eng.). The key judicial reform occurred two decades later, when Parliament stripped ecclesiastical courts of their "contentious [j]urisdiction" over probate. Court of Probate Act 1857, 20 & 21 Vict. c. 77, § 3 (Eng.). The Act's preamble observed that "it is expedient that all [j]urisdiction in relation to the [g]rant and [r]evocation of [p]robates of [w]ills and [l]etters of [a]dministration in *England*, should be exercised . . . by [o]ne Court." *Id.* preamble. The probate system was simultaneously broadened to cover estates disposing of real and personal property (real property having not previously been subject to probate). *See id.* § 62. The new Court of Probate took jurisdiction over probate along with all other "matters and causes testamentary," that is, construction proceedings and substantive issues concerning distribution of real and personal property under wills. *Id.* §§ 4, 23; *see also* Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, § 31 (Eng.) (creating the Probate, Divorce, and Admiralty Division of the High Court of Justice as successor to the Court of Probate). A subsequent act extended the probate system to estates composed exclusively of real property and, upon death, vested title to both real and personal property initially in the personal representative (real property having previously vested directly in the heir or devisee). *See* Land Transfer Act 1897, 60 & 61 Vict. c. 65, § 1(1), (3) (Eng.). The final step occurred in 1925, when Parliament harmonized intestate succession of real and personal property. *See* Administration of Estates Act 1925, 15 & 16 Geo. 5 c. 23, § 46 (Eng.); *cf.* Statute of Distributions 1670, 22 & 23 Car. 2 c. 10, §§ 3, 5 (Eng.) (establishing rules of intestate succession confined to personal property).

[15] *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 341 (2d ed., S.F.C. Milsom ed. 1898) (citing will of John de Clyfford, dated 1393, reproduced in 1 TESTAMENTA EBORACENSIA OR WILLS REGISTERED AT YORK 166, 171 (London, J.B. Nichols and Son 1836)). A British court observed the distinction between wills ineffectively seeking to override the rule

of law, and at first they went their separate ways. In the ecclesiastical courts, lapsed bequests of personal property fell into the residue and accrued to the residuary legatee—that is, the taker named to receive any part of the estate left over after satisfying particular bequests under the will; contrarily, in the common-law courts, lapsed devises of real property flowed to the heirs of the testator, bypassing the residue.[16] The distinction blurred when testators left demonstrative devises that provided legacies of money from the sale of land. Most courts treated lapsed demonstrative devises under the common-law rule "because the real estate was land at the devisor's death."[17] Still, the decisions were not unanimous. One high court characterized a lapsed demonstrative devise as "factitious personalty" and allowed it to flow into the residue.[18]

The dichotomy between lapsed bequests and devises emerged out of competing conceptions of testation itself. Following civil law, ecclesiastical courts viewed bequests of personal property as expectancies. In the eyes of the civilians, a residuary clause could therefore be all-encompassing.[19] Its net extended broadly enough to capture lapsed bequests.

Common-law courts took a different view. They conceived devises of real property as *conveyances*, although "not . . . subject to the strict rules of conveyances at common law."[20] A testator could forsake the formal requirements of livery of seisin when executing a will, for example. Yet, testators could only convey via a devise land that they owned at the time when they executed their wills—not land they might acquire thereafter.[21] In this framework, a residuary clause encompassed a testator's interests in real property at the time when the will was executed apart from specific devises of land appearing above the residue—making the residue itself just another specific

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of lapse and wills effectively naming alternative beneficiaries: "It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs." Greenwood v. Sutcliffe (*In re* Greenwood) [1912] 1 Ch 392, 396 (Eng.); *cf.* Henderson v. Porter (*In re* Ladd) [1932] 2 Ch 219, 224–26 (Eng.) (invalidating a bequest that attempted only to countermand the rule of lapse).

[16] *See, e.g.*, Morris v. Underdown (1741) 95 Eng. Rep. 454, 456; Andr. App., at viii, xiii; Roe v. Fludd (1728) 92 Eng. Rep. 811, 811; Fort. 184, 184–85; Wright v. Hall (1724) 92 Eng. Rep. 810, 810; Fort. 182, 182–83.

[17] *See, e.g.*, Smith v. Claxton (1820) 56 Eng. Rep. 784, 787; 4 Madd. 484, 492–93.

[18] Noel v. Noel (1823) 147 Eng. Rep. 702, 724, 729; 12 Price 213, 281–82, 300–01 (appeal taken from Court of Exchequer).

[19] *See, e.g.*, Bland v. Lamb (1820) 37 Eng. Rep. 680, 682; 2 Jac. & W. 399, 405.

[20] Arthur v. Bokenham (1708) 88 Eng. Rep. 957, 959; 11 Mod. 148, 152. Numerous cases remarked the distinction from civil law. *See, e.g.*, Harwood v. Goodright (1774) 98 Eng. Rep. 981, 982–83; 1 Cowp. 87, 90; Windham v. Chetwynd (1757) 97 Eng. Rep. 377, 386; 1 Burr. 414, 429.

[21] *See, e.g.*, *Bland*, 37 Eng. Rep. at 682–83; 2 Jac. & W. at 405. For an authoritative statement, see 2 WILLIAM BLACKSTONE, COMMENTARIES *378.

devise. Its scope therefore excluded lapsed devises, which went to the heirs in the absence of unequivocal language establishing an alternative beneficiary.[22]

One ramification of this dichotomy concerned the disposition of lapsed bequests within the residue itself. Because common-law courts failed to acknowledge the concept of a residue, the issue failed to arise in connection with real property—lapsed devises went to the heirs. In connection with personal property, the same was true if a predeceasing individual comprised the sole residuary beneficiary. But what if a testator divided the residue among several individuals? Did a lapsed bequest increase the shares of surviving beneficiaries, or did it go to the heirs?

Under what has come to be known as the no-residue-upon-a-residue rule, most British courts concluded that a lapsed residuary bequest went to the heirs.[23] Courts reasoned that a residuary clause divided into fractional shares expressed a fixed intent that the court could not modify into different fractions.[24] Nevertheless, the testator could override this rule by so providing in the will, and some courts stretched to discover such an intent.[25]

Whereas the judicial systems functioning in American colonies grew more complex in the eighteenth century, they never replicated the skein of tribunals that had accumulated over the ages in England. Ecclesiastical courts never took root in any colony.[26] Their absence left early American courts free to pick and choose substantive rules from among the pool of English precedents. Oversight by the home government was lax, given the expense—and hence rarity—of appeals.[27] Following the Revolution, of course, even that mild constraint disappeared.

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[22] *See* cases cited *supra* note 16.

[23] *See, e.g.*, Owen v. Owen (1738) 26 Eng. Rep. 313, 314; 1 Atk. 494, 496; Page v. Page (1728) 24 Eng. Rep. 828, 828; 2 P. Wms. 489, 489 (also reported in 93 Eng. Rep. 871; 2 Strange 820). *But see* Hunt v. Berkley (1728) 25 Eng. Rep. 263, 263–64; Mos. 47, 49 (observing that "[t]here is great variety of opinions on this head" and adopting the remain-in-the-residue rule discussed hereinafter).

[24] *See* Bagwell v. Dry (1721) 24 Eng. Rep. 577, 578; 1 P. Wms. 700, 700–01; *see also Page*, 24 Eng. Rep. at 828; 2 P. Wms. at 489 (observing in a case note Lord Talbot's approval of this decision in 1834 on the theory that surviving residuary legatees could take no more than their original fractional interests in the residue).

[25] *See* Knight v. Gould (1833) 39 Eng. Rep. 956, 957–59; 2 My. & K. 295, 296, 298–303 (focusing on "intention").

[26] *See* Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 275 (1967). Only one colony—Maryland—established a separate probate court, called "the prerogative or commissionary general's court." *See id*. at 276.

[27] *See* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 42 (1950) ("Appellate review was a judicial luxury that few litigants in infant plantations could afford, separated as they were by miles of ocean from the appellate body, and hampered by lack of adequate transportation facilities.").

Yet, for all of that, reported cases from the early post-revolutionary period accepted the English distinction between lapsed bequests and devises, now enforced by the same court, almost without exception.[28] American courts continued to describe a devise of land as a "conveyance" under the common law.[29] At least one court expressed its unease but declined to overrule precedent.[30] By the same token, American courts enforced the no-residue-upon-a-residue rule they had inherited from England, despite misgivings that it failed to effectuate intent.[31]

It was left to legislators to revise these rules. Delaware and Virginia led the way in the seventeenth and eighteenth centuries, respectively, enacting early statutes allowing wills to devise after-acquired land—and, following a long pause, a procession of states followed suit in the nineteenth century.[32] Most, but

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[28] The earliest reported case dated to 1793. *See* Lingan v. Carroll, 3 H. & McH. 333, 334, 338 (Md. 1793) (confirming the common-law rule as "settled" doctrine); *see also* Ferguson v. Hedges, 1 Del. (1 Harr.) 524, 529 (Super. Ct. 1835); Gore v. Stevens, 31 Ky. (1 Dana) 201, 206–07 (1833); Hayden v. Stoughton, 22 Mass. (5 Pick.) 528, 531, 537–38 (1827); Ballard v. Carter, 22 Mass. (5 Pick.) 112, 117–18 (1827); Hays v. Jackson, 6 Mass. (5 Tyng) 149, 156 (1809); George v. Green, 13 N.H. 521, 524–27 (Super. Ct. 1843); Van Kleeck v. Reformed Protestant Dutch Church of New-York, 20 Wend. 457, 498–99 (N.Y. 1838) ("The law is well established . . . that a *lapsed devise* goes to the heir . . . . The law, however, in relation to *lapsed legacies* is different. In such case the legacy goes to the residuary legatee."); James v. James, 4 Paige Ch. 115, 117 (N.Y. Ch. 1833) ("It appears to be well settled that in a will of personal estate, a general residuary bequest carries to the residuary legatees . . . every thing which turns out not to have been legally disposed of so as to pass to the persons intended as the objects of the testator's bounty."); Taylor v. Lucas, 11 N.C. (4 Hawks) 215, 215–16 (1825). *But see* Crane v. Heirs of Crane, 2 Root 487, 487–88 (Conn. 1796) (treating both bequests and devises as lapsing into the residue), *overruled by* Greene v. Dennis, 6 Conn. 292, 304–05 (1826) (reaffirming the English distinction between bequests and devises).

[29] *E.g.*, *George*, 13 N.H. at 524–26; Roney v. Stiltz, 5 Whart. 381, 385 (Pa. 1840).

[30] *See George*, 13 N.H. at 525, 527 (characterizing the common-law cases as "hard decisions").

[31] *See, e.g.*, *In re* Gray's Estate, 23 A. 205, 206 (Pa. 1892) (observing that the no-residue-upon-a-residue rule, although a matter of "settled" precedent, "is a sacrifice of . . . [the testator's] plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all"). American courts responded to the British argument, *see supra* note 24 and accompanying text, that courts should abide by fractional interests of the residue allocated by a testator: "How [such a deviation] is substantially different from increasing the share by allowing lapsed specific bequests to pass under the residuary clause is difficult to see." *In re* Slack Trust, 220 A.2d 472, 473 (Vt. 1966); *see also In re* Moloney's Estate, 83 A.2d 837, 838–39 (N.J. Cnty. Ct. 1951) (questioning whether testators would want to confine beneficiaries of "an undetermined and uncertain residue" to "a certain proportional share . . . and no more"); Wright v. Wright, 122 N.E. 213, 217 (N.Y. 1919) (similar statement). *But see In re* Estate of McFarland, 167 S.W.3d 299, 305 (Tenn. 2005) (reiterating the English argument).

[32] Delaware's statute dated to colonial times. *See* REVISED STATUTES OF THE STATE OF DELAWARE 276, ch. 84, § 25 (1668) (Dover, Samuel Kimmey 1852). Virginia's statute was enacted shortly after the Revolution. *See* An Act Concerning Wills (1779), *in* 12 STATUTES AT LARGE OF VIRGINIA 140, ch. 61, § 1 (William W. Hening ed., Richmond, George Cochran 1823). In chronological order after Virginia among the original thirteen states: see 2 REVISED STATUTES OF THE STATE OF NEW-YORK 57, ch. 6, tit. 1, art. 1, § 5 (Albany, Packard & Van Benthuysen 1829); PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 214, tit. 32 (1831) (Hartford, John B. Eldredge 1835) (no ch.); An Act Relating to Last Wills and Testaments § 10 (1833), *in* A COMPLETE DIGEST OF THE LAWS OF PENNSYLVANIA 467 (Philadelphia, James Kay, Jr. & Brother 1837); REVISED STATUTES

not all, courts interpreted these acts to cause lapsed bequests and devises alike to fall into the residue, "the foundation of [the] distinction [having been] removed."[33] The North Carolinians expressly so provided in a companion statute.[34]

In justifying the change, the Revisers in New York condemned the common-law distinction as "wholly arbitrary, . . . [with] no foundation in reason," and likely to confound the expectations of the testator in want of advice by "a well instructed lawyer."[35] Parliament also enacted this reform in the wake of American legislation.[36] The famous Fourth Report of the Commissioners in England who had recommended the change expanded on the Revisers in New York: the common-law rule "frequently defeats the intention of the Testator"

OF THE COMMONWEALTH OF MASSACHUSETTS 417, tit. 3, ch. 62, § 3 (Boston, Dutton & Wentworth 1836); ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 374, ch. 83, § 3 (1844) (Raleigh, Seaton Gales 1851); An Act in Relation to Wills of Real and Personal Estate § 1, *in* PUBLIC LAWS OF THE STATE OF RHODE-ISLAND 230–31 (Providence, Knowles & Vose 1844); COMPILED STATUTES OF NEW HAMPSHIRE 400, tit. 19, ch. 165, § 2 (1848) (Concord, G. Parker Lyon 1854); MARYLAND CODE, PUBLIC GENERAL LAWS 687, art. 93, § 309 (Baltimore, John Murphy & Co. 1860) (applicable to wills executed after May, 1850); A Supplement to the Act Entitled "An Act Concerning Wills," § 3 (1851), *in* A DIGEST OF THE LAWS OF NEW JERSEY 877 (2d ed., John T. Nixon ed., Philadelphia, J.B. Lippincott & Co. 1855) (becoming § 26). Legislation in South Carolina followed a unique, three-stage progression. An act in 1791 disallowed wills from disposing of after-acquired real *or personal* property, unifying the treatment of both forms of property by expanding, rather than relaxing, the common-law rule. *See* An Act for the Abolition of the Rights of Primogeniture (1791), *in* 5 STATUTES AT LARGE OF SOUTH CAROLINA 163, no. 1489, § 4 (Columbia, A.S. Johnston 1839). A subsequent act in 1808 repealed the prohibition on wills disposing of after-acquired personal—but not real—property, thereby restoring the common-law rule. *See* An Act Amendatory of the Act Abolishing the Rights of Primogeniture (1808), *in* 5 STATUTES AT LARGE OF SOUTH CAROLINA, *supra*, at 573, no. 1918, § 2. Finally, an act in 1858 allowed wills to dispose of after-acquired real and personal property. *See* An Act to Alter the Law in Relation to Last Wills and Testaments (1858), *in* 12 STATUTES AT LARGE OF SOUTH CAROLINA 597–98, no. 4395, § 1 (Columbia, Republican Printing Co. 1874). Georgia enacted no provision on point until the twentieth century. *See* 1 CODE OF THE STATE OF GEORGIA 971, ch. 2, art. 5, § 3905 (§ 3329) (Atlanta, Foote & Davies Co. 1911). Today, of course, all states allow wills to dispose of after-acquired real and personal property. *See, e.g.*, UNIF. PROB. CODE § 2-602 (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

[33] Prescott v. Prescott, 48 Mass. (7 Met.) 141, 145–46 (1843); *see also, e.g.*, Smith v. Curtis, 29 N.J.L. 345, 349 (1862); KENT, *supra* note 1, at *542 (drawing this inference); *cf.* Van Kleeck v. Reformed Protestant Dutch Church of New York, 20 Wend. 457, 498–99 (N.Y. 1838) (expressing uncertainty in dicta). *But see* Smith v. Edrington, 13 U.S. (8 Cranch) 66, 69–70 (1814) (asserting that Virginia maintained the common-law distinction as a default rule of construction following enactment of its statute permitting devises of after-acquired real property in 1779, *see supra* note 32, which the court misdated to 1785); Remington v. Am. Bible Soc'y, 44 Conn. 512, 514–16 (1877) (maintaining the common-law distinction despite enactment of its statute permitting devises of after-acquired real property in 1831, *see supra* note 32); Yard v. Murray, 86 Pa. 113, 115–16 (1878) (same distinction in Pennsylvania).

[34] ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 374, ch. 83, §§ 3–4 (1844) (Raleigh, Seaton Gales 1851).

[35] Original Reports of the Revisers (1825), *in* 3 REVISED STATUTES OF THE STATE OF NEW-YORK app. at 628 (Albany, Packard & Van Benthuysen 1836) [hereinafter Reports of the Revisers].

[36] Wills Act 1837, 1 Vict. c. 26, §§ 3, 25 (Eng.) (allowing testators to devise after-acquired real property, and expressly directing lapsed devises to the residue).

and furthermore "renders it necessary for a Testator to republish his Will, or to make a new one as often as he acquires other property."[37] In other words, the common-law rule implicated unnecessary transaction costs. Yet, vestiges of the old rule persisted in some states. In Kentucky, lapsed bequests and devises alike went to the heirs rather than the residue as late as 1974.[38]

Nor was that all. Lawmakers also began modifying rules of lapse to preserve some bequests and devises for the descendants of predeceasing beneficiaries. Once again, Americans led the way. Massachusetts was the first state to adopt what we would today call an "antilapse" statute in 1784.[39] No preamble preceded the act, nor does legislative history survive to reveal the act's provenance or reasoning. The scope of the act was vague. It overrode the traditional rules of lapse with regard to a bequest or devise made to "any child, grand-child, or other relation" who predeceased the testator.[40] Courts subsequently construed the act to cover collateral blood relatives,[41] but not the spouse, stepchildren, or other in-laws of the testator.[42]

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[37] FOURTH REPORT OF THE COMMISSIONERS MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 24, 74 (1833) [hereinafter FOURTH REPORT].

[38] *See* Belew v. Sharp, 696 S.W.2d 788, 790–91 (Ky. Ct. App. 1985) (noting the history). *Compare* KY. REV. STAT. ANN. § 394.500 (West 2017), *with id*., *in* BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED tit. 34, at 43 (3d ed. 1963). In Connecticut, by statute in 1801, both a lapsed "devise or legacy shall be considered and treated as intestate Estate." *See* An Act, in Addition to the Statute, Entitled, "An Act for the Settlement of Testate and Intestate Estates" (1801), *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 548 (Hartford, Hudson & Goodwin 1805); *cf.* Greene v. Dennis, 6 Conn. 292, 305 (1826) (suggesting in dicta that lapsed bequests go to the residue without addressing the statute of 1801). Even after Connecticut allowed wills to dispose of after-acquired real property in 1831, *see supra* note 32, this rule remained in effect. *See* THE GENERAL STATUTES OF THE STATE OF CONNECTICUT tit. 20, ch. 1, § 6 (New Haven, John H. Benham 1866). The statutory language quoted above was not deleted until 1875, when the common-law distinction between lapsed bequests and devises was restored. *See* THE GENERAL STATUTES OF THE STATE OF CONNECTICUT tit. 18, ch. 11, §5 (Hartford, The Case, Lockwood & Brainard Co. 1875); *Remington*, 44 Conn. at 514–16 (confirming the common-law rule). Lapsed bequests continued to go to the residue and lapsed devises to the heirs until 1947, when the modern rule finally came into effect. *See* CONN. GEN. STAT. ANN. § 45a-442 (West 1987) (applicable to wills executed after Oct. 1, 1947). In West Virginia today, under a statute originating in 1882, if the beneficiary of a *joint* bequest predeceases the testator without issue, that part of the bequest goes to the testator's heirs. *See* W. VA. CODE ANN. § 41-3-3 (West 2021). This aspect of the legislation has never been construed and applied in a published case, however.

[39] An Act Prescribing the Manner of Devising Lands, Tenements, and Hereditaments (1784), *in* 1 LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 109, 111, § 8 (Boston, Manning & Loring 1801).

[40] *Id.*

[41] *See* Lee v. Gay, 29 N.E. 632, 632 (Mass. 1892) (nephews and nieces); Howland v. Slade, 29 N.E. 631, 632 (Mass. 1892) (first cousins).

[42] *See* Esty v. Clark, 101 Mass. 36, 38–39 (1869) (spouse); Kimball v. Story, 108 Mass. 382, 385 (1871) (stepchildren); Horton v. Earle, 38 N.E. 1135, 1135 (Mass. 1894) (other in-laws).

The distributive consequences of the Massachusetts act were also unclear. If a beneficiary who comprised a relative of the testator predeceased him or her, "leaving lineal descendants, such descendants shall take the estate, real or personal, in the same way and manner such devisee would have done in case he had survived the testator."[43] This language failed to clarify how descendants in multiple generations shared the bequest. Courts construed the act to divide bequests per stirpes, as under the intestacy statute.[44] If a predeceasing relative left no lineal descendants, courts ruled, the act failed to apply and the traditional rules of lapse took effect.[45] Finally, the Massachusetts act left unstated that it created a default rule of construction, rather than a rule of law.

Similar statutes soon appeared in other states, whose texts drew on the Massachusetts prototype.[46] In adopting their version of the statute, the New Yorkers observed that it was "taken from the laws of Massachusetts . . . and the laws of Virginia," adding that "this section only requires to be read, to be admitted as perfectly just."[47] The scope of these successor acts was clearer than in the original one—and, whereas some narrowed the range of predeceasing

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[43] An Act Prescribing the Manner of Devising Lands, Tenements, and Hereditaments (1784), *in* 1 LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 109, 111, § 8 (Boston, Manning & Loring 1801).

[44] *See* Tillinghast v. Cook, 50 Mass. (9 Met.) 143, 148 (1845). Under the per stirpes scheme of representation, descendants divide equally the share of a predeceased parent even if there are multiple predeceased parents each leaving differing numbers of descendants. For a discussion of this scheme and its alternatives, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 (AM. L. INST. 1999).

[45] *See* Fisher v. Hill, 7 Mass. (6 Tyng) 86, 87 (1810); Ballard v. Ballard, 35 Mass. (18 Pick.) 41, 43 (1836).

[46] In chronological order among the original thirteen states: *see* An Act for the Settling of Testate Estates (1789), *in* CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE 161–62 (Dover, Samuel Bragg 1805); An Act Directing the Manner of Granting Probates of Wills and Letters of Administration (1789), *in* 5 STATUTES AT LARGE OF SOUTH CAROLINA 107, no. 1455, § 9 (Columbia, A.S. Johnston 1839); An Act, in Addition to the Statute, Entitled, "An Act for the Settlement of Testate and Intestate Estates" (1801), *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 548 (Hartford, Hudson & Goodwin 1805); 1 GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND 598, ch. 34, § 4 (1810) (Baltimore, John D. Toy 1840), *construed in* Glenn v. Belt, 7 G. & J. 362, 367–68 (Md. 1835); An Act to Prevent the Lapsing of Legacies and Devises, *in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 27, ch. 19 (Richmond, Samuel Pleasants 1813); REVISED CODE OF NORTH CAROLINA 611, ch. 119, § 28 (1816) (Boston, Little Brown & Co. 1855); A Supplement to an Act Concerning Wills § 3 (1824), *in* A COMPILATION OF THE PUBLIC LAWS OF THE STATE OF NEW JERSEY 90–91 (Camden, J. Harrison 1833); 2 REVISED STATUTES OF THE STATE OF NEW-YORK 66, ch. 6, tit. 1, art. 3, § 52 (Albany, Packard & Van Benthuysen 1829); An Act Relating to Last Wills and Testaments § 12 (1833), *in* A COMPLETE DIGEST OF THE LAWS OF PENNSYLVANIA 468 (Philadelphia, James Kay, Jr. & Brother 1837); A CODIFICATION OF THE STATUTE LAW OF GEORGIA 457, ch. 17, art. 1, § 17 (1836) (Savannah, John M. Cooper 1845); An Act in Relation to Wills of Real and Personal Estate § 8, *in* PUBLIC LAWS OF THE STATE OF RHODE-ISLAND 232 (Providence, Knowles & Vose 1844). Delaware did not enact legislation on point until the twentieth century. *See* REVISED CODE OF DELAWARE 1935, at 819, § 3854 (art. 4 § 56) (Wilmington, Star Publishing Co. 1936) (applying to testators dying after March 15, 1909).

[47] Reports of the Revisers, *supra* note 35, app. at 633.

beneficiaries to lineal descendants only, others expanded the range to all beneficiaries.[48]

Several states also clarified the distributive consequences of the statute. In Virginia, the devise or bequest went instead to the predeceasing beneficiary's own beneficiaries, be they "heirs, devisees, distributees, [or] legatees . . . as the case may be."[49] It was as if the bequest flowed through the predeceasing beneficiary's estate—thus, the bequest was subject to the debts of the predeceasing beneficiary "as if [he or she] had survived such testator."[50] This form of statute lasted in Virginia for all of six years. It was replaced in 1819 by an act providing that the descendants of a predeceasing beneficiary took "as if [the predeceasing beneficiary] had survived the testator or testatrix *and had died unmarried and intestate*"—tweaking the text of the original Massachusetts act.[51]

When it became a state a generation later, Iowa modified this formula. Under its antilapse statute, "[i]f a devisee die before the testator, his heirs shall inherit the amount so devised to him."[52] In Iowa, a surviving spouse took one third of an intestate estate under statutory dower and hence could claim part of a share given to a predeceasing beneficiary by virtue of antilapse.[53] This rule persisted in the state until 1995.[54] But other states confined the operation of antilapse

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[48] Lineal descendants only, among the original thirteen states: Connecticut, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. All beneficiaries, among the original thirteen states: Georgia, Maryland, New Hampshire, and Rhode Island. The later act in Delaware applied to lineal descendants plus siblings and their descendants if the testator left no lineal descendants. *See* statutes cited *supra* note 46; *see also* Van Gieson v. Howard, 7 N.J. Eq. 462, 463 (1849) (construing New Jersey's antilapse statute strictly to exclude from its purview descendants of nephews and nieces).

[49] An Act to Prevent the Lapsing of Legacies and Devises (1813), *in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 27, ch. 19 (Richmond, Samuel Pleasants 1813).

[50] *Id.*

[51] 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 376, c. 104, § 5 (Richmond, Thomas Ritchie 1819) (emphasis added).ha

[52] THE CODE OF IOWA 202, § 1287 (Iowa City, Palmer & Paul 1851). A "devisee" under this section included a legatee. *See id.* 202, § 1286; *cf.* REVISED STATUTES OF THE TERRITORY OF IOWA 472, ch. 162, ch. I, § 22 (Iowa City, Hughes & Williams 1842) (following the Massachusetts formula, *see supra* note 43 and accompanying text, under territorial legislation).

[53] *See* THE CODE OF IOWA 212–15, §§ 1294, 1390, 1407–08, 1421 (Iowa City, Palmer & Paul 1851). Under the common law, dower applied only to widows, and they received a life estate in one third of the real estate, rather than one third of the entire estate in fee simple. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *126.

[54] *See* Petersen v. Attema (*In re* Estate of Micheel), 577 N.W.2d 407, 408–09 (Iowa 1998) (noting the change in the statutory text, in a suit brought by thirteen heirs of a predeceased beneficiary seeking to receive a bequest in her place). A court in Maryland also reached this result by virtue of statutory construction under an antilapse statute applicable to all predeceasing beneficiaries, but without the court expressly addressing the rights of a surviving spouse of the predeceasing beneficiary. *See* Glenn v. Belt, 7 G. & J. 362, 367–68 (Md. 1835).

statutes to provide for the issue of predeceasing beneficiaries, rather than more broadly for their heirs.[55]

Most states parroted the vague language found in the Massachusetts statute concerning the range of benefits covered by the act. Only the Virginians took care to extend the act to interests "in equity"—that is, to trusts.[56] State legislators eventually added language clarifying that their acts created a default rule of construction, bowing to a contingency clause in the will of the testator—Massachusetts amended its statute to include this caveat in 1835.[57] Thus were the first, primitive antilapse statutes gradually refined.

English lawmakers in due course copied the Americans' idea. The English Commissioners asserted in 1833 that the doctrine of lapse "sometimes operates with great hardship, and defeats in many cases the intention of the Testator."[58] Whereas "[i]t is true that the event of death might always be provided for," they observed, "in practice . . . such provision is very rarely made."[59] As they explained, "[a] Testator does not contemplate that the immediate objects of his bounty, and especially his children, will die before him,"[60] and "[h]is legal Advisers think the chance that such an event will happen . . . is too slight an inducement for the trouble of inserting clauses to meet it."[61] The Commissioners added: "in truth it would often be difficult to determine how far such provisions

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[55] *See* A Supplement to an Act Concerning Wills § 3 (1824), *in* A COMPILATION OF THE PUBLIC LAWS OF THE STATE OF NEW JERSEY 90–91 (Camden, J. Harrison 1833); 2 REVISED STATUTES OF THE STATE OF NEW-YORK 66, ch. 6, tit. 1, art. 3, § 52 (Albany, Packard & Benthuysen 1829); An Act Relating to Last Wills and Testaments § 12 (1833), *in* A COMPLETE DIGEST OF THE LAWS OF PENNSYLVANIA 468 (Philadelphia, James Kay, Jr. & Brother 1837); An Act Directing the Manner of Granting Probates of Wills and Letters of Administration (1789), *in* 5 STATUTES AT LARGE OF SOUTH CAROLINA 107, No. 1455, § 9 (Columbia, A.S. Johnston 1839) (including a caveat for predeceasing children whom the testator provided for in their lifetime, following the principle of ademption by satisfaction).

[56] An Act to Prevent the Lapsing of Legacies and Devises, *in* ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 27, ch. 19 (Richmond, Samuel Pleasants 1813).

[57] *See* THE REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 419–20, tit. 3, ch. 62, § 24 (Boston, Dutton & Wentworth 1836); *see also* Weld v. Williams, 54 Mass. (13 Met.) 486, 491–92 (1847) (acknowledging this caveat).

[58] FOURTH REPORT, *supra* note 37, at 73.

[59] *Id.*

[60] *Id.* An American court chimed in that lapse "is a consequence known to few testators; it is an event rarely contemplated by any, and seldom provided for." Craighead v. Given, 10 Serg. & Rawle 351, 353 (Pa. 1823); *see also* Minor's Ex'x v. Dabney, 24 Va. (3 Rand.) 191, 203 (1825) ("No man supposes his legacies will lapse, or will not take place. It is the case of all lapsed legacies." (quoting a British opinion)). Compare the modern insight that "imagining an event may not increase its apparent likelihood . . . when the outcome is extremely negative. Some events are so upsetting that the very act of contemplating them leads to denial that they might occur." SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 125 (1993).

[61] FOURTH REPORT, *supra* note 37, at 73.

should be carried."[62] If a beneficiary might predecease the testator, so might the alternative beneficiary.

The Commissioners knew they could deal with the problem in alternative ways. Concerning the scope of the response, "we are not disposed to recommend alterations of the present Laws further than cases of frequent occurrence and great hardship appear to render necessary."[63] In line with most early American states, the Commissioners proposed to confine their antilapse statute to beneficiaries who comprised descendants of the testator.[64] Nonetheless, the Commissioners broke with most of the American states by suggesting as the alternative taker "the Estate of the deceased Devisee or Legatee"—the solution arrived at initially, and then rapidly discarded, by the Virginians.[65] The Commissioners added cryptically: "[w]e are sensible that there is difficulty as to deciding between the next of kin and the objects of the deceased Legatee's bounty and his creditors" who could take precedence if the bequest flowed through the decedent beneficiary's estate, "but upon the whole we prefer the latter class of objects."[66] Under this model, apart from supervening creditors, alternative beneficiaries could include not only descendants but also spouses or other takers named under the wills of predeceasing beneficiaries.[67]

Parliament approved this proposal, including it within the English Wills Act of 1837.[68] Thereafter, a predeceasing descendent was treated as having survived the testator "by a legal fiction."[69] The rule remained unchanged in England until 1982, when Parliament switched over to the model of substituting the issue of a predeceased beneficiary as the alternative takers, while continuing to restrict the scope of antilapse to a testator's descendants.[70]

Efforts to revamp the no-residue-upon-a-residue rule came later. In 1896, Rhode Island pioneered a statute providing that any lapsed residuary bequest

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[62] *Id.*

[63] *Id.* at 74.

[64] *Id.*; *see supra* note 48 and accompanying text.

[65] FOURTH REPORT, *supra* note 37, at 74. The Commissioners failed to acknowledge its derivation. *See id.*; *see also supra* notes 49–51 and accompanying text.

[66] FOURTH REPORT, *supra* note 37, at 74. Were the Commissioners speaking strictly or loosely when they referred to the "next of kin" rather than the issue of the predeceasing descendent? Under English statutory law, next of kin included a surviving spouse. *See* Statute of Distributions 1670, 22 & 23 Car. 2 c. 10, § 3 (Eng.).

[67] *See, e.g.*, Johnson v. Johnson (1843) 67 Eng. Rep. 336, 339–40; 3 Ha. 157, 165 (applying the resulting act to provide a lapsed bequest to the spouse of a predeceasing beneficiary, as taker under his will); *see also* Eager v. Furnivall [1881] 17 Ch D 115, 119, 121 (Eng.) (holding that the forced share rights of a surviving spouse are pertinent to the determination of the alternative beneficiaries in the event of lapse).

[68] *See* Wills Act 1837, 1 Vict. c. 26, § 33 (Eng.).

[69] Jones v. Hensler (*In re* Hensler) [1881] 19 Ch D 612, 615 (Eng.).

[70] *See* Administration of Justice Act 1982 c. 53, § 19.

went to the other living residuary beneficiaries, if any—what we today call the remain-in-the-residue rule.[71] No preamble or legislative history accompanied this provision.[72] Other states continued to enforce the no-residue-upon-a-residue rule, although some courts—like English courts before them—scoured wills for language from which they could infer an intent to override the traditional presumption.[73]

Neither the English Wills Act of 1837 nor its successors have addressed lapse within the residue.[74] To this day, English courts continue to abide by the no-residue-upon-a-residue rule.[75]

II. MODERN DOCTRINE

A. Wills

1. The States

Today, the rules of lapse have achieved greater regularity but still comprise a patchwork of doctrine among the states. Every state today has a statute on point.[76] Common law fills in the interstices of these acts.[77]

In all jurisdictions today, lapsed bequests of both real and personal property flow into the residue.[78] Meanwhile, as concerns lapsed residuary bequests, the remain-in-the-residue rule has eclipsed the no-residue-upon-a-residue rule, which today continues to operate by case law in only seven states.[79] Of the other

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[71] *See* Woodward v. Congdon, 83 A. 433, 434–36 (R.I. 1912) (noting the statute's history and applying it for the first time).

[72] *See* GENERAL LAWS OF THE STATE OF RHODE ISLAND 664–65, tit. 22, ch. 203, § 7 (Providence, E.L. Freeman & Sons 1896).

[73] *See supra* note 25 and accompanying text. Judge Cardozo opined that the no-residue-upon-a-residue rule is "reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention." Oliver v. Wells, 173 N.E. 676, 678 (N.Y. 1930). In the instant case, Cardozo identified a mere statement in the will that "[t]his clause [is] to be construed and considered as the residuary clause" as sufficient to override the rule. *Id.* (internal quotation marks omitted); *see also In re* Frolich Estate, 295 A.2d 448, 451 (N.H. 1972) ("[C]ourts . . . have strained to the utmost to find the slightest evidence of a contrary intent in order to avoid the rule.").

[74] *See* statutes cited *supra* notes 68, 70.

[75] *See* ROGER KERRIDGE, PARRY AND KERRIDGE: THE LAW OF SUCCESSION ¶ 14-75, at 379 (13th ed. 2016) (citing to cases).

[76] Louisiana was the last of the fifty states to enact an antilapse statute, which took effect in 1999. *See* LA. CIV. CODE ANN. art. 1593 (2001).

[77] *See, e.g.*, UNIF. PROB. CODE § 1-103 (amended 2019), 8 pt. 1 U.L.A. 36 (2013).

[78] *See, e.g.*, *id.* § 2-604(a) (amended 2019), 8 pt. 1 U.L.A. 260 (2013). *But cf. supra* note 38.

[79] These are: Connecticut, Indiana, Louisiana, Mississippi, Nevada, Oklahoma, and Tennessee. In all of these states, the rule is established by case law, not by statute. *See In re* Estate of McFarland, 167 S.W.3d 299,

forty-three states, forty switched over to the remain-in-the-residue rule by statute, and three more have made the change via case law.[80] Still, obsequies for the no-residue-upon-a-residue rule would be premature. The seven hold-out states show no sign of abandoning it.[81]

Rules of antilapse fall along a broad spectrum today. In Maryland, lapsed bequests go to the takers under wills of (or in lieu of a will, the heirs of) predeceasing beneficiaries.[82] This rule resembles the one established under the English Wills Act of 1837, except that creditors of predeceased beneficiaries are barred from claiming any part of a lapsed bequest.[83]

The remaining forty-nine states establish antilapse statutes preserving lapsed bequests for the descendants, if any, of predeceasing beneficiaries. In six states, with maximal breadth, antilapse statutes extend to all beneficiaries.[84] In one more state, the statute includes all beneficiaries other than the testator's spouse.[85] In six states, the statutes encompass all blood relatives.[86] In one state, the statute covers all blood relatives out to the sixth collateral line, plus the spouse.[87] In one state, the statute reaches all blood relatives out to the third collateral line.[88] In twenty-four states, the statutes pertain to all blood relatives out to the second collateral line.[89] In three states, the statutes are confined to the first collateral

304 n.6, 306 (Tenn. 2005) (citing to cases, including one superseded by IOWA CODE ANN. § 633.273A(2) (West 2013)).

[80] The three case-law states are Kansas, New Hampshire, and Vermont. *See* Corbett v. Skaggs, 207 P. 819, 822 (Kan. 1922); *In re* Frolich Estate, 295 A.2d 448, 452 (N.H. 1972); *In re* Slack Trust, 220 A.2d 472, 474 (Vt. 1966).

[81] *See McFarland*, 167 S.W.3d at 308 (reaffirming the rule despite its application in only two previous state cases—a high court opinion from 1852, and an appellate court opinion from 1964).

[82] *See* MD. CODE ANN., EST. & TRUSTS § 4-403(a)–(b) (West 1983); *see also* SECOND REPORT OF GOVERNOR'S COMMISSION TO REVIEW AND REVISE THE TESTAMENTARY LAW OF MARYLAND, ART. 93, DECEDENTS' ESTATES 54–55 (1968) (noting legislative history).

[83] *See* MD. CODE ANN., EST. & TRUSTS § 4-403(c) (West 1983).

[84] *See* GA. CODE ANN. § 53-4-64(a) (West 1996); KY. REV. STAT. ANN. § 394.400 (West 1942); N.H. REV. STAT. ANN. § 551:12 (2022); 33 R.I. GEN. LAWS ANN. § 33-6-19 (West 1956); TENN. CODE ANN. § 32-3-105(a) (West 1997); W. VA. CODE ANN. § 41-3-3 (West 2021).

[85] *See* IOWA CODE ANN. §§ 633.273–.274 (West 1963).

[86] *See* CAL. PROB. CODE § 21110(c) (West 2018); MO. ANN. STAT. § 474.460 (West 1980); NEB. REV. STAT. ANN. § 30-2343 (West 1974); OKLA. STAT. ANN. tit. 84, § 142 (West 1945); OR. REV. STAT. § 112.395 (West 1969); VT. STAT. ANN. tit. 14, § 335 (West 2017).

[87] *See* KAN. STAT. ANN. § 59-615(a) (West 1973).

[88] *See* S.C. CODE ANN. § 62-2-603(A) (2013).

[89] *See* ALA. CODE § 43-8-224 (1982); ALASKA STAT. ANN. § 13.12.603(a) (West 2019); ARIZ. REV. STAT. ANN. § 14-2603(A) (2001); COLO. REV. STAT. ANN. § 15-11-603(2) (West 1995); DEL. CODE ANN. tit. 12, § 2313(a)(1) (West 1995); FLA. STAT. ANN. § 732.603(1) (West 2020); HAW. REV. STAT. ANN. § 560:2-603(b) (West 1996); IDAHO CODE ANN. § 15-2-605 (West 1971); ME. STAT. ANN. tit. 18-C, § 2-603(2) (2019); MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West 2012); MICH. COMP. LAWS ANN. § 700.2603(1) (West 1998); MINN. STAT. ANN. § 524.2-603(1) (West 2022); MONT. CODE ANN. § 72-2-613(2) (West 2019); N.J. STAT. ANN. §

line.[90] In two more states, the statutes apply to the first collateral line, excluding the descendants of siblings.[91] Finally, in the narrowest formulation, five states limit antilapse statutes to descendants of the testator.[92]

Several of the antilapse statutes covering blood relatives also include within their purview relatives by marriage. In ten states, the statutes extend to predeceasing beneficiaries who comprised stepchildren of the testator.[93] In one state, the statute applies more broadly to stepchildren and their descendants.[94] In one state, the statute applies still more broadly to all in-laws of the testator other than a spouse.[95] Finally, in one state, the statute has been construed to cover children given up for adoption whom the testator nonetheless named as beneficiaries.[96]

Viewed as a whole, American antilapse statutes' most salient characteristic is heterogeneity. States have reached a consensus on who the alternative beneficiaries should be—namely, descendants of a predeceasing beneficiary—but on the question of which beneficiaries should come within the ambit of the statute and which should not, widespread divisions remain.

2. The Code

And then there is the Uniform Probate Code. The Code has gone through two iterations. The Uniform Law Commissioners first promulgated the Code in

3B:3-35 (West 2005); N.M. STAT. ANN. § 45-2-603(B) (West 2011); N.C. GEN. STAT. ANN. § 31-42(a) (West 2011); N.D. CENT. CODE ANN. § 30.1-09-05 (West 1995); OHIO REV. CODE ANN. § 2107.52(B)(2) (West 2011); S.D. CODIFIED LAWS ANN. § 29A-2-603(a) (1995); UTAH CODE ANN. § 75-2-603(2) (West 2010); VA. CODE ANN. § 64.2-418(B) (West 2018); WASH. REV. CODE ANN. § 11.12.110 (West 2021); WIS. STAT. ANN. § 854.06(2)(a) (West 1997); WYO. STAT. ANN. § 2-6-106 (West 1980); *see also* Diller v. Diller, 182 N.E.3d 370, 375, 383–93 (Ohio Ct. App. 2021), *appeal granted*, 185 N.E.3d 104 (Ohio Apr. 12, 2022) (No. 2022-0058) (identifying, but declining to correct, a glitch in Ohio's antilapse statute).

[90] *See* LA. CIV. CODE ANN. art. 1593 (2001); 20 PA. STAT. AND CONS. STAT. ANN. § 2514(9) (West 2016) (with exceptions, *see infra* note 352); TEX. EST. CODE ANN. § 255.153(a) (West 2009).

[91] *See* CONN. GEN. STAT. ANN. § 45a-441 (West 1987); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(2) (McKinney 2013).

[92] *See* ARK. CODE ANN. § 28-26-104(2) (West 1979); 755 ILL. COMP. STAT. ANN. 5/4-11 (West 1976); IND. CODE ANN. § 29-1-6-1(1)(g) (West 2012); MISS. CODE ANN. § 91-5-7 (West 1942); NEV. REV. STAT. ANN. § 133.200 (West 2011).

[93] *See* ALASKA STAT. ANN. § 13.12.603(a) (West 2019); CONN. GEN. STAT. ANN. § 45a-441 (West 1987); HAW. REV. STAT. ANN. § 560:2-603(b) (West 1996); MICH. COMP. LAWS ANN. § 700.2603(1) (West 1998); MONT. CODE ANN. § 72-2-613(2) (West 2019); N.J. STAT. ANN. § 3B:3-35 (West 2005); N.M. STAT. ANN. § 45-2-603(B) (West 2011); OHIO REV. CODE ANN. § 2107.52(B)(2) (West 2011); UTAH CODE ANN. § 75-2-603(2) (West 2010); WIS. STAT. ANN. § 854.06(2)(b) (West 2021).

[94] *See* S.D. CODIFIED LAWS § 29A-2-603(a) (1995).

[95] *See* CAL. PROB. CODE § 21110(c) (West 2018).

[96] *See infra* note 360.

1969 and then rewrote its substantive provisions in 1990.[97] The drafters took the opportunity in 1990 to modify the Code's treatment of lapse, but only in part. Aside from insignificant changes in wording, the drafters left the general provision on lapse unaltered.[98] At the same time, they elected to start from scratch as regarded the Code's antilapse provision, scrapping the original text, even while replicating its original structure and scope.[99] And when we probe the new subsections—the capillaries of our law—problems appear.

Before we turn our microscope to the text of the Code, a broader criticism is in order. The Code's original antilapse provision ran to a single paragraph.[100] The revised version "extends now to nearly three pages of printed text," as a court observed dryly.[101] The drafters of the revised provision acknowledge that it is "elaborate and intricate,"[102] but they justify its intricacy as necessary "to deal with a variety of potentially complicated factual situations. The test of a statute," the drafters aver, "is not whether the statute is understandable upon a single reading of its text. The test of a statute is whether it produces a clear and appropriate result."[103] The drafters contend that "a lawyer can resolve [a] case" arising under the provision "by working with the statutory language and official comments for an hour or two."[104]

It is true that, in some respects, the revised antilapse provision is more inclusive than the original one. But it is not "comprehensive," despite the claims of the drafters,[105] nor is its text as clear as they fancy it to be. We shall return to both of those problems presently. Whether the revised provision will serve to reduce litigation, as the drafters hope,[106] is difficult to say. The clearer the outcome of a case, the less likely it is to produce litigation, because adverse

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97 *See* UNIF. PROB. CODE art. 2 prefatory note (amended 2019), 8 pt. 1 U.L.A. 94 (2013).

98 *See id.* § 2-604 (amended 2019), 8 pt. 1 U.L.A. 260 (2013); *id.* § 2-606 (pre-1990 art. 2), 8 pt. 1 U.L.A. 591 (2013).

99 *See id.* § 2-603 (amended 2019), 8 pt. 1 U.L.A. 241 (2013); *id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013).

100 *See id.* § 2-605 (pre-1990 art. 2), 8 pt.1 U.L.A. 587 (2013).

101 Blevins v. Moran, 12 S.W.3d 698, 702 (Ky. Ct. App. 2000).

102 Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1124 (1992).

103 *Id.*

104 *Id.* Query, though, whether a *probate judge*, working for an hour or two, can resolve cases arising under this provision. The drafters seem to have forgotten that probate judges in some states need not be lawyers and hence may not fathom the intricacies of statutory construction. *See, e.g.*, GA. CODE ANN. § 15-9-2(a)(1)(D)–(E) (West 2018) (requiring probate judges to have graduated high school); S.C. CODE ANN. § 14-23-1040 (2013) (requiring probate judges either to have earned a bachelor's degree or to have worked for four years in a probate judge's office).

105 UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

106 *See* Halbach & Waggoner, *supra* note 102, at 1124.

parties can thereby more accurately value their claims and will settle cases they value equally (settlement being cheaper than litigation).[107] Legal clarity is not generated by statutory text alone, however. To the extent prior judicial doctrine has addressed issues that a statute now endeavors to cover, lawmakers trade one body of law for another.

The threat posed by the revised antilapse provision arises earlier, when testators draft their wills. At this stage, the test of a statute becomes whether citizens who make their own wills can understand the rules that it establishes. And in this respect, as is painfully apparent, the revised provision falls short. Its text is tough slogging even for a trained specialist and depends on clarifications found in the comment, which is not enacted by a legislature and must be consulted separately. Even with the assistance of the comment, laypersons would find the task of navigating the revised provision stupefying.

Lawmakers have long identified the comprehensibility of legislation as a metric of its quality. The Revisers in New York tasked with updating rules of inheritance in 1825 resolved to express "in intelligible language" statutes that hitherto had appeared "unintelligible to all not versed in the mysteries of feudal learning."[108] In a classic modern discussion, Professor Lon Fuller emphasized the importance of making statutes understandable in order to facilitate obedience to rules.[109] This desideratum fails to arise when we come to default rules such as lapse, which citizens are not charged to obey. Default rules are made to be broken.

As concerns default rules, the norm of comprehensibility must rest upon a different foundation, and one appears readily. By making default rules clear to citizens, we reduce the risk that they will interpret those rules inaccurately, thereby thwarting their intent. This risk falls disproportionately on poorer citizens. Those who appreciate the risk and can afford professional counsel have less to fear from opaque default rules. Professionals can amortize the information cost of mastering those rules, because they apply them as repeat players to a parade of clients.

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[107] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 22.5, at 781 (9th ed. 2014). *But cf.* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109–10 (1994) (discussing psychological factors that can affect propensities to litigation); Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 433–35 (2005) (surveying the relevant psychological literature).

[108] Reports of the Revisers, *supra* note 35, app. at 626, 632.

[109] *See* LON L. FULLER, THE MORALITY OF LAW 63–65 (rev. ed. 1969).

As regards general rules of lapse, the Uniform Probate Code is unexceptional. Lapsed bequests and devises (collectively called devises under the Code[110]) flow to the residue, whereas lapsed residuary devises are covered by the remain-in-the-residue rule.[111] Incongruously, although the Code addresses class gifts separately under the rules of antilapse,[112] it neglects to do so as concerns lapse. The Code fails to say whether lapsed class gifts that escape the antilapse provision go to other class members or flow into the residue—an issue left to common law.[113]

The breadth of the concept of lapse under the Code is capacious yet uncertain. The Code provides that a devise flows into the residue, and remains in the residue, if it "fails for any reason."[114] Does this language cover bequests that a testator revoked, either by physical act or by codicil, along with lapsed devises? That is unclear, and courts have divided over whether a revoked devise goes to the residue by virtue of this text or passes by intestacy.[115]

The revised antilapse provision elaborates that it pertains to a predeceasing appointee of a power of appointment—an issue not addressed in the original provision.[116] At the same time, neither the original nor the revised provision

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[110] *See* UNIF. PROB. CODE § 1-201(10)–(11) (amended 2019), 8 pt. 1 U.L.A. 46 (2013) (defining "devise" as "a testamentary disposition of real or personal property").

[111] *See id.* § 2-604 (amended 2019), 8 pt. 1 U.L.A. 260 (2013).

[112] *See id.* § 2-603(b)(2) (amended 2019), 8 pt. 1 U.L.A. 241 (2013) (applying the rules of antilapse to lapsed class gifts); *see also id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013) (same).

[113] *See id.* § 2-604(a) (amended 2019), 8 pt. 1 U.L.A. 260 (2013); *see also id.* § 2-606(a) (pre-1990 art. 2), 8 pt. 1 U.L.A. 591 (2013) (same); *cf., e.g.*, 755 ILL. COMP. STAT. ANN. 5/4-11(b) (West 1976) (providing that lapsed bequests to members of a class not preserved by antilapse flow to the surviving members of the class). Illinois' approach corresponds with common-law doctrine. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 27.1 (AM. L. INST. 1988). The Uniform Probate Code includes no provision codifying the class-gift concept, but common law fills gaps in the Code. *See* UNIF. PROB. CODE § 1-103 (amended 2019), 8 pt. 1 U.L.A. 36 (2013).

[114] UNIF. PROB. CODE § 2-604(a)–(b) (amended 2019), 8 pt. 1 U.L.A. 260 (2013); *see also id.* § 2-606(a)–(b) (pre-1990 art. 2), 8 pt. 1 U.L.A. 591 (2013) (same). This language covers devises made to beneficiaries who died before the will was even executed (known as "void" devises), which the Code amalgamates with lapsed devises. *See id.* § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013); *cf., e.g.*, MD. CODE ANN., EST. & TRUSTS § 4-404 (West 1983) (distinguished void devises from lapsed devises).

[115] *Compare* Jones v. Branford, 606 S.W.2d 118, 118–19 (Ark. Ct. App. 1980) (distinguishing revocation from lapse), *with In re* Estate of Doughtie, No. CH05-864, 2006 WL 933372, at *3–4 (Va. Cir. Ct. Mar. 27, 2006) (associating revocation with lapse); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. (AM. L. INST. 1999) (associating revocation with lapse).

[116] *See* UNIF. PROB. CODE § 2-603(a)(5)–(6), (9), (b)(5) & cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013); *cf. id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013). For a discussion, see Sheldon F. Kurtz, *Powers of Appointments Under the 1990 Uniform Probate Code: What Was Done—What Remains to Be Done*, 55 ALB. L. REV. 1151, 1182–201 (1992).

indicates its relevance to predeceasing beneficiaries of a testamentary trust.[117] By default, this issue is left to case law.[118] Nor did either the original or revised provision address its implications for devises appearing in separate writings referred to in a will.[119] And in still another respect, the revised antilapse provision proves less complete than its abbreviated antecedent. The original provision included a clause extending it to beneficiaries who *constructively* predecease the testator.[120] The revised provision omits this clause, obscuring its circumference, and the accompanying comment fails to mention—let alone to explain—the omission.[121]

Perhaps the drafters contemplated treating this issue under other individual sections of the Code. The section covering disclaimers, and the one regarding slayers (albeit only as amended in 1993), clarify that the antilapse provision pertains in both situations.[122] Meanwhile, the section addressing simultaneous

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[117] *See* UNIF. PROB. CODE § 2-603 (amended 2019), 8 pt. 1 U.L.A. 241 (2013); *id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013).

[118] Opinions indicate that when the beneficiary of a life estate in trust predeceases the testator, the antilapse statute fails to substitute a different life tenant. *See* Paine v. Prentiss, 46 Mass. (5 Met.) 396, 399 (1843); Wilder v. Thayer, 97 Mass. 439, 440–41 (1867); Zamichieli Estate, 81 Pa. D. & C. 288, 291 (Orphan's Ct. 1952) (dicta). An interest in a testamentary trust not measured by the life of a predeceasing beneficiary comes under the antilapse statute when the interest is for the beneficiary's "general benefit," but not when it is for a "particular purpose," targeting trust funds to aid the beneficiary in defined ways. *In re* Pierce's Estate, 276 N.Y.S. 433, 434 (Sur. Ct. 1934); *see also Zamichieli Estate*, 81 Pa. D. & C. at 291–94 (applying the antilapse statute to a testamentary trust); Hester v. Sammons, 198 S.E. 466, 469 (same); Estate of Kvande v. Olsen, 871 P.2d 669, 671 (Wash. Ct. App. 1994) (declining to do so because the trust served a "specific purpose"); RESTATEMENT (THIRD) OF TRS. § 44 cmt. d (AM. L. INST. 2003) (suggesting that antilapse statutes could apply to testamentary trusts); L.S.T., Annotation, *Statute to Prevent Lapse in Event of Death of Devisee or Legatee Before Testator as Applicable to Interest of Beneficiary Under Trust Who Dies Before Testator*, 118 A.L.R. 559 *passim* (1939) (collecting cases); *supra* note 56 (citing early statute on point).

[119] *See* UNIF. PROB. CODE § 2-603 (amended 2019), 8 pt. 1 U.L.A. 241 (2013); *id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013). Under the common law, documents incorporated by reference are "treated as part of the will for purposes of . . . construction." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.6 cmt. h (AM. L. INST. 1999). Accordingly, antilapse should apply to devises incorporated by reference. At the same time, the Uniform Probate Code inaugurated a novel statutory doctrine giving effect to signed writings disposing of tangible personal property referred to in a will that are prepared after the will is executed. Whether these writings are likewise subject to rules of construction for wills in unclear. *See id.* § 3.9 (failing to address the issue); UNIF. PROB. CODE § 2-513 (amended 2019), 8 pt. 1 U.L.A. 231 (2013) (same); *cf.* COLO. REV. STAT. ANN. § 15-11-603(3) (West 1995) (clarifying that the antilapse statute is *inapplicable* to signed writings disposing of tangible personal property).

[120] *See* UNIF. PROB. CODE § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013) ("If a devisee . . . fails to survive the testator, *or is treated as if he predeceased the testator*. . . ." (emphasis added)).

[121] *See id.* § 2-603(b) & cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013) ("If a devisee fails to survive the testator . . . .").

[122] *See id.* § 2-1106(b)(3)(B) & cmt., ex. 1(a**)** (amended 2019), 8 pt. 1 U.L.A. 393 (2013) ("[T]he disclaimed interest passes as if the disclaimant had died immediately before the time of distribution."); *id.* § 2-803(e) & cmt. (amended 2019), 8 pt. 1 U.L.A. 323 (2013) ("Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section . . . ."). In some states, descendants of constructively

death states only that a beneficiary who survives the testator but dies within the next five days "is deemed to have predeceased" him or her.[123] The section neglects to specify whether the antilapse provision applies to this constructive event, although the comment attached to the antilapse provision assumes without analysis that it does.[124] Whether the antilapse provision applies to beneficiaries who constructively predecease the testator by virtue of a divorce is less clear, because the relevant comments in the Code contradict each other.[125]

The scope of the revised antilapse provision is similar to that of the original one. As in a plurality of states, both the original and revised provisions give devises to the descendants of predeceasing beneficiaries who are blood relatives within the second collateral line.[126] The revised provision departs from the original one, however, by also extending antilapse to stepchildren of the testator.[127] What explains the Commissioners' choices in setting its purview? The comment accompanying the revised provision indicates only that it conforms to the "presumed intention" of testators but offers no evidence in support of that presumption.[128]

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predeceased slayers forfeit their rights under the antilapse statute. *See* Mary L. Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 531–32 (1986).

123 UNIF. PROB. CODE § 2-702(a) (amended 2019), 8 pt. 1 U.L.A. 271 (2013).

124 *Compare id.* & cmt., *with id.* § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

125 The section of the Code revoking a devise to a spouse upon divorce also applies to a devise to a stepchild. *See id.* § 2-804(a)(5), (b)(1)(A) (amended 2019), 8 pt. 1 U.L.A. 330 (2013). The stepchild is treated as having disclaimed the bequest. *See id.* § 2-804(d). The comment adds: "[T]his means that the antilapse statute applies in appropriate cases in which the divorced individual or relative is treated as having disclaimed." *Id.* § 2-804 cmt. As discussed hereinafter, stepchildren fall within the purview of the Code's antilapse provision. *See id.* § 2-603(a)(7), (b) (amended 2019), 8 pt. 1 U.L.A. 241 (2013). Yet, the comment accompanying the antilapse provision states:

> [T]he antilapse statute does not, of course, apply to a deceased stepchild's devise if it was revoked by Section 2-804 . . . . If a deceased stepchild whose devise was revoked by Section 2-804 had survived the testator, that stepchild would not have been entitled to his or her devise, and so his or her descendants take nothing either.

Id. § 2-603 cmt.

126 *See id.* § 2-603(b); *id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013); *see also supra* note 89 and accompanying text. Although the antilapse provision fails expressly to address adoptees, the Code elsewhere qualifies them as equivalent to blood relatives. *See id.* 2-118(a) (amended 2019), 8 pt. 1 U.L.A. 124 (2013); *cf.* IND. CODE ANN. § 29-1-6-1(g) (West 2011) (applying antilapse only to children adopted *as minors*).

127 *See* UNIF. PROB. CODE § 2-603(a)(7), (b) (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

128 *See id.* § 2-603 cmt. Compare the antecedent Model Probate Code, which extended antilapse to the fourth collateral line. *See* LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE INCLUDING A MODEL PROBATE CODE § 57(b) (1946). An early draft of the Uniform Probate Code followed this model. *See* UNIF. PROB. CODE § 256(b) (UNIF. L. COMM'N, Reporters' Draft No. 1, Aug. 1966). A subsequent draft limited antilapse to the second collateral line, which the text implemented by reference to the scope of intestate succession under the draft Code. *See id.* § 2-603 (UNIF. L. COMM'N, Summer 1967 Draft, July 1967); *see also id.* cmt. (noting that this scope was "broader" than that of some existing statutes and "narrower" than others—hinting at a sort of compromise between them).

In another departure, the revised provision speaks to the substantive effect of alternative devises on an estate plan. As in all states, the Code's lapse and antilapse provisions establish default rules.[129] If a testator makes a devise to A, adding that "if A fails to survive me, then the devise goes instead to B," and this contingency occurs, then B takes the devise, whatever the rules of lapse and antilapse would otherwise provide.[130]

But suppose both A and B predecease the testator. Suppose further that either or both A and B are close relatives of the testator, coming within the purview of the antilapse statute. Who receives the devise under these circumstances? Traditional lapse statutes failed to address this possibility, yet the drafters of the Code recognized the wisdom of doing so. Of course, the likelihood that both devisees and alternative devisees will predecease a testator is small. Nonetheless, events of small probability do occur, or they would be events of no probability.[131]

Four alternative scenarios arise out of this sequence of facts: (1) neither A nor B leaves descendants (or comprises a relative close enough to fall within the purview of the antilapse statute); (2) A (a close relative) leaves descendants and B does not (or is not a close relative); (3) B (a close relative) leaves descendants and A does not (or is not a close relative); or (4) both A and B leave descendants (and both are close relatives). Ideally, the antilapse provision would have addressed in its text each of these scenarios, seriatim. Instead, we must contend with murky language and needlessly complex illustrations in the accompanying comment.

The antilapse provision fails to treat the first scenario. Nonetheless, only one possible outcome could follow here. If both the intended and alternative devisees predecease the testator and neither leaves descendants (or is a close relative), then the devise lapses. Antilapse could not possibly apply in this situation.[132]

What of the second scenario, where the intended devisee leaves descendants but the alternative devisee does not (or is not a close relative)? Here, on analysis, the text of the antilapse provision implies that descendants of the intended devisee inherit in his or her place. The provision states that what it calls the

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129 *See* UNIF. PROB. CODE § 2-603(b)(4) (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

130 *See id.* § 2-603 cmt.

131 Some wills provide expressly for the possibility that both a beneficiary and contingent beneficiaries will predecease the testator. *See, e.g.*, *In re* Estate of Alexander v. Sparks Reg'l Med. Ctr., 533 S.W.3d 618, 621, 630–31 (Ark. Ct. App. 2017); Bosworth v. Parks (*In re* Estate of Bosworth), 342 P.3d 62, 63 (Okla. Civ. App. 2014).

132 *See* UNIF. PROB. CODE § 2-604(a) (amended 2019), 8 pt. 1 U.L.A. 260 (2013).

"substitute gift" for descendants of the intended devisee "is superseded by the alternative devise" created by the will if the alternative devisee "is entitled to take under the will."[133] In this scenario the alternative devisee is not entitled to take. Ergo, the substitute gift is not superseded, and descendants of the intended devisee take the bequest. The comment confirms this result with an opaque example: "$10,000 to my two children, A and B, or to the survivor of them," where both A and B predecease the testator, A leaving a surviving child X and B remaining childless.[134] This devise is a compound of two elements, which for didactic purposes the drafters ought to have differentiated into separate examples: (1) a devise of $5,000 to A, with B as alternative devisee; and (2) a devise of $5,000 to B, with A as alternative devisee. In this example, "X takes the full $10,000."[135] From this result, we can deduce—but only upon analysis—that the $5,000 devise intended for A goes as a substitute gift to A's child, X, notwithstanding the inoperative alternative devise to B.

What of the third scenario, where the intended devisee leaves no descendants (or is not a close relative) but the alternative devisee does? From the example just given, we can again deduce the answer. As regards the $5,000 devise to B, with A as alternative devisee, the $5,000 that neither the intended nor alternative devisee can take goes instead to the child of the alternative devisee as a substitute gift. We know this because "X takes the full $10,000."[136] At the same time, the text of the antilapse provision fails to address this fact pattern directly. It tells us when "a substitute gift is created in the devisee's surviving descendants,"[137] but not when a substitute gift is created in the *alternative* devisee's surviving descendants. We can justify the result reached in the comment's example only by inferring that an alternative devisee qualifies as a devisee. The provision's definitions support that inference but fail to say so explicitly.[138]

Finally, we must dissect the fourth scenario, where both the intended and alternative devisee leave descendants, and both are close relatives. The antilapse provision creates a substitute gift in favor of the intended devisee's descendants unless "the expressly designated devisee of the alternative devise is entitled to take under the will."[139] This language suggests—without stating expressly—that

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133 *Id.* § 2-603(b)(4)(B) (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

134 *Id.* § 2-603 cmt., ex. 5.

135 *Id.*

136 *Id.*

137 *Id.* § 2-603(b)(1).

138 *See id.* § 2-603(a)(1), (5)–(6) (defining the term "devise" to include "an alternative devise" and the term "alternative devise" to mean a type of "devise that is expressly created by the will," but defining "devisee" without reference to an "alternative devisee").

139 *Id.* § 2-603(b)(4)(B).

the descendants of the intended devisee supersede the descendants of the alternative devisee. Here, "the expressly designated devisee of the alternative devise" is unavailable to take.[140] The comment confirms this interpretation.[141] So, the result appears clear, although whether it matches the probable intent of the testator is anyone's guess.

But that is not the end of it. A final subsection provides rules where "substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other."[142] Is a lay person—or an attorney, for that matter—truly expected to decipher this language? By examining the examples in the comment, we can deduce that this subsection applies in cases where two devisees are also alternative devisees of each other's devises, *and* in cases where a testator names descendants of a devisee as his or her alternative devisees.[143] Surely, the drafters could have hit upon more artful language to identify these types of cases. The Code's text seems especially ill-suited to describe the second type of case.

At this juncture, the antilapse provision introduces a new set of terms exclusively for this subsection. The subsection distinguishes a "primary devise" and a "primary substitute gift . . . created [by the antilapse provision] with respect to the primary devise" from other devises.[144]

A "primary devise" is defined as a "devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator."[145] What the drafters achieve (apart from confusion) by switching to this new term is unclear. But never mind. The general rule created by the subsection is that where two devisees are also alternative devisees of each other's devises, "the property passes under the primary substitute gift" created by antilapse for descendants of the recipients of primary devises.[146]

So, consider a case to which this subsection would apply: Testator devises $5,000 to his son, A, but if A predeceases, then to his daughter, B. Testator also devises $7,500 to his daughter, B, but if B predeceases, then to his son, A. Both A and B predecease the testator, and both leave descendants. Who receives

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140 *Id.*
141 *See id.* § 2-603 cmt. (illustrated in first paragraph following subtitle "Subsection (b)(4)").
142 *Id.* § 2-603(c).
143 *See id.* § 2-603 cmt., ex. 7–9.
144 *Id.* § 2-603(c)(3)(A)–(B).
145 *Id.* § 2-603(c)(3)(A).
146 *Id.* § 2-603(c)(1).

what? Again, a primary devise is a devise that would have taken effect if *all* deceased devisees of alternative devises had survived.[147] Both A and B comprise devisees of alternative devises, so assume that both A and B had survived. If both A and B had survived, then A would have taken his $5,000 devise, and therefore it comprises a primary devise. Accordingly, it goes as a primary substitute gift to A's descendants. Likewise, B would have taken her $7,500 devise, and therefore it too comprises a primary devise, which goes as a primary substitute gift to B's descendants.[148]

Through this tortuous process we reach *the same result for dual devises* that the antilapse provision already produces for singular devises.[149] The obvious question to ask, then, is why bother? The text applicable to singular devises can function to dispose of each of the dual devises individually. To this extent, the final subsection comprises nothing other than an elaborate redundancy.

Yet, the final subsection does add an exception from the general rule that the drafters could just as well have located earlier in the antilapse provision. If the alternative devise goes to a descendant or descendants of a devisee—what the subsection calls a "younger-generation devise"[150]—then if both the devisee and a younger-generation alternative devisee predecease the testator, the alternative gift goes to the descendants of the alternative younger-generation devisee rather than to the descendants of the devisee, as would otherwise occur.[151]

The comment illustrates the operation of this exception with an example: Suppose the testator makes a devise to A, but if A predeceases the testator, then instead to A's children, X and Y. A and X predecease the testator, and X leaves two surviving children, M and N. Because the alternative devise went to a descendant of the devisee, the exception applies, and the substitute gift goes by antilapse to takers on the side of the alternative devise. As a result, Y (who survived) receives half, and M and N each receive one quarter of the devise as substitute devisees.[152]

Why carve out this exception? The drafters of the provision state no rationale for it.[153] Their concern appears to be that if the general rule applied here, Y could

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147 *See id.* § 2-603(c)(3)(A).

148 *See id.* § 2-603 cmt., ex. 7.

149 *See supra* notes 139–141 and accompanying text. *But cf.* UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013) (stating inaccurately that "both devises require application of subsection (c)").

150 *Id.* § 2-603(c)(3)(C).

151 *See id.* § 2-603(c)(2).

152 *See id.* § 2-603 cmt., ex. 8.

153 *See id.* § 2-603 cmt.

take both as a substitute and as an alternative devisee, because Y is a descendant of A. Under the general rule, Y, having survived, would take half of the devise as alternative devisee, and then would receive an additional quarter as substitute devisee for A, while M and N would each receive one eighth of the devise. Which result conforms to a testator's probable intent is unknown. In any event, this sort of "multiple" payout does not invariably follow from alternative devises to younger-generation devisees.

Assume the same family tree as in the comment's example. Suppose the testator makes a devise to A, but if A predeceases the testator, then instead to X. Once again, A and X predecease the testator. Because the alternative devise to X is a younger-generation devise, the exception applies. As a result, M and N each receive half of the devise. But if the exception did not apply, then Y would receive half and M and N would each receive one quarter of the devise. In this example, Y would take exclusively as a substitute devisee. Which result is likelier to effectuate the wishes of the testator? Once again, the answer is: Who knows?

The murky complexity of the Uniform Probate Code's antilapse provision represents its ultimate undoing. Its drafters are not oblivious to the problem. They concede that they are "susceptible to the criticism of over-legislating."[154] The greater problem is graceless legislating. This provision is arguably the most awkwardly drafted section of the Code.

Its shortcomings have impressed themselves on lawmakers. Although fourteen states have adopted the Uniform Probate Code,[155] only five have enacted its antilapse provision verbatim.[156] Four more have modified it—two by way of simplification, omitting the final subsection of the provision.[157] Four others have instead enacted the original version of the Code's antilapse provision, snubbing the drafters of the revised provision.[158] And a final Code

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154 Halbach & Waggoner, *supra* note 102, at 1148.

155 These are: Alaska, Arizona, Colorado, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Dakota, South Dakota, and Utah.

156 *See* ALASKA STAT. ANN. § 13.12.603 (West 2019); HAW. REV. STAT. ANN. § 560:2-603 (West 1996); MICH. COMP. LAWS ANN. § 700.2603 (West 1998); MONT. CODE ANN. § 72-2-613 (West 2019); N.M. STAT. ANN. § 45-2-603(B) (West 2011).

157 *See* ARIZ. REV. STAT. ANN. § 14-2603 (2001) (simplification); COLO. REV. STAT. ANN. § 15-11-603 (West 1995); ME. STAT. ANN. tit. 18-C, § 2-603 (2019); UTAH CODE ANN. § 75-2-603 (West 2010) (simplification). Although not a Code state, Ohio's antilapse statute is loosely based on the Code's provision and omits the final subsection. *See* OHIO REV. CODE ANN. § 2107.52 (West 2011).

158 *See* MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West 2012); MINN. STAT. ANN. § 524.2-603 (West 2022); N.J. STAT. ANN. § 3B:3-35 (West 2005) (with modifications); N.D. CENT. CODE ANN. § 30.1-09-05 (West 1995).

state eschewed both versions of the provision.[159] The Uniform Law Commissioners should take heed of these market signals. Something needs to be done about the Code's antilapse provision.

B. Construction

The problem of lapse raises issues of construction as well as law. Doctrines of lapse are, as we have observed, default rules that a testator remains free to override.[160] Testators can do so unambiguously. Nonetheless, testators sometimes sprinkle language in wills that courts could read either as significant or superfluous. The variations of language raising issues of construction are, of course, numberless.[161] Nonetheless, several recur with sufficient frequency as to have built up stores of precedent in the case law.

1. "To A and his heirs"

Some testators style their bequests as going to a named beneficiary "and his heirs." This formula traces to the thirteenth century, if not earlier, when it was deemed necessary to convey a fee simple absolute to the named party.[162] The phrase had a figurative meaning, comprising words of "limitation" pertaining to duration, rather than words of "purchase" delineating ownership, and therefore granted nothing to heirs.[163]

Although the common law failed to require this formula for bequests under wills, in contradistinction to conveyances, testators made a practice of using it, and some have continued to do so long after statutory law abolished the

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159 *See* S.D. CODIFIED LAWS § 29A-2-603 (1995).

160 *See supra* notes 15, 129 and accompanying text.

161 For example, does a "negative" bequest, expressly disinheriting either a specific heir or all heirs not named as beneficiaries under a will, override an antilapse statute that would create an alternative bequest to such an heir? The Uniform Probate Code fails to address this issue. *See* UNIF. PROB. CODE § 2-603 (amended 2019), 8 pt. 1 U.L.A. 241 (2013). Nonetheless, the issue arises periodically in the case law. *See, e.g.*, Norwood v. Barclay, 298 So.3d 1051, 1054–55 (Ala. 2019) (holding a negative bequest covering all unnamed heirs insufficient to override the application for the antilapse statute); Estate of Pfadenhauer, 324 P.2d 693, 696 (Cal. Dist. Ct. App. 1958) (same). For discussions and additional references, see Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1441–42 (2013); C.C. Marvel, Annotation, *Testator's Intention as Defeating Operation of Antilapse Statute*, 63 A.L.R.2d 1172 §§ 7–8 (1959); P.M. Dwyer, Annotation, *Intention of Testator as Defeating Statute to Prevent Lapses*, 92 A.L.R. 853 § 7 (1934). For another such ambiguity, ignored by the Uniform Probate Code while having generated conflicting precedents, see Reid K. Weisbord & David Horton, *Boilerplate and Default Rules in Wills: An Empirical Analysis*, 103 IOWA L. REV. 663, 694–95 (2018) (addressing the meaning of "per capita" or "per stirpes" when attached to an individual bequest).

162 The formula was already in use by Bracton's time. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 344–45 (1929).

163 *Id.*

common-law requirement.[164] Read literally, the phrase might appear to create an alternative bequest in the event that a beneficiary predeceased the testator. In historical context, however, the phrase comprises surplusage.

Presented with this language in wills, most courts have construed the phrase "and his heirs" as insignificant, appearing in wills "in a more or less haphazard way," and creating no alternative bequest.[165] As a court in New York observed, "it is not the policy of the courts . . . to strain after a construction that will prevent legacies from lapsing."[166] Nonetheless, some courts have borne the strain. The term "is a flexible one and may be treated as a word of purchase when such is the intention of the testator," one court posited.[167] In effect, these courts have converted an embellishment into a legal fiction when they infer that the testator would have approved.[168]

The same is true when testators vary the traditional terminology slightly. Some testators have phrased their bequests as directed to a beneficiary "*or* his heirs." In all likelihood, such deviations are mere faulty copies of the original

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[164] *See* JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 41–42 (2d ed. 1975).

[165] Liddell v. Edgar (*In re* Johnson's Estate), 225 N.W. 818, 820 (Wis. 1929); *see also, e.g.*, Jackson v. Hunter (*In re* Sessions' Estate), 153 P. 231, 232–33 (Cal. 1915); Wood v. Seaver, 33 N.E. 587, 587–88 (Mass. 1893); *In re* Martz' Estate, 28 N.W.2d 108, 110 (Mich. 1947); Woelk v. Luckhardt (*In re* Luckhardt's Estate), 277 N.W. 836, 839 (Neb. 1938). For an early example, see Dickinson v. Purvis, 8 Serg. & Rawle 71, 71–72 (Pa. 1822). For collections of cases, see M. C. Dransfield, Annotation, *Devise or Bequest to One "or His Heirs" or to One "and His Heirs" as Affected by Death of Person Named Before Death of Testator*, 78 A.L.R. 992 pt. II (1932); *id.*, 128 A.L.R. 94 pt. II (1940) (cumulative supplement) [hereinafter Dransfield Supp.]; 6 PAGE ON THE LAW OF WILLS § 50.8, at 85–86 (William J. Bowe & Douglas H. Parker eds., 4th ed. 2005 & Supp. Jeffrey A. Schoenblum ed. 2021) [hereinafter PAGE].

[166] *In re* MacKenzie's Estate, 141 N.Y.S.2d 349, 352 (Sur. Ct. 1955).

[167] Flynn v. Bredbeck, 68 N.E.2d 75, 78 (Ohio 1946); *see also, e.g.*, Jackson v. Schultz, 151 A.2d 284, 285–86 (Del. Ch. 1959); Harrington v. Haugland (*In re* Estate of Griffen), 543 P.2d 245, 247–48 (Wash. 1975). Courts can use this language to imply an alternative bequest to a beneficiary's *spouse*, along with children. *See* Wagner v. Cook (*In re* Estate of Cook), 206 A.2d 865, 869–70 (N.J. 1965) (decided under New Jersey's "probable intent" doctrine); Hoermann v. Hoermann (*In re* Hoermann's Estate), 290 N.W. 608, 611 (Wis. 1940). *But see* Delaware Cnty. Tr. Co. v. Hanby, 165 A. 568, 568–69 (Del. Ch. 1933) (confining the alternative bequest to children). One court cited the testator's failure to update a will following the death of a beneficiary as evidence of intent to create an alternative bequest. *See* Britt v. Garfoot (*In re* Britt's Estate), 23 N.W.2d 498, 500 (Wis. 1946). Yet, *all* lapses stem from laxity; one can draw no inferences from a testator's failure to update an estate plan.

[168] *See, e.g.*, *Jackson*, 151 A.2d at 286 (construing "and her heirs" to cover a stepchild "whom the testator raised as his own"); *In re* Burrows' Estate, 182 N.E. 79, 79–80 (N.Y. 1932) (construing a bequest to the testator's daughter-in-law and "her heirs and assigns" to create a contingent bequest for her children, who were the children of the testator's deceased son); Wettach v. Horn, 50 A. 1001, 1002 (Pa. 1902) (construing "and her heirs" to create a contingent bequest for a predeceased beneficiary's children "with whom [the testator] lived"). *But see Dickinson*, 8 Serg. & Rawle at 71–72 (construing "and her heirs" as surplusage, even though the court considered the strict application of lapse under the facts of the case "unfortunate" and was "sorry for" the result).

formula.[169] But, again, some courts have seized on the language to find contingencies that testators probably never meant to create, but which they would have ratified in retrospect.[170]

No current lapse statute treats the construction of this terminology. Neither does the Uniform Probate Code, although it addresses other rules of construction.[171] That leaves courts free to continue resolving these cases with a degree of license. Whether the drafters of the Code meant to acquiesce in existing judicial practice by skipping over the problem is unclear. But one could draw that conclusion.[172]

2. "Residue, including all lapsed bequests, to A"

Testators traditionally style their residuary clauses as a pleonasm: "all the rest, residue, and remainder of my estate" goes to a beneficiary.[173] But some testators tack on additional language: "all the rest, residue, and remainder of my estate, *including lapsed bequests*," go to a beneficiary.[174] What implications accompany this variation?

Some early courts pointed to the additional language as functioning to skirt the no-residue-upon-a-residue rule.[175] In the wake of the widespread abolition of that rule, other courts have suggested that the language operates to override the antilapse statute for all predeceasing beneficiaries.[176] These courts reason

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[169] *See, e.g.*, Miller v. Gilbert, 38 N.E. 979, 980 (N.Y. 1894) ("It is quite inconceivable that [the testator] supposed the words created a substitutionary bequest . . . , but it may more reasonably be assumed they were ignorantly used."); Sloan v. Hanse, 2 Rawle 28, 33 (Pa. 1829) ("Had the testator here, meant [to name a contingent beneficiary], . . . it is reasonable to suppose he would, instead of leaving his meaning to conjecture, have said so in terms.").

[170] *See, e.g.*, *In re* Evans' Will, 136 N.E. 233, 234 (N.Y. 1922). For collections of cases, see Dransfield, *supra* note 165, pt. III; Dransfield Supp., *supra* note 165, pt. III; 6 PAGE, *supra* note 165, at 84–85.

[171] *See* UNIF. PROB. CODE § 2-603(a)(1), (b)(3) (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

[172] The drafters of the Code were cognizant of these cases. *See* Halbach & Waggoner, *supra* note 102, at 1122 (describing *Harrington*, 543 P.2d at 245, as a case in which the court "strained" to create an alternative bequest).

[173] Versions of the phrase are centuries old. *See* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 360–62 (1963).

[174] *See, e.g.*, Blevins v. Moran, 12 S.W.3d 698, 701 (Ky. Ct. App. 2000).

[175] *See* Aitken v. Sharp, 115 A. 912, 914–15 (N.J. Ch. 1922); *In re* Cotterell's Estate, 234 N.Y.S.2d 19, 20–22 (Sur. Ct. 1962); *see also* Ortlieb v. Kelly (*In re* Estate of Mallam), 282 N.Y.S.2d 947, 947–48 (Sur. Ct. 1967) (Hopkins, J., dissenting).

[176] *See* Reardon v. Lovell (Estate of Salisbury), 143 Cal. Rptr. 81, 86 (Ct. App. 1978); Jensen v. Nelson, 19 N.W.2d 596, 575–79 (Iowa 1945); Merrill v. Phelps (*In re* Phelps' Estate), 126 N.W. 328, 329–30 (Iowa 1910); *In re* Neydorff, 184 N.Y.S. 551, 553–54 (App. Div. 1920); Colombo v. Stevenson, 563 S.E.2d 591, 593–94 (N.C. Ct. App. 2002); Lacis v. Lacis, 355 S.W.3d 727, 734–36 (Tex. Ct. App. 2011).

that the language must mean something—otherwise the testator would not have included it.[177] The Uniform Probate Code takes this position.[178]

Yet, classical residuary clauses already contain surplusage. A testator could bequeath "all the rest of my estate"—so then, what does "the rest, *residue, and remainder*" signify? A minority of courts assume that an "including lapsed bequests" clause is not intended to affect the estate plan in any way but merely restates the remain-in-the-residue rule.[179]

The minority position is persuasive. A testator intending to override the antilapse statute would likely do so with clearer language connected to each bequest at issue, even if the will is homemade. Meanwhile, "including lapsed bequests" clauses have appeared in wills with a single beneficiary and in abbreviated pour-over wills, where the clause could not possibly have substantive import.[180] And the same extended phrasing of the clause has appeared, word for word (including capitalization!), in wills executed all over the country.[181] Professor Patricia Roberts discovered a number of form-books that include versions of the language within standard residuary clauses.[182] If the language means nothing in form-books, then it means nothing to testators. That the Uniform Probate Code provides otherwise betrays carelessness on the part of its drafters.

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[177] *See Lacis*, 355 S.W.3d at 733–34 ("We presume that the testator placed nothing superfluous or meaningless in his will and that he intended every word to play a part in the disposition of his property . . . ."); *Neydorff*, 184 N.Y.S. at 553 ("[W]e . . . must make use of all [the testator's] language . . . .").

[178] *See* UNIF. PROB. CODE § 2-603(a)(1) & cmt., ex. 3 (amended 2019), 8 pt. 1 U.L.A. 241 (2013). The Restatement—presided over by the same reporter as had served for the Code—agrees. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. g & illus. 7 (AM. L. INST. 1999).

[179] *See* Blevins v. Moran, 12 S.W.3d 698, 700–04 (Ky. Ct. App. 2000); *In re* Moloney's Estate, 83 A.2d 837, 840 (N.J. Cnty. Ct. 1951).

[180] *See* Golly v. Eastman (*In re* Estate of DiMatteo), 2013 IL App (1st) 122948, ¶¶ 4, 38 (single beneficiary); Stroble v. Klingele (*In re* Estate of Stroble), 636 P.2d 236, 238 (Kan. Ct. App. 1981) (same); *In re* Estate of Leon Erson Barrenger Tr., No. 332837, 2017 WL 1967490, at *1 (Mich. Ct. App. May 11, 2017) (pour-over will). A pour-over will bequeaths property to the trustee of a preexisting trust, to be distributed according to the terms of that trust. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.8 (AM. L. INST. 1999).

[181] *Compare* Rushton v. Commissioner (Estate of Turner), 151 T.C. 160, 165 n.7 (2018) ("[A]ll the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situated and whether acquired before or after the execution of this Will . . . ."), *with Barrenger*, 2017 WL 1967490, at *1 (same), *and* RL Regi North Carolina LLC v. Estate of Moser, 731 S.E.2d 849, 852 (N.C. Ct. App. 2012) (same), *and* McNamara v. Feist (*In re* Estate of Harms), 814 N.W.2d 783, 785 (N.D. 2012) (same), *and In re* Thomas G. Goodwin Revocable Living Tr., No. 1124 WDA 2015, 2016 WL 6243320, at *8 (Pa. Super. Ct. 2016) (same, with one misspelling and one missing article).

[182] *See* Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 365–66 (1988).

3. "To A if A survives me"

Yet another issue raised in connection with antilapse statutes is how to interpret language in a will making a bequest to a beneficiary "if he (or she) survives me." This phrase has appeared, and continues to appear, in a great many wills.[183] In most states, the phrase has become a term of art, serving to override the antilapse statute.[184] In a small minority of states, however, given that survival already constitutes a legal necessity, courts have held the phrase to have no effect on an estate plan.[185] Until recently, commentators considered the meaning of the phrase a matter of settled law. Professor Thomas Atkinson asserted in his treatise that "it would be a manifest disregard of an express condition" to apply antilapse in the presence of a survival requirement.[186] An annotator agreed that "[w]hen the testator uses words of survivorship, . . . it is clear that the statute against lapses has no application."[187] And the authors of the second Restatement of Property chimed in that language requiring a beneficiary's survival "shows the decedent recognized the possibility the named beneficiary might not survive and did not choose to provide an alternative taker," which "eliminates the applicability of the antilapse statute."[188]

As revised in 1990, the Uniform Probate Code adopts the minority view. A subsection of the Code's antilapse provision now states 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."[189]

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[183] *See, e.g.*, Fischer v. Hutchins, No. 20A-ES-1691, 2021 WL 1307434, at *5 (Ind. Ct. App. Apr. 8, 2021); Att'y Grievance Comm'n v. Keating, 243 A.3d 520, 527 (Md. 2020).

[184] One court noted as significant the fact that the will at issue was "drawn by an experienced attorney." *In re* Robinson's Will, 236 N.Y.S.2d 293, 295 (Sur. Ct. 1963). The extent to which lay drafters understand the technical meaning of the phrase is, of course, impossible to say.

[185] One court characterized the majority rule as "[t]he general rule, almost universally applied by the courts in this country." Stroble v. Klingele (*In re* Estate of Stroble), 636 P.2d 236, 241 (Kan. Ct. App. 1981); *see also* Roberts, *supra* note 182, at 349 (concluding that "[t]he overwhelming weight of authority" supports the majority rule). For discussions of the two lines of cases, 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, 208–13 (2007); Dwyer, *supra* note 161, § 9; Marvel, *supra* note 161, § 10.

[186] THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 780 (2d ed. 1953).

[187] Marvel, *supra* note 161, § 10; *see also* Dwyer, *supra* note 161, § 9 (describing the rule as "obvious").

[188] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 18.6 cmt. a (AM. L. INST. 1986).

[189] UNIF. PROB. CODE § 2-603(b)(3) (amended 2019), 8 pt. 1 U.L.A. 241 (2013). The original version of the Code was silent on the issue. *See id.* § 2-605 (pre-1990 art. 2), 8 pt. 1 U.L.A. 587 (2013); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. h (AM. L. INST. 1999) (switching to the minority view, having been presided over by the same reporter who had served in that capacity for the revised Code).

What justifies this contrarian stance? The comment accompanying the Code's antilapse provision asserts that the meaning of words requiring survival are uncertain: "The testator who went to lawyer X and ended up with a will containing devises with a survivorship requirement could by chance have gone to lawyer Y and ended up with a will containing . . . no survivorship requirement—with no different intent on the testator's part . . . ."[190] And the comment adds: "Lawyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute are mistaken."[191]

This reasoning appears problematic. Different states have resolved the issue in different ways, so whether a client retains lawyer X or lawyer Y is not a chance event, but rather depends on where the client resides. Only in states lacking case law on point might competent lawyers disagree about the applicable rule of construction, and given the traditional supermajority position, we would expect most lawyers to assume that it applies.[192]

The comment's reasoning is also circular. Whether a lawyer is mistaken about the foolproof nature of words of survivorship depends on what rule lawmakers—including the drafters of the Code—impose.[193] Lawmakers can ratify, and thereby reinforce, what lawyers believe this language to imply, or they can contradict, and thereby undermine, those beliefs. Lawmakers need to estimate which approach will cause fewer mistakes and lessen transaction costs.[194] When lawmakers establish rules of construction, no other policy considerations arise.

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190 UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

191 *Id.*

192 In criticizing this aspect of the Code's antilapse rule, Professor Mark Ascher contends that "generations of lawyers have learned to draft wills in reliance on" this rule of construction. Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 654 (1993).

193 The drafters of the Code propose to swap one term of art for another, substituting for "if the beneficiary survives me" the phrase "and not to [the devisee's] descendants." UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013). The drafters claim that, unlike the traditional term of art, this alternative one *is* "foolproof." *Id.* Were the phase expressed as a contingency, "and if [the devisee] does not survive me the gift shall lapse," then the language would be clear. *See* COLO. REV. STAT. ANN. § 15-11-603(2)(c) (West 1995) (suggesting this alternative phrase). But the phrase "and not to [the devisee's] descendants," standing alone, has no plain meaning. Like any term of art, the phrase is foolproof exactly to the extent that lawmakers make it so. And the meaning of the drafters' alternative term of art *has never been construed in a published case*.

194 The drafters of the Code accept that in jurisdictions where the traditional rule is entrenched, the Code's rule could have "some form of prospective application, possibly even with a grace period allowing practitioners to adapt to the drafting significance of the statute." Halbach & Waggoner, *supra* note 102, at 1114. What the drafters propose is unorthodox: statutes regulating wills do not ordinarily "grandfather" wills executed prior to the effective date of a new statute. The Code's own transitional rule imposes its provisions on decedents dying after the Code's effective date, not on wills executed after its effective date. *See* UNIF. PROB. CODE § 8-101(b)(1)

If most courts already take the view that words of survivorship override the antilapse statute, then the more efficient course is to strengthen that view. It is nothing more than a matter of path dependence. To swim against the tide, as the Code now does, only muddies the legal waters.[195] Wills that were consciously drafted on the basis of prevailing assumptions likely outnumber those that that were not.[196]

Lawmakers have perceived the virtues of the majority approach. Only six smaller states have adopted the Code's rule construing survivorship language as surplusage.[197] At the same time, ten states, including California, Florida, and Texas, defied the model lawmakers and codified the majority rule.[198] Three of those ten are Code states whose lawmakers intervened, extraordinarily, not to omit but to invert this segment of the Code's text.[199]

(amended 2019), 8 pt. 3 U.L.A. 491 (2013); *see also* Petersen v. Attema (*In re* Estate of Micheel), 577 N.W.2d 407, 410 (Iowa 1998) (noting that "cases are legion" in assuming this transitional principle). Still, the drafters' proposal is not unprecedented, *see* CONN. GEN. STAT. ANN. § 45a-442 (West 1987) (applicable to "any will executed after October 1, 1947"), and it could serve to mitigate the transaction costs of rewriting wills already drafted in reliance on the traditional rule. But the proposal would not avoid transition costs, *viz.*, the cost of familiarizing practitioners with the new rule. For additional commentary on this provision of the Code, see Halbach & Waggoner, *supra* note 102, at 1104–15; Lawrence H. Averill, *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 919–25 (1992); Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 126–30 (1991); Horton, *supra* note 5, at 1151–55; Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 366–69 (2016); Weisbord & Horton, *supra* note 161, at 690–92.

[195] The model lawmakers have succeeded in persuading some courts to adopt the minority view as judicial doctrine. *See* Ruotolo v. Tietjen, 890 A.2d 166, 177 (Conn. App. Ct. 2006). Contrarily, at least one court was unpersuaded *despite enactment of the Code's provision*. The court overrode the provision, holding antilapse inapplicable by construing the clause "as a whole"—based on repetition of survivorship language. *See In re* Estate of Raymond, 739 N.W.2d 889, 896 (Mich. Ct. App. 2007).

[196] *See* Ascher, *supra* note 192, at 652 (noting that the Code "forces reconsideration of almost all outstanding wills").

[197] *See* ALASKA STAT. ANN. § 13.12.603(a)(3) (West 2019); COLO. REV. STAT. ANN. § 15-11-603(2)(c) (West 1995) (adding additional clarifying language); HAW. REV. STAT. ANN. § 560:2-603(b)(3) (West 1996); MICH. COMP. LAWS ANN. § 700.2603(1)(c) (West 1998); MONT. CODE ANN. § 72-2-613(2)(c) (West 2019); N.M. STAT. ANN. § 45-2-603(B)(3) (West 2011).

[198] *See* ARIZ. REV. STAT. ANN. § 14-2603(C) (2001); CAL. PROB. CODE § 21110(b) (West 2018); FLA. STAT. ANN. § 732.603(3)(a) (West 2020); ME. REV. STAT. ANN. tit. 18-C, § 2-603(2)(C) (2019); MINN. STAT. ANN. § 524.2-603(2) (West 2022); OHIO REV. CODE ANN. § 2107.52(C)(1)–(2) (West 2018) (drawing additional linguistic distinctions); S.C. CODE ANN. § 62-2-603(C) (2013); TEX. EST. CODE ANN. § 255.151 (West 2017); UTAH CODE ANN. § 75-2-603(2)(c) (West 2010); WASH. REV. CODE ANN. § 11.12.120(1) (West 2021).

[199] These are Arizona, Maine, and Utah. In addition, Minnesota, having enacted the antilapse provision found in the original version of the Code, which was silent on the issue, amended it to codify the majority rule. *See* MINN. STAT. ANN. § 524.2-603(2) (West 2022).

C. Will-Substitutes

The problem of predeceasing beneficiaries also arises in connection with nonprobate will-substitutes such as living trusts—validated either by courts on the theory (albeit a legal fiction) that they comprise inter vivos transfers, or by legislative fiat.

Nearly unanimously, courts hold that interests created under living trusts do not lapse.[200] If beneficiaries die before the settlor, their interests flow to takers under their wills or to their heirs, a result equivalent to Maryland's version of lapse.[201] The notion that trust beneficiaries receive their interests *in præsenti* dictates this result. On this theory, trust beneficiaries are alive when their interests come into being, unlike predeceasing beneficiaries under wills.[202]

Legislators in quite a few states have enacted statutes addressing the issue. Because distinct will-substitutes have proliferated, so have the statutes. In California, no fewer than seven different code provisions address the problem. Inevitably, this sort of fragmentation leads to inconsistency. In California, the statutes mandate that interests under individual will-substitutes either lapse per se, lapse in the absence of proof of a contrary intent, or both lapse and are subject antilapse.[203]

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[200] *See* Baldwin v. Branch, 888 So.2d 482, 488 (Ala. 2004); Tait v. Cmty. First Tr. Co., 425 S.W.3d 684, 689 (Ark. 2012); Randall v. Bank of Am., 119 P.2d 754, 757 (Cal. Dist. Ct. App. 1941); Sherman v. Hibernia Sav. & Loan Soc'y, 20 P.2d 138, 140 (Cal. App. Dep't Super. Ct. 1933); *In re* Estate of Capocy, 430 N.E.2d 1131, 1134 (Ill. App. Ct. 1981); First Nat'l Bank v. Anthony, 557 A.2d 957, 960 (Me. 1989); Detroit Bank & Tr. Co. v. Grout, 289 N.W.2d 898, 909 (Mich. Ct. App. 1980); May v. Safer, 208 N.W.2d 619, 623 (Mich. Ct. App. 1973); First Nat'l Bank v. Tenney, 138 N.E.2d 15, 18–20 (Ohio 1956); *see also Ex parte* Byrom, 47 So.3d 791, 794–96 (Ala. 2010) (holding that the lapse statute for wills fails to apply to living trusts); Hinds v. McNair, 413 N.E.2d 586, 595–99 (Ind. Ct. App. 1980) (concerning an irrevocable trust but citing revocable trusts cases from other states as authority). *But see* Dollar Sav. & Tr. Co. of Youngstown v. Turner, 529 N.E.2d 1261, 1264 (Ohio 1988) (holding that the doctrine of lapse and the antilapse statute apply to living trusts); Burg v. Old Nat'l Bank of Wash. (*In re* Estate of Button), 490 P.2d 731, 734–35 (Wash. 1971) (en banc) (same); *see also* Erlenbach v. Estate of Thompson, 954 P.2d 350, 351–52 (Wash. Ct. App. 1998) (suggesting in dicta that antilapse could apply to an inter vivos trust without expressly indicating that it was revocable). The court in *Tait* expressly rejected *Button*, identifying flaws in the opinion. *See Tait*, 425 S.W.3d at 687–88. The Restatement characterizes the majority rule as "traditional doctrine" and the minority view as "modernized doctrine." RESTATEMENT (THIRD) OF TRS. § 44 cmt. d (AM. L. INST. 2003).

[201] *See, e.g.*, *Tenney*, 138 N.E.2d at 20 (finding that the will of the predeceasing beneficiary determined the alternative taker); *see also supra* note 82 and accompanying text.

[202] *See, e.g.*, *Baldwin*, 888 So.2d at 488; *May*, 208 N.W.2d at 623. Nonetheless, inconsistently, Totten trusts (which rely on the same judicial theory) do lapse if the beneficiary predeceases the depositor. *See In re* U.S. Tr. Co., 102 N.Y.S. 271, 272 (App. Div. 1907); Collopy's Estate, 33 Pa. D. & C. 169, 173 (Orphans' Ct. 1937). Hence, cases can turn on whether the interest at issue comprises a living trust or a Totten trust. *See* Sherman v. Hibernia Sav. & Loan Soc'y, 20 P.2d 138, 140 (Cal. App. Dep't Super. Ct. 1933).

[203] *See* CAL. PROB. CODE §§ 21104, 21109–21111 (West 2002) (lapse and antilapse for wills, living trusts, and other will-substitutes); *id.* § 5507 (only lapse for transfer-on-death designations for securities); *id.* §

The Uniform Probate Code exhibits the same fragmented structure and adds glitches on top of inconsistencies. A section of Article 2 of the Code, ordinarily confined to wills, creates an antilapse rule applicable to revocable beneficiaries of "an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, . . . or similar benefit plan, or other nonprobate transfer on death."[204] This antilapse rule largely, but not entirely, mirrors the one pertaining to wills (whose difficulties we have already addressed[205]), also found in Article 2.[206] As regards wills, however, the Code establishes *two* rules—one for lapse and one for antilapse. For will-substitutes, the drafters established only a rule of antilapse, neglecting

5302(b)(2) (only lapse for a pay-on-death designee for a bank account); *id.* § 5302(c)(2) (applying lapse for a beneficiary of a Totten trust "unless there is clear and convincing evidence of a different intent"); *id.* § 5652(a)(2) (only lapse for a transfer-on-death designee for a real estate deed); *id.* § 5704(a)(2) (applying only lapse, here termed "revo[cation]," for a gift causa mortis); CAL. VEH. CODE § 5910.5(a) (West 1991) (only lapse for a transfer-on-death designee for a vehicle).

[204] UNIF. PROB. CODE §§ 1-201(4), 2-706(b) (amended 2019), 8 pt. 1 U.L.A. 46, 291 (2013). The drafters intend these provisions to apply to revocable pay-on-death designations for real estate deeds, although they are not expressly mentioned. *See id.* § 6-413 cmt. (amended 2019), 8 pt. 3 U.L.A. 402 (2013). The Code in general, and these provisions specifically, fail to address gifts causa mortis, which come under the law of gifts, even though in practice they comprise another type of will-substitute. *See id.* §§ 1-201(4), 2-706(b) (amended 2019), 8 pt. 1 U.L.A. 46, 291 (2013) (applying only to will-substitutes created by a "beneficiary designation"); *see also id.* § 6-101 (amended 2019), 8 pt. 3 U.L.A. 354 (2013) (applying only to will-substitutes created by a "written instrument"). Whereas English courts have held that gifts causa mortis are subject to lapse, the issue has never arisen directly in an American case. *See* ANDREW BORKOWSKI, DEATHBED GIFTS 31, 60 (1999) (citing English cases); Expressmen's Aid Soc'y v. Lewis, 9 Mo. App. 412, 415 (1880) (repeating the English rule in dicta); *see also* CAL. PROB. CODE § 5704(a)(2) (West 1991) (creating a statutory rule). Eleven states have enacted Section 2-706. *See* ALASKA STAT. ANN. § 13.12.706 (West 2019); ARIZ. REV. STAT. ANN. § 14-2706 (1994); COLO. REV. STAT. ANN. § 15-11-706 (West 1995) (excepting certain will-substitutes); HAW. REV. STAT. ANN. § 560:2-706 (West 1996); ME. STAT. ANN. tit. 18-C, § 2-706 (2019); MASS. GEN. LAWS ANN. ch. 190B, § 2-706 (West 2012); MICH. COMP. LAWS ANN. § 700.2709 (West 1998); MONT. CODE ANN. § 72-2-716 (West 2019); N.M. STAT. ANN. § 45-2-706 (West 2011); N.D. CENT. CODE ANN. § 30.1-09.1-06 (West 1995); UTAH CODE ANN. § 75-2-706 (West 2010).

[205] *See supra* Section II.A.2.

[206] *See* UNIF. PROB. CODE § 2-603 (amended 2019), 8 pt. 1 U.L.A. 241 (2013). The drafters concluded that these two provisions ought to be "parallel." *Id.* § 2-706 cmt. (amended 2019), 8 pt. 1 U.L.A. 291 (2013). Nonetheless, for reasons that go unexplained, Section 2-706, unlike Section 2-603, fails to cover appointees of a power of appointment. *Compare id.* § 2-603(b)(5) (amended 2019), 8 pt. 1 U.L.A. 241 (2013), *with id.* § 2-706(b) (amended 2019), 8 pt. 1 U.L.A. 291 (2013). Scholars have questioned whether contingency clauses that appear within *printed* parts of pension documents should supersede antilapse rules, which the Code mandates, *see id.* § 2-706(b)(4) & cmt., ex. 1–2, given that employees completing these documents, typically without counsel, might misunderstand their distributive implications. *See* Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 184, 201–15 (2014).

to add one for lapse.[207] For guidance on lapse, one must consult the Code's individual sections on the myriad of will-substitutes.

To the extent such guidance appears, it derives from a different article of the Code. Article 6 addresses will-substitutes, with separate parts for revocable pay-on-death designations for bank accounts, securities, real estate deeds, plus a catch-all category.[208] The part applicable to real estate deeds contains a provision establishing that if the pay-on-death designee predeceases the owner, the transfer "lapses."[209] Furthermore, if the owner named multiple designees and one predeceases, his or her share goes to the surviving designees—a rule analogous to the remain-in-the-residue rule for wills.[210]

Drafted earlier, the parts applicable to bank accounts and securities employ different language and establish less comprehensive provisions. Regarding bank accounts, "[i]f two or more beneficiaries survive," they take the account in equal shares, whereas "[i]f no beneficiary survives," the account flows back into the estate of the depositor.[211] The section fails to indicate what happens if one beneficiary survives and another predeceases. Whether the decedent's share goes to the survivor or flows back to the estate of the depositor remains unclear.[212] A similar provision, creating the same ambiguity, applies to pay-on-death designations for securities.[213]

These parts do not cover the field. The part applicable to revocable pay-on-death designations for an "insurance policy, . . . mortgage, promissory note, . . . pension plan, . . . or other written instrument of a similar nature" validates those instruments.[214] Unlike the other parts of Article 6, this one establishes no rule for the eventuality that a designee fails to survive the benefactor.[215] Other law fills the gap.[216] And under insurance law, although an insured "may attach [to a policy] the condition that, upon the beneficiary not surviving the insured, the

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[207] The lapse provision in the Code pertains exclusively to wills. *See* UNIF. PROB. CODE §§ 1-201(10)–(11), 2-604 (amended 2019), 8 pt. 1 U.L.A. 46, 260 (2013) (covering a "devise" to a "devisee," defined as a taker of a "testamentary disposition" under a "will").

[208] *See id.* art. 6 (amended 2019), 8 pt. 3 U.L.A. 347 (2013).

[209] *Id.* § 6-413(a)(2) (amended 2019), 8 pt. 3 U.L.A. 402 (2013).

[210] *See id.* § 6-413(a)(4).

[211] *Id.* § 6-212(b)(2) (amended 2019), 8 pt. 3 U.L.A. 371 (2013).

[212] The section states that after the death of the depositor, "there is no right of survivorship in the event of the death of a beneficiary thereafter." *Id.* From this language one might infer that such a right existed prior to the death of the depositor, but the section contains no express provision to that effect.

[213] *See id.* § 6-307 (amended 2019), 8 pt. 3 U.L.A. 386 (2013).

[214] *Id.* § 6-101 (amended 2019), 8 pt. 3 U.L.A. 354 (2013).

[215] *See id.*

[216] *See id.* § 1-103 (amended 2019), 8 pt. 1 U.L.A. 36 (2013).

interest of the beneficiary shall terminate and thus shall not be transmissible to his legal representatives,"[217] authorities divide on the outcome when the insured fails to attach such a condition. In most states the interest in the predeceasing beneficiary is deemed an "expectancy" and accordingly "lapse[s]."[218] But in a minority of states, "[w]hen the language of a life insurance policy expresses no other condition than . . . the right to change the beneficiaries, a named beneficiary takes a qualified vested interest which will be divested if the insured exercises the right reserved."[219] Hence, under the Code's catch-all category of will-substitutes, depending on the state, the interest held by a revocable pay-on-death designee on an insurance policy *might not lapse*, unless the policy provides otherwise. The same problem could arise as concerns other sorts of pay-on-death designations.[220]

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[217] Kruger v. John Hancock Mut. Life Ins. Co., 10 N.E.2d 97, 99 (Mass. 1937).

[218] *E.g.*, Wilson v. Perdue 167 N.W.2d 851, 853 (Mich. Ct. App. 1969); Schlereth v. Neely, 285 S.W.168, 170 (Mo. Ct. App. 1926); Hager v. Lincoln Nat'l Life Ins. Co., 484 S.E.2d 828, 829–30 (N.C. Ct. App. 1997) (raising the issue in a case of first impression); *In re* Bayer's Estate, 26 A.2d 202, 205 (Pa. 1942); *see also* Delany v. Delany, 51 N.E. 961, 964 (Ill. 1898) ("It seems to be well settled by the weight of authority, both in this state and other states, that the beneficiary . . . has no vested rights in the contract of mutual benefit insurance.").

[219] *Kruger*, 10 N.E.2d at 98 (citing to cases); *see also* Martin v. Mod. Woodmen of Am., 97 N.E. 693, 694 (Ill. 1912) (noting conflicting authorities); *Wilson*, 167 N.W.2d at 853 (same); Supreme Council Cath. Knights of Am. v. Densford, 56 S.W. 172, 172–75 (Ky. 1900) (indicating that an insurance beneficiary was "vested with a definite interest in the fund . . . which could only have been defeated by some action [by the insured] making other . . . disposition," while simultaneously observing that lapse and antilapse can apply to an insurance beneficiary as a principle of construction); Mattern v. Gas Cos.' Emps.' Mut. Aid Soc'y, 253 N.Y.S. 124, 127–28 (Mun. Ct. 1931) (awarding life insurance proceeds to the predeceased beneficiary's estate based on the by-laws governing the policy); Orville F. Grahame, *The Insurance Trust as Non-testamentary Disposition*, 18 MINN. L. REV. 391, 392, 396–97 (1934) (noting conflicting authorities).

[220] Pay-on-death designations for most types of pension plans are governed by the federal ERISA statute, which is silent on both lapse and antilapse, although the statute permits pension documents to govern rights of beneficiaries. *See* 29 U.S.C. § 1102(b)(4). Even where it is silent, the statute overrides state law by virtue of field preemption. *See* Egelhoff v. Egelhoff *ex rel*. Breiner, 532 U.S. 141, 146–52 (2001). The Uniform Probate Code seeks to circumvent federal preemption by making beneficiaries other than those entitled to take under Section § 2-706 personally liable to those who are. *See* UNIF. PROB. CODE § 2-706(e)(2) (amended 2019), 8 pt. 1 U.L.A. 291 (2013). The U.S. Supreme Court has yet to rule on the validity of this stratagem in connection with ERISA, although the Court has invalidated a comparable rule as it applies to other federal legislation. *See* Hillman v. Maretta, 569 U.S. 483, 497 (2013); *see also* UNIF. PROB. CODE § 2-804 cmt. (amended 2019), 8 pt. 1 U.L.A. 162 (Supp. 2022) (criticizing *Hillman*). If the Court relents and allows Section 2-706 to take effect, we could again face the situation where antilapse applies but lapse does not, as regards pay-on-death designations for pension benefits. Still, the Court could avoid this result by creating a federal common law of lapse. *See Egelhoff*, 532 U.S. at 152 (raising this possibility regarding issues where "[state] statutes are more or less uniform"); David Pratt, *Marriage, Divorce, Death, and ERISA*, 31 QUINNIPIAC PROB. L.J. 101, 185–88 (2018) (citing lower-court cases on federal common law within the interstices of ERISA). Beyond ERISA, state laws governing pension benefits typically redirect predeceased beneficiaries' interests to the estate of the employee. *See* Nash v. Tinch, 221 S.E.2d 425, 426 (Ga. 1975); Jacobelli v. Regan, 452 N.Y.S.2d 696, 698 (App. Div. 1982). Rules regarding predeceasing pay-on-death designees for IRAs remain unclear, however. *See In re* Estate of Praczkajlo, 542 N.Y.S.2d 131, 133–35 (Sur. Ct. 1989) (raising the issue in a case of first impression and finding that the IRA

Read in conjunction with the provision for will-substitutes found in Article 2, the Code here takes a bizarre turn. If a revocable pay-on-death designee for a life insurance policy fails to survive the depositor and leaves descendants, the rules of antilapse apply, and those descendants may be eligible to take in the designee's place under Article 2. If, however, the designee leaves no descendants, or if the rules of antilapse fail to apply given the absence of a close relationship with the insured, then in some states the rules of lapse also would not apply under either Articles 2 or 6. The proceeds of the policy would flow into the estate of the deceased designee and go to the designees' beneficiaries—paying greater deference to the wishes of a more distantly related, or unrelated, designee. This anomaly is unlikely to arise in practice. Insurance policies typically include survival conditions.[221] Still, drafters of model laws ought to account for unlikely eventualities when their occurrence would lead to absurd results.

And there is more. The Uniform Probate Code gives effect to living trusts in Article 6.[222] In Article 2, it adds a provision applicable to the lapse and antilapse of beneficiaries' interests in a living trust, which the Code lumps together with a different problem—future interests in trust (either inter vivos or testamentary) where the remainderman fails to survive the life tenant.[223] In respect of living trusts, which in theory qualify as inter vivos transfers, the life estate comprises the interest reserved by the settlor and the beneficiary receives the remainder.

Under this section of the Code, the beneficiary's interest of a living trust "is contingent on the beneficiary's surviving the distribution date," which is the

agreement dictated lapse but adding in dicta that lapse should apply by analogy to other will-substitutes); Lightner v. Ferguson, No. HQ-1742-4, 2001 WL 1590464, at *3 (Va. Cir. Ct. Nov. 30, 2001) (holding that when beneficiaries of an IRA predecease the depositor, the interest goes to the depositor's estate, citing no authority).

221 *See, e.g.*, Phoenix v. Metro. Life Ins. Co., 379 S.W.2d 626, 628 (Mo. 1964); *see also* O'Brian v. Baker (*In re* Estate of O'Brian), 2016 IL App (1st) 15-2197-U, ¶¶ 10, 17, 36 (quoting form agreement for an employee saving plan); Fidelity Brokerage Servs. v. Burns, No. 1:17-cv-1383, 2018 WL 3649091, at *1 (E.D. Va. June 4, 2018) (same for an IRA); Mury v. Allen, No. 105439/2010, slip op., 2010 WL 5117239, at *1 (N.Y. App. Div. Nov. 22, 2010) (same); Franklin Templeton Bank & Tr. v. Tigert, No. 05-09-01472-CV, 2011 WL 2507834, at *4 (Tex. Ct. App. June 24, 2011) (same).

222 *See* UNIF. PROB. CODE § 6-101 (amended 2019), 8 pt. 3 U.L.A. 354 (2013).

223 *See id.* § 2-707 (amended 2019), 8 pt. 1 U.L.A. 299 (2013). Fourteen states have adopted versions of this section of the Code: ALASKA STAT. ANN. § 13.12.707 (West 2019); ARIZ. REV. STAT. ANN. § 14-2707 (2001); COLO. REV. STAT. ANN. § 15-11-707 (West 1995); FLA. STAT. ANN. § 736.1106 (West 2013) (modified); HAW. REV. STAT. ANN. § 560:2-707 (West 2000); IOWA CODE ANN. §§ 633.273–.274 (West 2013) (modified); ME. STAT. ANN. tit. 18-C, § 2-707 (2019); MASS. GEN. LAWS ANN. ch. 190B, § 2-707 (West 2012); MICH. COMP. LAWS ANN. § 700.2714 (West 1998) (amended 2004); MONT. CODE ANN. § 72-2-717 (West 2019); N.M. STAT. ANN. § 45-2-707 (West 2011); N.D. CENT. CODE ANN. § 30.1-09.1-07 (West 2009); OHIO REV. CODE ANN. § 5808.19 (West 2012) (modified); UTAH CODE ANN. § 75-2-707 (West 2010).

settlor's death.[224] Translated into the language of wills, this phrasing means that the beneficiary's interest is subject to lapse. But the section also creates what amounts to an antilapse rule: It creates a "substitute gift" if the predeceasing beneficiary "leaves surviving descendants."[225] Unlike the antilapse provision applicable to wills, however, this one applies to *all beneficiaries without restriction*.[226] Hence, the provision creates an asymmetry between the scope of antilapse for wills and living trusts.[227]

Why did the drafters see fit to create this disparity? The accompanying comment states that "[t]he objective of this section is to project the antilapse idea into the area of future interests," suggesting harmony rather than disharmony.[228] The comment draws no comparison to, and fails to cite, the companion doctrine for wills.[229]

An article by the reporter elaborates that the drafters felt "it would be better to have the same rule of construction apply to all future interests in trust, whether the trust is revocable, irrevocable, or testamentary," and that an antilapse statute that "only protect[s] relatives in specified categories would raise special questions in this broader context."[230] Be that as it may, what reason did the drafters have to amalgamate revocable trusts with other trusts? As concerns true future interests in trust, the problem differs in significant ways. The remainderman under an inter vivos or testamentary trust that has come into being owns a transferable interest in property. The only question concerns the nature of that interest, *viz*., whether it is contingent or not. By contrast, the beneficiary of a living trust (under modern doctrine, and effectively even under earlier doctrine) has no existing interest or right to property prior to the death of the settlor.[231] The beneficiary's interest is functionally equivalent to an expectancy

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224 UNIF. PROB. CODE § 2-707(b) (amended 2019), 8 pt. 1 U.L.A. 299 (2013).

225 *Id*. § 2-707(b)(1).

226 *See id*.

227 In one other respect, though, the antilapse provision applicable to living trusts is marginally *narrower* than the one for wills. Without explanation, the provision for living trusts omits the subsection found in the provision for wills that applies antilapse to appointees of a power of appointment. *Compare id*. § 2-603(b)(5) (amended 2019), 8 pt. 1 U.L.A. 241 (2013), *with id*. § 707(b) (amended 2019), 8 pt. 1 U.L.A. 299 (2013). *See supra* notes 116, 206 and accompanying text.

228 UNIF. PROB. CODE § 2-707 cmt. (amended 2019), 8 pt. 1 U.L.A. 299 (2013).

229 *See id*.; *cf*. 755 ILL. COMP. STAT. ANN. § 5/4-11 (West 1976) (applying the same antilapse rule to present and future interests created under *wills*, if a beneficiary dies before the future interest becomes possessory).

230 Halbach & Waggoner, *supra* note 102, at 1139.

231 *See* RESTATEMENT (THIRD) OF TRS. § 25 (AM. L. INST. 2003) (viewing the corpus as "owned by the settlor"). Under earlier law, the beneficiary of a living trust was deemed to hold a theoretical interest in property that was so insubstantial as to comprise a legal fiction. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1126–29 (1984).

under a will, not a future interest under a trust. If most benefactors would fail to distinguish a will from a living trust as regards the rules of lapse and antilapse, then the drafters of the Code err by distinguishing them.

The reporter adds that "an extension of the regular antilapse statutes to revocable trusts becomes awkward when the distribution of the trust's corpus takes place at the death of someone other than the settlor."[232] Not really, if the drafters isolate the problems. Of course, living trusts often do create sub-trusts for the surviving spouse or other beneficiaries that precede the ultimate takers. These sub-trusts constitute the true equivalents of future interests. A rule of lapse for living trusts could correspond with the one pertaining to wills, whereas a rule addressing survival of remaindermen under sub-trusts could correspond with the one covering other future interests. Two states have modified this section of the Code to better align it with the antilapse rules applicable to wills.[233]

The decision to amalgamate living trusts and future interests also appears responsible for a glitch in this section of the Code. Suppose the section's antilapse rule fails to apply because the predeceasing beneficiary leaves no descendants. Here, a subsection provides that if the trust at issue was a testamentary trust, then the predeceasing beneficiary's interest flows into the residue.[234] If that subsection does not apply, then "the property passes to the transferor's heirs," determined as of the end of the life estate.[235] Apparently, the drafters assumed that the settlor of an inter vivos trust would prefer to keep the ultimate beneficiaries fluid, taking into account events occurring during the life tenancy, rather than freeze the beneficiaries into place.[236]

The drafters neglected to consider the implications of this subsection for living trusts.[237] If the beneficiary of a living trust predeceases the settlor without

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[232] Halbach & Waggoner, *supra* note 102, at 1140.

[233] In Ohio, the interest of a predeceasing living trust beneficiary goes to their descendants only if he or she is a grandparent or descendant of a grandparent or a stepchild of the settlor; otherwise, the interest goes to residual takers under the living trust. *See* OHIO REV. CODE ANN. § 5808.19(B)(2)(b)(i), (D)(3) (West 2019). In Florida, less satisfactorily, the interest of a living trust beneficiary is contingent on surviving the settlor only if the living trust beneficiary is a grandparent or descendant of a grandparent of the settlor, in which case the interest of a predeceasing living trust beneficiary goes to his or her descendants. *See* FLA. STAT. ANN. § 736.1106(5) (West 2014). Otherwise, implicitly, the living trust beneficiary's interest is not contingent on surviving the settlor and his or her estate receives the interest—an anomalous result that we criticized earlier. *See supra* text accompanying note 221.

[234] *See* UNIF. PROB. CODE § 2-707(d)(1) (amended 2019), 8 pt. 1 U.L.A. 299 (2013).

[235] *Id.* §§ 2-707(d)(2), 2-711 (amended 2019), 8 pt. 1 U.L.A. 299, 317 (2013).

[236] *See id.* § 2-707 cmt. (amended 2019), 8 pt. U.L.A. 299 (2013) (raising the prospect of a surviving spouse who remarries before a life estate ends).

[237] None of the ten examples in the comment illustrating subsection (d) involves a living trust—all concern either testamentary trusts or irrevocable inter vivos trusts. *See id.*

descendants, then the interest goes to the settlor's heirs, bypassing a residual-interest clause in the living trust and even a residuary clause in the testator's backup will. No time will elapse between the settlor's death and the determination of those heirs. And this rule will apply, even if the predeceasing beneficiary comprises one of a number of residual-interest takers under the living trust, a result similar to the old no-residue-upon-a-residue rule that the Code rejects for wills.[238]

If the drafters conceived a rationale for this result, they failed to state it. More likely, the issue never occurred to them. Drafters in Ohio and Iowa were more attentive. Under the Ohioans' version of this section, the interest of a predeceasing living trust beneficiary, in lieu of descendants, "passes under the residuary clause in the transferor's revocable trust instrument," rather than to the heirs.[239] Under the Iowans' version, the interest of a predeceasing living trust beneficiary, in lieu of descendants, is "distributed to the takers of the settlor's residuary estate" under a will, rather than to the heirs.[240] Ohio's scheme is preferable, homogenizing living trusts and wills. For no apparent reason, Iowa's approach bypasses residual takers under the living trust.[241]

In states that have adopted the Uniform Trust Code and *not* the Uniform Probate Code, complete homogenization could conceivably occur without further statutory reform. Under an optional provision of the Uniform Trust Code, "rules of construction that apply in this State to the interpretation of . . . will[s] also apply as appropriate to the interpretation of . . . a trust."[242] The drafters expressly contemplated that this provision would pertain to rules of construction concerning "the failure to anticipate the predecease of a beneficiary."[243] Courts could interpret this provision to extend to living trusts rules of lapse and

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[238] *See id.* § 2-604(b) (amended 2019), 8 pt. 1 U.L.A. 260 (2013).

[239] OHIO REV. CODE ANN. § 5808.19(D)(3) (West 2018). In lieu of a taker under this provision, the interest passes to the settlor's heirs. *See id*. § 5808.19(D)(4).

[240] IOWA CODE § 633A.4701(5) (2022).

[241] Backup wills for living trusts typically comprise pour-over wills that transfer testamentary assets into the living trust. *See* Thomas C. Taylor, Jr., *Pour-over Wills: Drafting for Testamentary Additions to Trusts*, PROB. & PROP., Jan.–Feb. 2001, at 15, 15. In Iowa, if the living trust "is the sole taker of the settlor's residuary estate," then the interest goes instead to the settlor's heirs as if the trust had failed, rather than to residual takers under the living trust. IOWA CODE §§ 633A.4701(5), .2106(1) (2022). The Iowans' concern may be that if the residual taker under the living trust predeceases the settlor, then a simple pour-over will directing property back to the living trust would create a circularity. Plainly, in the event of a circularity—which is possible but not inevitable—lapsed transfers should go to the settlor's heirs.

[242] UNIF. TR. CODE § 112 (amended 2010), 7D U.L.A. 105 (2018). Twenty-five states have enacted this provision: Alabama, Arizona, Arkansas, Colorado, Hawaii, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, South Carolina, Tennessee, Utah, Vermont, Washington, and West Virginia.

[243] *Id*. cmt.

antilapse applicable to wills, so long as the state eschews the Uniform Probate Code's asymmetrical antilapse provision that applies directly to living trusts.[244] Thus far, however, only a single court has addressed the rules of lapse for living trusts in a Uniform Trust Code state. In that case, the court's analysis failed to take into account the optional provision.[245]

III. POLICY

What do lawmakers hope to achieve by setting doctrines of lapse? Have they identified the proper objectives? And are current rules well-suited to accomplishing those objectives? Courts have weighed in on the subject for some time. Their observations, sprinkled into their opinions, suggest a want of unanimity, and a more glaring absence of substantiation, in respect of these questions.

One policy identified occasionally in opinions is favoritism for heirs. The common-law rule bypassing the residue and granting lapsed devises of land to heirs, the limitation of antilapse to close relatives, and the no-residue-upon-a-residue rule could all comprise variations on this theme. Thus conceived, they would take their place within a panoply of other rules with the same objective—the doctrine of worthier title comprises another example.[246]

A number of early American courts inferred that, notwithstanding its structural justification, the common-law rule of lapsed devises was "founded on the interest which the law always takes in heirs."[247] Likewise, the no-residue-upon-a-residue rule for lapsed residuary bequests "is in fact a concession to the set policy of English law . . . to keep the devolution of property in the regular channels, to the heirs and the next of kin, whenever it can be done."[248] In a

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[244] The optional provision of the Uniform Trust Code appears *without* Section 2-707 of the Uniform Probate Code in fifteen states: Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, South Carolina, Tennessee, Vermont, Washington, and West Virginia.

[245] *See* Tait v. Cmty. First Tr. Co., 425 S.W.3d 684, 686, 689 (Ark. 2012) (holding lapse inapplicable to living trusts, in line with the majority rule, and noting the optional provision without comment); *see also Ex parte* Byrom, 47 So.3d 791, 795–96 (Ala. 2010) (holding the optional provision inapplicable because it went into effect after judgment was entered by the lower court); *In re* Trust Under Deed of Kulig, 175 A.3d 222, 238 (Pa. 2017) (holding the optional provision inapplicable to the pretermitted-spouse statute, by analogy, in the absence of legislative intent, "clearly and unmistakably" expressed, to revise preexisting trust law). For analysis of the optional provision, see Russell A. Willis, *Section 112: The Problem Child of the Uniform Trust Code*, 46 EST. PLAN. 32 *passim* (2019).

[246] *See, e.g.*, *In re* Estate of Kern, 274 N.W.2d 325, 327 (Iowa 1979) (remarking the origins of the doctrine).

[247] Ballard v. Carter, 22 Mass. (5 Pick.) 112, 114 (1827); *see also* Gore v. Stevens, 31 Ky. (1 Dana) 201, 207 (1833) ("to benefit the heir at law").

[248] *In re* Gray's Estate, 23 A. 205, 206 (Pa. 1892); *see also In re* Maloney's Estate, 83 A.2d 837, 839 (N.J. Hudson Cnty. Ct. 1951); Ortlieb v. Kelly (*In re* Estate of Mallam), 282 N.Y.S.2d 947, 948 (App. Div. 1967)

British context, this policy served to protect the aristocracy. Feudal services were owed upon the event of intestate succession, not when property passed by will.[249] But Parliament abolished the feudal incidents upon the Restoration in 1660, following the collapse of the feudal system during the English Civil War.[250] Thereafter, common-law doctrines favoring heirs succumbed to reformist pressure, although some persisted as anachronisms.[251]

Lawmakers could reconceptualize rules favoring heirs as means of protecting the family. Historically, intestacy in England offered such protection only in a narrow sense. The eldest son comprised the sole heir to land, sharing nothing with younger children, whereas the spouse failed to take as an heir even in want of children. These rules persisted in England until 1925.[252] In America, by contrast, even during colonial times, local rules of intestacy often protected the spouse and all children—as every state's intestacy statute did following the Revolution, and as they continue to do today.[253] A number of modern courts have identified antilapse statutes as aiming to "protect the kindred of the testator."[254] This association could explain the limitation of antilapse statutes to close family members.

Such a conception faces theoretical objections. As a general proposition, commentators recognize that freedom of testation serves to protect families more effectively than its restriction, a point understood in England since at least the eighteenth century.[255] A default rule privileging close relatives does not impinge

(Hopkins, J., dissenting) (quoting a New York commission that recommended abolishing the no-residue-upon-a-residue rule as observing that "the rule is 'a reflex of the early common law predisposition to channel estates . . . to heirs'").

[249] *See* BAKER, *supra* note 12, at 259–60, 275–76.

[250] *See* Tenures Abolition Act 1660, 12 Car. 2 c. (Eng.); *see also* BAKER, *supra* note 12, at 271–78 (addressing the breakdown in the feudal system in England, beginning with the War of the Roses).

[251] *See Kern*, 274 N.W.2d at 327–28. A modern English court criticized the no-residue-upon-a-residue rule: "I think that the effect of [the rule] is to defeat the testator's intention in almost every case in which it is applied; but it is a rule by which I am undoubtedly bound." Brown v. Heywood (*In re* Dunster) [1909] 1 Ch 103, 106 (Eng.).

[252] *See* Administration of Estates Act 1925, 15 & 16 Geo. 5 c. 23, § 46 (Eng.); A. W. B. SIMPSON, A HISTORY OF THE LAND LAW 284 (2d ed. 1986). Traditional intestacy law did, however, function to exclude "utter strangers." 2 WILLIAM BLACKSTONE, COMMENTARIES *373. By contrast, succession to personal property was uncertain, and it could be appropriated by administrators prior to 1670, when Parliament mandated an inflexible scheme of succession whereby the spouse and all children shared as next-of-kin. *See* Statute of Distributions 1670, 22 & 23 Car. 2 c. 10, § 3 (Eng.).

[253] For a further discussion, see Adam J. Hirsch, *Inheritance: United States Law*, *in* 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 235, 235–36 (Stanley N. Katz ed. 2009).

[254] Gianoli v. Gabaccia, 412 P.2d 439, 441 (Nev. 1966) (internal quotation marks omitted) (quoting Hoverstad v. First Nat'l Bank & Tr. Co., 74 N.W.2d 48, 55 (S.D. 1956)).

[255] Freedom of testation gives testators the opportunity to "divid[e] . . . their estates as the exigence of their families required." 2 WILLIAM BLACKSTONE, COMMENTARIES *12. Lord Mansfield observed similarly: "In real

on freedom of testation, strictly speaking, but it remains suboptimal to the extent that it contradicts intent. A privilege-based default rule forces testators to expend resources to override it, and any such rule perforce discriminates against poorer, less well-advised testators.[256]

Orthodox theory eschews any notion that lawmakers should establish rules favoring close relatives, apart (arguendo) from mandatory shares for surviving spouses. As a modern court insisted, "[i]t is not the purpose of the anti-lapse statutes to restrict the testator's right to select the beneficiary."[257] And again: "The [antilapse] statute was not intended either to establish a public policy or to substitute a legislative intent for a testamentary intent . . . ."[258] The more common justification for rules of lapse—as articulated in both early and modern times—is to effectuate the intent of the "typical testator."[259] The drafters of the Uniform Probate Code concur with this assessment. The "statute is remedial in nature," carrying out the testator's "presumed intent[]."[260]

Likewise in connection with the no-residue-upon-a-residue rule, American courts that observed its favoritism for heirs were *criticizing* the doctrine. "If the question were new in this state, . . . I should not hesitate to reject the English rule as wrong in principle," one court opined.[261] "[I]n their solicitude for the heir at law, the English courts defeated the manifest intent[] of the vast majority of testators by creating intestacy . . . where it was rarely, if ever, intended," added another.[262] Still another court noted in dissent that the alternative remain-in-the-

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estate, the succession is governed by political consequences of a positive system: which makes the testamentary power often necessary, to enable a man to do justice to his family." Windham v. Chetwynd (1757) 97 Eng. Rep. 377, 381; 1 Burr. 414, 420; *see also* Banks v. Goodfellow (1870) 5 LRQB 549, 564; Jeremy Bentham, *Principles of the Civil Code*, *in* 1 THE WORKS OF JEREMY BENTHAM 297, 336–37 (John Bowring ed. 1843) (ms. c. 1775–1802). American courts have made similar observations: Wills "enable the testator to provide in a proper manner for those who are the objects of his bounty, giving to those who need, and ought to receive, his bounty, but would not, were it not for the right of testamentary disposition." Rapp v. Reehling, 23 N.E. 777, 778 (Ind. 1890). For a further discussion and additional references, see Adam J. Hirsch, *Waking the Dead: An Empirical Analysis of Revival of Wills*, 53 U.C. DAVIS L. REV. 2269, 2280–83 (2020).

256 For a further discussion, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1042–52 (2004).

257 McGowan v. Bogle, 331 S.W.3d 642, 645 (Ky. 2011).

258 Rossi v. Rossi, 448 S.W.2d 162, 165 (Tex. Civ. App. 1969) (internal quotation marks omitted) (quoting *In re* Estate of Howes, 229 N.Y.S.2d 469, 470 (Sur. Ct. 1962)).

259 Fitzpatrick v. Wolfe (*In re* Estate of Fitzpatrick), 406 N.W.2d 483, 486 (Mich. Ct. App. 1987); *see also, e.g.*, Piccione v. Arp, 806 S.E.2d 589, 592 (Ga. 2017) (quoting Professor Verner Chaffin approvingly); Nicholson v. Fritz, 109 N.W.2d 226, 229 (Iowa 1961); cases cited *infra* notes 270.

260 UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013); *see also* Halbach & Waggoner, *supra* note 102, at 1101–02.

261 *In re* Gray's Estate, 23 A. 205, 206 (Pa. 1892).

262 *In re* Maloney's Estate, 83 A.2d 837, 839 (N.J. Hudson Cnty. Ct. 1951); *see also* Ortlieb v. Kelly (*In re* Estate of Mallam), 282 N.Y.S.2d 947, 948 (Sur. Ct. 1967) (Hopkins, J., dissenting) (quoting a New York

residue rule "would . . . closely comport with the established presumption against partial intestacy, which is itself aimed at reinforcing testamentary intent."[263]

The policy of intent-effectuation has long been perceived as central to the construction of wills. A maxim attributed to Lord Coke held that testamentary intent was "the pole star by which the court must steer."[264] The roots of the policy lie in economics. By effectuating intent, we enhance freedom of testation and thereby encourage testators to industry and saving.[265] And by matching default rules of inheritance to the intent of the majority, or at least a plurality, of testators, we minimize transaction costs.[266]

Acknowledging this policy gets us only so far. An unnamed annotator (probably Charles Elsley) quoted Coke's maxim in the notes following a case in Blackstone's Reports and added a postscript: it is "generally a very dim star."[267]

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commission characterizing the rule as "seemingly inconsistent with the reasonably presumable intention of the testator to make a total testamentary distribution of his estate" (internal quotation marks omitted)).

[263] *In re* Estate of McFarland, 167 S.W.3d 299, 307 (Tenn. 2005) (Drowota, J., dissenting); *see also, e.g.*, Corbett v. Skaggs, 207 P. 819, 822 (Kan. 1922) (similar statement); *In re Gray's Estate*, 23 A. at 206 (same). The *McFarland* court's use of the term "partial intestacy" refers to the situation where a will fails to dispose of the entire estate, the rest then flowing under rules of intestacy. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. e (AM. L. INST. 1999). After noting the presumption against partial intestacy, another court elaborated that "[o]rdinarily a testator will include his most favored legatees in the residual bequest intending that they shall take the bulk of his estate to the exclusion of any unnamed heirs." *In re* Frolich Estate, 295 A.2d 448, 452 (N.H. 1972) (judicially overriding the no-residue-upon-residue rule). *But cf. McFarland*, 167 S.W.3d at 305 (defending the no-residue-upon-a-residue rule as harmonious with a parallel rule of construction that creates a presumption against disinheritance of heirs, ostensibly "the most natural objects of [the testator's] bounty").

[264] 4 KENT, *supra* note 1, at *537. The maxim is credited to Lord Coke by at least two sources. *See* Drayton v. Drayton, 1 S.C. Eq. (1 Des.) 324, 330 (1793); THE DUTY OF EXECUTORS AND ADMINISTRATORS 100 (New York, R. & J. Swords 1797) (published anonymously by John F. Grimké). English courts have recited the maxim since at least the seventeenth century, *see* Brown v. Cutter (1683) 83 Eng. Rep. 223, 223; T. Raym. 427, 428, as have American courts since colonial times, *see* Dudley v. Dudley, Quincy Reports 12, 24 (Province Mass. Bay 1762). The maxim has since found its way into opinions by the U.S. Supreme Court. *See, e.g.*, Inglis v. Tr. of the Sailor's Snug Harbour, 28 U.S. 99, 146 (1830) (Story, J., concurring in part and dissenting in part). A modern court has converted the maxim into a rule, to wit, "the polar star rule." Benjamin v. JP Morgan Chase Bank, N.A., 305 S.W.3d 446, 451–52 (Ky. Ct. App. 2010).

[265] *See, e.g.*, City Elections Act 1724, 11 Geo. 1 c. 18, § 17 (Eng.) ("And . . . that persons of wealth and ability . . . may not be discouraged from becoming free of the same by reason of the custom restraining . . . citizens . . . from disposing of their personal estates . . . ."); Heirs of Cole v. Cole's Ex'rs, 7 Mart. (n.s.) 414, 416–17 (La. 1829) ("one of the strongest motives to industry and economy"). For a further discussion and additional references, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 7–9 (1992).

[266] For a further discussion and references, see Hirsch, *supra* note 256, at 1039–42.

[267] Roe ex dem. Pye v. Bird (1779) 96 Eng. Rep. 762, 765 n.(i); 2 W. Bl. 1301, 1307. This note appeared only in the second edition of Blackstone's Reports, which was annotated by Elsley. The second edition also included, however, notes by "the late Mr. Serjt. Hill." (1828) 96 Eng. Rep. 1; 1 W. Bl. 1.

Unless they state their preferences in their wills, individual testators cannot make their wishes known—and, upon their deaths, their "lips . . . are sealed."[268] In want of evidence, lawmakers have ventured conjectures about what typical preferences might be. Under the circumstances, opinions are often hedged with qualifiers. The rules of lapse match not testators' intent, but their "presumed" intent.[269] These rules are "based *on the assumption* that this is what a testator would have intended had the testator contemplated this contingency."[270]

Some courts have expressed their reservations more strongly. Whereas "[t]he intention of the testator . . . is undoubtedly the polar star," one court reflected, "it is sometimes said, that precedents serve rather to obscure, than to elucidate it."[271] The difficulty is that "no two minds would often, if ever, arrive at the same conclusion," and in some cases "judges are called on to suppose an intention, where, in fact, none ever existed."[272] The purpose of rules of construction, in this court's judgment, was simply to achieve "certainty of result" and "stability of decision."[273] Without those rules, cases would be left "to the decision of chance, and the sport of opinion."[274]

Unsurprisingly, then, judicial commentary on the law of lapse betrays dissensus—"competing schools of thought as to what [result] a testator would most probably desire" when a lapse occurs.[275] Some courts claim that antilapse statutes match probable intent when narrowly confined, whereas others consider comprehensive antilapse statutes better fitted to testamentary preferences. Courts have defended both positions with unassailable logic. On one hand, "[i]t

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[268] *In re* Lee's Estate, 80 F. Supp. 293, 294 (D.D.C. 1948); *see, e.g.*, *In re* Hittell's Estate, 75 P. 53, 54 (Cal. 1903) ("What [the testator's] actual intent may have been after the conditions were changed by the death of [a beneficiary], we have no means of knowing . . . .").

[269] Estate of Mooney, 87 Cal. Rptr. 3d 115, 122 (Ct. App. 2008); Slattery v. Kelsch, 734 S.W.2d 813, 814 (Ky. 1987) (emphasizing the word "presumed"); *see also, e.g.*, Talbot v. Batchelor (Estate of Casey), 180 Cal. Rptr. 582, 585 (Ct. App. 1982) ("[T]he anti-lapse statute expresses the Legislature's notion of what the average individual would desire in the case of a lapsed gift.").

[270] Midthun v. Guske (*In re* Estate of Niehenke), 818 P.2d 1324, 1328 (Wash. 1991) (emphasis added); *see also, e.g.*, *In re* Estate of Christian, 652 P.2d 1137, 1142 (Haw. 1982) ("*it being thought* that the average testator would prefer . . ." (emphasis added)). For similar caveats, see, for example, Shapiro v. Solomon (*In re* Estate of Friedman), 18 Cal. Rptr. 252, 253 (Dist. Ct. App.1961); Ruotolo v. Tietjen, 890 A.2d 166, 169 (Conn. App. Ct. 2006); Polen v. Baker, No. 99 CA 34, 2000 WL 776931, at *7 (Ohio Ct. App. May 31, 2000); Martindale v. Warner, 15 Pa. (3 Harris) 471, 478 (1850); *In re* Estate of Snapp, 233 S.W.3d 288, 292 (Tenn. Ct. App. 2007). Likewise, the model lawmakers. *See* UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013) ("An antilapse statute is . . . designed to carry out presumed intention."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. f (AM. L. INST. 1999) (similar statement).

[271] Sloan v. Hanse, 2 Rawle 28, 32 (Pa. 1829).

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *In re* Estate of McFarland, 167 S.W.3d 299, 305 (Tenn. 2005) (addressing lapse within the residue).

is not unreasonable to presume that . . . the issue of relative-beneficiaries are objects of the testator's bounty and affection. Such a presumption in the case of nonrelated strangers . . . would be unrealistic."[276] This reasoning appears to have persuaded the drafters of the Uniform Probate Code, although (as the legislative history indicates) they determined the scope of their provision by means no more sophisticated than an analogy to the boundaries of intestate succession.[277] Another court noted that if the antilapse statute applied to predeceasing spouses, the rule "would have a very wide and somewhat indefinite application," providing not only for children of the testator but also for stepchildren, with whom the testator might or might not have had a parental relationship.[278] The court added: "There may be good reason why a wife would provide in her will for her husband, but generally not much reason for a more extended provision towards his side of the family."[279] On the other hand, some courts reasoned in defense of an antilapse statute applicable to all beneficiaries that "the [t]estator understands that a gift will likely descend to the beneficiary's issue upon the beneficiary's inevitable death; therefore, the [t]estator would also intend the same to occur if the beneficiary predeceased the [t]estator."[280]

The same dissensus is reflected in the disparate statutes and, over time, no clear pattern has emerged. Antilapse statutes have widened and narrowed. Whereas Iowa removed spouses from the coverage of its antilapse statute by amendment in 1963, for example, Kansas proceeded in the opposite direction, adding spouses to the coverage of its statute by amendment in 1970.[281]

Other aspects of lapse doctrine have sparked similar disagreements. One court defended the English statutory rule tying distributions under the antilapse statute to the will of the predeceasing beneficiary: the testator "may reasonably intend to give to such [predeceased] child the same power of regulating, as between the members of his own family, what they shall severally take, as he would have had if he had survived the testator. That is neither an irrational nor

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[276] McElligott v. Murray (*In re* Estate of Connolly), 222 N.W.2d 885, 893 (Wis. 1974).

[277] *See supra* note 128. *Compare* UNIF. PROB. CODE § 2-103(a) (amended 2019), 8 pt. 1 U.L.A. 104 (2013), *with id.* § 2-603(b) (amended 2019), 8 pt. 1 U.L.A. 241 (2013). The final version of the comment fails to explain how the drafters arrived at the scope of the antilapse provision. *See id.* § 2-603 cmt.

[278] Keniston v. Adams, 14 A. 203, 204 (Me. 1888).

[279] *Id.* "If the family situation be such as to require the protection of step-sons, special bequests would most always be made for the purpose." *Id.*; *see also* Sackman v. Campbell (*In re* Renton's Estate), 39 P. 145, 147 (Wash. 1895) (similar observation); Cleaver v. Cleaver, 39 Wis. 96, 102–03 (1875) (same).

[280] *In re* Estate of Snapp, 233 S.W.3d 288, 292 (Tenn. Ct. App. 2007); *see also, e.g.*, *In re* Estate of Braun, 126 N.W.2d 318, 320 (Iowa 1964) (similar statement); White v. Kane, 159 S.W.2d 92, 95 (Tenn. 1942) (same).

[281] *See* IOWA CODE § 633.274 (1966) (targeting this one matter, enacted in 1963). The legislative history of the Kansas statute is noted in *Thompson v. Mooney (In re Estate of Thompson)*, 518 P.2d 393, 395 (Kan. 1974).

an improbable purpose."[282] An earlier court had considered this outcome—akin to a power of appointment, the court observed—"absurd to suppose."[283]

Guided only by logic or impressions, lawmakers can never resolve such differences persuasively. And once upon a time, they would have stood at their wits' end. *No longer.* By conducting or consulting empirical studies, today's lawmakers can light up the pole star.

IV. EMPIRICAL EVIDENCE

In order to gain insight into testamentary intent regarding predeceasing beneficiaries, I have conducted five empirical surveys of the question. Ipsos, an electronic polling firm, conducted the surveys on my behalf in November 2021, drawing on a large panel of adult Americans. Budget constraints and practical considerations precluded narrowing the data set to respondents who actually have predeceased beneficiaries under wills or will-substitutes—the optimal pool for the survey. Instead, this study presented respondents with a hypothetical scenario where a beneficiary predeceased them under a will respondents might have created. To improve the accuracy of the surveys, respondents who lacked beneficiaries of the sort addressed in each scenario were stricken from the data set. Thus, whereas respondents addressed imaginary fact patterns, they were at least fact patterns with which all respondents could personally identify.

The surveys tabulated data regarding five types of beneficiaries: (1) spouses; (2) children; (3) siblings; (4) distant relatives, who figure occasionally in wills;[284] and (5) friends or employees, who also benefit under some wills.[285] I worded the survey questions and response choices to make them as clear as possible for laypersons. Following the first response, functioning to disqualify respondents who could not relate personally to the scenario, the answer choices were randomized. A different group of 1,005 respondents participated in each of

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[282] Johnson v. Johnson (1843) 67 Eng. Rep. 336, 338; 3 Ha. 157, 162.

[283] Bridge v. Abbot (1791) 29 Eng. Rep. 502, 503; 3 Bro. C.C. 224, 225–26.

[284] *See, e.g.*, *In re* Estate of Ramer, 24 Pa. D. & C.4th 412, 415 (Adams Cnty. Ct. 1995) (concerning a will that included bequests to first and second cousins); *see also* Dalton v. White, 129 F.2d 55, 56 (D.C. Cir. 1942) (concerning a testator who delightfully bequeathed $1,000 "to each one of my cousins . . . irrespective of the remoteness of their relationship," resulting in some 2,000 claims against the estate).

[285] *See, e.g.*, *In re* Estate of Paul, 180 A.2d 254, 256 (Pa. 1962) (concerning a will that included bequests to both friends and employees). The late Justice Ruth Bader Ginsburg reportedly left a cash bequest of $40,000 (out of a $6 million estate) to her housekeeper. *See* Anna Sulkin, *Justice Ginsburg Left Entire Estate to Her Children . . . and Housekeeper*, WEALTHMANAGEMENT.COM (May 28, 2021), https://www.wealthmanagement.com/estate-planning/justice-ginsburg-left-entire-estate-her-children-and-housekeeper; *see also* Windham v. Chetwynd (1757) 97 Eng. Rep. 377, 382; 1 Burr. 414, 422 ("It is natural and usual to give legacies to servants, and tokens to friends.").

the five surveys, totaling over 5,000 respondents in all. Accordingly, each survey reflects an independent set of attitudes, with no overlap among respondents in any of the surveys. The data were weighted according to the United States Census in order to provide a representative sample of the adult American population.[286]

Although this study is the first ever to present survey evidence, it is not the first empirical study to touch on the problem of lapsed bequests. Previous wide-ranging studies of probate records, examining actual wills submitted to courts, have noted the presence of contingency clauses for predeceasing beneficiaries in wills.[287] Those clauses again speak to testators' preferences regarding the treatment of lapsed bequests.

Probate records offer an alternative source of data featuring a mix of advantages and disadvantages as compared to surveys. On one hand, probate files contain executed wills. They reveal the actions of genuine testators, as opposed to the reactions of potential testators in response to hypothetical questions.[288] On the other hand, testators craft wills in the shadow of the law. Testators could be more prone to designate alternative takers for lapsed bequests in those instances where their intent deviates from outcomes dictated by existing rules of lapse, thereby skewing evidence of intent.[289] Survey evidence avoids

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[286] Slight discrepancies in the percentages reported hereinafter reflect the inexactitude of weighting and rounding. The raw data are available on request to the author. The results of the surveys are summarized and graphed at the end of the Article. *See infra* Appendix.

[287] *See* FINCH ET AL., *supra* note 7, at 126–61 (1996) (studying 800 wills in England); MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 45 (1970) (studying 659 wills in Ohio); Olin L. Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (studying 187 wills in Michigan); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241–42 (1963) (studying 170 wills in Illinois); Horton, *supra* note 5, at 1121 (studying 324 wills in California); Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 412 (1987) (studying 449 wills in Kentucky); Weisbord & Horton, *supra* note 161, at 668 (studying 230 wills in New Jersey); Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 357 (2017) (studying 493 wills in Florida).

[288] Studies of probate records have observed that contingency clauses do not appear in wills as "boilerplate," and hence suggest individual planning by the "draftsman or testator himself." Dunham, *supra* note 287, at 283; *see also* Horton, *supra* note 5, at 1153 (finding "little standardization" of these clauses). *But see* Weisbord & Horton, *supra* note 161, at 690–92 (identifying counterexamples).

[289] In an early case, language contained in the will appeared to rely on the antilapse statute. *See* Hillyer v. Ayres, 3 N.J. Eq. 390, 392 (1836) (quoting will providing that "if any of my before named children shall decease . . . without lawful issue him or her surviving, then his or her said legacy shall lapse" (internal quotation marks omitted)). Skewing should be limited (respectively) by lay drafters' ignorance of the default rules, and by professional drafters' preference to include contingency clauses in wills for each bequest, regardless of whether they correspond with the applicable default rule, given the risk that a testator might relocate to another jurisdiction with different rules. For a further discussion and references, see Hirsch, *supra* note 256, at 1039–40. For professional guidance, see GERRY W. BEYER, STATE LAW PITFALLS: DON'T STEP IN IT WHEN YOUR CLIENTS

this distortion. Furthermore, probate records are time-consuming to scrutinize. The extant studies of probate records examined fewer actual wills than the numbers of respondents polled in the instant surveys, making hypothetical wills.[290] In quantitative terms, the studies of probate records thereby furnish less reliable data than the surveys.

That said, studies of probate records provide points of comparison with the surveys. We will note them whenever they appear relevant.

A. Spouse

My first survey addressed preferences regarding a predeceasing spouse. This matter is centrally important, because married testators typically name their spouses as primary beneficiaries. I presented respondents with the following fact pattern:

"Imagine you have a will in which you leave money upon your death to your spouse. If your spouse were to die before you do, to whom would you want the money to go instead, since it can no longer go to your spouse?"

243 out of the 1,005 respondents (24%) identified themselves as unmarried and were excluded from the data set. The remaining 762 respondents could choose among three answers. The respondents were asked to select the answer "that best reflects how you would want the money to be distributed, even if you could select multiple response choices based on your life circumstances." The options, displayed to each respondent in random order, were:

First, "To whomever my spouse decides to leave his or her estate, leaving the decision to him or her." This choice recreates the Maryland rule, deferring to the preferences of predeceased beneficiaries.[291] My research into the published cases uncovered only a single American will in which a testator

STEP ACROSS STATE LINES 10 (2018) (on file with author) (continuing legal education materials); John L. Garvey, *Drafting Wills and Trusts: Anticipating the Birth and Death of Possible Beneficiaries*, 71 OR. L. REV. 47, 50–51 (1992). Some degree of skewing may nonetheless occur. *See* Dunham, *supra* note 287, at 283 (detecting the phenomenon).

[290] Whereas each of the five instant surveys polled 1,005 persons, or 3,584 different individuals in total after respondents who could not relate to the hypotheticals were stricken, the largest of the probate-record studies examined collectively 800 wills; other studies reviewed far fewer. *See supra* note 287 and accompanying text.

[291] *See supra* note 82 and accompanying text.

indicated this preference.[292] Nonetheless, one scholar surmises that it corresponds with testators' probable intent.[293]

Second, "To my children if I now or later have any." This choice offers a novel option, responding to the concern that testators might wish to omit stepchildren from their estate plans.[294] Instead of taking the usual form of antilapse provision, benefiting children of the predeceased beneficiary, this answer choice confines alternative beneficiaries to children of the testator—thereby excluding stepchildren.

Third, "To whomever I have named in my will to receive the residuary portion of my estate (anything I have not expressly left to others)." This choice reproduces the option of lapse.

Among all respondents, 8.5% chose the first option of deferring to the spouse's will, 26.0% chose the third option of lapse, and fully 65.5% of respondents chose to divert the bequest to their children.[295] The subset of respondents over the age of fifty-five—by hypothesis, the most likely to have wills—expressed preferences consistent with the universal set of respondents.[296] The wealth of respondents had no appreciable impact on preferences.[297] Likewise, neither gender nor place of residence changed the overwhelming preference for the second option in the survey: 59.7% of men, and 70.1% of women chose that option; 62.1% of Northeasterners, 68.5% of Midwesterners, 67.3% of Southerners, and 62.7% of Westerners preferred that option.

These data correspond with studies of probate records in Kentucky, Ohio, Illinois, and Florida. Out of the 167 wills surveyed in Kentucky that included a contingency clause in case the spouse predeceased the testator, 144 (86.2%)

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[292] *See In re* Piffard's Estate, 18 N.E. 718, 718 (N.Y. 1888) (quoting a will providing "I do hereby direct that my said daughters . . . shall have power, by their several wills . . . [to] bequeath the share of my estate . . . bequeathed to them . . . in case of the death of them . . . in my life-time"). *But cf.* Greenwood v. Sutcliffe (*In re* Greenwood) [1912] 1 Ch 392, 396, 398 (Eng.) (conferring lapsed bequests under a British will "as if [the beneficiaries'] death[s] had happened immediately after mine," and observing that "clauses such as we have in the present case have become almost common form clauses in wills" (internal quotation marks omitted)). The will in *Greenwood* tracked the British antilapse statute in effect at that time. *See supra* note 68 and accompanying text.

[293] *See* Richard F. Storrow, *Wills and Survival*, 34 QUINNIPIAC L. REV. 447, 458–59 (2016).

[294] *See supra* note 278–279 and accompanying text.

[295] These data are graphed below. *See infra* Appendix, Figure 1.

[296] With this age restriction, 4.4% chose the first option, 29.7% chose the third option, and 65.8% chose the second option.

[297] Among respondents with annual incomes of less than $100,000, 8.9% chose the first option, 26.5% chose the third option, and 64.8% chose the second option. Among respondents with annual incomes above $100,000, 7.8% chose the first option, 25.3% chose the third option, and 66.9% chose the second option.

directed "all, or substantially all" of the spouse's bequest to the testator's children as alternative takers.[298] In Ohio, the comparable fraction exceeded 70%.[299] In Illinois, the comparable fraction was 60%.[300] In Florida, this pattern again predominated.[301] The formula also arises repeatedly within wills appearing in published cases.[302] There are no conflicting studies of probate records.

B. Children

My second survey presented the same fact pattern, mutatis mutandis, as concerns predeceasing children.[303] Out of 1,005 respondents, 319 (31.8%) were childless and stricken, leaving a data set of 686 respondents. The answer choices (appearing in random order) again offered a first option of allowing the predeceasing child's will to control the bequest but then added a new, second option: "To the husband or wife of my child if my child now or later has one." Although no existing antilapse statute operates in this way, it appears a plausible alternative, suggested by contingencies clauses found in actual wills.[304] Such clauses might reflect either a relationship with the husband or wife (*viz.*, son- or daughter-in-law of the testator) named in the contingency clause or the expectation that he or she would serve as a conduit to descendants of the couple.[305] The third option diverted lapsed bequests directly to the descendants of predeceased children, as under conventional antilapse statutes. Finally, the fourth option sent lapsed bequests to the residue, as would occur in the absence of an antilapse statute.

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[298] *See* Schneider, *supra* note 287, at 424.

[299] *See* SUSSMAN ET AL., *supra* note 287, at 196–97.

[300] *See* Dunham, *supra* note 287, at 283.

[301] *See* Wright & Sterner, *supra* note 287, at 362–63 (tabulating no alternatives to this pattern).

[302] *See, e.g.*, Cori v. Schlafly, 2021 IL App (5th) 200246, ¶ 35; Parks v. Johnson, 870 S.E.2d 280, 281 (N.C. Ct. App. 2022); *see also* Wing v. Goldman Sachs Tr. Co., 851 S.E.2d 398, 400 (N.C. Ct. App. 2020) (concerning a living trust).

[303] "Imagine that you have a will in which you leave money upon your death to one of your children. If your child were to die before you do, to whom would you want the money to go instead, since it can no longer go to your child? Please choose the response that best reflects how you would want the money to be distributed, even if you could select multiple response choices based on your life circumstances."

[304] A British study found "a clear pattern of affines acting as 'replacements' for their own spouses at substitution," although they appeared in only 12% of wills that included contingency clauses. *See* FINCH ET AL., supra note 7, at 140–41, 141 tbl.6.6 (presenting evidence from 800 probated wills in Great Britain between 1959 and 1989). A study of probate records from Michigan in 1963 found that, whereas 117 of the 187 wills in the data set contained contingency clauses, only five of those clauses directed lapsed bequests to the spouses of predeceasing beneficiaries. *See* Browder, *supra* note 287, at 1322, 1326–27; *see also* Dunham, *supra* note 287, at 283–84 (finding examples of contingency clauses directing lapsed bequests to spouses of predeceasing beneficiaries in a study of probate records in Illinois, which the author of the study found "striking").

[305] *See infra* note 364 and accompanying text.

The results of the survey lend support for the antilapse model, although less decisively so than one might have predicted. Whereas a plurality of respondents (39.4%) preferred to divert lapsed bequests to the descendants of children, a significant fraction (33.5%) was content to allow these bequests to fall into the residue. Smaller fractions favored sending lapsed bequests to the spouses of children (13.4%) or deferring to the predeceased child's will (13.7%).[306] The plurality choice remained consistent across age, wealth, and regional subdivisions.[307] It was not quite consistent across genders, but the difference was insignificant, and lawmakers are not about to distinguish rules of lapse on the basis of gender in any event.[308] A study of probate records in Illinois supports the result found in this survey.[309] There are no conflicting studies.

C. Siblings

My third survey assayed lapsed bequests to siblings, occupying the first collateral line of a testator's relatives.[310] Respondents had the same four options

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[306] These data are graphed below. *See infra* Appendix, Figure 2.

[307] Among respondents over the age of fifty-five, 43.2% preferred that descendants of deceasing children represent them, and 37.2% preferred that the bequest lapse. Among respondents with annual incomes of less than $100,000, 40.7% preferred that descendants of deceased children represent them, and 32.4% preferred that the bequest lapse, whereas among respondents with annual incomes above $100,000, 37.2% preferred that descendants of deceased children represent them, and 35.6% preferred that the bequests lapse. Among Northeasterners, 41.8% preferred that descendants of deceased children represent them, and 32.7% preferred that the bequests lapse. Among Midwesterners, the fractions were 39.7% and 37.0%, respectively. Among Southerners, the fractions were 36.1% and 31.4%, respectively. Among Westerners, the fractions were 43.4% and 34.9%, respectively.

[308] Whereas 44.9% of women preferred that descendants of deceasing children represent them, versus 31.6% who preferred that the bequest lapse, 33.4% of men preferred that descendants of deceased children represent them, versus 35.5% who preferred that the bequest lapse. In a recent line of scholarship, advocates have argued that lawmakers should "personalize" default rules, using data to draw distinctions on the basis of gender and other variables. *See, e.g.*, Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1419, 1433, 1440 (2014) (advocating gender-specific rules of intestate succession where supported by data regarding divergent intent). Although rules of intestacy distinguishing the heirs of male and female decedents have existed historically, *see* ATKINSON, *supra* note 186, at 82–83 (discussing intestate succession by nonmarital children), they are now extinct. Lawmakers show no sign of wishing to restore any such regime today.

[309] *See* Dunham, *supra* note 287, at 283–84 (finding that out of eleven wills naming children as primary beneficiaries with a contingency clause, six named descendants of deceased children as substitutes, four named their spouses as substitutes, and one named the other children as substitutes).

[310] "Imagine that you have a will in which you leave some money upon your death to a brother or sister to whom you feel close enough to benefit. If your brother or sister were to die before you do, to whom would you want the money to go instead, since it can no longer go to your brother or sister? Please choose the response that best reflects how you would want the money to be distributed, even if you could select multiple response choices based on your life circumstances."

(in random order) given to respondents presented with the problem of predeceasing children.[311]

Considered in the abstract, one might assume that persons who feel sufficiently close to their siblings to want to provide a bequest to them would also care about their children. The data tell a different story. After eliminating the 19.2% of respondents who had no sibling they would want to benefit, leaving a data set of 811 respondents, nearly half (49.7%) preferred to allow a bequest to a predeceased sibling to lapse. By comparison, only 30.0% wished to substitute the children of that sibling, whereas 10.8% would substitute takers named in the sibling's will and 9.6% would substitute the sibling's spouse.[312] These comparative results remained consistent along gender, age, wealth, and regional subdivisions.[313]

These results also find confirmation in a study of probate records from Kentucky. The study uncovered forty-three wills that provided for siblings, twenty-two of which included no contingency clause for the possibility that siblings might predecease the testator. Out of the twenty-one wills that did include such a clause, *only a single one* created an alternative bequest for the siblings' issue. Five diverted the bequest to other siblings with nothing reserved for the issue of deceased siblings, six granted the bequest to charities, and nine named other persons as substitute takers.[314] Again, there are no conflicting studies.

Although budget constraints precluded an independent survey of testators' preferences regarding bequests to nephews and nieces, it stands to reason that

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311 *See supra* pp. 360–61.

312 These data are graphed below. *See infra* Appendix, Figure 3.

313 Among male respondents, 49.6% preferred that bequests to deceased siblings lapse, and 25.7% preferred that descendants of deceased siblings represent them, whereas among female respondents, the comparable fractions were 49.6% (again) and 34.0%, respectively. Among respondents over the age of fifty-five, 61.2% preferred that bequests to deceased sibling lapse, and 22.5% preferred that the descendants of deceased siblings represent them. Among respondents with annual incomes of less than $100,000, 50.1% preferred that bequests to deceased siblings lapse, and 30.0% preferred that the descendants of deceased siblings represent them, whereas among respondents with annual incomes above $100,000, the comparable fractions were 46.4% and 29.7%, respectively. Among Northeasterners, 50.0% preferred that bequests to deceased siblings lapse, and 23.9% preferred that descendants of deceased siblings represent them. Among Midwesterners, the comparable fractions were 47.7% and 25.9%, respectively. Among Southerners, the fractions were 49.8% and 32.5%, respectively. Among Westerners, the fractions were 50.5% and 33.2%, respectively.

314 *See* Schneider, *supra* note 287, at 432; *see also* Dunham, *supra* note 287, at 283–84 (presenting limited data from Illinois); SUSSMAN ET AL., *supra* note 287, at 196–97 (finding in a study of probate records that contingency clauses were relatively uncommon in connection with bequests to collateral relatives, and suggesting that this pattern might indicate that "the circle of those whom [the testator] would have liked to benefit had been exhausted").

testators would feel similarly toward them as they do to siblings, and therefore that they would not wish to benefit grandnephews and grandnieces as substitutes for predeceasing nephews and nieces.[315] A follow-up study is nonetheless advisable to confirm this surmise.

D. Distant Relatives

My fourth survey addressed lapsed bequests to distant relatives.[316] The survey offered no definition of distant relatives in order to avoid confusing respondents with genealogical terminology.[317] Accordingly, some respondents may have interpreted distant relatives to include first cousins and others not. Respondents had the same four options (in random order) given to respondents presented with the problem of predeceasing children.[318]

After omitting the 36% of respondents who had no distant relative whom they "feel close enough to leave anything under my will," leaving a data set of 640 respondents, a majority (57%) preferred that lapsed bequests to distant relatives flow into the residue. This option remained the majority response across gender, age, wealth, and regional subdivisions.[319] Much smaller fractions preferred to send lapsed bequests to children (19.7%), or spouses (10.6%), or takers under wills (12.8%), of predeceased distant relatives.[320] Apparently,

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[315] In two states, antilapse statutes cover siblings, *but not* nephews and nieces. *See* CONN. GEN. STAT. § 45a-441 (2021); N.Y. EST. POWERS & TRUSTS § 3-3.3(a)(2) (McKinney 2013).

[316] "Imagine that you have a will in which you leave some money upon your death to a distant relative to whom you feel close enough to benefit. If your distant relative were to die before you do, to whom would you want the money to go instead, since it can no longer go to your distant relative? Please choose the response that best reflects how you would want the money to be distributed, even if you could select multiple response choices based on your life circumstances."

[317] *See* Dalton v. White, 129 F.2d 55, 56 (D.C. Cir. 1942) (observing that "the word 'cousins' is often taken to mean first cousins" when construing wills); *In re* Bannan's Estate, 264 N.Y.S. 335, 336 (Sur. Ct. 1933) (finding that the testator "clearly intended by the words 'second cousins' as used in his codicil to define first cousins once removed").

[318] *See supra* pp. 360–61.

[319] Among male respondents, 58.8% preferred that bequests to deceased distant relatives lapse, and 14.8% preferred that descendants of deceased distant relatives represent them, whereas among female respondents, the comparable fractions were 55.4% and 23.7%, respectively. Among respondents over the age of fifty-five, 71.4% preferred that bequests to deceased distant relatives lapse, and 14.6% preferred that the descendants of deceased distant relatives represent them. Among respondents with annual incomes of less than $100,000, 57.5% preferred that bequests to deceased distant relatives lapse, and 20.0% preferred that the descendants of deceased distant relatives represent them, whereas among respondents with annual incomes above $100,000, the comparable fractions were 56.3% and 18.6%, respectively. Among Northeasterners, 60.0% preferred that bequests to deceased distant relatives lapse, and 25.5% preferred that descendants of deceased distant relatives represent them. Among Midwesterners, the comparable fractions were 56.8% and 21.2%, respectively. Among Southerners, the fractions were 57.7% and 17.4%, respectively. Among Westerners, the fractions were 53.8% and 18.6%, respectively.

[320] These data are graphed below. *See infra* Appendix, Figure 4.

affections felt by respondents for distant relatives are in most instances confined to them alone. Data from a study of probate records in Illinois support this result.[321] And, again, there are no conflicting studies.

These results are consistent with—and, predictably, more pronounced than—the results obtained concerning respondents' preferences with regard to predeceasing siblings. Considered collectively, data from this and the previous survey suggest attitudes that apply to all collateral relatives, near and distant, making further surveys to distinguish attitudes between different collateral lines of cousins unnecessary.

E. Friends and Employees

My fifth and final survey covered friends and employees of the testator. The fact pattern cited "a housekeeper or a driver" as examples of employees, to emphasize to respondents that the range of beneficiaries included employees within the home, not just within a business.[322] Respondents had the same four options (in random order) given to respondents presented with the problem of predeceasing children.[323] Thirty-two percent of respondents had no friends or employees to whom they felt close enough to leave a bequest under a will and were eliminated, yielding a data set of 685 respondents.

Once again, a majority of respondents (50.4%) preferred to send the bequest into the residue if the friend or employee predeceased them, and this majority or near-majority preference remained consistent across subdivisions of gender, age, wealth, and region.[324] Smaller fractions wished to divert the bequest to

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[321] *See* Dunham, *supra* note 287, at 283–84 (finding that out of twelve wills bequeathing to relatives more distant than siblings, four named the remaining distant relatives as alternative takers, one named the spouse of the predeceasing beneficiary as alternative taker, two named the residuary beneficiaries as alternative takers, three named other persons as alternative takers, and only two named the children of the predeceased beneficiary as alternative taker).

[322] "Imagine that you have a will in which you leave some money upon your death to an unrelated friend or employee of yours (such as a housekeeper or driver) to whom you feel close enough to benefit. If your friend or employee were to die before you do, to whom would you want the money to go instead, since it can no longer go to your friend or employee? Please choose the response that best reflects how you would want the money to be distributed, even if you could select multiple response choices based on your life circumstances."

[323] *See supra* pp. 360–61.

[324] Among male respondents, 50.3% preferred that bequests to deceased friends and employees lapse, and 17.9% preferred that descendants of deceased friends and employees represent them, whereas among female respondents, the comparable fractions were 50.8% and 27.1%, respectively. Among respondents over the age of fifty-five, 67.6% preferred that bequests to deceased friends and employees lapse, and 16.7% preferred that the descendants of deceased friends and employees represent them. Among respondents with annual incomes of less than $100,000, 49.5% preferred that bequests to deceased friends and employees lapse, and 24.3% preferred that the descendants of deceased friends and employees represent them, whereas among respondents with annual

children of friends and employees (22.6%), or to their spouses (13.7%), or to takers under their wills (13.1%).[325]

Intriguingly, the level of this preference was roughly comparable to the data gathered in regard to siblings but somewhat less pronounced than for distant relatives. As previously noted, 12.8% of respondents would allow a distant relative's will to control lapsed bequests (versus 13.1% for a friend or employee), 10.6% would divert lapsed bequests to a spouse (versus 13.7% for a friend or employee), and 19.7% to the distant relative's children (versus 22.6% for a friend or employee).[326]

These differentials—small but consistent—suggest greater insularity of relationships with distant relatives than with friends and employees. Why that insularity arises is unclear, and one can only speculate.[327] Perhaps, distant relatives are also typically physically distant. Interaction with them might be confined to intermittent family gatherings, and ties of benevolence to them might tend to form early in life, before distant relatives have families of their own. By contrast, respondents might reside in closer proximity to friends and employees, presenting greater opportunities to interact with their families.[328] This difference could explain respondents' marginally stronger bonds with the families of friends and employees. Whatever the explanation, disparities in the data were not great enough to change respondents' preferences. They chose to eschew the families of both groups as alternative takers of lapsed bequests.

V. ANALYSIS

The data harvested in this study support the statutory formula that steers lapsed bequests alternatively to a beneficiaries' descendants or to residuary beneficiaries in practically every state today. None of the five surveys revealed majority or plurality support for either deferring to the estate plans of

incomes above $100,000, the comparable fractions were 52.3% and 18.5%, respectively. Among Northeasterners, 44.6% preferred that bequests to deceased friends and employees lapse, and 24.1% preferred that descendants of deceased friends and employees represent them. Among Midwesterners, the comparable fractions were 49.6% and 18.7%, respectively. Among Southerners, the fractions were 49.2% and 29.6%, respectively. Among Westerners, the fractions were 57.2% and 14.4%, respectively.

325 These data are graphed below. *See infra* Appendix, Figure 5.

326 *Compare infra* Appendix, Figure 4, *with infra* Appendix, Figure 5.

327 Thus far, insularity has gone unstudied as a variable in relationships within the theoretical literature. *See* Arthur Aron, Elaine N. Aron & Danny Smollan, *Inclusion of Other in the Self Scale and Structure of Interpersonal Closeness*, 63 J. PERSONALITY & SOC. PSYCH. 596, 596 (1992) (identifying other variables).

328 Studies associate emotional closeness with physical proximity. *See* Franz J. Neyer & Frieder R. Lang, *Blood Is Thicker than Water: Kinship Orientation Across Adulthood*, 84 J. PERSONALITY & SOC. PSYCH. 310, 312 (2003).

predeceasing beneficiaries (as under Maryland's unique statute[329]) or diverting bequests to the spouses of predeceasing beneficiaries (as under contingency clauses found in some wills[330]) for any of the categories of beneficiaries studied.

Yet, when we proceed to examine the dividing lines created by antilapse statutes, we discover that they need revising. Most antilapse statutes, including the Uniform Probate Code's model provision, exclude predeceasing spouses from their purview.[331] In most states, a bequest to a predeceasing spouse simply lapses. Survey evidence compiled in this study shows that a majority of testators prefer to create a substitute bequest for children in this circumstance.[332]

On reflection, the prevailing structure of antilapse statutes is explicable as a product of bygone times. In the era when these statutes first took shape, testators typically provided for their spouses and children with separate bequests for each.[333] Under such an estate plan, children received substantial estates even if a spouse *qua* beneficiary predeceased the testator. An opinion from the nineteenth century made the point: "When the [predeceased] wife's issue is the husband's also, it seems to have been presumed that the [husband's] will itself would provide for them without necessity of statutory protection."[334]

Times have changed, and so have patterns of testation. Nowadays, testators typically bequeath the bulk of their estates to their spouses, relying on them as conduits to provide in turn for children.[335] In most cases, the backstop of

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329 *See supra* note 82 and accompanying text. Maryland's approach also creates a circularity problem when testators execute reciprocal wills naming each other as beneficiaries. *See* Simpson v. Piscano, 419 A.2d 1059, 1061–63 (Md. 1980) (addressing the issue); Segal v. Himelfarb, 766 A2d 233, 234–41 (Md. Ct. Spec. App. 2001) (same); Guiliano v. Gore, No. 1058, 2015 WL 5944694, at *1, *4 (Md. Ct. Spec. App. June 25, 2015) (same); *see also* Jones v. Hensler (*In re* Hensler) [1881] 19 Ch D 612, 614–15 (Eng.) (addressing the same issue under England's similar statute, no longer in effect).

330 *See supra* note 304.

331 Antilapse can apply to spouses in just seven states: Georgia, Kansas, Kentucky, New Hampshire, Rhode Island, Tennessee, and West Virginia. *See supra* notes 84, 87 and accompanying text; *see also* UNIF. PROB. CODE § 2-603(b) (amended 2019), 8 pt. 1 U.L.A. 241 (2013) (omitting the spouse from the provision's coverage).

332 *See supra* Section IV.A.

333 *See* CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 199–201 (1987).

334 Cleaver v. Cleaver, 39 Wis. 96, 103 (1875).

335 For the most recent study, see Wright & Sterner, *supra* note 287, at 363 tbl.2, 363 (finding in an analysis of probate records in Florida that wills bequeathing everything to the spouse outnumbered those dividing the estate between spouse and children by 260 to 12, or 95.6% versus 4.4%); *see also* Schneider, *supra* note 287, at 417–18 (finding in a study of probate records that 229 out of 279 wills (82.1%) of married testators provided the entire estate to the surviving spouse); Lawrence M. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 n.25 (1991) (citing other studies). The Uniform Probate Code's evolving intestacy provisions reflect this trend. *Compare* UNIF. PROB. CODE § 2-102(1)(B) (amended 2019), 8 pt. 1 U.L.A. 100 (2013) (providing the entire estate to the spouse if all of the

intestacy will salvage the estate plan in the event of lapse. If a predeceased spouse is named as the sole beneficiary, or the sole residuary beneficiary, and the antilapse statute fails to cover him or her, then the testator's children inherit the residue as heirs by partial (or complete) intestacy anyway.[336] This result is not assured, however. If the testator reserved even a small fraction of the residue for another family member or charity, then a lapse of the spouse's bequest would cause it to flow to the other residuary beneficiary under the predominant remain-in-the-residue rule.[337] The testator's failure to update the will following a spouse's death would then result in the children's disinheritance—a catastrophic outcome from the standpoint of intent-effectuation.

Another troubling result could follow under estate plans reflecting multiple marriages. A testator might provide individually for children from prior marriages but *not* for children of the current marriage, using the current spouse as conduit only for their children in common.[338] If the spouse predeceased the testator, causing a partial intestacy to ensue, then all of the children would share the residue equally as heirs, with the consequence that children of the prior marriage would inherit larger sums (because they are both beneficiaries *and* heirs) than children of the current marriage. At least one court recognized that this result "work[s] a hardship"—in other words, fails to correspond with probable intent—but the court felt compelled to abide by it.[339]

As noted earlier, the concern driving lawmakers to exclude spouses from the reach of antilapse statutes is the prospect that lapsed bequests might then flow to children of a spouse who are not also children of the testator, whom the testator might not have wished to benefit.[340] Lawmakers could sidestep this risk by making the alternative takers the *testator's* children, rather than the predeceasing spouse's children—tweaking the conventional form of antilapse statute. My survey offered respondents the choice of diverting the spouse's bequest to the testator's children, and it proved the most popular option among

intestate's descendants are also descendants of the spouse and the spouse has no other descendants), *with id.* §§ 2-102(3), 2-103(1) (pre-1990 art. 2), 8 pt. 1 U.L.A. 419, 421 (2013) (dividing the estate between spouse and children under these circumstances).

336 *See, e.g.*, UNIF. PROB. CODE § 2-103(a)(1) (amended 2019), 8 pt. 1 U.L.A. 104 (2013).

337 *See supra* notes 79–80 and accompanying text.

338 *See supra* note 335 and accompanying text.

339 *Cleaver*, 39 Wis. at 97, 103.

340 *See supra* notes 278–279 and accompanying text.

the ones available under the survey.[341] Estate plans revealed in published cases have also sometimes employed this formula.[342]

Were lawmakers to impose this rule, they should make an adjustment for direct bequests children receive under the will. Testators sometimes create such bequests, especially regarding children from prior marriages or relationships for whom the current spouse might not otherwise provide. Empirical evidence shows that most parents intend to bequeath equal shares of their estates to their children, and lawmakers crafting rules of antilapse should make the same assumption.[343]

So as not to confuse respondents in my survey, I did not give them the additional choice of benefiting the predeceased spouse's children, thereby including the testator's stepchildren in the alternative bequest. As we have observed, antilapse statutes in a few states do follow this formula.[344] Naturally, stepparents can form attachments with stepchildren that are indistinguishable from those bonding a parent and child. Sociological research suggests that such attachments arise most commonly when the relationship began during the minority of the stepchild, and where the stepparent and stepchild resided in the same household.[345] Empirical studies of testamentary preferences and patterns suggest that a plurality of testators treat these stepchildren no differently from natural children.[346]

In light of this evidence, lawmakers could further refine antilapse rules applicable to predeceasing spouses by creating alternative bequests for the

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[341] *See supra* Section IV.A.

[342] *See* cases cited *supra* note 302; *see also* GA. CODE ANN. § 53-4-64(c) (West 1996) (limiting antilapse in instances where a beneficiary is treated as having predeceased the testator by virtue of divorce or a slaying to "descendants of the beneficiary who are also descendants of the testator").

[343] For a collection of references to studies on the propensity of parents to divide their estates equally among their children, see Hirsch, *supra* note 256, at 1086 n.247. To make the adjustment mathematically, lawmakers could impose a hotchpot rule by analogy to the law of advancements. *See* ATKINSON, *supra* note 186, at 717–18.

[344] *See supra* note 331.

[345] For a collection of references, see Hirsch, *supra* note 4, at 651 nn.183–84.

[346] *See* Courtney Bravo, Stepfamilies and Inheritance Law: A Proposal for Stepparent and Stepchild Inheritance (2018) (unpublished manuscript) (on file with author) (presenting survey evidence, finding that out of forty-four stepparents whose stepchildren grew up full time in their household, 75% wanted their stepchildren to receive the same or more than their natural or adopted children; among twenty-two stepparents whose stepchildren grew up part time in their household, the comparable fraction was 63.6%; and among thirty stepparents whose stepchildren grew up in the other biological parent's household, the fraction was 36.7%); Wright & Sterner, *supra* note 287, at 368–69, 369 tbl.7 (examining probate records).

testator's children, along with stepchildren who meet the requisite criteria.[347] Alternatively, lawmakers could include stepchildren in a substitute bequest upon proof that they had a "parent-child relationship" with the testator. The second approach would establish a standard rather than a rule, albeit one courts can administer easily. Perceiving the existence of such a relationship, one court expressed regret when stepchildren failed to inherit under the mechanical operation of an antilapse statute.[348]

Empirical evidence presented earlier also holds implications for the breadth of antilapse statutes as regards blood relatives. My survey evidence confirmed that a plurality of respondents prefer to apply antilapse to children in the event that they predecease the testator, as is universally true under existing statutes.[349] My survey evidence also confirmed that a majority of respondents prefer that bequests to unrelated persons—friends and employees—lapse, as is also true under statutory law in all but a handful of states.[350] To this extent, most of the current statutes treat the problem in accord with the data.

At the same time, my surveys found that most testators would decline to create substitute bequests for descendants of predeceasing collateral relatives, both near and distant.[351] This result conflicts with the most prevalent form of antilapse statute, including the one found in the Uniform Probate Code, which applies to collateral relatives as far as the second collateral line.[352] In light of the data, lawmakers need to reconsider this formula.

The surveys concerning collateral relatives also raise questions about lapsed bequests to ascendant relatives. In all except ten states, antilapse statutes cover bequests to parents and grandparents.[353] When applied to them, however, an antilapse statute funnels bequests not only down the testator's line, but also

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[347] Uniquely among the states, California creates intestacy rights for stepchildren on the basis of such criteria. *See* CAL. PROB. CODE § 6454 (West 1994).

[348] *See* Woelk v. Luckhardt (*In re* Luckhardt's Estate), 277 N.W. 836, 842 (Neb. 1938).

[349] *See supra* Sections II.A.1, IV.B.

[350] *See supra* Section IV.E. The exceptional states are Georgia, Iowa, Kentucky, New Hampshire, Rhode Island, Tennessee, and West Virginia. *See supra* notes 84–85 and accompanying text.

[351] *See supra* Section IV.C, IV.D.

[352] *See supra* note 89 and accompanying text; *see also* UNIF. PROB. CODE § 2-603(b) (amended 2019), 8 pt. 1 U.L.A. 241 (2013). Currently, only five states (Arkansas, Illinois, Indiana, Mississippi, and Nevada) exclude all collateral relatives from the purview of antilapse statutes. *See supra* note 92 and accompanying text. Pennsylvania has enacted a refinement, whereby antilapse applies to bequests to siblings, nephews, and nieces *except* to the extent the testator's spouse or descendants would benefit if those bequests were to lapse into the residue or into a partial intestacy. *See* 20 PA. STAT. AND CONS. STAT. ANN. § 2514(9) (West 2016). The popularity of this variation has yet to be studied empirically.

[353] The exceptions are Arkansas, Connecticut, Illinois, Indiana, Louisiana, Mississippi, Nevada, New York, Pennsylvania, and Texas. *See supra* notes 90–92 and accompanying text.

along collateral lines. A lapsed bequest to a parent of the testator goes to the testator's lineal descendants along with the testator's siblings and *their* descendants, depending on who survived the testator.[354] By the same token, a lapsed bequest to a grandparent of the testator goes to the testator's lineal descendants along with the testator's parents, siblings, uncles, aunts, and all of their descendants, again depending on who survived the testator.

This study did not poll respondents as to their preferences regarding lapsed bequests to either parents or grandparents. Given, however, that only a minority of respondents wished to apply the antilapse principle to collateral relatives, we can infer a preference against doing so in the context of bequests to ascendant relatives. Based on this inference, lapsed bequests to ascendant relatives should flow only to the testator's lineal descendants, if any exist.[355]

There remains the matter of bequests to in-laws. This study's budget constraints precluded direct surveys of preferences with regard to different categories of in-laws. Nonetheless, if we can assume that a bequest to in-laws typically signals that the testator views them as functionally equivalent to their analogous blood relatives—as examples in the published cases might suggest[356]—then we can again draw inferences from the data harvested in this study.

The Uniform Probate Code includes direct bequests to stepchildren within the scope of its antilapse statute but offers no rationale for doing so.[357] Presumably, the drafters assumed that when a testator bequeaths to a stepchild

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354 *See* Kuenzi v. Nociaro (*In re* Monticelli's Estate), 236 P.2d 661, 664 (Cal. Ct. App. 1951) (concerning a lapsed bequest to a parent that benefitted collaterals in the absence of lineal descendants); Murray v. Murray, 564 S.W.2d 5, 6, 8 (Ky. 1978) (concerning a lapsed bequest to a parent that, *e contra*, benefitted lineal descendants in the absence of collaterals).

355 In practice, this issue is unlikely to arise for another reason: testators can more readily anticipate the contingency of lapse in connection with ascendants and should be more prone to include alternative bequests in their wills in the event that an ascendant relative predeceases the testator. *See* Dunham, *supra* note 287, at 283 (finding in a study of probate records that contingency clauses were more common in connection with bequests to contemporaries of the testator than in connection with bequests to his or her children); SUSSMAN ET AL., *supra* note 287, at 196–97 (finding similar but less decisive evidence in another study of probate records).

356 *See, e.g.*, Olson v. Erickson (*In re* Estate of Ulrikson), 290 N.W.2d 757, 758 (Minn. 1980) (concerning a testator who made coequal bequests to nephews, nieces, and nieces by marriage); Parks v. Johnson, 870 S.E.2d 280, 281–82 (N.C. Ct. App. 2022) (concerning a testator who created a contingent bequest dividing the residue of his estate equally between his parents or their descendants and his mother-in-law or her descendants); *In re* Estate of Harper, No. M2000-00553-CoA-R3-CV, 2000 WL 1100206, at *1 (Tenn. Ct. App. Aug. 8, 2000) (concerning a testator who divided the residue of his estate between his sister and his sister-in-law); Garrett v. McQuillen, 368 N.W.2d 633, 635 (Wis. 1985) (concerning a testator who created a contingent bequest of equal shares to his mother, father, and mother-in-law).

357 *See* UNIF. PROB. CODE § 2-603(a)(7), (b) & cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013).

the testator indicates that he or she views the stepchild as equivalent to a natural child—an unwarranted assumption when a testator bequeaths to a spouse who happens to have children from a prior marriage or relationship. Once a testator signals that he or she viewed a stepchild like a natural child, step-grandchildren become the functional equivalents of natural grandchildren and should take in the place of predeceased stepchildren. Data presented earlier confirm this preference as regards natural children and grandchildren.[358]

Several states have extended this idea to other in-laws. In South Dakota, the antilapse rule applies to direct bequests to step-grandchildren, a logical extension of the Code's approach.[359] In New York, more creatively, the antilapse rule applies to bequests to children given up for adoption, presumably on the theory that bequests to those children signal the renewal of a relationship with them—and therefore with their progeny.[360] Again, this extension appears thematic.[361]

In California, lawmakers include bequests to all in-laws within the scope of the lapse rule.[362] Data presented earlier suggest, however, that testators prefer to confine substitution via antilapse to lineal descendants.[363] Extrapolating from these data, we can surmise that testators would prefer to apply the antilapse rule to bequests to a son- or daughter-in-law, at least where the statute would preserve the bequest for lineal descendants of the testator. The testator may view the son- or daughter-in law as a conduit to the testator's grandchildren.[364] Contrarily, it

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358 *See supra* Section IV.B.

359 S.D. CODIFIED LAWS § 29A-2-603(a) (1995). For no stated reason, the antilapse provision in the Uniform Probate Code excludes in-laws other than a stepchild from its coverage. *See* UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013) ("Antilapse protection is not extended to devises to descendants of the testator's stepchildren . . . . Other than stepchildren, devisees related to the testator by affinity are not protected by this section.").

360 *See* N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(b) (McKinney 2013), *construed in In re* Estate of Murphy, 843 N.E.2d 140, 144 (N.Y. 2005).

361 *Cf.* Xavier v. Amaral (*In re* Estate of Goulart), 35 Cal. Rptr. 465, 472–75 (Dist. Ct. App. 1963) (holding that adoption precluded antilapse where, vice versa, an adopted child bequeathed to members of the natural family). An adoptee's bequests to ascendant or collateral members of the natural family should implicate antilapse only to the extent that the antilapse statute ordinarily covers bequests to ascendants and collaterals. Likewise, bequests from other members of the natural family to a relative given up for adoption should follow the same principle.

362 *See* CAL. PROB. CODE § 21110(c) (West 2019).

363 *See supra* Sections IV.B, IV.C, IV.D.

364 *See In re* Estate of Dow, 260 A.3d 1, 3 (N.H. 2021) (concerning a will leaving the residue to the testator's daughter-in-law, and alternatively to the testator's granddaughter if the daughter-in-law predeceased the testator); *In re* Burrows' Estate, 182 N.E. 79, 80 (N.Y. 1932) (concerning a bequest made to the testator's daughter-in-law, widow of the testator's son, who was the mother of the testator's grandchildren); Smyth v. Cleveland Tr. Co., 179 N.E.2d 60, 62–63 (Ohio 1961) (concerning a living trust providing that if the settlor's son predeceases, then the son's wife was to receive a life estate paying her all of the income plus a discretionary

would be strange indeed if testators wished to apply the antilapse rule to a predeceased sibling-in-law but not to blood siblings. Bequests to a predeceasing parent-in-law should also lapse if antilapse would divert the bequest to other affines, with whom the testator might not have shared a close relationship—but not to the extent that antilapse would transmit the bequest to the testator's spouse or children as substitute takers.

Other problems not addressed in my empirical study merit reconsideration. One concerns the distribution of lapsed bequests among descendants below the first generation. Under all existing antilapse statutes, grandchildren divide lapsed bequests that would otherwise have gone to predeceasing children. If more than one child predeceases, survived by different numbers of grandchildren, the amount each grandchild receives could vary. To illustrate: Suppose the testator bequeathed half the estate to child A and half to child B. A has one child, C, whereas B has two children, D and E. Both A and B predecease the testator. Under all current antilapse statutes, lapsed bequests operate individually.[365] The testator's grandchild C will receive half of the estate as a substitute taker for A, whereas grandchildren D and E will each receive one quarter of the estate as substitute takers for B.[366]

This result conflicts with the result that would follow upon intestacy in a majority of states.[367] Most states take what is called the per capita approach to rules of representation upon intestacy.[368] In this scenario, C, D, and E would each receive one third of the intestate estate. Under the Uniform Probate Code, grandchildren would take equal fractions of the intestate estate, even if one or more children survived the decedent.[369] This approach to intestate distribution accords with past empirical studies suggesting that most testators prefer to provide equally for their grandchildren, just as they typically benefit their children equally.[370]

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distribution of principal as she needs for her support "and for the care, support, maintenance and education of the children of my son").

[365] *See, e.g.*, UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013) (applying the antilapse provision to "individual devises," apart from class gifts).

[366] *See* Estate of Mooney, 87 Cal. Rptr. 3d 115, 120–22 (Ct. App. 2008).

[367] Professor Jesse Dukeminier drew this comparison. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 449 (5th ed. 1995) (in the 5th edition only).

[368] *See* WILLIAM M. MCGOVERN, SHELDON E. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS, AND ESTATES § 2.2, at 56–57 (5th ed. 2017).

[369] *See* UNIF. PROB. CODE § 2-106 (amended 2019), 8 pt. 1 U.L.A. 108 (2013).

[370] *See, e.g.*, Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1111–12, 1146 app. J (1978).

Lawmakers have taken a step in the direction of applying this concept to antilapse statutes. Under the Uniform Probate Code, alternative beneficiaries of a lapsed devise "take by representation," defined in another section of the Code by reference to its intestacy provision.[371] Therefore, if a deceased beneficiary who was a child of the testator was survived by both children and grandchildren (great-grandchildren of the testator), the rules of representation applicable to intestacy would govern distribution of the lapsed devise. Non-uniform lapse statutes make the same move.[372] What lawmakers have failed to do is to extend this formula to the division of devises left to *multiple* predeceased children.

Here, however, the problem is complicated by the fact that testate decedents signal greater information about their intentions than intestate ones. If a testator provided *un*equally for his or her children under a will, then we can have less confidence that the testator would want to treat grandchildren equally.[373] If, however, a testator provided equally for his or her children under a will, this decision suggests that he or she would probably want grandchildren to take equally under the antilapse statute as applied to that will.

In light of these problems, lawmakers could give courts discretion to infer a testator's preferences as regards rules of substitution from analysis of the testator's estate plan.[374] This sort of discretion is alien to the traditional rules of lapse, which "operate impersonally," that is to say, mechanically.[375]

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[371] UNIF. PROB. CODE §§ 2-603(b)(1), 2-709(b) & cmt. (amended 2019), 8 pt. 1 U.L.A. 241, 315 (2013). For an early discussion of this issue, see Tillinghast v. Cook, 50 Mass. (9 Met.) 143, 148 (1845).

[372] *See, e.g.*, GA. CODE ANN. § 53-4-64(a) (West 1996) (providing that lapsed bequests descend "in the same proportions as . . . under the intestacy laws of this state"). In ten states, however, antilapse statutes remain silent on this question. *See* ARK. CODE ANN. § 28-26-104 (West 1979); CONN. GEN. STAT. § 45a-441 (2021); KAN. STAT. ANN. § 59-615 (West 1973); KY. REV. STAT. ANN. § 394.400 (West 1942); MO. ANN. STAT. § 474.460 (West 1981); N.H. REV. STAT. ANN. § 551:12 (2022); OKLA. STAT. ANN. tit. 84, § 142 (West 1945); TENN. CODE ANN. § 32-3-105 (West 1998); VT. STAT. ANN. tit. 14, § 335 (West 2018); W. VA. CODE ANN. § 41-3-3 (West 2021).

[373] In contemplating this scenario, one court felt that, even so, equal distribution among the second generation of descendants "might be defensible" although it was "not . . . contemplated by the standard antilapse statute." Estate of Mooney, 87 Cal. Rptr. 3d 115, 121 n.5 (Ct. App. 2008).

[374] Professor Susan French has advocated this reform. *See* Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 362–63 (1985). Professor French identifies a variety of situations, arising in actual cases, in which she asserts the reform would yield better results than the operation of traditional antilapse statutes, *see id.* at 340–42, 348–62, and she suggests a substantive reformulation of antilapse statutes to take account of those situations, *see id.* 371–73. My own view is that a provision added to traditional antilapse statutes giving courts leeway to deviate from its mechanical operation (see *id.* at 372, § 8, for proposed language) should suffice to alleviate French's concerns. That difference aside, my briefer analysis of the problem is intended to complement hers.

[375] Xavier v. Amaral (*In re* Estate of Goulart), 35 Cal. Rptr. 465, 475 (Dist. Ct. App. 1963); *see also, e.g.*, Murray v. Murray, 564 S.W.2d 5, 8 (Ky. 1978) (declining to deviate from the dictates of the antilapse statute in the absence of an explicit expression of intent); Kimball v. Story, 108 Mass. 382, 385 (1871) (same); *cf.* Corbett

Nonetheless, seen in a broader context, the idea is not unprecedented. Under the Uniform Probate Code, and in twenty-six states, courts can vary from the default rules of abatement, determining whose bequests are reduced to satisfy creditors' claims against the estate, "if the testamentary plan or . . . implied purpose . . . would be defeated by" the mechanical operation of the statute.[376] In such instances, the court can set an order of abatement "as may be found necessary to give effect to the intention of the testator."[377] Granting courts the same power with regard to lapse would not run afoul of the policies underlying the statute of wills. It would acknowledge, rather, the inability of lawmakers to anticipate all possible contingencies when establishing rules of lapse by adding to those rules a standard-like safety valve.

Lawmakers in two states have gone further, allowing courts to override rules of lapse on the basis of extrinsic evidence,[378] and the high court of a third state has taken this liberty without statutory warrant.[379] Arguably, evidence beyond

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v. Skaggs, 207 P. 819, 821–22 (Kan. 1922) (observing that "there are special features of the will under consideration" from which the court might have inferred the testator's intent regarding lapse but adding that "[w]e prefer to rest our decision upon the general principal rather than upon exceptional features of the particular case").

376 UNIF. PROB. CODE § 3-902(b) (amended 2019), 8 pt. 2 U.L.A. 347 (2013). This or a similar provision exists in Alaska, Alabama, Arizona, Arkansas, California, Delaware, Hawaii, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, Utah, Vermont, Washington, and Wyoming.

377 *Id*.

378 *See* N.J. STAT. ANN. § 3B:3-33.1(a) (West 2005) (applicable to all rules of construction for wills); WIS. STAT. ANN. §§ 854.06(bm), 854.07(4) (West 2021). Courts in New Jersey had applied its so-called "probable intent" doctrine to lapse cases prior to the doctrine's codification. *See, e.g.*, Wagner v. Cook (*In re* Estate of Cook), 206 A.2d 865, 867, 870 (N.J. 1965); Engle v. Siegel, 377 A.2d 892, 895–97 (N.J. 1977). *Contra, e.g.*, IOWA CODE ANN. § 633.273(1) (West 2013) (applying the statutory rules of antilapse "unless from the terms of the will, the intent is clear and explicit to the contrary"). The Uniform Probate Code includes a provision, enacted in Alaska, Arizona, Colorado, Hawaii, Maine, Michigan, Minnesota, Montana, New Mexico, North Dakota, South Dakota, and Utah, stating that all of its rules of construction yield to "a finding of a contrary intention." UNIF. PROB. CODE § 2-601 (amended 2019), 8 pt. 1 U.L.A. 237 (2013). The comment clarifies that under this provision "evidence extrinsic to the will . . . is admissible for the purpose of rebutting . . . rules of construction." *Id*. cmt. The comment attached to the antilapse provision contemplates that extrinsic evidence is admissible under Section 2-601 to override rules of antilapse, although the comment adds that "the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether the testator had formed a contrary intent." *Id*. § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2013). As of yet, however, courts have *not* read Section 2-601 to open the door to extrinsic evidence. *See In re* Leete Estate, 803 N.W.2d 889, 902 (Mich. Ct. App. 2010). Nor does the text of the antilapse provision admit extrinsic evidence expressly. *See* UNIF. PROB. CODE § 2-603 (amended 2019), 8 pt.1 U.L.A. 241 (2013); *cf. id.* § 2-603(b)(3) (establishing a rule of construction that "[f]or the purposes of Section 2-601" operates "in the absence of additional evidence").

379 *See In re* Estate of Devin, 230 A.2d 735, 736–37 (N.H. 1967) (admitting extrinsic evidence to override the no-residue-upon-a-residue rule on the unconventional theory that lapse caused the will to become "ambiguous"). The high court of Wisconsin had also admitted extrinsic evidence regarding the disposition of a lapsed residuary bequest before the state codified this rule of evidence. *See* Nielsen v. Nielsen (*In re* Nielsen's

the four walls of a will is no less credible than evidence from within those walls, although courts should exclude evidence of unexecuted declarations, which a testator might make carelessly or even disingenuously.[380]

Discretion could also prove helpful in connection with the problem of choosing between lines of substitute takers, when a beneficiary and alternative beneficiary both predecease the testator, each leaving descendants covered by antilapse. The Uniform Probate Code suggests mechanical rules to cover the problem unsupported by evidence.[381] This study made no effort to poll respondents on the matter, given the difficulty of crafting meaningful scenarios. The variables here are structural rather than familial, and testators' preferences might vary, depending on who the beneficiary and alternative beneficiary is. Courts could, though, find ways to infer a testator's preferences case-by-case from a larger view of the testator's estate plan.[382] Granting courts discretion in this connection may better effectuate intent than by determining the outcome conclusively with arbitrary rules.

In the same vein, courts could usefully exercise discretion to select between the no-residue-upon-a residue rule and the remain-in-the-residue rule.[383] Once again, the problem resists empirical inquiry because it is structural in nature. And a conclusive rule either way is not surefire—intent may vary, depending on the idiosyncrasies of the estate plan. Discretion would be of service, in particular, if lawmakers continue to exclude spouses from the purview of antilapse statutes. If a testator divided the residue of an estate between a spouse and a charity (or a collateral relative), making the assumption that the spouse would serve as a conduit to children, then only the no-residue-upon-a-residue

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Will), 41 N.W.2d 369, 370–72 (Wis. 1950) (repeating the unconventional theory that lapse created an "ambiguity"); WIS. STAT. ANN. §§ 854.06(bm), 854.07(4) (West 2021).

380 *See* MCGOVERN ET AL., *supra* note 368, § 7.1, at 274 (discussing courts' general reluctance to admit declarations as opposed to circumstantial evidence when analyzing testamentary intent). In this regard, courts should draw no inference about intent from testators' failure to amend a will after a beneficiary predeceases them. One court intimated that "the fact that [the testator] allowed the will to stand as originally executed" following the death of a beneficiary might signal the testator's satisfaction with statutory rules of lapse. *In re* Hittell's Estate, 75 P. 53, 54 (Cal. 1903); *see also* English v. Cooper, 55 N.E. 687, 688 (Ill. 1899) (deeming a testator's failure to update a will following the death of a beneficiary as evidence he intended the bequest to go to the residuary beneficiary of a particular fund, rather than to his heirs); Britt v. Garfoot (*In re* Britt's Estate), 23 N.W.2d 498, 500 (Wis. 1946) (discussed *supra* note 167). It could just as easily signal inadvertence, however. *See* Expressmen's Aid Soc'y v. Lewis, 9 Mo. App. 412, 415 (1880) (declining to draw any inference from a testator's failure to update a will following the death of a beneficiary).

381 *See supra* pp. 331–34.

382 For instance, a creative court might divide a bequest between substitute takers for a deceased beneficiary *and* a deceased alternative beneficiary, if these two groups of takers, when combined, formed a natural class (say, all of the testator's grandchildren) which the will elsewhere reveals an intent to treat equally.

383 *See supra* notes 79–81 and accompanying text.

rule could rescue the estate plan if the spouse predeceased, allowing the children to succeed to the spouse's share by partial intestacy. But even if lawmakers configured an antilapse statute to cover spouses, discretion might still come in handy. Suppose, for example, a testator bequeathed most of the residue to the spouse and a small fraction to a charity. If the spouse predeceased the testator without children, a court might conclude that the testator would prefer not to inflate the bequest to the charity, to the detriment of other heirs.[384]

Nonetheless, legal flexibility has a drawback: If the rules of lapse fail to operate mechanically, testators cannot depend on them to achieve the results they prefer, thereby precluding more efficient estate planning a priori. Overruling a lower court that had "admitted extrinsic evidence from which [it] inferred an intention of the testatrix" contrary to the lapse statute, a court observed that "[l]awyers and testators . . . should be able to rely with confidence upon rules of property in preparing and executing wills, and be assured the intent of the testator as expressed therein will be carried out, instead of . . . being made the instrument of . . . a vague discretionary law," promising "endless litigation."[385] Yet, in practice, reliance on the rules of lapse is probably rare—and testators could signal such reliance with a statement in the will itself, if they wished to foreclose judicial intervention. Most laypersons are oblivious to the problem of lapse, whereas professional estate planners counsel testators to incorporate contingency clauses into wills rather than rely on lapse statutes, given the possibility that the testator might migrate to a different domicile with a conflicting set of rules.[386] Litigation should result only in those instances where evidence of intent contrary to the rule is manifest; this sort of mechanism constitutes a safety valve, rather than a pure standard.

There remains, finally, the problem of will-substitutes. The Restatement of Property asserts that wills and will-substitutes should follow the same rules of lapse "because of the similarity of the two situations."[387] From an empirical

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[384] This supposition corresponds with an early justification for the no-residue-upon-a-residue rule as maintaining the originally intended fractional shares of the residue. *See supra* note 24 and accompanying text.

[385] Atwater v. Meeks (*In re* Estate of Ricklefs), 508 P.2d 866, 871, 873 (Kan. 1973). By analogy, some parties rely on mechanical rules of intestacy to avoid the cost of executing wills altogether. *See, e.g.*, Cleveland v. Thomas (*In re* Estate of Cleveland), 22 Cal. Rptr. 2d 590, 599 (Ct. App. 1993).

[386] *See supra* notes 60, 289.

[387] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.6 cmt. b & illus. 3 (AM. L. INST. 1992); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. p (AM. L. INST. 1999) (taking this stance, even in the absence of explicit statutory warrant); Burg v. Old Nat'l Bank of Wash. (*In re* Estate of Button), 490 P.2d 731, 734–35 (Wash. 1971) (en banc) (extending lapse rules for wills to a living trust because it "is in practical effect a legacy"); Dollar Sav. & Tr. Co. of Youngstown v. Turner, 529 N.E.2d 1261, 1264 (Ohio 1988) (same).

perspective, the matter is not as simple as that. Evidence shows that wealthier individuals are more apt to use living trusts as vehicles of estate planning than wills.[388] This disparity could justify establishing divergent rules of lapse for living trusts, if data revealed that wealth systematically affects preferences as regards alternative provisions for predeceasing beneficiaries.

Importantly, the instant study found no significant differences between respondents' preferences tied to the variable of wealth.[389] Armed with this evidence, we can endorse the Restatement's position: the same rules of lapse should apply to wills, living trusts, and other will-substitutes. Jurisdictions that differentiate those rules ought to take pains to unify them. Some states have already attained partial unification, and one—Wisconsin—has achieved complete unification.[390] By comparison, the Uniform Probate Code, with its three distinct rules on point, sets a poor example.[391] Its drafters ought to revisit those rules.

CONCLUSION

This Article sheds new light on a venerable problem by bringing to bear on it—at last—the tools of quantitative analysis. Informed by data, we find that the predominant rules of lapse are both under- and over-inclusive. A majority of respondents preferred to apply the antilapse rule to predeceasing spouses in my survey; yet few of the extant statutes do so.[392] Meanwhile, pluralities of respondents preferred not to apply the antilapse rule to predeceasing collateral relatives in my surveys; yet few of the statutes narrow the doctrine to that

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388 *See* Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & CMTY. PROP. L.J. 1, 25–29 (2015) (presenting statistics); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 92, 95 & tbl.5.10 (1985) (same).

389 *See supra* notes 297, 307, 313, 319, 324.

390 *See* WIS. STAT. ANN. §§ 854.06–.07 (West 2021) (applying the rules of lapse to a "governing instrument"). Wisconsin defines a governing instrument comprehensively to cover wills and an extended list of will-substitutes "or any other dispositive . . . instrument that transfers property at death." *Id.* § 854.01(2); *see also* CAL. PROB. CODE §§ 21101, 21110 (West 2019) (applying antilapse to wills, living trusts, and other will-substitutes not dealt with by other statutes, *see supra* note 203 and accompanying text); MINN. STAT. ANN. § 507.071(11) (West 2021) (applying antilapse to wills and revocable pay-on-death designations for deeds to real property); OHIO REV. CODE ANN. § 5808.19(B)(2)(b)(i), (D)(3) (West 2019) (applying the rules of lapse and antilapse for wills to living trusts within the scope of a statute applicable to future interests in trust, effectively codifying Dollar Sav. & Tr. Co. of Youngtown v. Turner, 529 N.E.2d 1261, 1264 (Ohio 1988)); TENN. CODE ANN. § 32-3-105 (West 2021) (applying antilapse to wills and living trusts); VA. CODE ANN. § 64.2-418(B)–(C) (West 2018) (same); WASH. REV. CODE ANN. § 11.12.110 (West 2022) (same, effectively codifying Burg v. Old Nat'l Bank of Wash. (*In re* Estate of Button), 490 P.2d 731, 734–35 (Wash. 1971) (en banc)).

391 *See supra* Section II.C.

392 *See supra* Sections II.A.1, IV.A.

extent.[393] In spite of their variety, not one of the current statutes fits exactly the dimensions of the data presented in the last many pages—to wit, a statute confining antilapse to the *spouse and descendants* of the testator.[394]

Also of moment, none of my surveys indicated any difference in respondents' preferences hinging on their socioeconomic status.[395] This finding suggests that rules of lapse should apply symmetrically to wills and will-substitutes. Again, few of the prevailing statutes offer a unified approach to the problem at hand.[396]

The very wrongness of the statutes—the chasm yawning between lawmakers' assumptions and empirical reality—holds larger lessons. Lawmakers have overestimated their ability to predict preferences without data. The drafters of the Uniform Probate Code brimmed with confidence. The "principal revisers" of the Code included "leading scholars in the field," along with "nationally known estate planners of considerable insight and experience," the reporter observed, and "[t]heir cumulative experience suggests that they have a pretty good idea of what most clients want."[397] Specifically regarding the rules of lapse, the drafters of the Code rated their assumptions about testamentary intent as "highly probable."[398]

In point of fact, the Code's provisions on lapse proved no more discerning than other non-uniform statutes produced by less exalted bodies. The prominence of a drafting committee might even impair its ability to predict intent: High-flying estate planners serve clients who comprise an unrepresentative sample of the general population. But whatever their breadth of experience, estate planners will tend to recall atypical encounters with clients

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393 *See supra* Sections II.A.1, IV.C, IV.D.

394 *See supra* Sections IV.A, IV.B.

395 *See supra* notes 297, 307, 313, 319, 324.

396 *See supra* Section II.C. Wisconsin stands out as a laudable exception. *See supra* note 390.

397 Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2337–38 (1996).

398 Halbach & Waggoner, *supra* note 102, at 1099. The comment attached to this provision of the Code comes close to suggesting that its rules should create strong (and not merely rebuttable) presumptions: "Although Section 2-603 is a rule of construction, and hence . . . yields to a finding of a contrary intention, the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether the testator had formed a contrary intent." UNIF. PROB. CODE § 2-603 cmt. (amended 2019), 8 pt. 1 U.L.A. 241 (2019). In reality, the drafters established the scope of this provision by reference to the Code's rules of intestacy, and nothing more. *See supra* note 128 (noting the legislative history); *see also* Estate of Hutchison, No. G041619, 2009 WL 3756661, at *3 (Cal. Ct. App. Nov. 10, 2009) ("[C]are must be taken not to ascribe to the transferor too readily or too broadly an intention to override the antilapse statute, the purpose of which is to lessen the risk of serious oversight by the transferor." (internal quotation marks omitted)) (quoting the California Law Revision Commission).

more readily than the mundane. This tendency, documented in the psychological literature, together with other foibles and biases, renders suspect anecdotal evaluations of testators' preferences.[399]

The discrete charm of empirical evidence lies in its revelation of truth, free from the deficiencies of impressions and recollections. Lawmakers may have no choice but to rely on impressionistic evidence for a time—*but they should treat rules based on such evidence as tentative*. As soon as data become available, lawmakers should hearken.

Fidelity to data transcends the efficiency of estate planning. By better aligning default rules to probable intent, lawmakers also advance the equity of estate planning. The problem of lapse serves to illustrate the point. Studies suggest that contingency clauses for predeceasing beneficiaries—disclosing the actual intent of testators—appear in over half of all wills.[400] But those clauses more often appear in the wills of better-counselled—hence better-heeled—testators.[401] If the rules of lapse reflect probable intent in the absence of contingency clauses, we narrow the gap between estate planning at opposite ends of the socioeconomic spectrum. This turn toward equalization in itself represents a social good.[402]

Viewed broadly, then, data can enrich lawmaking at multiple levels in the inheritance field. Data illuminate efficient solutions more accurately than any other source. And once the scales fall from our eyes, we can better balance the scales of justice.

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[399] For a further discussion and references, see Hirsch, *supra* note 256, at 1070–72; SANJIT DHAMI, THE FOUNDATIONS OF BEHAVIORAL ECONOMIC ANALYSIS 1365 (2016).

[400] *See* FINCH ET AL., *supra* note 7, at 127 tbl.6.1 (finding in a study of British probate records that 62% of wills include contingency clauses); SUSSMAN ET AL., *supra* note 287, at 196 (finding in a study of American probate records that 52% of wills included contingency clauses); Dunham, *supra* note 287, at 282 (finding a rate of 55%); Horton, *supra* note 5, at 1152–53 (finding a rate of 69%); Weisbord & Horton, *supra* note 161, at 691 (finding a rate of 86%). A British study found that only 34% of wills include contingency clauses for *every* bequest. *See* FINCH ET AL., *supra* note 7, at 127 tbl.6.1. For historical observations see *supra* note 59–61 and accompanying text.

[401] *See supra* note 7. Attaching contingency clauses to bequests is a recommended practice among estate planners. *See supra* note 289.

[402] For a further discussion and references see Hirsch, *supra* note 256, at 1051–52.

APPENDIX

The graphs that appear below summarize the data detailed in Part IV. These data serve as the foundation for the analysis of legal policy in Part V.

Figure 1

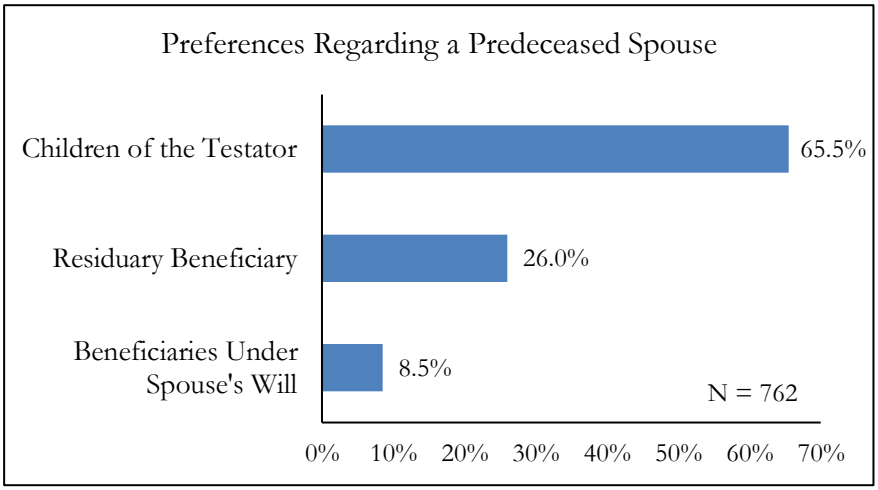


Figure 2

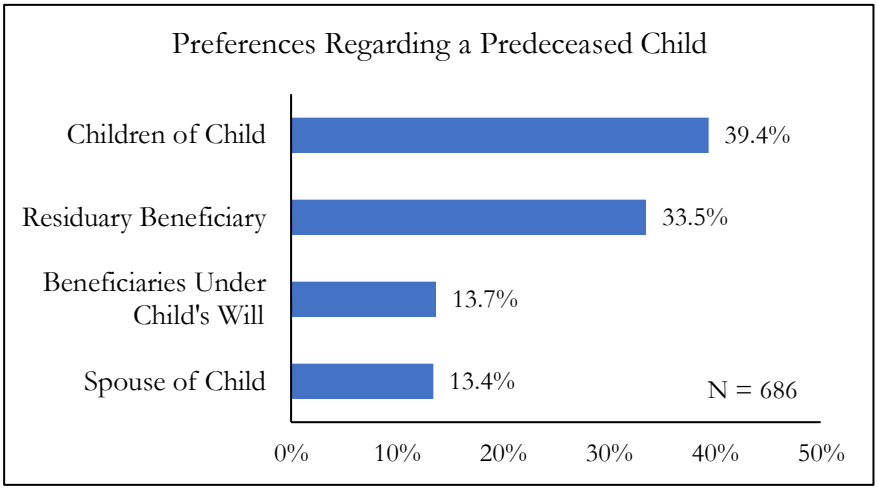


Figure 3

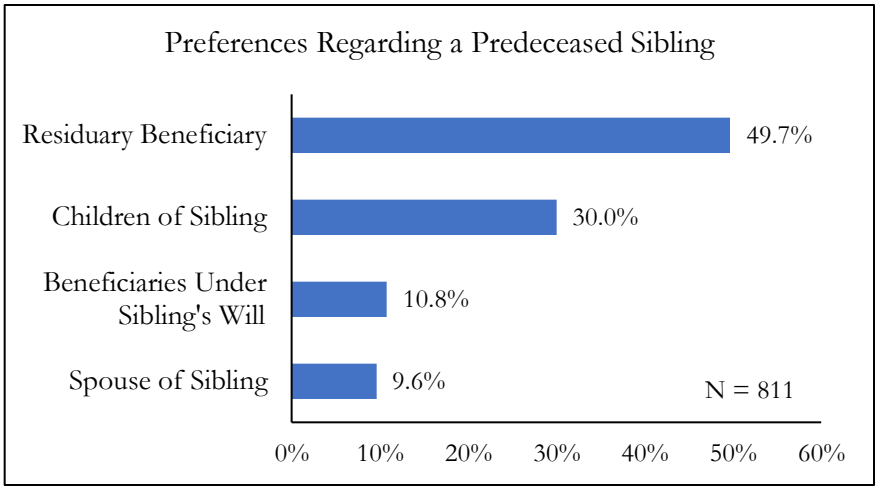


Figure 4

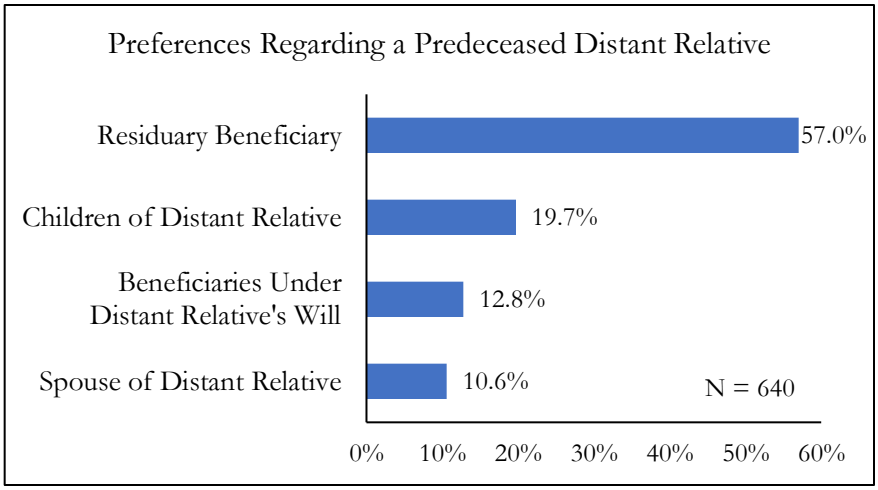
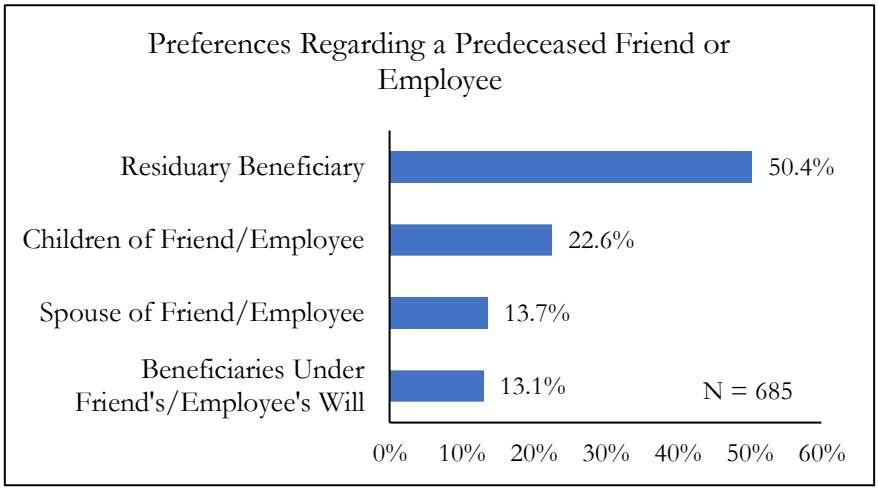


Figure 5


Preferences Regarding a Predeceased Friend or Employee
Residuary Beneficiary
50.4%
Children of Friend/Employee
22.6%
Spouse of Friend/Employee
13.7%
Beneficiaries Under Friend's/Employee's Will
13.1%
N = 685
0%
10%
20%
30%
40%
50%
60%